Hon. William D. Mitchell, Chairman. CEC

Volume 4

P R O C E E D I N G S

of

MEETING

of

ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE

of the

SUPREME COURT OF THE UNITED STATES.

Sunday, February 23, 1936.

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C O N T E N T S .

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2 p.m.

Washington, D. C.

The Committee met at 2 p.m., in the Supreme Court of the United States Building, Hon. William D. Mitchell, Chairman, presiding.

PRESENT: William D. Mitchell, Chairman,
Scott M. Loftin,
Wilbur H. Cherry,
Charles E. Clark, Reporter,
Armistead M. Dobie,
Robert G. Dodge,
George Donworth,
George Wharton Pepper,
Monte M. Lemann,
Warren Olney, Jr.,
Edson R. Sunderland,
Edmund M. Morgan,
Edgar B. Tolman, Secretary.

RULE A2. TRIAL BY THE JURY; BY THE COURT.

The Chairman. Gentlemen, we are on rule 2A. It was drawn on the theory that either party can place the case on the jury or the court's calendar, as the case may be. It stays there, unless the other party moves to transfer it, or unless the court on its own motion finds it is on the wrong calendar and transfers it. I think somebody made a suggestion at the end, that when a motion is made for trial by jury of special issues in an equity case, the motion shall contain the issues. I think that was under the prior rule, was it not?

Mr. Clark. Yes.

The Chairman. Is there anything in A2? If nobody else has any suggestions, I have one in line 4, after the word "unless":

As the rule is drawn, if there is a claim for jury trial, it must be tried by the jury unless the court on its own motion transfers it, or unless one of the parties makes a motion and it is granted by the court. I suggested inserting, in line 4, after "unless", the following words:

> "the parties by written stipulation filed with the clerk, or by an oral stipulation made in open court and entered in the record, consent to trial by the court without a jury, or unless".

Mr. Dodge. Why should it be in open court?

The Chairman. That is a copy of the present Federal statute. The original Federal statute provided that the only way to waive a jury was by a written stipulation filed with the clerk, and you could not waive it any other way. About five years ago many lawyers getting trapped by that rule, they stipulated orally in court for waiver, and then found out they had not waived it, and they made the court the arbiter. I got Congress to insert the words "by an oral stipulation made in open court and entered in the record".

Mr. Dodge. Or by written agreement?

The Chairman. Yes.

Mr. Dodge. That is entirely right.

The Chairman. I think the rule ought to permit the parties to stipulate for waiver, after they have once claimed a jury trial, and not have to make a motion, or have the court transfer it.

Mr. Dodge. Certainly.

The Chairman. Is there any objection to that?

Mr. Clark. I rather think I would prefer not to. It is not a vital matter, and so I will not take much time, but I will just speak of it. I think that after the time to put in your claim has gone by, it then ought to be a matter of discretion.

The Chairman. But you have the wrong end of it. This is after the claim is in, and the parties have demanded a jury trial. I want to allow them to stipulate for a waiver.

Mr. Clark. I am sorry.

Mr. Loftin. I move, Mr. Chairman, that the interlineation that you have just read be inserted.

Mr. Pepper. I second the motion.

The Chairman. All in favor say Aye; opposed, No. The motion is carried.

It is worthy of note, when you are drawing rules that look as though you were shutting off trial by jury peremptorily, to bear in mind that I had to go before the Judiciary Committee and make a fight to get a provision that the parties could be held to have waived it by an oral stipulation in court. They considered it so sacred that they wanted a written stipulation, and it stood that way for years. It shows how sensitive they are about anything that looks like gypping a man out of a jury trial.

Mr. Pepper. It is the one thing in the Constitution they think they understand. (Laughter)

Mr. Dodge. I should like to raise the question, Mr. Chairman, with respect to the words in line 7, "and shall further order such issues otherwise tried".

I think that order for the framing of issues is dealt with in the following sentence, and that if the case is not on the jury list as a matter of right, it ought to come off without an order being then made framing issues, or stating that the case shall be tried without a jury. It ought to be enough for the court to order it off that list, and then either side can move for jury issues under the following sentence.

Mr. Clark. On the matter of wording, I think perhaps the wording is not quite as good as it should be -- "and shall order it off the jury list", or something like that?

Mr. Dodge. Yes.

Mr. Clark. I am not sure, but Mr. Dodge has in mind two steps, and I must say that I think that is unnecessary, and really a clog. I do not see any reason why the court should have to order it off the list, and then order it on again. That piles up machinery that is a clog on this, without getting anywhere. I see no reason why it should not be done all at one time.

Mr. Lemann. You had better find out whether he really wants that. I do not think he meant that. Did you?

Mr. Dodge. No. The cases for jury issues are very rare -- not one in a hundred. The court ordering it off the jury list should not be cumbered up with the necessity of his taking into consideration every time, as a matter of course, whether somebody ought to have jury issues. It ought to be at once struck off the jury list, if it is not a Constitutional jury case.

Mr. Clark. Not if he has the right to order it tried by the jury anyway.

Mr. Dodge. He will not order it in one case out of a hundred.

Mr. Clark. I do not think he will, but the point is that the time the thing should come up is when somebody moves to strike from the jury list. You need go to the court only once. There is nothing, really, to prevent you going twice, if it is done that way, but I do not think you should compel it to be done twice.

This is the way the procedure would operate: One party moves to strike from the list as not being a case properly tried there. The reply to that would be (a) "it is properly there", or (b), "if it is not there, I ask your Honor, as a matter of discretion, to order it so tried." He should be able to pass on it at one time.

Mr. Dodge. I think that rather encourages a great many more motions for jury issues than are made customarily now. It takes up the time of the court with the consideration of that question, where it would not, in most cases, be bothered with it.

Mr. Clark. That is not the experience. Under this procedure we practically never have a question about trial. I will not say never, because there are exceptional cases where the matter is contested, and may even go to the Supreme Court, but, in general, the issue does not come up. I might say, in general, what what I have been trying to do is to provide a simple machinery whereby you can, whenever you are interested, raise this question of jury trial or otherwise, but so that it does not clog the step-by-step process in the ordinary case. There is not often a contest over these matters, and we ought to have some machinery which does not put it up, first, to the clerk, not knowing what to do, and second, to the court, not knowing what to do, in all the grist of matters that go through the court. You want a machinery that will be self-operative, so to speak, and will run through and discharge the grist of ordinary cases, and allow the person who wants to stage a scrap to do so.

What troubles me a little about the various suggestions made is that it seems to me that you clog the natural running of the thing by vague suggestions that maybe the Constitution is being restricted. Judge Donworth thought I was expanding it, which surprised and interested me. But either way you clog the machinery which runs very simply otherwise.

The Chairman. Let me ask you this, Dean. As I understand Mr. Dodge's point, it is this. A man claims a jury trial as a matter of right, when, by law, he is not entitled to it. If it goes on the jury calendar, and the point is raised, then, that it ought to be transferred, and the court orders it stricken off the jury calendar and placed on the court calendar, under your rule the man who has claimed a jury trial as a matter of right, but who is not entitled to it, finds himself in that situation. He can, at the same proceeding, ask the court, even though he has not a jury as a matter of right, to frame special issues. I think, in addition to Mr. Dodge's suggestion about it, that musses up our requirement that if a man wants to move for a jury trial on special issues, and make it a case, he ought to be required -- and we have accepted that -- to make a motion framing the issues he wants submitted, so as to get something definite up. If you leave this as it is, and allow him, when he sees he has lost his claim as a matter of right, without any motion or framing issues or anything, to get the court into a discussion there as to whether he should have a jury trial on equity issues, it rather mixes things up a little, does it not?

Mr. Clark. There is another point involved there, which is this. While special issues may be framed, there is no real occasion for compelling that in every case. Why do we need special issues in an equity case? It is done right along without it, and it can be done. I see no reason for not providing a procedure for the framing of them. It is perfectly permissible to do it, but it is not necessary, and I think, on the whole, it is probably rather complicated to do it.

Mr. Dodge. Would you put in a provision in the rule about it?

Mr. Clark. I would put in a provision whereby there is a process for asking the issues which you wish tried by the jury, but there is no special procedure necessary for framing issues in an equity case, so called.

Mr. Dodge. In the next sentence you have provided that a party may at any time ask the court to frame jury issues. Suppose the other question, of getting it off the jury list, comes up at the very beginning. It obviously is not there as of right. The court transfers it from that list, and, pursuant to this rule, orders it tried without a jury. Is that going to preclude a later motion by one of the parties, after fuller investigation, for the trial of certain issues by a jury?

Mr. Clark. No. You can ask the court at any time, and the court can decide it at any time.

Mr. Morgan. I suppose, in the Federal court, there will be the same judge who will handle both matters. Otherwise, of course, it would be allowing the judge who heard the motion to strike to determine whether another judge should try the case with or without a jury, and I think they would probably object to that. Certainly, in State practice, where the case comes up on a motion to strike from the jury calendar, the judge who is in charge of that calendar would not want to determine whether or not the judge who is trying equity cases would call in a jury. He would want to leave that to the discretion of the judge who is going to try the case. I do not know whether that is true in the Federal courts, if they have only one judge in a particular district.

The Chairman. If it came up before the judge on the law side, he would have to send it over and order the judge sitting in equity cases to take a jury in.

Mr. Dobie. Is that practice at all common in the larger cities, to designate one judge who practically hears nothing but equity cases?

Mr. Donworth. It is very common. They usually turn about, but usually they make a division.

Mr. Dobie. It does not come up with us at all. There is only one judge in the Western District of Virginia, and he does everything.

The Chairman. In Minnesota they usually have this system: The trial of the jury cases first, and then they take their equity cases afterwards. But often there is more than one judge sitting at the trial, and the judge who strikes it off the jury calendar and orders special issues for the jury does not know whether he is going to sit in equity on that case, or whether the other man is.

Mr. Dobie. If he does order those issues, the other judge, who does not care much for that, may get a little sore and say, "He has made a nasty mess for me."

Mr. Clark. In our State nobody ever thinks about it. Preliminary issues may be tried by one judge, and issues at the trial by another.

Mr. Dodge. I would suggest that we substitute, for the words in parentheses, the words "in which event the case shall be transferred to the non-jury docket."

The Chairman. What words in parentheses?

Mr. Dodge. "and shall further order such issues".

Mr. Donworth. What lines, please?

Mr. Dodge. In the seventh line, the words "and shall further order such issues otherwise tried". I would suggest substituting "in which event the case shall be transferred to the non-jury docket".

That is where it belongs, even if issues are framed, because only the issues go onto the law docket. The case remains on the non-jury docket, and comes back there for disposition after the jury has answered the issues.

Mr. Clark. That is not the procedure we have gone on so far. That is not the procedure provided in the books, covered by the later rule. I should hate to see the hands of the judges tied in this way, and not let the procedure go along naturally together. This emphasizes the old distinctions, and forces them to go through a little hokus-pokus, from one calendar to another, to keep it alive.

The Chairman. You cannot get rid of the fact that you have to have a jury calendar and a court calendar. You do not have to call them "equity" and "law". Why we should shrink from that --

Mr. Clark. We have not shrunk from that, but we have provided later that all jury cases go on the jury calendar.

Mr. Lemann. Does this bring you up to the rather fundamental point which Judge Donworth talked about yesterday, when he talked about expanding the right to trial by jury? Does the committee approach it from the point of view that a man, under this system, shall not have the right of trial by jury just because he would like it, and that the judge must not give it to him just because he would like to have it, but he can only give it where he would get it as a matter of right, and he either gets it as a matter of right, or he shall not have it? I think that is something we ought to settle definitely. If that is to be the rule, then I think the conclusions suggested by Mr. Dodge would follow, but, from the point of view of the Reporter, as I sense it, he should get a trial by jury unless the judge wants to take it away from him, even though the Seventh Amendment would not give it to him. We ought to make up our minds from which point of view we are going to approach the framing of the rule. If we are going to approach it from the narrower point of view, then I think we should phrase the rule somewhat differently than we would phrase it if we looked at it in the broader aspect.

Mr. Clark. I think Mr. Lemann states it fairly. I think, if you allow this to go along naturally, this way, you have much less question about the formal trial. You are able to protect the rights of the parties, and the case takes care of itself, so to speak, except in the unusual situation where somebody stages a fight. If you add these other things, you have to spend your time and the time of the court and the parties worrying over whether you are in equity or in law.

Mr. Lemann. Is there any State, outside of my hybrid State, where the broad right exists? In these code States generally do they fuss around to see whether you are at law or in equity, and say, "If you are in equity, you have no right to a jury trial, and you do not get it"?

Mr. Morgan. Yes.

Mr. Lemann. That is the situation today everywhere?

Mr. Morgan. Practically everywhere.

Mr. Clark. No, it is not.

Mr. Sunderland. I think it is practically the universal rule.

Mr. Dobie. In Virginia you never have a question.

The Chairman. Let us get one statement at a time.

Mr. Donworth. The distinction between the two classes of cases is known to the lawyers in the case as soon as the case is filed, as to whether it is one of equitable cognizance, or legal cognizance. That distinction is recognized by the clerks and judges and goes right along. When the case comes up, the judge says, "Is that a jury case?" Somebody says, "It is a foreclosure of mortgage." So then he puts it down on the non-jury list.

Mr. Lemann. Even though you have not any technical equity or jury docket, and you do not number it in equity or in law, you still preserve that idea?

Mr. Donworth. Yes.

Mr. Lemann. As I understand it, two experts state that the Washington situation is almost the universal situation.

The Chairman. That is what I understand.

Mr. Lemann. The third expert said there were some exceptions. I was just asking for light.

Mr. Clark. I do not think it is almost the universal situation. It is true, it is the one that developed under the original code of New York and, in my judgment, it is one of the things that has offered the most difficulty in applying the code we formed.

As I look at it, there is and has been the tendency to get away from it. I think myself there is a tendency to get away from it, even in Washington, because there you have to get the issue of the right of trial by jury out of the way at a reasonably early period.

Mr. Morgan. Do I understand the Reporter to say that there are many States, if any, where the right to trial by jury is not preserved inviolate in the Constitution?

Mr. Clark. That is not what we are talking about.

Mr. Morgan. That is exactly what we are talking about.

Mr. Clark. Oh, no.

Mr. Morgan. That is exactly what we are talking about. The way you test that is whether, before the fusion, the case was identified in equity or at law. As far as I know, that is the universal test, and if you claim your right to trial by jury, the way you test it is whether or not, at the time this particular Constitution was adopted, there was the right of trial by jury. It is true that in a good many States the right of trial by jury was expanded by statute, and then a new Constitution was adopted, which, by the Preservation Clause, practically wrote the right of trial by jury into the Constitution, but I am astonished if that is not the rule.

Mr. Clark. I am sorry if you have not understood me. That, I do not think, is the question at all.

Mr. Morgan. What is it?

Mr. Clark. There is no question claimed anywhere of limiting the right of trial by jury under the Constitution. This question is, What ought to be done with equitable claims going to the jury? My suggestion has been that the easy way to dispose of it is to have those go on the regular jury docket, and be tried along with the jury cases generally.

The Chairman. Let me get the issue. We are all agreed that, however much we would like to ignore the distinctions between law and equity, the Seventh Amendment compels us, every time the question of jury trial comes up, to say whether it is an action at common law or a suit in equity. We cannot blink that fact. The Reporter's rules, as I understand it, provide that a man, when he has a Constitutional right, can claim it and get it, and if he has not got it, and it is an equity case, he may make a motion to have special issues framed for submission to a jury. Then we are dealing right here with this very narrow question.

Suppose he makes a wrong claim for jury, and he gets on the jury calendar by error, and the error is discovered, and the court says, "No, you are not entitled to a jury trial." The narrow question, as I understand, is whether, right at that point, he may say, without any formal motion or anything of that kind, "Well, I would like your Honor to submit special issues to a jury, as in an equity case"; or whether the case should be transferred to the non-jury side, and he should be forced to make a motion there to submit special issues to a jury.

I think that is the narrow question we are dealing with on this rule, is it not?

Mr. Dodge. In other words, this motion, which, by the rule, he can make at any time, should be the basis of an order for a jury issue to be tried in the equity case, and that question should not be decided merely on the motion of the other side suggesting that there is no right to a jury, and it ought not to be on the jury list. That motion ought to be decided as a simple matter, expeditiously. The other side should not be required, then, to file its motion to frame jury issues. We do not so require it, because we provide that he can do that at any time. That is when the question of the discretionary right arises, which, I understand, does not transfer the case onto the jury docket, but merely the issues. The final judgment is to be entered on the other side of the court. When the issues are answered, there may be further things to be tried without a jury. I do not believe we should ask the judge, at this early stage, to order the case to be tried without a jury, and then have a later judge asked to overrule that order and grant jury issues as a matter of discretion.

Mr. Clark. Why don't we leave this particular phrase out altogether, because I think it would be clear without it. Apparently that would take another course. We are likely to tie up the procedure in some States. If we followed Mr. Dodge's idea, it would have a very limiting effect on the procedure in my own State, for example, where we do not have to go through all that.

The Chairman. Are you content to have the sentence ending in line 7 end with the words "United States"?

Mr. Clark. Yes.

The Chairman. Would that solve your trouble, Mr. Dodge?

Mr. Dodge. I think so.

Mr. Donworth. This is rule A1?

The Chairman. Rule A2, line 7. The suggestion is to strike out the words "and shall further order such issues otherwise tried" and just leave it so that he can claim a jury trial unless you stipulate that it shall be transferred to the court side, or unless the court on its own motion, or on the motion of the other party, finds it is not strictly a jury case.

Mr. Sunderland. If we do that, however, if the court finds it is not a jury case, it still stays on the jury docket. There is no provision that it be moved.

The Chairman. There is no provision, but that would be done. We are not getting confused with the question of whether he shall then entertain a motion to submit special issues in an equity case, or whether he will transfer it. He can settle that himself.

Mr. Lemann. Are we leaving a perfectly clear rule for the guidance of the profession, or will controversy immediately arise as to what is going to happen in that case? I am just a little uncertain.

Mr. Morgan. I do not think so.

Mr. Lemann. Do you think it is clear what the result will be if we stop there?

Mr. Clark. I think the question of fundamental right will be clear enough. Just how you get at the fundamental question, I think, may be shaped a little by your local law, but I should think that is a bit of play in the joints that could be permitted.

Mr. Morgan. The next sentence will cover it. You say:

"The court may in its discretion and at any time order the issues of fact to be tried by the jury."

The Chairman. Yes.

Mr. Morgan. Under your practice, it could be done at that time or any other time.

Mr. Sunderland. I think that is a better solution, to end it with "United States."

The Chairman. If it is the sense of the meeting, then, we will stop the sentence in line 7 with "United States" and strike out the balance of the sentence.

Mr. Dobie. I should like to bring up a point there. I do not want to debate it, but I should like to mention it.

The last sentence reads:

> "When certain of the issues are to be tried by the jury and others by the court, the court shall determine the sequence in which such issues shall be tried, and the court shall preserve to the parties inviolate the right of trial by jury as at common law and declared by the Seventh Amendment to the Constitution."

I would like to strike out "at common law". The Seventh Amendment just says that the right of trial by jury shall be preserved, and that common-law thing is only the re-examination of it. Somebody may say, "You have to have it as declared by the Seventh Amendment", and we may have some more crucifixion on the antique common law. I do not want to debate it.

The Chairman. That phrase is taken out of the act under which we are acting, and I am disposed to rule that that is a matter of form, and we will leave to the revisers the question of whether we put that statement in, or the one which Judge Olney suggested, which is probably better.

Mr. Morgan. You are not going to put the protestation in every rule here?

The Chairman. No.

Mr. Morgan. You have it in rule A2, and under your provision we start out with it, like a big flag. We are not going to have another signal here?

The Chairman. I like Judge Donworth's suggestion about enlarging, better than I do this language from the statute.

Mr. Dobie. If it is statutory language, perhaps you had better leave it. Once is enough.

The Chairman. I think we all agree that we ought to make it clear in a sentence somewhere. I have a suggestion that I think is a matter of substance, in line 10. You say:

> "In all actions, whether or not triable of right by the jury or jury trial has been waived, the court may in its discretion and at any time order the issues of fact to be tried by the jury."

In an equity case he might not order them all. He might order part of them.

Mr. Dodge. I have noted that. It should be "any issues of fact".

The Chairman. It would hardly work, though, because you have the right mixed up with the other. That is a matter of form.

Mr. Olney. I am not clear in my mind as to whether, when a jury trial is ordered in an equity case, the verdict of the jury is merely advisory or not, under these rules.

Mr. Clark. I think your question is a very proper one. May I say this --

Mr. Olney. Let me say something to Mr. Lemann, because he does not understand this practice at all. In an equity case --

Mr. Lemann. I think I understand it, because we have it in the Federal court. We have to watch this in the Federal court very closely.

Mr. Olney. Then I will not ask the question.

Mr. Lemann. Anything on equity we have to know. Under the Conformity Act, we do not have to know all about the common law.

Mr. Olney. Just to state it very briefly, under the old equity practice the court can be asked for trial by jury, and sometimes they would refer it.

Mr. Lemann. That is equity rule 23.

Mr. Olney. But usually the verdict of the jury was purely advisory.

Mr. Lemann. In equity rule 23 they use the word "shall" and while I have never had occasion to examine the point closely, I should suppose that that gave you the right to jury trial in cases within that scope, and the result would be the same as the result of an ordinary jury trial on an issue of fact.

Mr. Olney. What is the situation under these rules, Mr. Reporter?

Mr. Clark. I want to say this, that I am very anxious that you find that the forms of trial are binding. I should not think you would want to consider this question until you consider the question of findings, because it seems to me that they are pretty analogous. In that connection I hope that the committee will have read, or will read, my memorandum, because we struggled on it quite a good deal. I refer to the memorandum that deals with findings of fact. You will note in that that I have tried, as I have said, right along, to have the trier's findings given weight, and I have phrased the weight to be given in various ways. It seems to me that there is not any argument here, really. In sending a case to the jury, if you are not going to pay any attention to what the jury does, why do you send it? I think actually the court does. I think this is the sort of doctrinal statement, so to speak, which really does not mean a great deal.

The Chairman. You are arguing in favor of making the findings of the jury in an equity case, where special issues are framed, binding. You are arguing in favor of giving that verdict some binding effect on the court, as a verdict in a law case.

Mr. Clark. Yes.

The Chairman. Judge Olney's question was not that. His question was, What do your rules provide? How have you left that? Have you covered that effect of the finding of the jury in connection with this?

Mr. Clark. I think we have covered it on the rule as to findings. It may be it is not made as clear as it should be.

The Chairman. Does the rule as to findings have anything to do with anything except the report of the jury?

Mr. Clark. I think perhaps you are right. I may not have made it clear. Unless the committee has read the memorandum and is ready to pass upon it here, I think the two questions are pretty much connected, and I think you would want discussion on the whole subject.

