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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.

Saturday, February 22, 1936.

GEO. L. HART
EDWIN DICE
LLOYD L. HARKINS,
OFFICE MANAGER

HART & DICE
SHORTHAND REPORTERS
416 FIFTH ST. N. W.
SUITE 301-307 COLUMBIAN BLDG.
WASHINGTON, D. C.

TELEPHONES:
NATIONAL 0343
NATIONAL 0344

C O N T E N T S .

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ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE.

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The Advisory Committee met in the Conference Room, United States Supreme Court Building, at 9.30 o'clock a.m., Hon. William D. Mitchell presiding.

RULE 25. INTERPLEADER. (Continued).

The Chairman. Gentlemen, last night we were discussing Rule 25, interpleader.

Mr. Olney. I should like to inquire, in connection with Rule 25, what is meant by "joinder of parties in the alternative".

Mr. Morgan. That comes from Rule 24, Judge. Rule 24 allows joinder in the alternative. If you will read lines 6 and 7, you will see this language:

"Such persons may be interested, or be liable, jointly, severally, or in the alternative."

Mr. Olney. Oh, yes!

Mr. Morgan. You see, you may sue A or B.

Mr. Dodge. I should like to ask a question about the rule.

In the first place, it introduces into interpleader a novel element by permitting a plaintiff who does not admit his liability to anybody to institute the suit. It then provides, just before that:

"although the titles or claims of the conflicting

claimants do not have a common origin, or are not identical, but are adverse to and independent of one another."

Does that mean that the adverse claimants to whom the plaintiff need not admit any liability must have claims that are adverse to each other, or may two entirely independent persons who claim that the plaintiff owes them something, if he denies it, bring one suit?

Mr. Clark. It has to be a suit regarding some particular fund or sum of money; but this is a definite attempt to do away with the requirement of privity, so called -- that you must claim through a definite source.

Mr. Dodge. They must claim against each other?

Mr. Clark. Yes.

I may say further, on the first suggestion raised by Mr. Dodge, that what we are trying to do definitely is to go beyond the provisions of interpleader, so-called. Usually, this is expressed in the codes as a bill for an action in the nature of an action of interpleader; and the definite code idea has been to extend provisions as to interpleader. Hence, this point that he suggests as to the plaintiff. The general theory now is to allow a plaintiff who is not a mere stake-holder, but has an interest in the fund also, to claim.

If we are not going to do some of these things, I must say that I think you had better leave it out altogether, because our Rule 24 would then be broader. In fact, Rule 24 will probably cover most of these things anyhow. It is some advantage to put in Rule 25, because interpleader is a separate idea, so thought about by lawyers, and if it was not in they might not think that Rule 24 covered it all; but I

think all writers generally on interpleader have urged a broader provision. This provision is in line with the arguments made by Professor Chafee, of course, who has written extensively on this subject, and who has been a strong advocate of Federal legislation. He advocates that these various detailed restrictions should not appear in an action of interpleader; and why should they? If we want to determine the various liabilities and rights involved, these are simply provisions that clog the free and final disposition of a case of this sort.

Mr. Dodge. The fact that it is new may not be any objection to it; but is it anywhere permitted that a plaintiff should bring a bill of interpleader without admitting liability?

Mr. Clark. Oh, yes; I think so. I think that is the general tendency of the codes which have developed the action in the nature of interpleader as distinguished from the strict bill of interpleader.

Mr. Dodge. The new Federal statute requires an admission of liability.

Mr. Clark. The new Federal statute is, of course, not fully extensive anyway.

Mr. Morgan. It requires payment into court; does it not?

Mr. Clark. Yes.

Mr. Morgan. So that means admission of liability, of course.

Mr. Lemann. I do not know that they use the language "a bill in the nature of interpleader". Why use that extended phrase?

Mr. Morgan. He was intending -- so he told me, at any rate -- to go beyond the ordinary bill of interpleader, and call it a bill in the nature of interpleader.

Mr. Lemann. He starts out saying that, but in what respect does he really go beyond it?

Mr. Morgan. I do not know.

Mr. Clark. He did not know what the statute was when I saw him. He heard that the statute had been passed. How far this fully carries out his ideas, I do not know. It does contain some things. It does away with privity, or at least tries to do so:

"Such a suit in equity may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another."

Mr. Lemann. Can we get the drafts of this bill, so as to see whether Congress turned down the idea that Chafee had? I do not know whether that should have any persuasiveness with us, however.

Mr. Dobie. Does this bill contemplate the payment of money into court, or delivery of the thing?

Mr. Morgan. Yes.

Mr. Dobie. It may be that he denies liability as to these particular claimants, but admits liability to somebody. Can you have a bill of interpleader when a man denies any liability at all?

Mr. Clark. As far as I can see, it is not very clear on that point. It does have a provision that the plaintiff may either --

"(a) has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court; or (b) has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the complainant with the future order or decree of the court with respect to the subject matter of the controversy."

As to whether the plaintiff is prevented from having an interest, I do not see that it says beyond that; and the thing looking the other way is that it is headed:

"Original jurisdiction of bills of interpleader, and of bills in the nature of interpleader."

If it is a bill in the nature of interpleader, it is usually considered that the plaintiff does not need to be a mere stakeholder.

Mr. Dodge. Are there cases in the courts where a plaintiff not admitting liability has maintained an interpleader?

Mr. Clark. Yes; it is quite freely permitted in my own State, for example.

Mr. Lemann. That has a sort of declaratory judgment in it. You say, "I want primarily a decree. I do not owe anybody." Suppose one fellow claims that you owe him. You bring a suit to have it held that you do not owe him. That is a declaratory judgment idea purely, I suppose; is it not? If there are two fellows that you claim/do not owe, you come into court and say, "I want a judgment first, and I do not

owe either of them."

Mr. Pepper. Or "I owe somebody this money, and I want you to choose between them."

Mr. Clark. Of course as far as the declaratory judgment is concerned, the claim was made that we already had too many analogies in law, and this was one of them.

Mr. Pepper. Mr. Chairman, I was trying to make the situation real to myself by thinking of a typical case.

Suppose an insurer is the plaintiff, and the conflicting claimants are, respectively, the administrator of the deceased insured, and one claiming to be an assignee of the policy. The plaintiff denies liability to both of them. He files an interpleader bill on the theory that either of the claims, if valid, is exclusive of the other, but disclaims liability when he files the bill. Does that precipitate a conflict between the administrator and the assignee to determine whether there has been an assignment that is valid, and leave in the air the question of whether whichever wins that fight wins a Pyrrhic victory, because there is no liability on the company anyway; or is the company's right adjudicated in the proceeding, in which case it is not really an interpleader, but a proceeding in which the plaintiff himself becomes subject to the judgment rendered in the conflict?

Mr. Clark. I think it is clearly the latter, and that is what we intend all the way through. If this provision alone does not do it, the provision as to filing claims and counter-claims would; and perhaps we might define this more broadly as one species of interlocutory remedy instead of a separate bill. It goes back to its forefathers, and grows

out of the old equitable bill; but now it is a kind of a remedy you get, and the remedy you get is to force rival claimants to set forth their claims, not merely against you, but against each other.

Mr. Pepper. That is a much sounder analysis, is it not, than to try to reduce it to the category of interpleader?

Mr. Clark. That is true; yes; and, as I said to you last night, we had a good deal of worry about how to fit this in, anyway. We wanted to put it in so that lawyers would know where to look for it.

Mr. Pepper. Yes.

Mr. Clark. Actually, this is only a subdivision of Rule 24, really; and if it were not for fear of sinking it, so to speak, we would put it in Rule 24.

Mr. Dodge. In the case Senator Pepper supposed, the first issue to be tried would be as to whether the plaintiff was liable to either claimant. That would end the case if decided in favor of the plaintiff.

Mr. Lemann. They would make common cause against the insurance company. The insurance company says, "The policy is void for fraud or breach of warranty"; so both claimants would make common cause against the insurance company, and that issue would have to be first tried. Then, if they succeeded in doing up the insurance company, they would fight each other on who would get the payment.

Mr. Pepper. It really seems strange, if that is the case, that the plaintiff should be anxious to precipitate the litigation at all, because all that would happen through the filing of his bill would be that he would have

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to meet two enemies in court instead of one, because if it were decided that he was liable or not liable, as the case might be, to one of them, the case would still stand over in the ordinary way for determination as to the other.

Mr. Lemann. But he would have this advantage: If he did not bring the suit, without such an interpleader statute, and one claimant sued him, and the insurance company defendant lost on the principal defense, then he would be exposed to perhaps another suit by the other claimant. This permits him to say, "Well, I do not think I am liable to anybody, but certainly I am only liable to one, and here I can get them both in the one tribunal, and settle my position against all claimants."

Mr. Pepper. Of course in the case where he admits liability he has the Federal interpleader act.

Mr. Lemann. Yes.

Mr. Pepper. And the question is whether, if he does not admit liability, it is not somewhat of a confusion of thought to think of it as an interpleader question.

Mr. Lemann. It is a sort of doublebarreled thing.

Mr. Pepper. Yes.

Mr. Dodge. It is almost like a bill to prevent multiplicity of suits.

Mr. Morgan. Yes; and he might want to get them both in one jurisdiction.

Mr. Olney. That is a very important consideration.

The Chairman. Have you studied this statute? I did not catch the distinction. Can you inform me very briefly as to the extent to which, in your rule, you have enlarged what Congress has done?

Mr. Pepper. There is the statute.

The Chairman. I know, but I should have to read it all over; and I thought the Reporter might be able to tell me just in what respect you have enlarged what Congress has so recently done.

Mr. Clark. In this matter of jurisdiction we followed the decisions and not the Act. The Act provides for the interpleader in the case of two or more adverse claimants who are citizens of different States; but the decisions in the equity procedure do not now require it. That is, the statute in that regard is narrower than existing Federal law.

The Chairman. I drew that original interpleader statute 25 or 30 years ago, and I remember putting in that clause about diversity of citizenship so as to be sure I had a constitutional statute. Have the decisions made it clear that you can eliminate that?

Mr. Lemann. You have only one case cited in your memorandum from Oklahoma, recently, 1934, district court. Is that all the authority there is?

Mr.Clark. I think that is the direct authority. Of course we think it goes back to the earlier case of Strawbridge vs. Curtis.

Mr. Lemann. You have unduly restricted the statute if this theory is sound.

The Chairman. Yes; I was about to say I do not find any authority of that kind which justifies our dragging in an interpleader statute where no question arising under the Constitution and laws of the United States is involved, in a case where there is a controversy between two persons who are

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not citizens of different States.

Mr. Lemann. That would seem to be the logic of it.

The Chairman. But I have not any conviction about it now. I was wondering just what authority there was to write that down.

Mr. Clark. On the explicit interpleader point, the only case is this case that we cited. On the point in general, we discussed that in an article in the Law Journal last June. We went into it quite a good deal there, and we think that decision follows along the line of the other cases which do not deal with interpleader.

The Chairman. I am not going to object to your going as far as you can constitutionally go. If you have authority for it, we had better leave it that way; and if the court want to pare it down to fit the Constitution, they can.

Mr. Clark. And of course we are not really, in one sense, passing on that. That is, we do not put in the restriction of the act. This would be one of those rules that are subject to existing jurisdiction, you see. We leave that to be worked out. We are not affirming something that we know is either doubtful or not so. We are just not affirming anything on it. We are not affirming the restriction of the act.

Mr. Lemann. You do not put in the limitation, and the court may put it in or not, as it wishes. It is like the other thing; we do not express any opinion on the jurisdiction.

Mr. Donworth. If you are proceeding under this rule, the amount in controversy must be $300 and not $500, as stated

in the act; and I suppose, further, this rule contemplates the application of the principles of law that prevail in the case of a separable controversy, whereas the present statute provides that when a case is removed by reason of a separable controversy the Federal court acquires jurisdiction of the entire case. So that would be a germane and analogous idea here. If there is a real controversy between citizens of different States, the court may dispose of the whole matter.

Mr. Dobie. In that connection, Judge Donworth, there are cases which hold that a bill of interpleader may be filed by X of Texas against C and D of Louisiana. In other words, the two claimants are from the same State, but the interpleader is from a different one; and that was sustained. I do not know whether this new statute in any jurisdictional sense would be possibly considered to supersede that, because I understand that under the new statute the jurisdiction is based entirely on the citizenship of the claimants. That is true; is it not?

Mr. Lemann. Under both the original insurance statute and this statute. It is true under the original statute.

Mr. Olney. You say where the plaintiff admits his liability, he may maintain a suit against two defendants who are citizens of the same State?

Mr. Dobie. That is Turman Oil Company vs. Lathrop, Judge.

Mr. Olney. The real controversy there is between citizens of the same State.

Mr. Dodge. This proceeding may necessarily involve citizens of three States to give jurisdiction. Is not that

so?

Mr. Clark. I should think it might; yes.

The Chairman. While Dean Dobie is looking it up, one thing that is troubling me about that is this: I do not think we have, under this rule, any power by procedural rules to enlarge the jurisdiction in any respects in which Congress, in interpleader cases, has defined the jurisdiction of the Federal courts.

Mr. Clark. There is already an equity jurisdiction of bills in the nature of interpleader. That is broader than bills of interpleader.

The Chairman. Yes, I know; but here is an act of Congress which comes along and supersedes all the equity rules, and it establishes a limited jurisidetion in these interpleader cases, enlarged by the amount involved, reduced to $500, and limited expressly to this diverse citizenship business. Now, if you adopt a rule that goes beyond that, as Judge Donworth has carefully pointed out, your enlargement would be limited to $3,000 cases instead of $500. That is clear enough; but you would also be bringing into the Federal courts a jurisdiction that has been expressly limited by statute recently passed, and I am wondering whether you are not runningafoul of the idea that we are enlarging the jurisdiction as now defined by law.

Mr. Morgan. Are you not assuming, Mr. Chairman, that this bill supersedes all the others, rather than being in addition to it? This was supposed to be a liberalizing bill rather than a restricting bill.

The Chairman. Well, there is a restriction.

Mr. Dodge. Does the plaintiff under the act have to be a citizen of a different State from each of the defendants?

Mr. Clark. That is not specified.

The Chairman. The adverse claimants have to be citizens of different States. It does not say whether the plaintiff has to be different from the other.

Mr. Donworth. That is regarded as immaterial.

The Chairman. It is not under the Constitution; is it?

Mr. Dodge. It has always been supposed that the plaintiff in interpleader must be a citizen of a different State from the two defendants.

Mr. Donworth. It is not in the statute.

The Chairman. Let me call your attention to this: I have not studied this; but if your provision or your act provides for depositing the money in court, so that there is no controversy as far as the deposit is concerned, between the plaintiff and either claimant, your only controversy is between the conflicting claimants. The result is that it is not necessary, under that kind of a bill, to have the plaintiff a citizen of a different State than both of the defendants. The moment you abolish the surrender by the plaintiff of any defense, and allow him not merely to interplead and get the conflicting claimants together, but allow him to contest his own liability as between himself and the man who is a citizen of the same State as himself, you are running squarely afoul of the Federal Constitution.

Mr. Lemann. Here is a memorandum which Mr. Hammond has just handed me, prepared by Professor Chafee in connection with this Federal interpleader bill, and in it he has rather

detailed comment on various provisions of the bill. Here is what he says on jurisdiction:

"The draft reads 'two or more adverse claimants, citizens of different States.' The clause is very important because it describes the necessary diversity of citizenship which gives Federal jurisdiction. The text of the 1926 act is closely followed. Senator Hebert's bill is phrased differently: 'two or more citizens of different States, and of one or more States who are adverse claimants to such money,' etc. It seems better to use the existing statutory language.

"Some important questions of constitutionality arise under the Federal interpleader legislation where there is partial cocitizenship. I shall indicate briefly the nature of these problems and the way in which they have thus far been judicially handled."

Then he goes on for three pages, and he says in one footnote:

"The opinion of the Attorney General (see Appendix C) takes the view that all of the claimants may be citizens of the same State, so long as the stake-holder is a citizen of some other State."

But apparently he was reluctant to adopt that view.

When I look at this opinion, I see it is a memorandum from Mr. Cummings, enclosing an office memorandum which is entitled "Memorandum for Mr. Stanley", and signed by a man who apparently is an attorney in the Department of Justice. Apparently Mr. Chafee was left in some doubt, I take it, as to whether it was safe to follow that; but it does seem

to me that Mr. Clark has covered the situation by pointing out that we are not passing on the jurisdictional question. We are just using general terms here, and the courts will decide it.

Mr. Clark. Let me give you what we were suggesting to put in for the last sentence. This is found in our comments on page 14, and it is in line with the recent act. We suggest this: We had accepted previously some textual changes earlier that Mr. Morgan and Mr. Dobie had suggested; and then, at the end:

"The remedy herein provided is in addition to, and in no way supersedes, the remedy provided by Judicial Code, section 24 (26)."

Then we went on with this:

"Actions under said section, however, shall be governed by these rules."

The reason for that is this same one we talked about before. They require a petition in equity, etc. We are going to do away with petitions in equity.

"A complaint and counterclaim in a civil action shall be in lieu of a suit in equity and equitable defense as therein provided."

The Chairman. I think our proposal which was accepted yesterday -- I think it is called a protestation, but I think it is an advisable one -- to have a general rule saying that "Nothing in these rules is intended to enlarge the jurisdiction of Federal courts now established by law", would cover any questions we may have here in regard to the jurisdiction. If it is established by the Constitution, it is established by law;

and it would be a warning to lawyers that we are not trying -- of course we could not modify the Constitution, but they might assume that we modified the statutory limits on jurisdiction. It would be a warning to them that they must look out for that.

You must bear in mind that this is not a set of rules gotten out by a bunch of lawyers. They are going to be written, signed and promulgated by the Supreme Court of the United States; and the lawyers will look at them and say, "Well, here is the high court of the land saying we can join all these claimants."

M. Dobie. The idea is to put that in, not under each one of these rules, but once?

The Chairman. No; a general rule that would cover all of them.

Mr. Dobie. I think that is very important.

Mr. Lemann. Would it be worth while to entitle this rule "Suits in the nature of interpleader" instead of "interpleader", to cover the kind of things Senator Pepper has talked about -- to label it so that the lawyer would see that it was not only the old-fashioned interpleader?

Mr. Clark. It is a little difficult. You see, we have not called this a bill for interpleader. This is really an interlocutory judgment of interpleader. It is something that is an auxiliary remedy, so to speak, in the action.

Mr. Olney. A much more suitable name for the action you have in mind would be an action to determine conflicting claims. That is exactly what you are doing. In some respects it is a good deal like an action to quiet title.

Mr. Lemann. It goes beyond conflicting claims. Would conflicting claims cover the thought that you do not admit liability to either?

Mr. Olney. It is an action to determine conflicting claims. The claim may be admitted, or it may not. You have the conflict, and the object of the action is to determine the rights of the parties.

Mr. Dodge. What is there interlocutory about it, Mr. Clark?

Mr. Clark. There does not really need to be anything interlocutory about it; but I take it the more usual way is to pass an order requiring the parties to interplead, or requiring the claimants to state their claims.

Mr. Dodge. You do not provide for that here. You require that they shall come in.

Mr. Clark. Well, we do not say that they must do it by having an intermediate order, but we say generally that they may be required to interplead, and leave to the court how the details will be worked out; but the ordinary way is passing an order.

Mr. Lemann. That passes as of course when you file the bill; does it not? The thing you serve on the conflicting claimants is the order of the court directing them to assert their claims.

Mr. Clark. Yes.

Mr. Olney. The question in such a suit of whether or not the claim is admitted should affect only the matter of costs. If the claim is not admitted, and the plaintiff wishes to contest it, he should be responsible for future

costs incident to that fact. If they pay the money into court, they should be discharged without further costs.

The Chairman. We have made no provision for paying the money into court and being discharged; have we?

Mr. Clark. No. We have considered that a good deal. I should not think it need be a part of this, anyway. There has been a suggestion by Mr. Tolman for a separate rule on payment into court generally, and I think there is something to be said for that.

The Chairman. I should think so. The clerk would want some authority to receive the money. To make him liable on his bond you would have to have a rule or a law providing for receiving the deposit.

Is there anything more on Rule 25?

Mr. Pepper. May I ask the Reporter to take into consideration a possible substitute -- a mere matter of form-- for the matter between lines 7 and 10, inclusive? I am a little puzzled by the way in which the relation of the claims to one another is stated.

Mr. Morgan. He has already agreed to change that, I think, Senator.

Mr. Pepper. I was wondering whether this would possibly be worth considering as a substitute for that matter:

"The claims must be so related that if the plaintiff i held liable to any claimant he will not be liable to any other; but the titles or claims of the several claimants need not have a common origin, and the plaintiff may disclaim liability in whole or in part to any or all of the claimants."

I eliminate the word "identical" there because there is a

sense in which no two claims can be identical, in view of the fact that they are separate claims, put forward by separate people; and it does seem to me that instead of referring to them merely as conflicting, there is some advantage in having it made clear that by "conflicting" we mean that if the plaintiff is liable to one, he will not be liable to anybody else.

Mr. Clark. I think that should be considered. There was this problem involved there: Professor Chafee developed the language which has now gone into the statute. It does not cover all this, but it covers the point:

"Such a suit in equity may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another."

That phraseology we copied exactly. That is why we did it. I do not know whether we should now improve upon it. The statute has now gone into law. Perhaps now we may start improving upon it.

Mr. Pepper. I did not mean to start a debate. I just thought I would make a note of it for consideration when the time comes.

The Chairman. The Reporter has that in the notes, and we will consider that matter of form when we get to revising the rules.

Mr. Pepper. Yes.

Mr. Clark. I might say in answer to your question, Mr. Mitchell, that there is a Federal statute now on tender of deposit to the clerk. I think it is satisfactory.

The Chairman. I am not at all sure we ought to be chasing the lawyers around on that. It might be just as well to put in a brief provision reenacting it, saying that deposit may be made in accordance with section so and so of the statutes, and let it go at that. I think the lawyers ought to be able to get it pretty nearly in his practice from the rules, without too much chasing.

We will pass on to Rule 26, then -- intervention.

RULE 26. INTERVENTION.

The Chairman. Are there any suggestions of substance on that rule?

Mr. Dobie. Mr. Morgan made one suggestion there that I understand is a matter of substance. As I understand, it limits the intervention as a matter of right to the case where the parties make claims to the property, and does not permit intervention as a matter of right merely on inadequacy of representation.

Mr. Morgan. Mr. Clark says I am wrong on the authority. He is probably right on that. You have looked that up, have you not? You say there can be no question about it, so I take your word for it.

Mr. Clark. I speak vicariously there. Mr. Moore has an article in this number of the Law Journal that demonstrates all this.

Mr. Morgan. That is o.k.

Mr. Clark. I was hoping we would get copies down here before we leave, so that you may study it and be convinced by the demonstration.

The Chairman. I think we had better pass that, instead of

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getting into an analysis of the decisions here.

Mr. Morgan. No; we cannot go into that here; but you remember that whenever you hit an opinion saying "it is elementary that", you think there is something wrong. It is like Mr. Justice Brewer: " We will not stop to notice the argument that", because, if he stopped, he could not go any further.

Mr. Clark. I do not think there is really anything here except "amply". We simply said "the cases amply support two types of absolute intervention, and a discretionary right."

Mr. Morgan. All right; it is o.k.

Mr. Loftin. You raise the question in your agenda that it has been suggested tht the provision allowing interventionas of right to any person who is inadequately represented in an action be stricken out.

Mr. Morgan. I do not insist on that.

Mr. Loftin. Wasthat yours?

Mr. Morgan. That was mine.

Mr. Loftin. I had some question in my mind about that. Take the case of trustees under mortgages representing bond-holders: If some bond-holder who is dissatisfied comes into court and claims that he is not adequately represented, it opens the door, it seems to me, to going out and purchasing bonds in order to get into court, and lawyers' fees, etc.

Mr. Donworth. I think there are numerous precedents for that. One lot of bond-holders say, "We do not like the attitude of the trustee; won't you let us in to speak for ourselves?" I think the court gives them that permission.

Mr. Morgan. It usually does.

Mr. Donworth. It does not change the substantive right of the trustee to enforce the mortgage, and all that.

Mr. Dodge. This rule does not say "adequately represented". It says "any person not represented".

The Chairman (reading:)

"but who shows to the court the inadequacy of such representation".

Mr. Dodge. Where is that?

The Chairman. In line 8. He has to satisfy the court that he is not just looking for an allowance.

Mr. Dodge. Should not that be optional with the court, rather than mandatory?

The Chairman. It is. The word "direction" in line 10 is a misprint for "discretion". It should read:

"and such a motion to intervene in an action may, in the discretion of the court, be granted" --

And so forth.

Mr. Lemann. Would lines 12, 13 and 14 give the intervener the right to counterclaim?

Mr. Morgan. I suppose so, after he gets in.

Mr. Lemann. That is what I thought; but while I have sent for this decision to refresh my memory, I read a case referred to in some of these notes which practically said that when an intervener got in, he could not raise any question as between himself and the original plaintiff that the original defendant had no concern in; and I wondered whether this language was perhaps a little too broad with that decision in mind.

Mr. Morgan. I think we change that decision. That is the answer.

Mr. Lemann. You change the decision of the Supreme Court?

Mr. Morgan. I suppose so. I suppose that is what he intended.

Mr. Lemann. A good many of these cases will go to the Supreme Court. Wherever we do that, I think we ought specifically to tell them we are doing it.

Mr. Morgan. Is not that an accepted rule that you put -- that the intervener cannot counterclaim?

Mr. Lemann. When I read this case, it sounded reasonable to me; and then I looked at this rule, because the case is cited right here, and I said, "Evidently the framers of the rule did not think they changed that decision, because they did not say so in the note. They cited the case in another connection."

Mr. Clark. Just a minute on that point. The Chandler case was an independent claim. It was not a claim arising out of the same transaction.

Mr. Lemann. But a counterclaim does not have to be.

Mr. Clark. What we have done here is, we have not provided for absolutely free intervention, you see. We have provided that the intervener shall have the right to litigate his claim or defense on such terms and conditions as the court may think proper to impose. We have not given him free right of intervention. It is possible, I suppose, to say he could only counterclaim on something arising out of the same issue.

Mr. Lemann. In a sense, the counterclaim here, I believe, was tied up with the plaintiff's original claims, but it was not tied up with anything at issue between the plaintiff and

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Mr. Lemann. When I read this case, it sounded reasonable to me; and then I looked at this rule, because the case is cited right here, and I said, "Evidently the framers of the rule did not think they changed that decision, because they did not say so in the note. They cited the case in another connection."

Mr. Clark. Just a minute on that point. The Chandler case was an independent claim. It was not a claim arising out of the same transaction.

Mr. Lemann. But a counterclaim does not have to be.

Mr. Clark. What we have done here is, we have not provided for absolutely free intervention, you see. We have provided that the intervener shall have the right to litigate his claim or defense on such terms and conditions as the court may think proper to impose. We have not given him free right of intervention. It is possible, I suppose, to say he could only counterclaim on something arising out of the same issue.

Mr. Lemann. In a sense, the counterclaim here, I believe, was tied up with the plaintiff's original claims, but it was not tied up with anything at issue between the plaintiff and

defendant. I felt my way by asking first, to commit you on the point that you do permit free counterclaim. After you answered that, I proceeded further. If you had given a different answer, I would have withdrawn.

