C E C

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.

Thursday, February 20, 1936.

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Thursday, February 20, 1936.

9:30 a.m.

Washington, D. C.

The Committee met at 9:30 a.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,

Edgar B. Tolman, Secretary.

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The Chairman. Gentlemen of the committee, I think we can come to order. We will suspend the roll call, all members being present except Mr. Morgan and Mr. Gamble. I have a wire from Mr. Morgan:

"The doctor forbids my traveling at night. Hope to be there Friday."

That is a little disturbing. If the doctor is working on him it is too bad.

MEMORIAL RESOLUTION
on the death of
GEORGE WOODWARD WICKERSHAM

The Chairman. I am sure the members of the committee would not want us to proceed further without pausing to take cognizance of the fact that we have lost a member since our last meeting. I understand the secretary has been kind enough to prepare something for us to consider. We will hear from the secretary.

Mr. Tolman. I have been asked to prepare this memoir:

"The members of the Advisory Committee, appointed by the Supreme Court of the United States to assist the Court in the preparation of a unified system of general rules for cases in equity and actions at law in the district courts of the United States and in the Supreme Court of the District of Columbia, hereby express their keen sense of loss in the death of their fellow-member

GEORGE WOODWARD WICKERSHAM.

The record of General Wickersham's distinguished career, both in private life, in public office, and in great undertakings for the betterment of his chosen

profession and for the public good, cover too vast a field and are too well known to need further mention here. It is for us now sufficient to bear witness to the important part played by him as a member of this Committee in the task of simplifying judicial procedure in the courts of the United States and thus eliminating delay, uncertainty, and expense in the administration of justice.

General Wickersham attended every meeting of the Advisory Committee, participated in all the debates which arose, and brought to the conference the aid of wisdom derived from a half century of active practice in the courts. The value of his wise counsel cannot be over estimated.

General Wickersham's entire life has been marked by unfailing courage, but nothing could have been more gallant than the way in which, with full knowledge of the near approach of the end of his labors, he marched along his chosen path without hesitation and unafraid.

WASHINGTON, D. C.

February twentieth, 1936."

The Chairman. A motion is in order to adopt the memoir which has been presented by the secretary and transmit it to the members of Mr. Wickersham's family. I will explain that a copy of it has been engrossed by the Department of Justice for the signatures of the members of the committee.

Mr. Dobie. I make that motion, Mr. Chairman.

Mr. Loftin. I second the motion.

The Chairman. All in favor of the motion will signify their assent by a rising vote. (All members of the committee rose and stood for a few moments.) It is so ordered.

WELCOMING NEW MEMBER.

The Chairman. We have had the pleasure of informally welcoming our new member, George Wharton Pepper, and now formally extend to him a very hearty welcome. I know that we are all delighted to have Senator Pepper's help. Every time I look at him now I think of the boy who came home from school at the end of the term with all of his studies marked "B" and "C". His father got angry and inquired the reason why, and the boy said, "All of the A's have been declared unconstitutional." (Laughter.)

Mr. Dobie. General Mitchell, you probably know the counterpart. Some woman when talking about an automobile remarked, "Why not complain to the A.A.A.," of course referring to the American Automobile Association. The woman replied, "Why, the Supreme Court abolished that." (Laughter.)

INVITATION TO BRING UP ANY NEW MATTER.

The Chairman. Is there anything that any member of the committee wishes to bring up before we start in to consider what our method of procedure will be? (A pause, without response.) No one seems to have anything to suggest at this time along that line.

METHOD OF PROCEDURE.

The Chairman. Our first problem this morning, and I

think we may well devote some time to it before we really get started on our main work, is to consider how we are going at the situation now before us. The idea some of us had in mind seems to have broken down, perhaps because of the pressure with which we have been trying to proceed. It was the general plan that after this last proposition came in the members would sit down and carefully write out their suggestions, that they would go to the reporter and then the reporter would have the time to take such suggestions and adopt those that were acceptable, and make a revision accordingly, and that we could winnow out in that way a great many minor suggestions. But the reporter was shoved too fast in getting out the revision, he and the members of his staff; and then too the members of the committee were pressed for time, and perhaps not all of them have even gotten in their suggestions, and some of those that did come in arrived rather late and the reporter has not had time to do more than present an analysis of them, which is very helpful but falls short of accepting the language of them. That is the situation.

2 The reporter has prepared a general agenda with recommendation I think that we consider the points of substance, at least at the beginning of the meeting, and not get into matters of mere form or style or verbiage until we see how much time we have left after we have dealt with the substantial matters.

The subject of form of procedure for this meeting is now open for discussion.

Mr. Clark. I wonder if you all have before you the document I prepared and headed "Agenda"? It is possible you

might confuse it with another document which I headed "Suggestions to the Agenda." The suggestions document is an attempted discussion and analysis of the criticisms received. That is not the one I now have in mind. The one I mean is headed "Agenda. Meeting of Advisory Committee on Rules for Civil Procedure, Supreme Court of the United States, February 20, 1936."

Mr. Olney. Have you an extra copy of it, Dean Clark?

Mr. Clark. Yes. Here it is. That only goes down to the first section, but I sent yesterday to Major Tolman a similar document covering all the rules, except those which some of the members have been working on. You will see that that becomes a fairly light document.

The Chairman. You say the agenda goes down to what section?

Mr. Clark. It goes down to Rule 27. But there is in the office here, being now prepared, a similar document covering Rules A-1 to A-39.

The Chairman. Isn't that what I have here before me now?

Mr. Clark. No. That is my discussion of the criticisms.

The Chairman. It is headed "Agenda."

Mr. Clark. Well, it is a little confusing.

The Chairman. I am a little mixed on it. The agenda for the first section ---

Mr. Clark. (Interposing) That is as to rules 1 to 27 inclusive.

The Chairman. We will call that sections 1 to 27, then?

Mr. Clark. Yes. But Major Tolman is now having

prepared a similar document for Rules A-1 to A-39. But you will see that that is selecting only the points I considered most important, which makes it quite a task. I suppose there may be some of them omitted. Of course, this is not intended in any way to foreclose discussion, but is simply an attempt to single out things we can discuss perhaps with more profit.

The Chairman. Well, in regard to No. 2, "What title shall be used?" it seems to me we could well lay that over. We can adopt a title any time between now and January 1st. We could discuss for a long time the matter of the title without getting anywhere. And I suppose there are other things like that?

Mr. Clark. Yes. I think we erred on the side of inclusion rather than on the side of exclusion. We tried to put in the things we thought the committee would be interested in. These are not the things we felt should be discussed alone, but we put in some things that the members of the committee have raised points about. So that I think there may be quite a good many topics here you can pass over.

The Chairman. Suppose we go around the table and get comment from each member as to how he thinks we ought to proceed. Mr. Olney, have you any suggestions to make?

Mr. Olney. There are certain matters of very distinct importance that are raised by the present draft of the rules that we might well discuss with profit now. There are two things in particular that I myself would like to bring before the committee.

1. One of them is the matter of review by the trial court itself of the judgment by means of a new trial. There

is practically no provision for that in the rules substantially now. The only provision is that a lower court, the trial court, shall have the right to grant a new trial for good cause shown. That is a very important subject in my judgment, and should be discussed at considerable length.

2. I also desire to bring before the committee the method of appeal. I am quite opposed myself to the provisions -- or rather I will put it in this way and put it more affirmatively: It seems to me we could adopt here in connection with these rules a much more simple and more effective and less expensive method of appeal than is provided in these rules.

Now, there are other subjects of the same sort which should be taken up. For example, the more I have thought about it I am constrained to say it seems ill-advised for us to endeavor to attach forms. It seems to me ill-advised that we should endeavor to incorporate in the rules themselves a schedule of the time within which proceedings should be taken. And there are a number of other points, but they do not occur to me at the moment, that should be considered as we go through it. But these things which are things of substance we can discuss now.

So far as the general order or arrangement is concerned, and so far as the actual draftsmanship is concerned, it seems to me impossible for this committee, or rather impracticable for this committee, to give at this time the attention that is required in that respect. But that has got to be done, because none of us have the time, I imagine, to go thoroughly through these rules and make the changes which will be

required in order to make the rules right as a matter of draftsmanship merely.

And we must bear in mind in that connection that these rules are practically statutes. That is what they amount to. And they have got to be drawn with the utmost precision and accuracy. Otherwise we will cause more trouble than exists at the present time.

The Chairman. Will it conform with your idea if we take up the important matters in Dean Clark's agenda, and then went outside of it?

Mr. Olney. Yes.

The Chairman. Does any member of the committee wish to bring up any matter of substance, or how shall we deal with any suggestions that are not in Dean Clark's agenda? Shall we take those up in the course of considering these agenda points?

Mr. Olney. I suggest that we do that when we come to it in the rules, or at any time before being decided upon.

The Chairman. Mr. Dodge?

Mr. Dodge. I think we will have to go ahead much like we did in our last meeting, rule by rule, and touch the high spots, and leave questions of phraseology and style to be dealt with later by a small subcommittee. I do not see how we can avoid going through the matter in the order in which it is dealt with in the draft.

The Chairman. Dean Clark, your agenda deals with it as it appears in the draft?

Mr. Clark. Yes.

The Chairman. It might be worked out as we come to them.

Mr. Dodge. Yes.

The Chairman. Mr. Lemann?

Mr. Lemann. It seems to me the large group should concern itself only with the substantial problems, that we should not undertake to pass upon the form of expression in detail. I cannot conceive of our ability to do it unless we were to remain here continuously for perhaps a month. I am at present impressed with the idea that a small group of perhaps three will ultimately have to pass on all the stylistic suggestions, and then let the full committee meet to see their product before it is finally approved. But now I think we should confine ourselves to the question of substance, and use Mr. Clark's suggestion as indicating a concise statement of what these points are, with leave to anyone to bring up anything not covered by them.

The Chairman. You favor taking the rules up in their order, with his agenda, and allow each member to bring up matters of substance as we go along, any member to bring up any matter of substance that he is interested in?

Mr. Lemann. I think we might make progress by following his schedule of rules A-1 to A-39, with leave to bring up other matters after we are through.

The Chairman. Do you mean to take his agenda first, and then to go back over the rules?

Mr. Lemann. Well, the group would not go back over the rules one by one, but any member who wanted to bring up any matter he thought not covered here, would be at liberty to bring it up. I think by that method we would be certain at this meeting of covering all the substantial points. I am a

little afraid if we take up rule by rule we will get a little bit lost on the way, and may finally rush through the last part of it, and there might be some very important points of substance in the latter part.

Mr. Clark. If I may say so, I do not believe there will be many things which will not be found in here.

The Chairman. You attempted in your agenda to bring up suggestions of substance made by members who have turned in comments?

Mr. Clark. Yes.

The Chairman. Judge Donworth, have you any suggestions?

Mr. Donworth. Well, there are some ideas that I do not expect to be clarified until after hearing from others. Something depends upon what we hope to accomplish in the way of speed. I would regard speed as of far less importance than any other phase of our work. If we must put in a week here now, and then another week in April or May, or possibly in the autumn, I would rather see that done than to hurry through this very important work. I agree with what these three gentlemen have stated. Each one of them has expressed the idea of the importance of these statutes, and that is what they are. I think ultimately we will have to go through them, rule by rule, not with regard to matters of style, and as to that I agree with Mr. Lemann it may be safely left with the committee, but for substance. It is true in a general way without referring to the rules we can settle certain things. For instance, the question is up whether we shall retain the word "facts" in regard to pleadings, or whether we shall substitute "acts, omissions or occurrences." On that I do not

want to argue the merits now, but it seems to me if we want lawyers in the Code states to keep on doing what they have been doing in the past, we should use the phraseology they are accustomed to. If we change from "facts" to something else we will be suggesting to lawyers that we want them to do something different from what they have been doing in the past, and so on.

Then there is one important matter that can be settled generally I suppose, and which has been raised by Dean Clark, and that is whether on appeal the appellate court will treat findings of fact made by the judge in what used to be a law case, drafting findings differently from the way the court would treat a case that was formerly equitable. I do not feel it is important to go as far as Dean Clark shows in regard to abolishing the difference between law and equity. It seems to me that is something that comes out of the essence of things. And some general provisions like that we can discuss, but I do think when we get through settling these general things we will have to go through the rules, one by one, and probably have another session on the finalities, because I think there is a considerable amount of detail in each rule of a stylistic nature but of an important nature that we really will have to take the responsibility of settling.

The Chairman. Do you mean after we go through the general propositions on the agenda, we will then go back over the rules, one by one, in this meeting?

Mr. Donworth. Yes. And if we cannot do it at this meeting we will have to have another meeting.

The Chairman. I wonder if we won't duplicate the work

if we try to go over the high spots of the agenda, and then go back over it, rule by rule. I fear in that way we will not quite get a picture of it. That is the practical thing that worries me about the situation.

Mr. Donworth. In reply to that my thought was that certain general ideas, such as I have been discussing, when we come to the rules we will know that that feature has been settled but the details we have to work out.

5 The Chairman. How about you, Mr. Sunderland?

Mr. Sunderland. It seems to me the important purpose of this meeting will almost necessarily be to determine in detail the substance of what is to go into these rules. In other words, to indicate pretty exactly what shall be contained in the next draft. The next draft will be a draft of very great importance, and I do not see how we can accomplish what is desired without going through these rules, one by one, and discussing in detail the substantial matters that are to go in. I do not think we should bother with form at all at this stage. But I think every detail of substance ought to be considered and passed upon, so that the next draft will be clearly representative of the ideas of the committee as to what should go into the rules. When that is determined I think the drafting can be done without very much difficulty.

The Chairman. Regarding the machinery of operation, what do you think about starting in with the beginning of the rules and follow the agenda as we go along, and take up the important questions without reference to form or style, or whether you want an alternative method, and in that way shooting through the agenda first, and then going back over the

rules, one by one?

Mr. Sunderland. Personally I favor going over the rules, one by one, and considering the agenda, and any other matter affecting a rule. We must go over the rules in detail.

The Chairman. How about you on that point, Mr. Clark?

Mr. Clark. I do not think we are very far apart. We could begin with matters concerning specific rules, section 1, and take up as you will see, running down the page of rules, 1, 2, 3, 4, 5, and 6, on the first page.

The Chairman. They are tied to the rules.

Mr. Clark. What this does as to almost every rule is this: It asks questions, or just gives the running phrase to suggest questions you have raised, or that seemed important. It is really more or less a direction of the questions as to the rules rather than a very great amount of consideration of the rules. So I do not think there is very much difference really about the method of their consideration.

The Chairman. Well, I do not want to do anything myself except to see that it is done as well as we can. I might suggest that before the Court desires to adopt any set of rules it wishes to get out a preliminary draft to the bench and the bar, and give them a period of several months to study and criticise them. And if we are going to do that so as to have these rules ready by January 1, 1937, I will say that my communication with the Chief Justice indicates that we must have a draft for the Court to consider by May 1st. In other words, they want a month before they adjourn to consider our draft with a view to deciding whether they think it is fit to go out to the bench and the bar, see that they are proper for

them to approve it. Now, if you do not get it to the Court before the 1st of May so they can do that before they adjourn, you will probably not get it to the bench and the bar before the end of the summer, and then it is too late to get a set of rules ready by the 1st of January. If we wait until October, when the Court comes back, and then send them out, the bench and the bar will have no chance to give any adequate study to them.

Mr. Tolman, have you any suggestions?

Mr. Tolman. Mr. Chairman, I think this agenda gives us a starting point and a guide to our procedure. But I think we ought at the same time, when we have passed on the questions that are indicated on the agenda as to any particular rule, be called on to make other suggestions with regard to that rule, and a more or less tentative disposition of the rules had before we pass to the next point on the agenda. I think it will save time to do something of that sort, and time I think is a very important matter. For instance, we have something on rules 1, 2, 3, and 4, and rule 5 is omitted, and then we come to 6, and rules 7, 8, and 9 are omitted. I think following this agenda when we get through with one, and 5 is not mentioned, that everyone should be called upon. That is, the opportunity to be given to see if there is anything to be discussed on a rule not mentioned on the agenda. I believe in that way we will get through sooner than we will by going over the matter otherwise.

The Chairman. That will involve taking it up in the order of the rules.

Mr. Tolman. Yes; and the agenda is prepared in that way.

The Chairman. Senator Pepper?

Mr. Pepper. I am more interested in the use of the statutes. It is a question of working it out in a practical way, and of course the thing that I yearn for is to take them up rule by rule, one after the other, using the agenda which the reporter has submitted on the points in the rules. I think, Mr. Chairman, our experience in the Law Institute indicates more clearly how you can handle general or abstract discussion with reference to a particular rule, that it precipitates loss of time in abstractions, and that the more concrete the results are you are likely to get, depends upon a proper and direct discussion. But I would be in favor, which I think several gentlemen have pre-agreed upon, of proceeding rule by rule, using the reporter's agenda as a basis for any of those he has mentioned.

The Chairman. Mr. Loftin?

Mr. Loftin. My thought is that we can follow the agenda, taking up the particular points that are included in the agenda, and leaving to each member of the committee to bring up other suggestions or criticisms as to the particular rule referred to in the agenda, and also as to rules that are not referred to in the agenda.

The Chairman. That follows the rule-by-rule method, and using the agenda as the basis for discussion.

Mr. Loftin. Yes, sir.

The Chairman. Mr. Cherry?

Mr. Cherry. I am in favor of that.

The Chairman. Mr. Dobie?

Mr. Dobie. I am in favor of that. I feel very strongly

in regard to what Professor Sunderland said; I think thirteen men would waste a lot of time in connection with verbal changes. I think all of us have prejudices in connection with the use of words. All of us have stylistic phrases that are well known to us. One expression I do not like is "same" or "the same." I am willing to admit it is a prejudice. I also like shorter sentences. I do not like "it is" and "he is" in a sentence. But I do not think we should go into that now. A great many comments were verbiage. As I wrote Dean Clark, I think that should be referred to a small committee, and that we should not attempt to fight it out here. Otherwise I agree with Senator Pepper and Major Tolman, to use the agenda as a sort of guide and go through it rule by rule. I think time is very important. I think the whole thing should be sent to the Court as soon as practicable. And I think it should go before the Congress when it meets in 1937. Also I agree with Judge Donworth, that it is too bad we have to hurry, but think we should.

The Chairman. I think it is the sense of the meeting that our method should be to take up the draft, rule by rule, and when we come to a rule we will consider suggestions in the agenda relating to it. Then if there is nothing in the agenda any member of the committee is permitted to raise any matter of substance connected with the rules. And that in our discussion we will avoid matters of form, style, verbiage, and arrangements, and matters of that kind. Is that about the gist of it?

Mr. Olney. I think the chairman will be called on in that connection to rule rather strictly upon the members of

the committee themselves, because we are so apt to be tempted to go out into discussions which are not necessary.

The Chairman. If you will not be offended I will do that as far as I can, subject to appeal from the ruling of the chair.

Mr. Loftin. Mr. Chairman, I think you were pretty easy on us at the last session. I think you will have to be a little more strict this time and hold us down.

The Chairman. Of course, the character of the work we were doing at the last sessions made it possible to allow pretty free talk across the table, and two or three conversations at one and the same time. But I think we probably made progress by doing it. Still I am afraid this time we will have to stick a little closer to the possession of the floor and let one man alone who has something to say, and all listen to him.

Mr. Loftin. One of the things I am disturbed about in connection with suggestions and criticisms, is that I notice a number of matters are opened up again that we thought were settled at the last meeting after free and full discussion and a vote.

The Chairman. Well, it may be that I am guilty of that. But I am rather pugnacious and persistent. On the other hand, to the extent that I have done that, I felt that where we have a substantial minority we should have their ideas, and that their ideas might be put up to the Court in such a way that they will realize there is a difference of opinion and two views, and let them decide it. Within limits, I mean. I do not think we ought to put up everything, say something

on which one or two members might disagree. But there are a good many matters of substance that might well be put up in that way.

Very well, then, if it is the pleasure of the committee we will start in with the consideration of the draft along this line.

CONSIDERATION OF TENTATIVE DRAFT II
(in connection with the agenda)

The Chairman. The first thing on the agenda, that really has no relation to any rule, is this:

"Is the general arrangement and character of the rules satisfactory?"

Isn't that a matter that we might leave to consideration of style and form? Arrangement certainly is.

Mr. Olney. It seems to me it should be.

Mr. Clark. What we are particularly referring to there is the very great change made from the last draft. We put all the front part in, and at the rear made certain combinations of rules and things of that kind.

The Chairman. Isn't that a matter of style and clarity and draftmanship and form rather than of substance? I think it is. I think the matter of style might be quite a task. If we find something difficult in a phrase and agree to change it, that might be somewhat of a task. So far as the scope of it is concerned I think we are generally satisfied on that point.

Mr. Loftin. I move that that be left to the style committee.

The Chairman. It is so ordered unless there is objection. The chair hears none. Now I make the same suggestion as to names and rules and title. I think that is a matter of form. Unless there is objection we will pass that.

Mr. Clark. What my thought deals with is the question of certain specific forms of words. These can concisely be taken up in connection with specific rules. I would put it with specific rules at the end.

The Chairman. I think we better do that.

Mr. Dobie. I should like to hear some general suggestions about that because I think there is a right clear line of cleavage there. I know the late General Wickersham had, for example, some phrases he was very fond of, such as "cause of action", that the reporter and Mr. Morgan, and I also was in that group, rather objected to. I think it is a right big point whether we want to use these stock code phrases about which there is a good deal of dispute and uncertainty and confusion, and yet on others there is familiar terminology, or whether you want to get away from them.

The Chairman. I should be inclined to think that such an expression as the phrase "cause of action" is a thing that the drafting committee can settle. When we come to consider it, all right.

Mr. Dobie. I think it would be best to take them up, rule by rule.

The Chairman. Yes. And in No. 3, I think they are matters to be dealt with in the adoption of the rules rather than in a preliminary way.

Mr. Clark. No. 4 comes up particularly on comments by

the chairman.

The Chairman. That comes under specific rules, and I think we can lay that over until we come to the rules.

Mr. Clark. All right.

The Chairman. The schedule of time raises a point we can decide, and that is whether there should be a schedule, or it may be that a summary ought to be considered rather than a part of the rules. What is your pleasure about that?

Mr. Olney. That question will arise immediately in connection with Rule 11, when we come to it.

The Chairman. I see.

Mr. Clark. Also as to Rule 7, the schedule itself is attached to that rule.

The Chairman. We can take that up when we come to the appendix. The sixth point:

"Is the method adopted by these rules as to the statement of statutes superseded, modified, and continued, satisfactory?"

I think we better take that up as we come to the rules. That is too general.

Mr. Clark. That does come up in connection with Rule A38. You will need to have it in mind somewhat as we take up other sections because we refer to the statutes. Are we going to refer to them just by name, or are we going to incorporate them, or what is the plan?

The Chairman. Isn't that a thing that depends on the particular rule? Can we lay down any general formula on that? I should think not. I think we better leave that, as it arises under the rules.

Now, next:

"Should footnotes to the rules be prepared, and, if so, of what general form and content?"

Mr. Olney. I think in connection with many of the rules that we adopt there should be at least in the form of our report to the Supreme Court, some statement of the reasons which induced us to make such change or make such provision. Whether it is put in the form of a footnote, or just what form that expression to the Supreme Court should take, is a matter that better be left until we get the rules drafted and see what we are doing about them.

The Chairman. It occurred to me that footnotes explaining why it is done, and what we have, and what the purpose and effect is, are useful not only to the Court but when the preliminary draft goes out to bench and bar.

Mr. Olney. I am inclined to think that is it.

Mr. Dobie. Would that be a matter for the Court to decide, how many of these they want published or to go out, or is that for us?

The Chairman. Yes, for the Court. Your suggestion is that wherever there is reason for a footnote or explanation or something of the kind, that it would be well to make a note in our draft to the Court?

Mr. Olney. Yes. I think some explanation should be made. And as has been suggested, when the question whether that should go out to the profession or not, I think that is perhaps a slightly different matter. You know very frequently in connection with the interpretation of a statute, and we have approached these rules from that point of view, it is a very

distinct advantage to have a footnote giving the reasons for the change. It is a great aid in interpretation very frequently.

The Chairman. Well, is it the sense of the committee that the reporter be instructed generally wherever there is a real need for it and value in it, to place footnotes of explanation in his next draft?

Mr. Clark. Before the answer is made might I ask a little further: I think it would be plausible, and perhaps profitable, to make a certain amount of footnote material to every one or almost every one, which might take the form of giving the former practice. An equity rule might be based upon it, or a statute. And then of course it could go further and refer to state practice or not as deemed desirable.

The Chairman. I think that would be very useful to a court. It is useful to me when I go through these rules to find out what they are based on.

Mr. Olney. That illustrates something I have in mind: Suggestions of that sort are apt to be of great value to a court when the rule is once determined upon, even though it may not be of particular value to the profession.

The Chairman. Well, our primary task is to get up a draft for the Court. The question comes up in that connection really. What might be done in the draft when prepared is a different matter.

Mr. Lemann. Following the suggestion by Judge Olney, I find often that notes are rather heavily documented material. When I look down and see footnote1, and footnote 2, perhaps two paragraphs in small type, I have lost the gist of the

matter. That is just a stylistic point. In order not to crystallize any resolution, I wonder if we may not leave that open for discussion by the style committee, as to whether these annotations should be by way of footnotes, or as Judge Olney suggests, perhaps in the accompanying report. I do not think we ought to decide that now. I do not think we ought to give instructions that would force one method rather than the other.

Mr. Olney. It seems to me that just as to the form in which these matters should be put, explanations as it were of the rules, might be well left until we get further along and have something much more concrete before us.

The Chairman. Well, the reporter of course has to make up another draft. I suppose it is the sense of the committee that annotations be made, either rule by rule or in a separate document, which are reasonably needed to explain the basis or reasons for the rule. That is a matter of discretion I think, as to whether when a situation arises a note is needed. Is that the general sense of the committee? I think the reporter would like to have some instructions about it.

Mr. Tolman. It seems to me the derivation ought to be always in the notes. That is to say, the provisions of the Code which are superseded or from which it comes, or the old equity rule. I think it should be noted.

Mr. Pepper. We found in annotating the United States Code it was enormously important to state the pedigree of a particular section, whether in the form of an accompanying annotation or footnote I should think is a matter of style. But as Major Tolman says, as an historical matter, as to whether

a numbered rule is from a pre-existing rule or a statute, is important.

The Chairman. In the American Law Institute matter, the method followed in making a draft has been to place notes and comments at the end of each rule, and thus having them readily available in connection with the rule. That has been the course followed right from the beginning. And it would be awkward to put these things in a separate document. It would be inconvenient to work with them.

Mr. Lemann. Explanatory notes have always been separate, because they have been very much extended. I think they have not been put under the rules.

The Chairman. Senator Pepper, I think you have made some distinction as between an explanatory note and an historical note.

Mr. Pepper. There are three things: an historical note, an explanatory note, and comment. The explanatory note has been kept separate. And then the comment has followed the black letters to which it refers. I do not mean to make any suggestion as to the stylistic idea, but as a matter of substance I want to follow Major Tolman. I think the pedigree of the particular provision is enormously important as a guide in interpreting it.

The Chairman. Now, the question the reporter submits is this:

"Should footnotes to the rules be prepared, and, if so, of what general form and content?"

What shall be our answer to that?

Mr. Clark. I might say that I think a certain amount of

material, whether in the form of a footnote or otherwise, and I am not sure which would be best, would be very useful. Of course it may be a bit dangerous too, and that is why I brought it out. You can make a footnote without taking some position, other than on the matter of derivation. If you should say "derived from so-and-so" the derivation may be so distant that your bald statement may have an erroneous impression. If you go ahead with a little explanation you are probably going to say: From equity rule of a certain number, changed so and so, and you have immediately made a statement. I should rather like to do it and then it would be helpful, but when you do it I suppose you will be putting out material which they have stated with the rules as published, and which will or can be used in the eventual interpretation of the rules.

Mr. Donworth. Mr. Chairman, I should like to make a motion in order to put this in a different form: that the reporter prepare notes, and that so much of the notes as show derivation be in all cases printed by means of footnotes; that the method of putting before the profession the remainder of the notes be left to the committee on style or the final committee.

The Chairman. Does the chair hear any second?

Mr. Pepper. I second the motion.

The Chairman. All in favor of the motion will say aye. (A number of ayes.) Those opposed will say no. (Silence.) The ayes seem to have it.

Now we pass on to the heading:

"Matters concerning specific rules."

The first question is as to the subhead:

"Union of law and equity -- Is this subhead satisfactory?"

I think that is a matter of form and style. Is there any objection to that ruling? (A pause, without response.) If not, we will pass that and go to the next one:

"Is the phrasing of Rule 1 satisfactory?"

Although in one sense it is superficially a matter of style, I think it does go to matters of substance. Now, as to the question of the phrasing of this rule, Mr. Morgan had a suggestion. He did not like it. I am suggesting that it be made to read this way:

"All distinctions between the forms of action at law and suits in equity, and in the practice and procedure therein, are abolished, and hereafter there shall be only one form of civil action and of civil practice--"

The reporter does not like that. I have no definite conclusion about it. So that Rule 1 is open to discussion. Mr. Morgan's point was that we do not abolish all distinction between equity and law; it has been suggested that possibly we do not lay enough emphasis on the matter, but that certainly we do not abolish all distinctions between law and equity. The question before us is whether we abolish distinctions between law and equity.

Mr. Lemann. Shouldn't we pass this until Mr. Morgan is present? He will be here tomorrow.

The Chairman. According to his telegram he will be here Friday. Maybe it will be a good idea to pass it by.

Mr. Olney. I have very definite objections to Rule 1 in the way in which it is put. They run much along the line

of Mr. Morgan's objections. For instance, and I am quoting the rule:

> "All distinctions between actions at law and suits in equity and in the forms of actions and the practice and procedure thereof are abolished ---"

is not true. A distinction between them must still exist in the very nature of things because of the difference in relief sought. What we are doing is to abolish the difference in procedure and in practice, not the distinctions between them.

10 The Chairman. In the form.

Mr. Olney. It is not merely a matter of form. It is the difference in the practice and procedure between the two sorts of actions. Those we are abolishing.

The Chairman. Not entirely.

Mr. Olney. With the exception of the right of trial by jury.

The Chairman. A lot of questions have been raised about admissibility of evidence, the right to review, and the extent of review, of findings of fact, and all those things.

Mr. Olney. Yes, but I am under the impression that when we finish we will not have very much difference between them in those particulars. The difference in practice that we are not abolishing is that in connection with the right to trial by jury. But we are dealing not with distinctions between law and equity but with the difference in practice and procedure.

Mr. Clark. Well, I should have to disagree. I think we certainly are abolishing the difference in the actions. And it does seem to me we are confusing a little bit the

question of the substantive rights behind, and those rights are rights of specific purpose of relief, injunctions, and so on. And the actions are gone, and should be gone. I would not consider it quite so important had not the Codes used this expression, and these other formulae are redrafts from the code expression. There has been difficulty enough under the Codes in keeping a simple and orderly procedure, notably in New York. And if now in these rules we retreat from the code expressions, it seems to me the clear mandate of the federal judges is that this does not go so far as, for example, the New York procedure, or the California procedure. That is why I think it is more important than most questions of wording. But to say that we abolished only procedural distinctions, I think is not so. We are abolishing the actions. We are not abolishing the substantive rights, of course. I think there is the real problem, the fact that this form of expression is the historical code expression.

The Chairman. Why don't you say: All actions at law and suits in equity are abolished?

Mr. Clark. Well, the historic form has been that the distinction is abolished. I think it is worth a good deal to stick as closely as we can to that formula.

The Chairman. What is wrong, then, with my suggestion?

Mr. Donworth. The chairman retains the words that distinctions are abolished.

Mr. Clark. I like the chairman's much better than the other suggestions.

The Chairman. Maybe it is not good, and I do not claim it is, but what is wrong with:

"All distinctions between the forms of action at law and suits in equity, and in the practice and procedure therein, are abolished---"

Is your only objection that it is retreating from the code expression?

Mr. Clark. Yes.

The Chairman. But is it an actual statement of what you had?

Mr. Clark. I suppose it is pretty nearly. In the footnote to Rule 1:

"Note. The following are representative statutes in Code States:

"New York Code 1848. Section 62---"

And then that section is quoted. You will see that the New York Code starts out with the distinction between actions at law and suits in equity, and the forms of all such actions and suits.

Mr. Pepper. Mr. Chairman, as a new member of the committee who has come with an uninformed mind to this tentative draft, I venture to make this suggestion: I have noticed in a number of rules, and this is an illustration, that the enacting part of the statute comes in the second half of the rule, and there is very little difference of opinion as to how that should read. The difficulty arises in the attempt to state in the first part of the rule the conclusions that follow from what happens in the second. If, for instance, the rule contained nothing but this: Hereafter there shall be only one form of civil action and of civil practice and procedure in the district courts of the United States and in the

Supreme Court of the District of Columbia, it seems to me our
11 minds would all meet on that proposition. But I fancy there would be as many different ways of stating sentences after that as there are minds around the table. I cannot quite see the value in attempting to formulate the consequences of that enactment. That is clear and specific, and it accomplishes the precise purpose as I understand it that the committee has in mind.

Mr. Dobie. You have omitted all in front of the semicolon.

Mr. Pepper. Yes. To read this way: Hereafter there shall be only one form of civil action, and so forth. I do not see but what that is the whole thing we are trying to accomplish, and each of us would probably, as Mr. Clark has indicated, have his own comprehension as to the extent to which that involved merely questions of procedure, to what extent it involved questions of substance, and any other points. But there is an affirmative, definite, clean-cut statement which leaves no room, it seems to me, for misunderstanding as to what is intended.

The Chairman. Would that work in your judgment, Dean Clark?

Mr. Clark. I would say that I would rather have it stated in the limited statement that is suggested.

The Chairman. Well, isn't it sound? Suppose you simply cut out distinctions between actions at law and so forth and adopted Senator Pepper's suggestion and would take the last three lines and make it our rule. Would it do the business?

Mr. Donworth. Every code I think that has attempted to do this has done more than start with the semicolon. They have stated the reason why. I do not like to leave out things that the profession are used to unless we mean something by leaving them out.

Mr. Pepper. I have noticed as a practical matter that a great deal of the discussion in courts is over the significance of deductions from the fundamental proposition. It has often seemed to me that the function of legislation, and this is really legislation, is to state clearly the fundamental proposition and let the individual mind interpret it scientifically. That is the way with a law of Congress.

Mr. Lemann. I wonder, if we just take the last three lines, if somebody would say: Why did you change it? Then they will begin to draw a lot of inferences and deductions. On the other hand, being slaves to that superstition makes us retain a lot of stuff that we ought to improve on but that we have not the nerve to try to improve on, because of that very superstition. So we let it remain without change. I wonder if that suggestion would expose us to the charge of only changing the form of action. There are a great many other things that are going to be more uniform. If we say: Hereafter there shall be one form of civil action, and then you retain the words "civil practice and procedure" what about that?

The Chairman. Yes.

Mr. Lemann. Mr. Morgan was going to leave that out.

Mr. Olney. I suggest that the word "form" as used in the rule now is used in two different senses in the same sentence. "Form of action" when you speak of it in the real

sense of the word can only refer to forms of action at common law and nothing else. That is what is meant by forms of action.

Mr. Donworth. Such as trespass on the case.

Mr. Olney. Yes, and things of that sort. Then it goes on in the same sentence to speak of "form of practice or procedure," and "form of civil practice and procedure." That is an entirely different notion. They are not the same.

The Chairman. Your idea is in forms of action and suits in equity?

Mr. Olney. Equity of course has no form in the rule since the words "forms of actions" is confined to actions at law. And the use of the word "form" in this rule in my judgment is going to make difficulty, because strictly speaking there is no form of practice and procedure as a rule.

Mr. Clark. That was used in the original field code.

Mr. Donworth. Mr. Chairman, with due deference it seems to me any one of these rules is satisfactory. We all know what they mean. I will vote yes on a motion to adopt either one of them.

The Chairman. Shall we lay this over until Mr. Morgan comes tomorrow and see what he says about it? He has definite views about it. Or shall we attempt to decide it now?

12 Mr. Loftin. I think it would be only fair to Mr. Morgan inasmuch as he has raised the point rather definitely. So I move that it be deferred until Mr. Morgan arrives.

The Chairman. All in favor of that motion will say aye. (A chorus of ayes.) It is so ordered.

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RULE 2. DECISIONS TO BE ON THE MERITS

The Chairman. The next question raised by the agenda is with respect to rule 2. I think it is a suggestion based upon a criticism I made. I objected to the phrase "affirmatively appears" in lines 18 and 19. It says:

> "And no mistrial shall be declared or rehearing or new trial allowed or any order or judgment set aside, unless it affirmatively appears that the error or defect prejudicially affected the substantial rights of the parties."

I said about that:

> "Furthermore, the requirement that 'it affirmatively appears' that the error was prejudicial seems to me to be new and questionable. In a jury trial if a substantial error is made in admission of testimony or charge, how can the aggrieved party affirmatively show that but for the error, the verdict would have been otherwise?"

The general rule now is that if you commit an error in a substantial matter, in a charge or in the admission of evidence in a jury trial, the presumption is that it prejudiced the party. You do not have to show it affirmatively. That is my suggestion, and that is the question. It certainly is not new, if it is construed precisely as it reads. I suggested, for lines 15 to 20, striking out "and to the end that decisions shall be on the merits", and the paragraph would read:

> "At any stage of the proceedings, errors, defects, or objections, which do not affect the substantial rights of the parties, shall be disregarded

by the Court, and no mistrial shall be declared or rehearing or new trial allowed, or any order or judgment set aside by reason thereof."

That is, by reason of any error which does not affect the substantial rights of the parties. It leaves out that affirmative showing that prejudice resulted.

Mr. Clark. On the exact form to be used, I think that variations, of course, are quite possible and in point. Let me just recall to your minds attempts that have been made by legislation and by the equity rules. Section 391 of the Judicial Code, which was the "harmless error" statute of February 26, 1919, reads:

"On the hearing of any appeal, certiorari, writ of error, or motion for new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The equity rule is chiefly directed to evidence, of course. Rule 46, at the end of the statute dealing with testimony and objections on evidence, says:

"If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require."

Equity rule 19, on amendments, says:

"The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

We were attempting to get a formula which would limit reversals for technical errors. Whether this goes too far or not I do not know, but I have the feeling that it gets over the point that the court should not reverse unless there is material prejudice. Of course, after all, it does not really tie the hands of the court. It is an admonition more than anything else.

The Chairman. But it is a new phrase. Take my specific objection. This rule applies to jury cases as well as equity cases. Suppose there is some evidence that was introduced erroneously, that might have prejudiced the jury. Nobody knows whether it did or not. You say that there shall be no reversal unless it affirmatively appears that the error or defect prejudicially affected the substantial rights of the parties.

Mr. Dodge. Is it not a question of burden of proof? In your case it must affirmatively appear that it did not affect the rights of the parties. He says it must affirmatively appear that it did affect them.

The Chairman. Yes.

Mr. Dodge. I like yours better. The statutory language leaves the burden on the one who says that this did not affect the substantial rights. In other words, should not the presumption be that error does affect their substantial rights?

Mr. Clark. I think that that states the question. It

is a question of the burden of showing, really, but I thought the burden was and should be the other way. Is it not clear that equity rule 46, at least, clearly makes the burden the other way? That is the one I just read you. It shall not reverse the decree if evidence is erroneously admitted unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require. Ought not the burden to be on the person who wants to upset the judgment which has been entered?

Mr. Dodge. The equity rule relates only to the erroneous admission or exclusion of evidence.

Mr. Clark. That is true.

Mr. Dodge. This is much better.

Mr. Donworth. I read from the Code of Washington:

> "The Court shall, at every stage of an action, disregard every error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."

Mr. Clark. That is the substance of my suggestion.