Mr. Olney. In asking my question I had two things in mind: First, to bring up the difference between the advisory verdict, which is customary and permitted in equity proceedings in the more usual practice, as I understand it -- at least with us -- and the usual verdict of a jury; and, next, whether the rules clearly specify, so that, without any question whatever, a lawyer reading the rules would know what the effect of the verdict of a jury in an equity case would be.

Mr. Clark. I think you are probably right, that they are not clear enough.

The Chairman. We are agreed, I presume, that it ought to be clear in the rules what the effect of the verdict is in an equity case. That is referred to the Reporter.

As to the question of what the effect shall be, shall we leave that until we take up the Findings section?

Mr. Olney. It is all right in an ordinary case. I have not any great objection to making the verdict of the jury binding where they are called in, but there are certain cases in which it is rather advisable, it seems to me, to permit the verdict to be merely advisory -- where the judge, for example, wants information in order to get the view of somebody on some rather technical point. I have in mind particularly the practice which prevailed in some of the English courts at times, of calling in a jury of experts. The court would submit the question to them. I do not know that that is particularly appropriate here, or that we can very well provide for it, but it is something that was used by the English courts at times very effectively.

The Chairman. What I was attempting to do was to defer the discussion of that point until we get to the rule as to the effect of findings by the jury. He says it is interwoven in some way. Perhaps it is. I do not know.

Mr. Morgan. It is. That is his fundamental question. He is emphasizing the distinctions between law and equity, and he has a long memorandum here on the subject. I think we ought to read it before we discuss it.

Mr. Clark. Have you read it?

Mr. Morgan. Only parts of it.

Mr. Dodge. Dobie on Federal Procedure, page 782, indicates that the practice in Federal courts has been to treat the jury answer as settling the questions.

Mr. Donworth. I just read that. Mr. Lemann had the same impression you have. I do not interpret Mr. Dobie that way. My interpretation of Mr. Dobie is this: If, in an equity case, there is a counter-claim, or something that brings a legal issue into the case, and that legal issue is tried by a jury, then it is settled. But not an equitable issue.

Mr. Dodge. You may be right on that.

Mr. Dobie. That is, when, in a suit in equity, an issue of law arises, and it is sent out, it is binding.

The Chairman. I have tried to defer this until we get to the findings section.

Mr. Lemann. If there is something in the findings section that would bar that, it seems to me we ought to wait until we have read that.

Mr. Clark. I think the real reason behind the two is exactly the same. They are not exactly the same question. You could decide them differently. But if my theory appeals to you -- I think it should in connection with the other -- it seems to me that they are interwoven.

Mr. Lemann. Would it not be safer to pass it? We will lose nothing by passing it.

Mr. Clark. We will make the note now that we want to determine, before we get through, what the effect of the jury's verdict is in an equity case. I will ask you to spend a pleasant evening reading my memorandum, if you have not already done so.

Mr. Pepper. Where is that memorandum?

Mr. Clark. It is the memorandum which is headed "Hon. William D. Mitchell, Chairman."

Mr. Morgan. From page 14 on.

Mr. Tolman. I should like also to call attention to my distinct motion on this matter. I do not object to having it continued, but on page 24 of my suggestions, I phrase a memorandum to be inserted here which I think belongs here. The matter of special interrogatories will follow it later. I have suggested an amendment by adding, at the end of line 14 in this rule, the following words:

> "If the court should see fit to submit to the jury any issue not triable of right by jury, the verdict on such issue shall, as heretofore, be advisory only."

I think it is very important that you should not destroy that historical doctrine. I think it is based on very sound reasons.

Mr. Donworth. Will you please state again, Major Tolman, the page of your memorandum?

Mr. Clark. Page 24 of Major Tolman's memorandum.

The Chairman. I would like to have one thing clear. I would like to have a motion to take this thing up now, and settle it, or defer it until we get to the rules on Findings.

Mr. Olney. I move that we defer it.

Mr. Dodge. I second the motion.

The Chairman. All in favor of deferring it until we get to the rules on Findings, say Aye; contrary, No. The motion is carried. That will be the time to bring that up, even thought it properly belongs here.

Is there anything more on A2? If not, then we will pass to A3.

RULE A3 ASSIGNMENT OF CASES FOR TRIAL.

Mr. Clark. A3 has to be phrased alternatively, anyway. Your suggestion, Mr. Mitchell, comes in here, if we follow the hip-pocket method.

The Chairman. May I suggest that this rule is all right in idea, either on the mongrel rule, or the rule requiring all papers to be filed at once. It does not fit the possibility of the hip-pocket rule, and I suggested in my memorandum a substitute, in case you use the hip-pocket rule. I do not think we need to discuss it, or even read it. I would like to refer it to the Reporter, with the understanding that alternate rule A3 should be drawn to fit alternate rule A1.

Mr. Olney. I move that it be done, without further discussion.

Mr. Loftin. I second the motion.

Mr. Tolman. May I make another suggestion here?

The Chairman. Let us settle this other question first.

Mr. Tolman. I thought it was settled.

The Chairman. All in favor, say Aye; contrary, No. The motion is carried.

Mr. Tolman. I think it ought to go in rule A37.

Mr. Clark. That is the general provision for making rules. I should think it should, under your hip-pocket rule. I think there should be a definite rule. Under this version, it could go there, but it seems to me it does no harm here, and it answers the question which would come up. The equity rule has a definite rule that the thing goes automatically on the docket, and while we could put this all in the District Court Power to Make Rules, I should suppose lawyers would naturally say, "What is the rule going to be?" I think it would be worth while to have an answer here.

The Chairman. I think this machinery is so important that we ought not to leave it to local rules.

Mr. Lemann. We were talking last night about a rule for dismissal for lack of prosecution. I suppose this is where it would come. This leaves it to rules.

Mr. Clark. Yes.

Mr. Lemann. That brings up the question whether it should be left to rules, or whether there should be a general provision. I referred to the statute with which I was familiar, that a suit should be dismissed at the instance of either party if there had been no action taken on it for a period of five years. The suggestion was whether it might be less. That is a fixed right you have, and I do not think the court has much discretion about relaxing it. If nothing has been done for five years, it does not make any difference what your reasons are.

The Chairman. My understanding of the general law is that it is analogous to the statute of limitations, and if you make a motion to dismiss a suit for want of prosecution, and there is no statute or rule that settles the right one way or the other, the court will apply the general rule that if there has been no action taken within the statutory period of limitations, it goes off as a matter of right, and he has not any power to dismiss it for want of prosecution unless, in substance, the statute has run against it in that way. That is my recollection of the law, but you can, by rule, make it five years, or two years, or one year, if you want to.

Mr. Lemann. Should we have a rule to make the same uniform provision, that would not depend upon a local statute of limitations, and would not bother the judge with listening to the excuses of the lawyers? You have either done something within the period specified, or you have not. If you have not, out goes the case. If you leave it like this, to rules and excuses, I do not believe you have much.

Mr. Donworth. I rather favor elasticity there. I think I can recall a dozen instances, possibly, or more, where lawyers, not expecting that they have a case on the calendar, do not go to the assignment, and the clerk hands the court a list of cases in which nothing has been done for a year. He will dismiss them. As soon as the lawyers hear that, they will come up with a rush, and ask to have them reinstated. I sent Major Tolman a few weeks ago a case where, in order to get around the difficulty, the court had to construe the expression "clerical error" most liberally. The court held that the case was dismissed by clerical error, and had it reinstated, where the lawyers did not know it had been dismissed, or did not learn of it until quite a long time afterwards, after the term.

The Chairman. If we made any rigid rule, the court ought to be allowed to exercise it without notifying the parties, but the question, as I get it, is this. We have left it now to establishing local rules for the seasonable dismissal of cases for want of proper prosecution. Do we want to establish a definite rule, or do we want to leave it this way, and let each district court handle it in its own way?

Mr. Dobie. I had the idea that probably we had better leave it more flexible because of the tremendously different conditions in the dockets in various places. In New York the situation would be very different from that in Virginia. Our court meets at Big Stone Gap. The clerk knows every case by heart, and there would not be any difficulty at all. You gentlemen know the situation in New York better than I do.

Mr. Clark. I suggest that you might look back at the rule in Tentative Draft No. 1. Have you it in mind, Mr. Lemann?

Mr. Lemann. Not specifically, though I made a note to examine it.

Mr. Loftin. I agree with Dean Dobie that it would be better to leave it to the local rules, because of the different conditions that exist.

Mr. Donworth. You might put in a general rule recognizing the principle, and leave the details to local rules.

The Chairman. That is what is done here.

> "It shall also establish rules providing for the seasonable dismissal of cases for want of proper prosecution."

That leaves each district to handle it according to its need and the volume of business.

Mr. Tolman. When you come to rule A37, I am going to talk about it, because I think rule A37 now is futile. I think everything with regard to local rules ought to go into A37.

The Chairman. That is a matter of form and arrangement.

Mr. Tolman. It may be.

The Chairman. I think there are a good many transfers to be made from one rule to another, and the style committee ought to pick up things like this. If you will submit your notes, your notes will go before the style committee, and also before Dean Clark. I think that is a matter of arrangement.

Is it the sense of the meeting that we approve the principle of leaving to local rules the matter of dismissal for want of prosecution?

Mr. Pepper. I make a motion to that effect.

Mr. Loftin. I second it.

Mr. Olney. I am wondering if that should be worded in such fashion that it takes away from the court discretion to dismiss a case for want of reasonable prosecution, even if it does not come within any specific rule. Do I make myself clear?

The Chairman. We are authorizing the local court to make local rules that will result in dismissal for want of prosecution according to the conditions they specify. I am not sure I get your point.

Mr. Olney. I do not think it is worthwhile to bring the point up.

The Chairman. Is there anything else in A3? If not, we will pass to A4.

RULE A4 VOLUNTARY DISMISSAL AND NONSUIT.

Mr. Clark. There were some suggestions, it seemed to me, that were matters of form.

The Chairman. Do not bring up matters of form, if we can help it.

Mr. Lemann. The only question I had was this. I made some suggestion to you as to whether or not the rule as drawn, or as proposed to be drawn, would prevent a dismissal at the close of the plaintiff's case without prejudice -- a dismissal as opposed to a directed verdict. I am not sure what your answer to that was.

Mr. Clark. The last time it was suggested that we take the Minnesota rule, and we took it, so you people ought to be able to answer that.

Mr. Morgan. I know what the Minnesota rule is, and that is that the court can dismiss without prejudice at the close of the plaintiff's case, and he can do it at the close of all the evidence, for that matter, if he wants to, because he does not want to cut the plaintiff out from another action. He may feel that under the circumstances of the case he has to dismiss. A continuance would not do, and so forth.

The Chairman. Does the Minnesota rule allow the plaintiff to dismiss of his own right?

Mr. Morgan. Not of his own right.

The Chairman. At the close of his own case?

Mr. Morgan. It used to. They used to interpret it that way, but they do not any more.

Mr. Clark. Is not that covered by subsection (c)?

"By the court when, upon the trial and before the general submission of the case, the plaintiff abandons it."

Mr. Morgan. But there is another provision, I think.

Mr. Clark. Does not subsection (c) cover the case you have in mind?

Mr. Morgan. No. The plaintiff abandons it. The part in parentheses covers it, but you recommended that that be stricken out, as I understand.

Mr. Donworth. After reading Mr. Morgan's memorandum, I studied this rule somewhat, and I wondered if Mr. Morgan had in mind the introductory sentence at the top:

> "An action may be dismissed, without a final determination of its merits, in the following cases:"

Mr. Morgan. Yes.

Mr. Donworth. So, in all these cases, it means something equivalent to nonsuit.

Mr. Morgan. Quite so. But Mr. Clark wanted to strike out the matter in parentheses, in lines 14 and 15, and I think his memorandum said that if you did not strike that out -- look at page 2 of the rule. It says:

> "It is believed that the bracketed matter in (c) should come out, because that provision, together with the last sentence in (e), would preclude granting a motion for directed verdict for the defendant."

I do not suppose it would, would it?

Mr. Donworth. That is an important question. I think at present there is a discretion in the judge, which is perhaps not always wisely exercised. The idea is this: It arises possibly most often in negligence cases. At the end of the plaintiff's case the defendant's attorney is of the view that the plaintiff has not made out a case, and so, usually, instead of asking for a judgment of this kind, in the nature of a nonsuit, he moves for a directed verdict, and in practice, the court does not hold him precluded, in case of denial of that, from going on with his case.

I think the law ought to be -- and I think some judges recognize it that way -- to this effect: If the plaintiff's case simply fails to establish some point in his case that might be supplied later, the judgment really should be without prejudice. If, on the other hand, the judge is of the view that contributory negligence is clearly established, that is, a positive defense is established, then the judge should grant a final directed verdict. How it is best to meet that in the rules, or whether it is met, I do not know.

Mr. Lemann. Is not the point Mr. Morgan makes that the judge should be permitted to do either, and he is afraid, the way it is worded here, that he is not permitted to direct a verdict?

I am inclined to think --

Mr. Morgan. I think it ought to be cleared up.

Mr. Lemann. I think that is a matter of form. As I understand, we are all agreed that if the plaintiff's evidence fails to substantiate his case, the judge should have the right either to direct a verdict or to enter a nonsuit, according to what he thinks should be done. We should not preclude either possibility. Is that right?

Mr. Donworth. That is the way I think it ought to be.

The Chairman. That would mean that the bracketed portion ought really to stay in.

Mr. Morgan. Yes.

The Chairman. I think it would be safer to say "by the court in its discretion". As it reads, it looks as though he were bound to dismiss without prejudice.

Mr. Lemann. I do not know. I think there is room for argument, with the word "may" at the top, but let us make it plain.

The Chairman. Let us leave that to the revisers for consideration.

Mr. Clark. Would you want to say "in his discretion" for all of (c), or just the last part of (c)?

The Chairman. All of it.

Mr. Tolman. I think one of my suggestions on page 25 is a matter of substance. I think lines 18 and 19 of this rule probably conflict with the right of a person to make and get the benefit of a covenant not to sue. It looks as though lines 18 and 19 suggested that a suit should be dismissed without prejudice whenever there are others whom the plaintiff fails to prosecute with diligence, and those others may be some with whom he has executed a covenant not to sue. I submit it for consideration.

Mr. Olney. I do not think those words are necessary here at all, if the court has discretion to dismiss for want of prosecution. Whether the presence of other defendants against whom the case has not been prosecuted sufficiently is ground for dismissal or not ought to be left to the court. I think the words ought to come out.

The Chairman. "Dismissal for want of prosecution" would not apply where he is diligently prosecuting some people and failing to prosecute some other defendants.

Mr. Lemann. This is only permissive. He has not a right to do it.

Mr. Dobie. That is going to be important in separable controversy cases.

Mr. Lemann. A fellow may go to the judge and say, "This fellow is pursuing me, but he is not pursuing the other defendants. He has shown due diligence as to me and not as to the others. Therefore I want you to dismiss it as to me." Has that happened?

Mr. Dobie. It frequently happens in separable controversy cases, where he joins the local employee or foreman, and then goes ahead against the railroad company full steam, and does nothing against that man. You may get a judge who is going to take the attitude that the plaintiff has the right to do that, if he has a joint cause of action under the local law, under the Schwyhart case. He goes against the railroad company hook, line, and sinker, but does nothing against the foreman who ordered him to go on the cars. If you have a reactionary Federal judge, who favors the corporation, hell is going to break loose. This says "may". I understand that.

Mr. Lemann. I do not think he would ever do it much.

Mr. Morgan. Is that the case you had in mind?

Mr. Clark. This is not our language, please understand. There was debate about it the last time.

Mr. Morgan. But you cannot avoid it. I want to know what you mean by it.

Mr. Clark. I do not know about that. I would like to have my responsibility defined when I am obeying orders.

Mr. Dodge. Did Major Tolman move to strike those two lines?

Mr. Tolman. Yes.

Mr. Dodge. I second the motion.

Mr. Clark. This comes from the Minnesota rule. It was the recommendation of the Minnesota committee.

Mr. Morgan. Mr. Cherry, what does it mean?

(At this point Mr. Cherry spoke to Mr. Morgan in a low tone of voice.)

Mr. Morgan. I support the motion, after Mr. Cherry's statement.

Mr. Olney. What was his statement?

Mr. Morgan. "It doesn't mean a damn' thing."

Mr. Clark. I think that is sacrilege, if I may say so.

The Chairman. All in favor of striking out those two lines say Aye; contrary, No; the motion is carried.

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Mr. Dobie. Mr. Chairman, I have one point I would like to bring up here very briefly. It is substance, really.

The Chairman. All right.

Mr. Dobie. That is, as we understand this rule, the plaintiff has the right of voluntary nonsuit, just the plaintiff, as a matter of right, only if he exercises it any time before the trial begins. Is that right, Mr. Reporter?

Mr. Clark. Yes.

Mr. Dobie. Any time before the trial begins?

Mr. Clark. Yes.

Mr. Dobie. But after the trial begins he loses that?

Mr. Clark. That goes to the court.

Mr. Dobie. That is changing the law in a number of cases. That is changing the Virginia law. You remember Barrett v. Railroad Company in Virginia; he has a right to do it any time before the jury retires. In that case the defendant asks for a directed verdict, the judge says, "I am going to give it to the defendant," and the plaintiff bobs up and says, "Voluntary non-suit." I am objecting to that.

I favor your rule here, but that is my interpretation, the plaintiff loses his right, as a matter of right, when the trial begins. I am for that.

Mr. Clark. Yes, that is quite correct. Of course, there are differing rules in different places. Last time we felt we had to make a compromise and it was felt the best compromise came out of the Northwest.

Mr. Dodge. Does the trial begin when you proceed to take depositions or only when you get into court?

Mr. Clark. I don't think it begins when you take depositions.

Mr. Morgan. You know what they do in Massachusetts?

Mr. Dodge. I do. You could not take 15 depositions and drag the defendant all over the country and then drop your suit; he would be entitled to have you proceed.

Mr. Clark. Answering your question, not answering the question of policy, but answering your question, I think we provide that it shall be a formal trial. In Rule A-6 we start out:

> "In all trials, the mode of proof shall be by oral testimony"---

and so on. We contemplate that proceeding. On the question of policy I will not say anything.

Mr. Morgan. I would like to agree with Mr. Dodge; if you say the time before trial begins you better finish it, because I remember there is a dispute in the code states where the expression is used as to when the trial begins. Some say the trial does not begin until the first witness is sworn at the trial.

The Chairman. It ought to be definite, but under the question of policy, what is the sense of the committee as to whether this right to voluntary non-suit ends at any time before the actual trial in court commences?

Mr. Dobie. I think I can tell you how federal courts will hold if you leave it like this. I think they will hold against Mr. Dodge because there are a great many cases -- they held that in one of those cases when they were assembling the jury, they were questioning the voir dire and they had not commenced, but they held you had to have all the machinery there.

Mr. Cherry. "Call the first witness."

Mr. Dobie. Yes, or until counsel has made his opening statement.

Mr. Lemann. The question is, when can you quit without asking the judge? In California can you take 10 depositions and say, "Well, I don't like this so much. I think I will take a non-suit"?

Mr. Olney. You can dismiss at any time, and, of course, you pay the costs.

The Chairman. I think that is right.

Mr. Dobie. Substantial costs?

The Chairman. What are allowed by law. Nothing extra in the way of attorneys' fees or anything.

Mr. Olney. Mr. Chairman, this rule as it is worded is going to cause a good deal of consternation in California and rather a good deal of confusion in California. I think the expression "non-suit" is used entirely differently from what I judge it has been used around the table here. We have in California a non-suit, when a man speaks of a non-suit he means a dismissal granted by the court upon the motion of the defendant made at the time that the plaintiff's evidence is through, when the plaintiff rests his case in chief, on the ground that the evidence does not show a cause of action, does not sustain the plaintiff's claim, and that is what we always call a non-suit.

The Chairman. We have not used the word "non-suit" here.

Mr. Clark. It is in the title.

The Chairman. Is it?

Mr. Clark. That is the only place, I think.

The Chairman. You better strike that out.

Mr. Olney. We have got to ---

Mr. Morgan. (Interposing) You have adopted somewhat the common law practice, only made it compulsory?

Mr. Olney. Yes. You can do two things in California when the plaintiff rests his case, and there is a very sub-
2 stantial difference between them: You can move to the court for a non-suit, and if that motion is sustained the suit is dismissed but it is not a bar. On the other hand, if you wish, you can say, "I move for a directed verdict." In that case you have got no further right to adduce testimony yourself and the case is submitted on the testimony that is then in, and if you get a judgment on a directed verdict it is in bar, the issue has been tried and determined.

Mr. Morgan. Yes.

The Chairman. Judge Olney, the only place the word "non-suit" appears is in the caption to Rule A-4, and if you leave it out there you haven't any difficulty about the point, and there is a simple dismissal with or without prejudice. The reporter suggests changing the caption so that instead of saying "voluntary dismissal and non-suit" we say "dismissal with or without prejudice". Then the word "non-suit" does not enter into our calculation.

Mr. Olney. Very well. Now, there is this expression in here, and I do not just understand how it came up at all, in line 20:

"All other modes of dismissing an action are abolished."

Immediately preceding that is another ground of dismissing it, as I understand it, and there are other occasions for dismissing an action than these that are provided here.

Mr. Clark. Now, again, this is not my language; it comes from Minnesota, but you have to read that in connection with lines 22 and 23. I think what they are after is clear, whether you like the manner of expression or not.

Mr. Olney. It is not true.

Mr. Donworth. There is another point ---

The Chairman. (Interposing) Just let us finish with one point.

Mr. Donworth. This is another idea on the same point.

The Chairman. All right.

Mr. Donworth. This says in line 20:

> "All other modes of dismissing an action are abolished."

If that was to stay there I favor, I think, Judge Olney's motion or idea that it go out. If it is to stay there, there should be some words inserted after "action" so as to make it read:

> "All other modes of dismissing an action before a final determination of the merits are abolished."

It is the common thing in equity, as we all know, when you enter the case on its merits and say, "Bill dismissed" ---

Mr. Olney. Suppose it is dismissed for want of prosecution? That is not a judgment in bar, as I understand it.

Mr. Dodge. Yes, it is with us.

Mr. Lemann. Would you cover it by inserting these words---

Mr. Dobie. It is the custom with us in Virginia where you dismiss a bill in equity, to say, "Bill dismissed," that is, on its merits. If it is without prejudice you say, "Bill dismissed without prejudice."

Mr. Olney. What if it is dismissed for want of prosecution?

Mr. Donworth. I am inclined to think that the statement: "All other modes of dismissing an action are abolished" might well go out. There are so many ways the court might want to dismiss the thing without prejudice; because the following words, that is in lines 22 and 23, are very serious words:

> "In all cases other than those mentioned in this rule, the judgment shall be rendered on the merits."

Now, I think there might be numerous instances not mentioned in these rules where a court would want to give a man another chance.