Mr. Clark. I suppose you might have a limitation on the Chandler decision. That is, you have got to have first an independent counterclaim, and, second, the judge saying that "I will allow you to intervene. That is one of the conditions, that I will permit you to intervene." So restricted, I suppose you could find a limitation on the Chandler case.

The Chairman. I am thoroughly in accord with Mr. Lemann's suggestion that if there is any basis for the contention that there is any restriction or modification of Chandler vs. Price, you ought in your notes not only to recite the case but to point out to the court where there is any chance of enlargement or restriction of that case. They ought to know that and have that case in their minds.

Mr. Clark. I think you are probably right about it. The limitation struck us as so limited, in fact, that I am not sure I thought much about it.

Mr. Lemann. You cite the case for another point. The only way I knew about the case was because you cited it; but you cited it for the fact that --

"Good practice requires the proposed pleading to be served with the application to intervene"; and that is not the thing that bothers me at all. I was wondering whether we ought not to limit this rule to make it plain that an intervener cannot butt into a case and get the right to litigate something that is of no interest to one of the original parties.

That is what, as I understand, Chandler vs. Price practically says.

Mr. Clark. You see, too, you cannot say what the Supreme Court will think of a discretionary rule. That is not before them. That case there is a bald starting in with something new.

Mr. Lemann. They were deciding there what they thought was good equity practice. They could have laid down another rule without our coming along and telling them how to do it. This is hot off the box last November.

Mr. Morgan. They did not know how liberal they were going to be.

The Chairman. You ought to analyze the Chandler case, and if you have any variation from it in your rule you ought to state your reason for it, so that the Court will have the question before it, and not fool them with it.

Mr. Morgan. I have plenty of these things that they would not have thought of doing of their own motion.

Mr. Olney. There is another point I should like to bring up in this connection. What is meant by the phrase in line 6 "property which is then subject to the control of the court"? Does it mean property that is in the custody of the court, or merely property that is the subject of the action? There is a very great difference between the two.

The Chairman. I do not know what it means.

Mr. Olney. If it means property in the custody of the court, it should then be limited, it seems to me -- the intervener should be limited to one whose interest in the property is such as to give him an interest in the litigation.

In other words, if property is in the custody of the court, and some one entirely outside, who has nothing to do with the litigation before the court, says, "That is my property; it does not belong to these people at all," he ought not to be permitted to intervene to quiet his title.

Mr. Dobie. In that connection, he does not have to intervene. He can come in by an ancillary proceeding. It does not make any difference about his citizenship or about the amount in controversy. That is Freeman vs. Howell, and a long line of cases. If the property is in the control of the Federal court, all claims to that property can be adjudicated by the Federal court, and must be adjudicated there.

The Chairman. Here is the trouble: It is a matter of verbiage. Here is an expression which says "subject to the control of the court".

Mr. Dobie. If it means that, "in gremio legis" is the old expression.

The Chairman. It says "subject to the control of the court." I do not know whether that means actually in the custody of the court, or whether it means it is within its jurisdiction, so that it could take possession of it if it wanted to. Which does it mean?

Mr. Dobie. I think "subject to the control of the court" would probably mean that it was "in gremio legis", to use the old expression.

The Chairman. If so, it ought to say so.

Mr. Dobie. Yes; I think that ought to be made clear.

The Chairman. If it means merely subject to the jurisdiction of the court --

Mr. Clark. I think we ought to go over it to see if we can make the expression a little clearer. I do not want to make it too limited. I think trust funds are covered, also; and I am a little afraid of your expression, "in gremio legis".

Mr. Dobie. I did not suggest that. No; do not use that. I mean, that is an old Latin phrase.

The Chairman. Let us refer that to the Reporter, with the understanding that he will make that clause clear as to what he does mean by that.

Mr. Morgan. We shall have to know what the law is, first; shall we not?

Mr. Dodge. Does not this mean the property which is the subject of the litigation?

Mr. Clark. No; it is not that broad.

Mr. Morgan. Is it not as broad as that?

Mr. Clark. No.

Mr. Morgan. Ought it not to be?

Mr. Pepper. May I suggest that this case --"property which is the subject of the litigation" is adequately covered in the later lines, because it is provided that there may be, in the discretion of the court, a right of intervention to anybody who might have been joined as a party; and if he claims an interest in the property he might clearly have been joined as a party.

Mr. Clark. Yes; that is true.

Mr. Morgan. This is the mandatory part; is it not?

Mr. Pepper. Yes; this is mandatory; and in that connection may I ask this question of the Reporter: Does not that

provision about inadequacy of representation belong in the discretionary part of the rule rather than in the other part?

The Chairman, in answer to Mr. Dodge's question, called attention to "discretion" in line 10. That occurs in the second half of the paragraph dealing with optional or discretionary intervention. You begin above by saying "such a motion must be granted", and then you say, provided he shows-- that is, satisfies the court -- the inadequacy of his representation. That means that it does not have to be granted except in the discretion of the court.

Mr. Lemann. Is that true of the part before the semicolon?

Mr. Pepper. Mr. Lemann, my thought was that if you provide that such a motion-- that is, a motion to intervene -- must be granted to one who shows to the court the inadequacy of such representation, you are necessarily saying that it need not be granted if the court, in its discretion, thinks the representation adequate.

Mr. Lemann. I would not have thought so from reading the first part of the sentence and comparing it with the second part. I would have thought lines 5 and 6 lay down an absolute rule as to certain classes of persons; that is, persons who claim an interest in the property; and that the latter part of the sentence, beginning with the semicolon, laid down another rule as to persons who were not interested in the property subject to the control of the court. As to those persons, they must show that the representation was not adequate. I thought the first part of the sentence really presented one class of cases, and the second part a second class of cases,

and that the requirement about adequacy of representation applied only to the second part.

Mr. Clark. That is correct.

Mr. Pepper. I think it does; but the structure of the paragraph is this:

First, such a motion must be granted. Then, farther down, such a motion may be granted. My suggestion is that the inadequacy of representation case necessarily, as a matter of distribution of thought, belongs in the "may be granted" category; and I merely thought, as a matter of form, that it might be considered whether it would not be clearer if it was moved down there.

Mr. Clark. Of course it does not come up quite in that way. I suppose any finding of fact depends upon some element of discretion; but of course they do not talk that way. It is talked of in terms of absolute right, if you make the finding.

Mr. Morgan. Is not that the distinction, Senator? If there is a finding of inadequate representation, the court then has no discretion to keep him out.

Mr. Clark. That is the point.

Mr. Morgan. That is the point that I raised in the first place.

Mr. Olney. Mr. Chairman, is it not necessary that we determine just how far we are going, in connection with this, in regard to property? If the property is in the custody of the court -- I have just discussed the matter with Mr. Dobie -- the party has a right to intervene, and in many cases must intervene, on the theory that the court now has the property in its custody.

Mr. Dobie. That is not called intervention. It is an ancillary proceeding.

Mr. Olney. It is an ancillary proceeding; but he must come in there and say to the court, "Here, your marshal has taken my property. He has not any right at all to it." Are we going to do that, or are we going to go further and permit an intervention where the property is not in the custody of the court?

Mr. Clark. In the Federal cases, this matter of property subject to the control of the court is pretty indefinite anyway.

Mr. Olney. I cannot imagine what is meant by property that is subject to the control of the court unless you mean property that is in the custody of the court.

Mr. Dobie. Of course there might be a difference. Certain property might be there, and the court might enter a decree validly for specific performance, or something of that kind. It may be subject to the control of the court but not in its custody.

Mr. Olney. Even then, the property is not subject to the control of the court.

Mr. Dobie. It is subject to its decrees and orders, but not in its custody. I just want to make this clear.

Mr. Olney. The parties are. You can compel a man to make specific performance by a decree, but the property is not in the control of the court.

The Chairman. We are agreed that the phrase "subject to the control of the court" is vague, and ought to be made certain; but Mr. Morgan has pointed out that in making it

clear we want to find our objective, and know which way we want to make it read. That depends on the decisions, as I understand.

Mr. Dobie. If it means property actually in the custody of the court, you do not need this at all. The ancillary jurisdiction takes care of that, the jurisdictional amount and citizenship -- Freeman vs. Howell. I have a hundred cases on that.

Mr. Olney. I did not understand that the matter had been passed by for further investigation. If that is the situation, I have nothing more to say on it.

The Chairman. Perhaps it should not be. We agreed that it ought to be passed by on phraseology, as to which we mean-- whether in the custody of the court, or in some way under its jurisdiction -- but we have not settled, as I understand, the question as to which honr of the dilemma you want to take in clarifying the provision. I do not know whether you have or not. Have you?

Mr. Dodge. The provision of Equity Rule 37 is simple, and seems to be intelligible:

"Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

Mr. Dobie. That would be taken care of by the next sentence; would it not -- any person who could be joined or had been joined as plaintiff, defendant, or third party?

Mr. Dodge. It might be covered by that.

Mr. Clark. What we were trying to do was to spell out the decisions further. As I said, Mr. Morgan MOORE has worked on an article that I hoped would be down here by now. We have all the cases classified, and the article is available now as soon as I can get the reprint down here.

The Chairman. I think we had better refer it back to the reporter, then, and when he makes his revision he can do the best he can, in his judgment as to what the cases are.

Mr. Clark. Now, as to the equity rule, of course the first part about the interest in the litigation is a little blind; but it is pretty broad, and that would be all right. The subordination idea is one that we discussed a good deal. I think it is rather objectionable, and we did not want that in.

Mr. Dobie. We definitely repudiated that at the last meeting -- that that should go out -- and by going out we meant not just to overlook it, but to repudiate it. You cannot intervene although you do not claim insubordination, and you do not have to recognize the equity proceedings, according to the equity rule M.. Dodge read.

Mr. Clark. So what we are trying to do is to classify the cases. The difference here is small, actually, in practice. That is, the difference between the first class and the third class, which catches everybody, is the one of discretion of the court. You come in anyway. But in the third class we did not make it an absolute right; and further, Mr. Lemann, I ought to say that Mr. Moore vehemently denied that "merits" means anything but the same case, so far as the Chandler case is concerned.

Mr. Lemann. On the merits?

Mr. Clark. On the merits of the case. I do not think we had better try to clear it up, because I can see the question.

Mr. Dodge. You were not intending to extend that doctrine or to change that rule?

Mr. Lemann. Mr. Morgan was wrong in thinking you wanted to change the decision.

Mr. Clark. If I might answer for Mr. Moore, I will say "yes".

Mr. Lemann. We do not want to get lawyers on opposite sides of this rule when it is adopted.

Mr. Morgan. Mr. Lemann, it seems to me whatever Mr. Clark might have wanted to do, this language which he has -- and I suppose he did it deliberately -- puts it in the power of the trial judge to change this rule laid down in Chandler vs. Price. I supposed he was doing it deliberately, and I was in favor of it; so you were not catching me. I was diving in that pool, knowing it was a cold bath, and I thought Charley was going in with me, and now he has run for shelter. (Laughter.)

Mr. Pepper. That is because Lemann stole his clothes. (Laughter.)

Mr. Clark. Let me say that this is not my baby, but I am willing to go in and fight for the parentage if necessary. What we were trying to do was to state the existing law. I have no objection to going further. Let us consider that; but, to date, that is what we were trying to do, even though we may have done it imperfectly.

Mr. Morgan. I thought "on such terms and conditions as the court may think proper to impose" left it pretty wide open.

Mr. Clark. Is it not on the merits of the action, if we want to get technical? But let us not stop with that. Whatever we said, we had better improve it.

Mr. Lemann. If you wanted to accomplish what Mr. Morgan thought you did -- I was not sure whether you intended to -- I thought you should make that plainer, if you are going to change Chandler vs. Price.

The Chairman. You should say so in the notes.

Mr. Lemann. If you do not intend to do it, if Mr. Moore had no intention to do it, let us make it plain the other way.

Mr. Dodge. How do we want it done? I do not want to change that rule. I think that rule is all right.

Mr. Morgan. It seems to me, Mr. Dodge, it is pretty foolish to put a limitation here on our general notion to the effect that we should settle up everything that the judge thinks ought to be settled in one lawsuit. It does not make any difference when this chap comes in, or how he comes in, whether it is by intervention or by being made an additional party, or anything of the sort. It seems to me as long as he is in there, if the court in its discretion thinks this counterclaim or whatever it may be should be handled there, I do not see why we should put a limitation on it in this respect, where we do not put any such limitation in any other place.

Mr. Lemann. In other words, you think when we put in

all this third-party business, and the Supreme Court realizes how elastic an expression you are now going to have--

Mr. Morgan. Certainly; that was my whole notion of this thing, and that has been my notion on all these questions of joinder and settling things up. I supposed that was the philosophy underlying the whole body of rules.

Mr. Olney. As the result of recent experience with an intervener, if we are going to permit a man to come in who simply claims an interest in the subject matter of the action, and to intervene in the discretion of the court, it ought to be accompanied by the safeguard that the court shall not grant such an intervention if it is going seriously to delay and impede the trial of the original cause, because interventions are made for that purpose time and time again. It was made in this particular case in which I was interested.

Mr. Morgan. The court usually, as I remember, is very much motivated by the consideration you state.

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Mr. Olney. The rule ought to be framed in such fashion as to call the attention of the court to the matter.

The Chairman. There is another admonition in the equity rule which you dropped, which I think is useful. The court made plain by its language that the one who poked his nose in can not run the proceedings. There is a phrase contained in the language, "in subordination", which ought to be preserved, I think. It may be more a matter of chance, I think, than anything else, but the provision is that the one who has poked his nose in and attacked what is going on can not step in and try to run the proceedings.

Mr. Clark. That is a matter we discussed quite a little in detail. We had quite a little debate over there and we moved to strike it out. There was one difficulty with respect to it. If we would be sure it was a pious admonition, that would be one thing, but the courts may have something more in mind. That is not quite clear. If we could say that this is only a pious admonition, and do not worry too much about it, all right.

Mr. Olney. I can give you the facts about a case in order to give you the necessity for some safeguard. A party had brought suit claiming very valuable property. There was nothing in the claim as a matter of fact. The defendants were seeking to bring that case to trial, to get rid of it, and forced the issue practically up to the time of trial, when the plaintiff undoubtedly--- but we could not prove it,-- arranged to have an intervener come in and apply for intervention, for the sole purpose of delaying the trial. And he nearly got away with it.

Mr. Dodge. Did the court permit the intervention?

Mr. Olney. No; the court threw him out finally after an awful row.

Mr. Morgan. And so the court was your safeguard there.

Mr. Dobie. I have been rather in favor of what Mr. Morgan says, that we might make this very broad and rely on the discretion of the court. I have been very much impressed all through these discussions, however--- I do not mean to misinterpret you gentlemen--- but it seems to me that the men who are strongest against leaving it to the discretion of the court here are the only two men who have been on the court, namely you, Judge Olney, and Judge Donworth.

Mr. Olney. It does not arise from our experience on the court, but it arrived from our experience with courts. Is that not right, Judge?

Mr. Donworth. I think you may be right, but I was listening to a very wise remark which was being made at this end of the table, and I did not get what you said.

Mr. Olney. They brought you in along with me, and I was trying to make you a real party.

Mr. Dobie. Showing how these judges have no confidence in the discretion of judges.

(At this point a discussion of the subject of "amicus curiae" took place, which was, at the request of Mr. Pepper, with the approval of the Chairman, expunged from the record.)

The Chairman. Let us pass on to Rule 27.

Mr. Clark. Before we pass to that rule, Mr. Chairman, let me go back to the subject we had under discussion before we discussed the matter of "amicus curiae". Did we settle

that point? Are we going to overrule the case of Chandler vs. Price or not? Did you make a motion, Mr. Morgan?

Mr. Morgan. I have said my little piece.

The Chairman. The plan could be proposed to the court with a carefully prepared note calling attention to this part in which there is any question whether the effect of Chandler vs. Price has been enlarged or limited, and then let the court decide. If they think we ought to go a little farther, the reasons therefor can be stated.

Mr. Clark. Do you mean we are to do that in the alternative? If we are left to our own devices I do not think we will. I will say that the matter is not close enough to my heart to do it.

Mr. Morgan. I am not going to fight for it.

The Chairman. If it is not close to your heart do not tamper with Chandler vs. Price unless you have a very good case.

Mr. Morgan. I am not proposing to fight and die for it.

The Chairman. It means a fight with the court to get them to modify a rule they have laid down by a decision so recently rendered.

Mr. Clark. I think there is something in it in view of what Mr. Morgan has said.

Mr. Lemann. If all that we now have here before us were before the court they might have decided differently. As I understand it, under these rules, which I am not sure that I fully appreciate, we have many situations where a plaintiff who brings a lawsuit may find all kinds of issues in the case which are not of any concern of his. A third

party is brought in, and the case will become such that he will not recognize his own lawsuit; the plaintiff will be sitting on the sidelines three-fourths of the time while other people are fighting the suit. Is that a fair statement?

Mr. Morgan. That is a fair statement, but you have got to reflect that it is within the power of the court to order separate trials, and so forth. That is just exactly what the English do.

Mr. Lemann. Had the court had before it when it made its decision a statement as to what might happen under the rule, as it has been discussed here, perhaps they would have laid down a different rule.

The Chairman. Why not try them?

Mr. Lemann. That is what Mr. Morgan wants to know; whether we should.

Mr. Dodge. In the case we are discussing a party gets into the litigation that nobody wanted to get in. It is different in that respect.

Mr. Clark. It is different in that respect. In this case a party has butted into the litigation, and no one wanted him in the litigation. Yes, it is different in that respect.

Mr. Olney. I agree with the general purpose of what is proposed. It would very much diminish my doubt as to what it would do here if in connection with the rule it was laid down, for example, that the trial courts in determining whether to grant separate trials, and when to grant them, and all that sort of thing, should bear in mind that they should be conducted in such manner as not to prejudice the plaintiff in the determination of the claim for which he brought his

suit.

The Chairman. Well, the discretionary power is expressly that. In another section it says that he may order suit filed, and all that.

Mr. Olney. I am simply speaking of the necessity for rules that will guide the discretion of the court in those respects. They should be rather strong, it seems to me.

The Chairman. What is your conclusion then as to whether you want to adhere strictly to Chandler vs. Price, or whether you want to broaden it out?

Mr. Donworth. I suggest that someone make a motion, Mr. Chairman.

Mr. Olney. Mr. Chairman, I am not sufficiently acquainted with the case of Chandler vs. Price, and I understood that this matter was really being passed by for further consideration.

The Chairman. The Reporter has asked for instructions.

Mr. Olney. It seems to me that is the best disposition to make for the time being.

The Chairman. He has announced his decision, as I understand it, that if we do not instruct him he will adopt a broader rule and put a note in to the extent to which it may vary from Chandler vs. Price. If we do not like that, now is the time to stop it. He really has to have instructions.

Mr. Cherry. I would so move, Mr. Chairman, with the understanding that the admonition in the present equity rule be included as you suggested.

Mr. Donworth. What is that admonition?

Mr. Cherry. That it be in subordination.

The Chairman. Is there any second to that motion?

Mr. Donworth. That is a compromise between two ideas then, is it not?

Mr. Cherry. No; it is allowing him in freely, but it is a sort of direction that under this discretion to order separate trials, or power to order separate trials it still remains true that the principal action is the one that the plaintiff brought. That is what I had in mind.

Mr. Donworth. I think that is pretty good.

Mr. Clark. I wonder if using that phrase in the equity rules covers what you have in mind? What you have in mind, I take it, is really that the plaintiff's claim shall not be delayed, and so on. If you mean something else I think the two ideas would be inconsistent.

Mr. Morgan. Yes.

Mr. Clark. That is, you can not have the intervener suing on his own claim and still say it is in subordination of the plaintiff's claim.

Mr. Cherry. No; it is not in subordination. It is the proceeding from then on. That is a sort of guidepost to the trial judge when he has permitted that intervention.

Mr. Clark. Mr. Cherry, why can we not put it the other way?

Mr. Cherry. I was not intending to suggest the form but was simply suggesting the idea.

Mr. Clark. That the claim of the intervener shall not delay the plaintiff's claim.

Mr. Morgan. Cannot delay the litigation.

Mr. Clark. It is hard to tell what it means.

Mr. Cherry. I only suggested that idea. I did not

intend to suggest the wording.

Mr. Olney. I never knew what "in subordination" did mean in that connection. I never did quite find out.

The Chairman. We have gotten into a wrangle over a minor question. Suppose we leave the " in subordination" business out for the moment and decide the main question as to whether we will approve the Reporter's proposal, and adopt the Reporter's rule as he thinks it ought to be, and point out those respects in which it varies from Chandler vs. Price. That is the motion.

Mr. Lemann. Suppose, Mr. Dodge, you give us a statement as to what you visualize what will happen under the rule in the kind of case we are now discussing?

Mr. Dodge. In the case I have in mind apparently the intervener brought into the suit an element which was not within the issues made in any way in the original pleadings. He came in on some claim against the plaintiff not involving the defendant in any way, not affecting in any way the issues made by the original pleadings, and the court said "the issues tendered by or arising out of this bill may not by the intervener be so enlarged"; and the question really is whether a "butter-in" can bring in an entirely new issue not made by the plaintiff and the defendant. The original set-up is all made within our prior rules. Then the third fellow tries to inject himself into the case and raise entirely new issues.

Mr. Donworth. Under the rule as drawn the intervener has all the rights of the original plaintiff and defendant. As soon as he gets in they are all alike, and the court can not discriminate against any one of them, as I understand the rule.

Mr. Lemann. Well, it is proposed to make the rule plainer. There has been some debate on that point. Your interpretation is the same as Mr. Morgan's and mine, but that is not as plain as it might be. The question now is in which direction it shall be made plainer. Mr. Dodge pointed out one point that is sound, that you might distinguish between Chandler vs. Price as to third party practice, because the intervener has "butted in" without anybody wanting him in, whereas the third party has got to come in by being called in by one of the original parties.

Mr. Morgan. Yes.

Mr. Lemann. I was just wondering whether we ought not to make haste a little slowly on this matter.

The Chairman. If we enlarge it in any way the court is going to call us on the carpet and ask why, and someone has to go before the court and make it very plain why that is done. I would not undertake to do it. If you gentlemen who are proposing it have not got it very close to heart I do not see how you can get up in court and make a very strong argument in favor of broadening the rule.

Mr. Lemann. And if you press the question to its full extent you might lose the other point. It might be the part of wisdom on the part of the objectors not to press it.

Mr. Morgan. As I previously said, I do not feel strongly enough on the matter to press vigorously for it. I think Mr. Dodge's distinction is a distinction on which you can hang the point if you want to.

Mr. Dodge. I move that the case of Chandler vs. Price be adhered to.

Mr. Olney. I second the motion.

(The motion was put to a question by the Chairman, and was unanimously adopted.)

RIGHT TO ASSERT SET-OFF AND COUNTER-CLAIM ON ASSIGNED CLAIM.

Mr. Donworth. Mr. Chairman, before passing to a new subject I should like the indulgence of the Chairman and the Committee to pass to a matter that was gone over yesterday, not with the idea of making any motion, but to call attention to what I think was an omission. I may be in error.

We have allowed very liberal provisions to the defendants setting up counter-claims. Is there anything in these rules that embodies a provision, common I think in all codes, common law and others, that on an assigned claim, whether asserted by the defendant or the plaintiff, it shall be subject to set-offs and counter-claims existing against the original assignor? Now that is very important. Of course code provisions usually are--- take the simplest case, for illustration--- that where a plaintiff sues on an assigned claim the defendant may set up any set-off or counter-claim which he might have set up against the original assignor, with the provise that with the relief no affirmative judgment shall be rendered against the plaintiff.

I should like to ask the Reporter if there is anything in these rules that protects the party against whom an assigned claim is pleaded so as to allow him to make use of set-offs and counter-claims?

Mr. Clark. We have not said anything specifically about

that. I do not know whether that would go back to the law of the State or not.

Mr. Donworth. I did not wish to make any motion in respect to the matter, nor do I wish to take up much time in discussing it. I simply wanted to mention it.

The Chairman. I remind you, Mr. Donworth, of the fact that there is a statutory limit with respect to raising assigned claims in Federal courts. Where jurisdiction is based on diversity there is a limit. You can not take an assigned claim into court unless the original owner of it had diversity of citizenship.

Mr. Donworth. That occasionally happens, and it is very important to allow to the party against whom the assigned claim is asserted his set-offs against the assignor. That is a very important matter.

Mr. Sunderland. That really is not a question of procedure. Is not that a question of the character of the title that the assignee gets?

Mr. Clark. That is what I thought.

Mr. Donworth. No; it may be an independent promissory note or non-negotiable matter. Two parties may have mutual transactions, and if you do not allow a counter-claim against an assigned claim you are going to allow a man to assign his claim and cut off the gross items of account. It is very important.

I shall not take up any further time in discussing the question now, but I think there should be a provision covering that point, and at a later time when we get around to the rules, if that is not there I shall take it up, for in such

case I think it would be a very serious omission.

Mr. Clark. May I just take a moment on this subject. Do you think it ought to go in? I am not so sure about it, but my impression is that that would have to go according to the law of the State where you were anyhow.

Mr. Lemann. Let me ask, Mr. Donworth, this question so as to be sure I get your case. Let us say that A sues B. B goes out and buys from C a claim, or gets an assignment of a claim that C has against A. Well, we will say the plaintiff sues the defendant. The defendant goes out and gets an assignment from the third party. He then files a counter-claim against the original plaintiff based upon that purchased claim that he has bought. He sets it up by way of counter-claim. Now you ask whether the original plaintiff would not then meet that counter-claim thus asserted against him by setting up defenses which he might have had to the claim against the original assignor? Is that it?

Mr. Donworth. No, not counter defenses.

Mr. Lemann. Well, items of account as to a transaction that he has had?

Mr. Donworth. It is perfectly plain to me that if you do not give him that right under the statute he has not got it. That is an independent cause of action. One party has assigned his items of account, and the unfortunate man who was sued on that assigned claim must go out and start another suit on his independent cross items.

Mr. Lemann. The point you raise by your question is, I think, one relating clearly to procedure. I should have said there was no doubt under these rules that the person

against whom the assigned claim was asserted could plead the same counter-claims of his own and other items as he might if the assignor had been in the suit.

The Chairman. He is allowed to file a reply in the discretion of the court.

Mr. Morgan. But he cannot put the counter-clai in the reply.

Mr. Lemann. I think it ought to be provided for if it is not.

Mr. Olney. I can not tell without going back and making a careful examination of the rules whether the point Judge Donworth has in mind is covered or not. My impression is that it is covered, and that the danger which Judge Donworth has in mind does not exist under the rule. It can not be ascertained without a careful examination of the rules, and it is something which will be developed when the rules are in their final shape.

I move that we pass the subject for the time being.

Mr. Donworth. That is perfectly agreeable to me.

Mr. Lemann. I make the further motion that if it shall develop on a check being made that it is not covered, that it be covered. I think it should be covered.

The Chairman. Yes.

Mr. Olney. There is no doubt about that.

Mr. Pepper. I think the provision of the common law which permitted set-offs and counter-claims against an assigned claim was the thing which Judge Donworth insisted be included in the rules. We have provided in the early part of these rules that the assignee may sue in his own name, and the

instant that you provide that an assignee may sue in his own name you make him the real party in interest, and make it impossible to set up matters of account which existed between the defendant and the assignor.