Mr. Olney. This rule, as drawn here, is not entirely new. It has been adopted in most of the code States, and notably in California. So far as the burden goes, I think the burden, under any theory of appellate procedure, finally rests on the appellant, and it comes down to a determination by the appellate court of whether it can reasonably be taken that the error is such as to have prejudiced the party in his rights, or

whether it might well have resulted in a different judgment or conclusion or verdict being reached. I think, as a matter of fact, there is very little difference between what Dean Clark has in mind and what the Chairman has in mind, and it is something that can be very easily taken care of in the matter of draftsmanship, when it comes to specifically expressing the idea that it should be done in such fashion, and I think that your views are quite reconciled in the matter. There is no doubt about the proposition that where evidence has been introduced which, in itself, may well have prejudiced a jury or brought about a different verdict, the party should have a new trial, that is, if the evidence is incompetent. The general interpretation that has been put on such statutes in the other States would give a new trial in any such cases as that, and I think we can leave this particular point to a matter of draftsmanship.

The Chairman. You read the language of the rule, then, as it is given, in substance, to mean that it does affirmatively appear that the error ordefect prejudicially affected the substantial rights of the parties if the error was of such substantial nature that it might have influenced a jury?

Mr. Olney. Yes; if it can reasonably be taken to have done so.

The Chairman. That is not what he says.

Mr. Olney. You can easily change this language so that it goes no further than that. My suggestion would be that that is a matter finally of draftsmanship, because I think all of us have pretty definitely in mind the same thing.

Mr. Sunderland. You might avoid controversy and accom-

plish the same result by simply using the language of equity rule 46. I think it means substantially the same thing. The last sentence reads:

> "If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance."

The Chairman. Then I take it the sense of the meeting is that the rule be so worded as to carry out the thought I had in mind. Take a jury trial, for instance. What is a substantial error which may or may not have prejudiced the jury? Nobody knows, but it might have done it. If that is the basis for reversal, it is easy enough to fix the language of it, if that is what the committee wants. I only raised the point because it seems to me to introduce a new element in the review of verdicts.

Mr. Dodge. The equity rule applies only to evidence that is excluded, not to evidence that is admitted, or to any other kind of a ruling. I should rather have it read that errors may be disregarded where it affirmatively appears that they do not substantially affect the rights of the parties. That is, in substance, that rule.

Mr. Dobie. I think that is a question of distinction, and not a matter of verbiage. I do not mean to go into any Wigmorian discussions as to exactly what we mean, but I think it is important that we do away with the old idea of common law that error presupposes prejudice, and I think we should certainly put upon the appellant or the attacking party the

burden of showing, at least substantially, that the error might have affected the verdict or prejudiced his substantial rights.

The Chairman. You say "might have".

Mr. Dobie. Yes.

The Chairman. This rule says it must affirmatively appear that it did. That is where the difference lies in substance, I think.

Mr. Cherry. Is not your point met, General, by the distinction between error that is prejudicial and error that is not? Is there any difference, using that phrase, Mr. Reporter, unless it shall be found to have been prejudicial? Does not that import the point the Chairman has in mind, that you cannot say, in a jury case, whether it actually did or did not? But "prejudicial error" has acquired a fairly definite meaning, has it not, in the States in which they have used that as a test for reversal?

Mr. Olney. Are we not endeavoring there to agree upon the language of this, when, as a matter of fact, what we want to agree upon is the idea, and then leave it to the draftsman? Take this idea that if evidence is introduced before a jury that is incompetent, and prejudicial to the defendant, you should distinctly say there should be a reversal in a case of that character unless the court can say it is perfectly evident that it had no effect. It is almost impossible for the court to say that. I think I always will be agreed that that should be the rule.

The Chairman. If that is the sense of the meeting, we can leave it to the drafting committee, but it seems to me you

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are settling a question of substance.

Mr. Olney. As to whether that is what we mean?

The Chairman. Yes.

Mr. Olney. That is the idea. That is a matter of substance.

The Chairman. Is that what the committee wants?

Mr. Clark. May I make a further comment? I do not believe that any rule would lead to a different result in a jury trial than Mr. Mitchell has in mind. There might be two possibilities of modification. One is the one that Mr. Sunderland suggested, just to take the words of equity rule 46. There are two things about that which should be noted, and Mr. Dodge has called attention to them. The first is that that deals with evidence, and, second, that it does try to put the burden upon the appellant. I should think it desirable to have it apply generally, and to keep the burden on the appellant. Another possibility is in our line 19, to put "affirmatively appears that the error or defect may have a prejudicial effect".

The Chairman: Perhaps I can clear it up this way. You have not intended, by this rule, to state the result differently than I.

Mr. Clark. Not in a jury case, no.

The Chairman. With that understanding, let us leave it to the committee on style and form, if we are agreed on the substance of it.

Mr. Clark. I would like to add this, that this expression is very close to the expression of the California code, section 475.

Mr. Dobie. Read it.

Mr. Clark (reading). "The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done, if error is shown."

Mr. Cherry. Is not that a definition of the word "prejudice"?

Mr. Olney. Of course, that is a very awkward thing, but the courts, in interpreting that statute, have interpreted it exactly as the Chairman modifies it.

The Chairman. In view of the statement of the Reporter that that is not intended to bring about a new situation in jury trials, I withdraw my insistence on any change, and am quite willing to leave it to the drafting committee.

Mr. Dobie. I am willing to leave it to the Reporter, with that proviso I put in, that the task must be on the ap-

pellant to show at least a fair probability of substantial prejudice.

Mr. Clark. That is the main thing we are after. We want to put the burden definitely on the appellant.

Mr. Dobie. That is all I want to do. Provided you do that, I am willing to leave it to the drafting committee.

Mr. Pepper. May I inquire whether, in connection with such reference as this to the drafting committee, it is within the functions of such committee to consider a point that arises in connection with many of these rules, where there is a statement of the laudable purpose of the committee, or a statement which has no definite significance? For instance, in the opening of rule 2 it says:

"At any stage of the proceedings when the ends of justice so require" --

Later, in line 15, it says:

"And to the end that decisions shall be on the merits."

Is it competent for a committee on style to consider whether or not we should limit all aspirations upon legislation?

The Chairman. I think that is one of the things we will probably do.

Mr. Clark. I think there should not be too many aspirations stated, but I must say that in this sort of a job, where we are dealing with rules that leave so much discretion to the court, which is what we should do, some statements of aspiration, or yardsticks -- is that word also unconstitutional? -- are more worthwhile than in statutes dealing with substantive

rights. So, while I do not object to having some of the prayers go out, I hope that they do not all go out, because I think they have some effect as admonitions to the judges in passing on matters of discretion.

The Chairman. I think it would be competent for the committee on style to deal with that.

Mr. Clark. In connection with the first paragraph, Mr. Morgan and others made extensive changes, and we indicated our willingness to accept them. I do not know whether you want to go into the first paragraph or not.

The Chairman. Are not those matters of form and expression?

Mr. Dobie. I think so.

Mr. Olney. In connection with this rule, and in connection with the very matter that has been discussed, I should like to offer these suggestions.

This rule covers three very different matters. It covers, first, the matter of permitting amendment of pleadings or process. It covers, next, the matter of affording a party relief against accident, excusable neglect, and so forth, which is a different thing. It covers, third, the admonition that all errors and defects that are not substantial shall be disregarded so far as overruling a judgment or order, if made, is concerned.

Those are three very different things, and they depend upon different considerations. Each one of them has its own considerations. They should not be lumped in one rule. They should be stated separately. That, of course, is a matter of form, in a sense, but, in connection with it, and in connec-

tion with the very point Senator Pepper has raised, I doubt the advisability of putting this rule at this point at all, because each one of those subjects that I have touched upon, which are included here in this rule and stated together, comes up naturally in connection with the matter to which it refers.

In other words, there is a rule hereafter governing the matter of amending pleadings and process. Very well. Put these principles there where they belong, in immediate connection with them.

As a matter of fact, everything that is stated in this rule 2 is hereafter stated, in effect, in later rules, and they should be stated but once. It is dangerous business in a statute to endeavor to say something twice in different places, because you may not say it in exactly the same way. This whole rule ought to be revamped from that point of view.

The Chairman. I think that suggestion is a very good one, and I think it ought to be recorded for the Reporter and, after he gets through, for the committee on style.

Mr. Donworth. Before we pass rule 2, there is a note at the bottom which indicates that a portion at the top is a suggestion that I made. In making a suggestion at the former session I quoted from the Code of Washington from memory, and I find that, as usual, I made a mistake. I would suggest, without asking any debate on the subject, that the Reporter make a verbal note that in place of "misfortune", the first word in line 4, the Code of Washington uses the words "mistake, inadvertence", which, of course, is the same idea. I just suggest that for his consideration.

The Chairman. I think the committee has agreed as to the substance of this rule, and particularly that point raised about the affirmative appearance of a prejudicial result. I think we are agreed on that, and we can pass on, with the understanding that the rule will be modified to carry out the purpose we all have.

Mr. Pepper. May I ask one question before we leave that rule, Mr. Chairman? It has to do with the provisions in line 8 and subsequent lines, in regard to substitution or the adding of parties. It is said that this may be done where the substitution will not impair the rights of any litigant, change the grounds of action, and so forth. Sometimes the substitution or addition of a party affects the jurisdiction of a Federal court.

The Chairman. We have that later.

Mr. Pepper. I wanted to inquire whether that was taken care of.

The Chairman. The Reporter has asked a question about whether he should put in a general declaration that nothing should be construed as an attempt to enlarge the jurisdiction.

Mr. Clark. I might add, for Senator Pepper's benefit, that in our first draft we had quite a little on jurisdiction. The committee thought we ought to take that out and make no statements about it. Now, the question is, Shall we just assume what is our idea, that these rules do not affect jurisdiction, or shall we make an affirmative protestation later about it?

The Chairman. That is on the agenda later.

Mr. Pepper. I hope you will excuse me for asking ques-

tions which, it may turn out, the committee has already considered.

Mr. Olney. There are certain further suggestions which I should like to make in connection with these rules that I think are probably matters of substance.

In the first place, in connection with the right to have an order or judgment set aside on the ground of mistake or excusable neglect and inadvertence, I think there should be a time limit within which the party must make such motion.

The Chairman. That comes up later. I have a special point, and he has brought it up in his agenda, on the time limitation on motions for new trial, judgments notwithstanding the verdict, and so forth.

Mr. Olney. I do not refer to judgments in spite of the verdict, or moving for that, but setting aside an order -- for example, something in default, or something of that sort. There should be a time limit on that. I wish to call attention to the necessity for that, because it is very genuine.

Mr. Lemann. Could the rules of the local courts take care of that?

Mr. Olney. There is another thing in connection with this matter of amending the pleadings. It says "process, proceeding, pleading, or record". Amendment to pleading and process is understandable, but when it comes down to amending a record, that should not be permitted unless the record fails to state accurately what took place. Again, there is a difference there, and a very distinct difference. You can amend pleadings and process for the purpose of future action, or to justify past action, but the court ought not to amend a

record unless the record is wrong in that it does not state correctly what took place.

Going on further, when we come to the matter of what amendments are permitted, as this rule is drawn it provides that an amendment may be permitted by substituting another cause of action, without any limitation whatsoever. It would permit a man to bring a suit upon a promissory note, and then to amend so as to recover a judgment for assault and battery. That cannot be done. That is going altogether too far. There must be limitations placed upon that right of amendment in that respect.

Mr. Dobie. Don't you think the discretion of the court would take care of that?

Mr. Olney. I do not, by any manner of means. The amendment which should be permitted should be an amendment that refers to the same "occurrences, omissions, or transactions" that the Reporter has referred to. They cannot go entirely outside those matters and bring in something else that is entirely foreign to the suit that has already been brought.

The Chairman. I suppose the statute of limitations would take care of itself under situations like that.

Mr. Olney. I am not speaking of the statute of limitations.

The Chairman. A court, in allowing that to be done, delays the trial, and may substantially prejudice the rights of the parties.

Mr. Clark. In the amendment section we put in a provision which has been debated before, as to amendments after the statute of limitations has run. There is a question before

the committee as to whether we want to try to cover that separately or not. I favor covering it. I think a great many of the committee did not wish to.

Leaving out the question of amendments and the statute of limitations, and taking the other point, I shall have to say that to date we have gone on quite the other theory from the one which Judge Olney presents, and if we were to adopt his idea it seems to me it would very seriously change the whole theory of joining claims, parties, and so forth, because we have provided for absolutely free joinder of all sorts of claims, our theory being that the action as instituted ought to be able to cover all the claims between the parties in litigation, leaving it to the court to dispose of them at trial in the most convenient way, so that as it now stands you can join assault and battery, and promissory notes, or whatnot, at the beginning, and you can drop any one as you go along. The whole theory we have gone on has been absolutely free joinder, and if we have absolutely free joinder at the beginning we ought to permit amendments subject, of course, to this question of the statute of limitations, and subject to the matter of delay of the trial. So that on that I am afraid that we raise questions fundamental not merely to amendment but to joinder generally.

You will note that our instituting of suit is very simple. Why should we have to have the formality of different suits on assault and battery and promissory notes if the plaintiff has an honest claim on each one? Why should they not all be brought up at one time, with the possibility of separate trials if they cannot be easily tried together?

The Chairman. This discussion emphasizes, I think, Judge Olney's point, that various provisions of these rules ought to be cut out and put in the particular rule to which they relate, together with the proper limitations on each one at that point.

Mr. Clark. I ought to add, on that point, that I think I will have to say quite frankly, in answer to the question raised by Senator Pepper, that this rule is mostly, if not wholly, admonition and prayer. If it is not useful admonition and prayer, I suppose we will have to take it out, but this sort of thing is a very usual provision. Judge Olney is quite correct, that the specific rules come later, and this is a general statement of purpose, and what we are after.

Mr. Cherry. If it is only admonition, could it not be made much shorter, and without any attempt at detailed statement? I think that is where the difficulty comes. When we attempt to make a detailed statement about amendment, for example, there is the possibility of its clashing with or being somewhat inconsistent with the later statements about amendment.

The Chairman. It is inconsistent in one way. It does not say that all these things shall be subject to the limitations otherwise stated in the rules, as to time, circumstances, and conditions. It seems to me it would be safer to take these various unrelated parts of this rule and put them in under the proper section, where you are talking about amending pleadings, adding causes of action, and so forth, at which point the limitations and conditions under which they are granted are dealt with.

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Mr. Olney. If you want an admonition in here, it should be cast in language of admonition merely. This is stated in the language of the rule.

The Chairman. Do you want to take any action on rule 2 to direct the Reporter to split it up and put these provisions under the appropriate sections which specifically deal with this sort of relief?

Mr. Dobie. In that connection, I would like to ask if Mr. Cherry's suggestion, which affects the question you just put, is that we eliminate the first paragraph, and then have a broad general statute here, and then leave the rest under the other? Was that your suggestion?

Mr. Cherry. No. It would include part of what is in the first paragraph. Without attempting to state it, I would think it would exclude the attempt to be specific. It would be just an admonition as to amendments, and as to disregarding the unprejudicial error, leaving the details of the rules for the proper place. I think general admonition is a very good thing in this connection. It gives a sort of tone or color to all the rules that follow. I think the difficulty comes in attempting to be specific.

Mr. Sunderland. You might have one single rule that covers all the admonitions we want to make with respect to the entire administration of this thing, except the rules.

Mr. Cherry. That is what I had in mind.

Mr. Olney. There is a subsequent rule which says that these rules shall be liberally construed for the purpose of serving justice.

Mr. Donworth. In line 10, if you leave out the word

"litigant" and strike out the rest of that paragraph, it seems to me you eliminate what has become controversial here in this discussion. I think there is no objection down to the word "litigant". The whole idea here is to get away from the common-law rigidity and make the court an instrumentality of justice. It seems to me that down to "litigant" it does that, but when you get into this "changing" there, you run into what Judge Olney has spoken of as covered by other rules.

Mr. Dobie. There is a good deal of enumeration above that, though.

Mr. Olney. The first thing here is:

"shall relieve a party from the results of accident, surprise, misfortune, or excusable neglect, or from the fraud or misrepresentation of an adverse party."

Mr. Donworth. There is nothing about changing the cause of action at all. It is all about helping a man who is in trouble with his pleadings.

Mr. Olney. What I was saying was that it is not merely in the way of an adminition, but it is stated in the form of a rule.

Mr. Lemann. If a footnote is to be appended to the official edition, perhaps there can be a note stating that this is a statute of general principles, and that it is to be construed by reference to particular provisions later, and that specific provisions are to control. That is really what has been suggested here. I would think that would be the rule adopted by the courts, but we might put in a note to that effect, and that would certainly guard against the abuse of this

admonition.

The Chairman. The Chair is a little in doubt as to whether there is a concrete proposition before the committee. The only one that struck me as being definitely concrete was the suggestion of Judge Olney that this rule relates to a variety of matters, each one of which is specifically dealt with later, and that there be no limitations or conditions imposed here of any definite character, but that it would be better to split this rule up and put the parts of it under appropriate sections where the limitations and conditions are made as to the granting of relief. That is a concrete suggestion.

Mr. Tolman. I would like to add one suggestion to that, to supplement it. I think we ought to keep either the Chairman's revision or Mr. Morgan's revision of the second paragraph.

Then I think we ought to change this first paragraph into a general admonition for free, liberal right to amend, and then take all the details out of the first paragraph and put them where they belong.

Mr. Sunderland. It seems to me that it is very important, in getting up this draft, to eliminate repetition. There are a great many things which appear in various places in the rules, apparently for easy reference, but I believe there is great danger involved in duplicating the same ideas in different connections. I think it would be better to go through and eliminate every repetition and duplication, and have each matter covered just once somewhere in the rules.

The Chairman. That is in line with Judge Olney's sugges-

tion.

Mr. Olney. I regard that as exceedingly important. There is some trouble in the statutes where they have endeavored to repeat the same idea, and they have not repeated it accurately.

Mr. Sunderland. There is a good deal of that in these rules. It probably makes them easier to understand as we read them, but I believe the interpretation would involve a great deal of difficulty.

The Chairman. I have a feeling that rule 2 is out of place. We have certain provisions here for relief, but we have not yet prescribed the procedure. Why not go on to our procedure, and then put in our provisions for relief from excusable neglect and all that sort of thing later?

Mr. Dobie. I think Mr. Sunderland's point is very important. One example is the case of venue removal. There are two separate statutes. One of them says you must remove to the district of the State court which covers the county. Another statute says "to the proper district". The question is whether that "proper" requires it to be the district of either the plaintiff or the defendant. As we all know, until the Wisner case was repudiated in the Lee case, it caused the courts a terrific lot of trouble. I think Mr. Sunderland's point is very important. If you attempt to restate it, or use different words, right away they are going to say, "Which one of those is proper?"

The Chairman. Is there some motion anyone wishes to make, to bring some part of this discussion to a close?

Mr. Olney. I move, Mr. Chairman, that the three matters

that are dealt with in this rule be stated once hereafter in connection with the particular subject to which they refer, and that this rule be eliminated here, unless and except possibly for some admonition, if finally we think it is well to put that in. If we want to put that in, then let us cast it in the form of an admonition, and not in the form of a rule.

Mr. Donworth. Mr. Chairman, I am in sympathy with the object of the motion, but this is one of the advanced ideas that are common now in all the State statutes, to get away from throwing a man out of court for slight errors. I do not think we should leave it now to a mere inheritance of the new practice. This being a part of the new practice -- and by "new" I mean code practice, and other revised practices -- in some way the ideas here should be taken care of. I have no objection to having it split up and postponed, but I do not think we ought to indicate displeasure at the ideas here in regard to relieving a party, and so forth.

The Chairman. I do not understand there has been any objection to the substance of the thing, except the one criticism that this point was left open, without enough restriction as to time and conditions.

Mr. Olney. There is also a very important matter on which I have come finally to a conclusion definitely opposed to that of Dean Clark. Dean Clark has definitely in mind -- and it runs through a great many things here -- the thought that in one action every matter of dispute between the parties named, whether they have any relation to each other or not, may be taken up and tried and determined. He also has in

mind that they may bring in a third person and make him a party defendant, and practically settle with him on every dispute.

The Chairman. Judge, does not that come up more appropriately under the head of joinder?

Mr. Olney. It comes up there, but it is involved immediately here, when this rule permits the amendment of a pleading so as to substitute an entirely different cause of action.

The Chairman. But the main question is, What can you join? If you can join certain things, then the subsidiary question covered by this rule is, when you stick them in, can we not leave that until we come to joinder?

Mr. Olney. I do not care when it comes up.

The Chairman. I think you can register your point in connection with it when we come to joinder.

Mr. Olney. I call the attention of the committee to that particular thing, because it is something that the committee can settle at this meeting, and it should be settled.

The Chairman. I was in error in stating the substance of this rule as it was objected to. I see I went too far, but I think the question of joinder is a matter we had better take up when we come to that rule.

There has been a motion, but no second.

Mr. Pepper. I second it.

Mr. Donworth. What is the motion again, please?

The Chairman. The motion was to take rule 2 and split it up according to its different subjects, and state them in connection with the single rule that deals with each subject later, and not have the same matter dealt with twice, in two

different places.

Mr. Lemann. I see a good deal of this rule was originally in the rule dealing with amendments, so the effect of this suggestion would be to put it back where it originally was, or at least a good deal of it.

Mr. Olney. There is another point to which I wish to invite the attention of the committee. I do not think there will be very much question about it. In the last paragraph of this rule it says:

> "And to the end that decisions shall be on the merits, the court at every stage of the proceedings shall disregard all errors, defects, or objections made therein, and no mistrial shall be declared or rehearing or new trial allowed or any order or judgment set aside, unless it affirmatively appears that the error or defect prejudicially affected the substantial rights of the parties."

They are covering two different things, and the considerations that apply are not the same. If a defect or error is called to the attention of the court before judgment, particularly before trial, the question of whether any attention is to be paid to it depends ordinarily on what has been its effect in the past, but also on the question of how it is going to affect the trial of the cause in the future, as to whether it is going to substantially prejudice the parties when it comes to the trial of the action. But when a judgment once has been rendered, then you consider only the past effect, as to whether the party has been prejudiced. That distinction should be made in the rules, and the rules should not be stated in

the same way for those two different sets of facts.

Mr. Pepper. Mr. Chairman, I seconded Judge Olney's motion not with the understanding that Mr. Lemann has, that the motion will, in effect, relegate this entire matter to the caption of amendments, but that so much of amendments as relates to amendments would go to amendments; so much as relates to joinder would go to joinder; and so much as relates to proceedings in review, whether by new trial or by appellate proceedings, would go to that section; and also with the understanding that in so distributing we are not going to lose the very important objective of emphasizing liberality as distinguished from technicality in each of those particulars.

The Chairman. I so understood the motion, with the additional qualification that in such matters as joinder and things of that kind we were not necessarily approving the fundamental principle, but we would take that up under the rule to which it related.

Mr. Lemann. I did not understand it to be restricted to amendments. I merely referred to that. Historically a good deal of it was under amendments. It would mean that that much of it would go back to amendments. As I understand it, it is not proposed to eliminate a general rule 2 here, with this emphasis on liberality, but it should be very general in its terms.

Senator Pepper. That is a separate question, is it not? Is not the first question the one raised by the motion, that the matter now in rule 2 be distributed?

Mr. Lemann. He said he had no objection to preserving something in the way of an admonition. Is that right, Judge

Olney?

Mr. Olney. No; I have no objection to that.

Mr. Pepper. Must we not keep in mind that we are enacting rules? We must not trespass upon questions not susceptible of statement in rules as such. The difficulty I have with what we talk about as admonitions, and so forth, is that they have to do with temperament. They have to do with the principles upon which the man administers the judicial office. I do not quite see how they can be made the subject of a statement in a rule.

Mr. Clark. I was going to ask a question, and I think perhaps Senator Pepper brings it out. I understand the motion generally, and we can follow it out, but is there to be anything left here, or not? That is a question I would really like to have answered. Are we to have some rather general statement here, or not? Those general statements are very usual in the codes. Some people may miss them if they are not here.

Mr. Donworth. I think Senator Pepper's elaboration has clarified the entire matter. I would dislike to see a motion passed that would give a black eye to rule 2, but so far as reconsideration and distribution are concerned, I am in entire sympathy with the matter.

Mr. Loftin. As I understood Judge Olney's motion, he suggested that the matter of having some general provision of this kind be left to the draftsman and the committee on style.

Mr. Olney. We might substitute for this rule a rule that begins:

"In accordance with a rule subsequently found

herein, these rules shall be liberally construed with reference to the accomplishment of justice" and then put in such admonitions in that connection as we may desire.

The Chairman. There is a rule along these lines, and I think the admonition could go with that.

Mr. Clark. That rule is A-36.

The Chairman. The motion left it open to put in a general admonition at the appropriate place.

Mr. Olney. Yes. I left it wide open.

Mr. Donworth. It leaves it open to put in everything that is in rule 2, does it not, if we so decide at the time?

The Chairman. In its appropriate place.

Mr. Donworth. Yes.

The Chairman. Are you ready for the question?

(The question was called for, and, upon being put, the motion was carried.)

RULE 3. COMMENCEMENT OF ACTION, SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS.

The Chairman. We come now to rule 3. The Reporter, in his agenda, merely says:

"How should an action be commenced?"

That bears on the commencement, first affecting the statute of limitations. Possibly his question came up because of the comment I made with respect to subdivision 2, line 4. He provided that an action may be commenced (1) by the service of a summons. The other way to commence it under the statute as he has it is

to file a complaint with the clerk, provided that a summons is served upon the defendant, or the summons is given to the marshal for service, and then served, at any time within 60 days.

I said:

"I favor restoring the requirement in rule 2 that to commence an action by filing the complaint, the summons and the copy of the complaint must be delivered to the marshal for service." * * *

"The only reason for allowing commencement of an action by something short of actual service is to cover cases where the defendant is not accessible. The rule as drawn allows commencement by filing alone, with a deliberate delay of 60 days in service. It permits concealment from the defendant for 60 days of the fact that an action has been commenced against him. The substitute for actual service should be a bona fide attempt to obtain it."

I favor restoring the provision that to commence an action, so as to have all these effects on the statute of limitations, and so forth, you should not only file your complaint, but you should deliver the papers to the marshal for service, and make a bona fide effort to obtain service.

Mr. Dodge. Contemporaneously with the filing.

The Chairman. Yes. And the only excuse for not commencing it by service is because the defendant is not accessible. The only substitute ought to be a bona fide effort to obtain service, and it is almost universal, I think, that you cannot commence an action without service, or without handing the

papers to somebody who can serve, and who should serve, if he can locate the defendant.

That is the first point on rule 3.

Mr. Clark. Major Tolman had some other suggestions.

The Chairman. Let us stick to one at a time. There is the first vital thing, I think, in rule 3. Are you satisfied to allow the action to be commenced by filing a complaint, without any attempt to get the marshal to serve?

Mr. Olney. Mr. Chairman, in that connection, as this rule reads now, it is a condition subsequent to the commencement of the action that summons be actually served.

The Chairman. Within 60 days.

Mr. Olney. Within 60 days. Take this case. The statute of limitations is approaching the end on a man's cause of action. He cannot find the defendant to serve him. Under those circumstances, the only method in which he can bring his suit is to file his complaint in the manner that is provided, the alternative method that is provided here. Then, if it is provided that he must serve that complaint within 60 days, and he still cannot find the defendant, within 60 days, he is gone. There is no objection whatever that I can see to providing that it shall be a condition subsequent to the commencement of the action brought by filing a complaint with the court, that the process be put in the hands of the marshal within a certain length of time, to serve, but to make the service itself a condition subsequent is entirely wrong, and will result in great injustice.

The Chairman. It is very plain that you cannot abolish the statute of limitations by filing a complaint under any

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statute I know of, and giving the man a month in which to make the service, or a year.

Mr. Sunderland. You can stop the running of the statute by keeping alive the summons in the hands of the sheriff. You can issue alias summonses indefinitely. That is provided by statute.

The Chairman. You are getting onto another point. Perhaps I am wrong about this. My point is this. He may see the defendant walking around the street, and instead of serving him, he goes and files his complaint, and then, for 60 days, he does not have to make any effort to get service at all. I say he ought to place the papers in the hands of the marshal, whose duty it is to make service. Let the 60 days business go. Let us deal with that separately. That is another point, as to whether we shall require service within 60 days or six months, or renew the summons, or whatnot.

Mr. Olney. Perhaps I did not make my point clear. I quite agree with that. What I was pointing out was that under the rule as it was worded it makes it a condition subsequent that the man be served. You are going to have the possibility of great injustice.

The Chairman. Let us take that up separately. I think that is a different point from the one I am making. I have made no comment about the 60-day limit on service.

Mr. Clark. Speaking on the first subject -- perhaps it is rather difficult to separate them -- it seems to me unfortunate that we should extend the statute of limitations in this way. In fact, I was not too happy about any provision of this kind, but the committee wanted one, and a limited provision does exist in the States. That is what we tried to do.

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But now, turning particularly to Mr. Mitchell's point, Mr. Mitchell's point can, of course, be covered. It adds certain requirements. I was a little doubtful whether the requirements produce sufficient results to justify making the requirements complex in that way. If they do, that is all right. But let us see what they mean. He wants the service by the marshal and not by any person. Now, general service can be by any person of 18 years or 21 years.

The Chairman. You want delivery of the papers to the marshal, whose duty it is to get busy and serve them. And if you can find somebody else to serve, all well and good?

Mr. Clark. Now, to have that mean anything to the defendant, because he is the one involved, it would seem that there must be two requirements there, in addition to the delivery by the marshal. The first is that the delivery to the marshal be made within a certain time. The expression has been "at once"; and if we mean "at once", I suppose that will do. But we should insert a requirement of the time of delivery to the marshal, somehow.

And the second point is that the delivery shall be open, and a matter of public record in the marshall's office.

The Chairman. Every official I ever heard of, when he gets the summons for the delivery of service, stamps it "received." There is no reason to place any time limit upon the delivery to the marshal, because the action has not commenced until you do deliver. And if you want to let the delivery go by the statute of limitations, that is your business.

So, if you file the complaint, the action has not commenced until you, in your own discretion, deliver the papers to the marshal for service. And the moment that is done, the action

is begun. But you do not have to provide a rule that he shall do it within one or two days. You do not care when he does it. But you simply say that he shall not make a record until it is delivered.

Mr. Donworth. Mr. Chairman, I like your suggestion; but I should like to call attention to what seems to me to be a hiatus in it. There are two ways of commencing the action, as our general outline indicates: One, by filing the complaint, followed by something or other in an attempt to serve; and the other, that regardless of the complaint, the service of the summons--and the service of the summons does not ordinarily have to be done by the marshal; in fact, if you commence the action before filing the summons for service, does not your suggestion debar the service by an individual?

The Chairman. It may be that that is a matter that should be taken care of, if it impliedly does that. I should not think it was necessary to imply that you could not hand the summons to someone else to serve and, if you could get an actual service, bring him into court. But that is a matter of revision, I think.

Mr. Dodge. I should like to ask you how this leaves us in New England, where we begin service by a writ to the serving officers, commanding them to make service of writ or summons or both. I wonder if there should not be a third alternative: "or by writ issued from the clerk's office, where that is the local practice."

Because we have a practice in New England of a writ to make an attachment on property; and that is always issued by a writ issued from the court.

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Mr. Clark. That is really covered by our section that deals with special remedies. That provides for the local law of attachment, with only one modification: That when the local law of attachment permits the order of attachment by someone other than the clerk, we set that aside and say that the order of attachment must be made in all cases by the clerk. But that really would take care of that situation. That is section A 27.

Mr. Dobie. With that taken care of, I think it would probably be unwise to make this any more complicated or to provide for any adaptation of local laws in connection with service.

Mr. Dodge. I do not agree with that. You have provided for the local law of attachment, but that you cannot begin the suit in that way, by issuing the kind of process with which we began suit, and by which the attachment is made.

Mr. Donworth. Mr. Dodge, as a real difficulty there--having practiced both in Maine and in Washington--the Maine practice is much like that of Massachusetts. The writ that begins the suit in Massachusetts is both like an attachment and a declaration, is it not? That is to say, your charge or allegations are attached to the writ, are they not?

2 Mr. Dodge. No, very seldom. You begin a writ by putting a date on it. And if you begin within a reasonable time of service, the date which is put on it in the clerk's office is the date of the beginning of the action. And I think that a rule which prohibits anybody in the New England States from beginning an action in a way with which they are familiar--which is the universal way of beginning actions at law--would

created a lot of confusion there. And I think we ought to have the alternative method with which we are familiar. You make your attachment first, and the attachment must be made before the summons is served.

Mr. Lemann. Do you use "attachment" in the sense of actual seizing the property of the defendant?

Mr. Dodge. It is ordinarily the attachment attaching the debts.

Mr. Lemann. You cannot bring in a person, ordinarily, by that process in the Federal court?

Mr. Dodge. We can.

Mr. Lemann. But as I understand the rule, you cannot get jurisdiction by attachment of property. If you have personal service, you can attach property.

Mr. Sunderland. That is unquestionably true. That is Big Vein Coal Co. of West Virginia v. Read, 229 U.S. 31. In the Federal courts, attachment is an ancillary process.

Mr. Dobie. That is Clark v. Wells, 203 U.S. 164; Laborde v. Ubarri, 214 U.S. 173.

Mr. Lemann. And I wondered whether it would not be misleading to put in here something of a question that you could get jurisdiction in a Federal court by a lien on property. What you have to do is to serve it on the man, on the defendant.

Mr. Dodge. Exactly. I did not mean to eliminate that. We begin the attachment on the writ. And if that is done, we make the same notation in the summons as in the writ, and serve that. I merely proposed to begin an action by that method with which we are familiar. We have writs issued from the clerk of the United States court.

The Chairman. It seems to me that you are dealing with a very fundamental question. The statute under which we are operating provides for a uniform set of rules. Now, they ought to be uniform, as far as they can be, even though they must necessarily disturb things to which people are accustomed. And the moment that you get into the field of allowing local practice to apply with respect to the way writs are issued or people are brought into court, and all that, you get lack of uniformity. And we all concluded that with respect to such proceedings as attachments and garnishments, and so on, we should not deal with that, but leave that to local practice. But when you are getting into such a thing as practice in commencing a suit and summonsing a man to appear at court, we break down our uniformity if we are going to allow an individual to commence a suit in the way he is accustomed to doing, in the locality.

Mr. Clark. I should like to add, that this one point we very definitely discussed at the last time. I think that there was an alternative in the first draft that local practice might govern, and I think that the committee very definitely decided in favor of uniformity.

Now, my own State has the form of writ of summons with the complaint in it. But notwithstanding that, I think we have covered the situation in a way which is not very difficult for the attorneys in my own State. They will have to look at the rules, and to understand them. Of course it is a little different, but not very much. Because the rule of attachment that I referred to, requires that whenever you have an attachment, the writ therefor must issue out of the court and be served by

the marshal, which means that you can combine; and there is nothing to prevent combining the writ of attachment, the summons, and the complaint--either tandem or, if not, all lumped together.

So, in my own State, therefore, if you started an action with the attachment to which we are accustomed under local law, we would be following a system not very different from the system we are now following, by the effect of this latter writ on attachment.

Mr. Sunderland. Take the [illegible] situation, which is hideously complex: In an ordinary equity suit you file a bill in equity, and in there you ask that summons be served. In some instances you file merely a praecipe for summons, and that is all. But in 19 States we do it by this notice. I think it would be very, very unfortunate if we should vary from uniformity in this situation, and I am against it.

Mr. Dodge. But you do not eliminate the writ of attachment; you preserve the local laws as to attachment, which is always done by the original writ.

Mr. Loftin. Mr. Dodge, wouldn't your situation be taken care of by the provision, for one, by the service on the defendant of a summons, followed by your writ of attachment?

Mr. Dodge. Yes; but it complicates the situation a good deal. We have the original writ, to begin with, and that the action would not begin by the date on the writ but by the date on the service of the summons which the officer would make out to accompany it, and which would be served after the attachment.

The Chairman. Could it be served with it?

Mr. Clark. Yes.

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Mr. Dodge. It is served after the attachment is made.

Mr. Olney. Mr. Dodge, is this attachment of which you speak an attachment made to require jurisdiction?

Mr. Dodge. Not to require jurisdiction; to require security.

Mr. Olney. It is purely ancillary?

Mr. Dodge. Yes; it complicates the practice, but perhaps not too much so.

Mr. Olney. I should say that, under the practice that is contemplated, the writ or attachment could be taken out immediately with the filing of the complaint and the delivery of process to the marshal. As I understand it, under Chairman Mitchell's suggestion, the action will be commenced the moment the complaint is filed and the summons is delivered to the marshal. Now, that can all be done at the same time.

Mr. Dodge. Yes.

3 Mr. Olney. Then you can get your writ. Your action is commenced and your writ of attachment will issue.

Mr. Dodge. I think that can be worked out. But you are dealing with the five States, and I do not want too much antagonism to these rules to develop in those five States. But if you begin your action by filing the complaint, and take out the writ at that time, as well as the summons, you do not have the difficulty of making an attachment before your suit has begun, as you would have if you adopted that first method.

Mr. Donworth. I think the difficulty will be aided, when we come to the specific provisional remedies: That wherever

? the statute of a State leaves a supplemental local rule, the attachment can be issued in accordance with that local rule.

I think that Mr. Dodge's difficulty is not so much with the commencement of the suit as with the getting out of a writ of attachment, where that is desired. And as the gentlemen have already pointed out, the situations are few where you are entitled to an attachment in the Federal court because of non-residence. Of course, however, a foreign plaintiff may come into Massachusetts and sue. But then I think that the authority that Mr. Dobie cited would not be in point. I understand that it is the Massachusetts practice that you are entitled to an attachment without bond and as a matter of course. Is that true?

Mr. Dodge. I think that is true in five of the six New England States.

Mr. Dobie. Practically, you are right. In almost all of those instances, attachment is issued without service.

Mr. Dodge. No; that is a small proportion of the cases. The attachment is ordinarily made by seniority.

Mr. Dobie. No; I mean that practically all of the decisions of the Supreme Court are on jurisdiction.

Mr. Dodge. On jurisdiction?

Mr. Dobie. Yes; that is all I mean.

Mr. Donworth. I think that the practice can be taken care of, if the attachment ends.

Mr. Dodge. I think so. And I think that a local rule can be made not inconsistent with this, and that that will take care of it.

The Chairman. Well, we are back to the suggestion that the action is not commenced with the filing of the papers with the clerk, but must be commenced with the actual service.

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Mr. Dodge. I want to say that that makes the commencement of the service, under provision 2, not a matter of court record but a matter of record of the marshal's office. And I think that is a little doubtful. This, you see, is a way of extending the statute of limitations.

The Chairman. But the vital thing is the date of delivery by the marshal, and it is a matter of preserving the record of the exact date.

Mr. Dodge. Yes.

The Chairman. Now, the provision has been in force for many, many States. I practiced under it for 40 years, where you commence an action by the filing of the complaint and delivering of summons to the sheriff. And in all the years that I practiced under it, I never heard of a case arising where there was any controversy as to the date of delivery to the sheriff. It is a universal practice of the official who gets the papers, whether he is a marshal of the United States court or a sheriff of a local court. He has a system, and files the papers and receives them, and they are marked "Filed." And there has never been any difficulty arising. I do not think it is a practical difficulty, in actual experience. That is my observation of it.

Mr. Pepper. Mr. Chairman, is there anything in this consideration that would make it proper for us to consider the matter of the meaning of the law and as to the necessity of the matter of definition?

The Chairman. We shall come to that, under the definition of the necessity for filing papers. I am in the minority on their decision, but that will come up.

Mr. Loftin. Mr. Chairman, you also raised the question, did you not, as to having the summons accompanied by a copy of the complaint?

The Chairman. Yes. I shall speak of that, too.

Now, here we have a rule that provides that the action is commenced by service of the summons; and we have a rule, A6, which provides that the summons must be accompanied by a copy of the complaint. They are not quite consistent.