Mr. Dobie. I agree with you that the rule absolutely enumerates in (a), (b), (c), (d), and (e), and for these five reasons can there be dismissal without prejudice, and if we have missed anything else ---

Mr. Cherry. This is taken from the Minnesota statute, Mr. Chairman, and the use of the word "may" was meant to eliminate the sort of thing Judge Olney was mentioning. The purpose of Minnesota was to abolish any other name or procedure for ending a case in this type of situation other than dismissal without prejudice. That is, you get rid of what you call non-suit, discontinuance, and all the other phrases and all the other ideas. I think there is involved some difficulty in putting it into these rules without any change because it is already in its setting in the Minnesota statute.

Mr. Lemann. Of course, to take out this sentence alone, or the language in lines 22 and 23, I don't think would help the situation if you are going to leave the other language. The section starts off by saying:

> "An action may be dismissed without a final determination of its merits, in the following cases:"

It is perfectly consistent then that you have that in lines 22 and 23, saying that all other cases shall be on their merits. If you take out that language in 22 and 23 you would probably have the same result and all you could say would be some argument about whether you would have the same result, and I don't think we ought to leave that open.

I was wondering if we could not meet Judge Donworth's and Judge Olney's point by just inserting in line 20 the same language which appears in line 2:

> "without a final determination of its merits."

Then it would read:

> "All other modes of dismissing an action without final determination on its merits are abolished."

The Chairman. You would have to insert "for want of prosecution" as another subdivision. I can think of that one and there may be others.

Mr. Cherry. Yes.

Mr. Dobie. This dismissal for want of prosecution is without prejudice?

Mr. Donworth. This prohibits it.

The Chairman. Unless the statute of limitation runs against it.

Mr. Dodge. In the decisions of the Supreme Court of

Massachusetts that is a judgment on the merits and finally

3 disposes of that cause of action.

Mr. Lemann. Res judicata?

Mr. Dodge. Yes.

Mr. Lemann. Why should that not be so?

Mr. Olney. I have never heard of that considered for that rule, and I doubt it.

Mr. Dobie. It is a little harsh, if it is.

Mr. Olney. It is a very harsh rule, it seems to me if you have got a final determination of the case upon its merits.

Mr. Donworth. After hearing what I did of the sense of the meeting I move, to see how it goes, that lines 20 to 23 be stricken out.

Mr. Pepper. I second it.

The Chairman. Tell us what the effect will be if you strike that out.

Mr. Lemann. Yes, that is what I want to know.

Mr. Olney. All right, the effect will be this: The court may grant a voluntary dismissal in the casesmentioned and nothing is said under what other circumstances the court may make it.

The Chairman. I understand. All in favor say aye?

Mr. Lemann. The only objection I see is that I think there will be some uncertainty as to whether you can do it in other cases or not. Perhaps you want to leave the uncertainty and let the lawyers argue it, and leave something for the judges.

The Chairman. We have got some things that way in the other situations.

Mr. Lemann. The question would be whether we should try to fit all the situations in here or not. The only objection I see to it is that I think you leave it open. Maybe it ought to be left open.

The Chairman. Let us strike it out and then refer to the revision committee and the reporter the question of whether there is a hiatus there of some kind that ought to be taken care of.

Mr. Morgan. Mr. Chairman, it seems to me if there is a question of that kind the only thing we ought to provide for here is the places where the plaintiff may dismiss of his own motion without prejudice, and where he may not, and leave all the rest to the court.

Mr. Sunderland. You would cut out everything except the first?

Mr. Morgan. Yes, as to the enumeration of the places where the plaintiff may dismiss without prejudice; of course, without order of the court.

Mr. Sunderland. There are a great many States that have no enumeration at all in their statutes and I do not think there is really any occasion for enumeration.

Mr. Lemann. It would be better, I think, to say nothing about it.

Mr. Sunderland. I think so.

The Chairman. Then what becomes of those cases where the plaintiff cannot dismiss on his own motion, but you want to give the court discretion?

Mr. Morgan. The court can always allow him to demand that right, and where he can dismiss he will do so. I think that is what the statutes in the code states are.

Mr. Lemann. That at least adds to the weight of the argument as to what happens in enumeration ---

The Chairman. Simply say, generally, "The complaint may be dismissed on his own motion before trial without prejudice and in no other case may he do so except with permission of the court."

Mr. Donworth. He cannot do so even in the case you mention if there is a counterclaim in.

Mr. Clark. I think I am entitled to say this -- pardon me -- you really want to go back to Tentative Draft 1.

Mr. Lemann. That is a dirty dig. (Laughter.)

Mr. Clark. Oh, no, I don't think so.

Mr. Pepper. Mr. Chairman, I am afraid some of our difficulty grows out of the fact that we are trying to make a single rule for a single civil action but are not distinguishing between cases which were heretofore equity cases and suits at law. It is so familiar to us in my jurisdiction that you can terminate an equity suit without the permission of the court, and so familiar that you may discontinue an action at law at any time before trial, that I am wondering whether there is not a substantial basis for the distinction.

The Chairman. We are getting an interesting statement here.

Mr. Pepper. It really is not a statement; I am asking for light. I am pointing out in the jurisdiction I am most familiar with that we have never been able to discontinue a suit in equity at the mere will of the plaintiff without either the consent of the defendant or the order of the court. We have always been permitted to discontinue an action at law at any time before the case is called for trial, and even after the case has been called for trial and the plaintiff's evidence is in, we have the practice of what is called "Suffering a voluntary non-suit." We also have at the end of the plaintiff's case the right of the defendant to make a motion that Judge Olney referred to, the motion for non-suit, which is in effect a demurrer to the plaintiff's evidence.

Mr. Olney. Exactly.

Mr. Pepper. And if the court enters a judgment of non-suit then that finally concludes the litigation unless the plaintiff, as if he were moving for a new trial, moves to take off the non-suit, which is, with us, argued before the court en banc. If the court refuses to take off the non-suit that is the end of his case and it is a final judgment from which he may appeal.

But I do not see the advantage of trying to have a uniform rule of discontinuance applicable to cases of all sorts. One reason for making it necessary to get the court's permission to discontinue in equity is because it is almost certain that in those cases expense will have been incurred, depositions taken, and other steps of the sort mentioned by Mr. Dodge. In the ordinary case of the action at law, a negligence case, for instance, or a suit on a promissory note, nothing will have been done in the vast majority of cases, involving any considerable amount of expense.

Now, ought we not to have some distinction between types of cases or is it safe to do as we are here doing, first consolidate all cases into a single action and then make a uniform rule with respect to that action, irrespective of the cases that we have consolidated?

The Chairman. You would not want us, but we are trying to adopt the uniform system to abolish all distinction in procedure between law and equity, to save any distinction except that forced upon us by the Seventh Amendment, would

4 you ?

Mr. Pepper. Only this, sir, that I should think that we might well provide that the action may be discontinued by the plaintiff in all cases where after notice the defendant interposes no objection, but that where the defendant interposes objection the court shall determine whether upon the facts of the case the discontinuance should be granted; otherwise upon terms of paying costs or on such other terms as the court shall specify.

I do not want to revive the distinction between law and equity, but merely to perpetuate the distinction between cases where there is and is not room for some provision saving the rights of the defendant.

Mr. Donworth. I might say in answer to those observations which are very pat, that a code section covering in some form what we are doing here exists, I think, in most of the States that have combined the two procedures. The code of Washington, if I may mention it, has a provision purporting to do this, not following exactly the form, but purporting to cover both classes of cases in one general rule, and so has California and so has Minnesota, and I think it will be found in most of the code states.

The Chairman. I don't think in the code states there is a single one of them in which on the question of dismissal without prejudice there is the slightest distinction drawn between the nature of the cause of action.

Mr. Morgan. Not at all.

Mr. Clark. I might add too that this was a matter fairly close, apparently close, to the hearts of a good many members of the bar, because we had a lot of suggestions put forth somewhat in detail, and they were listed in the other draft. There were fifteen or so from different committees, and they all want some rule because it is so much in doubt now in the federal court.

The Chairman. Mr. Morgan, if we adopted your suggestion and simply say you can dismiss without prejudice before the trial, and in all other cases with consent of the court, you then will leave it open to the court after the final statement of the case and all the evidence is in?

Mr. Morgan. Yes.

The Chairman. I would not do that.

Mr. Morgan. I do not see any reason why not. It has been done right along. I have had it done on me, when I moved for a directed verdict the court said, "No, I will not grant a directed verdict even at the close of all the evidence, but I will grant a dismissal. I think there is a hole in this case that could be filled at another trial and I do not want to see this litigant foreclosed." And I think that right should be kept.

Mr. Lemann. It would be kept even under this Minnesota draft?

Mr. Cherry. That is the rule in Minnesota.

Mr. Morgan. Of course, this right to dismiss before trial is subject, as in the first draft, to counterclaim and interlocutory order. That prevents most of the injustice, I think, that Senator Pepper is thinking about.

Mr. Pepper. I just wanted to be sure that that point was considered.

Mr. Lemann. You say the reporter had this pretty well covered in his original draft, did you?

Mr. Morgan. I thought that, myself.

Mr. Lemann. I must apologize to him. I want to withdraw that characterization of his reference to the earlier draft. (Laughter.)

Mr. Dobie. Do you have the first draft? Would you mind reading it?

The Chairman. In Minnesota the court cannot do it after the final submission.

Mr. Morgan. Yes, he can.

The Chairman. Then the Minnesota committee is wrong.

Mr. Morgan. They might be wrong.

Mr. Clark. The first draft says:

> "The plaintiff may dismiss all or any part of his action upon a written stipulation to that effect signed by all the parties who appear therein at any time before entry of final judgment, or of his own motion at any time before the introduction of proof at the trial of the case."

Let me insert there and say that we had in a provision for the assessment of costs. That was stricken out, but we made the change on the theory that that would follow as a matter of course anyhow.

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Mr. Morgan. Certainly.

Mr. Clark. Then it goes on:

" * * * when the defendant has filed a counterclaim prior to the date of such dismissal, may decline to permit such dismissal or may order the counterclaim continued for trial and adjudication. An action may be dismissed at any other time by the court upon motion and such terms and conditions as it may deem just and proper."

Mr. Sunderland. I think that is a great deal better than the present one.

Mr. Dobie. I move we take the old rule, subject to any rephrasing as may be suggested by the chairman and the drafting committee.

Mr. Pepper. Does the last subdivision, Mr. Reporter, cover the case suggested by Judge Olney of what he described as a motion for non-suit at the end of plaintiff's case?

Mr. Clark. I should suppose so. It says it may be dismissed at any other time, "by the court upon motion and such terms and conditions", and so on.

Mr. Lemann. You leave it entirely to the judge in every case except where the plaintiff moves to dismiss?

Mr. Pepper. I wanted to be sure of that because that leads to one further question, and that is what we mean when we say that an action dismissed in that fashion is dismissed without a final determination of its merits.

I should suppose that if a plaintiff has had his day in court and called his witnesses and proved his case to the limit of what he can do, and then the court on the defendant's motion enters judgment of non-suit or dismisses the action, or whatever else you call it, that that can scarcely be described as the dismissal of an action without final determination of its merits. I have been wondering just why that initial qualification, which appears in lines 1 and 2, or in line 2, has to be carried through the whole category of cases. I do not see that it adds anything to the thought, and in the case referred to it seems to be somewhat inconsistent with the result.

Mr. Morgan. Senator Pepper, in the code states if you move for a dismissal rather than for a directed verdict you are really asking for a determination which does not finally settle the case ordinarily. You would move for a directed verdict under the circumstances that you suggest. If it is a non-suit or a dismissal on the merits it is in effect a directed verdict. That is the practice in the code states.

Mr. Olney. I think, Senator Pepper, the real reason why the plaintiff in these cases is held not to be bound, where a motion is strictly a motion for non-suit, not a motion for a directed verdict, but a motion for non-suit, I think the real reason for permitting that, is the feeling that the plaintiff may have slipped up somewhere in his proof or something of that sort and he ought to have another chance if he wishes to go ahead. The practical result in 999 cases out of a thousand is that it is the end of the case.

Mr. Morgan. It usually is.

Mr. Sunderland. As I understand, the federal courts have always refused to grant this involuntary non-suit.

Mr. Morgan. That is, they say there isn't any such thing as a voluntary non-suit.

Mr. Sunderland. And they treat it as a motion for a directed verdict and settle the case on the merits. There are hundreds of cases in the federal courts to that effect and certainly we do not want to do anything to upset those.

Mr. Olney. And the result has been that many a man has been caught in the federal courts, that is, a man who was accustomed to the practice that I have been mentioning, in the state courts, has been caught when he came into the federal court because he would either move for a non-suit, what he thought would be a non-suit, and if it were denied he has the right to go on with his evidence and present his evidence, and it would be construed as a motion for a directed verdict where he was submitting the case upon the evidence, and he had no right to go on with further evidence, and he would find himself where his motion was denied right up against it without the right to go on with the evidence although he fully expected he would have that right.

The Chairman. We have got that covered in another section. I tell you, gentlemen, this thing is in so much confusion in the different jurisdictions with all kinds of expressions like non-suits and one thing and another that I think the wise thing for us to do is to adopt a clear, specific rule enumerating the cases in which dismissal may be granted without prejudice. I think you will leave this thing in great confusion under all these decisions if we do not, and I think this Rule A-4 is the right type of rule.

Now, the motion has been made and seconded to strike out lines 20 to 23, and it may be that some other changes are needed, but I think it would be a mistake, and our discussion shows it, not to get all these various systems in one uniform rule of this kind, and if you try to make it too vague or too general you get back into all these differences about non-suits and what not, and it is not the wise thing to do.

Mr. Lemann. If you take out lines 20 to 23, I am afraid you have not accomplished your objective because it is then going to be debated whether you have enumerated all the cases or whether you have not. If you have not enumerated them all, then it means that Mr. Morgan's motion was the logical alternative, because you are not going to enumerate them all.

The Chairman. Let us change line 20 and see. "All other modes of dismissing an action without final determination of its merits are abolished." Then have the committee check carefully to see whether there are any other types of dismissal that ought to be listed. We have noted one, "For want of prosecution."

Mr. Lemann. That will be good.

Mr. Pepper. And might it not be left to the committee to substitute the form originally submitted by the reporter, because when he read that a few minutes ago it met with the general acceptance around the table?

The Chairman. Maybe so, but I would like to vote against it. I think this is the type of rule we need.

Mr. Lemann. I was going to vote for it if you were going to leave this in.

Mr. Olney. May I make this suggestion along the line you have in mind? This rule, I think, requires decided redrafting in certain particulars. There are certain parts where the wording of the rule should be changed. It is going to depend entirely on what we determine to be the substance, and we can pass this afternoon on the occasions when we think that non-suit should be granted, or, rather, dismissal should be granted, and then leave it to the reporter to draft the rule to conform with what we believe should be provided.

For example, just to see if I can cover it, I will make this motion, first, that the plaintiff be allowed to write a voluntary dismissal at any time before trial is commenced; next, that he be allowed the right of dismissal at any time before judgment with the consent of the defendant. In this case it is provided here that he has got to have the consent of the court also. I just cannot see any sense in that at all. If the parties agree to a dismissal of the case at any time that ought to end the litigation right then and there without the court coming in.

Next comes the question which should be passed on, which is the difference between the rule in my state and the rule that Senator Pepper evidently favors, where a motion is made in the nature of a demurrer to the judgment.

Senator Pepper. To the evidence?

Mr. Olney. A demurrer to the evidence, at the end of the plaintiff's case. Shall that be taken to be in bar, or shall it be what we consider to be a mere non-suit or dismissal?

Going down the line with those things we can determine what we wish to do, and I will make a motion, for example, that we cover the matters I have said and, so as to bring it to a head, I will move that the right of non-suit as we have it in the code should prevail and that it be not in bar.

The Chairman. Now, Judge, that may be the right way to go at it, but it would certainly be much clearer in my mind if we did it this way: If we are agreed on the proposition that we ought to list the cases where there can be a dismissal without prejudice, if we are agreed to that and are sure we include them all, then can we not take the particular cases which are enumerated, one by one here, and see if we have any objection to them? That will clarify it in my mind a lot better, because if anybody tries to state all these different cases in a general statement without some written provision to work on it puts him a little in confusion.

Can we not take the (a), (b), (c), (d), and (e) right down the line here and see whether we want to agree to these or add some at the end? Will that suit your theory?

Mr. Olney. Exactly. I think that will bring out what I have.

The Chairman. First, are we areed on the idea that the rule ought to clear all the confusion by enumerating the cases where dismissal may be had without prejudice? Are we agreed on that principle?

Mr. Pepper. I move that that be the sense of the committee.

The Chairman. It will be so ordered.

Now, we will take (a). There is a case cited. Who objects to that? I mean the principle there, not the verbiage.

Mr. Olney. I have no objection to the principle but I am wondering about this, which is entirely new to me, "provided, that an action presenting the same issue against any defendant shall not be dismissed more than once without the written consent of the defendant or an order of the court on notice and cause shown."

The Chairman. That is a common provision.

Mr. Olney. Is that a common provision?

The Chairman. Yes.

Mr. Morgan. That is, you cannot dismiss for the same cause of action twice.

Mr. Olney. That is all right.

The Chairman. Is there any exception taken to subdivision (a), that is, the substance of it? Let us not get into the verbiage. That is the voluntary dismissal controlled by the plaintiff alone, if a provisional remedy has not been granted.

Mr. Dobie. As a matter of right?

The Chairman. As a matter of right.

Mr. Dobie. I will agree to that.

The Chairman. Provided that he cannot do it more than once. The next time he tries it on the same cause of action he has got to have the consent of the court. Is that satisfactory?

Mr. Dobie. I will agree to that. You will have a fight on that in some states like Virginia.

The Chairman. Unless there is objection made, we will take it as agreed to. Now, (b): "By either party, with the written consent of the other." Let us stop there a minute. That is all right, is it not?

Mr. Dodge. That is not needed as to the plaintiff, and it seems to be a rather curious provision that the defendant may dismiss the plaintiff's case.

The Chairman. "By either party, with the written consent of the other."

Mr. Dodge. Yes.

The Chairman. You can say, "By written stipulation of the parties."

7 Mr. Dodge. The plaintiff can do it under (a) without the written consent of the defendant.

Mr. Lemann. Only to a certain point.

The Chairman. Before trial. This (b) covers any time.

Mr. Dodge. Any time before trial, the same as (a). How can you say the defendant is to dismiss the plaintiff's case with the consent of the plaintiff?

Mr. Lemann. Yes, by stipulation of both parties at any time.

The Chairman. I take it the first sentence read means the consent of both parties ---

Mr. Dodge. As to the plaintiff, that is not necessary. As to the defendant, it sounds peculiar.

Mr. Pepper. We are really on substance.

Mr. Dodge. He does not really need the consent of the defendant because under (a) he can do it without it.

The Chairman. I rule that that means by stipulation of both parties.

Mr. Morgan. It means even the second dismissal or the third dismissal.

Mr. Lemann. Take out the words "before trial" at the end.

The Chairman. No, because that qualifies the latter part. Let us get to that in a minute.

Mr. Olney. Mr. Chairman, Mr. Dodge has trouble here because he thinks it is the same as (a). It would be the same as (a) if those last words were not there, but, as a matter of fact, this means that by either party with the written consent of the other it can be dismissed at any time clear up to the time of judgment.

The Chairman. The words "before trial" I rule relate to the second phrase, "or by the court."

Mr. Clark. I wonder if there should not be a semicolon there?

The Chairman. That is a matter of form.

Mr. Dodge. Was that the intention?

Mr. Clark. I do not know. The punctuation is just the same as it is in the Minnesota rule here.

The Chairman. I guess I am wrong.

Mr. Morgan. Mr. Chairman, I think the second subdivision here is intended to take care of those places in the first subdivision that are qualified. By consent it may be dismissed even though there is a counterclaim or provisional remedy or anything else.

Mr. Donworth. That is what I have been trying to say for some time.

The Chairman. I will read it all together then:

> "By either party, with the written consent of the other, or by the court upon the application of either party after notice to the other and sufficient cause shown."

The phrase, "at any time before trial", affects the whole paragraph.

Mr. Cherry. Just to bring the matter before the committee and bring it to a point, I move that the action be dismissible upon the consent of both parties at any time up to judgment.

Mr. Dodge. Second the motion.

Mr. Donworth. Of course, the difficulty about these amendments is that this has a long history, these sections of the code, and there are lots and lots of decisions under them, and, as far as we know, they are satisfactory.

The Chairman. Well, we have got a clean-cut proposition there. Will you read that, Mr. Stenographer?

(The motion made by Mr. Cherry above was read by the stenographer.)

(The question was put and the motion prevailed without dissent.)

The Chairman. Now, we go on to (b), "or by the court upon application of either party after notice to the other and sufficient cause shown, at any time before trial." Any objection to that?

Mr. Olney. Yes, to that "upon sufficient cause shown". That does not state what the cause is, and it should be much more definite. I should dislike exceedingly to see it left to a court or judge to dismiss a case upon the motion of the defendant or what he might think was sufficient cause. I want his discretion very definitely limited in that respect by rule.

The Chairman. I think what the reporter meant when he said "of either party",is the party who is maintaining the suit. You see, the first clause qualifies the right of absolute dismissal before trial by saying it cannot be done if a provisional remedy has been granted. Now, under (b) the party who brought this suit or asserted a counterclaim may want to dismiss without prejudice before the trial, and he may have had a provisional remedy or something here, and, therefore, you have got to get the consent of the court. Is that not what you mean? You do not mean if I bring suit the other man can dismiss it before the trial for cause shown?

Mr. Clark. Ask Mr. Cherry.

Mr. Cherry. I agree with Judge Olney. Everything should go out with the written consent of the other.

Mr. Olney. That was the chairman's point, and I think his point is good.

The Chairman. We have to put something in to meet the cases where there is the condition in (a) about provisional remedy.

Mr. Olney. To bring the matter to a head, I move that in substitution for the matter in the second portion of (b), it be the sense of the committee that the plaintiff shall have the right to dismiss his cause upon notice to the defendant, by order of court, after good cause shown.

The Chairman. At any time before trial?

Mr. Olney. Yes.

The Chairman. By plaintiff, you mean a plaintiff of a counterclaim as well as the original suit? That is a clean-cut proposition and I think that is what the reporter meant. His phrase "either party" was unfortunate.

Mr. Pepper. The effect is really to transfer subdivision (b) up into subdivision (a). In other words, the effect of what is proposed is to enlarge the categories in which the plaintiff may do this and say it is the subject matter in (a) by adding the bar of the court on the plaintiff's motion to do the things specified in (b)?

The Chairman. Which he cannot do as a matter of right in (a)?

Mr. Pepper. Exactly.

The Chairman. As a matter of form, on revision I think it ought to be transferred up to (a).

Mr. Pepper. I second the motion.