The Chairman. It is understood that the Reporter will see what the rules do provide with respect to the matter referred to, and it is the sense of the meeting that if the original plaintiff, by our procedure, is not given the right to set up a counter-claim in his reply, he ought to have that right.

Mr. Clark. I think I will find that it is not covered. I do not think that this is covered by the rules.

The Chairman. Let us take a vote on whether it ought to be covered or not, then.

Mr. Clark. I do not have very great feelings on this matter. I think the law varies in minor details in wording in the different State codes. I am not sure, but it does seem to me that we are rather changing the right of assignment if we do not hit all these State codes right between the eyes.

The Chairman. Are you in favor of the idea that a man can assert the claim without letting the plaintiff have the right to set up a counter-claim?

Mr. Clark. No.

The Chairman. Then we are agreed on it.

Mr. Clark. It seems to me that it is a question of statement. It is substantive.

The Chairman. It is not substantive in your procedure. You stipulated what may be in the reply in such a way as to exclude such a claim. The point Mr. Morgan makes is that

your definition of what may or may not be in the reply is so limited that the original plaintiff would not be permitted to set up a counter-claim to an assigned claim. It is strictly a question of procedure.

Mr. Morgan. It would be a matter of substantive law as to whether or not the assignee of that assigned claim had a right if he sued on it in an independent action. It would be a matter of procedure whether he could set it up in this particular action.

Mr. Lemann. It should be maintained as a substantive right, but whether he should have the right to assert it is a matter of procedure.

Mr. Morgan. Yes.

Mr. Olney. I do not see how there can be any question but what the party should have the right to defend himself in that respect.

The Chairman. There can be no question at all.

Mr. Tolman. May I suggest for the convenience of the record that this matter we have just been discussing might apply to Rule 21 where the right to sue in the name of the assignor is dealt with.

The Chairman. The Reporter will note that.

RULE 27. DEATH OF PARTIES - SUBSTITUTION.

The Chairman. We will now pass on to Rule 27. Are there any matters of substance in connection with that rule?

Mr. Tolman. Yes, I have matters of substance on that matter.

The Chairman. Major Tolman has some suggestions of

substance.

Mr. Tolman. If you will turn to page 21 of my memorandum you will find that I discuss it there as briefly as I can. This depends on the provisions of Section 778 of the Code which gives jurisdiction to the courts to entertain cases by a survivor, and my suggestion is that this rule might be redrawn so as not to attempt to give any power or to seem to give any power, but to assume the existence of the power just as it is given by Section 778, and then confine the rule to procedure under that section. That would be accomplished by some simple amendments.

The act contains a limitation of two years after the death for this substitution. So I have suggested the insertion in line 3, after the word "party" of the words "within two years after his death". Then I have suggested in line 3, after the word "law" the insertion of "be substituted for such decedent and". And then go on with the text.

Then I have suggested striking out the last four words in line 4 and the first six words in line 5, and to substitute in lieu thereof the words "thereupon the court shall proceed with the case to the extent of the jurisdiction granted by"--the provisions of Section 778.

I have suggested one more insertion. In line 8, after the word "motion" to insert "within such period of two years".

As so changed the first paragraph of the rule will read as follows:

"Rule 27-- Death of Parties-- Substitution. When any party to an action dies before final judgment, the executor or administrator of such deceased party within two years after

his death may, in case the right of action survives by law, be substituted for such decedent and prosecute or defend any such action to final judgment. Thereupon the court shall proceed with the case to the extent of the jurisdiction granted by the provisions of Section 778, Title 28, United States Code. If no motion for substitution is made by such executor or administrator within a reasonable time, * * ".

There I follow the rule and the statute. That is practically all of that part of the section.

Turning now to line 23 of the draft I propose after the word "continued" to insert "and maintained", because those are the words that are used in the statute. "and continued" has a double meaning, but when it is coupled with "maintained" it does not have that double meaning.

The second paragraph is based on the statute, and I think it very satisfactory.

I made a study of the LaPrade case in which the right under existing law to do these things was in certain cases very limited and restricted. For instance, in Gorham Manufacturing Company vs. Wendell, 261 U. S. 1, Mr. Justice Harlan--- I think it was Mr. Justice Harlan but I am not sure--spoke of the difficulty in these words:

"The inherent difficulty in all these cases is not in the liability and suability of the successor in a new suit."

That is, an officer succeeding a deceased officer.

I continue reading from that case:

"It is in the shifting from the personal liability of the first officer for threatened wrong or abuse of his office to the personal liability of his successor when there is no

privity between them, as there is not if the officer sued is injuring or is threatening to injure the complainant without lawful official authority. There is no legal relation between the wrong committed or about to be committed by the one, and that by the other."

And then in the LaPrade case Mr. Justice Cardozo said:

"It follows from what has been said that Section 780 has no application to the case as presented and that the district court had no jurisdiction to substitute petitioner as a party defendant in place of his predecessor or to direct that the suits be continued and maintained against him. We have no occasion to decide whether or in what circumstances a successor in office who adopts the attitude of his predecessor and is proceeding or threatening to proceed to enforce the statute may be substituted in a pending suit. That question is not here and is reserved."

That is the very question that was reserved there with which the third paragraph of Rule 27 deals. And the decision in the LaPrade case, therefore, leaves that open. But the decision in the Gorham case, while the facts were not ideal, seems to doubt whether it can be done or not. However I have personally come to the conclusion, which I submit with deference, that the doubts were all based upon the existing state of the law, and not on a real inability to commit these things, and that the new act giving power to change the procedure and thus supersede the existing law gives power to pass this rule dealing with this provision which is in the third paragraph. I think however it ought to be considered by all before we commit ourselves to it.

Mr. Clark. Supplementing what Mr. Tolman has said let me make a suggestion. The latter part of his comments have been dealing with Rules 18 to 27, and he has put in a very fine statement of the background. I suggest that you look at the language beginning at page 27 of his statement. It is, I take it, in support of the way the rule is drawn here. The first part of his comments deal with matters of form, or at least I thought they were matters of form with reference to the beginning of the rule. I did not have any great feeling about them. I really did not think they made much difference. As I got it the main thing about the first paragraph was that he wanted to put in the two-year limit, as stated in the statute, but since we make the proceeding in subordination of the statute it seems to me that is covered. I do not have much feeling about that.

The Chairman. Let us take this up in detail. There are two different things dealt with by Major Tolman. The last one was a matter of substituting the successor officer, which is a separate thing, and we will leave that for the moment.

Mr. Clark. I submit, Mr. Chairman, the first is a matter of form.

The Chairman. Well, there is more than a matter of form in it. He wants it made clear in substance by reason of the rule, if you have not done it, that there is no enlargement of operation of the right of substitution and the manner of substitution fixed in the statute. Now I understand you have that same idea.

Mr. Clark. Yes.

The Chairman. That leaves it a mere matter of form, and without passing on the verbiage of the Major's statement, it will be taken as the sense of the meeting--- the Reporter agrees to it--- that it be made clear, if it is not so--- and that is a matter for form--- that the first part of the rule is intended simply to reenact and adopt the statutory provision.

Mr. Olney. Mr. Chairman, in connection with the first part of the rule you will notice how the rule is stated:

"When any party to an action dies before final judgment, the executor or administrator of such deceased party may, in case the right of action survives by law, prosecute or defend any such action to final judgment."

In other words it is merely one that gives permission to the executor or administrator. It overlooks the case entirely where the decedent was a dependent, and in such case where the cause of action survives the administrator or executor, or other representative, should be substituted for the decedent.

The Chairman. That is the next sentence. That brings you right down to my point as to the manner of substitution, the real question of substance that we have before us--- and it is not a question, because the Reporter and Major Tolman both agree that the matter of substitution of the defendant shall be in the manner prescribed by the statute. Now Major Tolman doubted whether the rule did that or whether it broadened it, and the Reporter said he intended to follow the statute. Let us leave the matter of form for him to do that.

Mr. Olney. Reading the next sentence I do not see that

it gives the plaintiff in the case the right to substitute the executor or the administrator as the defendant.

The Chairman. The statute does.

Mr. Olney. But our rule should conform to the statute in that respect.

The Chairman. That is my point, that we are simply readopting the statute. You are talking about clarity now. The Reporter said he intended to adopt the statute, and that provides for substitution on motion of the plaintiff.

Mr. Clark. You see the motion is in the last sentence.

The Chairman. The rule itself is that any party may make such motion, and the plaintiff may make it. Any party may make such motion, that is, motion for substitution, and that includes motion by the plaintiff.

Mr. Olney. If it is understood that the plaintiff shall have that right, all right.

The Chairman. It says so. I think there is no doubt about that.

Mr. Olney. Let me refer to the language which comes in in the third sentence here: "If no motion for substitution is made by such executor or administrator within a reasonable time"-- those words ought to go out, because if the executor or the administrator does not move--- or to put it in this way: The plaintiff in such case should have the right forthwith immediately upon the death, not waiting for the executor or the administrator, to move for the substitution.

Mr. Morgan. I agree with that.

Mr. Dodge. It gives that right to the plaintiff now. He has the right to make that motion.

The Chairman. You are just dealing with the matter of form. We are agreeing that the statute ought to be followed. As I remember the statute it gives the right to the plaintiff to move at once? Is that right? Does the statute so provide, or does it not? How does the statute read?

Mr. Lemann. The language of it is here in the old draft.

Mr. Morgan. Suppose the executor or administrator does not move promptly, or if no motion is made for such substitution, which has to be taken care of in two years, should there not be provision for the court to make the substitution?

The Chairman. That is another question. Let us now have an answer to the question whether the statute allows the plaintiff to move forthwith.

Mr. Clark. I think it does, but it is tied up with the scire facias. That is a curious thing, as a matter of fact. If you simply put in the statute you will find that it has some gaps. It says: "And if such executor or administrator, having been duly served with a scire facias--there has nothing been said before that you serve it, but it is implied that you have--- "And if such executor or administrator, having been duly served with a scire facias from the office of the clerk of the court where the suit is depending 20 days before hand, neglects or refuses to become a party to the suit, the court may render judgment against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party.

The Chairman. What does it say about the plaintiff's right?

Mr. Pepper. It must be the plaintiff that sues out the writ of scire facias.

Mr. Clark. That implies that you do it.

Mr. Pepper. Yes.

Mr. Clark. It does not say explicitly. It goes on the theory that you have done it and nothing has happened.

Mr. Dodge. What you follow is the equity rule?

Mr. Clark. Yes.

The Chairman. We are agreed that the plaintiff ought to have the right to make the motion for substitution forthwith. There is no doubt about that. You get that, Mr. Reporter. If the statute is blind about that, make it clear.

Mr. Clark. What we did was to follow the equity rule.

The Chairman. What does the equity rule say?

Mr. Lemann. I want to raise a point in that connection in connection with the equity rule. The usual practice in my State is that where people are solvent we do not have any administration. We present a petition to the court stating that the man has died and that he has left a large estate, but that there is no need for administration, as he has left no debts, and that his heirs will accept responsibility for the debts, if there should be any, and we get an order of the court putting the heirs immediately into the possession of the estate, and that makes them responsible for all obligations of the decedent. In a case where that happened, and if the decedent had been the defendant, our practice would be to have no executor or administrator; we very often have men none appointed. That is the normal case with us. The estate is not involved in any way, and we just put the heirs

in possession. If the deadman was a defendant, why the plaintiff in the case will make the heirs a party to that pending litigation.

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If he was a plaintiff, why the heirs will by motion make themselves parties. I do not know what the common law practice is, or whether that is ever permitted, or whether if you have got a suit pending at common law you have got to have an executor or administrator.

Mr. Morgan. Surely.

Mr. Lemann. You must have?

Mr. Morgan. Yes.

Mr. Lemann. That would not be true with us under our State practice. Where perhaps in the Federal court it would be.

Mr. Morgan. At common law you just suggest it on the record, I understand, and the court orders it.

Mr. Lemann. The equity rule is broad. It does not say anything about scire facias or administrators or executors. Equity Rule 45 provides:

"In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion, may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary."

The Chairman. That is all right, except I agree with Judge Olney that the equity rule compels the parties to wait a reasonable time, and in the presentation of the case it may be necessary for them to move at once.

Mr. Olney. With that exception the rule is the proper rule. It does not make any difference whether it is the executors or administrators, or the heirs or assignees, or who it is. That expresses the rule properly.

Mr. Pepper. Mr. Chairman, this is a very important point in suits against collectors of internal revenue for taxes.

The Chairman. That is a point which will be raised under the last paragraph, Senator. If you will look at the last paragraph you will find that point covered by the paragraph, and we are deferring consideration of it until we get through with what we now have under discussion.

Mr. Lemann. I think perhaps that is not quite so, Mr. Chairman, because the last paragraph deals with the case of a successor of a public officer. If you sue a collector you sue him individually, and he then hasrecourse to the United States for reimbursement. When the collector dies you do not sue his successor in my State. You sue his widow.

Mr. Pepper. That is right.

Mr. Lemann. We sue his widow if she is his heir. Or we sue the representatives of the estate.

The Chairman. The Reporter is having trouble here. Let us get this straight.

Mr. Olney. To bring this matter to a head I move that the first paragraph here of the rule with respect to executors and administrators conform to the principles and follow the language of the equity rule, with the single exception that the plaintiff shall have the right forthwith to bring action.

The Chairman. That is a clean-cut motion.

Mr. Lemann. I second the motion.

The Chairman. Do you want to discuss the motion?

Mr. Pepper. No. That is exactly what I think it ought to be.

Mr. Dodge. Would that not cover the first two paragraphs?

Mr. Tolman. In line 3 "may at any time within two years"--would not that cover it?

The Chairman. That gets down to phraseology. We want to adopt the general principle first.

Mr. Pepper. I think if you put the motion of Judge Olney that you will raise the question properly.

The Chairman. Very well, we will vote on the motion made by Judge Olney.

(The motion made by Judge Olney was put to a vote by the Chairman and unanimously adopted.)

Mr. Dodge. I would suggest that that might cover the first two paragraphs.

Mr. Olney. I think it does as a matter of fact.

The Chairman. It probably does. I have only a minor suggestion now to make before we pass on. I think the Senator has the same idea. When we were talking about the statute reference was made to scire facias. I do not think we ought to bother about that.

Mr. Morgan. No; let that die.

The Chairman. There was some question about that.

Mr. Lemann. In this matter we are going to supersede the statute; is that right?

The Chairman. I do not think we are going to supersede it really, because the equity rule is not inconsistent. It is

a method of statement, really.

Mr. Lemann. There is no limitation of time.

The Chairman. We have got to have a time limit on it.

Mr. Clark. I should like to have that just a little clearer, because the motion really does not provide for anything different from what we have. We follow the equity rule.

Mr. Lemann. No, you do not. You limited it to executors and administrators, whereas the rule I read is broader.

The Chairman. The equity rule provided that the plaintiff could not move until the defendant had failed for a reasonable time to do so. It covered that.

Does that general motion cover your suggestion, Senator?

Mr. Pepper. Yes.

The Chairman. Are you ready to pass on? There is a question with respect to the revision which the Reporter can determine as to whether the second paragraph is covered. That is a matter of form.

Mr. Clark. Just a minute on that. The second paragraph comes from another Federal statute, and that is why I prepared that. I was trying to follow both the existing equity rules and the statute. The Federal statute we have just been talking about is 778. 779 is the second paragraph. I will read the statute:

"779. Death of one of several plaintiffs or defendants. -- If there are two or more plaintiffs or defendants, in a suit where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or

more of them dies, the writ or action shall not be thereby abated; but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant."

The Chairman. Is that not covered by the motion?

Mr. Lemann. Yes. I think this equity rule covers it too.

Mr. Morgan. Does it?

Mr. Lemann. It can be made to by proper expansion. My idea was that we should not tie up with the statute any more but give the lawyers a simple procedure in case of death, to tell them what to do.

Mr. Donworth. The second paragraph is a little different from the equity rule. The second paragraph provides that you do not need to bring in the heirs of the deceased at all, but that the action shall proceed against the party or parties that are alive.

Mr. Lemann. The only suggestion I made here was that you should not tie up with the statute, but give us a simple rule.

The Chairman. Does not this equity rule, the substance of which we have adopted, cover a case where there are two or more plaintiffs and one of them dies? I think it does.

Mr. Morgan. This provides, Mr. Chairman, that you do not need anybody to take the place of the absent or deceased party. The liability survives against the surviving defendant alone.

The Chairman. Yes.

Mr. Dodge. That is where they say that the cause of action survives or shall survive.

The Chairman. I think the broad equity statement we have

adopted would cover that specific case, but perhaps I am wrong. We can leave to the Reporter to work that out.

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The Chairman. Now, we come to the last paragraph, and Major Tolman calls attention to the first part of it, which is all right. In the case of the death or retirement of an officer and the cause of action survives, he may be substituted. Now, the second part of it is this:

> " * * * including the right to substitute a successor when it is shown by supplemental bill that he adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law alleged to be unconstitutional."

That allows you to substitute a successor officer if he is committing the same wrong that his predecessor was, without bringing an independent suit.

Suppose an officer of a State attempts to enforce an unconstitutional statute, and he dies or resigns; this relieves you of the necessity of bringing a new suit against his successor which involves, as you can see, questions of conflict of jurisdiction, because if the old officer dies or resigns, then before you can bring a new suit in the federal court to enjoin him the state officer might bring a writ of mandamus in the state court to enforce the law and get prior jurisdiction in the state court, so that the object of continuing the successor in such a suit is really to maintain the priority of jurisdiction in the federal court.

Mr. Dodge. Is it right to speak of the right of action as surviving against a new officer?

Mr. Clark. Why not?

Mr. Dodge. I thought survival had a technical meaning of survival after death.

Mr. Lemann. This code gives it survival in connection with this provision.

Mr. Dodge. Does it?

Mr. Lemann. I was just wondering; I read the criticism of the LePraid case in the Yale Law Review, where they seem to suggest that the court was over-technical in dismissing the suit there. They dismissed the suit, as I recall it, a suit brought against the state attorney general -- the state attorney general died and the plaintiff then made his successor a party. The successor went in and said, "I have not said I am going to enforce the law they complain about." He said it was not within the statute, and they held it was not within the statute and dismissed it.

The criticism was that that was pretty technical, that, after all, as I recall it, when there is a mandamus suit against him if he is not going to enforce the law let him say so in that suit. Let him say the matter is a dead issue and confess that the plaintiff is right.

I was just wondering whether this was a case where we might say to the Supreme Court, "You just did this because you thought the statute compelled you to do it. Now you are making a rule here; why don't you make a little broader rule?"

The Chairman. The practical side of the thing is this: In most of the injunction suits against an officer of the State on an unconstitutional statute there is more than one officer to it. You join the attorney general and you join the prosecuting attorney.

Mr. Lemann. And the state treasurer.

Mr. Donworth. And sometimes the governor.

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The Chairman. If one of them dies you still have your suit pending against the other officers, and I think the existing practice in that kind of case is a supplemental bill. You can bring in the new attorney general if his predecessor dies, if you have a suit pending, and it would be a rare case where all your defendants died or where you have only got one. But that is a practical side rather than a legal consideration.

Mr. Donworth. Yes. Your suit against the first officer is based on the fact that he is threatening to enforce an unconstitutional law. When the second officer comes in your writ of action against him is not the same one except on the theory that it is a suit against the State, which it is not. It is a suit against a different man for threatening to continue the same kind of action, and I doubt if the word "survival" is accurate.

The Chairman. You are dealing with the first part:

" * * * when the right of action survives in favor of or against such successor."

We concede that where the attorney general who sought enforcement of an unconstitutional statute dies, there is no survival. So the first paragraph only relates to cases where there may be actual survival.

Mr. Dodge. As against another officer?

The Chairman. Yes. Now, the question is whether there are any cases like that. Are there? Suppose you bring an

2 action -- I cannot think of any unless there is some statute that provides there shall be a survival against a successor ---

Mr. Donworth. (Interposing) This relates both to plaintiffs and defendants, and a United States officer, for

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instance, may go out. The matter may relate to the duties of the Secretary of the Interior, for instance, who is trying to accomplish some purpose.

The Chairman. Yes. That is all right.

Mr. Dodge. His successor in office may, when a similar right of action occurs, or exists, continue.

The Chairman. It may be there are no cases where the right of action survives against the successor officers. There are cases where it survives in his favor.

Mr. Morgan. He succeeds to the right, at any rate.

The Chairman. Where he is the plaintiff, yes, and the draftsman has just assumed there may be cases where the cause of action survives against the successor of the defendant officer. I do not know whether there are any such or not. There is no harm in leaving it that way.

Mr. Morgan. Mr. Dodge does not like the word "survival". He says it is not survival, it is succession.

Mr. Dodge. The primary case we are dealing with is plainly not a case of survival.

The Chairman. It might not be for the defendant.

Mr. Clark. I think perhaps we will see if we can get something on that. Of course, we were going back to the statute and that says survival of action in suits and proceedings, but maybe there is something in the objection.

The Chairman. You would not want to leave it to read so as to cover survival of action against an officer as against his successor unless there are some actual cases, would you?

Mr. Clark. No, I think it better be broadened in some way.

The Chairman. You mean narrowed?

Mr. Clark. Yes.

Mr. Donworth. If that is the statutory language, it is an argument in its favor.

Mr. Dodge. It is not the statutory language. They use that term in the heading.

Mr. Olney. You have to bear in mind in suits for injunction, for example, that it is exceedingly important that the original suit does not abate; that is exceedingly important because there may be a lot of money impounded.

Mr. Pepper. And I am sure the reporter will think of the phraseology in lines 24, 25, 26, and 27, as to whether it is accurate to say that the right to substitute a successor, which means a succeeding officer, who either enforces the cause of action or is subject to it, includes the right to substitute the successor when he is going to be sued as an individual for acting under an unconstitutional law. The case which is said to include that latter case really does not include it at all. They are distinct thoughts. One is an official duty or an official right which may or may not be enforceable by or against the succeeding official; the other is a case where one tort-feasor is dead and another tort-feasor in a claim of authority to exercise the right in question is doing something which the plaintiff says is an invasion. Now, I just thought, as a matter of form--and don't forget the heresy which has crept into line 5. We speak of a supplemental bill.

Mr. Morgan. Yes, there is no doubt about that.

Mr. Clark. I am sorry, I apologize for that.

The Chairman. I had a very interesting case which shows

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the necessity or desirability of perpetuating these injunction suits. This did not quite arise on the succession point, but the State of South Dakota's statute regulating railroad passenger fares. The railroad brought a suit against the Attorney General and State officials to enjoin the threatened enforcement of the confiscatory law.

While that action was pending, the Federal court having had jurisdiction to the exclusion of the State court, the Legislature of South Dakota passed a new statute amending the first one and changing the rates. We knew they were going to pass it and we knew the Attorney General was going to try to beat it in the Federal court by a mandamus suit in the State court. So, we went up to Sioux Falls in a private car and had a wire up to the Capitol, and we had a bill of complaint all ready to file in the Federal court and had the judge in the Court House and the messengers all ready, to see whether the moment the bill was signed by the Governor we could not file our bill against the new law and prevent the Attorney General from getting first jurisdiction in the State court by a writ of mandamus.

But he beat us to it because he was on the inside and knew just when the Governor put his signature on the bill and he telephoned down to the State Court House and had his mandamus suit filed before we heard that the bill was signed.

I then filed a supplemental bill in the original suit on the ground that this was just a continuation or modification of the original unconstitutional confiscatory law, and got away with it. The court said it was supplemental and came within its jurisdiction to add it by supplemental bill, and,

having got the first jurisdiction under the main bill, he went on with it.

But, if it is permissible under the law to put this last paragraph in here, I think we ought to adopt it. You think it can be sustained, do you?

Mr. Tolman. I do.

Mr. Clark. Mr. Lemann wanted to make it broader still.

Mr. Lemann. I just raised the question, Mr. Clark, and I did not mean to indicate any inclination. I was bringing up the point for discussion in view of the comment in the Yale Law Journal. I notice just now, Major Tolman, in stating the decision in the LePraid case, said two grounds were stated for the conclusion reached; one was that Congress had authority to direct the conduct of Federal officers in proceedings brought by or against them as such, as representatives of the United States, but Congress is not so empowered as to State officers. And I wondered whether that was an intimation that the court considered there was no constitutional authority to bring in--

The Chairman. Is that a statement in the opinion?

Mr. Lemann. Yes; that is quoted. I think they afterwards favored the question of whether they might be authorized to do it, using the same language that the report has put in here: "The new man adopts or continues or threatens to adopt or continue the action of his predecessor."

I got the impression from the language I just read that Cardozo thought you could not go any further than this, certainly.

The Chairman. I got that impression too.

Mr. Lemann. So that would lead me to think we ought not to consider anything beyond this, and that the rule here would verge on what he said.

The Chairman. He makes a distinction between a suit against a Federal officer and a suit against a State officer, and we make none?

Mr. Lemann. That is worth considering.

The Chairman. That is the point. I think by rule, maybe, under that opinion we may adopt this as to new Federal officers. If what he says is right, Congress hasn't any power to say that a successor State officer can be substituted.

Mr. Lemann. He said perhaps they could, as I understand it, perhaps they could where the successor practically was adopting the action of his predecessor. That is where Mr.Clark got the language of the last two sentences, but the point I was raising originally for discussion was whether that limitation had to be retained. My present reaction is that perhaps we could get rid of it in the case of a Federal officer but we could not in the case of a State officer.

The Chairman. Of course, the State officer beats you under this rule very easily. He comes in and he takes office and he does not open his mouth as to whether he is adopting it or not.

Mr. Lemann. That is what he did in the LePraid case, practically.

The Chairman. Of course he does have to adopt that sooner or later, but in the meanwhile the very act of adoption is a writ of mandamus in the State court and it gets you into a hole there.

Mr. Donworth. Mr. Chairman, what the gentleman has just said is undoubtedly true if the new State official wishes to act as an obstructionist, but I think in the majority of cases the State authorities really want to find out what the Federal decision is going to be on the subject.

Mr. Sunderland. They have got to get it eventually.

Mr. Donworth. They have got to get it eventually. Of course, the doctrine started with Ex Parte Young that you could treat the individual officer as an individual wrong-doer, he having no real justification under the Constitution of the United States, but is it not a good idea to furnish this machinery? In the majority of cases I really believe the new officer will not try his disputing jurisdiction because if he does he must ultimately come back through some channel to the Supreme Court of the United States. I think generally it has been my experience that the State officers, when the suit is once started, say, "Let us hurry it up and find out what the Federal Constitution means on this."

The Chairman. My two experiences--I was in Ex Parte Young and also the South Dakota case, and in both cases the State officials were moving heaven and earth to get their cases tried originally in the State court. That was all there was in Ex Parte Young. We brought a writ of mandamus in the State court to stop it. Some of the States do not feel very willing to go into it.

Mr. Lemann. The LePraid case must have been just a game. If this fellow was not going to adopt this thing, why didn't he say, "I think the law is unconstitutional"? That was the criticism in the Yale Law Journal, that that decision just

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prolonged the game. If the State officials were going to be high class about it, why should he rely on that?