Then there are some more rules here, which I think are unnecessary, which provide for the situation when you do not have a summons to go with the bill of complaint, and how you should go about getting a copy of the summons. I think that lawyers are interested in getting a copy of the complaint with the summons. The defendant can not do anything much until he gets the complaint. And one of the things that stood out, in my mind, in practical experience, under a system which allows summons without serving the complaint, is the necessity of getting a copy of the complaint, which you have to have. And in the last few weeks a dozen lawyers in New York have spoken to me about that, and have said, "Can't you abolish the requirements that the defendant has to go on a scouting expedition, to get a copy of the complaint? Why can't you attach the complaint to the summons?"

The only objection I can see is where the complaint is a ponderous document; and I think that the rule should be that the copy of the summons and of the complaint should be served at the same time, and previously delivered to the marshal, and make the commencement of the action dependent not only on service of the summons, but on service of the complaint with

it.

So I say this: "An action is commenced against a defendant either (1) by the service on him of the summons and complaint, or by his written acceptance of service or appearance sufficient to give the court jurisdiction over him; or (2) by filing the complaint with the clerk, and delivering the summons with a copy of the complaint to the marshal for service, provided that, within sixty days thereafter, service thereof is made upon the defendant, or he accepts service or so appears."

Now, that takes care of it, and would seem to be the best way, unless you do what Rule 6 requires you to do--attach the complaint to it. And I wondered whether there was any practical objection in some types of cases to compelling the plaintiff to furnish the defendant with a copy of the complaint, with the service of the summons. I do not know of any. It makes a bulky document, and all that. But why make the defendant scout around and make a demand for a copy? And if he makes a demand, you have to make a rulethat he has so many more days than otherwise, to answer it; he has to have some additional time after it was served, and you get into complications, and you make necessary a lot of rules about what shall happen to him if he does not serve that.

Mr. Dodge. Mr. Wickersham was much concerned about the case of the defendant who was about to leave the State in two hours, and did not have time to prepare an answer to the complaint.

The Chairman. He says there is a practice up there that enables you to serve a summons that does not in any way indicate what relief is sought, but on its face merely says that you are demanding the relief asked for in the complaint. And you do not have any complaint, and you can put in any cause of action.

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Mr. Dobie. In that connection, we had a meeting of the American Association of Law Schools, in New Orleans. We had a little debate on these rules, and they were very discreet in what they said. But one South Carolina lawyer brought up that point. As I recall, it seems to me that he had a situation where he had to serve process on a woman who had been badly injured, and was being brought by train through South Carolina. He received a long-distance telephone call, and had about ten minutes to get to the train and serve process, before the train passed through. And he was very anxious to have some revision in that matter.

Mr. Dodge. We were not intending to do away with the rule that the complaint must accompany the summons; that is a separate idea. And Mr. Wickersham was in favor of it. We thought it was tied up with the question of filing pleadings or carrying them in your hip pocket. As a matter of fact, he thought we were probably getting around to Mr. Mitchell's opinion, here. The reason why we put in, later, the rule that the complaint must accompany the summons, was because we thought this was a jurisdictional matter. But we now think it is not jurisdictional, and that it does not affect jurisdiction. The real question is not whether you want it to accompany the summons, because that is what we are providing. It is a question of penalty.

The Chairman. The only penalty is this: You have Rule 6, lines 10 to 18:

"Failure to serve the complaint as herein prescribed shall not impair the validity of the service of process upon the defendant, but such defendant may by motion,

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which shall without more constitute a special appearance, ask for an order that the complaint be served, or for a dismissal of the action."

The court is not going to dismiss it.

"Thereupon the court may make such order with reference to service of the complaint as it shall deem proper, including the dismissal of the action; and shall, when it does not dismiss the action, allow the defendant twenty (20) days from the day the complaint is served upon him, within which to present his defenses as prescribed in Rule 13."

Now, that gets back to the old system of having the defendant chase around for a copy of the complaint. And why not make the addition of the complaint to the summons, in all jurisdictions? Why not?

Mr. Sunderland. Certainly it is done in many States, and does not give any trouble. In the States where it is required that the summons must be accompanied by the complaint, I do not think there is any complaint by the members of the bar that that hampers them.

Mr. Olney. Do I understand it is your suggestion that a copy of the complaint must be served with the summons? I should say that if you depart from that practice, you are going to cause considerable trouble out in the Western States, I am sure. Out in California and in some of the other States that I know of, we have always had the practice of serving the summons with the complaint.

The Chairman. Well, with the States in the Northwest and

up in the Mississippi Valley States,with which I am familiar, you have either to serve the complaint with the summons or file your complaint and serve the summons alone. And then the defendant can demand a copy,and then you have to furnish it to him. In either case you have to have a complaint before you can serve a summons, because the very form of summons which you prescribe here says that you may ask for the relief demanded in the complaint. If you do not have a complaint, then your summons' form is no good.

Mr. Donworth. Mr. Chairman, while in the State of Washington it is optional to serve the complaint, or not, with the summons, nevertheless I have never known of a case where it was not served. I suppose that a man leaving on a boat might be served, but it does not happen. But this is the situation with which we are faced: Up to this moment you could not bring a suit in Federal court and get service except on a summons issued by the clerk of the court. So, up to this moment, it is the law in the Federal courts in New York and these other States that have this free and easy method, that you must file your complaint. So, so far as your preparation is concerned, in the case of these men going to Europe, and so forth, as I understand the law in New York you could not sue a man in Federal court unless your complaint was all prepared--for the reason that you could not get a summons.

The Chairman. That is true, all throughout the United States.

Mr. Donworth. So it seems to me that it is no hardship to tell them, just as in the past, where they have had to prepare the complaint in advance, that they must keep on doing

it, and-- having prepared it--give the other fellow a copy.

Mr. Lemann. That seems to be a very good point. And if you have the South Carolinian's trouble or Mr. Wickersham's trouble, let them go to the State court. Why not stick to the State court, as you have in the past, and why not make it easy?

I think that is a very pertinent point.

Mr. Olney. As a matter of fact, the difficulty of making complaints does not amount to anything. Because you can serve any kind of complaint that you want, and state the relief you want, and then amend it thereafter, if you have not had time to prepare it. That is what happens.

The Chairman. I think the point is generally true in the State courts, but not in Virginia. The Virginia courts hold that is all right, in the case of West Fork Glass Co. v. Innes-Weld Glass Co.

Mr. Lemann. How do they get a summons?

The Chairman. Just serve notice of a motion for judgment.

Mr. Dobie. But in the common law court you can just get a praecipe for summons, and file your complaint later. So this having a summons without a complaint would not shock us, in Virginia.

The Chairman. But the Federal statute does provide that process shall issue out of the court.

Mr. Lemann. And you cannot get it now, as a rule, without filing your complaint or declaration in the court.

Mr. Dodge. You can, in Massachusetts and the other New England States.

The Chairman. In the Federal Court?

Mr. Dodge. Yes.

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Mr. Lemann. What do you do?

Mr. Dodge. Just get a writ from the clerk's office.

Mr. Lemann. And the clerk does not know what it is?

Mr. Dodge. You just get an attachment to issue on three days' notice.

Mr. Lemann. In other words, while I think the rules are not inconsistent as the reporter has given them, technically, nevertheless, I think they will have the practical result of perpetuating the practice that you will not get a complaint until, as the Judge says, you go out on a search party. And I do not think that should be required. I think that 19 States out of 28 require the complaint to be served with the summons; that is, about two-thirds of all the States require that. And I would move to have the discussion brought to a result: That the reporter be requested to change the provisions of Rules 3 and 6 to require the complaint to accompany the summons, and make it jurisdictional.

The Chairman. And make it jurisdictional?

Mr. Lemann. Yes.

The Chairman. Are you ready for the question? All in favor say aye.

Mr. Pepper. That is substantially the recommendation you have embodied in that form. May I make a note for the committee: That possibly you will want to substitute a separate provision as to the consequence of not filing within a specified time; for instance, that the action previously begun shall

6 abate. Because I think it is not orderly thinking to make a proviso that action shall be commenced in a certain way unless the service is not effected within a certain number of days.

It seems to me the provision that the action shall be commenced is a substantive provision, and we say it may be commenced in either of two ways. If we want to provide that an action commenced in the second way shall abate unless service is effected within a certain time, that is not a proviso on the commencement of the action; it is an independent thought.

The Chairman. Well, my motion was not intended to include this 60-day limit.

Mr. Pepper. But you had a proviso there. Would you mind readind that again?

The Chairman. Well, I do not understand that the motion includes the proviso of 60 days. That is a separate question.

Mr. Pepper. I see.

Mr. Lemmmn. The present motion merely went to the question of service of the complaint and the summons, and did not go to the second thought, as to the case where you initiate the suit by filing the complaint with the clerk. I think we should leave that to a separate motion.

The Chairman. And it does not include this 60-day matter. That is another matter, and not yet before us.

Those in favor of the motion please say aye.

(A number of affirmative responses were made.)

The Chairman. Then that motion is carried.

Now we go back to my original suggestion: That an action shall not be deemed to commence by filing, until you deliver papers to the marshal for service. I ask that that be restored, especially so that you will not have a man starting a suit, and then have the man walk around for 60 days without knowing what the case is.

Mr. Lemann. I make that motion, also: That where the plaintiff elects to institute the suit by filing the papers with the clerk's office, and wishes the suit to commence, he must also file the papers with the marshal, with instructions for service.

The Chairman. That includes the suggestion for the reporter that it is not intended to exclude service performed by someone other than the marshal?

Mr. Lemann. No.

The Chairman. All right.

Mr. Dodge. That service by someone other than the marshal is then limited to No. 1? Is that correct?

Mr. Dobie. No.

Mr. Sunderland. Suppose a man elects to file his complaint first? He may do that regardless of the statute limitations. For some reason or other he may want to file his complaint, and does so. If the filing of the complaint is followed by service by a private individual, the action is not begun until that service is actually made. The action is not begun by the filing of the complaint, and does not begin until you get service. And you get service even if done by a private individual.

The Chairman. I would put it this way: You have two alternative ways of beginning suit. You can make an actual service of a summons and complaint, or you can file the summons and complaint with the clerk and deliver copies to the marshal for service. Then the question is, as you raised it, whether it is intended to mean that if you file with the clerk and deliver the papers to the marshal for service, the marshal is

the exclusive man who has authority to serve. And my answer to that was "No." My thought was that though the action has been commenced, you still may have a proviso as to when service shall be made, and keep the action alive. And if you get service, not through the marshal but through some particular agent of your own, of the summons and complaint, then that is perfectly good service and the marshal does not have to serve in order to bring the man into court. That is the thought I had.

Mr. Dodge. Can you take the papers out of the marshal's hands, after giving them to him?

The Chairman. You do not have to leave the originals with the man you serve; you can hand a copy of them to the man you serve, and then go back to the Court House and file your affidavit of service or attach it to the papers, wherever you find them.

Mr. Dodge. Suppose you cannot find your man, to serve the papers; you only have the complaint and the summons, and you take them to the marshal and say, "Serve them, please." But then you find that the marshal is not very diligent, or perhaps is in some remote part of the district. And then you find that you can find that man yourself. Then, as I understand, you can write out another summons and sign it yourself, if you adopt this other part of the plan, and attach another copy of the complaint to it, and serve that. And then you can tell the marshal, "You do not need to worry any more about it; I have served him, as I might have in the first instance, except I was not sure I could."

The Chairman. That is correct, except I understand that

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you do not have to write out a new summons, but can obtain a copy and serve that. The service is good by handing the copy; and when it comes to the proof, your private party who made the service can attach his affidavit to the original documents, either in the clerk's office or the marshal's hands, or wherever they may be. It seems to me that he would not have to make out a duplicate original, in a case like that.

Mr. Pepper. But the jurisdiction attaches only when the summons is put into the hands of the officer, to-wit, the marshal. Isn't that so?

The Chairman. The jurisdiction is begun when you actually make the service. But still, you do not have the defendant in court until you actually serve him.

Mr. Pepper. But what I meant to say is this: If the mere filing of the complaint is not the beginning of the action, but must be supplemented by the delivery of the summons to somebody, that"somebody" ought to be an official?

The Chairman. That is right.

Mr. Pepper. And not a private agent of the plaintiff?

The Chairman. It is so worded, "Deliver to the marshal."

Mr. Pepper. Surely.

Mr. Donworth. Mr. Chairman, I think that we are likely to let this revolve too much around the statute of limitations. There are numerous other questions besides that.

Now, under the suggestion I make, as I understand it, if you file your complaint first, regardless of the statute of limitations, you can do that if you want to; and if you do not hand the summons to the marshal, your action is not begun until you get actual service on the defendant, in some way.

The Chairman. Right.

Mr. Donworth. If you want the filing of the complaint to act as the beginning of the action, without service, you must give your summons to the marshal. For instance, there are many things: You may want to make a motion of some kind; you may want to apply for an injunction, and all that. And in order for the action to commence, for those purposes, as I understand it you must file your complaint and give the summons to the marshal. Then the action is pending. But if you do not want immediate action, for any reason, you can just forget the marshal and go on and make service in the ordinary way, in which event the service is good when made; is that correct?

The Chairman. That is right.

Mr. Olney. Mr. Chairman, can we solve this question by merely providing that where an action is commenced by the filing of the summons, it should be deemed commenced by the filing of the summons, provided that within a very short length of time--we shall say five days--the summons is put into the hands of the marshal, for service, or else that within a certain longer period of time, service is actually made upon the defendant?

The Chairman. Well, the only difference you make is that you have allowed a man to commence an action for five days, at least, without even delivering to the marshal. And our rule, and the uniform statute, is that your action is not commenced until you deliver. But there is no reason why we should say five days or ten days; that is up to the plaintiff, certainly. If he does not want his action to commence, he does not have to deliver it to the marshal. But he has not commenced it until he does.

Mr. Olney. Well, the only difference between us might be a difference of, say, five days. Putting it as I have, the commencement of the action--provided it is delivered to the marshal--goes back to the time the date is filed, which is a certain, definite date of the court. And there cannot be any question about it, whatever.

It is also the practice in a great many States to consider that the action is commenced when the complaint is filed. Now, as I say, it makes only a difference of five days. And I do not see why you should not say that the action is commenced when the summons is filed, provided that within a very limited period, summons is delivered to the marshal for service, or within a considerably longer period the service is actually made upon the defendant.

The Chairman. I do not see any reason for saying that it is commenced with the filing of the complaint. Why not say that you will begin it by filing it with the marshal, plus the copy of the complaint?

8 Mr. Pepper. You cannot always find the marshal.

The Chairman. Yes; either the marshal or his clerk.

Mr. Dodge. It is always unfortunate to say that an action is begun, but only when there is a condition or an action precedent. Senator Pepper raised the point that the action is then begun, but is abated by something that later happens.

The Chairman. I do not think of any way to avoid that; it is a very common practice and, I think, is in the terms of the statute of limitations. Because this rule of commencing action by filing the papers and delivering copy of the complaint to the marshal for service, is a very common rule. And then,

as this rule is drawn, if you do not actually effect your service for 60 days, then your action is abated, if you want to call it that.

Of course, there is a distinction between commencing an action for some purpose and getting jurisdiction over the defendant. Service is the thing absolutely necessary, under due process, in order to get jurisdiction over the defendant, for the purpose of rendering a judgment against him. But it is the practice in many States to have the action actually begin for some purpose, such as to close the statute of limitations, without yet having obtained service. There is that distinction.

Well, I do not want unduly to insist on my views about it.

Mr. Tolman. Mr. Chairman, I should like to speak with reference to your views. I think that the Chairman's proviso on this rule, down to the word "provided" is the correct rule. In the first place, remember that there are four different subjects that affect and have relation to the beginning of the suit. And if you put too many objections and/or complications into it, you will find yourself in serious trouble. For instance, here is a question of conflict of jurisdiction between two courts, with an injunction in a bankruptcy proceeding or an injunction in an estate proceeding.

Then there is the question of the jurisdiction to which the thing is subject, as Judge Donworth pointed out in the case he mentioned. You have to have a definition of the commencement of a suit that will harmonize with that thought.

Then, the beginning of a suit has to do with a lot of other questions, and is not tied up with service. Now, in common law

the rule is, in effect, as the Chairman states it: That the suit is begun by filing the complaint or the declaration and giving the process to the sheriff and taking reasonable steps to procure service. Then that was defined, later, as he defines it, as "delivering process to the sheriff, with instructions to serve." And that is not only the common law, but that is the law of a great majority of the States.

Of course there have been numerous modifications by statute, as to what constituted reasonable opportunity to serve. Some of them have defined it and given it a time limit. But in my judgment as soon as you pocket these requirements for service and introduce the feeling that something else has to be done within a definite length of time, so that you make your service provisional and your commencement provisional, you have then left the whole thing at large with other aspects of the case.

So I think that the wiser thing to do is to adopt this language, which is almost identical with the language that I favor:

> "(1) by the service on him of the summons and complaint."

I think that the next paragraph is not very important, but I do not object to it:

> "or by his written acceptance of service or appearance sufficient to give the court jurisdiction over him."

I really do not think that has much to do with the beginning of this suit, and I think it might be omitted:

9 "or (2) by filing the complaint with the clerk, and delivering the summons with a copy of the complaint to the marshal for service."

And there,I think that ought to end.

Now, if you take these other details into account, when you come to other aspects of the beginning of a suit, you will find yourself entangled with things by which you ought not to be entangled.

The Chairman. Well, let us submit the matter to the committee, for the present eliminating this 60-day proviso. Let us discuss that separately. And that would narrow the question down as to whether you commence the action by merely filing the complaint,or whether you have, in addition to that, to deliver the papers to the marshal for service. That is my point. Are you ready to vote on that?

Mr. Loftin. I call for the question.

The Chairman. All in favor of restoring the provision that you have to deliver the papers to the marshal for service, say aye.

(There were a number of affirmative responses.)

The Chairman. And those opposed?

(No response.)

The Chairman. That is carried.

Now, that brings us down to the proviso about the whole thing failing unless you get service within a limited time.

Mr. Dobie. What is the practice on that?

Mr. Clark. Yes; the practice in the States, as far as we have them, is to require a fairly short period of service. That is the requirement in the two important jurisdictions

that we are now following--Minnesota and New York.

Mr. Dobie. Why should you not say "subject to the running of the statute"? Why should you not say that, if you cannot get him for 60 days? Because then you are gone.

Mr. Clark. Of course, the ordinary exceptions of the statute of limitations cover most cases. And I suppose that if they define the policy, that is all right. But the fear I have had with this and, I think, the reason why there have been restrictions placed in the provisions, are that you may be extending those statutes by a mere statute with respect to the means. The policy ought to be covered in those other statutes.

Mr. Olney. Will it not meet the views of all of us if we provide simply that an action shall be deemed commenced by filing the complaint and either delivering the summons to the marshal for service, or by actual service upon the defendant?

Mr. Dobie. And eliminate the proviso?

Mr. Olney. Eliminating the proviso of 60 days. That means that when the summons is delivered to the marshal, the action is commenced; or when it is served on the defendant, the action is commenced.

The Chairman. That leaves you with a case pending against, for instance, a man who is absent from the jurisdiction, and may be absent for years. And what becomes of all these statutes of limitations about the condition of a man being absent from the jurisdiction, and all that? I do not know.

Mr. Olney. This man would have nothing to do with that.

Mr. Loftin. But this provides that the summons must be served within 60 days. Does not that supersede all the statutes of limitations?

Mr. Olney. I suggest that we eliminate the 60-day provision entirely. In other words, the action is commenced either when the complaint is filed and the summons is delivered to the marshal--and if they do that, that establishes that as the date of commencement--or when the complaint is filed and the summons is served on the defendant. And then the date of commencement is the date of service.

Mr. Donworth. Judge Olney, you do not need that second proviso. Because we have already provided that an action is commenced by service of a summons and complaint on a defendant, whether a complaint is filed, or not.

Mr. Olney. Well, you could have two ways of commencing an action. The only thing I am desirous of making clear is that if you file your complaint, you are not required to turn the summons over to the marshal, but you can serve it yourself, if you wish; and when you have served it in that fashion, then the action is brought, then and there.

The Chairman. That is under subdivision 1. I covered that one.

Mr. Dodge. But there must be some time limit of service. You cannot keep a summons alive for more than a certain length of time, without doing violence to practically every one. Isn't that so?

The Chairman. I think that is true. I was going to ask the reporter about that. In how many of these States can you commence an action by filing a copy of the complaint and summons? Are the limitations controlled by this limit of time?

Mr. Clark. Well, I do not see that the State laws, generally, shall have a limitation on that. I cannot answer that.

Mr. Donworth. We have 90 days, in the State of Washington.

Mr. Clark. I think it is a very general limitation.

The Chairman. I thought it was.

Mr. Dodge. The Federal equity subpoena, under Rule 12, goes only for 20 days.

Mr. Sunderland. In my State there is no limit, if you show you have used due diligence in trying to locate the defendant. But you keep your suit alive, before the statute runs out, by the continuous exercise of due diligence.

The Chairman. Of course, that in itself is a limitation on keeping the suit alive. That is, you have to show due diligence.

Mr. Cherry. It is all ex parte, though. So what does it amount to?

Mr. Sunderland. Well, if you ask for a summons, in the Michigan practice, you have to make a showing why the defendant has not been served.

Mr. Cherry. That is, if you could not make an affidavit?

Mr. Sunderland. Surely.

Mr. Donworth. I want to come back to the thought that there is a lot in this besides the attachment and the statute of limitations. If you go to the judge at the sea shore and ask him to sign an injunction order, it is usually void; you must have a suit pending. I think that there are plenty of tests to show that writs of injunction issued before the complaint is filed, where that is the method, are not valid. I do not know what the general rule is.

Now, there are various kinds of orders-- ne exeat, and so forth--that depend upon a suit pending. And I think that some

proviso should be put in, in some way, for a limited time, at least, in connection, especially, with injunctions, and so forth. You want to know when the action is pending, for the purpose of these provisional orders, and so forth. I think that the reporter should bear that in mind and perhaps make some provision on that point.

Mr. Tolman. Judge Donworth said that the judge takes care of that, because it leaves the delivery to the officer. And if you put any limitation on that, you are going to have the question in your mind that injunctions may be declared invalid because there was no service made. And when you come into conflicts of jurisdiction, between a State court and another, and your suit becomes begun, and then not begun, you are going to get yourself into trouble.

The Chairman. I have a question about Major Tolman's suggestion, because it seems to me that that calls for a change in the matter of service. Because it provides, as I understand it, that no suit is commenced without the filing of the complaint, and the summons must issue from the court.

Mr. Tolman. That is not my understanding.

Mr. Clark. You mean it must be signed by the clerk? You provide that, I believe.

Mr. Tolman. That may be an inadvertence.

Mr. Clark. I think Judge Olney spoke, too, of the commencing by the filing of the complaint.

The Chairman. Well, we have that taken care of: One by service, and one by the delivery of the summons to the marshal.

Mr. Dobie. I understood that the debate now was on the 60-day limitation.

The Chairman. And when you talk about conflict of jurisdictions if you do not have a time limit, can you bring a suit in a Federal court and commence it by filing a complaint and delivery to the marshal for service, and then, without getting service for six or eight months, say that you retain jurisdiction over that cause, to the exclusion of any other court?

Mr. Sunderland. We have no provision in these rules as to when the marshal or anybody else shall make a return, do we?

Mr. Dodge. Does not the summons, itself, contain some specification of time? I never saw one that did not.

Mr. Sunderland. It usually provides when the return shall be made. I do not think we have provided that in this.

Mr. Olney. Let me call attention to this, to which Judge Donworth has called my attention; I did not think of it before: The practice in a great many States is that the action is commenced when the complaint is filed. And the moment the complaint is filed, then--and it is the usual practice in California, for instance, that if you want a temporary restraining order or an injunction, then you file your complaint and your application for a temporary restraining order-- When you have filed your other application for a temporary restraining order, you get your orders at one and the same time.

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Now, under this rule, as it has been framed, in addition to that, you would have at the same time--and in fact, prior to the obtaining of the restraining order--to have the summons put into the hands of the marshal. And a great many people are going to be caught on that. Lawyers are going to be caught on that, just as certain as can be, in California and States that have the other practice. Because they will just consider that

the action is filed when they have filed the complaint. And they will attend to the putting of the summons in the marshal's hands after they get their restraining order. That is just what they will do.

Mr. Clark. Judge, then they will just have to learn these rules.

Mr. Dodge. Should there not be some limit,here, of the power of the court--perhaps as in Washington--to extend the time of issuance of an alias process?

The Chairman. That is one suggestion: That you make the time limit 60 or 90 days, and give the court power to enlarge the time of service, on cause shown.

Mr. Clark. I think that we should not consider any of these matters foreclosed; but, on the other hand, these are the very matters we voted on last time. On the particular question of giving to the judge power to extend the time, the vote was six to six; and the chairman dissolved it by voting "No."

The Chairman. Well, I do not have any rigid views about it. I know that I have always been accustomed to a time limit on actual service. This filing of papers and delivering them to the marshal for service was a temporary expedient to prevent loss of your action for one reason or another. And all the action I am accustomed to requires that you have to go on and make service within a reasonable length of time, or otherwise the proceedings abate. And it is just a matter of being accustomed to that system and being doubtful about the consequences of letting the action stay so indefinite.

Mr. Olney. In California the practice is that if the summons is not issued within a certain length of time and

served within a certain length of time, the action shall be dismissed, and there is nothing to go the jurisdiction of the court.

Mr. Donworth. We have two sections in the Washington Code that answer this particular thing, and that clear up this matter of injunctions, and everything else:

"Civil actions in the several superior courts of this State shall be commenced by the service of a summons, as hereinafter provided, or by filing a complaint with the county clerk, as clerk of the court: Provided that unless service has been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within 90 days from the date of filing the complaint."

"From the time of the commencement of the action by service of summons, or by the filing of a complaint, or as otherwise provided, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings."

I think that the equivalent of that should be in this section. I just read section 238 of the statutes of Washington. That is the one about having control of the action. The one about service within 90 days is section 220.

The Chairman. There are two questions which have been discussed: One, the question raised by Judge Olney, that if the action is not commenced until the delivery of the papers to the marshal, you may make the mistake of getting out an injunctional order before you make delivery to the marshal, and therefore you have a void order.

The other question is whether we shall have a time limit to the actual service, whether we shall retain this proviso that if you do not serve within a stated time, your proceedings lapse. Those are the two questions.

Mr. Olney. In connection with the second question, Mr. Mitchell, there comes in this factor: There should be a time within which the summons must be served, unless the plaintiff shows good reason why he should have a longer time. I do not have any question about that; the question is the effect of the failure.

Now, in the one case you make it jurisdictional. The jurisdiction does not attach. That is one view of it, and one effect to be given to the failure to serve. It has the effect of abating action in the beginning, as though there never was that action.

The other is to make it a ground for abating the suit, and requiring a dismissal.

12 The Chairman. In other words, you would like to put in a proviso that would relate back to the filing. You would want to put in a provision that if the service is not made within a limited time, or if further time is not allowed by the court for cause, the action shall then abate?

Mr. Olney. Yes; abate, and it would not touch the jurisdiction.

Mr. Donworth. I think that is a very good suggestion. And even if it were ten days, or something of that kind, it gives you a chance to turn around.

Mr. Olney. Oh, I think the period of 60 days for service of summons is none too long.

The Chairman. In other words, your first one would be raised by a motion to amend the rule, as we have established, by saying:

"By filing the complaint with the clerk, and within five days thereafter delivering the summons or delivering the papers to the marshal."

That is your one point?

Mr.Olney. Well, I merely wish to call the attention of the committee to the effect of the rule as they have adopted it, which I did not appreciate until Judge Donworth brought the matter up in connection with injunctions. I am certain that it is going to have that effect in those States where the injunction is commenced merely by the bringing of an action. I am certain that people are going to get caught by the proposition that they did not realize that in order to commence the action, they had to turn the summons over to the marshal. I just wish the committee to appreciate that circumstance. If they wish to adhere to the rule, I have no particular objection to it, myself, except that it may cause miscarriages of justice, in that particular way.

The other thing about which you are speaking, that puts a time limit on the service of summons, impresses me in this way: I feel very strongly, there, that that should not be made a jurisdictional requirement, but merely a matter of abatement.

The Chairman. Well, if the action does abate all the proceedings that have been taken between the date of the filing and the date of abatement, and the proceedings fall to the ground, would not the practical effect be the same?

Mr. Olney. They do not fall to the ground for want of

jurisdiction. It may make a very substantial difference.

The Chairman. Your provision on the proviso is that it be changed to provide that unless service is made within 60 or 90 days or within such further time as the court allows on cause, then the action shall be deemed to be abated?

Mr. Olney. I would not put the proviso here; I think there should be a separate section.

The Chairman. Will you put that in the form of a motion?

Mr. Olney. I should say that we should have a provision, separate and by itself, to the effect that the summons shall be returnable within 60 days, and that is open to a party to secure an alias summons, in the discretion of the court, if he shows that he has been unable to serve the defendant, with reasonable diligence, and that unless the summons is served within 60 days/of the time when application is made for an alias summons and the alias summons is granted, then the action shall abate.

The Chairman. You are talking about an alias summons. I know your idea. But you do not have to apply to the court, under our system. The lawyer really can make it out, himself. So your motion really is for limited service, is it not?

Mr. Olney. Yes.

Mr. Dobie. Why do you want a separate provision? Would not that be confusing? Should we not make the rules for the commencement of an action, all in one rule?

Mr. Olney. That is my point: That we make the rule that when the summons is put in the hands of the marshal, that is the commencement.

Now, if the service is not made within a reasonable time, the summons ought to become functus officio, unless the service

is extended by the court; and also, for those cases, the action shall abate, under the conditions previously mentioned. The action has been commenced and the court had jurisdiction, but the parties failed to prosecute it; so, as a rule, it abates. It is going to cut a lot of figure in connection with interlocutory matters and bonds. You want the court to have jurisdiction from the time the summons is in the hands of the marshal.

Mr.Dobie. I am inclined to agree with you.

The Chairman. Do you want that to come under this rule?

Mr. Olney. I do not care where it comes.

The Chairman. I should like to have you state that in the form of a concrete motion, then.

Mr. Donworth. Mr. Chairman, it is one o'clock. I suggest that that could be drawn better after luncheon.

The Chairman. All right. To what hour do you wish to adjourn? I have a notice from the secretary that the lunch room has reserved tables for the committee, in its annex off the main room. On Saturday the cafeteria will be closed.

So, gentlemen, to what hour do you wish to adjourn?

Mr. Donworth. I suggest quarter of 2.

Mr. Olney. In view of the word from the cafeteria, I suggest that we have a regular hour for luncheon. Because otherwise the cafeteria will be reserving tables all the time.

The Chairman. Unless the committee feels otherwise about it, we shall make 1 o'clock our regular hour of recess for luncheon.

Do you wish to recess until quarter of 2, today?

Mr. Donworth. That was our former custom.

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The Chairman. Very well. If there is no objection, we shall recess until quarter of 2.

(Thereupon, at 1:00 o'clock p.m., a recess was taken until 1:45 o'clock p.m.)

AFTERNOON SESSION

(The committee resumed at 1:45 o'clock p.m. on the expiration of the recess.)

The Chairman. The committee will resume. The reporter calls attention to the fact that at the last meeting there was a series of objections raised by Mr. Wickersham, and maybe others, against the proposal to eliminate this 60-day limit of service, on the ground that it might operate to disturb the policy of States about their statutes of limitation, and possibly litigants would be rushing into the Federal courts if they could possibly get there, because they could just file a complaint and hang on to their lawsuit, whereas in a State court unless they got service within 60 days they would be out. I tried to sum up what I thought was the precise question we were dealing with, in this way:

"Strike out the proviso and substitute--"

Mr. Donworth (interposing). Whose draft are you referring to?

Mr. Tolman. You will find it on pages 3 and 4 of Mr. Mitchell's comment.

The Chairman. My own draft. It now reads: Provided service be made within 60 days. Strike out the proviso and substitute a provision as follows:

The action shall abate unless service is made within 60 days, or within such time as the court may allow for cause shown.

That is intended to be a statement of the proposition.

Mr. Olney. In Rule 4?

Mr. Tolman. On page 4.

Mr. Dodge. It seems to be the first part of Rule 4.

Mr. Clark. No. I think it comes in Rule 3.

The Chairman. I think these provisions about service within a limited time have always been made a part of previous rules and of codes to commence action within a certain time. Whether itis there or the other place, that is my proposal. I understand that Judge Donworth has another one, and he may present it.

Mr. Donworth. I am not at all proud of this phraseology. I should like to leave in substantially all that is in, and then add this:

From the time of the commencement of the action by service of summons, or by the filing of complaint, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings, provided that unless service has been made on defendant prior to the filing of the complaint, plaintiff shall within blank days--

And I suggest 60 days.

Plaintiff shall within blank days from the date of the filing of the complaint, or within such further time as the court shall order, cause summons to be served personally upon one or more of defendants, or in the appropriate case begin publication of order pursuant to section 118, title 28 of the United States Code, and failing such service or publication the action shall abate.

I should like to ask Judge Olney what he thinks of that.

Mr. Olney. Well, I had the general idea that an action should abate if not served within a certain time as distinguish-

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ed from its being deemed that no action has been commenced by reason of conditions subsequently. I fully agree with that. That is the point I had in mind.

The Chairman. Is that the point, that an action shall abate unless service is made within 60 days or within such time as the court may allow for cause?

Mr. Olney. That is it.

Mr. Clark. There are three propositions, and the first is: Whether we shall provide in effect that out of conditions subsequently, so to speak, it will make the summons invalid, or whether we shall provide that it should be simply a matter of abatement. The next is, whether we need to have some statement justifying the court to proceed in injunction or other matters. And the third one is as to the time.

Now, going back to the first: I do not see why we should not express this as a matter of abatement rather than a matter definitely tied up otherwise. The chairman's suggestion does that. As to the announcement that this is the basis for the court to act later, I think it is rather unnecessary because it is the obvious conclusion from what we say. And it is dangerous when you come to specify.

Now, in Judge Donworth's statement he has it that the court shall have jurisdiction, and that cannot be true unless you start defining the jurisdiction in some special way. The court does not have jurisdiction of the defendant until he is served. I think as a protestation it is unnecessary, and in

2 making it in any such form you are in danger of saying something that is not so.

Now, finally, as to the time: The 60-day limit is the

one we have discussed before. As to the further provision that the judge may extend the time, or that it may be within such further time as the judge may extend, I should like to quote one of the most distinguished of American lawyers, Judge Donworth:

"I will vote against the Judge in this motion. I think I appreciate the various State statutes of limitations passed by the States as a matter of strict legal policy. There is a good deal of jealousy about Federal judges infringing upon the power of the State, and I therefore hesitate to give any discretionary power to the judges upon this matter. The extent to which the courts may go is not a technical defense but a meritorious defense. We have fixed a reasonable time for service of summons, and if the defendant is not served the plaintiff loses his cause of action. It is a question of policy of the State, fixed by the legal authorities by methods pretty unanimous."

Mr. Lemann. Suppose we had drafted what shall be the commencement of an action. Does that in any way control the State statute of limitations? Suppose the legislature provide that the statute shall be interpreted only by the summons to the defendant. The provision we might make to begin an action would not in any way require the State to recognize the commencement of an action as commanded by the statute, would it?

Mr. Dobie. Are you talking about State courts or Federal courts?

Mr. Lemann. I am talking about the Federal courts

themselves, and the statute of limitations is a State statute. The Federal court will have to follow the State court's construction of the statute. Of course, the State courts will decide the ground of commencement of suits in the Federal courts in the state. That would be a matter for the State courts to decide, no matter what we do. They may decide that our kind of commencement of action interrupts the State statute, or they may decide to the contrary. But I do not think we should assume in this matter that we are impinging upon State action, because I do not think we can.

Mr. Clark. The question comes up before a Federal judge as to what he is going to do when he has our rule and when he has the other, the State statute.

The Chairman. He has to consider the State statute, what it means when it says commencement of action. I think he is bound by what the State court says as to what it is.

Mr. Lemann. Yes, and if he acts otherwise the State court will set him right on it the next time they get a whack at him. I do not think we ought to let our vote be influenced by the thought that we are interfering with statutes passed by the State. I do not think we can.

Mr. Olney. There are other amendments which will have to be made to this rule, in regard to when an action is commenced. For example, it should be commenced even though there is no service upon the defendant if the defendant voluntarily appears. That must be provided for also. There are a number of things of that sort in connection with the draftmanship that must be taken care of, and they are perfectly apparent.

Now, if we are agreed on the principle that the action

shall not be deemed commenced until either the summons is served on the defendant or the summons is delivered to the marshal for service. And we are also agreed that the failure to serve summons when it is delivered to the marshal shall operate only by way of abatement and not by way of jurisdiction. We have to determine the essential things, and the rest I think are very largely a matter of draftmanship.

The Chairman. Well, we have determined and settled the first two things. The only thing left is this proviso, and my suggestion was: The action shall abate unless service is made within 60 days.

3 Mr. Olney. I move that that be the sense of the committee, in order to bring the matter before the committee.

The Chairman. Leaving out the matter of extension of time?

Mr. Dobie. Do you mean that we shall put in as to whether the judge shall have the power to extend it?

The Chairman. I had that in, but I did not put it in because I wanted it.

Mr. Dobie. I am rather inclined to favor it.

Mr. Sunderland. I think that should go in.

Mr. Olney. I make the motion that it is the sense of the committee in case of failure to serve summons within 60 days the action shall abate, and that that requirement be not jurisdictional; and that we reserve for further discussion the matter of whether we want to permit the court to extend it beyond 60 days. I should like to hear from Mr. Dobie on that.

The Chairman. Are you ready for the question?

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Mr. Loftin Question.

The Chairman. All in favor of the motion will say aye. (A number of ayes.) Those opposed will say no. (Silence.) The motion is carried.

Now, the remaining question is whether we will give the court any opportunity to extend the 60-day period.

Mr. Olney. I did not understand Mr. Wickersham's objection to giving the court that power. As a practical matter if anyone has had experience with some of these defendants he will realize it may not be possible to catch them within 60 days. And they are certain to rely upon such a provision as that for the purpose of defeating the action. All that is necessary, or all that should be necessary, in a case of that sort is that defendant, or I mean the plaintiff shall use reasonable diligence. That is the whole principle underlying it. If he does show reasonable diligence he ought to be permitted to continue with his action until he can get service.

The Chairman. You and Mr, Lemann are very pertinent that you cannot violate State statutes. That was the ground for cutting out Mr. Wickersham's suggestion.

Mr. Olney. In order to bring the matter to a head I move that there be a time limit of 60 days for service of summons, with power to the court to extend it for good cause shown.

Mr. Dodge. You mean the power to be exercised within the 60 days.

Mr. Olney. Of course.

Mr. Clark. I do not object to this particularly, but I do not believe that statement of the law that Mr. Lemann gave is correct. I think the commencement of an action is a matter--

Mr. Lemann (interposing). The State statute of limitations is the State law.

Mr. Clark. It goes to when the action is commenced.

Mr. Lemann. The thing we are talking about is the fact of the commencement of the State statute of limitations. If you are doing it in a certain way when the action is commenced you can show anything you want, and it may be decided in the light of the rules you lay down. When you consider the effect of that upon the State statute of limitations, I do not understand under what theory you say that is not a matter of State law.

Mr. Clark. Mr. Dobie said something of that kind the last time.

Mr. Tolman. I do not understand that this is a matter of State statutes of limitation. I want to be recorded as voting no on both of these matters of subsequent service. I think what we are engaged in doing is simply saying when a Federal suit is begun, not a State suit but a Federal suit. When we have told that story I think we ought to stop and let the statutes of limitation take care of themselves. That is why I am opposed to both of these conditions.

Mr. Olney. I renew my motion that the court have authority to extend the time of service of summons.

The Chairman. If there is no further discussion, all in favor will say aye. (A number of ayes.) Those opposed will say no. (One or two noes.) The ayes seem to have it.

Mr.Pepper. It would follow if a State Legislature, for example, took the view that some other definition of the commencement of action than the one we had made was desirable

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locally, and they so enacted in specific language, it would be that specific provision that would control.

The Chairman. I think so.

Mr. Pepper. Would bind the Federal court.