The Chairman. All in favor of Judge Olney's motion say aye.

Mr. Donworth. I would like to understand what that motion is.

The Chairman. It means this: Under (a) you have given the plaintiff an absolute right to dismiss before trial without prejudice except where there is a provisional remedy.

Mr. Donworth. I understand that.

The Chairman. Now, you have to have some way to dismiss when there are the exceptions, so we provide that it can be done by motion before trial on order of the court, and really it ought to be a qualification or addition to rule (a).

Mr. Donworth. I am in favor of sticking to the limitations of clause (a) unless both parties waive that condition, and I would favor striking out all after "by either party, with the written consent of the other," and not let the court dispose of the conditions in paragraph (a). I believe if there is a counterclaim and the defendant is there insisting upon it ---

The Chairman. That does not dismiss it. Counterclaims are covered by the last part. I don't think you have done it very well, but we are not allowing him -- if there is a claim and a counterclaim and the plaintiff wants to dismiss we are not allowing him to dismiss the counterclaim. That is what the last three lines intended.

Mr. Donworth. The motion, then, is that (b) would have two situations: one is that both parties by written stipulation, notwithstanding the limitations of (a), may have the case dismissed. That is all right. Now, I understand it is proposed to leave in also, "by the court upon the application of ---"

The Chairman. The suitor.

Mr. Donworth. "--- plaintiff after notice to the other and sufficient cause shown"?

The Chairman. Before trial.

Mr. Donworth. Of course, that is very vague, indeed.

The Chairman. Suppose you bring a suit, Judge, and there is a counterclaim, or there is a temporary injunction, or some proceeding of that kind which has been instituted; you cannot dismiss that voluntarily under (a). But the court ought to have the power under (b), even if a provisional remedy has been granted, in his discretion to allow dismissal, and that is all it is intended to do.

Mr. Donworth. As you say, that is a clean-cut issue.

Mr. Morgan. Mr. Chairman, you cannot blame the reporter because this is the Minnesota draft, which he did not draft, and which he opposes, and I must say I have -- maybe you gentlemen here have had so much experience that you can foresee all these cases, but I certainly doubt whether anybody that is attempting to legislate can foresee all the cases where a dismissal without prejudice ought to be granted.

The Chairman. You move to reconsider ---

Mr. Morgan. I think what we are doing here, and the way we are getting balled up on every one of these sections, shows it is a pretty difficult, if not an impossible, task to enumerate all the situations to set the court up so it cannot let a case go without a decision on the merits. Personally, I think it ought not to be done.

Mr. Olney. I think the answer to Professor Morgan is this: The thing we are doing now is to provide the cases in which the court may dismiss the action. We are providing specific cases, put it that way, in which the court may dismiss the action without the dismissal being a judgment in bar.

Mr. Morgan. Surely.

Mr. Olney. Now, his objection, and I am rather with him on it, applies to that state of affairs when we get through with our enumeration, applying to that the rule that it shall not be dismissed except in those cases. I am afraid of that.

Mr. Morgan. So am I.

Mr. Olney. But the specific instances I want to call his attention to. We are providing specific instances in which it can be dismissed without being in bar, and we ought to do that.

Mr. Morgan. I wonder if we are telling the court anything on that. I agree you can pick out instances where you are sure the court ought to have the power, but I am wondering -- of course, you are not going to compel him to do it there, are you?

Mr. Olney. In some cases I would compel him to do it.

Mr. Morgan. Only in the cases where the parties are willing, is that right?

Mr. Olney. No; in case (a), in the first instance there, I would compel him to dismiss it.

Mr. Morgan. That is, if the parties -- (a) and (b) are both where the parties are willing?

The Chairman. No, (a) is not.

Mr. Morgan. (a) is where the plaintiff alone wishes it?

Mr. Olney. I mean the plaintiff alone, yes.

The Chairman. Gentlemen, if you want to reconsider your proposition to enumerate the conditions on which it may be done, we will have to reconsider.

Mr. Olney. I thought we were making distinct headway here.

Mr. Morgan. I understood that your proposition was that we were stating all the cases where he could do it, and then in all the others it had to be on the merits. Let us enumer-
9 ate the cases where he can and then when we get to the end we will fight out the question of whether we want a limitation.

Mr. Donworth. If we do not enumerate them, the limitation amounts to nothing.

The Chairman. I don't think there is any question about enumerating.

Mr. Dodge. There are at least two other cases in prior rules which provide for dismissal without prejudice, which does not cover this. One is for failure to make discovery as ordered, and the other is dismissal for failure to serve copy of the complaint.

The Chairman. That is easily handled. All other modes except as provided in these rules.

Mr. Lemann. These codes of Washington and California seem to undertake an enumeration. Why shouldn't we?

The Chairman. I think every code does.

Mr. Donworth. They are substantially alike, Washington and California.

Mr. Olney. We can discuss that question when we come to it.

The Chairman. Now, we have got a motion that the second part of subdivision (b) ---

Mr. Donworth. Before that goes to a vote, let me ask, does that right prevail at any time before trial?

The Chairman. Yes.

Mr. Donworth. All right. I would rather leave it as it is in most of the codes without that, but I will not delay by any opposition.

(The question was put and the motion prevailed, Mr. Donworth voting in the negative.)

The Chairman. I may suggest to the reporter that he may properly transfer that to (a) because it is only intended to cover the cases excepted in (a).

"(c) By the court when, upon the trial and before the final submission of the case, the plaintiff abandons it (or fails to substantiate or establish his claim or right to recover)."

Mr. Olney. That, Senator Pepper, is our motion for a non-suit.

Mr. Lemann. Of course it should be made plain, perhaps, it is designed to prevent the judge, where the plaintiff has failed to sustain his case, from entering a judgment at bar.

The Chairman. We put in the words "in his discretion" in there. I suggested that and the reporter has noted that to make that point clear.

Mr. Lemann. Yes, the Judge made it here.

Senator Pepper. What is the significance of the brackets around the words to which Judge Olney refers?

The Chairman. Because he may have failed to substantiate his case and not be willing to abandon it, and it ought to go in.

Mr. Clark. We put the brackets around to raise the question whether it would prevent a motion for a directed verdict. The original phrase without the brackets is in the original from which we took it. The chairman suggested putting in after "the court", "in its discretion" to cover that. We did not want to prevent the court's granting a motion for a directed verdict.

The Chairman. Listen a minute. This is before final submission. You cannot make a motion for a directed verdict then, can you?

Mr. Cherry. That is the point. In Minnesota it does not interfere with a motion for a directed verdict.

Mr. Morgan. In lots of the federal courts they will allow you to make a motion for a directed verdict.

Mr. Dobie. In the Scanlon case it was made at the end of the plaintiff's side.

Mr. Loftin. That is the practice in my state.

Mr. Dobie. No evidence was introduced whatever.

Mr. Dodge. They may say, "You have to go ahead. Unless you rest I will not consider it now."

The Chairman. We cover that by saying, "the court in its discretion".

Mr. Morgan. That is in there, yes.

Mr. Clark. Let me talk a little more. I am a little in doubt about that phrase, "final submission of the case". That does not apply when the evidence is closed and before it is submitted to the jury.

Mr. Olney. It should be the final conclusion of the evidence.

The Chairman. The conclusion of the evidence is what you mean there.

Mr. Morgan. He can do it at any time, I should say. It does not make any difference if he were charging the jury and he determined that he better dismiss it. He has control of the case up to that time.

Mr. Olney. I was wrong about that.

Mr. Lemann. The end of the plaintiff's case is really what we are talking about at the moment.

Mr. Morgan. No.

Mr. Clark. Those are not the words. The words are, "final submission of the case". And I wanted to make it clear. The question came up whether you could have a motion for a directed verdict if you had this in, and that comes, of course, when the evidence is closed.

Mr. Lemann. May I state this as I have understood the discussion around the table? In some districts, at least in mine, and I understand some other districts, you may, when the plaintiff has finished his case, which is a long way from the case being closed, perhaps, say to the trial judge, "I want to move for a directed verdict. He has not made out a case. He has affirmatively shown he has no case."

In some districts at least the judge may say, "I agree with you," or he may say, "I might do it but I will not in this particular case. I am going to enter a judgment of non-suit." That is not a judgment at bar.

I understand we are going to permit the judge to have that discretion, that he can either say to me, "I will entertain your motion and dismiss this case without prejudice," or, "I will entertain your motion and dismiss this suit finally," or, "I will not do either. Go on with your case."

Mr. Dodge. Yes.

The Chairman. Of course, you must bear in mind that a motion for a directed verdict in the federal court under the universal practice at the close of the plaintiff's testimony requires the defendant to rest, and that is a final submission of the case under the law.

Mr. Dodge. That is discretionary with the judge.

Mr. Clark. Just a minute on that.

The Chairman. And the present practice in the federal court is that if you want to make a motion for a directed verdict at the close of the plaintiff's case you have got to rest, and if you do not get the court to promise you in advance that he will allow you to withdraw your rest and reopen, you are sunk, and we put a clause in a later rule that that does not apply.

Mr. Clark. I was going to say ---

Mr. Lemann. That is a short cut. He always gives you that assurance, does he not?

Mr. Donworth. I never knew it to be refused.

Mr. Pepper. We have what I fancy amounts to the same thing, and it is the practice in the District Court of the Eastern District of Pennsylvania, as follows:

The plaintiff puts in his case; if the defendant is unwilling to take a chance that if his motion is overruled he should be precluded from going on with his defense, then he moves for a non-suit. If the court grants his motion the case is non-suited and is finally disposed of unless on subsequent motion the non-suit is taken off and what is substantially a new trial awarded.

The Chairman. What is the difference there? Both are on the merits then?

Mr. Pepper. Both are on the merits, but if the defendant is willing to take his chance upon the weakness of the plaintiff's case and is willing to forego his right to put in any evidence he asks for a directed verdict at the end of the plaintiff's case.

The Chairman. Why should he, if he can get the same result on the merits by a motion for non-suit and save his rights to put in evidence?

Mr. Pepper. Because if he does that, if he loses his own right to move to take off the non-suit, the jury has concluded it by its verdict, the question is settled; but if the plaintiff puts in his case and the defendant puts in his case and then the directed verdict is asked by the plaintiff at the end of the defendant's case, but the plaintiff may at the conclusion of his case rest, as usual, and then the defendant, if he chooses to, may waive his right to introduce any evidence at all and to go to the jury on the plaintiff's case alone, but in that event the defendant has the closing speech to the jury. We often do that. When I was trying jury trials constantly, where the plaintiff's case seemed to me on paper to be such a case that the court would have had to refuse to direct a verdict or would have had to refuse a motion for non-suit, but where I believed the jury were not going to give credit to some of the things stated by the plaintiff's witnesses, I would waive my right to introduce any evidence in defense and say I will go to the jury on the case made by the plaintiff. Then the plaintiff would open to the jury and I would get the closing speech.

Mr. Olney. You mean the defendant would open to the jury?

Mr. Pepper. No, where the defendant introduces no evidence, and goes to the jury on the testimony of the plaintiff only, the defendant may make the closing speech to the jury.

Mr. Lemann. The plaintiff makes the opening and the defendant closes, and the plaintiff cannot reply?

Mr. Pepper. That is right. The reason for that, of course, is that there has been no evidence on the record except that which the plaintiff has introduced.

The Chairman. Here is a point that I want from you: The only question is the meaning of the words "before the final submission of the case". Now, in all statutes and codes that I know anything about, something like it is found. Final submission of the case is this:

"Plaintiff, you rest?"

"Yes."

"Defendant, you rest?"

"Yes."

"The evidence is all in." That is the final submission. After you get to that point both sides have rested, and then it is a case ---

Mr. Morgan. That is the final submission by the parties. If you put "final submission of the case by the parties", that is one thing. If you just say, "final submission of the case", that is another thing. That is when the jury goes out.

Mr. Dobie. It is not final submission until after the instructions.

Mr. Lemann. Final submission would include the end of
11 the plaintiff's evidence because you ended at that point.

Mr. Dobie. Provided the defendant rested.

Mr. Lemann. I understand we are not going to require that. We are going to permit what is now permitted in many districts, in which, even in the case you put, the judge gives you an assurance. I understand you are going to provide by this rule that you do not have to get the assurance of the judge.

The Chairman. A motion would operate under those conditions as the equivalent of resting, and under our rule you have the absolute right to reopen if your motion is denied, but it is a rest just the same.

Mr. Lemann. It is how you put it.

Mr. Clark. That is Rule A-10, and I wonder if, with that in it, A-10 and this in some way ---

The Chairman. Let us wait until we get there.

Mr. Lemann. Is it not a question of phrasing as to just how it should be?

The Chairman. We are in a little disagreement about the question of final submission. We ought to make it clear what final submission means, and Mr. Morgan thinks there isn't any final submission until the verdict is in.

Mr. Morgan. No.

Mr. Donworth. Until the jury retires.

The Chairman. You draw the line on the jury retiring, and the court half way through his charge, or two thirds, or all the way through? It does not seem to me you can do that. If the jury is present in the courtroom, if that is not the final submission and the jury happened to walk out and the judge brought them back ---

Mr. Morgan. That is reopening. The court can reopen but you still have a final submission.

The Chairman. You want the rule to mean that he can do this at any time before he has finished his charge, is that it?

Mr. Morgan. I am not arguing for it. I am just saying that if you are using "final submission" you are using a phrase which is variously interpreted, that is all. It does not make any difference to me in principle which way you decide this. I am perfectly willing to take it before the charge starts, as a matter of fact.

The Chairman. We agree that the words ought to be cleared up. Now, what do we want to mean by final submission? Both sides resting?

Mr. Lemann. Make it when the jury retires. Why isn't that a good time? Isn't that practically the same as the judge's concluding his charge?

Mr. Clark. How about a jury-waived case?

Mr. Lemann. A jury-waived case, does this mean anything there?

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The Chairman. Suppose the court is trying the case and both parties are resting.

Mr. Olney. It ought to be made before it is finally submitted, in the sense that it is given to the jury to go out or retire to consider their decision, or, if it is brought before the court, in other words, it is put before the court to make his decision.

The Chairman. Is that the sense of the meeting? We want it provided by proper phrase that "before final submission" means, in a court case, before the case is submitted to the court for decision, or, in a jury case, before the jury retires.

All in favor of the second part of (c) with that interpretation of final submission to be clarified that way, say aye.

(There were a number of ayes.)

(The motion was carried.)

Mr. Olney. In connection with that second thing, I think attention should be called to the first part of the section, which reads, "by the court when, upon the trial and before the final submission of the case, the plaintiff abandons it." That is all right. He may not show up, or something of that sort. That is all right. But when it comes down to this matter of the court dismissing the case when the plaintiff fails to substantiate his right to recover, the court should grant only when the defendant moves. In other words, the defendant may win in a case of that sort a judgment in bar, and the court should not be in the position on its own motion, under those circumstances, to say, "Well, I will dismiss the case; he has not proved his case, and he shall not be in bar."

Mr. Morgan. I disagree with Judge Olney very, very violently. I think the court will very rarely do that. I think the court ought to have control over that rather than the party.

Mr. Dobie. It is a hole in the evidence that can very easily be plugged up. I think the plaintiff should have the right to ask the court for its non-prejudicial dismissal or a non-suit.

Mr. Pepper. That is the rationality of our severing voluntary non-suit. If the plaintiff comes to the end of his case and finds that there is a hole or something which he can't supply or has not at the moment, he can suffer voluntary non-suit, and that is entirely without prejudice. All he has to do is bring a new suit.

Mr. Olney. I will withdraw my suggestion.

The Chairman. Then we pass to (d). There can be no objection to that, can there?

Mr. Morgan. Let me ask about this. It says, "By the court when the plaintiff fails to appear." Suppose the defendant does not appear. Could not the court dismiss it if the plaintiff failed to appear and the defendant failed to appear?

Mr. Donworth. That should come under want of prosecution.

Mr. Olney. I think you are right. We had a most amusing situation out under our own practice, where the rule provided that the court could not dismiss the case for failure of plaintiff to appear until one hour after the time set for trial. The result was that lawyer after lawyer would show up just 59 minutes after the time set for trial. The Court ought to have the right, if parties do not appear, to dismiss the case.

Mr. Donworth. The defendant may want the case tried. Just because he is unfortunate enough to be a little late,or even an hour late, he says, "Why, for heaven's sake; I have got my witnesses coming. I want to dispose of this matter. Don't dismiss it."

This is a uniform provision, I think.

The Chairman. But the trial has not commenced. The defendant cannot compel the trial if the plaintiff does not get a judgment on the merits.

Mr. Morgan. That is in the discretion of the court.

The Chairman. Put in,"in the discretion of the court," the way you did in (c).

Mr. Morgan. I thought that was in every one of them.

Mr. Dodge. Striking out the last clause?

The Chairman. Putting in, "in the discretion of the court," and striking out the last clause.

Mr. Dobie. Do you mean the parenthetical clause?

The Chairman. No, the phrase, "and the defendant appears and asks for the dismissal."

Mr. Donworth. It is going to be like the first part of
2 (c). You can make the change suggested, "upon the discretion of the court." Plaintiff does not appear, and the court abandons it.

Mr. Lemann. I think the defendant ought to be there.

Mr. Dodge. What is the court going to do? Just continue the case?

Mr. Morgan. Strike it from the calendar is all he can do.

The Chairman. What happens is this: The parties do not show up, the judge has had a bad breakfast, and he says, "Dismissed."

That afternoon or the next day the lawyer comes in and says, "Your Honor, I was hit by an automobile."

Then the court restores it and cancels the order.

Mr. Donworth. It takes three days' notice and application, and the other fellow says, "My witnesses have gone."

I think that this is the established proposition here, and I think this language is good.

The Chairman. He could proceed the next day anyway. What good does it do you?

Mr. Donworth. Suppose the defendant wants to come and have a trial in bar to bar the claim for all time by proving his defense, which he has a right to do.

The Chairman. He can dismiss it without the defendant's consent three minutes before the clock strikes ten that morning without prejudice, and the mere fact that it is 10 o'clock instead of 9:57 makes no difference.

We have not had a vote on this. All in favor of striking out the words "and the defendant appears and asks for the dismissal," say aye.

(There were several ayes.)

The Chairman. Those opposed, say no.

(There were several noes.)

The Chairman. The chair is in doubt. Those in favor of striking out the words "and the defendant appears and asks for the dismissal," raise their hands; those opposed now do likewise.

The noes have it.

Now we come to the first two lines in (e).

Mr. Dobie. Are those lines out?

Mr. Dodge. I thought we struck out 18 and 19.

Mr. Dobie. I think they ought to go out.

The Chairman. Now we have got to get down to the question. Somebody suggests that we ought to enumerate also that the court may dismiss for want of prosecution, as one of the grounds, and also a provision, "except as otherwise provided by these rules." That brings us up to the question of whether we will just say that these are just some of the ways, but not all.

Mr. Morgan. Are you going to permit the court to dismiss the action where both parties fail to appear?

The Chairman. That is why I wanted to see "and the defendant appears" stricken out.

Mr. Dobie. If the plaintiff fails to appear and the defendant fails to appear, that is certainly enough.

Mr. Lemann. Let us put in, "where both parties fail to appear."

The Chairman. You have the court in the position where if the plaintiff and the defendant fail to appear, all he can do is strike it from the calendar.

Mr. Lemann. I move that we cover the point by adding a clause, "where both parties fail to appear"; then we have covered Mr. Morgan's worry.

The Chairman. Now, are we to treat this enumeration as a list of the exclusive methods? We had better take a vote on that.

Mr. Olney. I think it is safe enough to adopt that provided it is the condition. You have to consider that.

The Chairman. "Otherwise provided by rule."

Mr. Clark. Of course, this provision in some way is in most of the codes. All other methods on the merits after the enumeration.

Mr. Donworth. Then I move we put in another clause which would read substantially "for want of prosecution provided for in these rules" -- something like that.

Mr. Dobie. We are working to provide for all other cases in these rules. If we do limit the non-suit, as we call it, or dismissal without prejudice in all other cases, aren't we going to add "and other places under the rules"?

Mr. Morgan. "Except as otherwise provided."

Mr. Donworth. I thought you were going to make special provision for want of prosecution.

The Chairman. We are. We will note here in passing that when we get on to those places where there is a dismissal for failing to furnish documents or failing to submit to a physical examination, we have got to say "dismissal with prejudice or without prejudice," or you are sunk.

Mr. Dodge. It says both. "Either with or without prejudice, in the discretion of the court."

The Chairman. All right. I suggest, as a mere matter of form--I am not quite satisfied that this provision about counter claims is entirely consistent under (a), for instance. You say an action may be dismissed. That covers the whole action of counter claims and everything else, and then at the bottom you say that counterclaims may be dismissed under like conditions. That is a matter of form. I think we had better reconsider that.

Mr. Clark. They may not be dismissed under (a) when there is a counterclaim there.

The Chairman. It says so, does it? Oh, yes; I beg your pardon.

Mr. Clark. May I raise two questions, in this connection? The first, I think, is a matter of form but if you have any ideas, you may state them. That is the connection this rule has with Rule A10, which is the motion for directed verdict. When you drew A4, it was when a party wanted to get rid of it. Now we have both voluntary and compulsory dismissal. A10 contains the directed verdict. Whether compulsory dismissal and directed verdicts ought to be together or should be tied up, as a matter of fact, or whether there should be a footnote or some way provided whereby we could warn the lawyer that the whole story of getting rid of a case is not here, I don't know; I just raise the question in passing.

Mr. Donworth. Isn't that answered by the introductory clause at the top: "An action may be dismissed, without a final determination of its merits, in the following cases"?

Mr. Clark. Maybe the directed verdict ought to come next to this.

Mr. Donworth. We were going to change line 20: "All other modes of dismissing an action are abolished."

The Chairman. "except as otherwise provided in the rule."

Mr. Donworth. Exactly.

Mr. Clark. My other suggestion is this interesting suggestion about what they are trying out in New York, Henry S. Fraser sent in a long letter and said it is being followed in the appellate division, second department, in New York. It is an attempt to separate the injury part of the plaintiff's case from the damage part and to have a motion for a non-suit, as he calls it, passed upon without going into the expert testimony on injuries.

Mr. Dodge. Would the court do it?

Mr. Morgan. He could do it if he wanted to, and I don't think we should tell him to.

The Chairman. I think the court can do that.

Mr. Clark. I am not advocating either way.

The Chairman. Who is the lawyer?

Mr. Clark. Henry S. Fraser, of the Syracuse, New York, bar. He has apparently got the Second Department into doing it.

Mr. Tolman. Mr. Fraser says the court can do it, but he wants a rule to encourage the court to do it.

The Chairman. I think that is pretty complicated stuff to be dealing with in a rule.

Mr. Morgan. I suppose they have such a tremendous number of personal injury cases that that is what it is for.

The Chairman. We have very broad provisions for the court.