Mr. Donworth. There are a lot of mediocre state statutes. For instance, we had a statute in our state prohibiting trading stamps. I forget which way the ruling was on that, but the Attorney General was sued and it went to the Supreme Court of the United States, and the whole attitude of the Attorney General's office was "Let us find out about it."

I believe that will happen often enough to warrant our

4 putting the machinery in, and if the new defendant wants to claim it is unconstitutional he may do so.

The Chairman. I favor putting it in, citing the LePraid case, and see if the Court is willing to go along with us.

Mr. Clark. Putting it in as here, or broader?

The Chairman. I am talking about the second part.

Mr. Lemann. On the whole, I think it would be risky to make it broader as to State officers.

Mr. Clark. Yes.

The Chairman. We are talking now about the second provision, the unconstitutional statute?

Mr. Clark. Yes.

The Chairman. Is it the sense of the meeting that that go in or go out? It is the last half of the third paragraph.

Mr. Donworth. I move that it be retained, putting in Major Tolman's addition of "and maintained", "continued and maintained". Would that meet the point and bring the question up.

Mr. Loftin. I second the motion.

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

The Chairman. Now, we will go back to Mr. Dodge. What about making the distinction between the plaintiff and defendant in the first part of it? He makes a point that with respect to defendants there are no cases where the right of action does continue against a successor officer.

Mr. Clark. Now, is that not a case of wording? That is, Mr. Dodge, I take it, wants us to cover the point where there is a similar right. I am not now trying to be very technical when I define it, but he means where a similar right arises against the other party?

Mr. Dodge. Yes.

Mr. Clark. It is a question of wording, is it not?

Mr. Dodge. Oh, yes; you can consider it.

The Chairman. All right, we will let that go then, and we have finished with Rule 27.

Now, we come down to depositions, and I am afraid Mr.Clark will have to buy a toupee to cover up the hair we have pulled out.

Mr. Clark. May I say that you will find nothing manifestly on its face foolish in the next few rules.

The Chairman. I know I am speaking for the committee when I say that we greatly appreciate the fine work Mr. Clark has done on these things. The fact that we chew these things all up now does not mean that we do not appreciate what he has done.

RULE 28
DEPOSITIONS - THEIR FORM, PURPOSE, SCOPE AND EFFECT

The Chairman. When you come to these depositions, there are some important features of it on which I hope you will

bear with me. I have given more careful attention to this than most any other part, and under this Rule 28 as a whole this problem arises:

Under the existing statutes of the United States in law actions it has always been the policy of Congress to require witnesses to appear in court, and the only conditions under which you are allowed to use depositions in court are carefully restricted to cases of witnesses deceased or gone out on the high seas or more than 100 miles from the place of trial.

Likewise, in the equity cases; the equity rules have been struggling to eliminate long depositions and hearings in equity courts based on depositions. They have been fighting for oral testimony in court, and equity rules, generally speaking, limit the right of using depositions in an equity case to those taken pursuant to these specific statutes of the United States which are referred to in the equity rules which limit the use of depositions to absent, deceased, and sick witnesses, and so on.

Now, when you come to this paragraph or part of our rules, depositions and discovery, you will have two purposes in mind. We have incorporated in one set of rules, and I do not object to that, two ideas; one to take depositions for use in court and one to take depositions for the purposes of discovery. I agree that there ought not to be any limit to taking a deposition to discover, no matter where the witness is, whether he is sick, absent, a hundred miles away, or where he is, that part is all right. But when it comes to the use of depositions in court the new rules permit in any case, jury or court, the use in court of the depositions regardless of whether the

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witness is sick, away, or what, and the only restriction on it is that you cannot use the deposition if the witness is in the court room.

My feeling about that is, while we ought to leave the rule to allow depositions to be taken for purposes of discovery ad libitum, when it comes to the use of them in court we ought to get back to the limitations that they cannot be used unless the witness is absent or sick or something of that kind.

I am perfectly satisfied in my own mind that if you try to do anything else the Court will turn us down because we have opened the doors wide now at the will of the party to take the entire proof in an equity case in the form of depositions.

Mr. Lemann. In a law case.

The Chairman. In a law case too. But I am speaking particularly of the efforts that the Court has made to get rid of the terrible records in equity cases.

My main trouble with that is, I think, in subdivision (c) which provides that any deposition so taken may be used by either party, and so on, unless the witness shall be present in court, which is on lines 15 to 20.

Mr. Dodge. What rule?

The Chairman. Of Rule 28. I have studied the statutes and tried to re-incorporate all their limitations, and they provide that the deposition shall not be used--you can take it when you like but it shall not be used other than to contradict or impeach the witness.

Mr. Donworth. Are you reading from page 1 of your comments?

The Chairman. Page 8. This is the particular proposi-

tion to restore these limitations on the use of depositions in court:

"provided that a deposition shall not be used, other than to contradict or impeach the witness,--" that ought to be allowed, of course--"unless it appears to the satisfaction of the court that the witness is then dead or that without the consent or procurement of the party offering the deposition the witness has gone out of the United States, or to a greater distance than 100 miles from the place where the court is sitting, or that by reason of age, bodily infirmity, or imprisonment he is unable to attend, or that the party offering the deposition has been unable to procure his attendance by subpoena--" Suppose he has taken the deposition but before the trial comes he secretes himself--"but the foregoing limitations shall not apply to the use by one party of the deposition of an adverse party, and the deposition of any party shall not be used by him or in his behalf--" that is, the plaintiff or party cannot stay away from the court room and use his own deposition--"unless it appears that by reason of age, bodily infirmity or imprisonment he is unable to be present."

I read that simply because it ought to be revised. I admit maybe it is not accurate, but the general policy there is a broad one as to whether we are going to make these limitations on the use of these depositions, and I believe we ought to restore them. In fact, I do not think there is any chance that we could get by with a rule to the contrary.

I have some other minor provisions here but I think this is the question that arises under this subject. I would

like to ask the reporter on that subject what was his thought about wiping out all those limitations as to use.

Mr. Sunderland. It seems to me it would probably work under this rule in much the same way that it does under the present statutes and rules. The abuse that the chairman speaks of, I think, has been an abuse under permission of the courts. Under Equity Rule 47 they have given permission to take these depositions and use them, so that whatever abuse is heard has certainly been under court authorization and not entirely by the parties.

Now, the present rule as drawn, 28(c), puts it within the power of either party to prevent the use of the deposition at the trial if the witness is available under much the same conditions as stated in the statute. That is to say, if he is within 100 miles he can be subpoenaed, and if either party wants him and subpoenass him that seposition cannot be used. If he is dead, of course he cannot be obtained. If he has gone away to sea he cannot be obtained, or if he is sick.

So, as a matter of fact, if any party can bring him in, if he conforms to any of the limitations now found in the statute, in such a case the deposition cannot be used. But if he is within the 100 miles or is not sick then he can be subpoenaed, can be brought in. In fact, he might be brought in even if he was beyond 100 miles if he was willing to come voluntarily.

In any of those cases if he is subject to being called to testify at the trial then the deposition cannot be used.

The Chairman. But you have said here that it can be used unless the witness shall be present in court.

Mr. Sunderland. But that means that the parties, either party, is at liberty to have him in court if he can be reached. It in effect allows the deposition to be used only on consent of both parties if the witness is available.

The Chairman. Then if I were trying a lawsuit and my adversary had thirty or forty depositions of his own witnesses and I wanted to prevent him from using those depositions in court I would have to serve subpoenas on all his witnesses to compel them to be present in court, in order to prevent him from using the depositions?

Mr. Sunderland. Yes, if there were any depositions you did not want to have used.

The Chairman. I would subpoena the other fellow's witnesses?

Mr. Sunderland. You would not have to call that witness, but you would have him there and the deposition could not be used.

The Chairman. I do not think I ought to be required to subpoena my adversary's witnesses and pay their fees and mileage in order to assure the policy of the law and my own wishes that the man testify orally.

Mr. Lemann. Just to be sure I understand it, wouldn't you cover all your points, Mr. Chairman, in your substitute language if you just used the words:

> "That the party offering the depositions has been unable to procure the attendance of the witness by subpoena"?

Wouldn't that cover all these other points, that he must be gone outside of the United States or a greater distance

than one hundred miles, or sick, and so on? Would not the words: "unable to compel his attendance by a subpoena" cover them all? Just provide that the party who took the deposition could not offer it unless he could show he was unable to procure the attendance of the witness by a subpoena.

The Chairman. Maybe.

Mr. Donworth. If living within 100 miles.

Mr. Lemann. If he lives beyond 100 miles he cannot be procured.

The Chairman. I thought it was safe to take the statutory definition of it and use it under those conditions.

Mr. Dobie. Suppose he lives more than the statutory distance and it is perfectly clear he is willing to come if the man wants him, and the man deliberately keeps him away so he can use the deposition?

The Chairman. I think he is entitled to do that.

Mr. Donworth. I think it should be limited to the 100 miles anyway.

The Chairman. There are a lot of reasons in the statute, not only 100 miles, but absence from the district. Residing within 100 miles is one thing, and the statute uses the phrase that he has left the jurisdiction or something of that kind. He might have served his subpoena on him--you see, I have covered that by the phrase that if he has gone out of the jurisdiction without the consent or procurement--suppose a man takes a deposition in the very city where the court is going to sit and then before the trial the party who took the deposition procures him to go 100 miles out or go to sea, If you let it be as broad as you have, he could say this man is

away and I cannot get a subpoena on him.

I think that is a matter of style. I have not attempted to settle that but I tried to crystallize in one paragraph all the provisions of the federal statute, and if you use your general phrase then every lawyer in order to know whether he can use a deposition has got to examine all these federal statutes and figure out whether he has the right to serve a subpoena or whether he has not, and, in order not to chase the devil around the stump and make the lawyers hunt the statutes up, I have tried to embody in this one section every restriction to taking depositions under the old system that I find in any of them.

Mr. Lemann. I move that the committee approve the general idea that the party who took the deposition should not have the right to offer it except subject to the limitations proposed in the chairman's substitute draft.

Mr. Loftin. I second the motion.

The Chairman. On the assumption that they merely continue the present law.

Mr. Donworth. Mr. Chairman, in the fourth line of your substitute on page 8, would it not be better to strike out the words "consent or"?

The Chairman. I think so.

Mr. Donworth. If a man is going to Europe I don't want to object to that.

The Chairman. Yes. I think "procurement" is better. I can see many faults in this draft as I look it over again.

Mr. Morgan. You think it is more advisable to name all the causes here than to say that the court shall find he was

unavailable without fault of the party taking the deposition?

The Chairman. Well, that is a very vague term, and I thought it was safer as against criticism from the bar and the Congress to show that we had taken their statutory limitations on this plus the limitations in the equity rules, which themselves adopt the statute by terms, and to not leave it too vague as to what is meant by "inability". I have nailed it right down to the express terms of the law and it is specific and leaves no room for doubt as to what inability is.

Mr. Morgan. Mr. Sunderland had an objection to "inability", did you not, on the ground that it caused too much trouble?

Mr. Sunderland. I thought it raised a question of fact and would be troublesome to deal with.

The Chairman. Of course, the abuses in the equity system now, Mr. Sunderland, on the use of depositions in an
7 equity case, so-called depositions, do not arise under the de bene esse provisions. The equity rules expressly provide that you cannot use depositions taken on notice, and so on, unless the witness is in the situation defined in the statute, 100 miles away, or gone to sea or something. The abuses occur in equity cases through the appointment of masters and the taking of testimony before a master for use before the court. That is where the abuse comes in.

Mr. Sunderland. That is under Rule 47.

The Chairman. That is another matter. But the equity rules now, so far as taking depositions not before masters is concerned, are expressly what I have provided for. They expressly refer to these other statutes and say the parties

can take depositions de bene esse or under those particular statutes or conditions and use them, but you cannot do anything else, and I have just restored that, both under the equity and the law.

Mr. Sunderland. The equity rule in substance is about the same as the draft here proposed. The rule is that no deposition shall be taken in evidence at a hearing or trial of a cause or matter without the consent of the party against whom the same may be offered, unless the court or judge is satisfied that the deponent is dead or beyond the jurisdiction of the court, and so forth, taking up the various items you have. It practically puts the matter within the consent of the parties to use the deposition if they see fit.

The Chairman. But it really puts it in this form, that even if he objects the deposition is going to be used unless he scurries around and subpoenas all the witnesses.

Mr. Sunderland. That is true; it puts that burden on him.

Mr. Clark. I wonder, Mr. Chairman, if this ought to be made too inflexible; that is, if it would not be all right to have it to be used if the parties consent and the court is willing. I am a little afraid that this would mean you have gone and taken these depositions and have gotten the evidence and there is not such a great fight over it but you cannot use it.

Mr. Lemann. Why not? Could not the parties stipulate that the deposition could be used? Do you think this would prevent their stipulating?

Mr. Clark. Yes. Doesn't it?

Mr. Lemann. It prohibits it?

Mr. Clark. Yes.

Mr. Lemann. Do you mean Mr. Mitchell has taken the testimony of a witness by deposition for discovery and the witness has testified truthfully, it is my witness, and I agree he has told the facts, and we say, "What is the use of bothering this fellow; let us stipulate; we can use his deposition although he is right here in town"-- you say that prohibits stipulating that that can be done?

Mr. Sunderland. It says the deposition shall not be used unless certain conditions are met, and the agreement of the parties is not one of the conditions.

The Chairman. That is the language of the statute, and just think what you would be doing; the Supreme Court in its equity rules is trying to force the parties to have their testimony in court. There is more than the consent of the parties involved. It is the matter of future policy and the expense, appellate courts, and so on, to have these voluminous records made up.

Mr. Lemann. Is that the answer, Mr. Clark?

Mr. Clark. I don't want to say too much on this, but I should not think it was, really, because I do not believe there is much public policy where the parties are both willing. This does not add to the record, as I see it.

Mr. Lemann. It might. The Supreme Court was evidently afraid to leave it to the judge and the parties because the judge and the parties have been unduly disposed to do this sort of thing.

Mr. Clark. This is a rather new idea for the use of

discovery. I do not think we should get away from the general policy, which, of course, is sound, that your equity trials, all trials, should be in open court. I do not mean to infringe on that. I was wondering if we were not piling up too many technicalities.

Mr. Lemon. How are you going to word this so as to fight the abuse which the equity rules desire to fight and yet leave the door open to stipulation?

The Chairman. I can see some situations where the facts are not disputed, where the parties might stipulate to allow depositions, but I do not know how to do it by consent without defeating the purposes of the Supreme Court in the equity rule.

Mr. Dodge. Do you think that the purpose was primarily to shorten records? There is no reason why testimony by deposition should naturally be longer than that in court.

The Chairman. Your point is that when a deposition is offered each question is asked and a ruling asked on it in court so you really do not lengthen the record?

Mr. Dodge. I thought the main object of the equity rule in that respect was to set up the normal mode of trial in equity cases, namely by testimony of witnesses in court. I certainly think Mr. Lemann's suggestion should be followed and the parties should by agreement be allowed to relieve a very busy witness from coming into court if they have everything they want to get from him right in the deposition. I do not believe it would lengthen the record materially.

Mr. Morgan. If this rule is put this way, there would be nothing to prevent the parties from stipulating that the witness if present would testify thus and so and not introduce

introduce"

the deposition. There are plenty of stipulations that will allow you to get the effect of Mr. Lemann's suggestion.

Mr. Lemann. Where the statute says "shall" I have never construed that to mean that the parties could not with the leave of the court depart from the statutory method. I have always assumed they could do that.

Mr. Morgan. If they did it, what bar would there be?

Mr. Sunderland. There are a whole lot of things the statutes say shall be done, but when I try a case against Mr. Dodge and he and I agree we will not follow it but will cut it short we certainly cannot go to jail for it, and I never assumed we would lose any substantive right.

Mr. Morgan. If the court should say you cannot introduce the deposition under this rule, if I say let it appear of record, will the court stop me?

Mr. Sunderland. You would have to rewrite your testimony and put it in narrative form.

The Chairman. Listen to this; this probably gives the court power to permit it by stipulation. This is the equity rule:

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

Under stipulation, yes. Then it goes on to say how they shall be offered. Then it says:

> "Depositions: The court on application of either party when allowed by statute ---"

You get right back to the statutes which say 100 miles and gone to sea, and all that ---

"or for good and exceptional cause for departing from the general rule as shown by the affidavit ---"

Mr. Sunderland. That is where you open the door.

The Chairman. (Continuing)

"--- may permit the deposition of named witnesses to be used before the court or upon a reference to a master"-- and so on.

"All depositions taken under a statute or under any such order shall be taken --"

and so on.

Mr. Dobie. One of the chief evils they were after there was sending the whole case to a master and the court never seeing the witnesses at all.

The Chairman. Here is another one:

"After a cause is at issue depositions may be taken as provided by Sections 863, 865, 866, and 867, Revised Statutes."

So, the equity rule is this, without the consent of the court you can take depositions and use them in accordance with the statute where the witnesses are 100 miles away or sick or going beyond the jurisdiction. Unless that condition exists you cannot use the deposition in lieu of oral testimony except under an exceptional case as shown by affidavit, in the discretion of the court. There is no objection at all to providing that they may be used on stipulation if the court feels the facts permit it.

Mr. Donworth. I don't think there is any danger under the unified system of an abuse of the deposition power. In the majority of cases, at least in a large number, these are

going to be law actions, and we all know what a disadvantage a lawyer is at defending with a deposition.

So, I think the anxiety that the Court showed in the equity rules when they were getting away from the old deposition in all cases, or its equivalent, and getting around to the witnesses in open court, of course, in order to effect that reform, they had to be rather strict and severe, perhaps. But this is a different proposition, I think, in the great majority of cases coming up. Lawyers will be very foolish to rely on depositions, we all know from experience, and I thoroughly agree with the chairman's propositions here on page 8 and I am in favor of the motion which is made that as a matter of policy we adhere to these ideas, and I think it will be all right if where it says in (c), "provided that", you insert after the word "provided" the words "except by consent of the parties".

Mr. Morgan. And the court?

Mr. Donworth. You can put in the court if you want to, but I don't think it needs that protection. I think the parties should be allowed to do it.

Mr. Olney. What Judge Donworth says, you know, is absolutely the fact. No party is going to take the deposition of a witness if he deems it of any importance to his case, if he can possibly avoid it. He is going to produce him if he can.

Mr. Lemann. I am sending a man 200 miles to testify and I would not have to.

Mr. Olney. He wants to put him before the tribunal to testify, because the deposition never before a court or jury

can have the effect of the witness testifying on the stand face to face with the tribunal. It is only in cases where the parties are practically satisfied what the evidence is that they are going to stipulate that it may be taken by deposition.

The Chairman. I object to the provision, if you consolidate equity and law, to have equity cases subject to a provision to allow the party to do by stipulation what the court has been struggling for years to forbid them to do, that is, to try their cases in the form of deposition, unless the court for good cause shown permits it, except where they have the statutory right to take the deposition of an absent witness. I do not believe you will ever get the court to relax that, and if you do not put the consent in there then you are widening out by stipulation the present rules which require the consent of the court for good cause shown.

Mr. Olney. Mr. Chairman, it is a very small matter whether we require the consent of the court or waive it, a very small matter indeed, and if you feel that way about it let us put it that way. I do not think it is necessary.

The Chairman. It is not how I feel about it.

Mr. Dobie. Don't you think, Judge Olney, that in practically every case where the parties consent, as a practical proposition, the judge will say it is all right with him?

Mr. Olney. It is a very small point but I do not think it is necessary. I agree with the chairman on that.

The Chairman. Let us put it up ---

Mr. Olney. It is not worth while.

Mr. Morgan. When they were so careful to put that in

I think they must have felt there was a good reason for it.

Mr. Lemann. I think we ought to leave out the affidavit for good and exceptional cause and just say "by consent of the court".

Mr. Donworth. "Except by consent of the parties and approval of the court."

Mr. Loftin. I guess Mr. Lemann will accept that as an amendment to the motion.

Mr. Lemann. Yes.

Mr. Loftin. Then I will second the motion.

Mr. Lemann. I was just trying to cover the general thought of the chairman.

Mr. Tolman. I have another thought that occurs to me. The chairman just read the equity rule which provides that a deposition may be used on good cause shown to the court. Now, here we have this situation: A man goes to Europe and you can put his deposition in, or if he goes to Havana you can put it in; but if he goes down to Key West you cannot. If he is at Los Angeles ---

Mr. Lemann. (Interposing) Why not?

Mr. Tolman. (Continuing) --- or down in the southern part of California you can give it, but if he crosses over the Mexican line and plays the ponies you cannot put it in.

Mr. Lemann. Why is that so? Would not the 100 miles take care of that? I understood if you cannot get him in by subpoena within the 100-mile-rule provision, you can use a deposition.

Mr. Tolman. I mean, suppose you take it according to the statute; you cannot read it.

Mr. Olney. You can read it.

The Chairman. I am placing no restrictions about mileage or anything; let us take it; but the real test is as to our conditions at the day of the trial.

Mr. Lemann. You would permit its use if the fellow was at Key West or Palm Beach?

The Chairman. Yes.

Mr. Olney. If the witness is more than a hundred miles away from the court his deposition may be used?

The Chairman. If he is more than 100 miles at the time of the trial.

Mr. Olney. That is it, exactly, more than a hundred miles away at the time of the trial. In that connection, in connection with the 100 miles, there have been such changes in the transportation methods and requiring witnesses to appear personally is so important that I would like to suggest consideration of whether we should not extend that to any place within the district, 100 miles away or more. A man can travel now so easily over the entire state for that matter, that it seems to me there should be a change.

Mr. Morgan. Can you subpoena him now under the federal statute unless he is within the 100 miles? If he is not within the 100 miles you cannot compel his attendance.

Mr. Olney. That may be. I would like myself to see that rule extended.

Mr. Morgan. So would I.

Mr. Dobie. That is the point I made before. I made it at one time and referred it to the reporter.

Mr. Lemann. Referred it to the reporter? May I ask

what the rules will now be governing the taking of depositions in a complicated equity case, for example, such an exceptional case as the rules now provide for where the witnesses are within 100 miles -- as I understand, under the present equity rules if the case is exceptional he may appoint a master and the case may be tried by depositions even though the witnesses could be compelled to appear in court. Is that covered by a section on masters? I just want to be sure we reserve that right.

The Chairman. I do not understand that before a master you can use a deposition taken de bene esse unless the witness is outside the 100-mile limit.

Mr. Lemann. Taken de bene esse, and you assigned a master to take the testimony of everybody in a complicated case.

The Chairman. The witness has to appear before a master.

Mr. Donworth. But the point is, so far as the court is concerned, he is out of the presence of the court.

Mr. Lemann. And the present point is, you can offer a deposition so taken without proof that the witness could not be subpoenaed.

The Chairman. Yes, no doubt about that.

Mr. Lemann. I just wanted to be sure we keep that in.

The Chairman. I would not call testimony given orally before a master the same as a deposition in these rules. I am using it in the sense of a deposition and I think the reporter has taken notice of that.

Mr. Clark. I think you better look at the provision

when we come to the master. I have worried a little about that. Although we have done all we could. The point, I take it, is specifically this, in connection with equity rules 49, 51, 52, and 53, the taking of testimony before an examiner, we have not continued those in the form they are in. We have just got a provision that a reference may be for such matters as the court directs. I think that is probably enough but I suggest when we get there you can look over these equity rules on examiners and see if there is anything more.

Mr. Donworth. I think at the former hearing the chairman said he was going to make some inquiries in regard to what the practice is in patent cases which involve long examinations. I suppose at the proper time we will hear what he has found.

Mr. Olney. Mr. Chairman, has the motion been passed on?

The Chairman. No, it has not been.

Mr. Sunderland. First, what is the question, Mr. Chairman?

The Chairman. The question is to restore -- it is in principle to adopt the principles provided in my draft, with the qualification that depositions may be used with the consent of the parties and the approval of the court.

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

Mr. Olney. Mr. Chairman, while we are talking about these general matters, I would like to ask the reporter if any provision has been made for the use of depositions which have been taken for the sake of perpetuating testimony.

The Chairman. I have got a note on that. We have not

got any provision for perpetuating or taking testimony in anticipation of a pending lawsuit, and I just raised the question that later on after you get through here we are to have something on that.

Mr. Dodge. That is provided by statute?

Mr. Sunderland. That is provided by statute, and it seemed to me when you first drew it the statute would control, but I think the chairman's suggestion is a good one.

The Chairman. My suggestion again is so that you will not chase the lawyers around the statute books.

Mr. Sunderland. I have a suggestion that these rules shall not restrict the powers of the district courts of the United States sitting as courts of chancery.

The Chairman. I do not know that if I were sitting in chancery I would want to agree with that.

Mr. Sunderland. That is the way the statute reads.

The Chairman. It is better to say, "shall not be construed to prevent the taking of testimony pursuant ---"

Mr. Sunderland. According to the usage of chancery, we almost have to use that, do we not, because it is an equitable procedure?

The Chairman. Why don't we simply say they shall take them in accordance with the statute and leave out chancery. That will refer to the statute.

Mr. Sunderland. We can do that.

Mr. Olney. In that connection, I want to call the attention of the committee to this: In addition to providing for the district court taking such proceedings for the perpetuation of testimony, the question comes up as to permitting

the use of depositions that have been taken for that purpose under the state law and by state courts, because the California statute, for example, provides a means for perpetuating testimony, and suppose that statute is followed and a deposition is taken.

The Chairman. That ought to be referred to the reporter. You see the point here?

Mr. Sunderland. Yes, that is a good point.

The Chairman. He has got that. Let us start in, then, with paragraph (a) of Rule 28. I had a note there ---

Mr. Morgan. May I ask this, Mr. Chairman, before we go on? As I understand it, the de bene esse statutes have to do with chancery proceedings, do they, or can you preserve testimony for use in a law court later? A friend of mine said he knew that there was going to be a suit by the United States for taxes on a particular thing and the information was in the possession of a couple of witnesses who were ill, and he could find no way and no lawyer could find a way to preserve the testimony of those witnesses so it could be used in a tax proceeding.

The Chairman. I supposed that the proceeding for taking testimony was a chancery proceeding and when he perpetuated it he could use it in any kind of a lawsuit, but if I am wrong about that the reporter ought to make it broad enough.

Mr. Morgan. Could you use it in a tax proceeding that is not a lawsuit?

The Chairman. Make the rule broad enough to make it cover any proceeding.

Mr. Morgan. I know under the state statute it is

permissible.

The Chairman. It ought to be broad enough so that if taken it could be used in any civil cause in a federal court.

Rule 28 (a); I have a suggestion there. There is a provision that an adverse party who is unwilling or hostile may be examined as though on cross examination. I had one suggestion to make, and that is the only place this appears, and that is that if it is a good rule here it ought to apply to oral testimony in court, and my point is that if we are going to deal with this matter at all, if it is in our province, it should be broad enough to apply to all witnesses, whether on deposition or in court.

Mr. Lemann. I move the reporter be requested to put a provision in Rule A6 that will make that plain.

The Chairman. Is it a subject within our province? I suppose it is.

Mr. Morgan. The scope of the examination is not a rule of evidence; that is a rule of procedure.

The Chairman. All right. I have another suggestion to make. You talk about an adverse party; my familiarity with the statutes dealing with examination of adverse parties is such that we have expressly provided that "the officer, director, or managing agent of a corporation" shall be subject to it, and I do not think the words "adverse party" would necessarily include either of them, although I think they should.