The Chairman. I think so.

Mr. Sunderland. I do not see how that can be done very well. For example, in Ohio we commence by filing complaint and getting out summons, and that is the commencement of the suit. We have nothing in our rules to correspond to that at all. So how would you say that that State statute would control as against us, because we have nothing to correspond with it.

4 Mr. Pepper. All that I meant was that I thought it was the policy of a State that the statute of limitations should begin, we will say, from the filing of the complaint, even if no service was subsequently effected or no admitted service, if you can imagine such a thing, and we were to provide that the action should not be regarded as beginning until the complaint had been filed and the process placed in the hands of the marshal. A State statute might specifically provide that for the purpose of this limitation the six years, or whatever period it is, shall be told by the filing of the complaint without more done. And that would go I should think for the domestic forum and under the judiciary act.

Mr. Tolman. Whatever we provide supersedes the State.

Mr. Pepper. But we are not providing anything on the subject of limitations.

Mr. Tolman. We are providing something about when a suit shall be begun.

Mr. Pepper. But in relation to the statute of limitations,

it is not a question of Federal procedure but a question of State policy and administration.

Mr. Tolman. That is correct.

The Chairman. There is no provision in Rule 3, lines 8 to 14, inclusive, that I am suggesting about. That is more a matter of form, and I understand the reporter to object to it. What about this paragraph in brackets?

Mr. Clark. Major Tolman has suggested including statements as to service in cases. Do you want to do it by way of reference or by extended statement?

The Chairman. Well, that is a matter I should say of form. We have the substance there, and it is only a question as to whether we shall recite the statute and say: As to service it shall be made in the manner provided by State statute. Unless there is some disagreement I should say we ought to pass that for the revision.

Mr. Clark. You might want to glance at the idea that Major Tolman has in mind, because in his suggestions he has included rather extensive provisions as to how service shall be made upon governmental agencies. His suggestions begin on page 8 of his statement.

Mr. Tolman. On page 6, isn't it?

Mr. Clark. That is where your discussion begins, and there are specific drafts of rules on pages 8, 9, and 10. I mean on the question of filling these things out in detail. I suppose that might be form and style.

The Chairman. I should think so. When we are re-enacting a Federal statute we re-state it. That is a matter of form.

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Mr. Lemann. It would make it pretty long to have them spelled all out. That is convenient for a lawyer, to say for service it shall be so and so.

Mr. Tolman. I think this is an important thing to wait a moment on. I recognize what Mr. Clark has in mind. There are many different statutes telling how different suits against the Government and officers of the Government shall be commenced, and how process shall be served. I have read all those statutes. The variances are with regard to service rather than to beginning an action. So far as commencement of a suit is concerned, every one of them is commenced by either filing a bill in equity, a petition, or a complaint. Now, that is harmonious with our definition of what we shall require in a suit. Therefore, I do not think Rule 4 needs to deal with these statutes about special proceedings against the Government or Government officers. But when we come over to the matter of service of summons, then we have a multitude of statutes telling how summonses shall be served in these different governmental suits. I do not think it fair to the provision to just simply say: Look at section so-and-so of the Judicial Code, when they are susceptible of all being re-stated in short compass. And I endeavored to re-state them so that instead of eliminating every haystack (laughter)--excuse me for my mixed metaphor, but you have it before you in simple form. So I think it does not belong here in Rule 3 at all.

5 The Chairman. You may be quite right and I do not disagree with you. That is a matter that I think ought to be left. We do not want to change existing law as a matter of

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service in Federal suits, in suits against the Government. The only question is whether we should state it in one way or another. That question comes up in a great many sections, and I think it would be better, with your suggestions in mind, to handle it later.

Mr. Tolman. That is all that I can ask.

The Chairman. I am rather with you, that we do not want lawyers chasing around through statutes any more than is necessary.

Mr. Pepper. I am in favor of all suits against the Government and agencies of the Government, wherever it is proper to begin them at all, not being through service of process on the Attorney General.

The Chairman. Well, I don't know about that. But I used to sit in my office and would have a messenger come in and say the marshal was outside, and then I was handed the papers, two or three of them a day sometimes, and I would smile and say, "Thank you," and lay them aside, or put them in a basket and let somebody look after them.

Mr. Pepper. That sounds to me like a perfect prodedure.

The Chairman. It took too much of my time.

Mr. Pepper. Especially for the smile.

The Chairman. Well, I don't know. That takes us over to Rule 4.

Mr. Donworth. Before we leave Rule 3, for information I should like to know what is the meaning of the rule as to when I can apply to the court for an injunction. When is the action pending so I can apply for an injunction or a similar order?

The Chairman. I think there is a question there as it is really worded. By action is really meant that the action does not commence until you deliver the papers to the marshal for service. Then you go to the court and apply for a temporary restraining order and deliver the papers to the marshal the next day. That is one that Judge Olney raised, and he met it by allowing five days after filing and delivery to the marshal. He thought it was not necessary to press it now.

Mr. Donworth. I do not want to prolong the discussion, but do desire to know what must be done. We cannot act until we file the complaint and hand the summons to the marshal for service, and then the action is really begun; is that it?

The Chairman. That is likely the effect of what we have here. If you run to the judge's house at night and get a temporary restraining order, and then next morning go to the clerk's office and file his order, and deliver the papers to the marshal, whether your paper is a fraud because it was signed the night before, I do not know. But literally your action is not commenced until you have delivered it to the marshal.

Mr. Pepper. That practical question is not likely to give trouble, because your restraining order is of no use unless you can serve it. I mean the application for a restraining order or an injunction implies that you can get service on the restraining order or injunction on the defendant, does it not?

The Chairman. Really an order has no effect until it is filed, anyway.

Mr. Clark. And there is one other point--

The Chairman (interposing). Shall we pass on?

Mr. Donworth. I understand the court has power to issue an injunction after the process is in the hands of the marshal. Dean Clark objected,as I understood, to having any jurisdiction at all until we got service.

Mr. Clark. That is the trouble about "jurisdiction." We were not talking about the same thing.

Mr. Donworth. Then I withdraw the objection.

Mr. Clark. With reference to these actions begun against the Government, there is a question that comes in Rule 3. I am not sure but what the committee on form can treat with it all, but these statutes generally contemplate the old system of starting the action by the petition in court. That is what we changed. And we will need to consider whether anything in Rule 3 is required too. In other words, without something of the kind that is in the brackets. What is the effect of our first alternative of commencing suit without going to court?

6 Mr. Tolman. In my judgment the effect of Rule 3 is suggested by the chairman. There are, first, two methods, two alternative methods, of commencing. A suit against the Government would be commenced in either of those ways.

The Chairman. Yes. What we want is commencement with service of notice.

Mr. Clark. That involves amending the statute.

Mr. Tolman. I do not think so.

The Chairman. The statute provides certain methods for commencing suit, and it involves two things: Filing papers, and filing papers with the person on whom service is made. We have adopted a uniform system or method of commencing. When we come to the matter of service, you want to preserve that it

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shall be as provided by law.

Mr. Clark. I want it understood we are modifying the situation here.

Mr. Olney. The question is whether the Supreme Court has any power to change a rule provided by statute with regard to service on the Government itself, because the Government permits suit against itself only in certain cases.

The Chairman. We are not changing the service. The only thing we differ about is whether you have to file the complaint, or can serve without filing it, and things of that kind.

Mr. Olney. Well, the service of the process or summons is required by the statute as a condition of maintining suit against the Government, and the statute specifies it shall be done in a certain way. Might not someone raise the question as to whether or not the Government has given its consent to be sued only in that particular manner?

The Chairman. We are not proposing to change the method of service on the Government. We are trying to preserve it. The only question is whether we shall cite the statutes at length or only refer to them.

Mr. Olney. Dean Clark said he had in mind to state it in the alternative, that it could be done in the method that we provide or in the method provided by the statute. What I want to call your attention to is that in connection with suits against the Government it may be we cannot provide anything except what is already provided in the statute.

Mr. Dobie. Even if these rules go through the court and the Congress?

Mr. Olney. Well, as to going through the Congress, all

that the Congress does in connection with them, we hope, is to let them alone.

The Chairman. I feel safe as long as we preserve the statutory provisions as to what Government officials should be served in Government suits. The form of proceedings in other ways I do not think is vital. You might carry your argument to the point that we cannot prescribe the form of complaint. What we have changed is no existing law inconsistent with our Rule 3. As to how you commence a suit, whether by filing or by service. Now, when it comes to the method of service, it is understood we are not changing that. Do you draw any distinction between the method of service and the officer on whom service should be made and the mere matter of form of procedure, as to whether you file complaint or service, or what not?

Mr. Olney. Mr. Chairman, I am not familiar with the statutes in regard to suits against the United States. I assume from what has been said here that they prescribe certain rules in regard to service of process in such suits, and as to just how they should be commenced. What I have in mind is, in view of the fact that the sovereign can be sued only with its consent, that when you have a statute which permits a suit against it, that that suit has to be brought in certain ways. I doubt that we have any jurisdiction to provide any other method.

The Chairman. You are using the words "service of process." We are not changing the service of process.

Mr. Olney. So long as we do not change the process as provided in the statute, all right.

The Chairman. Of course, we are changing the possible requirements about filing a bill instead of serving it. But it did not occur to me that that was vital where the Government is concerned.

Mr. Olney. I did not intend to get into a discussion. I just thought that this point should not be overlooked.

The Chairman. Well, we can think about it and examine the statute.

Mr. Olney. I have the feeling that the safe thing to do is that suits should be brought and process served in the manner provided by statute. On the other hand, when it comes down to anything except suits against the Government, so far as the possible commencement of the suit and the service of process, it should be uniform, and I refer particularly to the exception to the provision here in regard to arbitration agreements.

7 The Chairman. Well, I have the theory of the matter of substance and not of form. The question is whether our provision in paragraph 1 of Rule 3 is the manner of commencing action. I did not attempt to consider service, but about filing. Whether we have the power to make any changes in the practice fixed by law for suits against the United States, with respect to service and the officer on whom it is served, we are not making any. But we are making changes in other methods about starting suit. I think it is substantial and that we ought to settle it.

Mr. Clark. Let me give you the provisions of what I suppose are the two most important sections. This is Section 45 of the Judicial Code:

"The jurisdiction of the district courts of cases brought under subdivisions 27 and 28 of section 41 of this title, and sections 20 and 43 of title 49, shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the district court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice."

This refers to appeals from Interstate Commerce Commission orders. And the point I am inquiring about is that first sentence:

"The jurisdiction * * * shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served--"

Then I will read section 762:

"Petition in suit against United States--The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a

petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law."

The Chairman. What kind of case is that?

Mr. Clark. That refers to suits against the United States.

The Chairman. The Tucker Act cases?

Mr. Dobie. Yes.

Mr. Clark. And section 763 I will read:

"Same; service; appearance by district attorney--The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the District Attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter."

The Chairman. I am ready to take this position as a matter of law: That all these things are a matter of consent. Congress can consent to the Supreme Court's providing rules to govern these very things. Why isn't that a consent to

make such changes in procedural matters that we want to make?

I have just been through a session in England on the question of whether statutes include the sovereign unless the sovereign is expressly mentioned. I examined decisions of our Supreme Court on the question, and they held that even though it is not mentioned if the matter is one that may fairly infer the Government was intended to be included, it shall be. And there are specific decisions holding that rules of court and statutes relating to proceedings in bankruptcies and the filing of claims, and all that, even though the Government was not mentioned, shall apply to it.

So it seems to me we can fairly rely upon the fact that the court will say that we are not trying to infer consent to be sued when it is not there at all; that we are just prescribing general procedure, and that that procedure will govern cases against the Government and by the Government. I think there is ample authority for that.

I think it might be wise when that matter is put up to the court, for the reporter to put a little note on that, a caveat, calling the court's attention to it. But I can furnish you plenty of decisions that I think cover it. And I think it would be foolish for the court to reach any other decision than that we are carefully preserving existing law. As to the
8 people who have to be caveated, so as to give the Government warning, I think we are going as far as we need to go.

Mr. Pepper. Might I inquire whether it is the proper implication from your remarks that Rule 1 can provide that hereafter there shall be one form of civil action, and that is to be interpreted as meaning that one form of civil action

supersedes not merely proceedings in equity as heretofore and the various common law forms of action at law, but also is the form which supersedes the specific statutory forms in proceedings against the Government or its different agencies? It seems to me that is the real question of the session, at the very threshold of the session, as to Rule 1. If we are prepared to take that position in Rule 1, then everything else follows along the lines you have indicated. But I think we ought to face the question whether this one single action we are envisioning is a substitute, not merely for bills in equity and common law actions, but also these special statutory proceedings where the Government is sued by its own consent.

The Chairman. These are for suits in equity or actions at law.

Mr. Pepper. The one Mr. Clark read is a statutory proceeding, and says nothing about the other. It says you shall file a petition in a certain way, and the petition shall serve for certain requirements.

The Chairman. But it is an action against the Government. I have no doubt in my mind that it would really be absurd for the court to take the position that if the Government brings suit, or is the subject of suit, that as to it the practice is to be different than we generally provide. I think there is ample authority for the view that even were we to say nothing about suits by or against the sovereign, that these special rules would apply against the sovereign. But it might be the part of precaution to put a clause in the rule somewhere intended to cover suits against the sovereign.

Mr. Pepper. You spoke of a note for the view of the

court. That note should be under Rule 1 rather than at some point in the discussion where the question is subordinate to the general proposition in Rule 1.

The Chairman. That may be so.

Mr. Lemann. I do not recall any statutes relating to suits by the Government where the courts are to lay down the form in law or in equity. I do not think there is any special form of suits against the Government. They can be in law or equity according to the complaint, as if private interests were involved. Here you have some special statutes referring to service.

The Chairman. There is some question about jury trials against the Government. Otherwise the practice is the same.

Mr. Dobie. What I was wondering about is settling the hybrid things. I think we may have to dispose of it with the consideration of partly criminal and partly civil, certain aspects calling for criminal action, and certain aspects for civil action.

The Chairman. Well, special proceedings of that kind might be cited. I think we will have to read through all of the Federal statutes and take them up.

Mr. Dobie. In certain forfeiture proceedings it is called an information, and you have probably appeared in a good many of them.

Mr. Lemann. Not a civil action.

Mr. Dobie. That was the question that gave me a little trouble.

Mr. Clark. On this I think it would be well to have the general forms of procedure the same. Of course there are time

elements in some of these cases, as the arbitration statute limits your petition to five days. There are various provisions as to what you shall do about making your petition for enforcing the arbitration agreement. I suppose we want to hesitate, perhaps, before we change that 5-day limit.

The Chairman. To do what?

Mr. Clark. To serve the petition. These are proceedings to enforce arbitration agreements under the Federal Arbitration Act, chapter 9 of the United States Code, section 4.

The Chairman. That has nothing to do with suits against the Government.

Mr. Clark. No. This is a special proceeding. It reads:

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the Judicial Code at law, in equity, or in admiralty of the subject matter of the suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of

9 such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in

accordance with the terms of the agreement."

The Chairman. What we are dealing with now is the question of suits by or against the Government. That refers to the question of suits between private parties. And as to whether we should make some special provision about that, any different from what we have, I think might be brought up in that connection. It may be that we ought to do something about it. Now we are troubled about suits by or against the Government. Don't you think, Senator Pepper, the only way to handle that matter is to have someone take these statutes and go through them carefully and see what they are and check closely on them?

Mr. Pepper. No doubt that would be the proper plan.

The Chairman. I feel a great deal in the air unless I have read all of them.

Mr. Tolman. I think perhaps I can give you some light on that matter. Dean Clark will correct me if I am wrong, but I understand this is his method as compared with mine: He provides that service in these Government suits shall be as provided in the Government statutes generally speaking. Whereas I have taken these Government statutes and paraphrased them, and I think I have all of them, although I might have omitted some. But on pages 9 and 10 and so on of my memorandum I have redrafted -- well, I commence on page 9 in the set, and take up all the statutes I could find. Then over on page 10 I go on with the rest of it. Page 9 also takes Government suits, and I refer to these provisions. Now, if you happen to be on page 9, "service upon a State," I follow the suggestion of the reporter that service on a State shall be in the way

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the State statute provides that it shall be.

Mr. Olney. Suppose it does not provide?

Mr. Tolman. I mean a suit against a State or an officer of a State. In the middle of the page, as to suits of which the court is given jurisdiction by certain paragraphs, which I enumerate, I set out just exactly in short the provision that I found in those statutes. They are funny, some of them. Some provide that you are to send a registered letter addressed to the Attorney General at Washington, giving his address, and some of them were simply that you were to mail it. I have taken these provisions of service by mail on the Attorney General and put them all together in one word, and where the statute provides it should be mailed to the Interstate Commerce Commission I have put that in.

I have endeavored to make this provision here a counterpart in condensed form of the existing Federal statutes.

The Chairman. Well, I think the question whether we will cite the statutes, or state the rule in substance, or simply refer to the statutes, is a matter of form. But along with the question it is an important matter of form, and as long as Major Tolman has raised it, I think maybe we better dispose of it if we are ready to do it. To do that the right way to dispose of it is to have a rule such as he has drawn correctly stating the existing law as to the manner of service upon the Government, have that incorporated into the rule.

Mr. Dodge. We have passed Rule 3. This is Rule 4, isn't it?

10 Mr. Clark. May I add that Mr. Tolman's suggestions do not cover the exact point we are now discussing, which deal

particularly with the question whether the complaint must be filed with the clerk as the beginning step. These statutes generally are based on that step. I do not believe it was done with much careful thought about it, except that was the existing practice and they were passed in view of the existing practice. It does seem to me that it is rather a formality. But that is the question I am now raising. Mr. Tolman's suggestions deal with the manner of service in Rule 4. I ask, what shall we do with our Rule 3, which provides in all actions that one way to start an action is not to start with the court?

The Chairman. My suggestion was, and I think there is ample reason for it, that procedure in suits filed against the Government shall be made the same as in private actions, except in respect of the person upon whom it is served. You have not acted upon it.

Mr. Clark. I think that is the way to bring it up, by motion. But I won't have claimed that it is settled.

Mr. Loftin. If Dean Clark has made the motion, I second it.

The Chairman. Are you ready to close the debate on that question?

Mr. Loftin. I call for the question.

The Chairman. All in favor will say aye. (A number of ayes.) Those opposed will say no. (Silence.) It is carried.

The next question that you want to take up is whether we want to adopt the next form when dealing with the manner of service on the Government, stating the substance of the Federal statutes or merely referring to them.

Mr. Dodge. That arises when we come to Rule 4, doesn't it?

The Chairman. We have disposed of Rule 3 now.

Mr. Dodge. How about the second paragraph of Rule 3?

The Chairman. I have made a suggestion in respect to that, and the reporter says it is acceptable to him. I have varied the language a little bit. Instead of stating:

> "In actions where personal jurisdiction over the defendant is not required--"

And that is pretty broad language, I have said:

> "In the cases described in U.S.C., title 28, section 118, the action may be commenced against absent defendants by filing the complaint with the clerk and procuring, within 60 days thereafter, an order directing such defendant to appear, and by causing the same to be duly served or published as provided in said Act."

In other words, we pin ourselves right down to the statute and do not use any language that might be considered as broadening it. But that is a matter of form, more a matter of form than of substance, and I was passing it over.

Mr. Clark. That paragraph is intended to agree with the statute.

The Chairman. The third paragraph, in brackets, we have settled upon, that the matter of commencing action other than the manner of service in a suit by or against the Government, shall be the manner prescribed in these rules, and not some special method that happens to be provided by law.

Mr. Donworth. Would you extend that even to Interstate Commerce Commission matters? In those I understand the United States is made a sort of statutory party. You are not really

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suing the United States, but in order for the railroads to have somebody to test it, the United States comes in. I am not very familiar with that statute, and I will ask Dean Clark: Will that fit in at all with our scheme of commencing actions?

The Chairman. You sue the Commission and the Government.

Mr. Donworth. Yes.

The Chairman. Under the present law the attorneys of the Interstate Commerce Commission appear independently of the Department of Justice. They appear for the Commission, and the Attorney General or his subordinates appear for the Government.

Mr. Donworth. I would not delay the matter at all, but I would have the impression that that is so different from the ordinary lawsuit or equity proceeding that it would have to stand on its own provision.

Mr. Clark. No, it is an injunction suit.

Mr. Pepper. With respect to service of process, I move in the case of a proceeding against the Government it is the sense of the committee that Major Tolman's suggestion should be adopted, with leave to the drafting committee to substitute, if found necessary, references to statutes which Major Tolman is endeavoring to summarize.

The Chairman. Your motion covers the substitute.

Mr. Pepper. Yes.

Mr. Loftin. I second the motion.

The Chairman. All in favor of the motion will say aye. (A number of ayes.) Those opposed will say no. (Silence.) The ayes seem to have it.

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2:45 p.m.

fls.
Hart.

THE CHAIRMAN: Now we are down to Rule 4. You will have to put in the words "and complaint" there.

MR. CLARK: All right.

THE CHAIRMAN: Anything to be said as to Rule 4?

MR. TOLMAN: Paragraph (a); Mr. Morgan had a suggestion. I am not sure that it has not been accepted.

MR. CLARK: We accepted a good deal of it.

THE CHAIRMAN: Is it form?

MR. TOLMAN: Form, yes.

MR. CLARK: We accepted it on form, a good deal of it, and there were certain things that were rather minor, details as to form. That is this matter in brackets. I think that would be form, although I will be glad to go into it if anyone wants to. There was one additional point brought up that might go further, and that is the last sentence.

THE CHAIRMAN: Where is that?

MR. CLARK: Rule 4(a), the additional summons. He said that that you did not want because --

THE CHAIRMAN: I agree to that. The way our summons are made out they are nothing but notices signed by a lawyer and you can get out as many as you want.

MR. CHERRY: I thought we practically settled that in November, that that was going out.

MR. CLARK: No, not in November. We had it tied up with one original. This was to state the converse. The first draft made one original.

THE CHAIRMAN: The idea of having the original summon is all founded on the practice of having the writ issued by the court, and the moment you get into the idea that it is not a

written process, that it is really a notice signed by the lawyer, you can make as many copies as you like and you do not have to get permission.

MR. CLARK: The reason we put it in was to make clear that you could do it. As we said in our comments upon Mr. Morgan's suggestion, the last sentence may not be essential but it can do no harm and it states that you can do it.

MR. CHERRY: I don't understand what you think you are doing. Copies? Copies are all you use.

MR. DONWORTH: There is this distinction to that: If you have served certain defendants and you want to make return of service to the court you file the service with the return, and if there are some other defendants you in your own office make out the summons and serve them on the others. That is my understand. Is that not yours?

THE CHAIRMAN: You can make additional copies and hand them the copies and put the return on one copy and file it.

MR. OLNEY: Are you talking about the last sentence of paragraph (a)?

THE CHAIRMAN: Yes.

MR. OLNEY: The expression "issued" should not be used then because the summons does not issue in cases like this.

MR. SUNDERLAND: It is not a copy with new names on it; it is a different summons.

MR. CHERRY: That is what he is talking about.

THE CHAIRMAN: When you get new parties you have to have a new summons.

MR. SUNDERLAND: I think that is what it is, yes.

MR. CHERRY: This is not a defendant who has not been serv-

ed.

MR. OLNEY: The expression "may be issued" is misleading, is it not? There is no summons issued in cases of that sort?

MR. DONWORTH: I think that is very helpful. It can do no harm. I have done it in some instances.

MR. CLARK: That is what we thought, and it seemed to be clear that without this statement you could do it.

MR. CHERRY: What you want is an additional return of service? Isn't that what you are getting at, that you are not limited to one return? I think that could be stated very simply. It is not an additional summons.

MR. DONWORTH: Would you have to apply to the court for permission to submit the return and get an order?

MR. CHERRY: I think it would be proper to state that an additional return could be made.

MR. LEMANN: If you have got five or six defendants you would have to have -- say you had five defendants, you would have to have five summons, would you not, five copies of the summons?

MR. CHERRY: Yes.

MR. LEMANN: Five copies of the summons?

MR. CHERRY: Yes.

MR. LEMANN: And a sixth copy for your return?

MR. CHERRY: Your original.

MR. LEMANN: Your original for the return?

THE CHAIRMAN: The way it works is this, under this system it has got to be signed by the lawyer. The lawyer signs the summons in his office and then he has his stenographer make as many copies as he needs for the service and the copies of the

signature are typewritten. Then you go out around and serve by handing each one of the defendants a copy, and then you put your proof of service, the affidavit, on the one signed by the lawyer. But there is nothing to prevent the lawyer from signing a score of them and one original is as good as another.

MR. LEMANN: That is what we would do. We would not permit service by a private individual. If we had six defendants we would have six citations, one addressed to each of them, each addressed to all of them, each signed by the clerk. That is what I would assume you do here. If we only had one original, as we have said in this, one gets an original, and the others do not get one with anything but a typewritten name on?

MR. CHERRY: None of them get an original.

THE CHAIRMAN: This clause assumes that there is one document which stands out as the summons and you can make as many additional ones as you want to.

MR. CLARK: It might say something like this --

MR. LEMANN: There may be issued as many counterparts --

MR. CHERRY: We have already spoken of service by copy. We have already made that clear. In Rule 3 you serve by copy. If it is not there it is in one of the rules.

MR. DONWORTH: This is what we do: Where I have a host of defendants in different counties in the State I send a summons out to one county and it comes back, and if you want any relief against that defendant it is complete. I make an original summons and send it to the sheriff of that county and it is served, and I would not like anything in there that would prohibit me from doing that. It is a good, lawful summons.

THE CHAIRMAN: I think it is all right, and I think it is

a matter of detail.

MR. DODGE: You say it may be issued at any time. How is that affected by the 60-day rule?

THE CHAIRMAN: I doubt it.

MR. DODGE: When the 60 days have expired the case is dead and you can not issue an additional summons at any time in that case?

MR. DONWORTH: Service on one defendant, and copies of it.

MR. DODGE: It does not say anything about service on one defendant.

MR. LEMANN: Does this involve that the case is alive?

THE CHAIRMAN: I don't think it implies you can extend the 60 days.

MR. SUNDERLAND: Instead of saying "additional summons", you may say, "as many summons may be issued as convenience may require."

MR. CLARK: That is all right, if you want to say, "as many summons".

THE CHAIRMAN: Is there anything else in Rule 4?

MR. OLNEY: Mr. Chairman, you mentioned something there that makes me want to ask a question. You stated that the practice was to serve on the defendant a copy in which the signature of the lawyer was typewritten in. It seems to me that is --

THE CHAIRMAN: That is, the paper that is handed him is a copy.

MR. CHERRY: Handed the defendant?

THE CHAIRMAN: There is an original with the signature of the lawyer on it.

MR. OLNEY: Exactly; the one that is handed to the defendant has the signature of the lawyer in typewriting?

THE CHAIRMAN: Yes.

MR. OLNEY: While all that the defendant gets, then, is this typewritten thing, signed in typewriting, or purported to be, signed in that fashion. Isn't that rather open to abuse? Should not the lawyer's signature be on the one that is given to the defendant?

THE CHAIRMAN: It never is. He seeks a summons and a copy of it is delivered to the defendant and the original is filed and that is all that is required. Even if you have a writ issued by a clerk you do not have duplicate originals issued and served. The writ is issued by the clerk and then copies are made by a stenographer.

MR. OLNEY: I understand that, but where the thing can be made out by a lawyer, it is just made out in his office and all that sort of thing, I think there should be something to really indicate that he made it out and signed it.

THE CHAIRMAN: Why shouldn't there be something to indicate that the clerk, who made the original, should sign it when it is issued by the clerk?

MR. OLNEY: I just brought up a query in my mind.

THE CHAIRMAN: It has worked all right, I think.

MR. CLARK: You do not want to take up, do you, the details as to the form of summons? That is the point Mr. Morgan and I have discussed a lot, and anticipated some and raised questions about the others.

THE CHAIRMAN: It is more a matter of form than substance, is it not?

MR. CLARK: I should think so, but I suppose the distinction between substance and procedure is one that varies with the individual.

MR. LOFTIN: I think Dean Clark and Mr. Morgan can get together tomorrow and settle that between them.

THE CHAIRMAN: Is there anything you want to deal with in substance?

3 MR. CLARK: There were several suggestions there by Mr. Morgan.

THE CHAIRMAN: Let us pass over the questions of form.

MR. LEMANN: "Notwithstanding the State is divided into two or more districts." Is that expression necessary to define the sentence above? Isn't that enough?

THE CHAIRMAN: That is a matterof form, is it not?

MR. LEMANN: I don't think wholly so. There may be some statutes limiting it. Yes, I withdraw that. I think it is all form, yes. It is all form and not procedure.

THE CHAIRMAN: If there is nothing to suggest on (b), how about subdivision (c), method of service?

MR. CLARK: I think the questions we got, most of them, were as to form. There is one Mr. Tolman suggested with respect to service upon a State or State officer. I don't quite see how the State gets in. You say you have to serve the State officer?

MR. TOLMAN: I am not sure there are not cases where the State has consented to being sued somewhere.

THE CHAIRMAN: Those are cases where you are suing a man who is acting under an unconstitutional statute.

MR. CLARK: You see, Mr. Tolman wanted to put in "service

upon a State officer", but, certainly, generally speaking,a State can not be sued and I would hesitate a little to infringe upon the dignity of a State, particularly in these times.

THE CHAIRMAN: No State has ever consented to be sued in the Federal court and we might as well forget that. Wherever they have consented to be sued it is in their own tribunals. All the suits are against State officers who are being sued because they are operating under an unconstitutional statute. So I think you need no provision about suits against the State because no action in a Federal court ever was brought against them.

MR. CLARK: Outside of this question of form there was nothing further on (c). I don't know whether any of you have anything or not. Of course (c) is the important part, perhaps, of that rule.

THE CHAIRMAN: There has been no suggestion as to substance, has there?

MR. CLARK: No.

THE CHAIRMAN: Let us pass it.

MR. OLNEY: I would like to make some suggestions in that connection.

THE CHAIRMAN: On (c)?

MR. OLNEY: On (c). The language, "municipal corporation, or other subdivision of a State" is not sufficiently broad, in my opinion. We out in California are blessed or cursed, according to your point of view, with numerous public organizations such as recolamation districts, irrigation districts, and municipal water districts, and all sorts of things of that kind. I think it should read, "municipal corporation or other public

or governmental organization or entity subject to suit." It ought to include them all.

THE CHAIRMAN: Did you get that, Mr. Reporter?

MR. CLARK: What was the last? "which are subject to suit"?

MR. OLNEY: "Municipal corporation or other public or governmental organization or entity subject to suit". There are lots of them out our way and I imagine there are in most States.

MR. DODGE: Are they not all municipal corporations?

MR. OLNEY: No, they are not. We have had lots of litigation as to whether they are municipal corporations, and some are held to be and others are not.

MR. DOBIE: You would not attempt to give the State the power to withdraw them from suit, would you?

MR. OLNEY: Not a bit of it.

MR. DOBIE: You are familiar with those cases in which they have held that they are subject to suit in the State courts, and the States can not exempt them from suit in a Federal court if they are subject in the State court?

MR. OLNEY: In that connection, and further on in this rule, is a point I want to take up. It would mean whether the State attempted to exempt them from suit or not; in certain instances they should be sued. The point I am making now is that the enumeration there, "municipal corporation, or other subdivision of a State", is not broad enough. It should be distinctly broader.

THE CHAIRMAN: The Reporter has noted that.

MR. CLARK: I see no objection now to the broader form.

MR. OLNEY: Now, there is another point which I wanted to bring up. The rule provides that service upon a State officer or other governmental corporation or organization or a person under disability must be made in the manner provided by the State law unless it appears that that manner is impracticable, in which case the court may prescribe the manner of service.

Now, in regard to the method of service upon a State officer or governmental organization, the rule, very properly, I think, recognizes the advisability of following the method provided by the State law if it is practicable and the method is provided. The alternative, however, that the court prescribe the method in particular cases is, to my mind, a very doubtful possibility.

THE CHAIRMAN: Suppose you put it otherwise -- "and if it is impracticable, it shall be done in accordance with these rules"?

MR. OLNEY: Exactly. It ought not to be left to the court to decide, because as soon as you do that you will have a question in every particular case whether the method which the court prescribed is sufficient.

MR. DONWORTH: Is there any method prescribed in the rules other than this identical one here? Would you not have to go further, Dean Clark, and add something else?

MR. OLNEY: I have drawn it in this way. Perhaps I better go on and I will come back to that point in connection with it. I think also it is a mistake in that rule to attempt an enumeration such as we have here:

"Upon a corporation, domestic or foreign, or upon any unin-

corporated association, whether partnership, joint stock company, club, union, business trust, or other association, which is subject to suit as an entity". That I think is too limited by the enumeration. There may be admitted from that enumeration associations which should be subject to suit.

Furthermore, looking at the case which is referred to in the Reporter's note, the United Mine Workers case, the Supreme Court laid down the rule which seems to me is the advisable rule, or practically laid it down as I gather it, that wherever there is an association or organization of individuals under a name and acting as an entity they are subject to suit in the Federal court if in that way relief can be had against them and in that way only, as a practicable matter.

Now, I think here in describing these defendants, incorporated or unincorporated, we should describe them in general language, such general language that it will cover any of them that are subject to suit or that may be sued in the Federal courts under the principle which appears in that case.

THE CHAIRMAN: Have you got a proposal to submit?

MR. OLNEY: I suggested a change here in regard to (c) reading as follows:

"Service may be made by any person specified in Rule 5 either:

"(1) In the manner prescribed by the law of the State in which the summons is served for the service of summons or other like process in any action brought in a court of general jurisdiction in that State, upon the defendant of the character of the defendant to be served; or

"(2) Upon a natural person, not under disability, by de-

livering a copy of the summons and of the complaint to him personally or by leaving a copy of the summons or complaint at his dwelling house or usual place of business" and so on, -- "and upon a corporation, public or private, or upon any organization, association, or body, public or private, subject to suit as an entity, by delivering a copy of the summons and of the complaint to an officer of such corporation" and so on.

"(3) Upon a natural person under disability in the manner prescribed by the law of the State in which the summons is served for the service of summons and other like process upon such a person in an action brought in a court of general jurisdiction in that State."

MR. CLARK: Of course, we were trying to go that far, but whether we should put that in or not I can not tell without going over it. It is just a question of which is the better form, which is the more inclusive.

MR. OLNEY: That is purely a question of draftsmanship.

MR. CLARK: I did not see anything to object to. Of course, we want to hit these associations, and, after naming some to give an idea what we were talking about, we said, "or other association, which is subject to suit as an entity".

MR. OLNEY: I am always afraid of enumeration.

THE CHAIRMAN: Would it be all right to leave this suggestion with the reporter and have this reconsidered by the drafting committee?

MR. OLNEY: Yes.

MR. CLARK: I want to go back to the municipal corporation point again.

THE CHAIRMAN: Can we not dispose of this?

MR. DONWORTH: What was your suggestion?

THE CHAIRMAN: My suggestion was that this draft of Mr. Olney's be referred to the Reporter and that he carefully consider this in the light of the suggestion. Personally, it strikes me as a complicated and involved thing, but I haven't any opinion about it one way or the other and I doubt if the rest of us have without more study thatn we are able to give it right now. Would that be satisfactory?

MR. OLNEY: Oh, yes; I wanted to get this because we have so many of these organizations out our way.

MR. CHAIRMAN: Suppose we pass that, then, with that disposition. What is it you want to raise?

MR. CLARK: I want to come back to the earlier suggestion which Judge Olney made about suing subdivisions of the State where all the officers had resigned. That is lines 29, 30 and 31, where the method of serving is impracticable and the court shall prescribe a reasonable method of service. That was designed to hit such cases as Amy v. Watertown, and if you will look in the comments to the rule on the next page at the middle of the paragraph — of course, maybe that will not do it, but in the Amy case everyone upon whom service could be made resigned his city position, obviously to avoid suit.

MR. SUNDERLAND: In that case the Supreme Court suggested that it ought to have the power to prescribe a method.

MR. DONWORTH: It seems reasonable.

MR. OLNEY: That, of course, is where they have left no one, no officer of the organization there at all, and you have to provide in that case some special method perhaps that is suited to the particular occasion. So far as service in gener-

al on these organizations is concerned, we ought to prescribe the rule.

MR. PEPPER: In that particular case the reporter mentioned, raised against the City of Watertown, the difficulty was much deeper than a procedural one. As I recall it, it was a case in which the municipality had failed to provide by tax levy for the meeting of some of its obligations, and the plaintiff, who was the holder of one of them, undertook to get a mandamus to compel them to levy the tax. The only people who could levy the tax were the town council or the alderman, and they resigned before the mandamus could be served upon them.

If that is the situation, you do not get anywhere by saying under those circumstances you can serve it on the mayor because the mandamus does not run to the mayor, it runs to the only people who can levy the tax, and they are out of office. So, I do not see how you can meet a situation where what has happened really is that you are up against the limits of civilized government. I do not see that you can do it by a special form of acceptance of service.

THE CHAIRMAN: Service will not help any if there is no one in office to get judgment against.

MR. PEPPER: That was the case, as I remember it.

MR. CLARK: You probably could not mandamus them to levy a tax but you can through sue a municipality and get judgment, and you can levy on the school houses if you get the judgment.

MR. LEMANN: Can you?

MR. CLARK: Yes.

MR. LEMANN: Would that not be on property used for the public service? I know you can not seize a fire engine or a

police station but maybe you can seize a school house.

I was also surprised to learn that if you had a contract with a State and you sued and part of the officials resigned they could just thumb their noses and tell you to run up the street and you would never get your money. But that is also outside of our jurisdiction.

Is there not a Federal statute on the subject of serving State officers? I thought that was what Major Tolman was undertaking to repeat here and I was looking for the wording of it.

MR. CLARK: No.

MR. PEPPER: There is no Federal statute? The Federal statute is only to cover the case where a State officer has died or gone out of office? There is such a statute but that does not deal with this preliminary matter of service?

MR. CLARK: No.

MR. DODGE: I would suggest that it really is not necessary to refer to cases where State methods are impracticable. It is an extremely rare case and we can not make our rules voluminous enough to cover every possible contingency that might arise.

THE CHAIRMAN: You move that the proviso commencing with line 29 be stricken out?

MR. DODGE: Yes.

MR. TOLMAN: I second it.

MR. LEMANN: Is the objection to the present provision that the court might go too far and you might have argument about the propriety of the court's order? Is that the objection to the present provision?

MR. DODGE: No, the objection is that the State statutes provide a method and we ought not to suggest that they are impracticable. That would very rarely be the case, and we must leave something to chance, I think.

MR. LEMANN: I am in sympathy with that.

MR. DODGE: And not have the rule so verbose.

MR. OLNEY: It is not necessary to leave it to chance. This provision in regard to impracticability can be cut out, but the rule should read that the service upon a State officer, municipal corporation, or anything of that sort should be made either in the manner provided by law or else in the manner provided by these rules.

MR. CLARK: Well, I do not see why that can not be done, something like "on the principal officer thereof", or something of that general nature.

MR. OLNEY: Yes, I have it covered in the draft that I handed you. In the first place, it provides that service may be made in the manner prescribed by the laws of the State for the service of motions upon a defendant of the same character as that to be served. Now, that covers the law of the State. "Or upon a corporation, public or private, or upon any organization, association, or body, public or private, subject to suit as an entity by delivering a copy of the summons and of the complaint to an officer of such corporation, organization, association, or body, or to its managing agents, its general agent, or to an agent authorized by appointment or by law to receive service of process for it."

I think that rule gives you the alternative; either follow the State law or follow this.

6

THE CHAIRMAN: Ought you not to be required to follow the State law unless it is impracticable, and then substitute if you want to a definite substitution?

MR. OLNEY: That may be.

MR. DODGE: To bring the question up, I move that it be left that the service shall be made in accordance with the State law, and with no suggestion that that may be impracticable.

THE CHAIRMAN: Is there any second?

MR. PEPPER: I second it.

MR. OLNEY: You do not intend to preclude the possibility of service in some other way?