Mr. Morgan. Yes, separation of issues.

Mr. Clark. I think it is correct that no court would think of it unless it was suggested.

The Chairman. I think that if in the course of trial a lawyer got up and said, "Here is a question of law and a question of liability; won't your Honor rest the case without that?" he can do that.

Mr. Olney. Usually that is a very difficult rule to apply, because the plaintiff is nearly always in these personal injury cases a witness himself or herself, as the case may be, and along with all her testimony in chief she testifies to damages.

The Chairman. Yes. We will pass to Rule 5.

RULSE A5.
CONSOLIDATION AND SEVERANCE

The Chairman. Are there any suggestions in substance?

Mr. Donworth. We had a debate in a former hearing on line 2. I think there was a good deal said. I don't remember much about the result. I take it we agreed to leave it in.

The Chairman. Unless somebody wants to re-hash it, I should like to see it passed.

Mr. Donworth. "It may order a joint hearing." I think "in the discretion of the court" takes care of that.

The Chairman. It is all discretionary.

Let us pass to Rule 6.

RULE A6.
TESTIMONY AND EVIDENCE

Mr. Clark. On this matter of evidence, which is, I hope, one the committee will think about a good deal, Major Tolman has some information.

Major, this is the evidence matter.

Mr. Tolman. Mr. Chairman, I have received from Dean

Wigmore some material that is now being mimeographed. I think it is important. I was going to suggest that you have the copies of his suggestions before you. Those suggestions deal with about 40 statutory provisions in regard to the method of proving certified copies of documents and records, state, official, and otherwise.

The Chairman. Federal statutes?

Mr. Tolman. Federal statutes, yes. Here is the bulk of it. It takes 20 pages and a fraction simply to cover the relevant provisions. I have had them all copied out and sent to Dean Wigmore at his request. He has prepared a suggestion of brief suggested rules or paragraphs, so that the whole matter of how you prove a record an official document is
4 written in brief compass in those rules. Of course, that is a little different from the question I have on his memorandum, but I believe it would save time if that whole question was discussed when you had everything before you.

The Chairman. One of the objections I have to this rule--"The rules concerning the competency of witnesses, and the admissibility of evidence, then in force by the law of the State in which the district court is sitting shall apply to all cases tried with a jury. In all cases tried by the court without a jury the rules of evidence shall be those heretofore obtaining in the courts of the United States on the hearing of cases in equity." I object because it does repeal all those federal statutes about method of proving documents and substitutes some local state law on the subject, and it does not fit in all cases, and the documents are not reposed in the offices of the state officials. This attempt to use a local conformity rule on evidence just wipes out among other things these federal statutes. I object to going into the business of partially writing a code.

Mr. Dodge. Don't the federal statutes apply to law cases as well as equity?

The Chairman. Any case.

Mr. Pepper. Do you favor the suggestion of Major Tolman that this be at a proper time taken up for consideration, or is the chairman objecting to Wigmore's proposal?

The Chairman. Why, Wigmore's preliminary memorandum, and it all runs to this: In the first place, we have the question of whether we have any business dealing with the rules of evidence. I am not talking about the mode of taking it, either orally or written. Wigmore's idea seems to be that he does not want to write a complete code, but he thinks there are certain features in which the rules of evidence are bad, and he wants to slip in a few good rules where they are most needed. That is his theory. I am opposed to that. I have still an open mind on the contention that there are some very serious gaps in our rules, if we don't here and there say something about it. I am willing to take up each one of those cases myself. If I am satisfied that there is a fearful gap, why, then, maybe I would feel differently about it.

You can bear in mind that there is a lot of argument on decisions, and so on, with the rules as to competency and admissibility of evidence, as distinguished from the mere mode of taking it as practice procedure, and maybe those words when used in some sentences are broad enough. But I have not reconciled my mind with the idea that Congress had any intention of using those words in this statute with that meaning, and I am impressed with the fact that although a similar statute gave the court power to make equity rules, there is not one word in the equity rules from beginning to end that says anything about competency or admissibility of evidence. Whatever they say there is respecting the mode of taking it. So, then, I have in mind that the Congress was uniting equity and law. We already had an equity set of rules. I do not believe that Congress ever intended to deal with that.

At our first meeting we reached a conclusion, after not much consideration, I will admit, that we did not want to get into the evidence field.

Mr. Dobie. I thought we agreed we would not try to enact a code of evidence.

The Chairman. The minutes of the meeting show we were of the impression that we should not go into the evidence field, and there was grave doubt whether we had any right to. I submitted that to the Court and they, perhaps superficially, approved it.

The only thing left in my mind about the situation, after reading all of these moranda--I have not seen this last one--is a contention that somehow or other there are different rules as to the admissibility of evidence in equity than there are in law cases, and when you get a united system of trial by court, if we don't do something about it, the court, when he rules on a question of evidence, will have to be scratching his ear and thinking whether it is a law action or an equity action. I have not had pointed out to me specifically any cases where there is a difference in the rules of evidence as to the admissibility of evidence in equity and law.

Mr. Pepper. I suppose the way the question would present itself is that in an action which heretofore would have been an action at law, some purely equitable consideration is advanced as a ground of claim or defense, which heretofore would have been cognizable only on the equity side of the court. The evidence to support that contention would have been excluded in the action largely on the ground that the court could do nothing with it if it was in. Now the court will have to accustom itself to taking in this form of action in evidence which would have been admissible either in a suit at law or a suit in equity. Isn't that what it comes down to?

The Chairman. I do not know that there is any difference.

Mr. Pepper. I do not know that there is any difference in the rules of relevancy, but there must be a difference with respect to the admissibility of it. Evidence with reference to the power of the court to give relief--evidence, for instance, on the law side of the court of mistake or accidents--would not have been respected, because the court could not on the law side mold its judgment.

The Chairman. It was not trying that issue.

Mr. Pepper. It was not trying that issue.

The Chairman. Don't you think that is out of the way?

Mr.Pepper. I think so.

TheChairman. I think the real question is not that--not whether it is relevant to an issue that the court is dealing with alone--but is a question of what I dall competency and admissibility under the ordinary rules of evidence. On that there have been volumes written.

I am willing to accept the statement that there is a great deal of confusion in the federal courts about the rules of evidence and that it would be desirable to have either a local rule or a general federal code, but I don't think we ought to fuss with it ourselves.

Mr. Clark. Are we going to take it up now?

Mr. Lemann. Is there any other memorandum sent by Mr. Wigmore than the one some time ago?

Mr. Clark. Yes, a new one.

Mr. Lemann. We have not seen that.

Mr. Clark. No, it is being mimeographed.

The Chairman. You stated that this memorandum of Wigmore's is directed toward codifying all the federal statutes with regard to the admissibility of documents and other evidence?

Mr. Tolman. No, only how to prove them.

The Chairman. Let us assume it is just that. Is there anything else about it in his memorandum?

Mr. Tolman. No.

The Chairman. Well, now, we don't have to look at the memorandum to test our view on the principle. Are we going to undertake to codify all the federal statutes as to how to prove documents?

Mr. Lemann. Is that what the memorandum calls for?

The Chairman. That is what the memorandum calls for, and only that.

Mr. Morgan. I think you misunderstood that, if I got the Major correctly. It is the method of proving under the federal statute, not a codification of the federal provisions, because they are pretty general.

6 Mr. Tolman. My proposed redraft of this thing puts two alternative clauses in brackets. It is A6, wherever it is.

The Chairman. I was looking only at the rule in the draft.

Mr. Tolman. I think without taking too much time I can explain the purpose of my redraft. My redraft is entirely different subject matter from what Dean Wigmore now sends up. In my redraft, section (a), it is just simply Equity Rule 46 that we now have.

My second paragraph (b), of my redraft, gives you these two alternatives. In all cases tried before a judge with a jury the competency of the witness to testify shall be determined by the laws of the State in which the court is held. That is the present 28 U.S.C. 724. That makes no change. But the alternative that I suggest for consideration is this: The rules of evidence shall conform as nearly as may be to those existing at the time--no, that is a restatement; I am wrong about that, except that it is proper.

Rules of evidence shall conform as nearly as may be to those existing at the time in the state in which the trial is had.

The Chairman. That is much broader.

Mr. Tolman. Yes, that is a much broader rule, but in both of them it takes the conformity. I do not seek to change any statute in a case tried before a jury. I am not proposing to abolish the statutes of conformity or any of them, but when you come to (c), trial without a jury, my whole purpose there is to assimilate the trial of submitted cases to the trial of equity cases.

> "In trials before the court without a jury the court may admit any evidence deemed to be relevant to any issue."

Or, as an alternative:

> "The rules of evidence shall be those heretofore obtaining in the courts of the United States on the hearing of cases in equity."

Let me explain my view on that. There are two points on it. One is law in a book, and the other is practiced, as you all know, in everyday practical work. I can't give you now the difference of the law of evidence in the state courts and in the federal courts, but in Mr. Wickersham's memorandum from Judge Knox, Judge Knox speaks of the size in accumulation of rules in evidence in equity as distinguished from rules in the state courts.

Here is the practical thing I am after: The patent lawyers are very much disturbed over the consequence of uniting the practice in law and in equity, and they say there is a situation like this: They try an equity case and try it before a judge. Now, in all equity cases, whether patent cases or a bill to set aside a will, or any other equitable case, the judge usually lets in the evidence unless he is very sure that it is not admissible, and he will say, "Let it go in; I will take it subject to objection."

When it goes up to the court of appeals, the reviewing court indulges in this presumption in an equity case, that it does not indulge in in a case at law. It says, "We will presume that the court considered only the competence evidence."

Now, the patent lawyers, and it will be the same thing for every man who tries an equity case, have to learn the rules in every one of the 48 States for the united practice. They want the practice in equity considered as it was. They don't want any conformity to apply in equity cases. My rule would provide that equity cases might be tried the way they are tried from day to day.

The Chairman. Court cases?

Mr. Tolman. Court cases, equity cases without a jury.

Then I want also to have, and I think it is wise, submitted cases where there is no jury, tried in that same practical way. Why not? The reason for this rule was the presence of a jury, which might be confused by incompetent or irrelevant or improper evidence. That is the reason for the old common law distinction.

I think the judge should have the right to proceed in all these cases just as he always has historically proceeded in equity. I think the wording of them should be the same. The same presumption should be indulged in, that the court considered only competent evidence. That is the general purpose of my rule.

The Chairman. I can understand that part all right. I think it is perfectly proper under this unified system, where cases are tried by the court without a jury, that there be some procedure provided that if evidence is erroneously admitted it can be disregarded, just the same as it was in an equity case. Isn't that a very different thing in making your rule as to the admissibility of evidence? It seems to

me the point you are making may be a good one, and I should think in court cases reversals should not occur for erroneously admitting evidence as strictly as they would in a case tried
7 before a jury. I think you have gone further and tried to prescribe what the rules are, not merely the effect of erroneous admission.

Mr. Tolman. Mr. Chairman, I can make that clear. The first two lines of (c) apply only to admissibility, of which you have remarked. Now, the second expands this rule to this extent, that so far as there are different rules in equity and in law, the equity rule should apply when the case is tried without a jury.

The Chairman. That brings me right down to the point where I am ignorant. I have not had pointed out any specific instance where a bit of evidence offered in an equity case would be admissible there which was admissible in a law action.

Mr. Morgan. Provided there is relevancy.

The Chairman. Oh, yes.

Mr. Lemann. I think we ought to settle that preliminary question and see what is the rule. My impression was that in the law actions the courts usually followed the state practice, which might be a highly technical rule of evidence. There was a little uncertainty, perhaps, in that field, except where the Supreme Court would but in with a federal rule; but by and large the federal courts follow the state law, which might be highly technical.

I think we ought to stop at this point to see if I am right in that understanding of the law.

Mr. Clark. That is correct.

Mr. Olney. I will take issue with that. He says in effect that the rules of competency and the rules of whether the evidence was competent, not whether it was admissible, relevant, or material, were different in equity than at law. I have never understood that.

Mr. Lemann. I am talking about the federal courts entirely.

Mr. Clark. There is a competency of witness statute which does apply, so I think on that the Judge is correct; but, on the other point, you will notice that there are two statutes under which the state law of evidence comes in.

The Chairman. You made a statement I did not understand. You stated that the competency of witness does apply.

Mr. Clark. A separate statute makes the law of the state apply.

Mr. Lemann. Even in equity cases. I understood that.

Mr. Clark. Now, on the other point, which I suppose we call the relevancy point or the admissibility, generally, there are two conformity acts, as they sometimes have been called. The procedural conformity act and the rules of decisions act are what they are called, and those apply to law actions. The courts have not been clear which statute here controls. They have sort of gone between the two as to which one they were using, but either one justified the use of the state law in law actions only. In equity actions you went to the law of equity, which I suppose meant the English chancery practice, but the state law does not apply there, because there is nothing that makes it apply.

Going back again to the law actions--

The Chairman (interposing). Just a minute. The rules of decision are irrelevant to our discussion here. That may raise a question as to how this thing is going to work when it comes to rules of decision. We cannot change any rules of decision.

Let us get back to the section.

Mr. Clark. What do you mean by rules of decision?

Mr. Tolman. The rules of decision act does not affect the procedure.

Mr. Clark. The actions at law to date, therefore, follow the state law. There is a division of opinion in the federal courts on the point of what state law means--whether it means state statute plus state decisions, or state common law, as we might call it. It is stated that the majority rule is in favor of state statutes and decisions; I don't know whether that is correctly labeled--majority--or not, but that label is applied.

In law actions you apply the state law. In equity actions there is no governing state law to apply.

The Chairman. Does that federal statute about the rules of decision in actions at law that apply to the federal court mean that the rules of decision are about the competency of evidence?

Mr. Clark. I was trying to state what the cases were doing--the federal cases. In getting the authority for actions for the state law, there has been a division of opinion on what authority to ascribe it to. Either way they get the state law.

The Chairman. Are you talking about state law as to the admissibility of evidence or as to the right of the parties?

Mr. Clark. As to the admissibility of evidence but not as to the competency of witnesses. Competency of witnesses applies both to law and equity.

Mr. Pepper. Do you mean the old judiciary act of 1789?

Mr. Dobie. That is the rules of decision act.

Mr. Pepper. That provides that the laws of states shall
8 constitute the rules of decision in cases where they apply.
You call that the rules of decision act.

Mr. Donworth. This question is one that I think we cannot avoid. I think we must,not today, perhaps, but before we finish these rules, state something definite on this subject. It has been stated very carefully both by Dean Clark and Major Tolman, although all coments I think are decidedly in point. I am not clear that there is such a variance in the rules applicable to law and equity in federal courts today-- I mean before we make this change, as is sought.

You take the question of competency of witnesses as affected by interest. We know, of course, that at common law a party having an interest in the result could not testify. I understand that would still be the rule in equity unless changed in some way. Congress did pass an act some years ago, which has been repealed, providing that no person should be disqualified by reason of interest in the case, but they repealed it. Here is what the substituted for it, section 631:

"The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held."

So, I take it that if in a patent case tried in Philadelphia--I take it that the court, in the question of interest of husband and wife, and all those things, would have to go to the laws of Pennsylvania to see who was competent, even in an equity case.

The Chairman. And there is no difference between a law case and an equity case.

Mr. Donworth. Not as to the competency of a witness.

Mr. Dobie. That is, as to whether he can testify at all.

Mr. Donworth. Yes, as to whether he can testify at all. It seems to me that these differences that have grown up have been those excrescences that come from habit of thought.

The judges in dealing with equity cases have not been quite as strict in dealing with state law as in law cases. It seems to me that in view of this statute here, which I don't suppose we would want to change, the competency of a witness shall be governed by state laws. It seems to me we have got to adopt this for both classes of cases. What that leaves for discretion on our part, I am not clear.

Mr. Clark. It leaves particular things like hearsay. As it stands, hearsay and other rules comparable to hearsay, in equity cases now the judge lets them in, and then the case is not reversed. That is what actually happens now.

The Chairman. Isn't it a question, as I said at the outset, of how far you consider a prejudicial error will affect any substantial rights of parties in a court case in letting competent evidence in? That is not a question of admissibility.

Mr. Clark. I am not sure that we could get at the same thing by saying that nobody can say anything if he does. I would not quite see why one was relevant and the other was not;

The Chairman. Judge Donworth has made clear that we do not have to fool with the competency of a witness,because that is determined by federal statute. Precisely the same rule applies in the so-called equity case and a law case.

As to the rules of decision as state statutes, I should like to be clear on that.

> "The laws of the several states * * * shall be regarded as rules of decision in trials at common law * * *."

Does that mean that a state law which is represented by a decision of the Supreme Court which decides a question of admissibility of evidence--not competency of a witness--is a rule of decision that has to be regarded by the federal courts in actions at common law, or does that mean the question of substantive right?

Mr. Dobie. I think it means substantive right, though the Supreme Court has never been clear on it; yet I think the tendency, since the passage of the conformity act, which was later, has been to treat all those things under the conformity act.

Mr. Pepper. There was a commercial law that was the same everywhere, and the federal court applied the rules of evidence, and all that sort of thing,irrespective of the Rule of 1789.

Mr. Justice Miller, and those men in Dubuque, Iowa, in a long series of cases held that the decisions of the States were just as much laws of the States and that the conformity was acceptable to them. You had that split, and it has never been reconciled.

The Chairman. I have not got to the conformity act. I am just trying to clear these statutes here. You are dealing
9 with questions of substantive law.

Mr.Pepper. It was a question of substantive law, but it raised the question whether the old Judiciary Act of 1789 was applicable only to statutes or bound the federal courts to folllww decisions in the states.

The Chairman. Let us assume it compels the federal courts to follow the rules of decision.

Mr.Pepper. Yes.

The Chairman. Now I ask, Does that phrase, rules of decision, apply only to matters of substantive law or to decisions on the question of admissibility of evidence?

Mr. Pepper. As applied, for instance, in the circuit court with which I am familiar, they applied it to rules of decision affecting matters of evidence as well as they do to matters affecting the substantive clause.

The Chairman. Isn't that because of the conformity act?

> "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which

such district courts are held, any rule of course to the contrary notwithstanding."

Mr. Pepper. I am thinking not of questions of pleading, practice, and so forth; I am thinking of questions of evidence, not questions of competency determined by local statute but questions of the common law rules of evidence.

We have been accustomed up yonder to treat in federal courts a decision by the Supreme Court of Pennsylvania, on the question, for instance, of a declaration as to pedigree or declaration against interest, or dying declaration, as the established law of the State and to quote it with authority in the federal court. As far as I know, it has always been accepted there.

The Chairman. Dean Dobie, you are our expert. What is your answer to this question? Does the action of the federal courts in following state decisions on admissibility of evidence rest on the rules of decision statute or the conformity?

Mr. Dobie. I should say they rested on the conformity act, though I must say that the opinions of the Supreme Court of the United States have not been as clear as they might be, even the Hearn case, very recently decided in a very elaborate opinion by Chief Justice Hughes.

I would say to Senator Pepper that the case of Swift against Tyson is not a decision in point at all, because it was not until more than thirty years after that the conformity act was enacted in any form.

Mr. Pepper. The Judiciary Act of 1789 contained the language I have reference to. That statute did contain the rules of decision act, but in the conformity act, we have talked about conformity as to rules of decision. I am talking about conformity of decision. I say that under that doctrine there has been a substantial body of authority for the proposition that decisions by state courts on common law rules of evidence have been accepted as establishing the law of the State on that branch of adjective law and that that has been in certain courts, to my knowledge, followed by the federal judges.

Mr. Lemann. Are not both these statutes applicable only to actions at law there?

Mr. Pepper. It would seem to me quite plain from the language before me that they are applicable only to actions at law. Therefore, whether you consider evidence as being controlled by the rules of decision act or controlled by the conformity act, I should say it would follow from both acts that a federal court of equity would not be bound to follow the local law.

Mr. Clark. Judge McDermott wrote to us, and he advocated the rule of evidence. He went on to say:

> "The circuits are almost evenly divided on the question of whether in the federal courts you follow only state statutes or state decisions only. The circuits are almost evenly decided on this question * *."

Mr. Lemann. In your propsed draft you do not propose to practice any conformity in cases tried by jury, nor even do you propose to have the conformity in cases tried without jury except to say that the court may take the proper view. We are not going into passing of ourselves on the rules of evidence. We are not going to determine any federal statute on the subject of competency of witnesses or competency of evidence. We are going to say that in a case tried with a jury the federal court must apply the local law. By their local law we will make it plain, I presume, that we mean decisions and statutes of the state courts. When the case is tried to the judge, the judge may apply either local law or a broader rule, if it is sanctioned by high authority.

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Mr. Clark. Yes.

Mr. Lemann. It seems to me to be a rather unobjectionable provision, and certainly not a narrowing one. It certainly does not get away from the Conformity Act in actions at law, jury cases, because those are going to be actions at law. We will even then be tied down.

The Chairman. The question is raised, as I see it, by the fact that we have, under our unified system, both common-law actions and equity actions which may be tried by the court without a jury. Under the Conformity Act, if you have one set of evidence rules in law cases, that applies whether it is tried by a court or by a jury, and then if you have a different set of rules of evidence, in the present system, in an equity case, then, when a court tried a case without a jury he would have to find out, before he could rule on evidence, whether it was a law case or an equity case, which is a bad thing.

Mr. Lemann. You mean if we do not adopt new rules.

The Chairman. If we do not adopt something. That is an argument in favor of doing something.

Mr. Lemann. Yes.

The Chairman. So that what they want to do, in substance, is this: When a case is tried by the court without a jury, it does not make any difference whether it is common-law or equity, the same rules of evidence apply, and those rules are not State rules upon the admissibility of evidence, but the system heretofore prevailing in the equity court.

Mr. Lemann. Letting evidence go in under either system. When he is trying it without a jury, if the evidence would go in under State practice, in it goes. If it would not go in under the State practice, but the Supreme Court has set a good rule of evidence, and the way it should go in, it would go in, which I did not think was objectionable.

The Chairman. We would not have to say anything about jury cases. That is all taken care of by the statute.

Mr. Lemann. I do not know about that. I am not sure I follow you on that.

The Chairman. I mean, a case tried before a jury as a matter of right is already covered by the Conformity Act rules.

Mr. Lemann. It depends on what we leave of the Conformity Act. That is why we want to make it plain. We have taken out a good deal of the Conformity Act. The Reporter says all. Some of us think not all, perhaps, but we are taking out a good deal of it, and I would like to make it plain in this case that we are leaving it in.

Mr. Tolman. It is true that so far as the cases tried by the jury are concerned, we do not really absolutely need to do anything, but here is the trouble. The practitioner, in order to get to the position where we are, has to read a very large amount of statutes, and the cases on them -- four statutes and an equity rule -- and then he has to look up the cases, and the cases are full of conflict and fine distinctions. My proposal is simply to make this so clear that on the question of competency of evidence, and how you try a case in equity, and without a jury, he will have a vade mecum right there. He has the material before him. He does not have to hunt around.