Mr. Olney. It ought to cover not only officers of corporations but their employees.

Mr. Lemann. Yes; I wondered whether "managing agent"

is broad enough.

The Chairman. I was just conservative enough to stick to what I knew had been used. The idea of a managing agent or officer is that he is really the corporation, interested in the case as such. When you get down to the cross examination of an employee, is that not generally covered by the question of whether they are hostile or unwilling?

Mr. Lemann. I guess you are right. If you did that perhaps you ought to include the employees of an individual party.

The Chairman. You may get into deep water on that.

Mr. Sunderland. The reason that was not put in was that the rules treat all witnesses alike. They draw no distinction between a discovery deposition taken from a party, an agent or a party, or a witness with no connection with the party, and, inasmuch as the procedure dealt with all alike I thought it was not necessary to make any provision of this sort.

The Chairman. I do not quite get your point. You have covered two classes of cases here; there is an adverse party or a witness who is unwilling or hostile.

Mr. Sunderland. Yes, or suppose we have an agent of a party.

Mr. Olney. It is intended to cover them all as one?

Mr. Sunderland. If he is hostile, he is a witness who is hostile and he comes in the same as any witness who is hostile.

The Chairman. But if he is an adverse party you ought to be able to cross-examine no matter how fair or un-hostile

he appears.

Mr. Lemann. The court would always say he is hostile.

Mr. Morgan. It might not.

Mr. Sunderland. I was trying to get away from the distinction between different types of witnesses. I want to put them all in one class.

Mr. Lemann. He wants to describe the adverse party because in the case of a corporation you have an abstract entity that you cannot put on the stand. He wants to make it clear that he would be treated as an adverse party.

The Chairman. Yes, the words "adverse party" include the officer, director, or managing agent.

Mr. Olney. What Professor Sunderland is getting at, I think, is quite in point as far as the form is concerned. It is that he wishes to make no distinction whatsoever as between an adverse party and anyone else as to the capacity to take his deposition.

Mr. Sunderland. Yes, that is the point.

Mr. Olney. Yes, that is his first sentence here.

Mr. Morgan. That is all right.

Mr. Olney. "The testimony of any party or witness may be taken by deposition ---" Perhaps, as I think more clearly, it could be "the testimony of any person, including an adverse party."

Mr. Morgan. Or any other witness.

Mr. Olney. Yes, there is no distinction whatever. "The testimony of any person may be taken by deposition."

The Chairman. I was only dealing with this cross examination business.

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Mr. Lemann. You are talking about the last sentence?

Mr. Morgan. If you are going to be consistent, Mr. Sunderland, would you not have to strike out "adverse party or" and say, "a witness who may be hostile"?

Mr. Sunderland. I do not think there would be any harm in putting in a provision that the adverse party shall include officers, directors, and managing agents of a corporation which is a party.

The Chairman. I am talking about adverse parties in the last line. I did not make any change in the first part. I did not change the provision about the testimony of any party or witness. That is as broad as it can be.

Mr. Olney. I would change it. I think it is clear if you say, "the testimony of any person, including an adverse party".

Mr. Dodge. Why is it necessary to include the additional words, "the testimony of any party or witness"? How can there be any doubt about it?

Mr. Olney. To make it perfectly plain to the profession that there is no distinction between them so far as taking their testimony is concerned.

Mr. Dodge. That is what it says now.

Mr. Sunderland. In this provision, "an adverse party
12 or a witness who is unwilling or hostile --" and so on, suppose we have this provision that "party" includes officers or directors ---

Mr. Lemann. (Interposing) We could cover it by adding another sentence which would cover it as a second sentence to say that in the case of a corporation the word "party" should

include the director, officer, or managing agent, and that could be read both in line 2 and line 6. Is that what you had in mind?

Mr. Sunderland. What I thought in regard to this cross examination was that if we are dealing with cross examination of a person who is being examined as an officer, he is examined as a witness. If we are dealing with an individual who is a party and he is under examination, he is examined as a witness. Our two terms include everybody, so I did not see any use of distinguishing between them.

Mr. Dodge. That is a question of form, is it not? The idea is plain.

The Chairman. I don't know, because here is a special provision that deals with the nature of the examination, cross examination of a man who is not your own witness, and then you put in a provision that that right of cross examination is limited to two classes, or two witnesses, first an adverse party and then a hostile witness. When you are dealing with adverse parties it ought not to be necessary that the officer or director or managing agent of the corporation, the adverse party, be hostile. You ought to be allowed to examine him because he is the director or manager without regard to whether he is hostile or not. The very statute that deals with cross examination that I know anything about of an adverse party includes by express terms, "managing agent, director, or officer."

Mr. Dodge. I thought we were all agreed on that and it was merely a question of putting it into words.

The Chairman. Well, there is some confusion -- I did

not intend to put that limitation in the second line about party or witness. I guess we all understand what I am talking about.

Mr. Dodge. There is one question I want to raise. Suppose one party wants to take a deposition on written interrogatories and the other party feels he must have the opportunity to cross-examine on them?

Mr. Morgan. That is covered in a later rule.

Mr. Dodge. Does that come later?

The Chairman. Yes, that is later. Is there anything else on (a)? (No response.) If not, we will pass to (b).

Mr. Morgan. I have some suggestions on (b) as drawn.

"as shown in the pleadings on file therein" --- as a matter of fact, I do not know what you did yesterday, but I suppose -- or the day before yesterday -- that the pleadings may not be on file, and that in the second place you have got such a liberal power of amendment, and so on, and so forth, and when you cut the pleadings off with the answer, there are all sorts of matters there that it seems to me ---

The Chairman. (Interposing) Your point, among others, is that when you take a deposition you are absolutely limited to the pleadings on file and you are foreclosed against the idea that if the proof goes beyond the pleadings they should be deemed to conform with the proof?

Mr. Sunderland. I think the point is well taken.

The Chairman. You strike out the words "as shown in the pleadings on file"?

Mr. Morgan. Yes. Do you agree to that?

Mr. Sunderland. Yes, I agree to that.

The Chairman. Have you anything else, Mr. Morgan?

Mr. Olney. Why don't you simply say, "any testimony that is relevant"?

Mr. Morgan. That is what we have got.

Mr. Sunderland. "Relevant to the pending action".

Mr. Morgan. Yes. And then you are going to use "action" instead of "cause", are you? That is what we have used all the way through.

Mr. Sunderland. Yes.

Mr. Olney. In that connection, however, when you come down to the next to the last line you have the word "including", "including the existence, description" and so on. I rather gathered from reading these rules that what the reporter had in mind, and with which I agreed, that he should not only be permitted to examine the witness as to relevant matters, but also be permitted to examine him as to the existence, description, subject matter, and so forth, as to documents on which he wished discovery, when he wanted to know where they were. It should not be "including", but it should be "in addition". Do I make my point clear?

The Chairman. Instead of saying "including", you would say "regarding the existence, description" and so on, or something of that kind?

Mr. Olney. Exactly.

Mr. Sunderland. Yes, "relating to the claim or defense of any other party to the existence, description" and so on.

Mr. Dodge. Where is the provision for the production of books and papers?

The Chairman. That is later.

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Mr. Morgan. We have one later.

Mr. Dodge. I looked ahead and could not see it.

Mr. Morgan. You could not, really?

Mr. Dodge. If it does come later, all right.

Mr. Olney. It is later, I know.

The Chairman. Is there anything else on subdivision (b)?

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Mr. Sunderland. There is another point that was made in some of the comments as to whether in (b) there should be a provision that the testimony should be competent as well as that the testimony should be relevant. I do not think there is any particular objection to putting that in that "any party or witness may be required to testify, so far as he is competent, regarding any matter, not privileged."

Mr. Morgan. I don't think you want that in there.

The Chairman. Then we will pass on.

Mr. Sunderland. Then that is not to go in? But the point was made last time that something of that sort should be put in, and some comment suggested it.

Mr. Loftin. So far as he is competent?

Mr. Sunderland. Yes.

The Chairman. We cannot state all the law in one paragraph.

Mr. Loftin. That is substantive law.

The Chairman. (c); that is the one where you have adopted the policy and the motion covers that. So far as (d) is concerned, my point is that these attempts to enumerate grounds for objection -- it says, "any part of a deposition offered in evidence in the cause, may be excluded on the

ground that it is irrelevant or immaterial or that the witness is incompetent, whether or not such objection was made at the taking of the deposition, except that where any objection is of such a nature that it could have been obviated or corrected if made when the deposition was being taken, failure to make it at that time will constitute a waiver."

That attempts to enumerate grounds, and I suggest we go at it the other way:

> "When a deposition is offered in evidence, objection may be interposed to the competency of the witness, or to any question put to him, or to the whole or any part of his testimony, in like manner, on the same grounds, and with like effect as if the witness were testifying in open court, except that no objection to the form of any question ---"

whether it is leading ---

> "can be made unless such objection was made before and noted by the officer taking the deposition, nor to the form of any written interrogatory unless the objection was made when the interrogatories were proposed."

Mr. Lemann. Suppose it was hearsay; would that be irrelevant? It would be immaterial.

The Chairman. That is why I made the change. He has attempted to enumerate, and I have said to make all the objections at the trial as if the witness were in court, except objections as to the form of the question or the interrogatory. That is the standard rule on the subject.

Mr. Sunderland. I wondered if that was broad enough. Suppose the witness is not qualified.

Mr. Morgan. Yes, how about that?

Mr. Sunderland. That is not the form of the question, yet if there is no objection to the qualification you think it ought to go in?

Mr. Morgan. Suppose you say:

"Objection may be made to the reception in evidence in the cause of any part of a deposition for any reason which would require its exclusion if the witness were present and testifying, except that where the ground of objection is such that it could have been obviated or corrected had the objection been made at the time."

Mr. Sunderland. It seems to me that really covers it better.

The Chairman. I am glad to include that. My proposal is not to try to enumerate it.

Mr. Morgan. Yes, that is what I feel about it.

Mr. Sunderland. I would approve of that phraseology.

The Chairman. Will you adopt the principle that we ought not to try to enumerate?

Mr. Sunderland. I think so.

The Chairman. We ought not to enumerate them.

Mr. Lemann. You have the same rights as to testimony given in open court.

Mr. Morgan. That is the way it would work out. I suppose that is what you intended to do.

Mr. Donworth. Even as to the form of the question?

Mr. Sunderland. Mr. Morgan's wording will include objection to the form of the question.

The Chairman. That should be corrected.

Mr. Morgan. Yes, that should be corrected.

The Chairman. Well, we will pass (d) with the understanding that it will be changed, and the draft I have submitted and Mr. Morgan's will be referred to the reporter.

Now, there is a very violent thing in (e) as I read it. I may have misunderstood it. Lines 34 to 38 in (e), I question, and I ask this: Does this mean that if one party introduces a deposition to impeach the witness of the other party he makes the witness to any extent his? Should this be qualified by inserting after "evidence" in line 35 the words "except for the purpose of impeaching the deponent"?

You have it that if either party introduces the deposition in evidence the deponent is deemed thereby to have become the witness of such party with respect only to so much of the deposition as shall be introduced. Now, if a witness on the other side is called and you use his deposition to impeach him, you make him your own witness with respect to the matter you are cross-examining about, don't you?

Mr. Sunderland. You do literally; I would not suppose it would have that effect.

The Chairman. Let us clear it up.

Mr. Sunderland. I think it is better to put in a provision.

The Chairman. Let us clear it up.

Mr. Sunderland. Yes, I approve of that.

Mr. Lemann. The last part, lines 38 to 40, permits you to contradict your own witness.

Mr. Sunderland. Yes.

The Chairman. That abolishes the established rule that

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a party cannot impeach his own witness unless taken by surprise. I am opposed to dealing with the rules of evidence and suggest, if we do not write a code on the subject, at least we may deal with it wherever necessary to avoid undesirable gaps. I am willing to consider such cases, if any, as they arise. This provision is not necessary to prevent a gap. In how many states has this new rule been adopted? Why adopt such a rule for depositions and leave the old rule in force for oral testimony in court?

Mr. Dodge. In Massachusetts you can show a prior self-contradiction by your own witness if you have confronted him with the statement.

The Chairman. That is surprise.

Mr. Morgan. You do not have to show surprise in Massachusetts, do you?

Mr. Dodge. I think you cannot show a prior contradictory statement unless you have confronted him with the original.

Mr. Morgan. You do not have to show he surprised you on the stand, do you?

Mr. Dodge. No.

Mr. Olney. You do in California.

Mr. Lemann. You are surprised in all cases, because you would not put him on if you knew he was going to contradict the statement.

Mr. Morgan. You have this kind of statement in Massachusetts, that a woman who was driving an automobile had told the claim agent she was driving only 25 miles an hour, and so on, and she did not know what happened and the first thing she knew she found herself in the ditch.

She went on the stand and testified, when her mother or the guest was suing her, the defendant, that she was driving 35 or 40 miles an hour and she took her hands off the wheel to light a cigarette and her mother shrieked and the next thing -- and they offered in evidence the claim agent's statement made by her when she testified. That was the point, that you could not impeach your own party by bringing contradictory statements because the insurance company was defending her against this particular suit, and the Massachusetts court said she was a witness and any witness could be impeached by prior contradictory statements under their statute. They intimated they might not be able to do it in common law.

Mr. Dodge. Should it not be left to local rules?

Mr. Lemann. If we are going to provide this here, this is another thing that ought to be equally so in open court. I mean, it ought not to be restricted to depositions.

Mr. Sunderland. There is a difference, is there not, because here you are getting these depositions as matters of discovery. You are getting after these hostile people and you may get something that is good, that you want to use.

Mr. Lemann. You mean the other fellow is going to be your witness? That is what you really mean to say, don't you?

Mr. Sunderland. You want to be a little freer in dealing with what this witness says because you are going to have hostile witnesses and try to get something out of them and you may want to use what you get out of them, introducing the deposition as part of your case.

Mr. Lemann. And you don't want to be bound by them.

Mr. Sunderland. You don't want to be bound. It seems to me that discovery feature makes a difference there, and there ought to be more liberality than there would be in the ordinary case. Furthermore, you cannot show surprise at the time very well because you have already had your deposition. It seems to me there is going to be a gap left here if you do not make a provision of this kind.

Mr. Lemann. The point is that this fellow is not your witness, as lawyers think of it. He is the other fellow's witness, but he has made some statement you would like to use, you would like to use it, but here is a rule that says if you use it that makes him your witness, and then if you read on a little further you say this is O.K.

Mr. Morgan. This is in accordance with the rule for examination that if you outside of the scope of the cross examination you make the witness your own, and that is all this does. When you use this witness you are just following the common law.

The Chairman. This says you do not make him your witness.

Mr. Morgan. Yes, you do; only for what you go outside.

Mr. Dodge. Does this indicate you can pick out a sentence in a deposition and read it and not read any more?

Mr. Morgan. Yes.

The Chairman. It is up to the other fellow to offer it if he wishes to. It would not be much use if you had to offer it all.

Mr. Donworth. My understanding would be this, that if you make a man your witness for any purpose, then, except in

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the one case of surprise or contradiction, you cannot impeach him at all. If you put a man on the stand and ask him which way the wind was blowing, you have made him your witness and I do not understand you can impeach him.

Mr. Sunderland. Under this rule you cannot impeach his character but you can to the extent of showing prior contradictory statements.

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Mr. Morgan. The extent to which you can impeach for contradictory statements is in some jurisdictions only in case of surprise.

Mr. Lemann. Of course, this would be a hostile witness; if he had been in the court room you could cross-examine him and he would have been hostile.

Mr. Morgan. You cannot tell about that.

Mr. Sunderland. I collected some statutes on the subject of the right to show prior inconsistent statements by one's own witness. In Florida I found a statute that that could be done.

The Chairman. I don't think I would worry over that. The thing that worries me is not that. You have not limited it to prior self-contradictions. You say:

> "Either party may, at the trial, by counter-evidence rebut any evidence contained in any deposition * * * whether such evidence was introduced by him or not."

Mr. Sunderland. That is true. There is nothing new about that.

The Chairman. I guess you are right.

Mr. Morgan. But you do not want to make him your own witness by introducing impeaching prior contradicting statements from him. For example, if Mr. Mitchell had this case, and the other fellow puts him on the stand a t the trial, and you have this deposition in which he has a prior contradictory statement, and you want to put that pior contradictory statement in for the purpose of impeachment, which I understand by every rule except the rule in Missouri, is all you can put it

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in for--

The Chairman. He has excepted that.

Mr. Morgan. Oh, you have excepted that?

The Chairman. Yes. I put in, "except for purposes of impeaching," and he has agreed to it.

Mr. Donworth. How will that read?

The Chairman. This is the way it will read:

"A party shall not be deemed to make a witness his own for any purpose by subjecting him to a deposition examination. But if either party shall thereafter introduce such deposition or any part thereof in evidence, except for the purpose of impeaching the deponent, the deponent shall be deemed thereby to have become--"

Mr. Morgan. That is all right? You think that is all right?

The Chairman. Yes.

Mr. Lemann. It goes on: "for the purpose of cross-examining on that deposition."

Mr. Morgan. Without making him your own witness.

Mr. Lemann. You can say, "Didn't you testify such and such a thing?" You can do that and then offer the deposition.

Mr. Morgan. Yes.

Mr. Lemann. I think you will find the tendency of the judges is to let you show the prior statement to get the facts.

Mr. Morgan. It all depends on where you are.

Mr. Sunderland. Just to check this provision for prior self-contradiction, I asked Mr. Wigmore what he thought of it and he said he approved that provision, said it was good.

The Chairman. Does he approve it because it is along the

line that he thinks ought to be the law or because there is merit for it?

Mr. Lemann. He says there are statutes for it in many states.

Mr. Sunderland. I have statutes in eight states that allow that absolutely even without any question of surprise.

Mr. Olney. By the way, when you come to contradictions, how about subsequent contradictions?

Mr. Lemann. Why not take out the word "prior"?

Mr. Morgan. That means prior to the trial.

Mr. Olney. It reads "prior to the deposition."

Mr. Lemann. Take out the word "prior."

Mr. Sunderland. Yes.

Mr. Lemann. May I ask, then, are we going to accept Professor Sunderland's thought that there is a reason for distinction here as to the deposition--

The Chairman. As between oral testimony--

Mr. Lemann. Yes; or are we going to carry it forward? Have we decided that?

Mr. Loftin. As it is there it applies to depositions taken for discovery.

Mr. Lemann. But it would not permit you to contradict your own witness if you have not taken a prior deposition. If we do not make that plain I think there will be a bone of controversy; some fellow will say we must have meant you to have that same right in trials; others will say, No, they could not have meant it because they did not put it over there. I just wondered if we mean to carry it over, and if we do mean to we should say so and put a note in giving the

reason he just gave.

Mr. Sunderland. But we do not deal with the general subject of testimony anyway. It is not in our rules. So, I do not think anybody would be misled by it.

The Chairman. I am in doubt here. We ought to take the cross examination of an adverse party and try to make it a general rule of oral evidence.

(There was discussion off the record.)

Mr. Pepper. Mr. Chairman, is the question just discussed relative to the practice of calling an adverse party as if for cross examination? Is that it?

Mr. Lemann. Yes.

Mr.Pepper. What position, if any, are we taking on that in the rules?

The Chairman. We have taken the position that you can call an adverse party for cross examination in a deposition and then we have adopted the principle that that ought to be broadened out to calling the adverse party in open court.

Now, we have come to the same problem in (e). We have provided certain rules about not being bound by the deposition you offer, and then Mr. Lemann raises the question, Why should that be limited to depositions? Why not oral witnesses?

Mr. Lemann. Mr. Sunderland says there is no inconsistency in limiting it. He says there is a special argument for it here, but my inclination would be to make them both apply to trials as well as depositions; that is, in (e) as well as the other point about the adverse party.

I make that motion just to dispose of it.

Mr. Pepper. I will second it.

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The Chairman. You could put a clause at the end of (e) and make it (f) and say that the provisions for cross examination in subdivision (a) and in (e), properly described, shall apply to open court.

Mr. Morgan. It ought to go in (a). I think the place would be before that. There should be a general sentence in A 6 that wherever you have anything like that in regard to depositions that would be applicable, it should also go in trials.

The Chairman. Do you approve the principle laid down in (e) to also apply to witnesses called orally in court?

Mr. Pepper. That was Mr. Lemann's motion. I am glad to second it because it seemsto me that these rules about correcting the testimony of a witness by showing up inconsistencies and calling the adverse party without making him a witness and cross-examining him are all tremendously valuable agencies for getting at the real facts, and, after all, that is what the court wants.

The Chairman. They are really matters of procedure?

Mr. Pepper. Very much so.

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

Mr. Morgan. Now, I would like to know, Mr. Mitchell, whether that means that we are going to put in A 6 the fact, which is the federal rule, I suppose, that the opponent makes a proponent's witness his own by putting anything in the case with respect to impeachment by the opponent under those circumstances except the prior contradictory statement.

?

Mr. Sunderland. What would that prevent?

Mr. Morgan. All character; conviction of a crime; you could not ask him about prior disgraceful conduct or anything of the sort on the stand, anything that either directly or indirectly bears on general character is kept out. Of course, if there is or ever was an asinine rule in evidence, and most of them are, it seems to me, it is that rule which forbids you impeaching your own witness. I think that is the silliest thing, and it is all tied up with the adversary system.

Mr. Olney. It is a matter as to which there is great lack of understanding on the part of the profession. They so frequently consider that when you put a witness on the stand and he has testified to something you are bound by the testimony. That expression is used constantly.

The Chairman. It is 1 o'clock. We will recess until 2:15.

(Thereupon, at 1 o'clock p.m., a recess was taken until 2:15 o'clock p.m. of the same day.)

AFTERNOON SESSION

The committee resumed at 2:15 p.m. on the expiration of the recess.

RULE 28. DEPOSITIONS - THEIR FORM, PURPOSE, SCOPE, AND EFFECT. (Resumed)

Mr. Donworth. Is there any pending discussion?

The Chairman. Yes; we are at the bottom of rule 28. We made some provision here about self-contradictory statements which you adopted, and Mr. Lemann suggested that we ought to make the same provision in the case of oral testimony in court as well as in depositions, as we did in the other case about cross examination, and we were discussing the question whether there was any distinction between the situation in depositions in discovery and oral testimony which justified us in not broadening that rule to include examination of witnesses in court. We left it there.

Mr. Loftin. As I read Mr. Sunderland's rule, the language he uses does not limit the self-contradiction to something that is in a deposition. It is just used as a broad term, "self-contradictions by the deponent".

The Chairman. "In regard thereto" -- in regard to any evidence contained in the deposition.

Mr. Loftin. But it does not have to come at the deposition?

Mr. Sunderland. No. It can come anywhere.

The Chairman. I should be afraid to infer that it meant on the depositions, because that is the subject matter.

Mr. Sunderland. You do not have to find the contradiction

in the deposition. Your point is that you have to find the contradiction in the same deposition?

Mr. Loftin. No. I said under the particular language used, you could bring in some particular witness who would testify that this man made a contradictory statement.

Mr. Sunderland. That is what I intended to provide for.

Mr. Donworth. In that same connection, I suggested, during the recess, to Professor Sunderland, the point whether he meant to change what I understand is the general rule, that you cannot show self-contradiction by a witness unless you have laid a foundation by calling his attention to it with sufficient particularlity to arouse his memory, if there was any such.

Professor Sunderland can answer for himself, but he gave me the impression that he intended to leave the rule just as it was.

Mr. Morgan tells me that in many States you do not have to confront a witness with a contradictory statement or call his attention to the circumstances in order to show by another witness that he made the contradictory statement. I might say that the custom and the rule of not being allowed to show a contradictory statement without confronting the witness with it in some proper way, I supposed was the general practice. I do not know just how to meet it here. If it were universal practice or general practice, I would put, in some proper place, "proper foundation therefor being laid". But I am just throwing that open for discussion. I do not make any motion.

The Chairman. We are dealing now with a deposition that is offered in evidence. The witness might not be there -- in

fact, he would not be there normally. The deposition is offered in evidence. Now you start to put in a self-contradiction, to contradict the deposition. You cannot confront the witness with it. You would have had to confront him with it when the deposition was taken. So, I think he has at least broadened the rule to that extent.

Mr. Donworth. See what chance that leaves for chicanery. You take the deposition of a witness who is going to Europe, who was present at the time of the automobile accident. He is gone. He testifies strongly for one side or the other. Then you come to trial six months or two months later --

The Chairman. You are right.

Mr. Donworth. I confess it is a rather difficult situation. Mr. Morgan, what do you think about it?

Mr. Morgan. Of course, I have not too much sympathy with the idea that you should have to confront the witness with the statement in the first place, because there are a few States-- I do not know that there are very many -- where you do not have to lay any foundation. It is a Massachusetts rule that you do not have to lay any foundation.

Mr. Dodge. If it is an adverse witness, not your own witness.

Mr. Morgan. Yes, not your own witness, but an adverse witness. That is what you are thinking of, Judge Donworth -- any adverse witness.

Mr. Donworth. I was thinking more of the adverse witness.

Mr. Morgan. The adverse witness is the one we are talking about. Some of the courts have carried it to the extent that they will not let in a dying declaration, a prior contradictory

statement of the dying declarant, simply because you cannot confront him, which always seemed to me like allowing the tail to wag the dog. I see your point, and I suppose the basis of the whole rule of confrontation is that you should give the witness a chance to explain.

Mr. Donworth. Yes.

Mr. Dodge. You may not learn of the contradictory statement until later.

Mr. Morgan. Here is a place where you do not have a chance to confront him.

The Chairman. Is not that the penalty a man has to pay for using a deposition? It is for his convenience, and not that of the other side. If he sees fit to take a deposition and bring it into court, he ought not to be able to deprive you of the right of self-contradiction, because he has not brought the witness. So it seems to me fair enough, at least where the other side is taking the deposition, to waive the rule of confrontation, because it is the party you are fighting against that has made it impossible to do the confronting.

Mr. Morgan. If we leave it open, we have the possibility of the court's ruling in accord with Judge Donworth's suggestion that since you cannot confront him, then you cannot use the prior contradictory statement.

Mr. Lemann. If you had the prior contradictory statement at the time of giving his deposition, he might have been confronted with it at that time.

Mr. Morgan. That is all right, but that would appear in the deposition itself, and Mr. Sunderland's provision would not be necessary.

Mr. Sunderland. No.

Mr. Morgan. This is a case where the deposition is offered, and you want to show a prior contradictory statement.

The Chairman. Is not Mr. Lemann right in suggesting that you ought not to hold back contradictory statements?

Mr. Lemann. The only open case would be where you did not have the contradictory statement, or did not know it until after you took his deposition. My answer to that would be that you should not be in that position on the trial. If you did not know about the contradictory statement, and found out about it afterwards, you are just out of luck because you did not know it at the time. Ought not the rule to be the same with respect to the deposition, that it is your business to know it when you take his deposition?

Mr. Morgan. You mean when you are responding to his deposition?

The Chairman. Otherwise a man might take a deposition on you and run his witness abroad, and you would have no chance to put in the newly discovered contradictory statement.