MR. DODGE: No, but I know there is a statute in every State providing a method of service and I think we ought to be content with that.

MR. LEMANN: In answer to Judge Olney's question, you would preclude service in some other way?

THE CHAIRMAN: It would meet objection in Congress from a lot of chairmen if you tried to set aside State statutes as a method of service on such agencies.

MR. LEMANN: I think we are all borrowing trouble. We have only this one case here, and it is a pretty old case, 101, or something like that. Most of the States now have statutes.

MR. OLNEY: I think you are going to face in a few years more than one attempt by these organizations to escape summons.

THE CHAIRMAN: Let us leave that for the court to wrestle with; if they find it does not work they can adopt a new rule later on. Are you ready for the question?

(The question was put and the motion prevailed

with one dissenting vote, that of Mr. Olney.)

THE CHAIRMAN: That carries us over to Rule 5.

RULE 5

PROCESS, BY WHOM SERVED

THE CHAIRMAN: I suggest we strike out "eighteen" in line 3, and make it "twenty-one".

MR. CLARK: I have no great feeling on that. I only wondered what difference it would make. If you have an office boy of 18 or 21, it does not make any difference.

THE CHAIRMAN: You have got a responsible job here. You are wiping out the necessity of the marshal with a badge on to go around and do it, and some people are going to gag on that. Now, if you put children doing it, they will gag harder. It is a minor thing, but it seems to me they ought to be of full age.

MR. TOLMAN: I move to substitute "twenty-one" for "eighteen" in line 3.

THE CHAIRMAN: Any second?

MR. DODGE: I second the motion.

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

MR. PEPPER: I suppose that is all right. As a matter of fact, some of the most competent writ servers that I know about are office boys, fellows who have been in your office from the time they were 14, and they have now got up to be 18 or 19 and they really know the job and they do it constantly. They serve the subpoenas for witnesses, and so on, but maybe it is better to leave it.

MR. DODGE: Does this cover witnesses?

MR. CLARK: I was going to suggest that we are suggesting a change to read as follows:

"Subpoenas for witnesses and subpoenas duces tecum may be served by the proper marshal, by the deputy, or by any other person, not a party, who is of sound mind and twenty-one years of age or over."

And then we put in a query as to whether we ought to have a form of subpoena.

THE CHAIRMAN: On your first point, all in favor of including subpoenas with summons to be served by others than the marshal, say aye.

(The question was put and it prevailed without dissent.)

THE CHAIRMAN: You will have to put in "and complaint", in there.

MR. DONWORTH: The second part of Rule 5, have we touched on that?

THE CHAIRMAN: We have not got to that. We are ready for it, if you are.

MR. DONWORTH: I suggest the word "other" go out in line 4. If the judge happened to designate a deputy marshal it should not be invalid.

MR. CLARK: I guess that is right; line 4; "by some other person"; make it read "by some person"?

MR. DONWORTH: Yes.

THE CHAIRMAN: I guess that is all right. I have nothing more on my aggenda about Rule 5.

MR. CLARK: Is a rule necessary defining the form and signing of subpoenas?

THE CHAIRMAN: Yes, because it is a question whether they have to be issued by the clerk or by the lawyer.

MR. CLARK: If a summons does not have to be issued by the clerk it would seem a little hard to make the subpoena.

THE CHAIRMAN: I am not saying it should, but it is probably wise to make some provision for the subpoena, when it shall be issued by the clerk or by the lawyer.

MR. PEPPER: The penalty for disregarding the summons is merely judgment by default, but if you disobey the subpoena you may be subject to either attachment or an action for disobedience, and it seems to me there is something to be said in favor of having in that case a document that issues under the authority of an official, the clerk of the court.

MR. LEMANN: Isn't there some provision about contempt later on, that if you want to proceed for contempt you must have something?

MR. CLARK: There was, and there was some discussion about that. We had in a provision for preliminary notice and Mr. Morgan wanted to take that out. That is down in Rule --

THE CHAIRMAN: Senator Pepper raises the point that the violation of a summons is a contempt matter.

7 MR. PEPPER: The violation of a subpoena.

THE CHAIRMAN: The violation of a subpoena, yes. I think he is sound about that.

MR. LEMANN: I just wondered whether --

THE CHAIRMAN: You can not commit him for contempt until you have had the cour t make an order for him to appear. Your summons is no good as a basis for contempt proceedings unless it is issued by the clerk.

MR. LEMANN: Would it be worth having it say you can get out a subpoena without having the clerk sign it, but if you want to send him to jail for contempt you will have to do it another way?

THE CHAIRMAN: The way it works in my bailiwick is that when you get ready to try a case and you want to serve a subpoena, you go to the Clerk's office and get a bundle of them signed by the clerk, all in blank, and you take them back to your office and fill in the names of the witnesses and serve them; but they are issued by the clerk and a violation of them is contempt. Of course, a man has to be cited for contempt, but failure to appear is contempt under those circumstances.

MR. DODGE: Does not a subpoena duces tecum in the Federal courts have to be issued by the court now?

THE CHAIRMAN: The proper practice is to apply for it and have the court specify anything that is to be produced, in order to be produced. You apply to the court for subpoena duces tecum and state what you want and let the court say, at least, whether you are getting things that you ought to have.

MR. DODGE: Do we change that here anywhere in the rules?

THE CHAIRMAN: I don't think we have anything on it.

MR. CLARK: We haven't anything on it. That is the question I was raising, whether we ought to have a rule on subpoenas and subpoenas duces tecum.

MR. LEMANN: Is there anything here about the method of serving subpoenas?

MR. CLARK: We just put it in.

MR. PEPPER: Mr. Chairman, I move that the Reporter be requested to formulate for our future consideration a rule pre-

scribing the form of the subpoena and by whom issued.

THE CHAIRMAN: Including the question of --

MR. PEPPER: Both the simple subpoena ad testificandum and the subpoena duces tecum.

THE CHAIRMAN: Do you want to go further and say that it is the sense of the Committee that a subpoena duces tecum should be issued by the order of the court, or do you want to leave it to the lawyers to specify? Maybe it is enough to do that.

MR. PEPPER: I should think the latter was desirable, to prevent fishing expeditions.

THE CHAIRMAN: To have the court make an order?

MR. PEPPER: Yes.

MR. DOBIE: I would like to make a suggestion there, that the Reporter consider the present statute about subpoenas by which you can not bring a man more than one hundred miles. It seems to me that is an undue limitation and I wonder whether it ought not to be enlarged with modern methods of transportation. Of course, in criminal matters you can go all over the country, but in civil cases you can not issue a subpoena for a man who lives more than one hundred miles. This seems inadequate and I suggest that to the Reporter.

THE CHAIRMAN: The motion is with respect to subpoenas and subpoenas duces tecum and to request the Reporter to prepare a rule on this.

MR. CLARK: May I ask a question? The suggestion is that they issue out of the court; does that mean that the clerk can do it? I think it is well to make that clear.

THE CHAIRMAN: That is the ordinary subpoena, but there is a question whether a subpoena duces tecum ought to be issued by

the clerk or by the court.

MR. PEPPER: I move that in the case of the subpoena duces tecum the provision be that it issue only under the direction of the court.

MR. DODGE: I think that must be contrary to the present practice because the proceeding is not unfamiliar to quash a subpoena duces tecum as too broad and it then comes for the first time to the attention of the judge. I think the clerk now issues them, does he not?

MR. PEPPER: Would this not be a wholesome ruling, the one suggested? It seems to me there is no real hardship where you are calling upon a defendant to produce books and papers, and so on, to have that submitted to the judge. It can be done in chambers or the side bar while the action is pending.

MR. SUNDERLAND: It is a little more difficult where the judge is out through a sparsely settled district where you can not get at him.

MR. PEPPER: I suppose that is true.

8 MR. DODGE: The parties summoned can always raise the question.

MR. PEPPER: Yes.

THE CHAIRMAN: It is the sense of the meeting, as I get it, that the Reporter draw a rule with reference to the issuance of writs of subpoena and subpoena duces tecum, with the understanding that they shall be issued by the clerk on the request of the parties?

MR. LEMANN: What provision have you made for service? I did not get it. I understand there was one?

MR. CLARK: You have not covered the question Mr. Dobie

raised regarding extending the one hundred miles. All we have done is to say that it may be served by those here specified. All we have done is to insert the extra provision in this Rule 5 that we were considering.

MR. LEMANN: What I had in mind, was, do you make a domiciliary service by subpoena under this rule?

MR. CLARK: We have not provided for that.

MR. LEMNAN: You provide how the summons should be served and I wondered if there should be a provision for service of subpoena. We permit domiciliary service of subpoena, but if you want to get out a judgment for contempt domiciliary service will not be enough. You must have placement service. We can not get a fellow for contempt by leaving it with his wife or his child, or somebody at his home.

MR. SUNDERLAND: It has no legal effect, just a moral effect.

MR. LEMANN: Yes, that is it.

THE CHAIRMAN: Suppose we leave the question of the manner of service to the Reporter along with the rest of the rule.

Now, so far as the distance from which the witness can be subpoenaed is concerned, we have covered that with respect to provisions for a very considerable limitation.

MR. DOBIE: That is only when you want to get the witness himself on deposition.

THE CHAIRMAN: I know we have made rules about how far you can make a man travel on a writ of subpoena to give a deposition, but we have said absolutely nothing about it when it comes to hauling a man in court.

MR. DOBIE: I just throw out that suggestion, and if you

don't think we ought to go into it, all right.

MR. CLARK: I think if we go so far as to talk about subpoenas it will be almost necessary to carry it through. I would like some advice about this one hundred mile limit.

MR. SUNDERLAND: What we did on deposition was to reduce that? We did not extend it?

THE CHAIRMAN: No, but we provided for --

MR. SUNDERLAND: More than one hundred miles?

THE CHAIRMAN: Yes, but we made no provision --

MR. SUNDERLAND: The question would be if you can extend the one hundred miles that Congress has fixed.

MR. DOBIE: Of course, there is this proposition that you can pick a place right around there and take a man's deposition there, but here is a suit being tried at Norfolk, for example, and there is a man 105 miles away and it is very important to get him there as a witness in a civil case and he just will not come. I think one huhdred miles is too short.

I have one friend, for example, who was sent from Charlottsville to Seattle in that Krankhouse case that you probably know about. He had to go from Charlottsville to Seattle on the criminal side.

I am not, however, extending it that far, but I think one hundred miles is too little. I think that was drawn at a time when one hundred miles was a long distance. It is nothing now when you can hop in a car and do it in a few hours.

MR. LEMANN: As we look at it, your provision for subpoenas may have some detailed provisions for subpoenas in connection with depositions, and how far we should make subpoenas for attendance at court --

MR. DONWORTH: I don't think they should be uniform. I think it is all right to make a man travel farther to attend an actual trial than it is a deposition. I think it is much more important and more useful. We can travel one hundred miles and restrict ithe other to forty. I think it is all right just as it is.

MR. DOBIE: You can go to the man and take his deposition.

MR. LEMANN: He is there previous to the service of the subpoena.

MR. SUNDERLAND: It is one of the peculiar details we have in connection with depositions.

MR. PEPPER: Mr. Chairman, how far do we go in this business of dealing with compulsory attendance of witnesses? For instance, take the person who is under restraint and on whom we have to get out a writ of habeas corpus ad testificandum; is that a subject --

MR. DOBIE: We have not gone into that.

THE CHAIRMAN: We have not dealt with that. I have a note here whether we ought to deal with habeas corpus ad testificandum. I have some notes about taking the depositions of persons -- but that comes under the head of depositions. I don't think you can subpoena a man who is in jail to appear as a witness. You have to have a writ to do that.

MR. LOFTIN: At one time, Mr. Chairman, they amended this statute we are discussing so as to provide you could go beyond one hundred miles upon making application to the court for cause, the court making an order to that effect, but that statute has since been repealed and it is now limited to one hundred miles without any authority in the court to make an order to go beyond

the one hundred miles.

THE CHAIRMAN: Now, I had this suggestion to make: I think the Reporter, when he is dealing with writs of subpoena he ought to have a rule about the distance people can be compelled to travel. When you come to the head of depositions you will find that I made a suggestion that I hope will appeal to you. Although, for the purposes of discovery you can take depositions any place, even though the man is roundabout, when you come to use the depositions you can use them in court unless the witness is so far from the place of trial or dead or something of that kind.

Now, you will find there, if you adopt that suggestion, material that will fit right in with this because if you provide you can use a deposition if the man is within one hundred miles, it necessarily follows that you can go out and subpoena him for personal attendance at the trial if he is within one hundred miles. I think that thing will work itself out consistently with our rules about the use of depositions. I think the problem as to how far you can subpoena a witness will fit right in there and can be left until you get to that part of the rules, because you will then if you adopt the suggestions limiting the use of depositions by being conditional on the distance the witness is away, or something of that kind, that that will ipso facto prescribe the distance you can compel him to travel personally to attend the trial. When we frame this rule we can make it about subpoenaeing a witness to fit in accordance with the question of depositions.

MR. CLARK: That is not going to extend the limit at all?

THE CHAIRMAN: I am not talking about what you will do. I

am saying that the subject is one that necessarily dovetails in with the use of depositions. Why say you can not use a deposition if a man is within one hundred miles unless your subpoena rule gives you the right to bring him personally that distance, so the two things fit together.

MR. LEMANN: If you said you could bring into court within two hundred miles then you would have to change the deposition rule?

THE CHAIRMAN: Right. The solution of the deposition rule will solve the troubles on the subpoena.

MR. LEMANN: By settling the rule here we will settle the rule there?

THE CHAIRMAN: Yes, but let us wait until we get to that, because a very important thing under our deposition rules as they stand now is that there is no limit to the use of depositions. You can take a man's deposition and then use it even thought he is out in the street, and I think we will have to back up on that. Let us wait until we get there.

MR. DONWORTH: Mr. Chairman, on Rule 5 there was the suggestion I made at the former hearing, but I did not win any support. Without taking up time I wish to renew it because I think there is a lot in it. I refer to the second paragraph of rule 5:

"Return of service of all process shall be made by the clerk making service and shall set forth the manner, place, and date of service" and so forth.

There will be a great many judgments rendered by default and the validity of those judgments will depend upon the return of service, upon the summons, and I foresee that a great many

courts are going to differ about the interpretation of that word "place". If it means street and number there will be a lot of bad jusgments. I suggested that we make it definite.

What I think it means is city or county. Where there is no city of town, it would be the county. In New England where most everything is in some town or city it would be the city or town. In the West usually, or very often, it is not. But I do think that instead of "place" we should say just what we mean. If we mean street and number, let us say so. If we mean a county, let us say that, because a great deal is going to depend, as I say, upon default judgments that will not be scrutinized until the trouble arises.

THE CHAIRMAN: The general rule is that it is sufficient if you state that within the city of so and so you served him on a certain date by handing a copy to him.

MR. DONWORTH: With us we simply state the county, although it may be a city. If it is a city, we simply state the county. But I do not care what it is as long as it is definite.

MR. DOBIE: If you make an enumeration, of course you have to have an accurate one. Does every State in the United States have cities and counties?

MR. DONWROTH: I think they do. The State of Louisiana has parishes, which are the same thing.

THE CHAIRMAN: How about the District of Columbia? You have a State but no county.

MR. DONWORTH: All those questions suggest the ambiguity of the word.

MR. PEPPER: It is suggested, Mr. Chairman, that the reason for putting in "place" at all is in order that the court

may be assured that the process is executed within whatever territorial area is legitimate to execute that process. In the case of a subpoena it has got to specify a place within one hundred miles. In the case of a summons it has got to specify a place within whatever these provisions will cover.

THE CHAIRMAN: Within the jurisdiction.

MR. PEPPER: In Rule 4 -- within the jurisdiction, and would Judge Donworth's suggestion not be a little bit of circumlocution in the statement when you specify the time and manner of service and place within -- I do not mean the phraseology, but a place within the range of the process is the idea that I have.

MR. DODGE: The process runs all through the District against the defendant.

MR. PEPPER: You see, over here we have one hundred miles for the subpoena.

MR. LEMANN: That means you can not make him come one hundred miles from his residence. If I happened to be in the city of New Orleans right next to the Court House you could serve me and summon me to come to testify. But, as a matter of fact, I live 150 miles out of New Orleans, and I do not think that the fact that you served me within one hundred miles would make any difference, as I understand the statute.

MR. DOBIE: I think that is the statute.

MR. LEMANN: You see what I mean on that particular point.

MR. PEPPER: I do not see any purpose at all in specifying the place in the return unless the place is significant as respects the validity of the return, and if it is to be significant it must have some relation to the territorial area within which

the process can be executed.

MR. LEMANN: Is there anything in the point of identifying the verity of the service? With us I think they would say, "I executed the within writ by serving it on the defendant and placing it at his residence, 308 St. Charles Avenue, in the city of New Orleans."

MR. DONWORTH: They would not require --

MR. LEMANN: I always thought they did it to prove the verity if any argument comes up -- "Where did you serve him?" This will show where it was done.

MR. CLARK: To make it more definite and to follow Judge Donworth's other alternative, we are permitting service by any indifferent person now and we thought it desirable to make them specify about as exactly as they could for the very purpose you suggest.

THE CHAIRMAN: This would give the defendant a chance to prove an alibi, that he was not at that particular place at that time although he was within the county.

MR. DODGE: I would like to ask a question for information. Is not the return of the marshal now more than prima facie evidence?

THE CHAIRMAN: No.

MR. DODGE: Isn't it?

THE CHAIRMAN: No.

MR. DODGE: I think with us the return of the sheriff is unconvertible.

MR. DOBIE: It is conclusive in a number of States and the only recourse is on the sheriff's bond.

MR. LEMANN: It would not be conclusive if somebody said

they served me in Philadelphia tomorrow. I would have a recourse under the 18th Amendment. I don't think a judgment under that service would be any good.

MR. DOBIE: They have held that it is good and your recourse is on the sheriff's bond.

MR. LEMANN: It can not be good under the 14th Amendment. Suppose his bondsmen were no good?

MR, SUNDERLAND: The United States Supreme Court has held the other way.

MR. LEMANN: It can not be conclusive.

MR. DODGE: The marshal's return now is only prima facie evidence?

MR. SUNDERLAND: Yes.

THE CHAIRMAN: The precise point is, what is meant by the word "place", and I think we agree that we ought to be clear what is meant, and the real question is whether we want to follow Senator Pepper's suggestion that it is sufficient to show a place within which the document will be served, or whether we ought to particularize as to the street location, building, and what not. That is the question.

MR. DOBIE: How are the different statutes phrased, do you know? Do they usually just say the place? I am inclined to think a court would give a very liberal interpretation in the case Judge Donworth suggests, in a default judgment. It seems to me that if they stated anything that, as Senator Pepper said, brought it within the range of the process, I don't believe any court would ever set that judgment aside.

MR. DONWORTH: I would not delay the discussion of important matters with that. I think we can leave that to the Re-

porter and if he finds that the State statutes require some elucidation of that point, let him work it out.

THE CHAIRMAN: All right.

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The Chairman. Is that all on No. 5?

Mr. Cherry. I wish to ask one question, with regard to the last clause:

"and shall be prima facie evidence of the facts recited."

That applies both to the marshal's return and the affidavit of the individual, I take it. Now, in the absence of a statute of that sort, don't the courts make a distinction?

Mr. Sunderland. A few do, and a great many do not.

Mr. Cherry. I wonder if there is not some basis for it, in saying that they require clear and convincing evidence, or something of that sort, and require that in the return of the officer, rather than they do in the return of an individual.

Mr. Sunderland. Some do. But you get all sorts.

Mr. Cherry. But the point I am making is that that appears to put both on exact parity, but appears to be describing each as prima facie evidence.

Mr. Lemann. You would make a distinction where you have the marshal serve it? Is there any substantive reason for making that distinction? Here we are permitting something that we do not have, now, in my state -- permitting an individual to make service. I should prefer to have someone in my office make the service, than have the return by the kind of person who goes out of the marshal's office, to make service, because he is a deputy marshal with a badge; but some of them can hardly walk.

Mr. Cherry. I do not know how to answer that; because it would seem to imply that we have different sorts of people in office. But it has been my observation that where that rule applies, you get more attention paid to your official

return. Sometimes it is of value that you should have. It does not mean, of course, that you cannot attack it; because you can. But I only raised the question because this seemed to set an indefinite rule on it.

Mr. Lemann. If you get some advantage it would seem to make some advantage to the official service, as against the unofficial service.

Mr. Dobie. How would you phrase that? Prima facie evidence would require more evidence by the marshal than the other.

Mr. Cherry. I was going to let them work that out.

Mr. Sunderland. It seems to me that they all have the same weight, in principle. I think you would get just as conscientious service from an individual server as you would from a deputy.

Mr. Pepper. It is like testing the credibility of a witness. The person who has him before him can be trusted to do it rightly.

The Chairman. Does that finish No. 5?

Mr. Dodge. I think so.

The Chairman. Now we come to Rule 6, and I have a matter here which I have very much at heart. It has been dealt with before. When you come to Rule 6, lines 10 to 18 go out automatically. They relate to what a defendant shall do if he is not served with a copy of the complaint. Now those rules are prescribed, and we have automatically stricken that out by requiring the complaint to be served with the summons. So that is off the board.

The rest of the rule relates to the question of filing

papers, and starts out with the paragraph specifying that complaints must be filed within 20 days after the service. And in (b) there are a number of other provisions as to the time when other documents should be filed, and so on.

2 I do not know that I can state my position any better than I have in my notes:

"First, I am still opposed to any rule requiring filing of complaint or other papers, where the plaintiff does not choose to begin suit by filing complaint, before the court has occasion to act in the case. They should be filed before any action by the court is asked, and in time for the court to make up its calendar, if the case is to be tried, or on demand of another party, but there are good reasons why this should be sufficient.

"A vast number of cases are settled or abandoned and never brought before the court. It is a waste of time and money to require papers in such cases to be filed. It loads the clerks down with useless entries, requires increased clerical force, and increases public expense. When papers are filed, fees must be paid by litigants, and this money is wasted if the case is dropped or settled. It forces early publicity on the parties when one or both may not want it. Even if the case is tried, they may have good reason to avoid publicity as long as possible. On the other hand, I know of no reason why a prompt filing is desirable. The argument that a lawsuit is a formal thing which ought not to be carried around in the 'hip pockets' of the parties, is not persuasive. There is no point in the contention that an unfiled

complaint is an instrument of blackmail. A threat of suit, or exhibition to the defendant of a proposed complaint is equally effective. There is a very large number of States which do not require filing until action by the court is about to be asked. New York, Minnesota, and many Code States follow that practice."

I suggest that we provide in section (b) the manner of service of other pleadings, appearances, motions and orders, and that we then provide a new subsection or sub-paragraph (c) about filing of summonses, pleadings, written appearances, motions, notices, demands, and other documents forming part of the proceedings in the case, together with the proofs or admissions of service, and that we specify that they shall be filed with the clerk by the party having custody thereof, on or before the date at which the court is to conduct any hearing, or take any action. At any stage of the proceedings any party having custody of such a document, shall file the same with the clerk on the demand of any adverse party. If any party having custody of an original document shall fail to comply with this rule, any other party may file a copy in lieu thereof. The court may make such orders as it deems necessary to enforce compliance herewith.

In substance, that is the usual practice in the State of New York -- although of course it is very much condensed and shortened -- and is the procedure followed in many states. I cannot help feeling that this requirement of filing the material within a specified time, in the first place is not going to be obeyed. Lawyers generally ignore those rules. And in the next place, I do not see any object in it. It seems to

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me it is rather a superstitition, to be unwilling to break ourselves away from the old idea that we have to file something before we have a lawsuit.

Senator Pepper was talking about something that came up in the American Law Institute, with respect to whether libel exists, and whether suit was pending, and whether the privilege against libelous matter existed until a paper was filed.

Under our rules, if you have to file right away, the libeling man has an excuse of saying, "Well, the suit has started and I am privileged."

But that is a minor thing. I have practiced for 40 years under the other system, and I know how the New York lawyers feel about it.

Mr. Pepper. What is a concrete case, such as you have in mind?

The Chairman. Well, suppose instead of filing the complaint and delivering to the marshal for service, you draw up a complaint, with summons attached, and give it to somebody in your office, and have it served. Now, under the rule, you have to file it in court within 20 days, and you may never try it. But you have to go up there and file it and pay fees and have entries made in the clerk's office, and all that. And there are other provisions, here, for all other kinds of documents. In subdivision (b) there are various time limits within which you have to file this or that or the other document, all of which are more or less ignored in practice.

Under my method of doing it, you start the suit by serving a summons and complaint on the other side. You do not have to file it except for one of two things: If you want to go to

court and have some action on it, you have to file your papers of course. And I have made provision for filing the papers before the case is tried.

Mr. Pepper. When does the defendant who has been privately informed, enter his appearance?

The Chairman. Well, he serves it on you, if you are the plaintiff. And he does not have to file it unless he thinks you are going to do something when his back is turned. And there is no objection to this, if a man filing anything here, feels that his protection is involved. But under the rule as presented by the committee, the man is forced to file his papers immediately, and thus encumber the record with papers which may never be useful. Whereas, under my system, the time of filing is voluntary, except that you have to have the papers on file when you ask the court to do anything in a lawsuit.

I am giving you the New York practice and the practice of a great many other States. I have a feeling that the filing of things is rather a reactionary idea because of the old custom of filing things and getting the writs issued, and we cannot break loose, although we do not know just why.

If there is any good reason why we should file these things within 20 or 10 days, I do not know. For I do not know of any.

Mr. Pepper. I was thinking of a case in which the plaintiff makes out his complaint and puts it, with a summons, into the hands of a suitable agent. That agent effects service, and so reports to the plaintiff. Then it is optional with the plaintiff, under your system, when he files. It is

quite important when he files; the period within which the appearance must be entered, then begins to run.

The Chairman. Oh, no.

Mr. Pepper. Then his attorney goes to court, and there is no case pending in which he can enter his appearance.

The Chairman. He does not have to. He can serve a notice of appearance on his adversary.

Mr. Lemann. It is just a private matter between the two of them.

The Chairman. He serves a notice on his adversary, and he can put that in his files if he wants to. Or if he thinks the other man may try to slip over something with the court, or if he chooses, he can go up and file his notice of appearance. And that is on file. And if the other fellow tries to be crooked and get some word from the court, without notice of appearance, the appearance is there.

Mr. Pepper. I suppose it works out all right. It just sounds as if his appearance is his disappearance.

The Chairman. Perhaps your thought is based on the idea that a man does not enter an appearance unless he goes into court and appears.

Mr. Pepper. I suppose so.

The Chairman. After all, a summons is not a summons, as we call it. One method is to go and file your papers and get the clerk to issue a writ, and all that. And then you have filed with the court everything you have.

Now, we have departed from all that. You do not have to file anything. You can issue a summons, yourself. And yet we are hanging on to the idea of filing something. And I know

that it will meet violent opposition from those lawyers who have practiced under the other system. I have practied for 40 years, and I never heard of a single case where there was any abuse occurring under it. I think this is an important, practical question, affecting the convenience of litigants, the expense of litigation, and of maintaining the clerk's offices, annoying publicity, and the chances of settlement. As I say, I have never heard of any abuse resulting from it, just because a man did not have to run up and file papers immediately -- or any abuse resulting from his being able to keep the papers in his office.

Mr. Pepper. Does that not increase the possibilities of blackmail?

The Chairman. I cannot see that it does. Because what difference is there between threatening to file and threatening to sue? We have cases in New York where they will draw a complaint and show it to the other side and say, "If you do not settle this case, this is the kind of suit we shall bring."

I think that the blackmail phase of it is rather well eliminated.

I have talked about it before, but the committee was against me. I simply feel that it is an important matter, and I should like to see an alternative rule drawn up, the way I have drawn it, and put up to the Supreme Court, for their consideration. I think they ought to have the other picture before them. They may say, at once, "Oh, we have always had a requirement of filing," and they may turn it down on the matter of summons by a lawyer instead of by the clerk.

I do not know. But I think we ought to give them an opportunity to consider this from the point of view of saving in the routine and saving in the procedure in the clerk's office.

Mr. Pepper. Do you have the idea of a note to the counsel or to the court?

The Chairman. Yes.

Mr. Pepper. Then I move you, Mr. Chairman, that this matter be reported to the Court in the form of a rule and a note calling attention to an alternative means of dealing with the situation. Is that your thought, there?

The Chairman. My thought is that if the committee adheres to its former rule about it, and still believes that the rule as stated in the present draft should be retained, then the alternate rule be offered.

Mr. Pepper. Very well. I make such a motion.

Mr. Olney. Mr. Chairman, I do not understand that the committee had adopted the rule as laid down here. The matter was discussed to some extent; but my recollection of the decision was that it was not necessary to file the papers within any particular length of time. I do not think the committee was committed on this.

The Chairman. I thought it was as a result of the last meeting, when it is required that you must file within 20 days after the starting of the lawsuit.

Mr. Olney. Well, there is no answer to the argument that you have made: That if you are going to provide that a suit may be brought merely by the serving of a summons, without filing a complaint with the court, the advantages which make that method of bringing the suit advisable, will be lost

if you require the plaintiff to file his complaint within, say, 20 days. The advantages are gone, and the reasons for that method of bringing the suit will be lost.

If we are going to permit the bringing of suit merely by filing summons, we ought not to require the complaint to be filed until the defendant demands it or until further proceedings have to be taken by the court.

Mr. Lemann. I thought we did vote just what the reporter has done -- that it must be brought within 20 days.

The Chairman. I thought so.

Mr. Lemann. And the majority felt that you should have no time limit on filing it; that if you allowed 20 days, there was a period for discussion and conciliation; and if the matter was not disposed of -- I do not know who got up the phrase -- but that the matter should not be "carried around in a hip pocket."

The Chairman. You did.

Mr. Lemann. Well, I did not remember. But, like a good many other things, the more I think about it, the less terrible it seems. It seemed perfectly awful, the first time I thought of it, but I am getting a little bit more adjusted. I had the impression that in the Federal Court of New York you had to file your complaint right away, and can only do this other thing in the State Court in New York.

The Chairman. That is true. But you cannot get your summons in the Federal Court without filing it.

Mr. Lemann. Yes; but I am just thinking of the reaction on the profession that we have been considering. But I suppose in Minnesota you could not do what we have been advocating

in the Federal Court, now.

The Chairman. No. Because you cannot even get your summons until you file your complaint.

Mr. Lemann. Therefore I think that so far as the effect on the profession is concerned, and the remonstrances that will be made, I should not expect as much remonstrance if you should continue this as if you changed it. So I should not think that the profession would get very much worked up about it. We are doing more for them than they can now do. And we can feel, I should think, that that would be the answer to popular reaction.

How many states are there, Mr. Chairman, where the state practice permits you to carry around a complaint indefinitely?

The Chairman. Oh, I imagine most of the code states.

Mr. Clark. I will have to disagree with that; that is not quite so. If you will look back to the table we presented, you will see a great many suits stopped before the filing.

The Chairman. I do not like a mongrel system. If you are going to require filing papers immediately or in a few days, then I am in favor of getting back to the idea that prevails in most federal courts -- that you must file a complaint in order to get a summons from the court, and proceed along that line, and have everything in the clerk's desk from day to day. That is one course.

The other course is to have a free hand and let the lawyers make their own service and summons and handle the suits out of court until they want to go in court and get some relief, and then file the papers.

Now, your system is a mongrel system. Of course, I do

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not know that the Supreme Court, when it gets these suggestions, would consider it for a minute. They may turn it down flatly. And they may turn this down, likewise, and say, "Let us have everything in the hands of the clerk." But your system is a mongrel system; you pull away from the old method and then get a little bit frightened and say, "We shall do it in 20 days, anyway."

Mr. Lemann. I gathered that it was in force as an intermediate system. From what Mr. Dodge said, I gathered that it was 20 days, in Massachusetts.

Mr. Dodge. Either 14 to 16 days from the date of service.

Mr. Lemann. I had the old-fashioned idea, Senator, that a lawsuit is a public matter and not a private matter.

Mr. Chairman, I am simply turning over in my mind as to which should have the committee's approval, and which should be the committee's suggestion.

The Chairman. I do not ask you to do that. Certainly I do not ask you to do that, but just ask that it be put up as an alternative rule. I settled six lawsuits in New York that were never put on the calendar, and yet were on hand for months. And that just shows what you can do. They were state cases and not federal cases, but it shows what you can do.

Mr. Lemann. Did not Mr. Wickersham quote Judge Knox that he did not like the rule because you had to chase around after the lawyers, in order to get the papers?

Mr. Clark. The federal court has adopted the rule of requiring filing of pleadings.

Mr. Dodge. If I am a director of a bank, I want to know if my bank has been served, and I do not want a fraudulent officer of the bank, upon whom process has been served, to conceal that service for a year. And if I am an officer of the bank and am asked to extend credit, I want to know whether there are six suits pending against that man at that time. So it seems to me that in the interests of proper progress, it ought to be known whether suits are in process. That is one consideration.

Mr. Donworth. Mr. Chairman, I recognize the force of what these gentlemen say. But the practice that the chairman advocates was adopted in the State of Washington 40 years ago. It has been in practice ever since, and no one has suggested changing it. These abuses and difficulties do not seem to arise, there. The plaintiff's lawyer makes out his complaint and summons and serves it on the defendant, and the defendant can file his papers any time he wants to, of course, if he so elects. If he does, a number is given to the case, of course, when the first paper is filed. The first paper may be a motion to make definite. The defendant comes along with his motion to make definite, and he takes the next number that is vacant. And when the plaintiff files, in that case, what is called the belated complaint, that takes the number that the case has been given. We do not find that there is any encouragement to blackmail, or anything of that kind.

And so I think that the legal profession there is entirely in favor of continuing the system that we have. Of course, whether it would work well in the federal court, with the large demands and important litigation, I am not sure. But

certainly I feel like supporting the chairman's suggestion.

Mr.Dobie. Mr.Chairman, I do not think it makes a great deal of difference whether you have that mongrel system. Because we have both in Virginia. To my mind it is a question of practical expediency, and that is all. If it is convenient and expedient to adopt what you say, then I am very, very much impressed by your suggestion and by the suggestion of the gentlemen who have had wide experience in the courts -- which I regret that I have not had. So if you gentlemen who have had experience, suggest that it is a wise and proper and expedient one, then I would unhesitatingly vote for it, regardless of whether it seems to me a mongrel system or whether it is felt that it might shock some of the lawyers in the courts. Consequently, if it seems more expedient, I suggest that we adopt your rule. I think that what we adopted last time was in the nature of a compromise.

Mr. Loftin. That is true.

Mr. Dobie. I should like to hear from some of these gentlemen. General Olney, I should like to hear from you. You have had a very wide experience.

Mr. Olney. Well, bear in mind that in my state, both in the federal courts and state courts, all actions are begun by filing a complaint. And that is a procedure to which I was accustomed. Consequently, when this matter was first brought before the committee, I was very much shocked at the idea of bringing suit in any other way. The idea of a man's bringing suit by serving a summons and carrying the complaint around in his pocket until he saw fit to file it, seemed to me to be perfectly preposterous. But the more I thought about

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it, and the more I realized that it had been in force in such important states as New York and Washington and Minnesota, and had worked there, it made me feel that my feeling was that of a man who just was not accustomed to that particular practice. I could not find any answer to the arguments that were made, particularly by our chairman; I had no sufficient answer in my mind. So I was willing to accept the provision that the suit could be brought in either way -- either by filing the complaint or else by merely serving summons. And the rules, as I understood it, were so to provide.

If I may continue for a moment, now, let me say that I should like to understand clearly what the mongrel system is, to which the chairman refers. If I understand him correctly, he does not consider it a mongrel system which provides that suit may be brought by either of these methods in the alternative; the mongrel character lies in using the first or the second alternative -- that is, in using the alternative of bringing the suit by serving summons, and then by attaching to that permission the requirement that the complaint be filed within 20 days. Now, that last requirement to my mind would wipe out entirely all of the advantages, or else a large part of the advantages, that these gentlemen say are inherent and that attach themselves to the method of bringing the suit by serving the summons only. However, it seems to me that the real question before us is not so much, and ought not to go back to, the question of whether we are going to permit these two methods. That is settled, and let us go ahead with it. The question merely is this: Shall we now recommend as a part of our rule that if the method is followed by bringing a suit

by merely filing a summons, then the plaintiff has to file his complaint within 20 days or within any other particular period, or that he be required to file it whenever the other party serves notice on him, or if there are to be subsequent proceedings. But until there is some necessity of filing it, then the whole theory is that it is not necessary to file it.

And the reason which impresses me, as advanced by the
6 chairman at the preceding meetings, for permitting a suit to be brought in this manner, is that after the suit is brought, the parties can discuss it. There is no publicity attaching to it. There is opportunity for settlement and compromise and arrangement. There is all the difference in the world, when it comes down to compromising a matter during the period between the time when suit is brought and the time when the papers are filed, when the defendant sees that the other side means business and is going ahead with it. And as I understand the results of the practice, it is advisable to permit the suit to be brought without any publicity whatever attaching to it, and to go along in that fashion until the time comes when something has to be done in the suit and when it is perfectly evident that the parties are not going to get together and that the suit is never going to be dismissed or allowed to drop. And then they file their papers.

So, the rule that is before us, and which it seems to me we ought clearly to understand, is merely the requirement that the plaintiff file his complaint within a certain length of time after the service of summons.

Mr. Dobie. Mr. Dodge, you talk about the interest of third parties. You are a director of a bank, but you could

go to a court and see whether the summons had been served.

Mr. Dodge. There will not be any papers in court, at all.

Mr. Pepper. No.

Mr. Dobie. There would not be anything there?

Mr. Dodge. No.

What is the practice in Pennsylvania?

Mr. Pepper. Well, the writ or summons, whichever it may be, bears the seal of the court, and is served only by the sheriff.

Mr. Dodge. When do the papers appear in court, as a proper writ?

Mr. Pepper. Why, the plaintiff goes into court and files a praecipe for a summons, and the case gets a trial number, under the rule of court, which prescribes that the declaration must be filed. But the summons, under the seal of the court, is returned by the court's officer. And the summons specifies the return day.

Mr. Dodge. And the praecipe is on file from the beginning?

Mr. Pepper. Yes, sir. And the defendant then must cause his appearance to be entered in court, either in person or by attorney; otherwise there would be a judgment against him.

The Chairman. My judgment is that the Court is going to go either one way or the other on this, and not stick in the middle, as we have. I think they would be inclined to sit back of the process and say, "Here, this has been used in the federal court, and we will stick to it."

Mr. Dobie. If this is desirable -- and you gentlemen have convinced me that it is -- then I am in favor of putting it up to them.

Mr. Clark. With or without an alternative?

Mr. Dobie. Well, I do not object to an alternative. But I should like the Court to have our advice, and I should like to put it up to them. And you gentlemen have convinced me that this is a desirable rule.

The Chairman. I think we should put up to the Court the matter of whether to follow the old rule of getting a writ and summons from the court and filing the papers, or whether to adopt the new view and not require filing until the case actually is to go before the court. If we put it in that way, I think they will have something to choose between, rather than an intermediate system which is neither flesh nor fowl.

Mr. Pepper. I merely put the motion in the form of an alternative -- that a rule on this subject be reported, with a note for the information of the Court, stating the alternative. I thought that if your motion could be adopted, the time would then be ripe for a motion as to which of the alternatives should be put up as the recommendation of the committee.

The Chairman. Are you in favor of suggesting to the Court an alternative rule in the line of my draft?

Mr. Tolman. Mr. Chairman, I have considerably changed my view since I examined the chairman's rule and gave it a very intense inspection. I never knew before of a practice like that, and have not heard of such a thing in my life. Therefore it was very startling to me, when I first heard of

the matter. But I can see, here, that anyone who wants them filed can have them filed. And I am really impressed by the statement of the choice between really the old system and this new one, and not a half-way measure.

I should like to make a substitute motion: That we report to the Court a rule as proposed by the chairman, and also a rule as heretofore in use. Of course it may be that you would want to have a vote as to which you would prefer. I think that there has been some change in thought on the subject. But at any rate I should like to see the present system and the chairman's system presented as alternate rules.