Mr. Lemann. In your proposed redraft of "Trials by Jury", as I understand it, you do not make any different proposal from what the reporter makes. Both of you say that in that case the rule of the State law shall apply.

Mr. Tolman. Trial by jury?

Mr. Lemann. Yes. You are both alike.

Mr. Tolman. Yes.

Mr. Lemann. When you get to trials without a jury, the only difference between you and the Reporter is that he has a somewhat broader rule than you have, because you do not refer in that situation to the State law at all, whereas he would refer to the State law, that lets evidence in that might not otherwise get in. Is not that a fair statement?

Mr. Clark. I think it is.

Mr. Lemann. I think he has a somewhat broader rule than you have, Major. There is no difference between you and the Reporter as to cases tried by the jury, as I see it, but as to cases not tried before the jury, he would adopt a somewhat broader rule than you adopt, because he would let it go in under either set of rules.

Mr. Tolman. I do not think we are apart on the proposition. As I stated, it is so simple. You try them just as you do equity cases, so that everybody would understand it. I am not against his language on that point.

Mr. Lemann. I do not think the adoption of either would commit us to adopting a code of evidence or passing upon the detailed rules of evidence, which, it seems to me, would be too ambitious.

Mr. Olney. Mr. Chairman, there is a lot of this discussion that I have not understood at all. I have talked with Mr. Morgan about it. He has taught evidence, and teaches it now. I used to teach it myself, for a good many years. There is no rule that distinguishes between evidence that is admissible before a court of equity and that which is admissible before a court of law, trying it with a jury. I am thinking now of the rules of evidence in the real sense of the word, and not the question of its admissibility, really, as relevant or material, or irrelevant or immaterial, but the question of the competency of the evidence, whether it is hearsay, whether it is within any of the exceptions to the hearsay rule, and rules of that character. There is no difference, I am sure, between the evidence which is receivable, and properly receivable, in a court of equity, and that which is properly receivable in a court of law, unless it happens to have been made by some of these particular statutes.

The case which Major Tolman is concerned about is a patent case. That is not one that involves the competency of evidence at all. What goes on in patent cases is what goes on in nearly all cases that are tried by a court alone, whether it is an action at law or a suit in equity. The court is sitting there. He is the judge not merely of the law but of the facts, and evidence is offered, and it is objected to as irrelevant or immaterial. He says, "Well, I don't know. I cannot quite see the materiality of it, but it may be material, and I will let it in", and he lets it in.

He does not let it in by reason of any ruling or any question presented to him that calls for a ruling on the competency of the evidence. He is simply saying, "Well, I do not know, particularly, whether this evidence is material. If it is material, I will consider it when I consider the whole case, and, if it is not, it cuts no figure."

It is something that applies whether it is a patent case or any case that is tried before a court, in the very nature of things.

The Chairman. May I ask you this question? I am not sure that you are right as to the attitude of patent lawyers. As I get the point, it is this. Under the Conformity Act, in actions at law, the Federal courts adopted the local rule as to the competency of evidence, which differs in different States, but under the equity practice they had a uniform system. At least, they were not bound by local rules, and could adopt a uniform system, and they generally did.

What the patent lawyers are afraid of is that if we left this conformity system as to the local rules of evidence apply to our unified system, a patent lawyer will have to learn the local rules of evidence in a particular State in which he is trying a patent case, and he has got it in his head that they differ as between one State and another. He wants the Federal courts free to follow a general scheme of admissibility in equity cases and patent cases, without being bound by a local rule as heretofore. He is afraid of conformity in evidence. I think that is really what the patent lawyers are worrying about.

Mr. Olney. They may be worrying about it, but I think the reply to it is that in no respect that I know of, when it comes down to any testimony of any substantial character, is thre any particular difference or important difference between the rules of the different States.

The Chairman. What is the object of the Conformity Act, then?

Mr. Olney. They have rules in regard to the competency of witnesses that are different, and things of that sort, but I am speaking of the justification for the fear that the patent lawyer has. He apparently conceives that their rather loose method, in one sense, of trying a case, will be changed. They put all their evidence in. They pay very little attention to objections as to admissibility -- not objections to competency, but objections to admissibility, on the ground that it is irrelevant, has not anything to do with the case, and all that sort of thing. That fear is wholly groundless. The rule that we should adopt here, if we are free to do it, it seems to me, should be simply that that evidence is competent which is either permitted by the general rules of evidence applicable in English jurisprudence, or by the statutes of practice of the States where the forum exists, whether the action is one at law or one in equity. I am using "competent" in the strict sense, now.

The Chairman. Would you be willing, instead of saying "in conformity with the general English rules" to substitute for it "the general rules heretofore prevailing in the equity side of the Federal courts"?

Mr. Olney. Yes.

The Chairman. That solves it, then.

Mr. Olney. It is the same thing.

Mr. Morgan. I think that for both equity cases, so called, and jury cases, if we can do it, we ought to provide that the evidence that would be admissible, or evidence that would have been admissible by the rules heretofore prevailing in equity cases, shall be received; and evidence which would be admissible under the law of the State in which the court is sitting should be received, so that we get both of them in.

The Chairman. You raise a little question there about the power. I am not sure that it is logical for me to say this, but we cannot say that in a court case, which is in essence an equity case, so far as the trial is concerned, we use the equity rule as heretofore prevailing. When you come to enlarge the rules of evidence in law cases beyond that established by existing law, then you are getting into changing the rules of evidence, and I am still in doubt whether we have the power.

Mr. Morgan. I think, if you put that up to the Court, they would say, as the servant girl said, "It is such a little baby." (Laughter)

Mr. Olney. I would say that the prime objection to the rule as it is worded is that it would apparently make a difference in the rules of evidence between a jury trial and a court trial, and there should be no difference, unless we are going the full limit.

The Chairman. The second paragraph satisfies Mr. Morgan and satisfies you. The second bracket --

Mr. Morgan. I want it broader than the second bracket.

The Chairman. Let us see what it says. This does not say jury cases or court cases. It applies to both, as I construe it.

Mr. Clark. That is as intended.

The Chairman. It does not limit it to one kind or another, and the section is not limited to one kind or another.

Mr. Clark. The section goes back to "all trials".

The Chairman (reading). "In all trials, the mode of proof shall be by oral testimony and examination of witnesses in open court, unless otherwise provided by these rules."

That is all kinds of cases. Then we come to the second bracketed paragraph following that:

"The rules of evidence heretofore obtaining in the courts of the United States on the hearing of cases in equity shall apply;"

that means both law and court cases.

Mr. Morgan. I could interpret that the other way.

The Chairman. Then it says, in addition to that:

"except that evidence which is admissible, or the testimony of any witnesses who are competent, under the laws of the State in which the District Court is sitting, shall also be admissible in the District Court."

Mr. Olney. That is all right.

The Chairman. Why is not that broad enough?

Mr. Morgan. It is all right if you interpret the first sentence that way; but I think the first sentence can very well be interpreted the other way. You say "the rules heretofore obtainining" "in equity shall apply."

Mr. Olney. Shall apply in all cases.

The Chairman. Suppose we say "any cases tried by the court or jury".

Mr. Morgan. You might say "evidence admissible by the rules heretofore obtaining shall be admissible in all cases."

Mr. Olney. I think that is the way it should be put, by way of clearer definition.

Mr. Morgan. "The evidence admissible by rules heretofore obtaining in the courts of the United States on the hearing of cases in equity shall apply in all cases."

Mr. Lemann. You cannot say "evidence admissible" "shall apply".

Mr. Morgan. "Shall be admissible."

Mr. Olney. "And also evidence admissible" --

Mr. Dobie. I would like to make one point there. Let us see what we mean by the laws of the State. Do you mean non-statutory, or don't you?

Mr. Clark. I think that is a good point.

Mr. Olney. We should mean both.

Mr. Dobie. I think so, too. I am strongly in favor of that. But don't let us have Swift v. Tyson again. Let us say what we mean -- statutory and non-statutory.

Mr. Clark. How about statutes and decisions?

Mr. Morgan. Yes.

Mr. Dodge. I move that the bracketed clause, as amended, be adopted.

The Chairman. All in favor, say Aye; contrary, No. The motion is carried.

Mr. Dobie. I just want to get this "competence" straight -- "except that * * * the testimony of any witnesses who are competent" and so forth. In other words, we take the positive part. If he is competent we let it in, but if he is incompetent under the State law, and competent under the Federal law, we do let it in.

Mr. Lemann. Are you talking about two different things in this sentence? Are you talking first about admissibility of evidence, and then about competency of witnesses?

Mr. Clark. I wonder if we could not take out that phrase.

Mr. Lemann. I think so.

Mr. Clark. "And also evidence which is admissible." Then go to "under".

Mr. Morgan. I think you had better do that.

Mr. Lemann. Where does that leave you on competency of witnesses as such?

Mr. Clark. We will continue with the competency act. That will be one of the statutes which will be continued, and all these other statutes will be continued. You can do it by express reference.

The Chairman. Put it in in so many words. It is only two or three lines.

Mr. Lemann. That will give you the law of the State in every case, will it not?

Mr. Clark. The law of the State plus these other Federal rules. We want to put in the proof statutes, with regard to proof of documents, and so forth.

The Chairman. Are you sure we are not repealing the Federal statutes about proof of documents?

Mr. Clark. If there is any doubt about it, let us put in another sentence saying that they shall apply.

Mr. Lemann. What is Wigmore's complaint about those statutes?

Mr. Clark. He does not complain so much about that. He thinks it would be a good plan if we stated them, so as not to chase the lawyers around. He has not gone against them.

The Chairman. It is a question of whether we ought to codify all those Federal statutes. They are too long. You can put in a note and say, "See section so-and-so."

Mr. Lemann. Let us leave something for another committee to do.

Mr. Donworth. The question remains whether, in addition to preparing a document for admission under the Federal law, we may also prepare it for admission in accordance with the State law, that is, treating the Federal statute as not exclusive, because the two statutes differ, of course, in many cases. Do you have that in mind?

Mr. Clark. Yes; but our idea was that you could qualify them under either statute.

Mr. Donworth. That is my idea.

Mr. Clark. Yes.

The Chairman. I have one further suggestion. I think we have abolished equity rule 48, about affidavits of experts in patent and trademark cases. I think that ought to go in.

Mr. Clark. I have talked to Professor Sunderland while we were here, and we were not quite sure to what extent it went. We thought probably we had better not put it in.

The Chairman. That is the equity rule relating to affidavits of experts in patent and trademark cases.

Mr. Tolman. Equity rule 46 is very important.

The Chairman. Is that with relation to affidavits of experts?

Mr. Tolman. No; that is the offer to prove.

The Chairman. That is another thing. Just hold that a minute until we get the other one out of the way.

Where is the equity rule?

Mr. Clark. I know the rule, and we are ready to put it in.

The Chairman. Get it in the record. Is it the sense of the meeting that we incorporate in these rules equity rule No. 48, regarding the testimony of expert witnesses in patent and trademark cases, which allows the expert testimony to be taken by affidavit, subject to cross examination?

Mr. Donworth. It is restricted to that class of cases, is it, in the rule?

The Chairman. Yes. Are you in favor of that?

Mr. Olney. I have no objection. It will be made a special exception, as I understand.

The Chairman. My proposal is to put the rule right into our rules. I take it that is the sense of the meeting, if there is no objection.

Now, Major, you have a question of offer of proof.

Mr. Tolman. That is equity rule No. 46.

The Chairman. It says:

"In the trial of all civil actions, whether with or without a jury, when evidence is offered and excluded, the court shall take and report so much thereof, or make such statement respecting it, as will clearly show the character of the evidence and the form in which it was offered, the objection made, and the ruling. * * * If the appellate court should be of the opinion that the evidence should be admitted, it shall not reverse the decree unless it be clearly of the opinion that material prejudice would result from an affirmance."

Mr. Donworth. We would put that in in actions tried without a jury?

Mr. Olney. Does not the same matter of offer of proof come in later in these rules? That is my recollection.

Mr. Tolman. No, it does not.

Mr. Morgan. I suggested it somewhere.

Mr. Clark. I think this is the place for it. You will notice this question as to the last end of this section came up before, and it was suggested not to put in anything that looked like review, or the appellate courts. Our last words, in lines 20 to 24 of this section, are an attempt to cover the last end of it.

The Chairman. I think you have covered it all right, because, while it does not say anything about the appellate court, it is broad enough to cover it if we have power to do it. It is a fine statement.

Mr. Clark. As to the first sentence, I do not know that we have stated it as explicitly as the Major has. When we come to make up the record on appeal, we put in that all rulings on evidence shall be recorded.

Mr. Dobie. Is the problem now whether to put the provision from equity rule 46 in here?

Mr. Clark. The last sentence is practically in here, as we changed it, in lines 20 to 24. The question now is on the next to the last sentence.

The Chairman. This is what the Major has. Let us stick to his point, while he is interested in it. He wants a provision about the procedure where evidence is excluded, and he wants a provision about making an offer in order to show what the evidence is.

Mr. Morgan. I have a suggestion for that in my rephrasing of the third paragraph.

The Chairman. I will read the Major's, and then you can read yours.

> "In the trial of all civil actions, whether with or without a jury, when evidence is offered and excluded, the court shall take and report so much thereof, or make such statement respecting it, as will clearly show the character of the evidence and the form in which it was offered, the objection made, and the ruling."

What is your suggestion?

Mr. Morgan. Mine is much briefer than that. It may not be detailed enough.

> "No error in the exclusion of evidence shall be ground for setting aside a verdict or for reversing, modifying, or otherwise disturbing a judgment, unless the proponent of the evidence shall present to the court, in such form and manner as the court shall direct, the proposed testimony or other evidence, and shall request that it be made to appear of record."

Mr. Donworth. Do you cover the point of no reversal?

Mr. Morgan. Yes; no reversal for either admission or exclusion, and so forth. The present Federal rule in non-equity cases seems to be that you do not have to have an offer of proof. The question merely has to call for relevant evidence, and it seems to me that is a terrible rule.

The Chairman. The Reporter informs me that his committee has accepted Mr. Morgan's suggestion on it, and it covers the ground pretty well.

Mr. Morgan. I do not know whether it covers it as well as the Major does, or not.

The Chairman. It covers the field.

Mr. Clark. You recognize that later in the question of making up the record on appeal. This is the kind of thing that has to be included under that rule.

Mr. Tolman. Let me see, now. I might be wrong, but it seems to me that Mr. Morgan has made a big omission here, affecting the question of whether or not it is necessary to send a case back for retrial. I do not understand it to be the rule that you do not have to put in the evidence. You have to offer the evidence and put it in so that the appellate court will have it before it.

Mr. Morgan. Not under the Federal cases at common law, Major.

Mr. Tolman. Oh, no; not the common law.

Mr. Morgan. But I think the rule ought to be that way at common law, don't you?

Mr. Tolman. But we are making rules for both. Haven't we got to say that?

Mr. Morgan. Certainly. There is no doubt about it. I agree. It ought to be the same at common law.

The Chairman. Is there anything else in lines 14 to 19 remaining to be disposed of? It reads:

> "No formal exception to the ruling of a court shall hereafter be required; but it shall suffice for all purposes for which an exception has heretofore

been necessary" --

Mr. Dodge. Is this limited to rulings on evidence?

Mr. Clark. Yes. There is another provision that applies to the charge to the jury.

Mr. Donworth. I thought that in line 14, after the word "court", you should insert "during a trial or hearing".

Mr. Clark. I do not think it should be limited to evidence. I think Judge Donworth is right.

The Chairman. Your rule relates to testimony. This is no place for it, if it is not limited to evidence.

Mr. Donworth. It might be a ruling which would relate to evidence, or anything that is not already of record by some court order. My understanding is that you must note --

Mr. Dobie. I think this is applicable to everything. It ought not to be in the evidence section.

Mr. Clark. We have a provision as to the charge to the jury. We call it "Objections"; and he must state the objections. This section deals with "all trials". It says:

"In all trials, the mode of proof"

and so forth. Is not this the kind of thing that only comes up during the trial?

Mr. Olney. Not by any manner of means. Exceptions are frequently taken to interlocutory rulings.

Mr. Dobie. For misconduct of counsel, and things of that kind.

Mr. Olney. The exception is for the purpose of a bill of exceptions, and unless you took your exception, you could not incorporate it in your bill.

Mr. Clark. I see no reason why it should not be in a separate rule.

The Chairman. I think it should be, if you intend it to be broader than that. Do you?

Mr. Clark. Yes.

The Chairman. Then it ought not to be under "Testimony and Evidence".

Mr. Olney. It seems to me that the words in that paragraph, "No formal exception to the ruling of a court shall hereafter be required", are sufficient, without the rest of the paragraph.

Mr. Clark. I wish you would consider just how to express it. It has troubled us a good deal.

Mr. Olney. What you had in mind there was unless something appeared which might be taken to be a waiver.

Mr. Dodge. You must state an objection.

Mr. Olney. You have to state your objection.

Mr. Morgan. And the grounds of it.

Mr. Olney. This is the exception. This is not the objection. There is all the difference in the world between the two.

Mr. Lemann. Was it your suggestion to stop with lines 14 and 15?

Mr. Olney. Yes -- "No formal exception to the ruling of a court shall hereafter be required."

Mr. Lemann. He is afraid that if he stops there, somebody might think he did not even have to object.

Mr. Olney. No; they have to object.

Mr. Lemann. That is why he went on, to make that plain.

Mr. Donworth. You have to make it plain.

Mr. Lemann. Otherwise you will find some argument.

The Chairman. You cannot get a ruling until you have made an objection. I think it ought to be clear, so long as you are getting rid of exceptions in any case. It is only fair to require the man who is making the point to state it specifically, and the ground. You do not have to except to the ruling.

Mr. Dodge. It might be an exception on the other man's objection, where you have to say something if you wanted to save the point.

Mr. Lemann. If his objection was sustained.

Mr. Dodge. If his objection was sustained.

Mr. Lemann. In that case you do not have to do anything, under this.

The Chairman. No; you have offered the evidence.

Mr. Lemann. This is further language to cover the point where you do not make an objection. This is to make it plain that you must object.

Mr. Olney. In some cases the party has not any opportunity to object.

Mr. Donworth. If you limit this to "during a trial or hearing" and then cover exceptions to interlocutory orders somewhere else, you are disposing of the whole matter properly. During the trial the court does not merely rule on evidence. The court may refuse to issue a subpoena duces tecum; he may refuse to grant a continuance; and there are lots of rulings during a trial. You ask various things of the court, besides making objections to evidence.

Mr. Dobie. There is the matter of misconduct of counsel.

Mr. Donworth. Yes. Those things do not become matters of record, ordinarily, but they are reported by the stenographer, and later they get into the record in the appropriate manner. This should not apply, as now worded, to interlocutory orders that are in writing, because you may not be there when the court signs those orders, and you must make some provision as to orders made in the absence of a party, if you are going to cover the whole subject. But what I am getting down to is that if you restrict this to the trial or hearing, it is all right, as far as it goes, and you take up written orders in another place.

Mr. Clark. You do not have to have an exception noted, do you, on orders not at the trial?

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Mr. Donworth. I think there is a difference in the ruling on that. We have a statute dispensing with exceptions in certain cases.

Mr. Clark. Will you look further when you get there? There are two alternative forms there. This is a little puzzling.

Mr. Donworth. Don't you agree that inserting, after the word "court" in line 14, the words "during a trial or hearing" would clear this up?

Mr. Lemann. Would it not be limiting it?

Mr. Donworth. It is limiting.

Mr. Lemann. Why do you want to limit it?

Mr. Donworth. For this reason: I may not be present when he makes these orders.

Mr. Lemann. If you do not put in those words, "No formal exception to the ruling of a court shall hereafter be required", would not that cover the case when you were not present, as well as the case where you were? I do not get your point.

Mr. Donworth. The point is that you have an opportunity to object at a trial, and I do not think you should import an exception where there is no objection.

The Chairman. If a man decides a case against you by filing an order --

Mr. Donworth. There is not just one order that decides the case. There are usually a lot of others.

Mr. Lemann. You have in mind the rest of the sentence. That is why you think you have to put in these words, because of the provision for objection.

The Chairman. Judge, if you appeared in court and resisted a motion, and then the parties came back, and the next day the court filed an order, you would not need to file an exception to that.

Mr. Donworth. I do not want to push the point, but there are a great many orders entered when you are not there.

The Chairman. I think that this exception about no formal exception being required ought to be a general one. We ought not to be putting it under "Evidence" and then somewhere else. The matter ought to be referred to the Reporter to make a general statement on it and revise it.

Mr. Pepper. There is another place where it will have to be thought out, and that is in connection with objections to the charge of the court.

Mr. Clark. That is covered.

Mr. Pepper. It is covered, but I have just looked at it, and it seems to me that the form of expression ought to be the same in the two cases. I merely indicate it as a thing the committee on style would consider.

Mr. Olney. I thought we definitely tried to make a different form of expression because we wanted a different situation.

Mr. Pepper. It is exactly the opposite of the situation with which I am familiar. In the case of an objection to evidence during a trial, we always speak of it in terms of an objection. When we make an objection to the failure of the court to charge as requested, we ask an exception to the failure of the court so to charge, and we use the term "exception". No instructions having been asked, we are not satisfied with the way the charge has been made.

Mr. Clark. After the court rules against you, excluding evidence, then do you have to get up and say, "If your Honor please, I would like an exception"?

Mr. Pepper. Yes. We have now a State practice which permits us to except to the whole of the charge, without specifying, but heretofore the custom has been to take up to the court the particular parts of the charge that you object to, and ask him to modify his charge. If he refuses, you get an exception. What I understand we are doing here is dispensing with the formality of making it necessary to ask for an exception after you have made a definite objection and that has been ruled against you.

Mr. Clark. Yes.

Mr. Pepper. You will get the benefit of your objection in the same fashion as if an exception had been granted you, unless it appears affirmatively that after the ruling had been made against you, you acquiesced in it.

Mr. Clark. That is the first alternative.

Mr. Pepper. Yes.

The Chairman. Let us recess for about 10 minutes. We have an hour and 25 minutes left.

Mr. Clark. I think five minutes would be enough.

(At this point a brief recess was taken, at the conclusion of which the committee proceeded further as follows:)

The Chairman. Gentlemen, I think we have agreed on our objective here about exceptions. The thing is in rather confused shape, and I doubt if we can gain anything by trying to deal with it in detail. I suggest that we refer that exception business to the Reporter for revision.

Mr. Donworth. Mr. Chairman, may I make an observation? I agree to that course. My objection to these lines 14 to 19 is not to the general object, but for lack of clarity, unless they are restricted to what happens during the trial or hearing, because it says "No formal exception to the ruling of a court" -- made anywhere, apparently, now --

> "shall hereafter be required; but it shall suffice for all purposes for which an exception has heretofore been necessary if it appears that the party adversely affected did not expressly indicate that he acquiesced in the ruling."

or:

> --"if an objecting party shall make known his objection, or the action of the court desired at the time the ruling of the court is made or sought."