Mr. Lemann. Personally I am inclined to take away the confrontation rule, and just let you contradict him and not confront. I have used this confronting thing a few times. It never seemed to me to amount to much. I showed the witness the thing. He did not expect it, obviously, and looked at it on the witness stand, and gulped a little bit. It did not do him much good to be confronted with it. I was just following the technical rule.

Mr. Morgan. That was when you had it written or spoken?

Mr. Lemann. Written.

Mr. Morgan. The Queens case makes you do that. You cannot ask any such question under the Queens case if it is in writing, without showing him the writing.

Mr. Lemann. You were not talking about the writing?

Mr. Sunderland. No. I think that takes care of itself under other rules.

The Chairman. One reason I favor going back to the limitations on the use of depositions where the man is available is this: If you do not require the man to appear in court as a witness, with perfect freedom about substituting depositions for oral testimony, at an early stage of the case one of the parties can take the deposition of a witness, and at that time you may not have the material for cross examination. As you go on with your preparation for the trial, you learn a lot of things about the case, and it is extremely essential to you that you have the witness in court then to cross examine him with the material you have developed. If you allow the deposition to be used, even though the man is available, you practically destroy your right of cross examination based on the discoveries and other facts you have learned as you are preparing for your trial. That is an added reason why oral testimony ought to be insisted on.

Mr. Pepper. We have clearly provided, have we not, that where a deposition has been taken and the witness is in court, or his attendance can be compelled, and he is examined orally, you can then call his attention on cross examination to statements that he has made in the deposition, and bring out the inconsistency? That is clearly provided for, is it not?

The Chairman. That is expressly provided for. It is pro-

vided by the express words in that proposed draft of mine.

Mr. Pepper. That is what I thought.

The Chairman. We are down to this one question, and that is whether we shall ask the Reporter to make this rule about self-contradictions broad enough to cover contradicting evidence given in court as well as evidence in a deposition. It is a narrow question left under rule 28.

Mr. Lemann. Judge Donworth raised the other confrontation question, which I think is still open, too. Let us take them up one at a time. In order to get action, I move that the Reporter be requested to make this rule also applicable to testimony in the courtroom.

Mr. Pepper. I second that.

The Chairman. All in favor, say Aye; contrary, No. It is so ordered.

Mr. Donworth. With regard to this question, I see arguments both ways. If every lawyer is honest --

Mr. Morgan. Stop right there, Judge.

Mr. Donworth (continuing). -- this rule is all right. But if the lawyers are of the kind who supply gaps, then, as soon as the witness has gone, they are free to find a third party who comes in and says, "Yes, I heard that witness. He told me so-and-so."

On the other hand, if the confrontation rule is required, it does put the party to a disadvantage. The man who learned of these contradictory statements, in good faith, and did not know of them when the deposition was taken, is put at a disadvantage. I am not prepared to make a motion either way for the present. I am willing to leave it as it is, just now.

Mr. Sunderland. Mr. Chairman, you made a suggestion in connection with 28(c).

"When an action is dismissed and another action for the same cause or involving the same subject matter is afterwards begun between the same parties or their representatives, all depositions lawfully taken and duly filed in the first action may be used in the second, as if originally taken therefor."

The Chairman. Yes.

Mr. Morgan. Just the same rule as with respect to prior testimony, is that it?

Mr. Sunderland. Yes. It seemed to me that was a good thing to have. It seems to me that ought to be added.

Mr. Morgan. I think so.

The Chairman. I had that under another rule.

Mr. Dodge. That is, if the witness cannot be produced under the same conditions.

Mr. Morgan. Yes; under the same provision.

The Chairman. There is no provision there for taking the deposition of a sick person during the trial on order of the court, is there?

Mr. Sunderland. No.

The Chairman. There ought to be. I have referred to that in note 2 of my comments, and I have given you a section under the Civil Practice Act. That is a valuable right.

Mr. Donworth. On such notice as the court may order. It will be very short notice, perhaps.

The Chairman. Yes.

Mr. Pepper. Why is not that covered by rule 29, which

provides that depositions may be taken on at least five days written notice, and so forth, unless the court shall make an order, on good cause shown, reducing or enlarging such period?

The Chairman. Perhaps it is.

Mr. Sunderland. It would come under that, by reducing the time.

The Chairman. I had another suggestion. These rules are broad enough, having the effect of law, to authorize a party to walk into the penitentiary and take the deposition of a prisoner on notice. Having had custody of Federal prisoners once, I remember that it is advisable to hedge that about. I think the depositions of prisoners ought not to be taken except on order of the court. I am not dealing with habeas corpus ad testificandum. That is another matter. I think we ought to be sure that we do not make a rule that will allow a man to get up a lawsuit, and then give notice and go in and take prisoners' depositions.

Mr. Dobie. You mean it was abused in your experience?

The Chairman. It would be abused if you left it as broad as this. The court will not order it if the prison authorities object to it, or unless it is hedged about with proper precautions. There is a Civil Practice Act on that, too, in New York. I have referred to that in my comments.

Mr. Donworth. What rule would that come under?

The Chairman. That is a matter of location. I did not trouble with that.

Mr. Pepper. I suggest that it would be in order to add it in rule 29 at some point, because that deals with notice, time and place of taking depositions, and it would seem to me

in that connection that provision should be made for court permission to take the deposition of a prisoner.

The Chairman. Will you note that suggestion?

Mr. Sunderland. Yes; I will note that.

The Chairman. Then we are down to rule 29(a).

RULE 29. NOTICE, TIME AND PLACE OF TAKING DEPOSITIONS. SUBPOENAS.

Mr. Sunderland. I think you made a suggestion, Mr. Chairman, about a provision for tendering fees and paying expenses in the first instance.

The Chairman. I do not know whether that is necessary.

Mr. Sunderland. I thought that would come in here, if we had such a thing. There was a suggestion that the party taking the deposition shall advance the fees of the witnesses called by him and the fees and expenses of the officer before whom the deposition is taken, and of any clerk or stenographer employed in taking the same, and that if the deposition is used at the trial the court may make any order regarding the taxation of such costs as may be just.

Mr. Dodge. That is, they generally require us to pay the expenses of the opposing counsel's trip.

The Chairman. The only suggestion I made was that no witness need attend unless his fees and travel allowances fixed by law shall be paid in advance. I do not know that that is necessary, because we are not prescribing the subpoena conditions, are we?

Mr. Sunderland. No, we are not.

The Chairman. I doubt if we need say anything about that.

Mr. Sunderland. It seems to me advisable to have something in here to make it perfectly clear what the lawyer taking the deposition would have to do.

The Chairman. The officer will not serve unless he is paid or secured, and that is up to the one taking the deposition. If he wants to take the deposition, he has to dig up.

Mr. Pepper. May I ask Mr. Sunderland to clear up a little obscurity in my mind in connection with rule 29? There is reference there to the possibility that written interrogatories may be issued in lieu of the ordinary form of deposition, and certain provision for five days written notice, which I suppose means five days written notice to the person to whom the interrogatories are to be submitted, that is, the witness.

Mr. Morgan. No.

Mr. Pepper. The provision is for five days written notice, and one day additional for each 300 miles of travel.

Mr. Morgan. That is notice to the other party, is it not?

Mr. Lemann. That is really intended to cover chiefly oral examinations, is it not? I think the point is good.

Mr. Pepper. What I want to inquire is how you would force your adversay to draft his cross interrogatories, because you say you have to send a written copy of the cross interrogatories with your notice.

Mr. Morgan. If any.

Mr. Sunderland. That is provided for in rule 34. The whole mechanism is taken care of in rule 34.

Mr. Pepper. I did not know that. I was just thinking, if you cannot give notice of your intention to submit written

interrogatories until you have secured written cross interrogatories, or given the other side an opportunity, there ought to be some way of forcing him to file his cross interrogatories.

Mr. Sunderland. I think that is taken care of in rule 34.

Mr. Lemann. Would it not be less misleading to take out of rule 29 any reference to interrogatories? You have it provided for in rule 34, where you have to deal with it anyhow.

The Chairman. You are dealing with notice here.

Mr. Loftin. I think that suggestion is a good one, because it is confusing.

Mr. Lemann. You could put the notice part in rule 34. It might take another line. It would be less confusing to the lawyers.

The Chairman. We will leave that as a matter of rearrangement for the Reporter.

Is there anything in subdivision (a) of rule 29?

(No response.)

Let me ask you this: The only provision we have for taking depositions now is on notice. There are many default cases, where you have to take depositions to prove an unliquidated claim, and you cannot serve any notice unless you are going to chase the defendant up. He has not appeared. What are you going to do in a case like that?

Mr. Sunderland. I suppose the only way to take care of that is to provide that notice shall be given to the --

The Chairman: To the clerk?

Mr. Sunderland. To the parties who are not in default. If they are in default, they are not entitled to notice. We

have a rule which provides what sort of notice people are entitled to, where they make a special appearance, general appearance, and that sort of thing.

Mr. Morgan. There is a general provision on notice.

The Chairman. So long as it is perfectly clear that you can hook up all these words and take a deposition without giving notice to parties in default, I am satisfied. I think that ought to be cross-checked with the notice section.

Is there anything else in 29(a)?

(No response.)

Let us pass to 29(b). I had a suggestion there. I am wondering whether this is right, as to non-residents. I fear that it requires a non-resident to travel a long distance. Let us see.

> "(b) A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county where he resides or has an office for the regular transaction of business in person, but a non-resident of the district may be required to attend in any county in the district."

Suppose a non-resident is up in Lake George. Ought you to be allowed to drag him down to Staten Island for a deposition?

I suggested striking out the last three words "in the district" and saying "wherein he is served with a subpoena, or at any point within 40 miles of the place of service, or fixed by an order of the court."

Mr. Sunderland. I think that would be entirely satisfactory.

The Chairman. It prevents injustice.

Mr. Sunderland. What I had in mind was that a non-resident would not be tied down to any particular place as a matter of convenience, so that there is not the same reason for locating the point.

The Chairman. That is true.

Mr. Morgan. You thought of his being served with a subpoena in the district, and having to go anywhere in the district.

Mr. Sunderland. Yes.

The Chairman. Suppose he is having a summer vacation at Lake Champlain, and you want to take his deposition. Just because he is a non-resident, do you want to drag him to New York?

Mr. Sunderland. I think it would increase his convenience to have this limitation you suggest.

Mr. Dobie. Some of these districts are very large.

Mr. Lemann. What was the suggestion?

The Chairman. I suggested that you add at the end that a non-resident of the district may be required to attend in any county wherein he is served with a subpoena, or at any point within 40 miles of the place of service, or fixed by an order of the court.

Mr. Lemann. If he was down in New York City on a visit, and about to take the train, and you served him with a subpoena, he would have to stay there, I suppose.

The Chairman. He is a non-resident.

Mr. Lemann. Yes.

The Chairman. He would either have to stay there or have

to come back to that county at the time of the deposition. I do not know how you can help that.

Mr. Lemann. The only way you can help it is by saying he should never have to go more than 40 miles from the place where he resided.

The Chairman. He has not any residence. He is a non-resident.

Mr. Lemann. Yes.

The Chairman. If you served him in New York County, for instance, it would not do to say you must make a return to any county in the State to which he happens to be intending to go, so you are protecting him all you can by making the place of service the focal point around which his travel must be forced.

Mr. Sunderland. Why don't you make it any place fixed by the court?

The Chairman. There might be special circumstances.

Mr. Sunderland. Would not this fully take care of anything -- "the county where he is served, or not more than 40 miles away from that point"? Would not that take care of every possible situation?

The Chairman. It might, except in a case where there was great hardship to him, and he planned to go to Lake Champlain, or something.

Mr. Morgan. That would be the way to take care of Mr. Lemann's hardship cases, where a person just happened to be going through a county and you nailed him with a subpoena there.

Mr. Lemann. You cannot prevent all hardships. You can do that now, to make him appear in court if you get him when he is

going through.

Mr. Morgan. That is true.

Mr. Lemann. I do not know whether "fixed by order of the court" would give the court pretty broad authority to make him go considerable distances.

The Chairman. I just thought that was a protection to the man. Suppose he is served on his way through New York to Lake Champlain. The notice calls for the taking of the deposition two weeks hence. He may get a lawyer and come into court and get an order directing that deposition to be taken at Lake Champlain and not in New York. Maybe it is not necessary.

Mr. Sunderland. The suggestion is made here that one might be temporarily a resident somewhere. What would be the test of residence, I wonder?

Mr. Lemann. You cannot cover everything. You have to leave something to the judges.

The Chairman. Is there anything else in connection with subsection (b)?

(No response.)

Then we will pass to subsection (c). I have one remark to make about that: That makes it absolutely necessary, when you start to take a deposition of witnesses, for instance, in another State, even though they are willing witnesses who agree to come, that you go through the rigamarole of applying to the local court for a writ of subpoena. The purpose of it, as I get the Reporter's rule, is to insure that the other side will not have to travel there and then find the witness is not there. I think lawyers will object to being required to go through the form of getting a subpoena outside the State for

witnesses who are willing to come. The way to protect against the failure of a witness to appear is to provide that the expenses on account of the futile appearance should be placed by the court on the other side. I prefer the provision that if the witness named in the notice fails to appear because of the failure of the party giving the notice to serve the subpoena, and the adverse party has attended at the appointed place, the court may allow the adverse party such sum for expenses and attorneys' fees in so attending as he shall deem proper. That is a proper penalty to pay for not insuring the presence of the witnesses by subpoena, but it relieves you of the duty of serving subpoenas in all cases.

In this connection I suggest that there should be added a rule for expenses and attorneys' fees to be allowed if the party giving the notice fails to attend.

Mr. Dodge. Would you change that "shall" to "may" in the third line?

The Chairman. No; I would not say anything about subpoenas on witnesses at this point.

Mr. Dodge. Was not this intended to make it mandatory upon district courts everywhere to issue these subpoenas upon the receipt of the notice, if they were necessary?

The Chairman. That is not what the rule does. I think they have power under the statute to issue subpoenas. This rule says that, after the requisite notice has been given, all witnesses to be examined shall be served with subpoenas. I say that I do not want to serve a subpoena on a witness whose attendance I have arranged for.

Mr. Dodge. The last sentence seemed to indicate that the

notice was to be taken as sufficient authority to the court.

Mr. Donworth. I thought of leaving it the way it is, but adding at the bottom a new sentence:

"But if the witness actually attends and gives his deposition, the failure to issue or serve a subpoena shall not invalidate it."

The Chairman. I do not see why there should be any compulsory rule about serving a subpoena on any witness, except that you might penalize if he fails to appear. Suppose I issue a notice to take the deposition of six witnesses in Illinois for use in a New York court. They are all friendly to me, and have arranged to attend, and promised to attend. Do I have to go out to the United States District Court in Illinois and get a subpoena served on them? No. If I do not, and they do not appear, and the other side makes a futile trip out there, then their expenses for making the trip ought to be charged against me. That is the usual way to do it. It is usually provided, for instance, that if the party giving the notice himself fails to appear, the expenses of the other party attending should be taxed as costs against him.

Mr. Sunderland. Is there any risk there of not being able to collect those costs?

Mr. Morgan. There is always a risk.

Mr. Lemann. Whatever that chance is, it is that much more protection than you have here.

Mr. Sunderland. Here we would compel him to serve that subpoena.

Mr. Lemann. Suppose you do not. You have notice, and the other fellow is going to take the testimony.

The Chairman. You have no further protection with what you have than with what I have suggested.

Mr. Lemann. Mr. Mitchell is giving you something more.

Mr. Donworth. I like the Chairman's suggestion, but I do not think it should be a substitute for what the draftsman has put in here. That sentence at the end of subsection (c) is going to be useful:

> "A copy of the notice of the taking of any deposition, and of the affidavit or return of service thereof, shall constitute a sufficient praecipe for the issuance of subpoenas for witnesses named therein."

In many cases it is going to be necessary to get a subpoena, so my suggestion would be to leave this as it is, and add what I drafted there about the voluntary attendance, dispensing with the necessity for subpoena, and then add also what the Chairman has drafted about the indemnity for costs.

The Chairman. I did not draft anything, so I was not striking out intentionally any part of this. I simply meant to make the proposal that instead of compelling you to serve subpoenas on your witnesses, you penalize the man who makes the other side travel unnecessarily because of his failure to do so; and that there be added to that a provision that if the party giving the notice fails to attend, the expenses of the other party shall be paid. Whatever else there is in subsection (c), which has no relation to that, is all right.

Mr. Dodge. You might insert, in line 23:

> "shall, unless their attendance can be otherwise secured, be served with subpoenas".

Mr. Lemann. I move that we approve the substance of the Chairman's suggestion and ask the Reporter and the style committee to make appropriate changes in the rule to accomplish those two purposes, namely, that failure to issue subpoenas shall not invalidate the testimony; and that there shall be a penalty on the one who does not show up, or whose witnesses do not show up.

Mr. Pepper. I second that. I have found in practical experience that there are a certain number of friendly witnesses who like to have their promise taken at par that they will attend, and some of them take themselves sufficiently seriously to wince a little if you think it necessary to back up your request for attendance and their promise to comply by the formal service of a subpoena.

As the Chairman says, you take a chance if you trust them and they go back on you. That is your fault.

The Chairman. All in favor of adopting that suggestion as a matter of substance rather than form, say Aye; contrary, No. The motion is carried.

Mr. Morgan. Mr. Chairman, I should like to know whether it is the sense of the meeting that we should keep something like this for the purpose of lines 28 to 30, so that this rule will determine the place to get your subpoena.

Mr. Sunderland. I have a draft here which I will read, if you care to hear it, embodying the suggestion of the Chairman.

The Chairman. Suppose you read it.

Mr. Sunderland. "Witnesses who are not parties shall be given reasonable notice of the taking of depositions and may be served with subpoenas issued by the District Court of the

United States in the district where such depositions are to be taken. A copy of the notice to adverse parties, and of the affidavit or return of service thereof, shall constitute a sufficient praecipe for the issuance of subpoenas for witnesses named therein. If a witness named in the notice does not attend because of the failure of the party giving the notice to serve the subpoena upon him, and the adverse party shall attend, the court may order the party giving the notice to pay the adverse party such sum for expenses and attorneys' fees in so attending as may be just."

Mr. Tolman. What page is that?

Mr. Sunderland. That is a substitute for subsection (c) of rule 29.

Mr. Donworth. That is new matter.

The Chairman. Why do you say he shall be given reasonable notice? Is not that pretty vague?

Mr. Sunderland. You would always give him reasonable notice, and you may serve him with a subpoena if you choose.

The Chairman. You have not appropriated in that my further suggestion that if the party giving the notice fails to attend, the other side shall get the expenses of the trip.

Mr. Dodge. I should not think you ought to be required to give notice to the witness before serving a subpoena.

Mr. Morgan. It does not mean that.

Mr. Sunderland. Not before; but if you do not serve a subpoena you give him reasonable notice.

Mr. Dodge. If you get him there voluntarily, of course, you have to give him notice.

Mr. Lemann. Can we not leave the wording of it to the

Reporter and the style committee?

The Chairman. You have adopted the proposal that if the party giving the notice fails to appear, the expenses of the other side shall be charged against him. That is not covered by this draft.

Mr. Lemann. No.

The Chairman. Then we will leave it to you, Mr. Reporter, to recast that rule.

Mr. Donworth. I do not think there should be any provision about notice to the witness, unless he is subpoenaed.

Mr. Morgan. Neither do I.

The Chairman. Neither do I. That makes a vague requirement, and causes trouble.

Mr. Sunderland. You want a provision that if the party giving the notice does not appear --

The Chairman. You will find that on page 9 of my comments. You can refer to it later, I think. I have given you a section of the Minnesota statutes that is a very clear and well-worded provision to that effect.

RULE 30. OFFICERS BEFORE WHOM DEPOSITIONS MAY BE TAKEN. LETTERS ROGATORY.

The Chairman. Is there anything in rule 30(a)?

Mr. Morgan. Did you get my suggestion with reference to lines 5 and 6?

Mr. Sunderland. Which one is that?

Mr. Morgan. Lines 5 and 6 apply only to depositions to be taken outside the United States.

Mr. Sunderland. I thought that was covered here --

"or, if taken out of the United States".

Mr. Morgan. --"before some consul of the United States or notary public or by such other officers as may be appointed by commission or under letters rogatory."

Mr. Sunderland. You made the point that that was not clear.

Mr. Morgan. Yes. I thought it was not quite clear, when you change your phraseology:

--"or, if taken out of the United States, before some consul of the United States or notary public or by such other officers as may be appointed by commission or under letters rogatory."

Mr. Sunderland. Commissions will apply outside the United States. That all applies outside the United States.

Mr. Donworth. You want it to apply inside, too, do you not?

Mr. Sunderland. We do not have any commissions inside.

Mr. Donworth. Such things are known.

Mr. Morgan. I just wanted to make sure what he was doing.

Mr. Sunderland. We are changing the practice, are we not?

Mr. Morgan. He shifts his phraseology, and I did not know whether the shift was intended to be a shift in meaning.

Mr. Sunderland. What I intended was that all those three lines should apply to depositions taken outside of the United States.

Mr. Lemann. You mean lines 4, 5, and 6?

Mr. Morgan. Yes.

Mr. Lemann. Lines 1, 2, 3, and part of 4 apply to depositions taken within the United States.

"Such depositions shall be taken before some officer of the United States or of the State or territory in which the examination is held, who is authorized to administer oaths," --

That is your sole authority within the United States.

Mr. Sunderland. Yes.

Mr. Lemann. Would that cover a notary public?

Mr. Morgan. He is authorized to administer oaths.

Mr. Lemann. Is he an officer of the State?

Mr. Morgan. He is in most States. He is commissioned by the Governor.

Mr. Lemann. He is authorized to administer oaths.

Mr. Morgan. Isn't he an officer? Isn't he commissioned by the Governor?

Mr. Sunderland. I think so. He is under bond.

The Chairman. Is there anything further in connection with subsection (a)?

Mr. Pepper. Would it not make it clearer, to meet the question raised by Mr. Morgan, if you were to end your first sentence in line 4 with the words "to administer oaths"?

Mr. Sunderland. I think so.

Mr. Pepper. And then keep the same form of phraseology as to commissions and letters rogatory?

Mr. Sunderland. Yes. That can be easily fixed.

The Chairman. In subsection (b) I suggest that we ought to disqualify an officer related to a party. It says here that he is disqualified if he is counsel or attorney for either of

the parties, and I suggest that we insert "or related to him" after the word "or" in line 9.

Mr. Sunderland. I think I just took the present statute.

The Chairman. So long as we are specifying his qualifications, we certainly ought to keep out relatives. You do not object to that?

Mr. Sunderland. Not at all.

Mr. Pepper. Do you want to have the disqualification extend, Mr. Chairman, to an employee of the attorney taking the deposition? Sometimes you get notice to attend and take depositions in the office of counsel for the adverse party, and you find that his secretary, who happens to be a notary public, is the person who is going to take the deposition. It always gives me an uncomfortable feeling, which I would rather divest myself of if I could.

The Chairman. How would you word that?

Mr. Pepper. "No officer, otherwise qualified, shall be eligible to act in the taking of depositions by oral examination if he is counsel or attorney for either of the parties, or an employee of either, or is of kin"

or whatever you please. It seems to me that somebody who is on the payroll of your adversary ought not to be the official charged with the duty of taking the deposition.

Mr. Morgan. Suppose he is on the payroll of your adversary's attorney?

Mr. Pepper. I meant to cover that.

Mr. Sunderland. As a matter of fact, very little harm will be done, anyway, because these examiners have no power.

The Chairman. Yes; but they have to transcribe, certify, and return the deposition.

Mr. Morgan. They have the power of reducing the thing to writing, and methodizing, so-called, the deposition.

Mr. Sunderland. It does not have to be signed unless it is satisfactory.

Mr. Donworth. They employ the stenographer.

Mr. Clark. I think the expression "financially interested" is one that causes trouble. Is one who has, say, 10 shares of United States Steel interested in a suit against the United States Steel Company?

The Chairman. There is no difficulty about getting thoroughly disinterested people, and we ought to get them.

Mr. Dobie. They have construed those statutes pretty liberally in connection with witnesses to wills. A taxpayer in the town is not interested in things of this kind. I do not think it would give much trouble.

The Chairman. Then it is the sense of the meeting, I take it, that we will add to the disqualifications employees of the parties or attorneys.

That takes us to subsection (c). I was the one who suggested the idea of having a master on demand, in order to prevent objections from the bar as to fishing expeditions among parties. As this rule is worded, it says:

> "If the adverse party, upon being served with a notice of taking a deposition by oral examination, shall promptly apply to the court for an order that such deposition be taken before a standing master of the court or a special master to be appointed for

such purpose,"

it shall be done.

Might we say that it would be sufficient protection if we require a master to rule on the questions only in those cases where the witness to be examined is an adverse party? I thought perhaps if he were just an ordinary witness he could protect himself fully by refusing to testify and standing on his rights. I think, probably, so long as we are putting this in just to quiet the apprehensions of lawyers, that it would be sufficient if it were limited to a case where you started to examine an adverse party -- and by "adverse party" I mean directors, officers, and agents of a corporation or association, and so forth --

Mr. Lemann. You would have to include employees, and not merely agents.

The Chairman. I have said "agents". That means employees. But limit this right to demand a master to cases where the party or his officers, agents, or employees are being used as a fishing pool.

Mr. Lemann. If you are really worried about that, as Mr. Wickersham was, I think, very much, I am not sure that your limitation would relieve that fear or allay it, because I think if he were here he would say, "Well, I am afraid of fishing expenditions. You may get a fishing expedition by going around to a bank, or a third person, not my employee, and asking a lot of questions that ought not to be asked."

I am not subscribing particularly to that fear, but I am making the point that if the fear is entertained, and you want to avoid it or protect against it, your suggestion would not

leave it sufficiently protected.

The Chairman. Leave it discretionary with the court in other cases.

Mr. Lemann. That would cover it. It is pretty well discretionary now.

The Chairman. We are dealing here with a matter of right. As a matter of right, it ought to be limited.

Mr. Lemann. Does he get it as a matter of right? Do you not always have to satisfy the court by special and unusual circumstances, in line 15?

Mr. Sunderland. The court may make such order.

Mr. Lemann. So that it is always discretionary.

Mr. Loftin. I was impressed with the fact that it put a heavy burden on the adverse party to get an order from the court.

Mr. Sunderland. Should he not be under a heavy burden? As a matter of fact, I do not see how this thing will work anyway. I do not find any authority for these examiners or masters ruling on testimony. The equity rule expressly provides that all evidence taken before an examiner or like officer, together with any objections, shall be saved and returned into court.

Mr. Morgan. I think it would be very unfortunate to let a master rule out evidence.

Mr. Sunderland. I do not think it is ever done.

Mr. Morgan. I think it would be very unfortunate.

Mr. Lemann. That is what the proposal was.

Mr. Sunderland. It is contrary to the universal practice, and it seems to me, if we put in a thing like this, we would be

going backward.

Mr. Morgan. You would be inviting appeals.

Mr. Sunderland. It would be a serious retrogression on our part.

Mr. Dobie. And you make your objection when it comes before the court.

Mr. Sunderland. Yes. Even when you take testimony before a court in another district, to be used elsewhere, the court will not pass upon the evidence. He will take it and let the principal court make the final decision as to whether it is to be used or not.

Mr. Morgan. Are the rules of the forum always applied?