Mr. Lemann. You would not favor presenting to them the third alternative?

Mr. Tolman. No; I never was pleased with mixtures. I wanted to go back to the old system, because it was the one I knew and practiced for 50 years.

The Chairman. I think that there is where the choice is going to be made. I do not know, for I have never talked to the Court. But I think that Major Tolman is right, and that we ought to have either one system or the other. For I feel that the mongrel system -- which might have been adopted in deference to my views and those of others who wanted to get rid of the idea of getting the summons issued by the clerk -- is a thing they will not like.

Mr. Clark. In connection with the so-called old rule, I would ask that it be proper to suggest as one alternative, one that is fairly usual, as shown by the tables which we have; that is, that the clerk do the job of serving the papers. That is the system as applied in some jurisdictions. That is

what might be termed a modification of the rule that you designated as the old rule. And you will see, from our table, that that is one that is followed. The lawyers in my part of the world are going to be shocked by the requirement that you have to go around and chase up the other lawyers. And if we are going to have the clerk of the court look after the case, it would seem proper to have the clerk look after the whole business.

The Chairman. And to take care of all the papers?

Mr. Clark. Yes.

The Chairman. Then you would have to have a tremendous personnel.

Mr. Clark. No; it would be a very simple and easily worked out system.

The Chairman. But you should bear in mind that we are getting up a new system for the federal courts; that we have in mind that when we get into the modern methods, we shall have something that is easy and inexpensive.

I certainly hope that we shall get something inexpensive, and that may be adopted as a good model by the States. If we do get up such a good model, then we are hoping that the state courts will decide to adopt our system, and thus we would get uniformity. I do not think that any idea in the system should go to the point of getting us back to the old idea of the clerk's issuing the writ, and whatever you get in using anything like the old system.

I am sure that the States using my system will never go back to the other. The States that are using the old system may gag a little bit before they adopt the new one; but if

they see that it works well, I think they will adopt it. But I am perfectly sure that all the States using the new system will never go back to the old one.

But I am in favor of Major Tolman's suggestion that we should either go back to the old system, and have the clerks keep track of everything that is done, on the one hand, or else adopt a completely new system on the other hand, rather than a mongrel system.

Mr. Donworth. I withdraw my motion.

Mr. Dobie. What was the Major's motion?

The Chairman. The Major's motion was that we put up two alternative systems to the Court: One, that we have the old system of having the clerk file the complaints, and the consequence of having everything served; and second, the alternative of a system such as I like.

Mr. Lemann. Eliminating the intermediate system entirely?

The Chairman. Yes.

Mr. Dobie. I should like to suggest an amendment, if the Major will accept that: That the committee express its preference for the rule you have suggested.

The Chairman. Well, let us have the alternative.

Mr. Lemann. I think that the other is followed in many states.

The Chairman. Is there any objection to all three?

Mr. Tolman. No, I do not think so.

Mr. Olney. Then we can submit to the Supreme Court the rule that an action commences with the filing of the complaint. That is the rule with which I am familiar, and which is

followed by the federal courts at the present time.

The Chairman. With a writ issued by the clerk?

Mr. Olney. Yes; a writ and summons issued by the clerk.

The Chairman. All right.

Mr. Olney. And then we can put up to the Supreme Court, instead of that, that an action shall be commenced by serving the summons, without requiring the papers to be filed at all. Or we can put up to the Court what we have here, essentially: That a suit may be brought in either of those ways.

But there is also the fourth alternative, if you please, which is presented by this Rule 6: That is to the effect that if it is brought in the second of the ways I have mentioned -- namely, by merely serving a summons -- then the plaintiff has to file his complaint within a certain length of time.

Now, I am wholly opposed to the last.

The Chairman. Well, that is the present system.

Mr. Donworth. You mean the present rule?

The Chairman. Yes.

Mr. Olney. To my mind, that is simply wrong and indefensible. You can advocate either of the others, or you can defend the third alternative, which includes them both; but you cannot defend this last method.

Mr. Lemann. Is there any suggestion that one of these recommendations will restrict you to service of the motion, only?

The Chairman. No.

Mr. Lemann. As I understand Major Tolman's motion, that was this: One, the present system; two, the system by which you could initiate the suit either by service of the summons

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by anybody or by the present system, as you prefer -- by filing the complaint with the clerk's office.

Those were the only two alternatives that he had in mind and, it seemed to me, were the only two alternatives which ought to go to the Court, if we think that the mongrel system should be ignored. And by no means should I think that there would be four systems to go to the Court.

Mr. Dodge and I are possibly the only ones who still think that the third alternative is also worthy of consideration.

8 Now, whether a plan which is the thought of only two members of the committee, should be sent by the committee to the Court, is a doubtful matter. I do not know that we ought to present it to the Court.

Mr. Loftin. Mr. Chairman, I voted for this compromise that was being discussed at the last meeting of the committee, when it was very thoroughly gone into for some length of time. In my state we have the system of filing the papers from the very beginning. And of course it was very revolutionary to me at that time. I admit that I have become somewhat reconciled to it now, and of course I have great respect for the judgment of you gentlemen who have practiced under that system of not filing the papers until necessary. I realize that there are arguments on both sides.

I think that the instances presented by Mr. Dodge are arguments for filing, and are things that we have been used to, in my state. For instance, a man is in business, down there, and his creditors are considerably concerned, where he is sued -- especially if by more than one man -- and his credit

is immediately affected. Of course, if they do not know anything about the suits, they might rest in security, thinking they were getting along all right, whereas, as a matter of fact, some other creditor was getting the preference. But now, when anyone brings a suit, everybody knows it.

I had always thought of a lawsuit as being something rather sacred, after the courts were invoked to intercede between the parties and determine their rights. And that is all set aside by this plan of not filing the papers initially, but just having a lawsuit that no one knows anything about, except the lawyers involved and the two or more persons who are plaintiffs or defendants. But I pointed out, in the discussion, what we had in Indiana. And I stated that while this committee and while the Court would like to set up rules that would be the very best thought of both the committee and the Court, nevertheless we must realize that these rules have to run the gantlet of Congress, and there are many lawyers in Congress who may be impressed with the fact that this is something that they are not used to; that they have never heard of this system before, and that these rules would be revolutionary. There perhaps would be many objections of that kind, as well as other objections suggested, and such a situation might provoke dissension and attack on the rules, in Congress. Therefore, considering it from a practical and from a political standpoint, it seems to me that these things must be given considerable thought and consideration.

Of course, if you are not going to think of the practical and political side of these matters, then we can go ahead and get up the very best set of rules we know of, and whatever

changes, revolutionary or otherwise, which we think are desirable, and which would bring about a better system of justice.

I have no very fixed opinion at this time. I am perfectly willing to put it up to the Court in the form of three alternatives or two alternatives.

The Chairman. Let us see, now: The motion was made to put up an alternative, together with the system which goes to the other extreme, on the other side of the line. And then the suggestion was made that the system as provided in the rules, as we have drafted them, be put up as a third system for suggestion. I think it is obvious that we could put up both, and let the Court examine both of them. The Court ought to know of both, and should not have either one or the other of the possibilities concealed from them. The only question is whether to put up three alternatives, instead of two.

Mr. Tolman. How do you feel?

Mr. Clark. I feel that I am rather "out in the cold" anyhow.

The Chairman. Well, I thought there had been some expressions favorable to that theory.

Mr. Lemann. My conclusion would be to put up the alternative. I am not nearly as sure as I originally was about this, but I should think that the third has merit and should be considered. But if I were the only one who thought so, I should not be asked that it be put up to the Court -- in fact, even though there were two of us.

Mr. Tolman. If anyone wishes that motion expanded to

take in the three, then I think that should be done and the third one put in. If we are in the business of putting up alternatives, I think we should give them the three, if anyone wants them.

Mr. Olney. I doubt very much if anyone here would deem it advisable to provide that a suit should only be brought by service of summons. In other words, I think we would all agree that you should be permitted to bring a suit by filing the complaint, and have a summons issue. We would not eliminate that method, and simply have the other. I think we would all agree upon that.

The Chairman. Summons issued by whom?

9 Mr. Olney. Either to be given by the court or by the clerk of the court. But that would not elect the method of filing with the clerk or the court, in the first instance.

The Chairman. Now, you would have to have that, in order to have it before the marshal and save your lawsuit temporarily.

Mr. Olney. You have to have that.

Then you can present that as the Mitchell method, as one alternative, and the other alternative would be to combine with it the method of serving a notice of an action, together with the summons.

Then we have what may be called the third alternative -- the combination of the two, and the addition of the further proviso that if the suit is commenced by the service of the summons, then the complaint must be filed, we shall say, within 20 days.

The Chairman. My understanding is that there are three

alternatives under consideration: One is the old system of requiring in every case the filing of the complaint and the issuance of the writ by the court, and recording everything under that. The second system is the one that you provided in these rules, which abolishes the idea that the court shall issue the summons. It allows the lawyer to do it, and provides that the suit shall begin either by service of the summons and complaint or delivering to the marshal a copy of the summons and complaint, for the marshal to serve -- in which case, if you choose the other method, you must file within 20 days. That is the second system.

And the third alternative is the system I have suggested. It follows the system adopted by these rules you drafted, except abolishing the requirement that you have to file your papers within a reasonable time, and substitutes the proviso that the papers may be filed when you come to the court for action, or when you may decide.

Mr. Olney. That is the third suggestion?

The Chairman. Yes.

Mr. Donworth. I am not sure that the gentlemen have clearly in mind that the New York system is not a single system, but has in itself the additional method of two ways.

Mr. Olney. I have that, now.

Mr. Pepper. Mr. Chairman, I am just thinking that possibly it would be helpful to have something down on paper, in written form, and I have this:

"Resolved, first, that the reporter be requested to formulate a rule providing in the alternative for the commencement of an action by service and its commencement

by filing and delivery of the writ to the marshal, and providing further that in the former alternative, no limit of time be imposed for filing.

"Resolved, secondly, that the committee recommend the former course.

"And resolved, with relation to the so-called third point, that the third point be made the subject of a note for the information of the Court, as a solution that has been discussed but not approved."

The Chairman. What is the third alternative?

Mr. Pepper. The present rule.

The first alternative is that beginning the action by service of the complaint and summons privately upon the defendant.

The second is by filing the complaint in court, and delivery of a copy of the complaint and the summons to the marshal.

As to the former of those two, the suggestion was that there be no limit of time for the filing of the complaint, after it has been served, and that that is the course which the committee prefers; and with a final provision that the third alternative, which is the beginning of the action by delivery of the complaint and summons privately to the defendant, have a requirement that there shall be a filing within a limited time thereafter. It is a solution that has been requested, but not yet approved.

Mr. Lemann. On the third one, you can have all those matters combined, if you want to.

The Chairman. Can't we be more concrete in this matter?

We have two sets of rules before us; one is the method that we have in the draft, here, which is a rule which allows you to commence your suit just by issuing a summons, and not going to the court, and commences either by service without filing or by filing and delivery by the marshal. That is that rule here (indicating), with the addition that if you adopt the method of serving without filing, you must file within 20 days. Now, that is concrete enough to be laid down in any system.

My idea is that by detailing in the notes, here, we shall have set forth the alternative method of starting the suit either by issuing this summons or filing it with the marshal for service. And the only change in that system is to abolish this filing of papers in 10 days or 20 days, and so on, and substituting for that that they must be filed with the court on demand of either party.

Now, if you want the third alternative, that would be the only thing that the drafting committee would have to draw. And that is the rule which prescribes that in all cases the suit shall be commenced by filing of the complaint and having the writ issued by the clerk, with the consequence that everything that is done after that time, must be filed as done.

And I am afraid that any discussion of the real difference between my rule and the rule we have drafted would cross the line.

Mr. Lemann. All right; put this third one up to the Court. And if you wish to make a statement, say -- as is my judgment -- that the majority of the committee favor the rule as you have described it.

The Chairman. Well, let us consider, first, the important matter of whether we shall put up three alternatives.

Mr. Lemann. The Mitchell statement, or the New York statement, is first; that embodied in the proposed rules is the second; and the third is the existing system in the federal courts.

The Chairman. That is right. And is it your wish to put to a vote which of these shall be recommended to the Court?

Mr. Dobie. Yes.

Mr. Olney. Is there anyone who wishes to put up the alternative, in which the complaint is to be filed within a certain length of time?

The Chairman. That is the one in the present draft.

Mr. Olney. Yes.

Mr. Dodge. I favor it.

Mr. Lemann. And I favor its consideration. It is not a one-sided question, and it seems to me that it is worth while to have the Court know that it is debated.

Mr. Loftin. I am in favor of putting it up to the Court.

The Chairman. All in favor of putting all three of those forms up to the Court, say aye.

(There were a number of affirmative responses.)

The Chairman. All those opposed, say no.

(One member answered that he was opposed.)

The Chairman. Now, do you care to discuss it?

Mr. Olney. I think that the one with a limitation as to time should not be presented to the Court; it is distinctly

bad, I think.

The Chairman. Yes; and I think that not many of the other members favor it. But I think it may throw light, to have the whole matter up.

Let us take a vote on the matter: Who favor the present rule, as drafted? Who have a preference for it?

Mr. Dobie. You mean, as expressed in here, in what we call the Mitchell rule, or the one in the draft?

The Chairman. The one that is drafted in T.D. 2, that is now before us.

All those who prefer that, say aye.

(There were several affirmative responses.)

The Chairman. I count three.

Do you favor it? Did you vote on it?

Mr. Clark. No.

The Chairman. Record three votes in preference of the present rule.

Now, all in favor of adopting the present rule of the federal courts, which requires that you have to file a complaint and get a summons issued by the clerk, and file everything as you go along -- all in favor of it, say aye.

Mr. Loftin. Aye.

The Chairman. There is only one vote.

Mr. Tolman. I think I should vote that way, but I am in doubt about it.

Mr. Loftin. My vote in favor is not on the merits, but because I live in Pennsylvania.

The Chairman. Well, we shall record two votes on that.

Mr. Olney. Perhaps I should vote in favor of that.

The Chairman. Then, we have a total of three votes in favor of that, now, who would prefer the present rule of the federal courts.

Mr. Dobie. Now, the other one is the Mitchell rule?

The Chairman. All right; let us put up my proposal as a preference. All who favor that, say aye.

(There were several affirmative responses.)

Mr. Tolman. What is that proposal?

The Chairman. The proposal as made in my comment.

Mr. Tolman. That is my second choice. How do I indicate that?

Mr. Olney. It is my second choice, and I do not have much choice between them.

The Chairman. Well, let us vote on them, separately, first.

All in favor of the proposal that I made -- and that is the best way I have of identifying it -- raise their hands.

(Several members of the committee raised their hands.)

The Chairman. I count five.

Well, there is not a majority in favor of any one of these.

Mr. Loftin. Did the reporter vote?

Mr. Dobie. You voted for it, did you not?

The Chairman. Yes.

Mr. Dodge. How does that work out?

Mr. Clark. In the first place, the writ or complaint is signed by the lawyer; and in the second place, after the complaint is returned to the court, then all proceedings are in the court, controlled by the court and the clerk -- which

in my opinion is the simplest system of all, and the most economical.

The Chairman. Well, that involves something additional, and that is the matter of whether the lawyers should serve all their own papers, or whether the clerks will make the service. Of course, that is involved in these others; if you do not file things, you do not have things to serve.

But I am against the idea of the clerk's making service. They are too slow. You cannot depend on them, and there is too much chance of a slip-up. You never know whether it has been served, unless you run up there and ask them.

Perhaps it works better in Connecticut.

Mr. Clark. It does.

The Chairman. Now, I think that the best way to do is to show that there is a difference of opinion, and put it up to the Court, presenting to them these three, and giving them something to discuss. Can we pass on, then?

Mr. Donworth. Was it your thought, Mr. Chairman, to report the number of votes on each, to the Court?

The Chairman. Not unless they ask me which the committee favored. I thought they might ask me that, and then we would have to say something to them. But I wanted to get an idea as to how strong we were on any of these propositions.

Mr. Clark. Now, there is one matter of detail about my drafting: I take it that I should have this particular Rule 6 in the three forms. I wondered if I should go through all the other rules and try to have them in three forms. Because there are some other rules that depend on what we do here.

The Chairman. I do not think so. I think you could

state that if this rule is adopted, some modifications would have to be made to rule so-and-so.

Is that agreeable?

Mr. Loftin. I think that is a good solution.

The Chairman. Shall we pass to Rule 7?

The question, there, is whether a schedule of time should be attached to the rule, or put as an advisory note in the appendix.

Mr. Olney. There is one point in connection with Rule 6, to which I might call attention.

The Chairman. On Rule 6, you say?

Mr. Olney. "B", as it reads now, requires that all orders, unless otherwise stated, in these rules, shall be served on one of the attorneys, if any.

It seems to me that there are a good many orders that do not require service, and I feel that that section should re-

11 quire service of only those orders which should be brought to the attention of the other party. I do not know whether that is worth considering, just now.

The Chairman. I do not know that I understand you.

Mr. Olney. Well, this requires that all orders of every character should be served on one of the attorneys, if any, or upon a party affected thereby. Well, there are many orders which a court makes, service of which is not really necessary.

Mr. Donworth. Judge, you do like to have your office file include copies of what has been done in the case; you do like to have a file of everything.

Mr. Dodge. Does this mean that counsel has to get from the court a copy of everything allowed him on the pleadings,

and serve it on the other side?

Mr. Lemann. That is what I understand. As Judge Olney says, "Whenever your adversary does anything in a case, you have to get a copy of it."

Mr. Dodge. But that is what the court does.

Mr. Donworth. No. You move the court for an order; and when you have it drawn, you take them a ribbon copy, which you file, and you keep the carbons for yourself and for the others.

Mr. Lemann. Suppose the court endorses on the motion, "Motion allowed"?

Mr. Donworth. Then you would give to the other side a copy of the motion.

Mr. Lemann. He already has the motion.

Mr. Donworth. We do not have our practice that way; I never knew our judges to do that. We sign a brief order, of two or three lines, saying that "The motion filed this day is granted."

Mr. Dodge. But a good many things are customarily done that way, by a mere endorsement on the motion.

Mr. Lemann. Do you have to give the other fellow a copy of the motion?

Mr. Dodge. Oh, yes; of course.

The Chairman. Take the case where a court takes a matter under advisement, without a jury and, after a week or a year or two, he files findings of fact and an order for judgment: Now, under this rule, that would have to be served. But whose job is it to serve it?

The practice that I know of is that when an order is

filed, the clerk writes out a postal and mails it to the lawyer, saying, "Order granted" or "Retrial is denied", and so forth. And then if the lawyer wants to file an appeal or limit the time for motion for a new trial, or what not, he may serve some notice of that desire.

But as this is worded, I think it would be necessary for each lawyer to get a copy and serve it on the other. It is a little loose on that.

Mr. Donworth. It is not intended to cover orders that the court makes of its own initiative.

The Chairman. Mr. Hammond calls my attention to Rule A33, and says that there is the provision, there, that in case an order is filed, the clerk is supposed to notify the parties by mail. Is that it?

> "Neither the noting of an order or judgment in the docket nor its entry in the book shall of itself be deemed notice to the parties or their attorneys; and when an order or judgment is made in the absence of a party, who has appeared generally, the clerk, unless otherwise directed by the court" ---

that is when he is not in court, I suppose:

> --- "the clerk, unless otherwise directed by the court, shall forthwith send notice of the entry thereof, by mail".

Now, that is just the practice I was talking about. And this other rule would require both parties to serve each other with that order. And it seems to me to be out of place.

Mr. Donworth. Don't you think that is meant to be confined to orders proposed by one or the other of the parties,

and not to an order which the court makes of its own initiative?

The Chairman. Well, the court generally acts on a request for an order.

Mr. Olney. Suppose a man makes a motion to dismiss, and the court grants it: Do you have to serve on the other party a copy of the order dismissing it, or simply inform him that the order has been granted, and the matter dismissed?

The Chairman. Well, under Rule A33, as I have practiced it, all that anybody gets is a postal card from the clerk.

Mr. Olney. There is no necessity of serving a copy of the order, in a great many cases.

The Chairman. It might be that you want to limit the right of appeal, or something of that kind. But that is another thing.

Mr. Olney. Well, I am making the distinction, Mr. Mitchell -- and probably it is unnecessary to call it to your attention: I make a distinction of serving on a man, notice that an order has been made, and serving on him a copy of the order.

The Chairman. Correct.

Mr. Olney. And this calls for a copy of the order.

The Chairman. I think the provisions for service of orders, here, are too broad, undoubtedly. That section will have to be revised, and I do not know just how to do it. There are certain kinds of orders. There is the matter of a postal card from the clerk, which may be all that is necessary. And then we have to guard cases where we want to start

a time limit running on appeal, or motion for a new trial. And I think that there, it is customary for the party who wants to limit the time, to serve a copy of the order on the other party; and that fixes it.

But a postal card from a clerk is not a very good way to serve notice of time limit with respect to a bill.

Mr. Lemann. If you take an appeal, then you have a time within which to perfect it, and the appellee is not concerned.

I just wondered whether we could take out all this reference to orders, and just say "notice of motions", and then the clerk must send notice of other orders. If you get a copy of the motion, you are going to go around and find out, and the clerk is going to send you a notice of the order.

Mr. Chairman. I think you are right. I think the reference should be stricken, and we should consider orders separately, as distinguished from papers, pleadings, and so forth.

Mr. Lemann. I think that should be done.

Mr. Olney. Right.

Mr. Donworth. Don't you think that if you prepare a motion and go up, ex parte, and get the order -- provisionally, of course; the other side can move to extend -- then the other side should receive a copy? There are lots of orders that are drawn, and it seems to me that the other man should receive a copy of them.

The Chairman. Well, is there a rule which might draw a distinction between a rule drafted by order of the court and one drafted by the lawyer? I doubt that.

Mr. Olney. You will find that the rules requiring a shortening of time, require that a copy of the order be served with the notice.

Mr. Donworth. Of course, that may be.

The Chairman. There is no formal action on it, but it is the sense of the meeting that in provision 6-B, the rule for inclusion of orders in the rule, be stricken out.

Mr. Dodge. What does the word "offers" mean?

The Chairman. Offer of judgment, I suppose, to tell somebody to stop the running of costs.

Mr. Dodge. That is the only kind of offer, is it not, that is in contemplation -- offer of judgment?

Mr. Clark. Yes, I think so.

Mr. Olney. Well, in that connection the next four words are exceedingly objectionable: "service of all written claims, demands, offers, or other such papers". Now, what "other such papers" means, is too indefinite a rule, entirely.

Mr. Donworth. Well, if you are going to file anything in a case, you ought to give opposing counsel a copy, should you not? I am not referring to evidence or exhibits, of course.

Mr. Olney. I think that the expression "other such papers" should be clarified and specified.

The Chairman. I think that subdivision (b) will have to go to the revision committee on form and detail.

But the motion, now, is whether we shall eliminate from it "orders", and let that be taken care of elsewhere.

All in favor, please say aye.

(There were a number of affirmative responses.)

The Chairman. It is so ordered.

Mr. Dobie. This rule contemplates that the service shall be made, in each instance, by the attorney drawing it or offering it.

The Chairman. Yes.

Mr. Lemann. Is 20 days the usual time required?

The Chairman. That is usual, I think.

Mr. Lemann. It would slow us up a good deal. We have 10 days.

Mr. Olney. Another small matter is the last sentence in the first paragraph, six:

> "When the complaint has been filed, the clerk shall docket it and enter the general appearance of the plaintiff."

Isn't that mere filing of it, an appearance, without anything further?

The Chairman. Yes. I do not think you have to provide for the appearance, there.

Mr. Donworth. Some of the clerks have a form of praecipe for appearance, and will not file it until the lawyer signs one of the printed forms of praecipes, so that he will have, besides that, a signed form. But I do not think that is a rule.

The Chairman. Well, that is not necessary. If a man wants to serve notice of an appearance and nothing else, he is entitled to notice, without further proceedings.

When you come to this place, I think it is appropriate for me to bring out that we have no provision, whatever, for removed cases.

Mr. Dobie. Yes; you provide for that by the record in the federal court.

The Chairman. Yes, but where is it?

Mr. Clark. It is down in Rule A36, at the bottom of the page-"C".

The Chairman. All right; we shall take that up when we come to it.

Is there anything else, in substance, in Rule 6 with which you want to deal? If not, we shall pass to Rule 7.

Mr. Sunderland. Under "appearance" there, in "C", is there any use of our trying to define what a special appearance is? Would it not be better to let that definition go, and simply provide, here, what special appearance shall entitle a person to, in the way of notice, and not try to define it?

Mr. Clark. Well, we tried to expand Rule 13, to cover general appearance,-- Rule 13, lines 6, 7, 8, 9, and 10.

Mr. Sunderland. It is almost impossible to give a definition of a special appearance. There are a good many judicial discussions of whatever it is.

Mr. Clark. I think that we can now make it hang entirely on Rule 13. And then, when we get to Rule 13, I suppose we shall have to change it a good deal.

We have taken out the matter as to the complaint, anyhow. A special appearance to obtain the complaint, I suppose, is not necessary; and the only special appearance, I suppose, will be under Rule 13 or whatever may be left of Rule 13.

The Chairman. Is there any proposal that you wish to make, there?

Mr. Sunderland. I should suggest taking out the definition and simply providing that special appearance shall entitle one to notice of all matters and things relative to the motion.

Mr. Olney. Shouldn't this matter of what constitutes a special appearance and what constitutes a general appearance, be left to Rule 13, as to what constitutes a basis of jurisdiction?

Mr. Clark. Well, in the matter drawn, there was a reference to this part of it -- Rule A.

Mr. Sunderland. But you can make a special appearance by asking for a new trial, even.

The Chairman. Do you wish to strike out the definition of special appearance, too?

Mr. Sunderland. Yes.

Mr. Donworth. Strike out all after line 46.

Mr. Sunderland. Well, I think it might be well to leave in there the proposal that the party is entitled to certain notice, whether he makes a special appearance or a general appearance.

The Chairman. If you strike out the second paragraph, you have no provision in your rules to denominate what is a special appearance and what is a general appearance. That is quite important.

Mr. Sunderland. That would come under "any other appearance":

"A special appearance by a party may be made under the circumstances and in the manner prescribed herein, and in Rule 13; and shall entitle him to notice of all

matters and things relative to the motion, constituting his special appearance.

"Any other appearance by a party, such for example, as serving a paper denominated an appearance, serving a pleading, or serving any motion other than one which by these rules is treated as constituting a special appearance, is a general appearance and shall entitle the party making it to notice of all subsequent proceedings up to and including entry of final judgment."

The Chairman. If you left it that way, it would have no express reference to the procedure, saying "You are hereby notified that I appear in this action for such-and-such a party, and request notice of proceedings."

Mr. Sunderland. That would be under another appearance, than a special appearance.

The Chairman. I know, but you have not provided for it.

Mr. Sunderland. Do you have to?

The Chairman. I think you do. Shouldn't you provide that a man cannot appear just by serving notice of appearance? Shouldn't there be some mention of it?

Mr. Sunderland. Possibly so. But if you do that, there is no use in including a comprehensive definition.

Mr. Clark. I think I understand Professor Sunderland's idea: Simply to say that a special appearance entitles one to such and such, and a general appearance entitles one to something else?

Mr. Lemann. And put the definition of what is a special appearance, somewhere else.

Mr. Sunderland. Not put them in at all.

The Chairman. It comes under Rule 13.

Well, is there any motion to that effect?

Mr. Donworth. I suppose Dean Clark's idea was to codify the idea: That when a man puts in anything in a case and does not limit it to special, then it is general, and has jurisdiction?

Mr. Clark. That is correct.

Mr. Donworth. And somewhere, I think, a reference to that would be proper -- I do not know whether here, or elsewhere.

The Chairman. What is your objection to the attempted definition?

Mr. Sunderland. I do not think you can give a comprehensive definition; and it would be better not to give any at all. There are other things a party might do, not included in this list, which might amount to a general or a special appearance.

The Chairman. Well, he says that any other appearance -- such, for example, as serving papers and serving a pleading, or serving a motion requesting a new trial, and so on -- is a general appearance. Doesn't that limit it to the things he specifies?

Mr. Tolman. Mr. Morgan suggests that we strike out that clause, down to the first word in line 54.

Mr. Clark. That is true. And Mr. Dobie suggested retaining it.

The Chairman. If we talk about general and special appearance, should we not have a description of what they are?

Mr. Olney. Isn't the real rule that any action taken by

a party in connection with the proceedings, other than to appear for the purpose of making an objection, where the court has no jurisdiction over him, is a general appearance? It can be stated just about that broadly, can it not?

Mr. Sunderland. I think that is the general definition. But the question is, What comes within that? And I do not think you gain anything by that general, abstract definition, and you cannot go into any further details.

Mr. Olney. But in the general definition, you have the statement of the principle; and then in each particular case, you have to determine whether the facts come within that principle.

Mr. Sunderland. But it is a general principle of law; it is not a principle of procedure.

Mr. Olney. Yes; it is a principle to the effect that every appearance of a party in connection with the proceedings, for the purpose of taking some action in connection with it, otherwise than merely to object to the jurisdiction over him, individually, is a general appearance and subjects him to the jurisdiction of the court.

Mr. Sunderland. Yes, that is true.

The Chairman. Well, "action taken" is a broad term. Suppose I hear about some action demanding service, and I say to my lawyer, "Here, I do not want to make an appearance, but I want you to go see the complaint," and he walks over and asks for a copy of it: That would be an "action taken".

Mr. Olney. Oh, no; I should not say so.

Mr. Lemann. It is an "act" and not an "action" in a suit.

Mr. Sunderland. Things of such sort were held not to be a general appearance.

Mr. Clark. The first part of this rule referred to the matter of getting a complaint, and the rule refers to Rule 13, and refers to those matters of jurisdiction. I am inclined to think that we could consider this better after we have considered Rule 13.

The Chairman. Well, suppose we pass it until we reach Rule 13, and then see how it fits it. If there is no objection, we shall do that.

Is there any objection to Rule 7?

Mr. Clark. Well, how about the schedule of time?

The Chairman. Oh, yes. The first question is whether the schedule of time is to be made a part of a rule like this, or whether it ought to be made a convenient note in the appendix. If somebody makes a motion either to leave it here or to put it in the appendix, we are ready for such a motion.

In line 27 there is an attempt to sum up the various rules about time during which things must be done.

Mr. Tolman. I move that it be put in the schedule.

The Chairman. The appendix, you mean?

Mr. Tolman. Yes; that the schedule be put in the appendix.

Mr. Clark. You should also consider what the effect would be. I should think that Mr. Tolman's motion would deal only with the question of form, with reference to appearance. It still would be an official part of the rules, would it not?

The Chairman. Well, if you do not draw it accurately, in summing up what is in the rules, why, we would be in

trouble. But I think we have a right to assume that the schedule would conform precisely to the rules. And with that done, no question would ever arise.

Mr. Lemann. We can assume that it is official?

The Chairman. Yes; it has to be correct, or it cannot be there at all.

Well, suppose we place that in the appendix, instead of leaving it in the body of the rule. All in favor, say aye.

(There were a number of affirmative responses.)

The Chairman. Those opposed?

(No response.)

The Chairman. The motion is carried.

Now, is there any matter of substance in connection with Rule 7?

Mr. Donworth. Line 5, "And when the time prescribed by these rules" or by the court's orders: The court requires things to be done in 5 days. And I wonder whether the same thing would apply?

Mr. Lemann. You provide for the court to enlarge the time.

Mr. Donworth. Well, if the last day is a legal holiday, I would say, "these rules or by court order".

The Chairman. Well, the reporter has noted that.

Mr. Donworth. This sentence from line 5 to line 8 is all right, but I do not think it goes far enough:

"And when the time prescribed by these rules for doing any act, including the time for taking an appeal, expires on a Sunday or legal holiday such time shall extend to and include the next succeeding day that is

not a Sunday or legal holiday."

That simply tells you that when the last day is a Sunday or legal holiday, you have another day.

Now, in the Washington Code there are four lines that cover a parallel idea, but not just the same:

"Computation of time. The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day falls on a Sunday or holiday, it shall be excluded."

I understand that the old common law rule was that in three days -- and counted the first, second, and third. That is not the usual method, and I do not know why it was deemed necessary. As I say, in Washington the statute is:

"The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day falls on a Sunday or holiday, it shall be excluded."

I should like to ask Dean Clark if he thinks that something as to a computation of time as to what constitutes three days is desirable.

Mr. Clark. Well, this goes back to Equity Rule 80. I have no great feeling in the matter. I think that the Equity Rule 80 did the business. I do not know that we need anything more.

Equity Rule 80 is this:

"When the time prescribed by these rules for doing any act expires on a Sunday or a legal holiday, such time shall extend to the next day that is not a Sunday or holiday."

I should think that what you have in mind is a little obvious, is it not -- that in counting days you do not count the first, and that you do not have a day until you get into the second day?

Mr. Donworth. I suppose so. But let us say, for instance, that you are required to give three days' notice, beginning Monday. Some meticulous lawyers have sometimes allowed three full days intervening between the day you serve and the return day. And this is to avoid that idea and to say that a notice served on Monday and returnable on Thursday, is three days' notice, even though it may be served at 4:30 o'clock Monday afternoon and returnable at 10 o'clock Thursday morning. I think the reporter should consider that.

The Chairman. Well, I think there is a well-settled opinion in the federal court about that. We do not need a rule on it.

But if there is no objection to that, perhaps it is a thing that is to be settled by statute.

Mr. Donworth. You might note section 252, Washington Revised Statutes.

Mr. Dodge. In line 21, is there not some change that must be necessary? "Cause service of the order" has been struck out of the former rule. And Rule A33 merely provides for notice by the clerk of the order. Wasn't it to be within "after five days of the notice of the order"?

Mr. Lemann. Giving the notice that he should be there, even if he is not there.

Mr. Clark. Well, why not give him something on that point by saying "after the order is made"?

Mr. Dodge. It must be communicated in some way, if it is made in his absence. And it is provided for in section A33. "Five days after notice of the order" would cover it.

The Chairman. Do you have a note, there, of notice instead of serving?

Major, what was your point?

Mr. Tolman. That as I understand this rule, you must get your three days' notice. That would not do, with us, at all. We have a habit of serving before 4:30 in the afternoon, and going in the next morning. And if I have to wait three days on every motion I have, I am going to be in trouble. I do not think we ought to say, here, "at least three days' notice."

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The Chairman. You can get an order to show cause returnable the next morning.

Mr. Tolman. Yes. And it is sometimes very important.

The Chairman. Unless a definite time is fixed by these rules, or by order of court, which order for cause shown may be made a provision, I do not know how it would work. It has always been my experience that we have fixed a time for notice, and have to give at least three or five or ten days notice, and when you want to save time you go to court instead of serving notice and you get an order to show cause. You go to court and say: We must have this at once under the circumstances, and we must have an order. We want it.

Mr. Lemann. In this schedule of time on page 2, you say the answer of the defense must be within 20 days after the service, the same as Rules 4 and 13. I have looked at both of these rules, and could not find 20 days in either of them. You might check us on that, and if it is not in there you could put it in.

Mr. Olney. In connection with this rule, in the first paragraph, the fact that the court might have power to extend the time in which appeal must be taken, means that there should be distinct limits of time on motions for review, and on motions for new trial, which the court ought not to have the power to extend. It should come to an end without the power of the court to extend the time.

The Chairman. Well, I have in my notes, "Ought there not to be a time limit on motions for new trial and judgment?"

Mr. Olney. There is no time limit on that, and the time limit should be one the court should not be permitted to

extend.

Mr. Clark. I think we will have to amend the motions for new trial. I understand it is in the new trial section. I think Judge Olney's point is correct, however, that as to the extension it now stands that the judge can extend the time. I think this would apply, because we saw it would not apply. This would apply to a new trial. The new trial rule ---

The Chairman. (Interposing) There is a time limit now on a motion for a new trial.

Mr. Donworth. It is different in every district.

Mr. Clark. It is 10 days.

The Chairman. How about the ground of newly discovered evidence? Suppose 10 days after the verdict you find out about important new evidence, and you have not the time to put it in the form of an affidavit. Are you going to be barred?

Mr. Clark. That is Rule 19. That was the trouble before, and always is troublesome. We always try to divide up the points. First, there are trial mistakes which are always corrected. Then there is rehearing or new trial, and next relief against fraud, mistake, and so on. And we have put in there an alternative bracket, because of newly discovered evidence. And there we have put in:

> "Provided the application is made within a reasonable time and in no case more than six months or 90 days after such proceeding was taken."

First, on Judge Olney's point I suppose since we do not exclude it from Rule 7, a judge would have discretion to extend the time, and you can exclude it if you wish. And if it is a judgment you can provide that you will not give the judge

discretion as to this point. We have not said anything about judgments notwithstanding the verdict. We can put them under the new trial rule.

The Chairman. Yes, they should be under the new trial rule.

Mr. Dodge. Where is there any suggestion in Rule 7 that the judge can extend the rule?

Mr. Clark. It was the conclusion from it because it says he can extend the time of everything except the matter of appeals.

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The Chairman. You can say: except where otherwise provided. You can put a limitation in the special rule. Suppose you put in Rule 7: except as otherwise expressly provided, or something to that effect. Then you can deal with Judge Olney's point later on.

Mr. Donworth. In Rule 7, lines 53 to 56, I think there should be a change. At present it reads:

> "Where the amended pleading is filed because of a motion for further statement or bill of particulars, such time as remained to the movant at the time of filing his motion for further statement or bill of particulars."

Now, that is very unfair to the mover.

The Chairman. I do not think we ought to entertain a motion to extend the schedule. I think we better wait until we read Rule 14.

Mr. Donworth. You can see how unfair it is to the mover, when he has won on his motion and finds he has only two days left because he has made his motion on the eighteenth day.

That is not right.

The Chairman. Make a note to consider it in connection with Rule 14.

Mr. Lemann. We always say "mover," but it is not the New England word Mr. Dodge says.

The Chairman. Let us not take too much time on matters of form or verbiage or matters that dovetail in with them. Let us deal with matters of substance. Is there anything more on Rule 7?

Mr. Clark. Mr. Tolman thinks there should be no more time for service by mail.

Mr. Tolman. I did have the impression that you did not need any more time for service by mail.

Mr. Sunderland. I think that is a rather common provision.

The Chairman. You are assuming that the service takes place when you deposit it in the post office. If you make actual service then the service takes place when you get the copy. When you serve by mail the theory of it as I understand it is that the service is made by depositing it in the mails, not the day of receipt. Therefore it is necessary to grant additional time to do the act called for by that service.

Mr. Tolman. All right.

The Chairman. I raised the point and I should like for the reporter to note it. I don't know when we are going to reach it. That is one of the rules that have been drawn on the theory that the service takes place when deposited in the mail or when received. The rule is blank on that so far as any express provision is concerned, I believe.

Mr. Clark. Well, we thought we covered it, but maybe we did not. That is Rule 6 (b) providing for mailing a copy.

The Chairman. You can say: by depositing it in the mail. Maybe it means that by saying "mailing." You make a note of that anyhow. I do not want to take too much time on it. I think it was debated as when the service took place.

Mr. Clark. Possibly we can change that to depositing.

The Chairman. Is there anything else of substance under Rule 7?

Mr. Olney. I imagine Rule 7 contains statements of time found nowhere else.

Mr. Clark. I think not. We did not intend it to. That is, leaving out these provisions at the beginning. That is, 3 days for mailing, and things of that kind. But in the schedule of time we did not intend that to cover anything but what was covered elsewhere.

Mr. Olney. Well, there are some comments on that.

The Chairman. That is a question of duplication, is it? Where it was duplicated in some other rule?

Mr. Olney. No. Some of these times it seemed to me were open to question. For example, as to time for answer, the defense rule that defendant has 20 days to answer, but if plaintiff is sued on a counterclaim or cross-complaint he has only 10 days. I do not see why the time should not be the same in each case.

Mr. Clark. Well, the time for the reply generally is shorter.

Mr. Dobie. In suits already started and you have gotten involved.