I think, in the progress of long and complicated cases, the court often makes orders, and they are entered sometimes without being served on the adverse party. This says it is sufficient if you make known your objection at the time the ruling of the court is made or sought. I do not care what the rule is going to be about written orders. Many favor the idea that if there is a written order entered in a case, your objection is implied if it is against you, and that you can, on appeal, take advantage of the point if you do not like that. I do not care whether that is the rule or whether it is not. But I do not like to leave it in this blind way here, with orders and rulings made when I am not there, open to doubt as to the application of this rule, because I did not indicate any objection at the time the ruling was made or sought.

So my suggestion is that the Reporter, in revising this, make it plain that written orders in a case made in the absence of a party are to be treated in a certain way -- whatever way that is; I do not care -- but not to imply that you must make known your objection at the time the ruling is made or sought, because it will happen in many cases that you will not be there.

Mr. Morgan. You will be there when it is sought, will you not?

Mr. Donworth. Not always. The parties come in, and there is a long argument over a motion, and then the court enters an order quite astray from what was debated.

Mr. Dobie. A lot of them are sought, too. As you say, you cannot make objection, because you do not know what ruling he is going to make.

Mr. Morgan. But you oppose the order sought, and that is an objection.

The Chairman. I think that statement has been recorded, and it ought to be considered by the Reporter.

I have one additional suggestion. I think we may find, in some of the practice statutes, a very clear and explicit rule that might help in framing the words of it. I do not mean to argue about it. I just suggest it.

Mr. Clark. Just a minute. We have struggled a good deal with this. Can you not at least indicate some preference as between this or that? We also sent around an extensive statement from the statute. It is rather difficult to word. I think it gets a little more into form than substance.

The Chairman. Then I think it should be referred to the revision committee. I do not think this committee could start in here tonight and analyze verbiage.

Mr. Donworth. Is there a separate section on orders, other than this?

Mr. Clark. There is not anything that covers your point. I must say that I had not supposed it was necessary. We can put it in, I am quite sure. You will see that this is limited to the case where an exception has heretofore been necessary. I did not suppose that on orders not passed at the trial you had to make an exception at the time.

Mr. Dodge. You have to file a written exception within three days after notice, in our State.

The Chairman. A suggestion has been made about some mess Federal lawyers have gotten into about that. I think it is too confused for us to deal with in detail here.

Mr. Dodge. In general, an order made in the absence of the parties should be presumed to be objected to.

Mr. Clark. We will take care of that. But coming to the thing at the trial, haven't you any reaction on this? We stated it two ways:

First, that you do not need to do anything, and, unless you have acquiesced, there need be nothing on the record; or

The second one, in general, that you have to make known your objection.

Mr. Morgan. I move that the second one be followed, Mr. Chairman. The "failure to acquiesce" I think would be terrible.

Mr. Clark. Some of the State statutes go further. In Illinois no formal exception need be taken in order to make such a ruling a ground for review.

The Chairman. They do not say that you do not have to object to it?

Mr. Morgan. For the trial, I move the adoption of lines 18 and 19.

Mr. Dodge. I second the motion.

The Chairman. All in favor of adopting the rule in the bracketed part, lines 18 and 19, in case of trial, say Aye; contrary, No. The motion is carried.

Mr. Clark. That is quite all right, but when you said it was not done anywhere, the first alternative is the New York form.

Mr. Morgan. It is a foolish form.

Mr. Pepper. I do not understand that anything that has been said indicates approval of the necessity of making some overt or affirmative statement that you do not acquiesce in a ruling made against you. Am I wrong in that?

Mr. Clark. I think we rejected that alternative. That was the first alternative. We have adopted the second.

Mr. Pepper. I was hoping we had, because it seems to me that the real value in this exception business is that you do not have to go through the silly formula, after the ruling has been made against you, of saying, "Will your Honor grant me an exception?" And the court says, "Exception granted." If you have to say something else that is of equivalent merit, it takes away the value of excluding the exception.

Mr. Loftin. May I ask, Mr. Reporter, why, in line 19, you use the words "at the time" instead of "before the ruling of the court is made"?

Mr. Clark. We wanted to cover both before and after.

It may happen, especially in New York, where they go very rapidly, that the court has ruled before the man has been able to state his objection. We did not want to have any question about getting it in before. You could say "before or during or after".

Mr. Loftin. I am not used to that rapid practice you speak of in New York.

Mr. Dobie. They do not do that in the south.

Mr. Clark. You may be lucky if the court even knows you are there, in New York, sometimes.

Is there any question about that point? Does anybody want it "before"?

Mr. Donworth. "At the time", I think.

The Chairman. We are clear about this -- and this is about all we are clear about -- the principle that if a man makes known to the court the action he wants taken, and the court rules against him, he does not have to say "exception". If he has made known his attitude, assuming he has had an opportunity to, he ought not to have to make a second objection or exception. There are a lot of different angles to it, on the question of what can be done at the trial, and what may be done with respect to orders ex parte, and all that. I think you had better leave that to the Reporter and the revision committee, to work out a rule that carries out the general principle. We all agree about the principle. It is a mere matter of hitting all the cases in explicit terms.

Now we will pass to rule A7.

RULE A7. EXAMINATION OF JURORS BY THE COURT; ALTERNATE JURORS.

Mr. Clark. In connection with rule A7, there are several questions of detail that we have accepted. I think we have accepted most of them. We suggested a lot. There is one question which I think is fairly important.

Mr. Morgan has questioned the advisability of allowing peremptory challenges in choosing an alternate juror. I might say, on that, that I think I sympathize with him.

The Chairman. What does he say?

Mr. Morgan. I do not want an additional peremptory challenge, just because you are going to draw an alternate juror.

The Chairman. You are diminishing the number of peremptory challenges, then.

Mr. Morgan. Suppose you are. What difference does it make? You are just diminishing the percentage, but not the number.

The Chairman. I will give a good reason for it. I drew a bill to provide for alternate jurors in criminal cases, and they put in a clause there for a certain proportion of extra peremptory challenges, which shows the attitude of Congress about it.

Mr. Morgan. But why in a civil action?

The Chairman. For the same reason. Congress is likely to say, "Well, you have 14 jurors instead of 12 to draw, so why shouldn't you have a proportionately greater number of peremptory challenges?"

Mr. Morgan. The proportion would be just a small fraction.

Mr. Sunderland. It does not do any harm, anyway.

Mr. Morgan. This is just a feeling of mine, that the use of most peremptory challenges is to clean out the competent men on the jury.

The Chairman. I am thinking of the position we would be in in going before Congress and asking for the reduction of peremptory challenges. I do not think we want to do that.

Mr. Morgan. The point I make is this, that while there were peremptory challenges at common law in criminal cases, there were no such challenges at common law in civil cases. It is all purely a matter of statute. In some States it is just a hopeless mess. Take Pennsylvania, for example. Half the time neither the trial judge nor counsel knows the number of peremptory challenges they have in a particular case, because there are different numbers for different kinds of cases, and so forth. If you read Von Moschisker's book, he has 30 or 40 pages listing peremptory challenges in different kinds of cases. In the Federal court they have held pretty generally that peremptory challenges were very largely in the discretion of the trial judge, including the manner of exercising them, and all that. If you are going to have only two alternate jurors, I do not see why you should, in a civil action, allow additional peremptory challenges.

I do not think it is particularly important.

The Chairman. I think it would be a ground of objection to our rule. I think you will find that every statute which now provides for alternate jurors has a provision for additional peremptory challenges.

Mr. Morgan. Does your California statute provide for additional challenges? You have alternate jurors, do you not?

Mr. Olney. Yes. I do not remember about it. I could find out. But I think you are entirely wrong in saying that peremptory challenges are ordinarily used to get rid of competent jurors. They are frequently used to get rid of incompetent jurors.

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The Chairman. It depends on which side you are on.

Mr. Olney. It depends on which side you are on, naturally.

Mr. Morgan. I always used to see my best jurors taken.

The Chairman. What do you want done, anything special, on A-7?

Mr. Clark. I take it that stands?

Mr. Morgan. Yes.

Mr. Clark. Mr. Wickersham did not like the first. I was surprised; I thought Federal judges claimed that power now.

Mr. Morgan. They do.

The Chairman. I think we better leave that.

Mr. Clark. I have no more--there were quite a good many suggestions, but I thought they were all form, and we accepted them more or less.

The Chairman. Has anybody any substantive criticism on Rule A-7?

Mr. Loftin. You have a bracket at the last.

Mr. Clark. We suggested it be left out. Mr. Morgan made several suggestions of detail and we thought we could not leave out the brackets.

The Chairman. Let us leave that to ~~to~~ the Revision Committee.

Mr. Donworth. How does that work out, the bracketed matter, that the alternate jurors must attend at all times upon the trial?

The Chairman. It is a mere matter of form as to how it will be stated. I made the suggestion that we deal with the whole paragraph by putting in the word "function" somewhere, but I think that is a matter of form. It is taken as a matter of substance, of course, but they will have to stay around and act like jurors until they are discharged.

Mr. Morgan. That is right.

The Chairman. Rule A-8.

RULE A-8

JURIES OF LESS THAN TWELVE--MAJORITY VERDICT

Mr. Clark. Mr. Morgan had some suggestions there.

The Chairman. Are they substance or form?

Mr. Clark. I think they are form. We accepted them, so they must be. Now, Major Tolman suggested we use these words "answer to interrogatories" instead of "finding". I do not know whether that is important or not.

Mr. Tolman. Purely a matter of form.

The Chairman. Form, he says. Well, A-9.

RULE A-9

SPECIAL VERDICT; ANSWER TO INTERROGATORIES

Mr. Clark. I have got these questions on that: Should the court have power to order a special verdict in all jury cases? Oh, yes, that is the matter in bracket.

The Chairman. I think the bracketed part ought to be retained.

Mr. Morgan. That is A-9?

Mr. Clark. We think the cases held that it is permissible. We took that up in the note.

Mr. Morgan. The court to direct a verdict on its own motion, do you mean, or submit interrogatories?

Mr. Clark. No, it is the bracketed matter in A-9. What do you say about that?

The Chairman. I don't care about it. That is a matter of

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form.

Mr. Clark. Mr. Morgan says: "I am inclined to agree that the matter in brackets in the firmt paragraph should be deleted. As I understand the common law rule, the trial judge in his discretion may charge the jury that in their discretion they may return a special verdict."

Mr. Morgan. Yes, I do not think you need the consent of the parties under the Supreme Court decision, do you, Mr. Sunderland? You have written on that.

Mr. Sunderland. But you can not force the jury.

Mr. Morgan. You could not force the jury at common law but you can force them to answer special interrogatories, and then, under the American decisions, I understand--

Mr. Olney. What is the difference between answers and special interrogatories and special verdicts?

Mr. Morgan. Why, the special verdict carries no general verdict with it, you see. Answers to special interrogatories carry a general verdict; you have a general verdict plus answers to special questions. In a special verdict you do not have any general verdict; you merely have answers to questions and findings.

Mr. Olney: If you have answers to interrogatories, if you had a special verdict and also a general verdict--

Mr. Morgan. That is the practice in a good many States and this has been called an exploratory operation to test the validity of the general verdict.

Mr. Olney. I am asking, what is the essential difference
2 to an interrogatory and a special verdict in itself, not in connection with the general verdict? Is it the same thing?

Mr. Morgan. What I should say is this: You may have an answer to a special interrogatory that accompanies a general verdict, and if the answer is inconsistent with the general verdict the court may order judgment on the answer to the special interrogatory.

Mr. Olney: Why can you not call that answer to special interrogatory a special verdict?

Mr. Morgan. Simply because you do not have a special verdict and a general verdict together.

Mr. Olney. Why not?

Mr. Morgan. It is simply a matter of phraseology. It is just a matter of terminology.

The Chairman. I would like to raise one question about this. Dowin in lines 19 to 27 I notice here it says this is a case where you have got a general verdict, as I understand it, and special interrogatories.

Mr. Morgan. Answers, yes, sir.

The Chairman. And the answers to the special interrogatories in line 24 are inconsistent with each other, and you have got a general verdict; now, you are forbidden here to enter a judgment on the general verdict, he has either got to send the jury back or grant a new trial.

Mr. Morgan. That is right.

The Chairman. Now, suppose you have an action at law where a man is entitled -- he gets a general verdict and then the court submits two or three special questions that he wants answers on, and they are inconsistent with each other; is he forbidden then to enter the judgment on the general verdict? The rule makes it so.

Mr. Lemann. Did you say the judge had no right then to enter judgment?

The Chairman. He can not enter judgment.

Mr. Lemann. This memorandum of Morgan's says:

"The United States Supreme Court, however, has held that a jury may constitutionally be required to answer special interrogatories, and that judgment may be rendered on such answers notwithstanding the general verdict."

I take that to mean if they were inconsistent.

Mr. Morgan. But he is talking about the answers being inconsistent with each other.

Mr. Lemann. Oh, not inconsistent with the general verdict?

Mr. Morgan. When they are inconsistent with each other, if they are properly drawn questions, that means that the jury just did not know what it was doing, and the general notion is, as I understand it, that the court must send it back for a new trial. Certainly, that ought to be the rule.

Mr. Olney. I do not know about that.

Mr. Morgan. Ohterwise, they just cancel each other, and that would be just tossing up.

The Chairman. That leaves the general verdict.

Mr. Morgan. That seems to me to be still just tossing up.

Mr. Olney. Suppose you had the general verdict and also had the answers to special questions, and the answers to the questions were inconsistent with each other but none of them were inconsistent with the general verdict?

Mr. Morgan. They may be immaterial questions.

The Chairman. If they are properly drawn, one or the other is bound to be.

Mr. Olney. My point is this: The general verdict should stand unless-- the point isnot whether the answers to the special interrogatories are inconsistent with themselves, but whether any of them are inconsistent with the general verdict.

The Chairman. Yes, I had the same idea, Judge, and I made a note of that; but then I realize this that you are assuming that special questions are irrelevant, because if they are pertinent, if they are essential factors, each one of them, in the general verdict, then if they are inconsistent with each other your hypothetical case can not exist because one or the other of the answers is going to be inconsistent with the general verdict.

Mr. Olney. Yes.

The Chairman. But you are assuming a case, as I mistakingly assumed one when I raised the point, that the questions are so badly framed that they haven't anything to do with the case.

Mr. Olney. They might be. But my point is that the real essence of the matter is that the general verdict should stand unless it is inconsistent with some special verdict. That should be the principle that applies, and that will cover everything.

Mr. Morgan. No, it does not cover every case if you state unless everyone of them is inconsistent.

Mr. Olney. That is what I mean, unless anyone of them is inconsistent.

Mr. Morgan. Some of them are inconsistent with each other, and one of them would be inconsistent with the general verdict.

The Chairman. It would have to be.

Mr. Morgan. Yes, if it were a properly drawn special question.

Mr. Olney. If there is anything in the special verdict that is inconsistent with the general verdict, the general verdict should not stand; otherwise it should. And that is the principle that should apply and that is the way the rule ought to be worded.

Mr. Clark. It has got to be.

Mr. Donworth. Should not the first part of line 21 go out? What has the consistency of the answers with each other to do, as long as one or more is inconsistent with the verdict?

Mr. Morgan. Suppose you had one finding that necessarily meant contributory negligence, with another finding that necessarily meant no contributory negligence; now, what are you going to do, with the general verdict for the plaintiff?

Mr. Donworth. I do not suppose the second sentence, when one or more findings are inconsistent with the verdict, then the verdict is no good, regardless of the fact whether the answers are consistent with each other or not--

Mr. Morgan. Yes, but if you get an answer that is inconsistent with the verdict, or several that are inconsistent with the verdict, then you can enter your judgment upon the inconsistent answers, but if the answers are inconsistent with each other, you can not enter any judgment either on the answer or
3 on the verdict, if you are supposing the jury knew what it was doing.

Mr. Lemann. If the answers are consistent with each other, it will not make any difference whether they are inconsistent with the general verdict; you just give judgment according to the answers. Did this bracket go in or out in line 2?

Mr. Clark. I understood it was going out.

The Chairman. Yes. Mr. Morgan, under the Seventh Amendment, have the courts held that it is permissible for a court to--

Mr. Morgan. To enter judgment on the special answer?

The Chairman. No, to eliminate a general verdict entirely?

Mr. Morgan. No, they have not held that yet, but I do not see how they could help holding that if they hold you can disregard the general verdict and enter judgment on the special verdict.

Mr. Sunderland. The trouble would be that the jury at common law had the right to render either verdict it saw fit. Now, if it had the right and we forbid it by the Seventh Amendment we take that right away from the jury.

Mr. Morgan. Don't you remember the decision which discussed this very question and said it would be foolish to hold that it was unconstitutional to tell the jury to answer special questions because they recognized the long practice in this country to the contrary? That is in your article on this.

Mr. Sunderland. Yes, but answering special questions is done here in connection with a general verdict.

Mr. Morgan. But there is no discretion with the jury as to whether they should answer the special questions.

Mr. Sunderland. That is true.

Mr. Morgan. If that is true, that is contrary to the English rule. The English court holds flatly that the jury need not answer special questions if it does not want to; and the United States Supreme Court went the other way on that and said it was preserving trial by jury if the questions of fact were answered by the jury.

The Chairman. If they held it was within the Seventh Amendment-- take this case: You ask for a general verdict and you ask for answers to special questions, and they render a general verdict and they render answers to the special questions inconsistently; now, have they held it is a jury trial if you disregard the general verdict?

Mr. Morgan. That is the case exactly. That is the exact case and I think it includes the other, necessarily.

Mr. Sunderland. It is possible. I think there is a question there but I do not know whether we want to bother about it.

Mr. Morgan. I agree, but I can not see why they would say you had to go through the form of taking a general verdict if you could disregard it afterwards, because they departed from the English rule when they held you could compel the jury to answer these questions.

The Chairman. That is logical.

Mr. Donworth. Where did this case originate that you speak of?

Mr. Morgan. It must have originated in a Federal court or a Territory, because otherwise they would not have discussed the question, it would not have been under a jury trial at all.

Mr. Donworth. Unless they discussed it under the 14th Amendment.

Mr. Morgan. I am quite sure it was the other way, Judge; I think it was a Federal court.

Mr. Donworth. If this came up under the 14th Amendment as due process in a State, it would not help us at all.

Mr. Morgan. Not at all, but I am sure this came up in a Federal court.

The Chairman. There is no Federal constitutional provision that requires any State to give any man a jury trial.

Mr. Dobie. Not even in trying cases under the Employers' Liability Act.

Mr. Morgan. I will look that case up and send you a memorandum.

Mr. Dodge. As a matter of form, I wonder if we could not shorten this up by leaving out in lines 5 to 7 and in lines 16 to 18 the words "giving such explanation or instruction as shall enable the jury to make findings thereon"? You have not told the judge anywhere else that he must explain questions to the jury. Isn't that obvious?

The Chairman. Isn't it enough to say he may submit? Doesn't that necessarily imply the necessary instructions? I think it does.

Mr. Dobie. Some of the judges will have a little trouble.

Mr. Donworth. The Reporter cites Davis v. Aetna Acceptance Company, 298 U.S., on certiorari to the appellate court of Illinois. That is what bothered me some.

The Chairman. I don't blame you.

4 Mr. Donworth. I suppose it is threshing of old straw but I am in favor of a general verdict no matter how many interrogatories you have. I believe, unless the parties waive a general verdict, they ought to have it.

Mr. Morgan. Yes; I do not know whether the sentiment of the Committee is entirely made up against that, but if there is any chance for a motion to carry I would make a motion that unless the parties waive the general verdict,and an express waiver is provided for, of course, in the first thirteen lines, and that is all right--but in lines 14 to 27, as I understand it, if I understand it right, you are going to permit the court to substitute entirely the findings. Am I correct on that?

The Chairman. No. "In any act tried by a jury the court may submit to the jury written interrogatories upon one or more matters lf fact involved in the action, giving such explanation or instruction as shall enable the jury to make answers to the interrogatories and render a general verdict."

Mr. Morgan. If that is plain, all right.

The Chairman. There is nothing here that empowers him to frame special questions and eliminate the general verdict.

Mr. Dodge. I think that is covered by the first paragraph.

Mr. Lemann. I do, when you took the brackets out.

Mr. Morgan. No doubt about it. The first paragraph has a special verdict, and the second paragraph has special interrogatories with general verdict.

Mr. Donworth. Of course, under lines 8 to 13, if the court does not put in all the issues of fact into the special verdict, and if a party affected does object, why, then, there is a sure reversal in the case.

Mr. Sunderland. Then it will go in. Then the question will be put to the jury, if there is objection made.

Mr. Donworth. Do you think so?

Mr. Morgan. If you do not put that provision in you just better leave the special verdict out, because they are in a terrible mess.

Mr. Donworth. That is all right. I am calling attention to the fact that if the court is arbitrary and says there is no issue on that point and he will not put it in--

Mr. Morgan. Then you take your exception to that.

Mr. Donworth. And then there is a sure reversal.

Mr. Morgan. Yes, I suppose that is true.

The Chairman. You leave in the bracketed part in lines 2 to 4?

Mr. Dodge. No, we struck that out.

Mr. Morgan. We struck it out.

The Chairman. I was confused because I was looking at the bracketed part in line 14. I thought that was surplus.

Mr. Morgan. Yes, but it is the other part, and didn't you in your memorandum want to keep that in?

The Chairman. I thought it ought to be left.

Mr. Morgan. Of course, I have no brief for a special verdict as such, apart from a general verdict, because of the technical qualifications the judges have put around them. While the general rule is they will not even look at the evidence to see whether or not an issue that was made by the pleadings was made by the evidence, if there is not a finding on every issue made by the pleadings, the special verdict is no good.

The Chairman. Let me get this clear in my mind. Striking out that bracketed part in lines 2 to 4 makes it possible for the court to submit special questions without allowing the jury to make a general verdict. Do you think we ought to have it that way?

Mr. Donworth. Mr. Chairman, I move the brackets be reinstated. I did not know that that had gone out.

Mr. Morgan. I said you do not have to have it in. I think you do not have to have it in, if you believe in special verdicts without the consent of the parties.

The Chairman. I am afraid we will have a lot of opposition about a rule--- there is always a lot of opposition on certain types of cases by one side to having any special interrogatories submitted at all. The lawyer thinks he can get a verdict on general principles and he does not want the jury to pin down the facts on which they may base his verdict. Now, you have gone a step farther, not only providing for special issues in connection with the general verdict, but you have made it possible for the court, without the consent of the parties, to eliminate the general verdict entirely, and nail the jury down to the specific questions, and, outside of the argument on the merits, I think it is a very dangerous thing to do here.