Mr. Lemann. If you are afraid of a fishing expedition, that is no protection.

Mr. Sunderland. No protection.

Mr. Lemann. It is a good deal like agents of the Government, getting any party's private business. I am not arguing that that is really something that ought to frighten us away, but I think we ought to know what the difficulty is, and whether the point you are making would meet the difficulty. I do not think it would at all.

The Chairman. I am inclined to think that my suggestion, which was made to quiet the fears of General Wickersham and others, probably is not a sound one.

Mr. Dodge. I am not so sure about that.

Mr. Olney. I am not so sure about that.

Mr. Dodge. This is a very sore point in those jurisdictions where it is not known. Two of our district judges, in talking to me, have already opened themselves up on this topic,

and said, "I hope, for heaven's sake, you are not going to open up this discovery before trial."

Personally, I am entirely read to vote for it, with proper limitations, but it must be understood that we have to cloak this in such a way as to make it popular in those parts of the country where they are totally unfamiliar with it. The local committee in Massachusetts, for example, voted against this, and, as I say, two of the judges, or one of them, the best judge we have, is most violently opposed to it. The only thing it occurred to me that we might do is to give some power of redress, or some power to make application to the court to check the thing if it obviously is not going right. Is that in here?

Mr. Lemann. Yes.

Mr. Dodge. I do not know.

Mr. Lemann. It is here in a broad way. The point about Mr. Mitchell's suggestion, Mr. Dodge, was that he would have somewhat relaxed, as I understood him, the protection against a fishing expedition by permitting this officer to be appointed only in a case where the testimony to be elicited was by examination of a party. If you had third persons, he was going to wipe out any provision for a master, as I understand it. That would have been in line with Professor Sunderland and Mr. Morgan, because they think there never should be a master.

The Chairman. Mr. Morgan, let me ask you this. It may not have been the practice normally to give a master the power to rule on evidence, unless he is going to make findings of fact, but there is no reason on God's earth why we cannot have a rule --

Mr. Morgan. You can have it, but I question the wisdom of it for this reason. Suppose you get a master who sustains objections to these questions?

The Chairman. Call the witness in court and ask the questions.

Mr. Morgan. That is all right, to call the witness in court, but suppose he is unavailable? These rules apply both to cases where the witness is going to be available and to cases where the witness is not going to be available, and by our own rules we cannot use it as long as the witness is available.

If the witness is unavailable, and you do not let him answer the question, your deposition is just useless. If the master is wrong on that thing, then there is no way of correcting the error.

Mr. Lemann. It would slow things up, but, to meet your objection, how would it do, to try to get everybody somewhat satisfied, to have it this way? Normally, as I read these rules, there would be no master.

Mr. Morgan. That is right.

Mr. Lemann. But there is a protection afforded, that if the fellow against whom the testimony is taken goes to the judge and says, "Now, Judge, my opponent has an order for examination. It is a fishing expedition, and he is going to ask a lot of irrelevant questions, and we want some protection. You see what kind of a case it is. I want you to appoint a master, and I will be responsible for the fees", the judge, if he thinks the fellow is entitled to protection, can then appoint the master. The master in that case takes office, the

question is asked, and the attorney for the defense says, "I object to the question."

The master, we assume, is going to be a high-class fellow. He may overrule the objection. If so, your difficulty does not arise.

Mr. Morgan. Quite so.

Mr. Lemann. You have to assume the master is going to make a mistake.

Mr. Morgan. Yes.

Mr. Lemann. That is assumption No. 1. Let us suppose that happens.

Mr. Morgan. I think that is a fair assumption.

Mr. Lemann. I think that is a little broad assumption.

Mr. Morgan. I think it is fair.

Mr. Lemann. If you have the kind of judge who appoints the right kind of master, it may be a broad assumption. You say there is going to be a lot of harm there. There will be a master appointed, and he will arbitrarily exclude evidence which ought to go in.

Mr. Morgan. I do not say arbitrarily. I say erroneously.

Mr. Lemann. Then the Chairman says, "We will haul the witness up." You say, "Well, that would take too long. He will get away."

I am wondering whether you could then bring in what I understand they do in New York. If the master says, "I think this testimony ought not to go in", the fellow who wants it to go in would say, "Let us go right down to the judge now and let him rule on it." I understand that is what they do in New

York. Am I right?

Mr. Sunderland. They do it in some places.

Mr. Lemann. Ordinarily the objection to that is that it slows up your depositions, but you do not get to that unless your master has made an erroneous ruling.

Mr. Morgan. That is true.

Mr. Sunderland. I think it is a great nuisance to the courts.

The Chairman. Yes; they might be trying cases, and they would have to stop. They could not do that.

Mr. Sunderland. It would not work at all in sparsely settled circuits.

Mr. Lemann. I understand it does not work very well in New York, but they have it. I heard of a case once where it was referred to the judge on the question as to whether he would answer. I understood General Wickersham to say that the judge always makes him answer.

Mr. Sunderland. They have a practice in Wisconsin of running to the judge. As a matter of fact, the judges do not like it, and they make them answer, so they do not go to them much.

Mr. Morgan. You talk about getting the witness later. If this evidence is not preserved now, and the trial does not come up for six months or a year, as it does not in some districts, it is just futile to talk about getting the witness later.

The Chairman. He may be dead or in Europe.

Mr. Morgan. Yes.

Mr. Lemann. That is why I say the Chairman's suggestion might not work. I was trying to make another.

Mr. Morgan. I want the situation so that the answer of the witness is somehow preserved, so that the deposition will not go for naught on this particular thing. If it is a hard-fought case before a master, it will be an exceptional master who does not make errors in his rulings on evidence.

The Chairman. I feel very strongly as I did before. We are going to have an outburst against this discovery business unless we can hedge it about with some appearance of safety against fishing expeditions. Perhaps my suggestion is not feasible. Has anyone another?

Mr. Sunderland. Why can we not put in a provision for a master on application, just to look well, but not put in anything about giving the master power to exclude evidence? That is really the difficult part.

Mr. Lemann. What good is it?

The Chairman. It does not mean anything.

Mr. Sunderland. You have a high-class man --

Mr. Lemann. To sit there and look pleasant. He has no power. You might as well have a low-class man.

The Chairman. You might as well have a notary public and be done with it.

Mr. Pepper. Mr. Chairman, I am not worried about the fishing-expedition aspect of this thing, but, in the part of the country I come from, I know perfectly well that this sort of power given to a plaintiff is simply going to be used as a means of ruining the reputation of responsible people. You bring a suit against a man, without any ground whatever -- the president of some important company, the president of a utilities company or a bank or something. You take his deposition,

have the reporters present, and grill him in the most unfair way, intimating that he is a burglar or murderer, or this, that, and the other. He has no redress, and the next morning the papers have a whole lot of front-page stuff. The case never goes any further. That is all that was intended.

The Chairman. It is too much like some of these Senate committees you used to sit on. (Laughter)

Mr. Pepper. Exactly; and that is where I got a taste of the kind of lawlessness that ruins people's reputations without the opportunity ever to redress the harm that is done.

I do not think there is anything worse than the use of judicial proceedings for the creation of a forum from which, through the newspapers, to harangue the public. The defendant is perfectly helpless. There is no restraint upon the examination. This business of getting a high-class man to sit there and listen in increases the audience for the publication of the slander, but that is all it does.

I do not like the attitude of mind that suggests that the thing to do is to make a vicious practice sound well or look well. It seems to me that the whole thing is vicious, and the only reason I am not worried more about it is that I am morally certain that it will never get by the Supreme Court, I do not care how you dress it up.

The Chairman. It is a system that is in use in a great many States in the union, and has been for years.

Mr. Morgan. It is a system that is growing by leaps and bounds.

Mr. Dodge. In some way the courts must have control over the proceedings, and the power to check abuses. I think that

is more important than any question of reference to a master. In some way there must be opportunity to apply to the court and say, "This man is just summoning the president of this corporation to ransack all his books and papers and he is just keeping it going day after day to force a nuisance settlement out of the company." In three or four days the president will say, "Here, you have to settle this case. I am through with this." In some way the court must have the power to check this.

The Chairman. Instead of providing an absolute right to take the depositions of the adverse party and his agents, servants, or employees, can we not, in all cases where you want discovery from the adverse party, require the parties to go before the court and get an order? That is the New York system.

Mr. Morgan. I think we ought to do it the other way. Allow the party who has been served with the notice, for good cause shown, to prohibit the taking of the deposition by the adverse party.

Mr. Lemann. How will the judge pass upon this?

Mr. Morgan. The same way you do on any preliminary hearing, by affidavits as to what there is to be found in this particular case. It would be a preliminary question of fact, as to whether he was going to use it in good faith for proper purposes or not.

Mr. Lemann. I have not reached any conclusion, but I think that would not mean anything, because the judge ordinarily would have to say, "Here is a lawsuit. The man asks me for an order to examine. The rules provide for it. How can I

assume that he is going to ask a lot of improper questions?"

Mr. Cherry. Could you not supplement that, Mr. Lemann, by a provision that after the procedure of taking the discovery statement, if evidence of that intention appears, then you could go to the court?

Mr. Lemann. That might be.

Mr. Cherry. Have both those things in -- to prevent it or to stop it.

Mr. Lemann. I was wondering whether counsel for the witness could not say to the witness, "Don't answer. This thing is going too far. This is being abused. This thing is obviously improper. He is asking you about your private life on a matter that involves the corporation. Don't answer. We will go up and see the judge about it."

Mr. Morgan. There is nothing to prevent him from doing that, but he would be subject to a motion for punishment for contempt, or an order to compel him to answer. There is a later rule here, when a witness does that, which authorizes the proponent to apply to the judge for an order to compel him to answer the question.

Mr. Lemann. I understand that.

Mr. Sunderland. He runs no risk by the original refusal.

Mr. Lemann. No. I was wondering whether that was the answer.

The Chairman. It narrows the thing down to the question whether a particular question is proper or not. It seems to me that there ought to be a practice -- if you do not adopt this -- by which the question of whether there will be any examination at all is determined. The court will pass upon that by examin-

ing first the pleadings, and get any idea you put in by way of affidavit or whatnot, as to whether the case is a fishing expedition or not. Then he will consider whether the excuse the party put up for wanting an examination was justified, whether there were any instruments or information being withheld from him, that he legitimately ought to have. He can decide not merely whether the question is right or wrong but whether the examination ought to be permitted at all. That is a more fundamental thing than merely passing on the propriety of particular questions.

Mr. Dodge. He should have the power to check it also if it is being abused.

Mr. Morgan. I agree with you.

The Chairman. I think the New York system requires you to go to the court in all cases where you are going to examine the adverse party before trial, and make a showing. That showing gives the court a chance to size the whole thing up. He knows who the lawyers are, and what kind of a case it is, and whether there is anything that ought to be brought out that is being concealed, and all that sort of thing. He can take into account all our other discovery provisions, the means of asking for information, demanding information, and all that, and see whether this drastic method of examining your adversary before trial is really justified. That appeals to me a lot more than giving him the right and then trying to check it at that stage of the proceeding. I think the bar would like it better if you were required to get your authority from the court in advance.

Mr. Pepper. Is there any reason, Mr. Chairman, why the

court to whom application is made in the way you suggest should not have the power, in appointing the master, to give the master such instructions with respect to ruling upon testimony and reporting to the court as to the court may seem meet?

The Chairman. Not only that, but under the New York practice when you make your application and the court sizes the thing up in granting the order, under the statute he is authorized to specify the particular things you are going to be allowed to inquire about. He makes an order defining the things you can fish about.

Mr. Lemann. I see Mr. Sunderland quotes the report of the New York State Commission on Administration of Justice for 1934, as recommending an abrogation of that.

The Chairman. They want it broader.

Mr. Lemann. They want it broader. They want to enlarge the scope of the examination to include all relevant matters, and the elimination of any designation in the notice or order of the specific subject of the deposition.

The Chairman. I think it is quite common in New York to make applications to vacate the order. They keep bringing matters up, wanting to get it limited, vacated, and restricted, and it makes an enormous amount of preliminary litigation, which becomes quite a nuisance.

Mr. Lemann. We might see what they say about it. That report is here.

Mr. Donworth. I think this, as drawn, with some slight amendments, would be pretty good. We are giving to the parties a new method of getting evidence that they never had before. We do not have to give them the whole thing at one time. If

we go a long way in advance, the rule may be made more extensive later. It seems in New York the first approach was only part way. My thought would be to leave this very much as it is. I would not require special and unusual circumstances sufficient to satisfy the court that the deposition cannot be satisfactorily taken before an examiner in order to have the commissioner appointed. I would suggest something like this:

> "If the adverse parties, upon notice, etc., shall promptly apply to the court for an order that such deposition be taken before a standing master or special master appointed for the purpose, and shall show in such application circumstances sufficient to indicate to the court that the deposition can be more satisfactorily taken before such master, the court may make such order and fix therein the time and place."

That does not give the court the right to limit the investigation in advance. It is a general reference so far as the points are concerned, and it just allows the court, on motion showing circumstances, to substitute the standing master for the notary public in some downtown office.

It seems to me if this does not go far enough it can be made to go further later. But let us give them a good, substantial advance, and leave it there.

Mr. Pepper. Mr. Chairman, the difficulty of the suggestion about leave to exclude testimony that is irrelevant, and so forth, is, it seems to me, among other things, that these depositions may be taken immediately the complaint has been filed or served without filing, before the answer comes in.

There is no issue.

A man can write out a summons and complaint and serve it and give notice of depositions. He can put the defendant on the stand and go through the forensic performance that some of us are accustomed to, and never take any further step in the case. He can see to it that that is broadcast on the front pages of papers everywhere. There is not even an issue joined. The answer has not been filed. The time for filing it has not arrived, and there has been no opportunity for the defendant to prepare and file an answer.

The Chairman. That is one reason for making the order by the court defining the issues, because there is no answer.

Mr. Pepper. That seems to me to be essential if you are going to permit this thing to be done before issue is framed.

Mr. Olney. We have been using this practice in California for a great many years. There is the very freest right out there to take the deposition of an adverse party, and has been ever since I can remember. It is not abused in the way in which it has been described here that there is fear that it might be. I have never known of such a case as Senator Pepper has in mind.

We must bear in mind that ordinarily, if it were to be used in that way, it would be used in taking the deposition of an adverse party. What happens there is that whenever a question of a particularly objectionable character is asked, counsel for that party simply instructs the witness not to answer, and that is the end of it, right then and there. They cannot go any further. The official taking the deposition has no power to compel the witness to answer or to rule on the

question at all.

The Chairman. Do you have to get an order from the court?

Mr. Olney. It has to go right up to the court, and he has to get an order from the court to compel him to answer.

The Chairman. In order to take the deposition, you do not have to get an order in advance?

Mr. Olney. No; we just go right about it. There is the possibility of abuse, not in the mere asking of degrading questions of a witness -- and that is what Senator Pepper has in mind -- but there is also the possibility of abuse in the way of dragging out a deposition and harassing them with it. But if that occurs, we can easily cover that by a provision that if that occurs the party whose deposition is being taken shall have the right to apply to the court and have the deposition stopped. But I doubt very much the advisability, from a practical point of view, if we are going to allow the right of discovery, as it should be, and as it will work in the great majority of cases -- I doubt if we should require an order of the court in the first instance. I think the protection can come later. But certainly there should be a broad, free right to examine an adverse party, who is supposed to know something about the issues of the case.

Mr. Dodge. Should it not be restricted to the period after the issue has been raised or formed by the pleadings?

Mr. Olney. They do not even do that. I think that is ill-advised. I can see how this provision for discovery is going to work. The minute a lawsuit is filed each side is going to rush to take the depositions of the other side, the depositions of all the other side's witnesses of whom it knows. That is

what will occur.

Mr. Donworth. That is what they do in the State practice.

Mr. Olney. They immediately take the deposition of the adverse party, and the deposition of every person they think the adverse party may call as a witness. I am inclined to think that if that practice is followed, and is followed immediately, that is, if they go right at it instantly, as a matter of fact it will result in the real facts of the case appearing finally with more certainty than they otherwise would.

Personally, I feel that while we ought to throw about this procedure safeguards that will prevent its abuse, except for the necessary safeguards I think we ought to make it just as free and liberal as possible.

The Chairman. There is one great objection to limiting examination to the strict issues made by the pleadings. One of the purposes of the discovery is to get some information that may result in transforming your issues to some extent.

Mr. Olney. I want to say to Senator Pepper again that we have not had the experience out there that he anticipates, and yet we have some members of the bar who are of the same stripe, I imagine, as you have in some of the large metropolitan cities here. They have no scruples in the world, and they live very largely, to be plain, by blackmail. And yet we have not had this particular trouble.

The Chairman. I was interested, Senator, in seeing the report from the Minnesota committee on this subject, strongly recommending the discovery provision. They have not had it

there. They have had it across the river -- not only examinations after suit was commenced, but examinations before. The lawyers of Minnesota, after crossing the line and seeing how it works over there, want it.

Mr. Morgan. This reminds me very much of the questionnaires of the Commonwealth Committee, sent out to various members of the bar, with reference to the working of rules of evidence. Massachusetts has the most liberal hearsay statute in the country, without any doubt. It provides specifically that evidence shall not be excluded as hearsay if the judge finds that the statement was made by the declarant before the commencement of the action, and in good faith, and the declarant is deceased.

In Connecticut they have a statute that allows self-serving statements of a decedent to be put in in any action by or against a representative.

In New York they have the common-law rule, of course.

We sent a questionnaire to the Massachusetts lawyers to find out how the Massachusetts hearsay statute worked. The approval of the statute was in exact ratio with the experience that the lawyers had had with it. Some of them who had had no experience with it thought it was a dreadful statute. The same thing was true in Connecticut, and when we asked Connecticut lawyers what they thought of adopting the Massachusetts statute, they thought that would be pretty bad. When we asked New York lawyers what they thought of both the Connecticut and the Massachusetts statutes, they said either one would be terrible. As Judge Hough put it, according to New York lawyers perjury must be rampant in Massachusetts and

Connecticut. Everybody was opposed to that reform. As a matter of fact, when Connecticut put in that reform the statute was denominated A Statute For The Encouragement Of Fraud And Perjury, by the lawyers in the State, and yet the experience with it was such that they all approved it. There were about 10 or 15 Connecticut lawyers who had not known about the statute when we wrote to them, and they thought it was terrible legislation. They could not see how it could possibly work.

It seems to me you have the same situation here. Ragland, in his book on Discovery, has interviewed lawyers all over the country on this thing, and corresponded with them. He found there, according to his book, that where the right of discovery was most liberal, it met with the most general approval by members of the bar who had used it. That is quite in accord with Judge Olney's testimony.

Mr. Olney. Let me call your attention to a particular class of cases where this thing is most important. That is personal injury suits. If the deposition of the plaintiff in one of those suits can be taken almost immediately, taken just as soon as the parties can get at it, you are going to have a much truer statement, in all probability, than if you wait until the time of trial, or if you have to go and get an order of court, or fuss about it at all. You are going to be in a position where the party cannot change the testimony, and when you extend that to include taking the deposition of any person who may be a witness, and you know the parties that were there -- all the people that were in the automobile, for example -- and can take their depositions right out of hand, you are going

to prevent a large number of cases that otherwise would finally be brought on perjured testimony.

Mr. Donworth. Mr. Chairman, the discussion here has taken a turn as if there were opposition to this discovery. I do not understand, except for some precautionary remarks Senator Pepper made, which were in point, that anybody is opposing this universal discovery that is proposed here.

The only modification that is now under discussion here is that if the adverse party is to be examined no order of court is necessary at all. You can go ahead and examine him, but he may say to the court, "I think my deposition can be more satisfactorily taken before a master." It is true it goes on, then, with the power to exclude evidence, and so forth, but the whole thing is wide open to ask any question you want to of the adverse party. You can go ahead within three days and do so.

Let us bear in mind the nature of the cases that are going to be brought before the Federal courts, and are brought. In personal injury suits it is true that it will be useful both ways. Judge Olney's remarks are decidedly helpful. There will be litigation between corporations, litigation of the Government against defendants on the Sherman act, and the most far-reaching civil cases of every kind. I do not think it is any serious limitation to suggest that when the adverse party, perhaps amplified by his employees, is to be examined, then, on his application showing cause, the court may appoint a special master.

The Chairman. With power to rule?

Mr. Donworth. Yes; with or without power to rule.

The Chairman. I do not think there is anything in appointing a master unless you give him power to rule.

Mr. Lemann. You favor what is now in here, by limiting it to the case where the party to be examined is the adverse party or his employee?

The Chairman. That is my proposal, and I am going to ask Mr. Morgan if he does not think the objection he raised about erroneous exclusion of evidence disappears to a large extent if you limit this master business to an adverse party.

Mr. Morgan. Yes, I think so.

The Chairman. Because, if it is the adverse party, or his agents, that are examined --

Mr. Morgan. Then we will get him on the stand.

The Chairman. I think that objection disappears.

Mr. Morgan. I think so.

The Chairman. I think if you limit it the way I now propose to limit it, to adverse parties, their agents or employees, your objection is not important.

Mr. Loftin. Is it not so limited now, Mr. Chairman, as drawn?

The Chairman. No, it is not.

Mr. Lemann. I do not think so. The adverse party there means the objector. He can make the objection even though the testimony taken is of a third person. That is why I do not think it would satisfy the people who are worried about it.

The Chairman. It is the adverse party who applies for the master, but he can do it in the case of any witness, as it is drawn. I think it ought to be limited to cases where the person to be examined is the adverse party or his employee.

Mr. Dodge. I think Judge Donworth is wrong in assuming that there is no objection anywhere to this wide-open discovery. I think there would be tremendous objection to it any place where it is unknown and cannot be readily explained. Take the district judges who have spoken to me about it. Personally, I am in favor of it, but I want to see the power of the court to check it established in some way.

Mr. Donworth. I think my statement probably was too broad.

Mr. Pepper. So far as I am concerned, Mr. Chairman, I recognize, in line with what Mr. Morgan has said, that forensic prophesy is seldom verified as made, and I think it is very easy to load up a suggested change or innovation, that is, something that is a novelty in your own experience, with dangers and evils that might turn out subsequently to have been imaginary. But, after all, one has to think of these things realistically, in terms of his own experience and observation. I think it would be unfortunate if all the members of the committee were so much of a mind that there was no danger here that we should fail to put in such safeguards as the Chairman has suggested.

While I frankly say that I am so apprehensive about it that if it were left to me I should not try the experiment at all, yet, that not being the sense of the committee, I am perfectly willing to acquiesce if the Chairman's suggestions can be given effect in the form of an amendment.

Mr. Lemann. He is taking away a limitation, not adding one. I think I am going along with the suggestion, but I do it conscious of the fact that the Chairman's suggestion would

relax the limitation now placed, if I am right. I want to be sure I understand it.

As Mr. Sunderland has now framed the rule -- and he framed it in deference to vote taken last November, when we had a good deal the same kind of discussion -- he has framed the rule so that if the application is made to take anybody's testimony, whether he be the adverse party, or a bank, or a third person, touching some information in the possession of the person against whom the order is sought to be obtained, the other party to the litigation can go to the judge and say, "Judge, I want a master appointed in this case with power to pass upon testimony."

The Chairman is proposing to take that right away unless the person to be examined is the party himself. Therefore, the Chairman's suggestion is taking away some of the supposed protection against the abuse of this right of discovery.

As I sit here thinking, I have about concluded that I approve that. I am willing to relax this in deference to the feeling that we are loading this up with too much protection. But I am conscious of the fact that I am removing some of the protection, and not adding protection, as you thought.

Mr. Pepper. I was referring particularly to what I understood the Chairman's suggestion to be, that the court should have jurisdiction in making the order for the examination to prescribe the subject matter if the application is made in advance of the issue being framed, and to instruct the master along the lines of the exclusion of testimony.

The Chairman. No, Senator. I made more than one suggestion. The original suggestion I made, at the November meeting,

was in order to palliate the opposition to this rule, and prevent abuse. That was to put in a provision that you could examine any witness, as soon as your case was started,on mere notice, without getting any order at all. It was drawn that way; and then I suggested putting in a qualification that when such notice was served, if the adverse party felt that there was some abuse going to result, he could apply to the court for an order appointing a master with authority to take the evidence and rule on the admission and exclusion of evidence.

My suggestion in my notes is that that is too broad, and that that power of the adverse party to demand that a master be appointed ought to be limited to those cases where the adverse party himself is the witness to be examined, or, if the adverse party is a corporation or association, where its officers, agents, or employees are the witnesses to be examined, so that if my formal suggestion is adopted, we would have it this way:

That any party, as soon as the suit is brought, could serve notice to take the deposition of any witness and proceed to examine him. If that witness was the adverse party, or his servants, that party would have the right to demand a master to rule on evidence; otherwise not.

I made a third suggestion here, as an alternative proposal, merely to stop the discussion on it, that if this provision about the master ruling on evidence is objectionable, there might be another safeguard adopted, by adopting the New York rule, that instead of taking the deposition on notice you could apply to the court for an order for leave to take it, with a definition of what you were going to look into. I think that

has met with so much difficulty that they are even trying to repeal that in New York.

I come back to my original idea of having a demand for a master, possibly as a precaution, provided it is limited to cases where the witness to be examined is the adverse party. I think, as Mr. Morgan admits, that that largely obviates the objections he made, as to the results that would follow the erroneous exclusion of evidence. If a master had power to exclude the evidence of any witness, there would be trouble. I can see that. Where this master only comes into being if you have an adverse party or his agents, then there is no great harm done if the master improperly excludes evidence, because the adverse party or his agent can come into court and offer that same evidence.

Mr. Pepper. I agree, Mr. Chairman, if there is sufficient limitation so far as concerns those who may apply for the master, if it be limited to the adverse party, having regard to the proposition that if the adverse party is a corporation, the officers of the corporation are included in that term. I agree to that.

I would prefer to have the provision such that there must be an order to take the deposition before it can be taken at all; but, as that obviously is not the sense of the committee, the next best thing is your suggestion, that the adverse party should have a right to apply to the court for the appointment of a master, with power to exclude evidence. The only difficulty I have is that I do not know by what yardstick the master will measure the relevancy of questions put, because, by the terms of the proposition, no issue has been framed, and it is

as wide-open as the sky.

The Chairman. When we are talking about authorizing the master to receive or exclude evidence, should we not put a sentence in there to make it clear that it is not a question of admissibility under the pleadings?

Mr. Lemann. Is it not relevancy under the petition? You have to say one of two things. The petition or the bill has been served. If the particular allegation is admitted, in that event you need not worry about their taking testimony. You can stop right there and say, "I am going to admit that." Or, if it is denied, the relevance is to be determined by reference to the petition that has been served. I cannot see, really, that the absence of the answer can cause you any embarrassment in applying the word "relevance". "Relevant" means with reference to the petition. You have to assume it is all going to be either admitted or denied.

The Chairman. Suppose there is an affirmative defense, like a release, or something, and the discovery is intended to discover whether there has ever been anything of the kind.

That is not a very good example.

Mr. Pepper. The complaint may be full of matter which, upon motion, will be stricken out as scandalous and impertinent, but this deposition will take place before there is ever a chance to make such a motion as that.

Mr. Lemann. You have to act a little quickly, and say, "I am going to file a motion to strike this. Don't answer until the court has passed on it."