Mr.Clark. Yes. The plaintiff is in court and probably wants to push it. Mr. Lemann raises the question that perhaps 20 days is too long for an answer. We might compromise by making 10 days for the answer.

Mr. Lemann. The trouble here is that we have a bill in equity and if we have 20 days it cuts down the pleadings a good deal and compensates for the longer time.

The Chairman. Have you any motion to make, Judge Olney, on changing the time there?

Mr. Olney. No. I only wanted to call attention to it. It is not a matter of particular importance. Somewhere in this rule also there is a provision requiring the filing of appearances. I do not see any reason whatever for requiring the filing of appearances if they be not made by way of pleading or motion or some other proceeding. There is the time necessary so to plead, or whatever it may be, and that takes care of it so far as that is concerned. So far as appearances generally are concerned I do not see any reason for any requirement of time, because it is merely an instrument of appearance, and the party giving such appearance can file it if he wants to. And if he serves it on the other party, and he does not care to serve it himself, the other party can serve it, and it operates as an appearance. But after all it is really a matter of little importance.

Mr. Donworth. Have we finished with that rule, Mr. Chairman?

The Chairman. I think so.

FIXING TIME OF SESSIONS

Mr. Donworth. I was going to ask the chairman and others about the time of our sessions. It is now nearly a quarter of 6 o'clock, and I think a discussion about our program or hours of sessions might be gone into. What does the chairman think about it?

The Chairman. I have not thought about it. I was rather trailing along according to our old practice. I believe we adjourned at 6 until 8 o'clock p.m.

Mr. Donworth. I thought it was a quarter to 6.

The Chairman. That is a matter for the committee to settle. I have no objection to settling it right now. I think we might still discuss our proposals here for 15 minutes. Or we might now settle when we will meet in the morning, when we will take adjournment for luncheon, and then how we will hold our afternoon and evening sessions. First let me ask the question: What hour do you wish to meet in the morning?

Mr. Loftin. I move that we meet at 9:30 as we did at our last sessions.

Mr. Pepper. Is 9 o'clock too early?

Mr. Clark. Nine is perfectly satisfactory to me. I suggested 8 o'clock the last time.

Mr. Pepper. We have an awful lot of work to do.

Mr. Cherry. It depends on how long you are going to run into the night.

Mr. Pepper. Well, I have had many years of that kind of thing.

The Chairman. It depends on how the committee feels. The morning hour depends on what you are going to do the rest

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of the day. I assume we will meet nights, and during our last sessions we had two hours of work every night. But that is a matter for you to settle.

Mr. Dodge. I think at the last session we sat from 9:30 to 5:30, with about 45 minutes for lunch, and then from 8 to 10.

The Chairman. Did we?

Mr. Loftin. That is right. With three quarters of an hour for luncheon.

Mr. Lemann. Yes, sir.

The Chairman. There are two sides to it, of course. The harder we drive ourselves the more fatigued we get.

Mr. Olney. I do not think we gain anything by sitting after half past five in the afternoon.

The Chairman. What is your pleasure.

Mr. Olney. I think we better adjourn at 5:30 to meet at 8 o'clock. You do not gain anything by sitting an extra half hour at that hour of the day.

Mr. Lemann. Do you want to sit until 10:30 at night?

The Chairman. That is pretty late.

Mr. Lemann. Shall we stick to the hours we had the last time?

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The Chairman. That is, from 9:30 to 1, and then take three quarters of an hour for lunch, and meet again at 1:45 and sit until 5:30, and then recess until 8 o'clock and sit until 10. Somebody suggested that we take a 5-minute recess at 11:30 or 12 o'clock in the morning. Do we really need that?

Mr. Clark. We ought to make as much headway as we can.

The Chairman. Yes. What is your pleasure?

Mr. Olney. I move that we adopt the hours of our last meeting here.

Mr. Donworth. I second the motion.

The Chairman. And those are from 9:30 to 1, and then 1:45 to 5:30, and 8 to 10.

Mr. Olney. Yes.

The Chairman. All in favor of that motion will say aye. (A number of ayes.) Those opposed will say no. (Silence.) It will be so understood.

Mr. Donworth. I suppose we sit on a holiday, Saturday, and also on Sunday.

The Chairman. We sit on Saturday, a holiday, and make special provision for Sunday. What we have adopted carries us through anyhow to Saturday night.

Mr. Dobie. I understand the cafeteria in the building is closed on Saturday, but there are plenty of places to eat around here.

The Chairman. The committee will now take a recess until 8 o'clock tonight.

(Thereupon, at 5:50 p.m., Thursday, February 20, 1936, the committee recessed until 8 o'clock the same evening.)

* * *

EVENING SESSION.

THURSDAY, FEBRUARY 20, 1936, 8 O'CLOCK P. M.

WASHINGTON, D. C.

The Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States reconvened its meeting at 8 o'clock p.m., Thursday, February 20, 1936, at the expiration of the recess.

The Chairman. We are now down to Rule 8. Use of Forms. That simply refers to the Appendix of Forms. There is nothing to do with it unless you desire to take up the question as to whether you want to end it or not. I thought we would pass on that later on. It is a thing that we can decide on any time between now and fall. Perhaps we can make better progress if we do not get into discussion about it. I wait your pleasure concerning that.

Mr. Pepper. I move that the question be postponed for the present.

The Chairman. It will be so ordered unless there is objection then.

III. PLEADINGS.

Rule 9. Pleadings Designated; Motion Defined.

The Chairman. Is there any matter of substance in connection with Rule 9?

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Mr. Olney. There are two things I should like to call attention to. The rule speaks of "any other and further pleadings in addition to the complaint, the answer and the reply." "any other and further pleadings which the court may order under these rules". I do not see any necessity for any further pleadings.

The Chairman. I raised the question whether there ought not to be a reply as a matter for discussion. Suppose the plaintiff brings a suit, and then the defendant had a release and discharge in his pocket, and he pleaded it in defense. The way the committee have it there is no reply needed, and the defendant comes into court without knowing what the plaintiff wants, unless he proceeds under the discovery provisions, which he could do. The plaintiff does not know whether the defendant is going to make denial, or claim fraud, or what he is going to do. So that that order for further pleadings, as I understand it, is a provision to give the court power to order reply to those matters which the allegations call for.

In that connection I have raised a question in my notes for discussion: Whether or not a reply ought to be required. There are two sides to it: Our discovery provisions and our provisions for admission of facts; all that may cover the ground pretty fully. Practicing however under a system where we do not have such provisions I should say a reply was an absolutely desirable thing to meet situations such as I suggest. I have often had cases such as a case in which a man brought a suit, and then I set up a complete defense and force him by verifying my answer to admit or

deny the defense under oath, and he would either have to admit it or stand the pains and penalties of perjury, and he would go out of court on a motion for judgment on the pleading. If it were not for our discovery provisions perhaps the need for the provision in question might be clearer. It may be a good substitute. However I am divided two and two upon the question.

Mr. Olney. Mr. Chairman, my point was that the rules now provide for a complaint, an answer and a reply.

The Chairman. No, Mr. Olney, you will find that no reply is provided. If we provided for a reply we could then strike our the clause "for such further pleadings as the court may order", because you will find later on in the rule that the court may order a reply if he thinks it proper.

Mr. Olney. The reply is provided, as I remember it, in answer to a cross complaint or a counter claim.

The Chairman. Yes. He may be ordered by the court in addition to make a reply. A counter claim of course calls for a reply, but that is a different thing. I am talking about a case where there is not a counter claim.

Mr. Olney. The point I wish to raise, in any event, is: Should we not specify the pleadings that are to be permitted, and then end without providing for further pleadings which are not called for under the rules?

Mr. Clark. For example, the supplemental pleadings that are provided for. We have limited it to the other pleadings which the court may order under these rules.

Mr. Morgan made a suggestion which I think is in one sense largely a matter of form, but it may go farther. Mr.

Morgan wanted to take out lines 6 to 9 and place them over in the first sentence, giving them letters. That is with respect to third party complaint and third party answer. That can be done. I thought it was a little better to state it in the form that we have done, as stating the ordinary pleadings, and not trying to specify the extraordinary ones. You have the choice of trying to make something very complete at the expense of telling the pleaders the more ordinary things. I have no very strong feeling either way, but to make a string of letters of all the different things as a sort of a catalogue did not seem to me, on the whole, as informative as to specify the ordinary pleadings that you ought to have.

The Chairman. Where is the rule which specifies the condition on which a reply is required.

Mr. Clark. Rule 17.

The Chairman. "Unless the answer assert a counter claim or cross-claim, denominated as such, no reply shall be made without (special) order of the court."

That, Judge Clark, is the reason why the language was put back in here that the reply may be ordered by special order of the court.

Mr. Olney. Then my point would be that in Rule 9 we should not say: "and (d) any other and further pleadings which the court may order under these rules and any reply, if permitted by the court."

In other words this is apt to be taken as allowing the court to go on and keep on permitting the order of pleadings.

The Chairman. I think we ought not to have the pleadings dependent on the order of the court. If a reply ought

to be had, we should say so.

Mr. Olney. Yes; that is the point.

The Chairman. If not we ought to say that new matters in the answer shall be deemed denied without any reply. I am not talking about counter claims, mind you. That is a different thing.

Mr. Donworth. Mr. Chairman, do you favor a reply in the ordinary case? I understand it is the usual court practice that where there is an affirmative matter in the answer a reply is required.

Mr. Clark. There are three different recognized rules, and the rule we follow is the New York rule. The rule you speak of is followed in a good many States, but so is this rule. The New York rule calls for a reply to all counter claims, but to nothing else except on order of court.

Mr. Sunderland. I never could see what was the use of starting toward a goal and stopping before you got there. If the pleadings are to present the issues I do not see why we do not favor such pleadings.

Mr. Clark. I suppose it was on the theory that the pleadings take more time in trying to develop an issue than they were worth, and so the pleadings were cut short definitely at a fairly early date. Every further step in the pleadings that is required means more time, not merely to get the thing filed but also to take exceptions to it. Of course one of the things lawyers like to do is to raise questions of form on the pleadings. I do think when there are complete provisions for discovery and so on, that the parties had better get into that part of the case than to try to reach

issues on the pleadings, because the pleadings do not present issues except very broadly. That was one thing that the common law pleadings are supposed to do but did not do any too well, and the whole idea of the reaction from common law pleading was to get away from that objection.

Mr. Lemann. Do you take several other steps after the replication? Do you go from the pleadings all the way down until the case is at issue?

Mr. Clark. We are not stopping until, as is supposed, the case is at issue.

Mr. Lemann. Every lawyer is supposed to become accustomed to his own brand of trouble. We have never required nor permitted any further pleadings after the answer.

The Chairman. How does that work in practice?

Mr. Lemann. We find no trouble with it. It has worked. We never knew anything different.

Mr. Dodge. Suppose you want to do the equivalent of demurring to the answer. Once in a while a question of law is presented by the answer.

Mr. Lemann. You certainly could not do that. Perhaps you might move to strike out. Usually we would simply object to any testimony in the answer. We can now fix the case for hearing on the bill and answer under our State practice.

Mr. Olney. Can we not settle the question in this way. We are dealing here with Rule 9 which is the provision as to what the pleadings shall be. It seems to me that we do not want anything in there which will intimate that the court in its discretion may order pleadings which are not provided for in the rules, and it is required in the rules as they

presently read "where provided by these rules, a reply on the part of the plaintiff, or a co-defendant", and let it stop with that.

Mr. Lemann. Yes, that would cover it.

The Chairman. That covers it.

Mr. Olney. The question whether we desire a reply finally or not should come in later on in the discussion of the later rule. All I am getting at, at this time is to get the principle established.

Mr. Lemann. If you will look at Mr. Morgan's note you will find it is proposed to change the (d) and (f) and put in a new (d) and an (e), and leave the present (d) as an (f). You might do what Mr. Morgan proposes, but I do not think that would cover what we are now talking about.

The Chairman. Mr. Clark refers to the matter of supplemental pleading, which is usually a matter of the order of the court. He says that clause about "such other pleadings" is intended to cover supplemental pleadings; facts which have arisen since the action was brought.

Mr. Olney. That is done either by supplemental complaint or supplemental answer or supplemental reply.

Mr. Lemann. Is that ordered? Is it not done by the parties by leave of court?

Mr. Clark. It is done by order, under Rule 19 (c). It is done upon motion, but the court may be order permit.

Mr. Lemann. It is permitted rather than ordered.

Mr. Olney. There is no more occasion for enumerating a supplemental pleading at this point than there is for enumerating an amended pleading.

Mr. Debie. That is provided by law. The law provides that "It shall consist of the following", and then there is the provision "and amendments". You might put in "supplement" if you want to make that complete. I do not think this is vital, though.

Mr. Pepper. It seems to me we have two sets of questions before us, Mr. Chairman. One question comes up on what I understand to be Mr. Morgan's suggestion that these small letter subheadings be added to so as to bring in the third party business. I was impressed with what the Reporter said about the importance of letting the rule stand on that point, because that deals with the normal course of business, instead of attempting to cover the more or less unusual case of the third party intervention.

Mr. Chairman, just to bring the matter before the committee I move that on that point the rules stand as written.

Mr. Sunderland. If you let the rule stand as written would it not exclude the unusual case?

Mr. Pepper. I do not understand so. Dean Clark explained that the proposition was, following (d) to put in other small letter headings so as to treat in the same rhetorical sentence this matter of the third party intervention.

Mr. Sunderland. I did not get that. I see what is meant. That is right.

Mr. Pepper. And he explained that he thought it was better to let it end with (d) because that is the normal case; and then let the relatively unimportant case stand as he has it here.

Just to bring it before the committee I move that as to

that the rules stand as recorded.

Mr. Loftin. I second the motion, Mr. Chairman.

Mr. Lemann. Rhetorically I should think Mr. Morgan is right. He starts out by saying "The pleadings shall consist of the following", and then we have (a), (b), (c) and (d).

Mr. Pepper. Yes.

Mr. Lemann. Then we have a sort of a disconnected sentence which refers to two other things which really ought to be part of the pleadings, and Mr. Morgan was trying to add them to the enumeration of the pleadings. I suppose the things the Reporter has in mind, with respect to the second sentence, is that when they happen they will be parts of the pleadings. Whereas the way he has them now is in a disconnected sentence that leaves it a little doubtful whether you would classify them as a part of the pleadings.

Mr. Clark. They are of course complaints and answers.

Mr. Lemann. Complaint on the part of the plaintiff, yes, and an answer on the part of the defendant.

Mr. Clark. That is true.

Mr. Lemann. So I really think Mr. Morgan's arrangement is more exact. It is a stylistic point.

The Chairman. Is it not right to say that the pleadings should consist of complaint and answer and the reply, as required by the rules, if you are going to have two other kinds of pleadings that you do not enumerate except as third party pleadings.

Mr. Lemann. No. I really think we have gotten a

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little bit away from what we started out with. This is something apart from what Judge Olney and the chairman were discussing. As I understand it Judge Olney was discussing the present (d), and then somebody suggested that Mr. Morgan's suggestion would take care of that matter. Mr. Morgan's suggestion would not take care of it, because his suggestion was as to something else. He was talking about the third party practice, with respect to bringing that in in a proper place.

Mr. Pepper. I was simply trying to clear the way for the point the Chairman and Judge Olney were discussing.

Mr. Lemann. Yes. As I understand the attempt was to get rid of that.

Mr. Pepper. The question was as to whether we would adopt Mr. Morgan's suggestion about the third party matter or keep it as the reporter has it, and just to bring it up I moved that it stand as the Reporter reported it. That was all I did.

The Chairman. The motion is seconded.

Mr. Olney. What was Mr. Morgan's suggestion in respect to that matter.

Mr. Dobie. To enumerate the third party complaint and the third party answer and make them (d) and (e).

6 Mr. Lemann. He wants to take out what the Reporter has covered here by his second sentence. It is a stylistic point.

The Chairman. I think Senator Pepper's idea is right, because if you list these other two third party businesses as part of the regular pleadings it will sound as if they

were in every lawsuit, whereas the standard pleadings are complaint, answer, and possibly reply. So I think enumerating the other two as a regular part of the pleadings is stylistically objectionable. I think it is better handled by referring, as the Reporter has, to the possibility of those additions.

Mr. Lemann. Would they then be part of the pleadings in that special case? Would they have to be?

The Chairman. I think they would be in that case.

Mr. Lemann. You might argue that it was not clearly so stated.

Mr. Donworth. I do not really think it is worth taking much of our time about it. I do not think these are within his definition of pleadings. I thought he agreed himself that they were not within his definition of pleadings, but it is not worth talking about.

Mr. Clark. On that question I do not think we ought to make it hard and I did not intend to. I think we can cover it perhaps, if you want to do so, by saying that "The pleadings shall consist of the following, and amendments and supplements", and then expand sufficiently to cover both the ordinary reply and the order to reply.

Mr. Olney. The Reporter can fix that very easily when he comes to drafting it. It is just a matter of draftsmanship if we are agreed upon the principle that the court shall not have the authority to call for pleadings which are not provided for by the rules.

I make a motion that it is the sense of the Advisory Committee that the court do not have that authority.

Mr. Pepper. Mr. Chairman, did you put the other motion,

so as to settle this question in order that we could get the matter clearly before us?

The Chairman. No I did not. I take it as the sense of the meeting that Senator Pepper's motion is accepted. It will be so ordered unless there is objection.

Mr. Olney. Then I make my motion now, that it is the sense of the Advisory Committee that the court do not have authority to require pleadings which are not provided for in the rules.

The Chairman. Any second to that motion?

Mr. Dobie. I second that motion.

(The motion was put by the Chairman and unanimously agreed to.)

Mr. Donworth. Mr. Chairman, there is another matter I should like to bring up at this point. It is with reference to this new sentence which begins in line 9 and runs to the end of the paragraph. As I read that recently I thought this sentence related to additional pleadings. In line 6, however, the language appears "the court may order" and so forth. However I see now that the sentence has an entirely different genesis.

The Chairman. It relates to all motions.

Mr. Donworth. Yes. The committee will recall that at the previous hearing the first draft distinctly included motions, in the definition of pleadings. Mr. Wickersham expressed surprise at that, and some of the others say a motion is no longer called a pleading. But I think this should be dignified by making it a sub-sentence there just the same as the other one about technical forms.

I think also in line 10 the word "its" should read "an", so as to show that we are dealing with all motions, and it would then be put down as a new sentence, with an indentation in the paragraphing:

"Any application to the court for an order shall be by way of motion and counter reply to it".

Then it would be very plain that this is dealing with motions in general.

"Any application to the court for an order shall be by way of motion" and so forth.

Motions will be very numerous in the case, and I think motions are entitled to be so plain in that way.

Mr. Clark. I think that is right.

The Chairman. There is no objection to that.

Mr. Clark. As a matter of fact some suggestions came in to that effect. One suggestion was that that clause beginning "and it, together with all other papers" should start a new sentence, and it should start: "All papers by a party provided for by these rules, shall conform" and so forth.

The Chairman. I think Judge Donworth's suggestion is a distinct improvement as a matter of form, and we can leave it with the Reporter with the understanding that he will carry it out.

Mr. Sunderland. Is not the subject of motions irrelevant to this rule? We are dealing with pleadings. The only motions there are which directly affect pleadings are covered in Rule 14. All other motions are motions which do not affect pleadings. It seems to me that this

is irrelevant and is confusing. I think that ought to have a separate heading. If we are going to deal with motions in general we ought to have a separate rule for them, and not mix them up with pleadings.

Mr. Olney. I should like to join in that suggestion.

The Chairman. That could be made in a separate rule, which would be Rule 9 (a).

Mr. Clark. Whether it appears in a different rule or not I do not know, and that is not what I am speaking about, but I will say that we tried to make the motion a fairly important part of the series. That is why originally we wanted to call a motion a pleading. It comes in Rule 13 and also in Rule 14. The motion is to do several important things. I will not call that a substitute for a demurrer, but it is something along that line.

The Chairman. It is more a matter of arrangement, it seems to me. However, this provision that "Any application to the court for its order shall be by way of motion, which, except when made during a hearing or trial, or unless otherwise specified, shall be in writing" and so forth ought to be stated as a separate rule, and not be buried in a rule relating to pleadings. That is the point, is it not?

Mr. Olney. There is a further point which I should like to bring up.

Mr. Pepper. There are all sorts of motions which by no change could be called a pleading. For instance, a motion to withdraw a juror; a motion to continue because of surprise; a motion for a bench warrant, and other motions.

Mr. Clark. Yes, there is no doubt about that. It is the motions which come as a part of the forming of the issues that we had in mind.

Mr. Sunderland. Those motions are mostly covered in Rule 13 and Rule 14.

Mr. Clark. That is true.

Mr. Dobie. A motion to direct a verdict we cover in another place.

Mr. Denworth. That is taken care of by exception during the trial. During the trial oral motions are made.

Mr. Sunderland. I take it it would be pretty hard for the bar to take hold of and have clearly in mind the subject of motions. It ought to be dealt with as a separate sort of an instrumentality.

Mr. Dodge. This is section III entitled "Pleadings". Section II of the rules has the word "motions" as one of its topics. Would it not naturally come in there somewhere, or does that deal with service of motions?

Mr. Clark. That deals with service.

Mr. Dodge. That refers only to service?

Mr. Clark. Yes.

The Chairman. We have it set up in a good many places here. We talk a great deal about service and about motions, and we have not yet reached the point where we say what a motion is. That is a matter of arrangement. I think this matter we are discussing now is a style question, as to whether the reference to the matter of motions should be arranged in a separate rule, or stuck in with this Rule 9, or in the enumeration of pleadings. I suggest we leave that as a matter

of style with the suggestions which have been made.

Mr. Pepper. I am impressed with what has been just said by Mr. Sunderland about the importance of emphasizing the motion as such, as distinct from the pleading, in view of the very large function which we assign to motions here. Is there not, Mr. Reporter, something to be said in favor of having it segregated and listed under a separate heading?

Mr. Clark. I do not regard that as very objectionable. I have no very decided opinion about it. It will be, so far as I can see, about three lines.

The Chairman. It will include all of the language after the words "any application to the court for its order shall be by way of motion", and so forth, will it not?

Mr. Clark. Oh no.

Mr. Pepper. I meant all motions. Rule 14 is "Motion For Further Statement or Bill of Particulars; Motion To Strike Out".

Mr. Clark. Well, we cannot put those together here very well and have them perform different functions. There is more reason for having Rules 13 and 14 separated from each other than to have "Motion" taken out of the pleadings. Rules 13 and 14 are rules providing for the carrying out of different functions. I suppose it all comes back to the way you look at things. I have always been brought up to regard this particular class of motions as a proper part of the pleadings and to serve important functions in developing the issues. Now it seems to me perhaps a little odd, but not necessarily objectionable, to take this sentence out and put it in a paragraph by itself. It seems to come

in here at this place in the rule logically. I do not see anything that we want to put in except that one sentence beginning "Any application" down to the word "sought".

Mr. Dodge. Do you need that sentence at all? They do not need anything like it in the equity rules. Everybody knows what a motion is and that it ought to be signed.

The Chairman. It ought to be in writing, ought'nt it? There should be the requirement that the party making the motion make it in writing.

Mr. Olney. That is what I wanted to bring out, Mr. Chairman. This order, as it reads, says that every application for an order is a motion, and then it requires that the motion itself be in writing. As a matter of fact the application for an order is usually made in court and is made orally. This rule would require, for example, that if you wish to apply for an order shortening time you have to make

9 your motion in writing. The application itself is the motion, and in 99 cases out of 100 is made orally. It is the notice of motion that must be in writing when the order is one that cannot be granted ex parte or should not be granted ex parte. And we must distinguish here between the motion itself, the application, and the written notice of the application that is necessary. There is a confusion of ideas in this sentence in that respect.

Mr. Donworth. I am sorry to find myself in disagreement with Judge Olney. Of course during a trial or hearing the motions are oral. Everyone I suppose will agree to that. But in the absence of a trial or hearing it is my impression that the practice is to make the motion in writing and

accompany the motion with a notice that the attached motion for so and so will be brought on for hearing at such and such a time. That is my recollection.

Mr. Olney. Judge Donworth, under this rule as it is worded now, if you wanted to get an order shortening time you would have to go out and make an application in writing for it. You do not do that, I will say, in any case.

Mr. Donworth. Well perhaps not in that particular case.

Mr. Lemann. We always do it by motion. We will say "On motion of sonand so".

The Chairman. Is that in writing?

Mr. Lemann. Yes, we always file a written instrument. We say "On motion of so and so, suggestion that so and so be done" and then "It is ordered by the court so and so".

Mr. Cherry. It is recited in the order.

Mr. Lemann. If we file that motion we call the motion an order.

Mr. Cherry. Even when you are simply asking the court to assign the case for trial?

Mr. Lemann. Yes.

The Chairman. The court signs an order reciting that the motion has been made. That is in writing. But the motion itself may or may not be in writing.

Mr. Cherry. In Minnesota for example I do not think we have a single written motion provided for. We have notices of motion, just as Judge Olney said.

The Chairman. The distinction there is sharply drawn between a notice of a motion and the motion. If you make a motion which requires a notice then you have to serve a

written notice stating that you will on such and such a day move the court for an order on the following ground, and serve it, and that is presented to the court. But you do not have to accompany that with a written motion addressed to the court saying "So and So here appears and moves the court thus and so". The notice of the motion states the ground of the motion and what you are going to ask for. But the motion itself is not in writing. We do not have written motions in Minnesota. We have written notices of motions.

Mr. Dodge. Has it been found necessary in other States to define in the rules what a motion is?

Mr. Olney. It is defined in the California code.

Mr. Donworth. In the Code of Washington we have about a page and one-third devoted to the subject of motions.

Mr. Sunderland. Do they define motions in the code of the State of Washington?

10 Mr. Donworth. Yes.

Mr. Dobie. Mr. Sunderland, you are a great code authority. Is there a provision of this kind which appears in the codes generally?

Mr. Sunderland. Do you mean a provision defining a motion?

Mr. Dobie. Defining a motion and requiring it to be in writing?

Mr. Sunderland. I would guess there were as many States which did not define it as there were States which did in their codes. We have never defined it in the Michigan code. It is not defined in the Illinois code. I do not suppose it is defined in the Pennsylvania code.

Mr. Olney. This is about the language--- not quite, as I have changed it slightly--- of the California code.

First. Every direction of a court or judge, not included in the judgment, is denominated an order. An application for an order is a motion.

Second. When an order is not to be made ex parte, written notice of the motion to the adverse party must be given, specifying the time and place at which the motion will be made, the nature of the order that will be sought, and the ground upon which it will be sought, unless the time for notice be shortened by the court for cause shown. Notice will be served at least five days prior to the time of the making of the motion.

The Chairman. I notice that you have a notice in writing and you have to serve notice.

Mr. Lemann. I know there is such a thing as a written motion for a restraining order or a temporary injunction in the Federal courts. I recently had occasion to look up some of the phrases. In case the plaintiff moves the court he puts that in writing. No order about it. That is a separate document. That I suppose is a real Simon-pure written motion.

Mr. Olney. I have had occasion rather recently to apply for a restraining order and for a preliminary injunction in a very important case, and it was simply done by notice of motion that at such and such a time we would move for a preliminary injunction, specifying what we wish in that way, and specifying the grounds upon which it was asked, specifying upon what grounds we would move for it, and specifying the

material that would be used in making the motion, the affidavits, and so on. But the application, the actual motion was made in open court and hotly contested. That was all oral proceedings.

Mr. Clark. Here is the difficulty we run into so often, that the practice differs in different States. I do not know just how we are going to cover it. As a matter of fact the substance is not really different, between the cases where it is or is not in writing, whether it is a notice of motion or whether it is a motion. A notice of motion covers the thing completely, as it does in New York. In New York it is: "Please take notice that a motion so and so", stating it fully, and it is in writing.

The Chairman. But you do not make the distinction that the California code does, that it is an ex parte proceeding, and you do not have to serve any notice. You do not have to file any written notice. You require that a motion be filed ex parte without any notice.

Mr. Lemann. This rule will be strange to most every lawyer everywhere. We will sit here telling the lawyer how to do it, and lawyers in different places are accustomed to their local practices. It is going to be hard for the lawyers.

The Chairman. I think we ought to be explicit about this matter. I do not think we ought to provide for written motions in all cases. I think the California system is a simple one and would work.

Mr. Pepper. Mr. Chairman, is there not a fundamental distinction between motions which at common law would have been

called motions based upon pleadings and motions pending the trial or hearing? In the case of motions based upon pleadings you have a motion for a more specific statement, for example. You have a motion for the striking out of scandalous or irrelevant or impertinent matter. You have I suppose--- I do not know where it comes here, but I suppose there is a motion for a judgment on a complaint where a complaint is filed and fails to state a cause of action, and the motion for judgment on an answer where an answer is filed.and fails to disclose a defense. All those things tell their own story, do they not? Those would necessarily be in writing.

The Chairman. The motion might not be.

Mr. Pepper. Those are before trial.

The Chairman. When you are dealing with motions where notice is given there is not much difference in substance between writing out a written motion there: "Now comes the defendant and moves for an order allowing an amendment to the answer", and then accompanying that with a notice saying "You are hereby notified that the annexed motion will be brought on for hearing". That is one way to do it. The other is not to have any written motion saying "Now comes the defendant and moves" and so forth, but simply make a notice "You are hereby notified that at such a time and place we will move the court for such and such an order on the following grounds". That is a mere difference in form. There is no difference in substance.

The real point of difference comes between a motion where you are not serving notice and do not have to, and one where you do.

I think this rule is so broad that if you went up and made an ex parte application where no notice is required, you would have to file a written motion, and that is a burden that is not borne in a good many jurisdictions.

Mr. Dobie. If it is in order, Mr. Chairman, I should like to make a motion. I move that this language be left out. I believe it will cause more trouble than it will cure, and I think we take care of all the specific situations in the subsequent rules.

Mr. Dodge. I second the motion.

Mr. Olney. I find in our practice, Mr. Dobie, that we define what is required in the way of giving notice.

Mr. Dobie. We are providing for that later. I agree with regard to the matter of the notice of motion. But what I am referring to is not to require the motion to be in writing.

Mr. Donworth. Gentlemen, that is all right. I think one of the most common motions is the motion to make definite a bill of particulars, and as I understand the weight of authority here it seems to be that that can be oral. I never knew that to be done orally. As I said, in our Washington code about a page and one-half are devoted to this subject. I refer to Remington's Revised Statutes of Washington, Volume I, pages 157 and so forth. I quote:

"Copies of all motions, demurrers and pleadings, except complaints, must be served on the opposite party, or his attorney * * ".

"When a motion is supported by affidavits or other papers, it shall specify the paper to be used--- that is

the motion shall specify--- "by the moving party, and the grounds of the motion * *". I am quoting from the General Rules of the Superior Courts (in effect on April 1, 1931).

"A party moving to strike out any portion of a pleading shall, in the motion, specify the paragraphs or parts of paragraphs asked to be stricken out; and such motion must be served and filed within the time fixed by rule of court."

I should like to have a written motion served on me if the opposite party was going to ask to strike out a complaint, or a part of it, or a part of a pleading.

The Chairman. Would you be satisfied with a written notice stating that at a certain time and place the court would be moved to strike out lines so and so in the answer?

Mr. Donworth. I regard that as a combination of a notice and motion in one paper.

The Chairman. The real question is with regard to the ex parte motion. It does not make much difference whether you adopt the rule that the motion should be in writing accompanied by a notice or that the motion shall not be in writing, but the substance of the motion that you propose to make should be stated in the notice. That question, however, is a question of Tweedle Dee and Tweedle Dum. But the rule that requires the motion to be in writing when it is ex parte and no notice is required is the thing which bothers me.

Mr. Donworth. It makes a pretty good reco d on the docket to have a written motion justifying what the court does, and the court's reason for it.

The Chairman. Mr. Dobie made a motion to strike all this out. I am not clear just what he wanted stricken out.

Mr. Dobie. I move to strike out the sentence beginning in line 9 and ending in line 15, and the words "or motions" in line 16.

Mr. Olney. I do not think they should be stricken out. My only thought is they should be changed so as to conform.

Mr. Dobie. Do you want them to file a motion?

Mr. Olney. My only question is that that is the better way. Certainly one thing which stands out in this language as worded now is that if you go to make any application to the court, it does not make any difference what it is, if you want to get an order shortening the time you have got to put your application in writing.

Mr. Dobie. Are you opposed to that?

Mr. Olney. Oh, absolutely. It is just a nuisance.

Mr. Tolman. The Illinois custom is like the California custom. I would make a motion, if it were in order to do so at this time, to strike out that part of this rule beginning with the words "any application" in line 9, down to the end of the paragraph, and then have a separate rule similar to the California and the Illinois custom.

Mr. Olney. Would that not leave it in this way, because we are dealing only with matters of substance: That it is the sense of the Committee that written motions or written notices--- it does not make any difference which--- be not required in the case of ex parte applications; that that order can be obtained on ex parte applications without any writing whatever. And then I do not care particularly whether they call it a written motion or a written notice in the case of

the non ex parte application.

The Chairman. Your motion draws the sharp distinction between ex parte applications and those which are given on notice.

Mr. Olney. Exactly. I think we can get down to it just as a matter of precise language that the California code in its definition is correct. Take the very illustration which Judge Donworth used of what he calls a written motion to strike out parts of a pleading. He looks upon the written paper there as his motion, but as a matter of fact what Judge Donworth does in such a case is to go into court and present this writing to the court and ask the court to make an order in accordance with his writing. And the actual application to the court is the one there in open court and made orally. So just as a matter of precise language I think the California code is correct, but it does not make any particular difference.

The Chairman. Mr. Dobie made a motion which was not seconded. Mr. Tolman made one which was not seconded. Now Judge Olney makes one drawing the distinction between ex parte applications and those that are not ex parte.

Mr. Olney. And leaving the rest of the matter to the draftsmen.

The Chairman. Yes, leaving the details to the draftsmen.

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

Mr. Donworth. I should like to make this remark, that all well organized courts have a motion calendar. Some of them do not require any notice at all. The motion which you file in the court goes on the next motion calendar

automatically, and to substitute notice for a motion when you are asking the court for something important I think, gentlemen, is rather new. The motion is the important thing to start what you want. The time when you are going to call that up is a different thing. For instance I think there ought to be a provision in these rules, and at the proper time I am going to ask to have it put in the rules, with respect to a motion to make the complaint more definite, or for a bill of particulars, and extension of time for answer until the court rules upon it; you serve that motion within the time for answer, and you file it. When it will come up depends on the convenience of the parties. There is provision for the making of the motion and filing it and as to the extensions of time for answer, in the Washington practice.

Mr. Dodge. We provide elsewhere for notice of motion, and there is nothing in this sentence except a definition of motion, and unless the committee wants to recommend that all motions must be in writing I do not see any scope or definition of a motion.

Mr. Pepper. Mr. Reporter, will you enlighten me on something which I guess everybody around the table except me knows. Where do we provide, if anywhere, for such a substitute for a demurrer to the complaint as will enable you upon the filing of a complaint which obviously discloses no cause of action to ask for judgment then and there upon the record?

Mr. Clark. That is taken up in Rule 13, and it is a rather extended provision.

Mr. Pepper. There is a provision for such a motion, though?

Mr. Clark. We try to push the party into presenting all his objections at one time, as you will see when we get there.

Mr. Pepper. We come to it later, do we?

Mr. Tolman. Yes; in Rule 13.

Mr. Pepper. And how about the case of an answer which is obviously insufficient?

Mr. Clark. That is covered in the same rule, Rule 13, in section (b)"Other Defenses" and on the next page. You will notice in lines 31 to 35 of Rule 13, the second page of that rule that the same attempt is made to require the pleader to put all his objections in one document.

Mr. Pepper. But that is a motion, is it not?

Mr. Sunderland. Part of an answer.

Mr. Clark. That is a part of an answer. And down in lines 49 to 52 on the second page of Rule 13 we do provide for a motion in the case of a party who is not required to plead further.

Mr. Lemann. You will find that it is provided for later, Senator, but you will have to be very much on the alert to recognize it.

The Chairman. Can we get ahead by narrowing down the one issue to this: That is the question whether ex parte applications to the court for orders shall be in writing?

Mr. Donworth. I am willing to compromise on that, that ex parte motions need not be in writing. I think they should be, but I would not vote "No".

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The Chairman. That is Judge Olney's narrowest point, as I understand it. If we could get that out of the way then you can decide whether you want a written motion with a notice attached to it, or whether you want the substance of the motion to be stated in a notice. I do not think there is much difference.

Mr. Donworth. I think a man should have a right to make a motion without indicating at the time he makes it the day it is coming up. I think the calendar takes care of that. I can make a motion now and not call it up for a month unless the other side calls it up.

Mr. Olney. I think, Mr. Chairman, if we conclude that the ex parte order, or an application for an ex parte order need not be in writing, and leave the matter to the draftsmen, we have disposed of the only matter of substance here, and the draftsmen can fix it up.

The Chairman. Do you make a motion to that effect?

Mr. Olney. Yes, I do.

The Chairman. Do I hear any second?

Mr. Tolman. I second Mr. Olney's motion.

(The motion was put to a question and unanimously adopted.)

Bud fls
9 pm
2/20/36

Bud fls
Carls
9 PM
Feb 20

Mr. Sunderland. Are we to vote on Mr. Dobie's motion?

Mr. Dobie. I think that supersedes it.

The Chairman. I am afraid I lost sight of that. I thought it was not seconded, but I was corrected about that.

Mr. Dobie. If you gentlemen want to agree on that I shall be very glad to withdraw the motion. I think that will take care of it.

The Chairman. Is there anything further we can do about Rule 9 just now? If not, we will pass over to Rule 10.

RULE 10. COMPLAINT, ANSWER AND REPLY.

Mr. Clark. Mr. Morgan raised the question whether this rule said much; and it is, of course, a sort of an introductory rule. I think it is helpful, inasmuch as the equity rules in other codes so often have special rules on these subjects. Mr. Morgan suggested an alternative in wording which I think is all right, if you want to take his alternative in wording. It is merely a change in the form of wording. It appears on page 6 of his comments.

The Chairman. Is that a matter of substance, Dean Clark, or is it a mere matter of verbiage and form?

Mr. Clark. I think the latter is a matter of verbiage and form. Whether you think the entire rule is useless or not, I think that is a matter of form, too; but perhaps it might not be.

Mr. Donworth. I think, as rephrased by Mr. Morgan, it fulfills a function. I do not mean to say that it did not originally. (Laughter.) What I meant to say is that the improved phrasing would help the rule; and I think, anyway, it has a function, although not, perhaps, an

extensive one.

Mr. Leamann. I do not like the English of the portion of the sentence after the semicolon. I read it over several times; and as it now stands --

The Chairman. Unless you want to strike out the rule entirely, I should rule that everything in Mr. Morgan's comments is a mere matter of form. There is no change in substance.

Mr. Leamann. Major Tolman had a point as to verification in case special relief were asked in accordance with the provision of the equity rule. I think that ought to be noted.

Mr. Clark. I think it would be too bad to put that in. Of course that is covered later in connection with the most important thing; namely, preliminary injunctions and matters of that kind. This rule is now very general; and to put in a special provision I think is unfortunate -- a special provision dealing with a very particular class of cases.

Mr. Donworth. Do not the Chairman's recommendations favor the verification in all cases?

The Chairman. I did not recommend it. I suggested:

"I am in doubt about abolishing verifications by the litigants. Discipline of the lawyer we know to be ineffective."

This idea of a certificate of good faith does not amount to much.

"The pains and penalties of perjury are a strong deterrent to false claims, denials and 'strike' suits."

I have no special recommendation about it.

Mr. Clark. That matter, I think, is a different one

from the one Major Tolman suggested. The matter of verification generally, or not verification, is taken up in our rule on signing.

The Chairman. Where is that?

Mr. Clark. Rule 12. We, of course, require very little in the way of verification. We try to say that the mere signing shall subject the signers in general to the penalties of verification.

The Chairman. That is right. My note is under rule 12.

Mr. Clark. Yes; your note is under Rule 12.