Mr. Dodge. It is a practice with which I am familiar and I think it is a very valuable practice. There are cases sometimes complicated so that the jury may be led astray unless they are pinned down to certain questions, and those questions can very readily be stated in such a way as to cover the whole case. The general verdict is entirely surplusage. The jury answers these questions and the court enters the judgment accordingly and that settles the case.

Mr. Donworth. You know, there is a large class of lawyers that want a general verdict, and, quoting Senator Pepper, that is about the only part of the Constitution they understand, and I think 1936 is a poor year to attempt to change that.

Mr. Sunderland. In the Illinois Civil Practice Act a provision for a special verdict was put in by the committee, but there was opposition in the Legislature and they cut it out.

Mr. Morgan. Is that so?

Mr. Sunderland. I think that is something that is likely to arouse antagonism from the lawyers, and I would think it was better policy to put it in with the consent of the parties and let the thing gradually become common practice.

Mr. Lemann. It is up to the judge, and if there is a strong local feeling against it the judge probably will not do it. I see quite a few cases in Simpkins saying it can be done, but it is up to the discretion of the court.

Mr. Morgan. May I ask Mr. Dodge whether the special verdict is used much without the general verdict in Massachusetts, without the consent of counsel?

Mr. Dodge. I don't know. It can be done without the consent of counsel, but I do not know whether it is, very much.

The Chairman. I am afraid of it, as a matter of opposition.

Mr. Pepper. I think that is full of dynamite.

Mr. Morgan. Then let's put it in, if it is dynamite. I don't think it will hurt much.

The Chairman. What is the sense of the meeting on that?

Mr. Olney. Your idea is both in connection with these special interrogatories?

Mr. Morgan. No.

The Chairman. Up here in lines 2 to 4--

Mr. Morgan. Just to substitute.

Mr. Dodge. Why not restore just the words, "with the consent of the parties"?

Mr. Olney. It is only with the consent of the parties or on cases not triable of right.

Mr. Morgan. That was stricken out.

Mr. Olney. Oh.

The Chairman. Just with the consent of the parties, is all you move to restore?

Mr. Dodge. Yes.

Mr. Morgan. Yes, that is all you need.

Mr. Dodge. Without regard to the question of policy, I vote against restoring it.

Mr. Loftin. I second the motion.

The Chairman. All in favor of restoring the words, "with the consent of the parties", in line 2 of Rule A-9, say aye.

(Upon the question being put, the motion prevailed without dissent.)

Mr. Olney. Why not permit that to be in equity cases where they have a jury?

Mr. Dodge. Because issues are framed there anyway.

Mr. Olney. Do you see what I mean? I should say that was the one case in which they might want a special verdict.

The Chairman. Why should we not leave in there, "or of its own motion if the case is not triable"?

Mr. Donworth. That has gone out.

The Chairman. Ought it to go back? I have a feeling, if you are going to restore anything there, you ought to restore all of the bracket.

Mr. Lemann. May I ask, then, what would be the situation as to interrogatories? Would this situation only apply under lines 2 and 3 to special verdicts and not apply to lines 14 and 15?

The Chairman. Under lines 14 to 15 he can not submit special issues without at the same time calling for a general verdict.

Mr. Morgan. Yes.

The Chairman. That is clear.

Mr. Dobie. In the first paragraph there is no general verdict at all.

The Chairman. But the first paragraph, with that bracket out, has no general verdict at all, and I think the whole bracket ought to be in.

Mr. Dodge. The difficulty is, you always have in equity cases, which would be the only other cases where there would be a jury trial, special questions put to them.

Mr. Clark. That is not so always.

The Chairman. It might be an action for fraud or something of that kind. There might be several questions of fact, and instead of framing special issues the court might choose to lay the whole case before the jury.

Mr. Dodge. That would be a novelty to me, anyway.

Mr. Clark. That is one trouble with the difference in practice. It would be a great novelty in my State in an equity case, tried with a jury, to have special questions.

Mr. Dodge. By equity?

Mr. Clark. Of course there would be the power, but this is the difference in practice in States. You just would not do it. You are quite right on the power.

The Chairman. You see, if we do not put it in, then, if you try a case with the jury you have got to get consent to the general verdict and the court may prefer to do it that way. You may not have framed specific issues in advance.

Mr. Dodge. I did not know equity cases were ever tried as a whole to a jury without specific questions. If there is such a practice, then the whole thing should go back.

The Chairman. It is possible. The motion is to do what?

Mr. Morgan. Restore it?

The Chairman. The whole bracket?

Mr. Morgan. Yes.

(The question was put and the motion prevailed without dissent.)

The Chairman. May I, without taking too much of your time, ask this? I think this whole business of special verdicts and their effect is, as the Senator said, dynamite. Instead of stating what would happen if these verdicts are inconsistent with the general verdict, and all that sort of thing, could we not just stop in the last paragraph on line 19 and not say what the effects are, but just leave it to the general practice, and not leave this sticking up like a sore thumb?

Mr. Dobie. Don't you leave the question open?

Mr. Sunderland. There would be doubt as to what the result would be.

The Chairman. Do you mean different opinions?

Mr. Sunderland. It might result in a new trial. I do not think entry of judgment in accordance with special issues could be rendered.

Mr. Lemann. We are saying that you can not ask for special judgment without consent of the parties under the Seventh Amendment. In the other cases you can ask for general verdict and written interrogatories, and you simply put it in to show how it would work when the answers came in.

Mr. Sunderland. There must be a statute to enter judgment contrary to the general verdict.

The Chairman. I thought we were merely stating the law that the court has established. If that is so, we better leave
6 that alone.

Mr. Sunderland. Is that always fixed by statute, Mr. Morgan?

Mr. Morgan. As far as my acquaintance with statutes goes, they all state it.

The Chairman. I will withdraw my suggestion again.

Mr. Olney. There is so much force in that suggestion, it will certainly make trouble. I mean, if we let it go this way it is just certain to make trouble in connection with the adoption with the rule.

The Chairman. It ought not to be in unless the decisions are at variance with the Federal courts.

Mr. Sunderland. That can be checked up, but my impression is that there is always statutory authority.

Mr. Olney. That is the way the law ought to be. I don't think there is any doubt about that. But, for our purposes here, in order to get along and get this thing adopted with as little objection as possible, I would prefer to see a provision in here for these special interrogatories, but with a provision that the general verdict should govern, and the court should consider the special interrogatories, if they are inconsistent, only for the purpose of granting a new trial, and let the general verdict govern.

Mr. Dodge. Suppose the jury finds: One, the defendant was negligent; two, the plaintiff was in the exercise of due care;

three, damages, $1,000; verdict for the defendant. Now, isn't it obvious that those first three questions are contrary, and the general verdict was simply a mistake?

Mr. Olney. Of course it is obvious.

Mr. Morgan. I think the practice is very widespread. The Supreme Court said so in its opinion in that case. It is a pretty old case, as I remember it, back in the 90's.

Mr. Lemann. I do not see why it is considered so dangerous. You have the jury's finding, and unless the fellow comes out and says, "I want to use the jury to mess things up; I don't really want to know what the jury thinks"--

The Chairman. There are thousands of lawyers who try those kind of cases.

Mr. Lemann. They will say, "We object to the rules because they permit you to find out what the jury really thinks, and nobody ought to find that out." I don't see how they could afford to come out on that.

The Chairman. I know when I have ever asked for special interrogatories with a jury I have met the most violent opposition from the other side.

Mr. Clark. Don't you want to have something?

The Chairman. It is the defendant's lawyer that wants these in, always.

Mr. Sunderland. You cross examine the jury.

The Chairman. The plaintiff never wants it.

Mr. Lemann. One thing seems pretty plain; you ought to take it out or leave it in altogether. If you leave it in and take out the last part--

The Chairman. My suggestion is this: If the Federal courts have already--

Mr. Sunderland. Settled it.

The Chairman. -- laid down the law substantially as we have got it in lines 20 to 27, we are just adding insult to injury by stating it here. We do not need to state it; they will do these things. I would like to know about that because I feel strongly if this is not absolutely needed here to clear up conflict in the jurisdiction to the effect that special findings in general verdicts in the Federal court have, the less said about it the better. Let us leave it just where the courts have got it. If the Federal courts are in confusion about it, if there is conflict, then maybe there is an argument on leaving it in. If so, it all turns, in my mind, on-- "Is there a real difference of opinion among the Federal courts as
7 to the effects of these various verdicts?"

Mr. Olney: I was thinking of having something in here that would keep the lawyer from chasing around as much as possible, and the question is general; there would be some uncertainty in principle as to what would happen, whether you would send it back for a new trial or render judgment. We must remember that we are going to deal with, on the whole, a pretty good class of lawyers; we are going to the Federal bar; really, the other fellows are not affected.

Mr. Morgan. You are going to Congress; that is the trouble.

Mr. Olney. We are going to Congress only with the veto power, and if the Supreme Court puts its stamp of approval on it I would not think they are very likely to jump on this.

Mr. Clark. We want to have something we can give up too.

The Chairman. We can not give up anything very well.

Mr. Clark. I mean during the discussion next summer and next fall.

Mr. Lemann. You mean if they throw plenty of bricks at this, this is something that will not break our hearts to drop?

Mr. Clark. Yes.

The Chairman. I am against that clause unless it is needed to clear up a conflict.

Mr. Pepper. Mr. Chairman, don't let's do anything in anticipation of the presidential campaign and all sorts of questions about the court and all that sort of thing, before the people. Don't let us do anything we can fairly be criticized, or even unfairly criticized, as promulgation by the court of rules, prepared by defendant's lawyers. The opposition that we are going to meet in Congress is not going to be on the floor; it is all going to be done in secret, through influence with the different members of Congress from a very undesirable part, but a very influential part, of the bar in all the States. They will never come to the surface, they will never state their position. They will never state out loud, "We do not want the jury to know what they are doing", but they will say to their Congressmen, "We don't want you to vote for this measure because the practical effect of it is to play into the hands of the big corporations and defendants' lawyers."

Mr. Lemann. If we take out all this about interrogatories, that is really what they don't like. As I get it, just sitting around here, I get it they do not like these interrogatories at all. They might work as much for them as against them but they do not like them. I do not think we will allay this opposition by leaving out the last four lines.

Mr. Sunderland. We have a practice and have had in Michigan for many years, and it is very seldom used. Lawyers do not think it amounts to anything. I have talked to Illinois lawyers and they have had it for years in Illinois and they do not use it. I do not think it is a practicable matter.

7 Mr. Morgan. Where they do use it in Wisconsin they swing it around to a special verdict.

Mr. Sunderland. Where they use it in their argument they always explain to the jury how to answer those questions to make it consistent with the general verdict, so it really amounts to nothing.

The Chairman. Unless somebody can point out to me that this last paragraph, lines 20 to 27, is absolutely necessary to cover up serious conflicts in the Federal court in the effects of these rules, I think it ought to be eliminated.

Mr. Clark. I do not think you are going to have that very much. As I get it, the cases have got to come up from some provision that the court recognizes. The main case here came up from a territorial act in New Mexico.

Mr. Morgan. What is the name of it?

Mr. Clark. Walker v. The Southern Pacific Railway.

(There was a period of confusion during which the reporter was unable to record the discussion.)

Mr. Dodge. If you strike out the whole thing, the courts will continue, I suppose, to exercise this very valuable power as they have. The most important case we have had where specific questions were put with no general verdict was in the Federal court, and it is a very useful adjunct, and it tends to improve the jury trial. I representative the plaintiff in that case, as I remember it. It is a decided step forward to give t the court this power to improve jury trials and make it more conducive to justice. Without regard to any question of policies, I should never vote against restricting the power of the court which I understand it now has in this regard.

The Chairman. Nobody has made it clear to me yet that it is necessary to state here at length in the last nine lines what the effect of the general and special verdicts ought to be. The courts will handle that in their own way unless there is some serious--

Mr. Morgan. What precedents will they use, Mr. Mitchell? They can not use any precedents that I know of. It is not based on a statute.

Mr. Clark. That is correct.

Mr. Morgan. Because the English courts do not like it, and the English courts never entered a judgment on an answer to a special interrogatory; they ask the jury how about this, and so on, and so forth, and if there is a general verdict, they say, "Well, how could you give your general verdict that way? Go on back and think it over."

The Chairman. If without a statute or rule they can not enter a judgment on a special finding in the face of the general verdict, then what is the result? The defendant's lawyer, who always wants these things, has at least got this much; if the jury has been fluttering around and rendering verdicts on general sympathy rather than on facts, and he has got a special finding, that perhaps gives him an almost undeniable ground for demanding a new trial, and we are gaining something in the administration of justice when you do that.

Mr. Morgan. When you get new trials? I doubt it.

The Chairman. I think if the verdict has been granted on the sympathetic ground and the facts are specially found the other way, and you get a new trial, it will further the ends of justice.

Mr. Morgan. I think you are to end it right up on that finding.

The Chairman. Theoretically, I do not disagree with you. If I were just acting on this thing according to my own ideas about how jury trials ought to be conducted, and all that, I would be 100 per cent with you. I am looking at it from the standpoint of policy, and when we are giving effects to special verdicts that they have not got now, in the absence of some statute we are just starting a bonfire, that is all.

Mr. Dodge. Why not strike out the whole rule and leave it to the present practice?

Mr. Morgan. Yes, I think if you are going only to provide that, you might as well not have the rule.

The Chairman. There is an advantage in special verdicts. It gives a man at least a chance for a new trial if the special verdict is inconsistent with the general verdict, and nobody can criticize that very much, but when you enact a statute here that is not the law now, wiping out general verdicts and using the special verdicts alone, you are just starting up violent opposition to it.

Mr. Morgan. If we leave the rule where it is now, will not the courts just proceed to do what they have always done, use the special verdicts in States where they are used and not use them elsewhere?

Mr. Dodge. Yes, they will.

Mr. Morgan. That is what they will do.

Mr. Dodge. That is why I suggested leaving it out. I do not want to see the practice in Massachusetts changed.

Mr. Clark. I do not know; they do not now use that in Federal courts. That is not in the Conformity Act.

Mr. Morgan. They do it in Massachusetts.

Mr. Dodge. I have tried a case before a jury--

Mr. Clark. In Federal courts?

Mr. Morgan. Sure.

Mr. Clark. The matters at the trial are not within the Conformity Act.

Mr. Dodge. What is that?

Mr. Clark. Matters at the time of trial by jury are not covered by the Conformity Act.

The Chairman. Let us take a vote on striking out the
8/9 last part, and if anybody wants to move to strike the whole section we can vote on that. All those in favor of striking out lines 19 to 27, commencing with the words, "The court shall enter the appropriate judgment", say aye.

(On a show of hands the motion did not prevail.)

The Chairman. It stays in. There being no motion to strike it all out, we will pass on.

Mr. Donworth. Mr. Chairman, Professor Sunderland says he would vote to strike out the whole if a motion of that kind was made.

The Chairman. You mean from line 14 on?

Mr. Donworth. Yes. I would rather have it all out than put it all in. So, to test the sense of the Committee, I move that all from 14 to 27, inclusive, be stricken.

The Chairman. Where would that leave you?

Mr. Donworth. It would leave it that the general verdict is the only thing you can have except by consent of the parties in a strictly jury case.

The Chairman. I am against that because it takes away the power that the courts now have in some districts to submit special interrogatories.

Mr. Donworth. That is true.

The Chairman. All right. Any second to it?

Mr. Dobie. What is the motion?

Mr. Sunderland. Would it operate that way if you cut out the second paragraph?

The Chairman. Yes, because you have said already, "In any action tried by a jury the court with the consent of the parties, or of its own motion in cases not triable by right by the jury --" may submit several issues of fact.

Mr. Donworth. Yes, but specific questions of fact are not really special verdicts. There is a difference, and on them without any express authority the court could submit special questions of fact.

Mr. Sunderland. I think the courts always exercise that.

Mr. Lemann. It will leave controversy if you cut out that second paragraph.

Mr. Donworth. My reason is this: I agree with everything the Chairman has said, and what Senator Pepper has said, about the undesirability of lines 19 to 27, and I would rather strike out from 14 down rather than leave in what I think is objectionable matter, and later on the Supreme Court may make another rule if they want to and submit it to the bar, but I think at present this is undesirable matter.

The Chairman. Then the result would be this: If you strike out from 14 to 27 there is no such thing as permitting special interrogatories with the general verdict?

Mr. Donworth. No provision for it, but we leave it to the common law.

The Chairman. You better strike the whole rule out, then, because the inference is that you have covered the subject.

Mr. Donworth. I hope you have grasped my argument, that in order to get the undesirable part out I am willing to put out something that is a little desirable.

The Chairman. The motion is to strike out lines 14 to 27. If we all understand the effect, let us vote.

(The question was put to a voice vote, and, the vote being in the negative, the motion did not prevail.)

The Chairman. The whole rule stands.

Mr. Clark. The next question is Rule A-10.

RULE A-10

MOTION FOR DIRECTED VERDICT

Mr. Clark. There is, of course, some very important matter in that. Let me see if I can state that. There are several things, but, of course, when we get down from 9 to 24, we deal with the Redman case, but before we get to that, on the first part Mr. Mitchell had some suggestions.

The Chairman. In lines 7 and 8 it says:

"A motion for directed verdict may be general unless the court asks that specific grounds therefor be stated."

I objected to that and said I thought a motion for directed verdict should state the specific grounds therefor. I don't think a man ought to make a general motion and conceal in his bosom some technical defect in the proof, and then raise it afterwards,and not tell the court about it and give the other fellow a chance to correct it.

It is quite the oppsoite of what you have got. We are abolishing exceptions, and, therefore, we want to make the motion so the court will know what it is ruling on. I do not have any great feeling on that and I do not believe the court will get anything very specific. He will get a great bunch of language, but that is all right.

Mr. Olney. It does not make wery much difference from the practical point of view.

Mr. Morgan. Not if it is argued.

Mr. Olney. If the motion is denied and it goes to a verdict and the verdict is the other way, and the verdict is not in accordance with the motion, it cuts no figure. If it is the other way, the party will have the right always to raise the point that the verdict is not supported by the evidence, so I do not think it makes very much difference.

The Chairman. I think it makes a lot. Suppose I am the attorney for the defendant and the plaintiff has overlooked one item in the proof that we all know he could prove, and I state in the court room, "I move for a directed verdict," and sit down and do not have to say any more; the court does not notice the point and the plaintiff does not notice it and the motion is denied. Then I gamble with the verdict, and if I lose I walk in with a smile the next day with a motion for a new trial and say there is a defect in the plaintiff's proof. It might be something which could be cured right there.

Mr. Olney. Of course, if it has gone to a verdict, he

9/10 could not have said anything.

The Chairman. What?

Mr. Olney. He may not have made any motion or anything else.

The Chairman. He can make the point.

Mr. Olney. He need not even make the point, and if it goes to a verdict and it goes against him, it is still open to him to object that the verdict is not supported by the evidence.

The Chairman. It makes a new trial necessary and he is gambling on the verdict.

Mr. Lemann. The circuits are very much in conflict about the way you state your motion. In Circuits 1, 4, 6, and 9 a general motion is sufficient. In Circuits 2, 5, and 7 the general motion is sufficient, and in circuit 8 it is both ways.

The Chairman. The question is on the rule as stated, or on my substitution, that a motion for directed verdict shall state the specific grounds therefor.

Mr. Morgan. I think that is true, if we are going to try to make a judgment notwithstanding the verdict go through.

Mr. Dobie. Take a case like that Slocum case, where the idea was that the policy had lapsed; I think the judge is entitled to know that.

Mr. Loftin. I move that the language --

Mr. Olney. It occurs to me in this case, I had not thought of it before, but all my remarks were directed to a motion made at the close of all the evidence. My point would not apply at all to a motion which is permitted here at the close of the plaintiff's evidence.

Mr. Morgan. You are right there too.

Mr. Olney. I withdraw my point in connection with that.

Mr. Loftin. Mr. Chairman, I moe that the language which was stated by you be substituted for the language in the rule.

Mr. Donworth. Where does that go?

The Chairman. Lines 7 and 8, to strike out, "A motion for a directed verdict may be general unless the court asks that specific grounds therefor be stated", and substitute the words, "A motion for a directed verdict shall state the specific grounds therefor".

Mr. Dodge. I second the motion.

(The question was put and the motion prevailed without dissent.)

Mr. Dodge. I would like to ask a question about the first sentence. Does that mean the judge must pass upon the merits of the motion at that time and can not say, as they so often do, "I think the plaintiff may get something out of the cross examination of the defendant's witnesses and I do not want to pass upon the question now"?

Mr. Donworth. This means at the close of all the evidence.

Mr. Dodge. It says at the close of the testimony offered by an opponent.

Mr. Donworth. I think that should be at the close of all the evidence.

Mr. Clark. That was the matter we discussed before and we were directed to put it this way.

The Chairman. You are talking about the first four lines?

Mr. Dodge. Yes. The party may make the motion then, and must the court deal with it then or may he in his discretion, as they so often do, hold the decision until the evidence is all in?

The Chairman. The only effect of lines 2 to 4, as I understand it, is to enable a man to make a motion for a directed verdict at the close of the plaintiff's testimony without risking his chance of being allowed to put in evidence if the motion is denied.

Mr. Dodge. And without imposing upon the court necessarily the duty of deciding it then?

The Chairman. Oh, no.

Mr. Clark. Nothing is said about that.

The Chairman. Nothing is said about how he shall decide it.

Mr. Donworth. Of course, the word "testimony" in lines 2 and 4, I think, could be improved by saying "evidence".

The Chairman. Now, gentlemen, the next important thing under this rule are the Slocum and Redman cases. It is seven minutes of seven. Do you want to start in on these?

Mr. Clark. Mr. Wickersham's point on the motion for a directed verdict is that it is a waiver of a jury trial. In his comments he was right on the technical Federal law, but, as has been indicated, it was very easy to get around it.

Mr. Morgan. Sure; all you have to do is to reserve your right.

Mr. Dodge. We must get around that technicality.

The Chairman. We have abolished that rule and I have had six lawyers appeal to me to retain this clause.

Mr. Clark: Another thing might be added to our first alternative on the Redman case, where a final sentence should be added so you might have that before you as in point for consideration tomorrow morning: "The appellate court on review --" lines 21 to 24, add those to each alternative to make it perfectly clear.

Mr. Dodge. What is that? I did not get it. Will you state that again?

Mr. Clark; Here are three alternatives.

Mr. Dodge. What is to be added?

Mr. Clark. Add lines 21 to 24 to each one so each one will say that the appellate court on review may affirm such judgment in whole or in part, or order a new trial, or direct that the action be dismissed, or verdict be entered for any party, as the ends of justice may require.

The Chairman. I think, instead of taking up the Redman case we had better adjourn, and we will meet again at 9:30 a.m.

(Whereupon, at 6:55 o'clock p.m., a recess was taken until 9:30 o'clock a.m., Monday, February 24, 1936.)