The Chairman. Let us adhere to Rule 10 at present, then.

Mr. Pepper. Mr. Chairman, just in order to have it on the notes for the consideration of the committee on drafting, may I dictate a brief suggestion for a substitute for Rule 10?

The Chairman. Yes.

Mr. Pepper. It is as follows:

"It shall be sufficient if the complaint contain, in addition to an appropriate caption, (1) a short and plain statement of the grounds upon which the Court's jurisdiction depends; (2) a short and simple statement of the claim showing that the plaintiff is entitled to relief; and (3) a demand for the relief to which he deems himself entitled."

I do not want to discuss it. I just want to have that suggestion on the notes. It seemed to me there was something to be said in favor of that condensed statement.

Mr. Donworth. You mean as an improvement in phraseology, Senator?

Mr. Pepper. Yes. I meant merely as a matter of form,

and merely that that might be before the committee for such disposition as they chose to make of it.

The Chairman. That will go to the Reporter with the other suggestions, including Mr. Morgan's, which I think are all matters of form.

Mr. Tolman. I should like to record myself as very well satisfied with that form. I have written one almost exactly like it.

Mr. Pepper. The one I have just dictated?

Mr. Tolman. Yes.

Mr. Pepper. This was worked out in conference between Mr. Hammond and me in the recess, and he said it was substantially yours; and, not knowing that you were going to offer it, I suggested it.

Mr. Tolman. No; I was not going to. I simply want to emphasize the fact that I am in favor of your suggestion, very much.

Mr. Pepper. It will go to the committee.

Mr. Olney. Mr. Chairman, there is one thing in this connection to which I should like to call attention, and that is, the rule as it presently reads simply says that the complaint must contain "a demand for judgment". I think that demand should specify the judgment that is required.

The Chairman. That has just been suggested in Senator Pepper's draft. He has made a suggestion as to the relief demanded there, the nature of the relief asked for.

Mr. Olney. This draft of the rule says:

"First, a statement showing that the court has jurisdiction of the subject matter of the action."

It seems to me that should be simply "showing that the court has jurisdiction". It is not "jurisdiction of the subject matter". In some cases that is required to give the court jurisdiction; but if it is a matter, for example, of the jurisdiction, depending upon the statutory amount, that is the end of that.

Mr. Dobie. Judge, I believe the idea there is to make a distinction between jurisdiction of the case growing out of diversity of citizenship, or something of that kind, and jurisdiction over the person acquired by process or an objection to the venue. I never liked the phrase, but I think that is the big idea. I think it is in the equity rules; is it not?

Mr. Olney. It should not be put "jurisdiction of the subject matter". It might be jurisdiction to entertain the action, which is a very different thing.

Mr. Dobie. I agree with you absolutely, Judge; but that is used all through the books, and in a number of Supreme Court cases they distinguish jurisdiction in venue and jurisdiction in process by those phrases -- jurisdiction over the subject matter and jurisdiction over the person. I never liked it.

Mr. Olney. That is just a misuse of words.

Mr. Dobie. I agree with you.

The Chairman. I still think that is a matter of form for the revision.

Mr. Dobie. I think so, too; and I should like to say just one more word, and then I am done. I like very much Senator Pepper's restatement, in that it avoids the rather objection-

able term "right of action."

Mr. Pepper. And it also omits subject matter in connection with jurisdiction. It specifies --

"(1) A short and plain statement of the grounds upon which the court's jurisdiction depends; (2) a short and simple statement of the claim showing that the plaintiff is entitled to relief; and (3) a demand for the relief to which he deems himself entitled."

Those were Judge Olney's points, I think.

Mr. Leamann. Of course you have to bear in mind the battle which will rage on Rule 11, which we are coming to, and I think that is why Mr. Morgan said this rule was useless. Rule 11 goes into a great deal more detail as to what the complaint should contain; and if you have a statement such as Rule 10, or Senator Pepper's substitute, corresponding to Rule 25, and you then come to Rule 11, you say, "Well, evidently I cannot stop with Rule 10; I have to do something more", which Rule 11, as I understand, undertakes to spell out. Is that your understanding?

Mr. Olney. Yes.

Mr. Leamann. So Rule 10 is almost misleading on account of its simplicity. When you get to Rule 11 you find you have been betrayed about it.

Mr. Pepper. Mr. Chairman, it occurs to me that what Mr. Leamann has just said is applicable to that portion of Rule 11 which is contained in subsection (d).

Mr. Cherry. Subsections (d) and (e).

Mr. Clark. And (e).

Mr. Cherry. Yes.

Mr. Pepper. All those. It occurs to me that when we come to analyze Rule 11, we may decide that if we have Rule 10, we will strike out that matter in Rule 10, or vice versa. Both of them ought not to be in.

Mr. Leamann. I think that is right. They must be considered together.

RULE 11. GENERAL RULES GOVERNING PLEADINGS.

The Chairman. Let us pass to Rule 11, then. What points of substance has anybody to bring up there? Have you anything in your agenda on that? I think not.

Mr. Clark. Yes; two things: the pleading of facts, or something better than facts (laughter); and then the other thing that I discussed mostly was (g), on admissions. There were lots of corrections of form, but I think those were the two ones that were disclosed by the criticism as going, one might say, beyond questions of form.

Of course the suggestions just made might raise more question about (c), (d) and (e).

On that last point, as to whether (c), (d) and (e) become useless or otherwise, I think further specification such as in (c), (d) and (e) is useful.

Subdivision (b) particularly deals with things more than just the complaint. One advantage of the way Mr. Morgan stated the form was that it was definitely tied up to Rule 11. I do not see any reason why Senator Pepper's version could not likewise be tied up to Rule 11, about the way that Mr. Morgan had done.

Mr. Morgan, you will recall, in his comments about Rule 10, started off:

Redrafted rule

References to transcript

½ page showing exhibits

Note. Showing

Where rules comes

from (statute – equity rule

– code procedure – England)

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derivation from our previous

draft

Own comments

"Each pleading shall contain an appropriate caption and shall be framed and phrased as required in Rule 11 and be signed as required in Rule 12."

Then he goes ahead:

"A complaint shall be sufficient" --

And I should think that by making that heading as he does, and then starting "A complaint shall be sufficient", we could go right ahead with Senator Pepper's version, and have it tied up to this.

Mr. Dodge. We are trying to simplify matters in these rules; and I never have seen anywhere such an elaborate and detailed statement of the contents of pleadings as is contained here. It seems to me that it is inconsistent with the intention of these rules to have such a long statement of requirements.

Mr. Clark. May I just say, as to that, that what we have intended to do was to try to give definite help in the way of statements. There is not very much in the way of absolute requirement. The rules are very flexible; but these cover matters which it is true very often are left uncovered, and are therefore left very much in doubt. We covered all such details as incorporation by reference, pleadings, exhibits, and matters of that kind about which there is conflict in the States, and we tried to get away from those problems. We tried to provide very definitely for all those things. It is true you can say nothing about a good many of these things, and hope that the courts will reach a correct conclusion; but you have all the district courts which can go in opposite directions.

Mr. Dodge. Is there any such rule as this in the English form, which contains the same general directions as ours as to simplicity of pleadings, a short and simple statement of the facts relied upon, or whatever the language may be? Our equity rules do not contain any such details as these.

Mr. Leamann. Our equity rules are packed with what Senator Pepper has just said.

Mr. Dodge. This, it seems to me, is very puzzling and confusing.

Mr. Clark. Of course it may be confusing to put it all in a single long rule.

The Chairman. Is it necessary to say that an averment shall be truthful?

Mr. Olney. I should like to suggest, in connection with the present rather confused condition of Rule 10, that Rule 10 and Rule 11 should be combined; that there should be a separate statement of those things which are required which apply to pleadings in general, or rules that apply to pleadings in general; such, for example, as when you are pleading a condition precedent. The provision here is a valuable one as to pleadings. It is found in the codes, and it is of very great use. The same thing is true in regard to the provision found here with regard to pleading of judgment -- that you need not go on and plead all the jurisdictional facts, etc. That also is of distinct value, and it is worth having in the rule; but they apply to all pleadings. There should be, first, a statement of the rules that are applicable to pleadings generally; next, and in a separate subdivision, so to speak, a statement of the rules that are applicable to complaints; and then a statement of the rules that are

applicable to answers, so that any one looking at it will see just what the order of things is, and just to what the rule applies.

Mr. Dodge. I would suggest reference to the simple equity Rule 25, in which a bill of complaint, a bill in equity, is described, and the third requirement is:

"A short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence."

I cannot imagine why, if we put that in, anybody would think that if the short and simple fact was that we had a judgment of another court, and were suing on it, we had to go on and say that the court had jurisdiction, and the parties were of full age, and duly appeared by counsel, and all that. I think there is a lot of unnecessary matter in this rule which is only confusing.

Mr. Olney. Suppose you were suing on a judgment in a court of limited jurisdiction?

Mr. Dodge. Let the defendant set it up. I would say, "I have this judgment, and I am suing on it."

Mr. Olney. Exactly; and that is just what this rule provides. Otherwise, he can claim that you have not sufficiently alleged your judgment, unless you have a rule of this character.

Mr. Pepper. Mr. Chairman, this seems to me one of those matters that it is very hard to reduce to form in an around-the-table conference. I thought Judge Olney's motion-- I understood him to make one -- was very helpful, that Rules 10 and 11 be combined. Was not that your motion, sir?

Mr. Olney. Yes; it was.

Mr. Pepper. It seems to me that if that were done, it would remove the redundancy that Mr. Lemann spoke of as between Rule 10 and subsections (c) and (d) at least; and the method of combining them is a matter of form very largely. No doubt in working on the form the committee will have in mind the suggestion last made, that some of these provisions are applicable alike to all pleadings, and some of them are particularly applicable to complaints, and some to answers, and possibly some to replies, if we have them. Would it not really save time, and help us toward our objective, if the motion were to combine the two, and then if the combination as a matter of form and style were left to the committee?

The Chairman. That is what I understood the motion was, but I did not hear a second to it.

Mr. Pepper. I second it.

Mr. Clark. There is one matter --

The Chairman. Do you want to bring it up before we pass the motion? We get started on motions, and then we forget them -- I do. If this relates particularly to the motion, it is in order. If it does not, I should like to put the motion.

Mr. Clark. What I was going to say was -- it may not be directly involved -- that there is a question as to whether we should try to cover these details, or whether we should leave things, as I feel, greatly in the air, as Mr. Dodge suggested.

I have stated it now; and if you would like to put the motion at this time, I should like to speak about it a little afterward.

The Chairman. I will put the motion, I think. There is nothing about what should be left in and what should be left out. They have not really tied us down by this motion. It is suggested that the combination and rearrangement be referred to the Reporter for consideration. Is not that it?

Mr. Pepper. I second that; yes, sir.

(The question being put, the motion was unanimously carried.)

The Chairman. Now is there some matter of substance you wish to present?

Mr. Clark. I think this matter of approach is a matter of substance, and fairly important. What we are trying to do is to hit, so far as we can, matters which have been fought over; and I think it is important and desirable, and that is what I want to get your judgment on. Mr. Dodge apparently thinks it is not.

There is nothing in here that I know of in regard to what has caused heartburning in the cases. You go right down through the matter of incorporation, the matter of separate statement of causes of action, etc., the matter over the page, lines 39 to 52. What are denials and new matter? Generally, that is not covered in the codes, and that has been one of the worst things possible. The Federal rules are not altogether clear on such matters as the way of pleading contributory negligence, and matters of that kind. In the English rules they found it helpful to specify all these things; and New York has recently copied the English practice in this very regard of saying what things should be affirmatively pleaded, the effect of demand for judgment,

etc.

Now going down through (f), "pleading truthfully", that is stated in a form to draw the teeth of the difficulty. It may sound well to say the pleadings shall be stated truthfully, but the real gist of that is in the rest of it. No particular form is needed, and therefore you may plead alternatively, and an insufficient alternative shall not affect a sufficient one, and the pleadings need not be consistent. All those matters have been very grievously fought over. In New York today you cannot be very sure about that matter of alternative pleadings, and the Appellate Division is now in conflict on the point; and so on with every one of these points. It is an endeavor to meet in advance, by definite statement, things that the courts fight over. If they would not fight over them, and we could be sure they would not, we would not need them. This is an attempt in advance to do away with the possibility of conflict.

Mr. Pepper. Is not some of it an invitation to conflict? For instance, in (d) here, in Rule 11, we have this very interesting controversy as to whether facts and law is a true antithesis, and whether you shall substitute, for "facts", "acts, omissions, and occurrences." It occurs to me that the real trouble is that we seem to be of the opinion that we have to use one or the other of those expressions, when I should suppose that if they were both left out the thing would be fairly clear.

If (d) read:

"Each averment of a pleading shall be set forth as simply, concisely, and directly as the circumstances permit"--

It would go just about as far as I should suppose a rule can go in guiding pleaders and directing the attention of the court to the principle involved. If we then go on and say:

"and shall state the facts", or "acts, omissions, and occurrences without detail" --

You get involved in this endless discussion as to the distinction between fact and law; and I do not think it adds anything in the way of clarity.

Mr. Donworth. Senator Pepper, a great many of these things are in the codes, having begun with the Field code, as you doubtless know; and they were intended originally -- it is the same thing that everybody knows, but I state this just to get to the point -- to get rid of pleading legal conclusions and to get to the real facts. I think a great deal of what Dean Clark has here is actually enacted in the various codes. A great deal of it is here in the code of Washington -- not by any means all of it, but quite a lot, including the allegations of fact.

Mr. Pepper. I think that is true, sir; but what I meant to suggest was that just because the experiment has been tried unsuccessfully in the codes, as evidenced by the amount of disputation in the cases as to what they mean, that fact is some warning to us that if we can avoid that controversial ground, perhaps we had better do so; and I should think that some affirmative statement like --

"Each averment of a pleading shall be set forth as simply, concisely and directly as the circumstances permit"--

gets us about as far on our journey as we can go in the

direction of insuring simplicity. Everything we add to that calls, as it seems to me, for controversy as to the relevancy and clarity of the additional matter.

Mr. Olney. Senator Pepper, there has been a great deal of dispute, perhaps, over what facts are necessary to be pleaded in connection with pleading under the code; but when you come to such provisions as the one that you can plead the performance of a condition subsequent in general terms, or that you can plead an order or judgment by simply saying that it was duly given and made, there has been very little dispute, so far as I know, in the cases in regard to those rules, and they have been of decided assistance in simplifying pleading -- very decided assistance.

Mr. Dodge. We want to get rid of all the technicalities of pleading we can, and it seems to me this rule is full of technicalities.

Mr. Lemann. I notice that the Illinois Practice Act rather dodges the matter along the lines, I think, of your suggestion. This is their new Practice Act of 1933, and here is the way they put it:

"(1). All pleadings shall contain a plain and concise statement of the pleader's cause of action, counter claim, defense, or reply.

"(2). Each separate claim or cause of action upon which a separate recovery might be had, shall be stated in a separate count or counter claim, as the case may be, and each count, counterclaim, defense or reply, shall be separately pleaded, designated and numbered, and each shall be divided into paragraphs numbered consecutively, each paragraph containing, as nearly as may be, a separate allegation."

Apparently, that is all they have in their statute on

the subject. Then they have some notes. When they get to the notes, they use this horrible expression "material facts", and quote English order 19, rule 4, which says:

"Every pleading shall contain and c ontain only, a statement in a summary form of the material facts upon which a party pleading relies for his claim or defense, as the case may be, but not the evidence by which they are to be proved."

That is the English rule; but this Illinois rule rather dodges the whole thing, and says you must make a precise statement.

Mr. Donworth. Here is the usual code provision, I think. I am reading from the Code of Washington (laughter), Remington's Revised Statutes, Volume 2, Section 258:

"What complaint shall contain. The complaint shall contain, --

"(1) The title of cause, specifying the name of the court, the name of the county in which the action is brought, and the name of the parties to the action, plaintiff and defendant;

"(2) A plain and concise statement of facts, constituting the cause of action, without unnecessary repetition;

"(3) A demand for the relief which plaintiff claims; if the recovery of money or damages be demanded, the amount thereof shall be stated."

So I think that this follows the main provisions of the codes.

Many of these other things are to avoid difficulties. Judge Olney has referred to the condition precedent clause, and the judgment of a court, etc. -- things which, if they were not there, would be open to dispute, as to the pleading, I

mean; and I think that in the main Dean Clark has done a very good piece of work there in getting these things in. I do not well see how very much of this could be left out without leaving out something that is of use.

Mr. Dobie. There is another thing there about which I think we ought to make provision, and which General Wickersham objected to very seriously, and that is the use of the common counts. I am rather inclined to agree with Judge Donworth on the general idea that we should say those counts can be used or they cannot be used, subject of course to the power of the court to order a fuller statement, because right away that problem is going to come up.

The Chairman. There is a clause in here which says that common counts may be used.

Mr. Dobie. Yes. General Wickersham objected to that.

Mr. Loftin. We voted on that at the November meeting, and voted to keep them in.

Mr. Clark. May I point out that this question of what we shall use as to facts, or what not, is a detail, but a fairly important one. I think there is a good deal in what Senator Pepper says; but before we get to the question of detail, I think the question of our general approach is important.

My heart is a little wrung by Mr. Dodge's suggestion that we are bringing in difficulties. I think, on the contrary, we are erasing difficulties in practically every sentence, and where we are not it is the fault of the expression, which should be corrected. That is, every one of these is in the direction of flexibility.

Mr. Pepper. Mr.Reporter, would it be agreeable to you, or is there some objection to it, to reduce our discussion to the concrete by embodying each of the two approaches in, so to speak, competing rules between which we might choose?

I can conceive of a rule drawn along the line of Mr. Dodge's suggestion, and a rearrangement of rules 10 and 11 drawn along the lines which you yourself favor; and it seems to me that it is a lot easier for a big committee to choose between two concrete proposals after each of them has been put in the best form that it can be put in consistently with that method of approach. Would that be impossible or difficult?

Mr. Clark. I think it can be done. Of course, as I understand Mr. Dodge's motion, it is mainly that, except for very limited things here, it all go out.

The Chairman. Did you make a motion, Mr. Dodge?

Mr. Dodge. I did not make any motion.

The Chairman. The whole matter before the committee, as I understand, is simply this: We passed Judge Olney's motion to consolidate these rules, with his suggestion as to rearrangement to be considered by the committee. Now the Reporter has asked for instructions as to whether he shall preserve his effort in this rule to meet the particular cases that have caused conflict in the authorities by specifying what may or may not be done.

Mr. Pepper. It is as to that that I ventured the suggestion that we would be in better position to decide if we had, so to speak, in parallel columns the kind of a rule that Mr. Dodge has in his mind and this rule when

rearranged. Then we have the two methods of approach, each reduced to concrete form, and the question would be, which of them the committee would take. I do not see where we would ever get to the end of the kind of discussion we are now engaged in.

The Chairman. I thoroughly agree with that.

Mr. Olney. Mr. Chairman, right along that line, I have here -- I just counted them up to see -- eight pages of notes of criticism of section 11. Many of them are criticisms merely of the language used -- what you would call criticisms of draftsmanship. Some of them are criticisms of substance.

The Chairman. Have they gone in to the Reporter?

Mr. Olney. No; they have not. I suggested that this whole section be referred, and that we spend no more time discussing it here tonight, but we send our suggestions in to the Reporter with this resolution having been passed, as I understand, and then that he take up those suggestions and revamp this section, and then we would be really in position to go down the line with him. We are hardly in position to do so now. We would spend half a day on this section alone, at least.

Mr. Dobie. There are 115 lines here, Judge.

Mr. Olney. Yes. The thing ought to be put in a little different order, and separate things ought to be very clearly segregated down the line.

The Chairman. I sympathize with Dean Clark's request for some indication as to whether, without dealing with particular provisions here, he shall follow his plan of trying to clear up disputes that have arisen in the courts under

general and indefinite rules.

Mr. Olney. We cannot very well pass on even that question until first we have seen the product of the rules redrafted.

Mr. Donworth. Have you indicated to Dean Clark the nature of the redraft? Have you that in mind, Dean Clark, as to what would be the substitute?

Mr. Clark. I have it in part. I have the idea of the consolidation, with the possible rearrangement back, segregating complaints, etc. I am not sure of this broader question, and I should think it was almost possible to pass on that, whether we should specify or whether we should simply generalize.

Mr. Lemann. Whether you should take something like this Illinois provision, which is seven or eight lines, or whether you should go into detail. Ought we not to tell the Reporter which way we are headed about that?

The Chairman. I do not know when we are going to have another meeting to choose between rules. The Chief Justice says, in substance, that if these rules are going to be laid before Congress on the first of January, 1937, the Court will have to have our preliminary draft by May 1st of this year. That will give the Court a month to pass on the rules and see whether they are fit to be exhibited to the bar before they adjourn on the first of June. Then they are printed and go out to the bar and bench, and they are to have through the summer and into the early fall to bombard us with suggestions; and in the fall we should have to meet and take all these suggestions and go over them and make such revision as we

thought wise, and adopt those that we thought were right, and then shoot it back to the Court again; and then they have to take time to give their real last hard look at it before they adopt it.

If we do not get the rules before the Court by the first of May -- that is, our draft that we are thinking of sending to the bench and bar -- we might as well throw up our hands on getting the rules ready by January 1st, 1937. So when we ask the Reporter, without any instructions on a matter like this, without any decision, to draft alternative rules and let us look at them again, I do not know just when we are going to look at them. I had hoped we could direct the Reporter at this meeting to make the revision along certain lines. I have been disappointed, of course, because our individual suggestions did not get in to him earlier, and he did not have time to adopt or reject them and make a revision. That was our plan, but it failed. We were pushed too hard.

Mr. Dobie. In that connection I should like to ask a question. I did not know that the Court or that we contemplated any more meetings after we submitted our draft to the Court. I did not mean that I was unwilling to meet, or anything of that kind; but is that your idea -- that after the rules have been published and have been bombarded, as you say, we shall have another meeting?

The Chairman. No; I am talking about whether we shall have any meetings before we submit the rules to the Court, except this one. My idea was that we could get far enough with this T.D. II to have the Reporter make the revision, and then I had it in the back of my head -- I did not know whether it would be adopted or not -- that about the best we could

do with that, before we handed it to the Court, was to get a style committee busy on the thing then for a time, and try to whip it into shape without any changes in substance and to hand it to the Court. If we are going to have time to have another meeting after this next revision, T. D. III, a meeting of the whole committee, before the 1st of May, I do not know where it is going to come in.

Mr. Dobie. I mean, you contemplate another meeting of this Committee in the fall?

The Chairman. Next fall?

Mr. Dobie. Yes.

The Chairman. Oh, yes; oh, yes. My idea was that after the thing went out to the bench and bar we should have to have meetings to consider their suggestions.

Mr. Dobie. I did not know that. I thought that was up to the Court. I thought we were to make our report, and then it would be up to the Court.

The Chairman. Oh, no. All we are planning to do now is to get out a report that the Court thinks is fit to go to the bench and bar, and is willing to send it out as a basis for criticism and discussion. It ought to be good enough so that it will not give rise to a storm of criticism at first sight. It ought to be clear and plain. Suggestions will come in by the score from the judges and lawyers. They will probably find that we have made many mistakes. Then when they come in, some time in the fall, perhaps the 1st of October or in September or somewhere through there, we shall have to meet and consider these suggestions, and see what ones we wish to adopt; and we will get a reaction from the bar that will

show us where we are off on the wrong foot here and there. Then we shall have to make such changes as those suggestions seem to require, and hand them back to the Court.

Mr. Pepper. Mr. Chairman, it seems to me that we are a lot more likely to get light from Dean Clark than Dean Clark is likely to get light from us. We have said around the table about all that we can say on this subject. I do not see how we can make any specific suggestions to him. He is a past master in handling material like this. In the light of this discussion, I should think the only thing to do was to refer it back for a reorganization of this material; and I, for one, shall feel that if he comes back with a rule in the expanded form, it will be because, for the best of reasons, he has found it impossible to shorten it. I am sure that if he does find it possible to shorten it or simplify it, he will do it.

I do not believe we can get any farther than that tonight.

Mr. Clark. Perhaps I might add a little. I think perhaps Senator Pepper has invited it.

I want to say that leaving out the question of form, it does seem to me that one of the finest things we can do is to hit these matters. These are sore points, and I do not see any reason why they should not be cleared up where we can clear them up.

As I read the pleading developments, one of the developments is definitely along this line:

The model rules of procedure of the American Judicature Society contain many provisions of this kind. I am not sure

but that I have more here than in other places. I am not sure, because we have looked at the Judicature Society's suggestions, and the English, and New York, etc. Nevertheless, I am quite convinced that that has been the tendency -- that is, to cover matters like conditions precedent, and pleading judgments, and this matter of specifying what are affirmative defenses and what are not. It is a step in the direction of definiteness.

So, if you are asking my opinion, I would gladly change the form and the arrangement; but my general theory would be to follow much the same idea as now. Perhaps there is too much here. We may eliminate some things, but in general that is the way I would do it.

Mr. Lemann. If the Committee wants it the other way, you ought to be told it. We know his views, I think, Senator, as well as we shall ever know them; and I think we can decide now as well as we can ever decide whether we will go along with that view or whether we will have another view.

I rather got the impression that some members of the Committee would prefer not to go into these details. I think we ought to cast that die now. We ought to say, "No; we think we should go into them", or the reverse.

One difficulty in making this general is that we want uniformity, and we wonder where you get your background with the hiatuses. In the equity rules you dug out the books on equity pleading, and they were more or less the same everywhere; and under the earlier practice that we are abrogating, you went to the State practice. But now, if we leave these hiatuses, every Federal judge after all is a local lawyer, and

if he is going to fill out the hiatuses every one will fall back on his local practice, and I think we shall make a lot of things for the Supreme Court to iron out as to what these rules require.

So it seems to me, on the whole, the weight of the argument is to be detailed about it, and more so than these State codes are, for that reason.

The Chairman. On the assumption that these details relate to matters on which there has been conflict and difficulty, I am for Dean Clark's idea.

Mr. Dodge. Has there been any trouble under equity rules 25 and 30, which state what the contents of a bill and the contents of the answer shall be?

Mr. Clark. Some of these questions have come up; yes -- of course not all of them, for two reasons. One of them is the one suggested by Mr. Lemann; and the other is that some of these things do not come up in the same way in the equity actions. You do not have much question of pleading contributory negligence in equity actions, for example. You certainly do not have the question of pleading the common counts.

Mr. Lemann. Judgments, etc. I do not think you can rely on the absence of trouble in the equity rules. The fact that the State codes have found it necessary, on the whole, to go into some particularity about it, rather indicates to me the need for it.

Mr. Dobie. Where they have failed to do it, you have just got to look in Mr. Sunderland's cases on code pleading, and a great many of these things, particularly in personal injury actions as to contributory negligence, fellow service,

and assumption of risk, I think he will bear me out that they have held practically everything; and there certainly is hideous uncertainty there. I am heartily in favor of Dean Clark's method of approach; namely, where you find practical difficulty, that you cannot obviate that difficulty by general words. You have to grapple with it and make express provision for it.

It does make the rule a little long and a little complicated; but in the long run I myself am satisfied that it will save a great deal of trouble, and that the lawyers and the judges will welcome an express provision made for that situation that they can read, and that takes care of it, rather than have to interpret general expressions that are overlarded with conflicting decisions as to what they mean and what they do not mean.

Mr. Olney. I agree with that.

Mr. Clark. There is one question of form. We put this all in a general rule. I think, as a tactical matter --

The Chairman. You ought not to have said it is a matter of form. I would rule you out of order. You should say it is a matter of substance. (Laughter.)

Mr. Clark. Anyway, Judge Donworth suggested that many of these appear in separate provisions. That is the usual way. Perhaps we made a mistake in lumping them together. We lumped them together because we thought they were pretty much allied, and it would be nice to have them in one place where you would look for them all; but I suppose the more usual practice is the separate provision on each separate thing.

Mr. Lemann. I think the lawyers would like it better

with a heading. It gives an appearance of simplicity and lack of complication.

Mr. Olney. I suggest that you put the related things together. They should come together.

The Chairman. That was covered by your motion, which was carried.

Unless somebody wants to raise the issue by moving to change the system which the Reporter has adopted, we will pass on, on the assumption that the Committee has no objection to going into it.

Mr. Lemann. Referring to this matter of facts, acts, omissions, and occurrences, Major Tolman has given us some alternative suggestions. Ought we not to decide whether we are going to take "acts, omissions, and occurrences", or whether we are going to take Major Tolman's substitute, or whether we are going to go back to this troublesome word "facts", which they all seem to stick to, but the cases seem to make a lot of trouble about?

Here is this new Illinois Act, the English Act, and the New York Act; yet, as I read these briefs we have had, they seem to have given so much trouble that I do not feel like standing out for them. You use facts, do you not, in Washington?

Mr.Donworth. If we know them; yes.

Mr. Cherry. Perhaps Mr. Sunderland can tell us why he kept that word in Illinois.

Mr. Sunderland. Facts are out.

Mr. Lemann. You do not use the word in the statute, but you use it in the notes.

Mr. Cherry. He did not write the notes.

Mr. Pepper. To bring before the Committee the matter Mr. Lemann has raised, I move that in his revision the Reporter be requested to terminate the statement now appearing in subsection (d) with the words "circumstances permit", so that it will read:

"Each a verment of a pleading shall be set forth as simply, concisely, and directly as the circumstances permit."

Mr.Donworth. What line is that?

Mr. Pepper. That is in lines 25, 26 and 27. I think the controversial matter is the matter that follows the word "permit". It seems to me at best to add nothing to what precedes, and at worst it involves us in a controversy about which there are two irreconcilable views.

Mr. Tolman. I was going to ask permission to suggest that right there your Rule 10 be inserted.

Mr. Pepper. That would be a thing for the Committee on Style; but, in order to bring the question up, I move that when the Reporter rearranges it, he confine himself to a general statement such as that which ends with the words "circumstances permit", and omit the debatable matter which follows.

Mr. Lemann. That is what they did in Illinois. They just dodged it.

Mr. Pepper. Well, gentlemen, it must be true that when we are writing rules for the bar and for the courts, an affirmative statement in general terms like that is about all that we can do to guide practice and thinking. We have got to leave room for the individuality of pleaders. There will

always be men who know how to draw pleadings, and there will always be more who do not; and nothing we can say can educate the second class.

Mr. Clark. I think Senator Pepper's idea is fine. I have a feeling that I can carry it out.

Mr. Pepper. I am sure you can, Mr. Dean.

Mr. Donworth. It is a happy thought, and I think it is welcome.

As between "occurrences", etc., and "facts", I am strongly for "facts", in the first place because we have a million decisions now construing them, and we should have to start afresh construing the new words. The second reason is that if we want the lawyers to keep on what they have been doing in the past, we should use the language they have been using, instead of giving them something to guess about; but, most of all, we have a rule of our own here, and it is now the rule of the Supreme Court, that the trial court shall find the facts. Now, is the trial court going to find something different from what the pleader alleges? If the pleader alleges what he conceives to be the entities of the situation, which I call "facts", why tell the court, as Dean Clark has it here in Rule 21 (a), that the court shall find the facts? Can the court find something that the parties do not allege?

However, I am perfectly willing to accept Senator Pepper's suggestion and make progress.

The Chairman. Let me ask if I understand just what it means.

Our equity rule provides that you shall omit mere state-

ments of the evidence, and what appears in line 29 is to the same effect. Now, if you cut off subdivision (d) by simply stating that each averment shall be as concisely and directly stated as the circumstances permit, and say nothing further, I do not find any place in the rules that will condemn a man for setting up all the evidence he has.

Mr. Pepper. And you will not accomplish your purpose even if you do put up that sign-post. If he is the kind of fellow who does not know what to put in and what not, he will put it in, and the other side will have to move to strike it out.

The Chairman. Yes; but if you have not any rule which prohibits it, you cannot even strike it out.

Mr. Pepper. Then he either will follow the rule that his statement is to be concise and simple, or he will not. I do not see that we can do more than state the rule in an affirmative form.

The Chairman. You are willing to leave in "omitting mere statements of evidence", in conformity with the equity rule?

Mr. Pepper. I would not do that, sir.

Mr. Chairman, if you take these distinctions between law and fact, you get involved in all sorts of contradictions. If you are really strictly thinking about it, and are bound by the rule that you must state facts and not conclusions of law, or that you must state conclusions of law and not facts, you could not draw a libel in divorce, because you could not state that the parties had been married. The statement that they had been married is a statement of fact,

and it is a statement of a conclusion of law from the fact. There is no end to the subtleties in which you may engage if you undertake to make those refinements. All I am suggesting is that most people prefer difficulties that they do not see to explanations which they cannot understand. (Laughter.)

The Chairman. Where is there any provision here, then, which will require you to state any facts?

Mr. Tolman. That is in Rule 10.

The Chairman. Where is that?

Mr. Tolman. That is what he read.

Mr. Pepper. That was referred to the Committee a while ago.

The Chairman. That is the suggestion as a substitute?

Mr. Tolman. Yes.

The Chairman. Rule 10 does not differ. It says "a statement of the right of action".

Mr. Tolman. The Reporter understood that this was a suggestion for his consideration in combining Rules 10 and 11. Is not that right?

The Chairman. That meets my approval exactly.

Mr. Lemann. The word "facts" does not appear in your substitute.

Mr. Pepper. No; that is carefully eliminated.

Mr. Dobie. I am rather inclined to think the Senator is right.

Mr. Sunderland. The word "facts" comes in three lines lower. Just read three lines farther, and it says:

"The facts upon which the adverse party relies."

Mr. Pepper. The Reporter can deal with that. If the

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general principle we are stating is sound, I think that can be arranged.

The Chairman. Are you ready to vote on the motion?

Mr. Olney. What is the motion?

The Chairman. In substance, that subdivision (d) of Rule 11, the first sentence, end with the words "circumstances permit", and that the phrase "and shall state the facts without detail, upon which the claims of the pleader are based, omitting mere statements of evidence", be omitted.

Mr.Donworth. That motion does not strike the "facts" in line 32.

Mr. Pepper. If that motion were to prevail, I understand Dean Clark to say that he would take that as a guide in dealing with the similar questions wherever they occur later.

Mr. Clark. Yes; that is correct.

Mr. Olney. The motion is to say that it shall state the facts?

The Chairman. That it does not have to state the facts.

Mr. Pepper. It reads in this way:

"Each averment of a pleading shall be set forth as simply, concisely, and directly as the circumstances permit."

The Chairman. Coupled with Rule 10, which is to be embodied inhere, which says that it shall be sufficient for the complaint to contain a short and simple statement of the claim showing that the plaintiff is entitled to relief. It does not say whether you have to state the facts or what not -- just the claim.

Mr. Lemann. I should like to offer an amendment to this motion that we retain the last five words to which you have

referred, "omitting mere statements of evidence". Those words are now in equity rule 25. If you leave them out, somebody will construe that as encouragement that they can plead evidence. I do not see that the retention of those words can do any harm. Then it will read:

"Each averment of a pleading shall be set forth as simply, concisely and directly as the circumstances permit, omitting mere statements of evidence."

The Chairman. I like that, because otherwise, if you set forth twenty pages of evidence, if you do not have a rule like that, what right has the court to strike out the pleading?

Mr. Lemann. They will all ask why we left it out if it was in the equity rule -- those five words.

Mr. Donworth. Of course they will also ask why you do not want facts any more.

Mr. Pepper. The old common law theory was that things must be stated according to their legal effect, which necessarily excludes evidence. How in the world any human being can do anything but that without stating matters of evidence, I do not know. You either state things according to their legal effect, or you state evidence. We say you shall not state them according to their legal effect, and you shall not state the evidence, which leaves zero.

The Chairman. There was a motion for substitution there or amendment which has not been seconded, to retain the words "omitting mere statements of evidence."

Mr. Tolman. I really think that is dangerous. I think you cannot require that every statement which is a statement of

evidence be excluded. I think you can put in everything we have put in and make it short and brief and succinct; but there are some things as to which you must plead evidence. How are you going to plead a promissory note without pleading evidence?

Mr. Lemann. The word "mere" in the equity rule was designed to emphasize the fact that you were to omit mere statements of evidence.

Mr. Tolman. That may cure it.

Mr. Clark. Is it not a statement of mere evidence?

Mr. Lemann. Perhaps we may transpose; but this is a Bible to a certain extent.

Mr. Clark. What is a mere statement?

Mr. Lemann. It implies what the court had in mind. We all know pretty well what they had in mind, as the Chairman says.

The Chairman. It is past ten o'clock. I think we ought to vote on this thing. We have no second to Mr. Lemann's motion. That takes us back to Senator Pepper's motion. Are you ready for the question?

Mr. Olney. On this matter of facts, there is a question whether we shall use the expression "facts" or use such an expression as Dean Clark has used -- " acts, omissions, and occurrences."

The Chairman. If this motion is carried we shall not need to worry over that, because he does not have to state any facts.

Mr. Olney. That is just what I am coming to. Is not that something which should be put in the alternative to the

Supreme Court?

Personally, to me it does not seem to make so very much difference -- this question of facts. That expression has been construed and passed on by the courts time and again. Of course it is true that in many allegations which the courts hold to be just allegations of fact, there is involved a conclusion of law.

Take, for example, the allegation that John Smith, on such and such a date, was the owner of Black Acre. That has been held by the courts time and time again as a good allegation of fact, and yet there is involved in it the man's whole chain of title, with all the conclusions of law which must enter into it.

Take the proposition that you sue a man upon an obligation. You cannot allege simply, unless you use the common counts, that he is indebted to you in the sum of $300. You have to set out what we call the facts; but if the thing comes in collaterally in connection with it, you can say, "John Doe was indebted to Jim Smith in the amount of $300", and that is one of the facts that runs along. The courts, in other words, have passed upon this question of the facts, and their decisions adapt themselves to the necessity of good pleading; and any one who is at all familiar with the decisions and with the view of the matter among lawyers is not greatly troubled any more by this sort of thing. It is not in actual practice, at the present day, a point of difficulty.

Men, of course, are constantly pleading evidenciary matter, and they plead pure conclusions of law, things that are very evidently nothing but conclusions, and they are

stricken out upon motion; but as a rule the courts will not strike out any matter of this sort unless they are sure that it is just a pure conclusion, and cuts no figure in the final merits of the case. But, at any rate, whether we adopt one rule or the other, in view of the strong feeling of the law school men about this point, I think we should put it up in the alternative, because we have these findings of fact.

The Chairman. Mr. Cherry, have you any suggestions along these lines?

Mr. Cherry. I was going to vote for facts until Senator Pepper's suggestion came along; and I really have a hope that the pretrial procedure we are going to adopt will take care of most of the difficulty anyway in actual practice. People are not going to be so very much worried about whether they get a thing that you can call a fact or a conclusion or not, because it can be inquired into, and there can be a discovery, etc. Your issues for trial will really be developed in that way, and this thing will not have nearly the importance that it now has in jurisdictions where you do rely so largely on the pleadings to determine what you are going to try and how you are going to try it.

I am not impressed, however, with the idea that we get away from any particular difficulty by a new set of words, unless it is possible that we do by eliminating any statement of what it is that you plead, except that whatever it is you plead shall be pleaded concisely, simply and directly.

Mr. Donworth. Mr. Chairman, it is now ten minutes past ten, and I suggest that we adjourn and take up this matter in the morning.

As I think of this, it would be the most important step, I think, that we take. If it goes out to the profession that this committee and the Supreme Court -- if they approve our action -- have determined that no longer is it necessary to state facts, that they have left out the facts altogether in pleading and simply said the averment must be concise -- the more I think of it, the more I think we had better think that over, because I think it is going to be very far-reaching, and a very decided change in pleading in this country. On further reflection, I feel that to compromise the matter by avoiding precision is probably not what we ought to do.

I move that we adjourn.

Mr. Lemann. I second the motion.

(The question being put, the motion was unanimously carried; and, at 10:10 o'clock p.m., the Committee adjourned until tomorrow, Friday, February 21, 1936, at 9:30 o'clock a.m.)