Mr. Pepper. I feel that I have taken up too much time already, which I ought not to have done, for the reason that I

was not a member of the committee when the question was originally discussed, but I just wanted to make my position clear, recognizing that I may be raising ghosts where there is no justification for it, but desiring to have all the safeguards the committee is willing to recommend.

Mr. Sunderland. The particular difficulty you suggested, Senator, by way of publicity as a result of the discovery examination, is one that does not actually occur very often, but I think it should be provided against by a rule that upon the request of either party the officer taking the deposition should exclude from the room where the deposition is being taken all persons not immediately concerned with the taking of it.

Mr. Pepper. Our judges would never make a rule like that.

Mr. Morgan. Is not the protection the one Judge Olney spoke of? If the questions are impertinent and do not relate to the merits, if it is the adverse party counsel will tell him not to answer, and then the only way you can determine whether or not he has to answer is by an application to the court for an order to compel him to answer. Then the whole thing will be threshed out before the court, and no answer will be given until the court orders him to answer. There the whole thing can be handled that way to protect against abuse. Certainly if I were appearing for an adverse party he would not answer if the questions got out of bounds, until the court told him he had to.

Mr. Pepper. Of course, there is a lot in that. It is all a question of whether the thing is going to work out happily and decently, and in sportsmanlike fashion, the way it

evidently does in California, or whether it is going to work out along some such lines as I perhaps mistakenly apprehend.

But if it works out the way I venture to apprehend, the publicity is: "Important Question Asked of President of X.Y.Z. Company. Corporation Attorney Instructs Witness Not to Answer."

Where are the liberties of the citizen, and all that? That is what you get in the newspaper the next day, and it is a lot worse than if you answered, because the question might be susceptible of being answered No.

Mr. Dodge. I am not accustomed to having depositions taken in public.

Mr. Pepper. They always are with us.

The Chairman. Is not that a Constitutional requirement?

Mr. Pepper. They will have half a dozen newspaper reporters hanging around, because it is a political move. That is the purpose of it.

Mr. Lemann. That will ordinarily not be the case here.

Mr. Pepper. No.

Mr. Lemann. In your Government cases, to which reference has been made, the Government gets everything it wants anyway, in advance. They summon all the investigators down, and have all the correspondence and files, before they try the case, so I do not think you need to worry much about that.

Mr. Pepper. I feel that I must apologize for taking so much of the time of the committee.

Mr. Olney. I have this suggestion which occurs to me as the discussion has gone on. Of course, we want all proper safeguards, and, as Professor Sunderland has said, it should be

apparent on the face of the rulesthat there are safeguards, so that they will appeal to the members of the profession who are not acquainted with this practice. I think that suggestion is worthy of consideration. You might provide, for example, that while the party need not get an order of the court in order to examine the adverse party, any adverse party at a deposition may always have the right to appeal to the court to stop the deposition on the ground that it is not being taken in good faith, or that it is going into irrelevant matter, deliberately so and intentionally so, or that it is being used for the purpose of degrading the witness, or the party, and things of that sort. Give the party the right to appeal to the court to stop the deposition then and there under those circumstances. It is well to add something of that sort to meet objections.

The Chairman. Instead of having the master provision?

Mr. Olney. Yes.

Mr. Dodge. I would lik to ask a question, the answer to which would help me to argue this case when I go back to Massachusetts. In how many States have they this wide-open practice, and to what extent have there been objections from the bar in those States? Do you know, Mr. Sunderland?

Mr. Sunderland. What do you mean by the wide-open practice?

Mr. Dodge. This practice of the free taking of depositions of adverse parties and witnesses everywhere.

Mr. Lemann. Without a master to exclude testimony.

Mr. Sunderland. This practice is used essentially in this form in perhaps 12 or 14 States, very liberally. There are only two that make any effort whatever to provide for taking it

before an officer with power to rule. Those two are Wisconsin and Missouri. In Missouri, in cities over a certain population, you may, by special request, have the deposition, by order, taken before an officer authorized to rule. In fact, it is used very little.

In Wisconsin they provide that the commissioner who takes the deposition shall have power to rule. As a matter of fact, he does not. He lets things in, and if the point is made, reference may be made immediately to the court, but that is not very often done, so that practically, in the only two States where the practice is permitted at all, it is almost never used.

The other States have no provision at all for taking any deposition before an officer qualified to rule on the evidence.

Mr. Lemann. You just take it before a notary public, and everything goes.

Mr. Dodge. It is a new thing, and it has been spreading very rapidly.

Mr. Sunderland. Yes.

Mr. Dodge. To what extent is there opposition from the bar in those States?

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Mr. Dodge. Do they have this complaint in Washington?

Mr. Donworth. No, it is popular there.

The Chairman. I have practiced law within a block of Wall Street, and I have not heard any complaints. My observation since I have been there is that they squirm a little bit and wish the fellow did not have a way of finding out the facts. But I do not know of any abuse that has occurred.

Mr. Donworth. In my remarks I mentioned that I thought this meant that there was no limit except in the case of the adverse party, himself. I thought that the whole thing was open to others, and I think that we must help Mr. Dodge and others sell this idea to their judges and clients in the conservative states. So I do think that it is a reasonable safeguard to provide. I may be in error, but I thought Judge Olney assumed that this suggestion here was that it was the adverse party for whom a court order was required.

Mr. Olney. No, I did not assume that. Personally, I think it is just throwing a perfectly useless obstruction in the way of properly taking the deposition of adverse parties, to require a court order in advance.

Mr. Donworth. No; that has not been suggested by anyone. What has been suggested is that after the service is made of the notice that the deposition will be taken at a certain time, then the adverse party may apply to the court for an order for the deposition to be taken before a master, on the showing of special or unusual circumstances.

Mr. Olney. It would seem to me that at that very time they might present evidence to show that the request was not made in good faith, but for the purpose of degrading the party.

And under those circumstances the court would have the right to stop the taking of the deposition, if that safeguard were in there.

The Chairman. I have three propositions which I think will narrow down the field. I am going to put three questions.

The first one is the provision that the provisions pertaining to the master be stricken out, and that the protection shall consist only of an application to the court to stop the examination, or limit it.

The second proposition is to leave out the power to apply to the court to stop the proceedings as bad, and leave in only the provision for the appointment of a master, and limit it to the case where the witness is an adverse party, or his employees.

The third proposition is to retain the provision pertaining to the master, limit it to the adverse party, and add to it the further precaution that in all cases where a master is applied for but cannot be obtained, then you can apply to the court at least to correct the situation.

Those are the three propositions. Do you wish to vote on them one at a time?

Mr. Lemann. Let us take the third proposition first.

The Chairman. All right. Let us take the third proposition first, then. That involved having a right to demand a master when the witness or adverse party is served.

Mr. Donworth. With power to rule on the evidence.

The Chairman. Always; plus the right, where a master is not appointed, to apply to the court for protection.

All in favor of that double check, say aye.

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(Chorus of ayes.)

The Chairman. Those opposed?

2 (Several noes.)

(The chairman declared the motion carried.)

The Chairman. Well, then, that settles the other two. That would mean that section C, Mr. Reporter, would have to be modified to limit the right of the master in the case where the witness is an adverse party, or his officer, agent, or employee--and do not limit it to associations or corporations--plus another clause that where a master is not allowed or the court refuses to grant one, the party shall have a right to apply to the court, on the showing that the privilege is being abused, and ask to have it checked or limited. That is the substance of it.

Mr. Dodge. How about the employee of the individual party, if you have the employees of the corporations?

The Chairman. I think so, because a man's books, papers, effects, and business may be in the hands of an employee.

Mr. Dodge. It should be the employee of either party.

The Chairman. Oh, yes. Because you can do as much damage by fishing around with a man's employee, as you can with him.

Mr. Dobie. For instance, I am your secretary, Mr. Dodge, and you are enormously rich and even more powerful than you are now. And that is exactly the kind of case that we are taking care of.

The Chairman. Have you finished?

Mr. Dobie. All right.

Mr. Donworth. "(c)", as drawn here, imposes such a

stringent finding upon the judge that he will never make the order. The condition is that the adverse party who wants the deposition taken before a master "shall show in such application special and unusual circumstances sufficient to satisfy the court that the deposition cannot be satisfactorily taken before an examiner as provided in the preceding paragraphs."

I think it should be in the discretion of the court.

Mr. Dodge. To show good cause therefor.

The Chairman. Yes; good cause shown.

And in your additional rule, do not forget to make the application to the court for help, apply not only to those cases where a master could be appointed, but also to those where an application for a master has been refused; in other words, in a case where there is no master.

Mr. Sunderlan. In every case where there is no master.

The Chairman. Yes.

Well, we cannot anything more with "(c)", then, until it has been re-drafted.

Is there anything in section (d), rule 30? If not, we shall pass to Rule 31.

RULE 31
STIPULATIONS REGARDING DEPOSITIONS

The Chairman. Did you read my substitute for that?

Mr. Sunderland. Yes. However, I did not think it was quite broad enough.

The Chairman. I made it read this way:

"The parties to any action, by stipulation in writing, may agree upon any other mode of taking

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depositions, either within or without the District, and when so taken they may be used as if taken as provided in these rules."

Mr. Sunderland. I think that is rather narrow.

The Chairman. I wanted it narrow, because I did not want the parties starting to take a deposition within a one hundred mile limit, without the court's approval.

Mr. Sunderland. But this is a discovery deposition, and our theory is that we shall take a discovery deposition anywhere.

Mr. Morgan. But you say "when so taken, may be used."

Mr. Sunderland. Well, "with the same force and effect as though taken in accordance with the special provisions of these rules."

Mr. Tolman. I believe that I do not find any place where a judge may order a deposition taken, on his own notion. I have known that thing to be done. Sometimes a judge wants evidence that he cannot get except by depositions. Would it do to consider putting such a provision in that: "or the court, on his own notion"?

Mr. Sunderland. There is quite a good deal of controversy as to whether a judge has power to order witnesses to come in. We had a case in the federal district court in Detroit, not long ago, where a party sat in the court room throughout a long six weeks' trial and did not testify. And the jury was unable to agree. The court felt that if that party were put on the witness stand, the difficulty might be removed. He asked counsel to put on that party, and counsel refused. Then the judge called him, on his own account. And the judge was right,

for the jury was then able to decide the case. But it was reversed by the court of appeals.

Mr. Morgan. Yes; but it was because the court of appeals said that if the judge had done that before the jury went out, 3 that would have been all right, but he did it in too dramatic a manner. The jury had been out, you see. But the whole thing left me a little sick at my stomach.

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

Mr. Morgan. I tried to get some adverse comment on that, but I could not get any.

The Chairman. It is one thing for him to put on a witness who is in the court room; but I do not want any judge ordering me to travel around the country and take depositions of any witnesses I do not want. We are talking about depositions here, and not jamming on a witness who is in the court room. I think it would be an outrage for a judge to be able to force you to travel around and take depositions.

Mr. Dobie. Is there any question in your mind about the power of the judge to question witnesses?

Mr. Sunderland. Whether he could question witnesses?

Mr. Dobie. Yes.

Mr. Sunderland. None of these rules deals with it.

Mr. Morgan. No; we do not deal with it at all.

Mr. Donworth. Isn't it done every day?

Mr. Morgan. Yes; it is done every day. And the federal courts used to say, all the time, that it was all right and that the sky is the limit. But they are getting more and more conservative; and you know that in a good many states the judges cannot indicate their opinions to the jury. And if the

examination is conducted in a way to indicate the judge's opinion to the jury, the case is upset.

Mr. Lemann. Not in the federal court.

Mr. Morgan. Not yet, but they are putting on the brakes all the time.

Mr. Dobie. How about the jurors' asking questions?

Mr.Sunderland. We cannot deal with it. They always have that power.

Mr. Morgan. A man did that in Boston, the other day, and they dismissed him from the jury.

Mr. Dobie. Some years ago, down in Norfolk, they were trying a case under the 18th amendment. And a juror asked the court, "May I ask a question, your Honor?"

And the court said, "Yes."

And the juror said to the witness, "What kind of a still do you use?"

And the witness said, "Copper."

And the juror then said, "That is all I want."

And the man was acquitted!

RULE 32
EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS

TheChairman. The next one is Rule 32. I shall give someone else a chance to speak about that first; I have been taking the "first shot" right along here.

Mr. Loftin. Have we finished with Rule 31?

The Chairman. Yes.

Mr. Olney. Well, there are some very minor things there. I think that after the words "in the oath administered," you might include "or in the return of the deposition." There is

sometimes a defect in there. On the other hand, the words "while the deposition is being taken" should be cut out, so that the order should be "unless objected to seasonably," without this limitation of "while the deposition is being taken."

So, he is required to make the objection seasonably; and of course if it is an objection to a question, he has to make that right at the time. It could not be seasonable otherwise.

The Chairman. Well, I said something more:

"It seems this will have to be considerably revised. In the first place, it assumes that the adverse party is always in attendance at the taking of the deposition and there available to make objections as to irregularities."

Now, a man ought not to be required to go there and attend, just to make objections. Because often he can, but he does not attend.

Mr. Olney. I should say that if he wants to stay away, he practically waives his right to make objections.

The Chairman. He waives his right to make objections as to anything that could be corrected at the time, as to form, and so on.

Mr. Olney. Yes.

The Chairman. But suppose the evidence is incompetent and wholly irrelevant.

Mr. Olney. Oh, no.

The Chairman. This proceeds on the theory that if he does not object to it there, he is gone.

Mr. Dodge. This has nothing to do with the testimony;

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it says "he may."

The Chairman. But why let his objection to the notice wait until the deposition is being taken? If the notice which is served on him is defective, why shouldn't he object?

4 Mr. Sunderland. I thought that your objection there was valid, and I drafted a point on that.

The Chairman. All right. Now,"many valid objections as to the manner of taking, certifying or returning the deposition are first apparent after the deposition is filed. If there are such, the adverse parties should be required to move to suppress within a fixed time after notice of the return of the deposition to the clerk. See Rule 73-B, of rules proposed by Minnesota Committee."

Mr. Sunderland. It seems to be a bad policy to suppress a deposition after the taking of it, merely because of some formal matter which had nothing to do with the matter taken.

Mr. Morgan. Yes; I think so, too.

The Chairman. Suppose the officer fails to certify to the deposition; suppose the witness fails to sign it: How can you make that objection at the time the deposition is being taken? It is not apparent until its return.

Mr. Dodge. We are striking out the words "at the time the deposition is taken," and just leaving it "seasonably."

Mr. Olney. And "seasonably" relates to the character of the objection.

The Chairman. I think that is too broad. Because, suppose you return a deposition and there is a substantial defect in the way it has been signed, certified and returned: Now, you say "seasonably." What is "seasonably"? I say

that the rule that is generally adopted in codes and statutes ought to be provided to fix what is "seasonably." Let the other fellow serve notice of filing, and then he has to make that within three days, giving his opposition to the filing, so as to warn his adversary. Whereas if you leave it open to "seasonably," he may delay and drag along and lay a trap for his adversary.

Mr. Sunderland. If it could not be shown that any of these facts impaired the value of the deposition in any way, then I do not think that such matters of form should be allowed to interfere with it.

Mr. Morgan. Suppose the deposition is not signed, but it is evident that the lack of signature does not affect the character of the testimony: Now, why should that be suppressed?

The Chairman. I take it for granted, Mr. Morgan, that when you put in a provision that the deposition is to be signed either on one page or all pages, and say nothing more, then you have already provided that if that is not done, the deposition cannot be used.

Mr. Morgan. Well, that is just the point.

Mr. Lemann. If you say nothing more. But lines 13 to 18 say a good deal more. And I did not suggest that Mr. Mitchell's comments suggest taking them out.

The Chairman. No; I am not adding anything to the grounds on which you can object to a deposition--not a bit. If the objection is not one that is substantial, then under this rule it does not count. But suppose you have objection that is not an immaterial matter, under this rule: Then, when are you

going to raise it?

And I think that some of the objections are not discoverable until the deposition is filed.

Mr. Morgan. I am sure of that.

The Chairman. And this rule makes it necessary to raise the point when you are taking the deposition.

Mr. Lemann. Could we ask the reporter to provide that any objections which could be cured at the time of the taking of the deposition, must be made there; and other objections, not discoverable at that time, should be made within five days after the deposition should be filed; and then leave "(c)" as it is?

So, any objections that could have been made at the time the deposition was taken, if not taken then, are waived. Other objections must be made within five days after the deposition is returned.

The Chairman. You would return the suggestion, too, that an objection as to the sufficiency of the notice ought to be made before the taking of the deposition?

Mr. Lemann. Yes.

Mr. Morgan. Yes, sir.

The Chairman. Well, I have nothing more to say about that.

Mr. Olney. It really comes down to defining what is meant by "seasonably." And I think that that is a matter of drafting.

Mr. Donworth. Of course, I think that the matter of certification should be considered. Could an objection to certification have been made at the time? I suppose it could have, if the party stays there to see.

The Chairman. It may take two or three days or a week to transcribe it.

Mr. Donworth. But the court may say, "You could have stayed there and done that."

Mr. Lemann. I assume that you will take care of that.

May I ask if there is any provision here as to when a deposition shall be returned? Can a man, taking a deposition, hold it a month?

Mr. Sunderland. The officer is compelled to send it in promptly.

Mr. Olney. Do you have any method of compelling a man to sign it?

Mr. Sunderland. No; the officer sending in the deposition then endorses on it the fact of the refusal and the reasons, if any given.

Mr. Pepper. Does it imply that "sworn" means any substitution for an oath, such as affirmation?

Mr. Sunderland. I particularly left out the details as to that; I thought it was foolish to put them in.

Mr. Pepper. Of course, there are so many of the members of the Society of Friends in our section, and who will not swear to any sort of document or deposition, that the clerk customarily says "swear or affirm."

And I take it that any court will interpret this as meaning that.

Mr. Sunderland. I suppose so.

Mr. Olney. In line 11, I think that the expression "fraudulently concealed" goes altogether too far: "The disqualification of the officer will be deemed waived unless

such disqualification was fraudulently concealed from the party desiring to make such objection."

It seems to me that this should be, "unless such disqualification was known or should have been known to the party making the objection." The use of the words "fraudulently concealed" practically destroys the waiver.

The Chairman. Yes.

Mr. Sunderland. It seems to me that the party ought to take some affirmative step to find out.

Mr. Olney. The rules specify that the officer taking the deposition be one not related to any of the parties or with any interest in the litigation, and should be a disinterested party. Now, it is the duty of the party taking the deposition to see that the officer is of that character. And if he is not, and the other party is ignorant of it, the other party has a right to rely on that presumption. And if he is ignorant, he ought to have a right to object when he finds it out.

The Chairman. You could cover the whole thing by saying, "if known at the time, must be made before the deposition is entered into."

Mr. Olney. Yes.

The Chairman. But that is not very good, either.

Well, is it the sense of the meeting that the qualification may be insisted on, notwithstanding that the objection was not made at the time the deposition was taken, if it is unknown to the adverse party?

Mr. Morgan. That is subject to the qualification of (c), is it?

Mr. Sunderland. Yes. That will probably save the

deposition, in the ordinary case, even though there was an otherwise fatal defect in the application of the rule.

Mr. Lemann. In section A-6, sub-paragraph 4, there is a ruling bearing on that.

The Chairman. Then we can pass to Rule 33-A?

RULE 33
CONDUCT OF ORAL EXAMINATION. PREPARATION OF RECORD.

Mr. Olney. I have a suggestion there that has been born of sad experience: In the first place, the witness should be permitted to correct his deposition. Frequently it is taken down and transcribed incorrectly--usually in minor particulars, but sometimes in a major particular. I have known it to happen.

Furthermore, I have seen cases where a perfectly truthful witness testified in such a fashion that, reading his testimony, it did not say what he really intended to say, or what the fact was, at all. Now, he should have the right to correct his testimony. That is always allowed. It is allowed under our Code, especially.

Mr. Dodge. Correcting errors in the transcription of what he said?

Mr. Olney. Not only that, but changing the testimony, too.

The Chairman. Conceding that, don't you think the reason for his corrections ought to be noted on the margin?

Mr. Olney. I am coming to that point, because that is not covered by our Code, and should be: Namely, that when a correction of that character is made, the officer should note the correction and he should note the reason given for changing

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it. The explanation should be right there on the face of the record. It makes all the difference in the world.

I have seen this right to correct the deposition used to make a complete change in the deposition of the witness, and after the lawyers have gone over it. And you want a witness to state why he changes his testimony, and what explanation he has, and why he gave the testimony in one way in the first place, and now undertakes to change it, when he comes to sign it.

The Chairman. Is it the sense of the meeting that the provision be inserted that if the witness demands the right to change his testimony, the reasons for the changes be put in?

Mr. Olney. That is my motion.

The Chairman. All in favor say aye.

(A chorus of ayes.)

The Chairman. The motion is carried.

Mr. Donworth. In line with Senator Pepper's suggestion, I think it would be wise to insert "or affirm."

Mr. Pepper. Mr. Hammond calls my attention to the fact that Equity Rule 78 specifically makes that statement, "or a solemn affirmation." So this conforms to the equity rule.

The Chairman. I should like to ask whether it is desirable to have the witness sign each page or sheet. A great many codes require that. It is only a precaution against substitution.

Mr. Dodge. I should not think so.

The Chairman. You would not think so?

Then, is it necessary to provide expressly that the

signature of the witness may be waived? I have often done that, where the witness is going away and where you trust everybody; and you waive his signature.

Mr. Olney. Yes.

The Chairman. Now, is it necessary to say anything about it? The court would admit it, then; and if the stipulation had been filed, he would say that, under subdivision (c), that was not a serious defect.

Mr. Morgan. I have had some oral stipulations that were not just as good as writing, I will tell you right now.

Mr. Donworth. In line 10, after the word "refusal," you might state: "The signature of the witness may be waived when so indicated in the record."

Mr. Sunderland. It is perfectly easy to state that the fact of the waiver, and also the reasons therefor, shall be set forth on the record.

The Chairman. All right. Is there anything else in section (a)?

Then let us pass to section (b).

Mr. Olney. I am going to ask Mr. Sunderland, there, if the word "party" in the second line and in the fourth line should not be "witness":

> "During the time of the taking of depositions by oral examination on behalf of any party."

Mr. Sunderland. That refers to the party who was urging the taking of the deposition.

Mr. Olney. I believe I have read this too hastily. No, it is the "party," in the 19th line:

> "During the time of the taking of depositions by

oral examination on behalf of any party, the adverse party may give notice in writing to the party taking the same that he will, at the completion of such depositions, take the deposition of such party."

Should it not be "such witness"?

Mr. Morgan. I was mixed up on that. Did you read my comment on that?

Mr. Sunderland. Yes, I did. And I thought that your draft was all right, and made it clear.

The Chairman. I object to notice of giving notice of depositions. The rule ordinarily is that at any time after one party has given notice of taking depositions on oral interrogatories, his adversary may serve written notice that he will take the testimony of witnesses, naming them, at the same time and place, after the other depositions are completed, and thus giving him advance notice, in other words.

Mr. Sunderland. You can always do that, under our general rules. But this is a special notice to be given at the time of the taking of the deposition, where you have not given advance notice.

The Chairman. But your general rule would not quite help you, as to the time, if I give you notice that I am going to take a deposition at a certain time and place, and I have to give you three days' notice, plus one additional day for every 300 miles. Now, after you serve notice on me and after I have taken the train, and after the time has gone by, then I can serve another notice on you.

Mr. Sunderland. I see. You can simply reduce the time?

The Chairman. Yes. It is quite common. If one man

serves notice of taking depositions, and serves notice of a certain time and place, the other fellow can plan to take other depositions at the same time. But he does not have to give notice, because the other man is present, anyway.

Mr. Morgan. If a party is personally present at the time of taking of the deposition, the other party may notify him, then and there, that he will take the others deposition at the close.

The Chairman. Yes.

Mr. Lemann. You give me notice that you are going to examine Mr. Smith; and when you have finished examining Smith, I give you notice that I will examine Morgan.

Mr. Morgan. No. I have drafted it this way:

> "Any party to an action personally present at the taking of a deposition by oral examination of another party or witness may then and there be served with a notice in writing that his own deposition will be taken before a designated officer at the same place immediately upon the completion of the deposition or depositions then being taken."

Mr. Dodge. What is the advantage of that?

The Chairman. The adverse party's deposition cannot be used at the trial, anyway, unless it is impossible for him to attend.

Mr. Morgan. But this is for discovery:

> "Any party to an action personally present at the taking of a deposition by oral examination of another party or witness may then and there be served with a notice in writing that his own deposition will be taken."

Mr. Dodge. What is the advantage of that?

Mr. Donworth. You must not have your client present at the time of taking these depositions, or they may put him on the witness stand.

Mr. Lemann. He does not have to be there.

Mr. Sunderland. I think that is true, and I think that Mr. Morgan's draft covers the point.

You have your party right there, and why shouldn't you examine him, right then and there?

Mr. Lemann. But why should it be tied down to the examination of the party? That might develop, during the examination of the witness. I might want to tie down the party, in connection with the examination of the witness; and if the party is out there, I might say to him, "You have taken the testimony of my witness, and now I want to take the deposition of your party."

Mr. Morgan. No; a party who is present at the oral examination of another party or a witness, may have his own deposition taken.

The Chairman. By the adverse party.

Mr. Morgan. Yes.

Mr. Sunderland. Read your draft; I think it is clear.

Mr. Morgan (reading):

"Any party to an action personally present at the taking of a deposition by oral examination of another party or witness may then and there be served with a notice in writing that his own deposition will be taken before a designated officer at the same place immediately upon completion of the deposition or depositions then

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being taken. The deposition of the party thus served with such notice by any other party to the action shall be taken as stated in the notice."

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in the notice."

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Mr. Olney. Is that the only time you can take his deposition?

Mr. Morgan. Oh, no.

Mr. Olney. Do we provide for repeated depositions of the same witness?

Mr. Sunderland. But otherwise, if you wanted his deposition taken, you would have to give three days' notice. But by this means, you can examine him then and there.

Mr. Donworth. It means that any notice for a deposition includes the deposition of the adverse party, if he happens to be there.

Mr. Lemann. And he will just keep away, if he does not want to be exposed to that.

The Chairman. I think that all we need is the common definition that where one side gives notice of taking depositions, fixing time and place, the other may counter with a notice to take other witnesses at the same time and place, notwithstanding that he could not give them the required time and notice -- or something to that effect.

Mr. Lemann. But he would have to give the counter notice immediately. I think he ought to give that counter notice as soon as he gets the first notice -- within 24 hours afterwards.

Mr. Olney. However, this matter is not of any importance.

Mr. Morgan. Not at all.

Mr. Olney. And we have rules to take care of it, anyhow; so I should prefer to leave it out.

Mr. Morgan. So would I.

Mr. Cherry. So do I.

Mr. Loftin. Mr. Cherry moves to leave it out. I second the motion, Mr. Chairman.

The Chairman. Perhaps you are right; but I have often seen that done. We have given notice of taking of depositions, and the other party has come back and said that he is going to take depositions at the same time. But by that time, the three days have gone past, and also the time for each 100 miles.

Do I have leave to strike it out?

Mr. Cherry. My motion was directed to the provision about the written notice.

Mr. Sunderland. Just to strike out section (b)?

Mr. Cherry. Yes.

The Chairman. That relates merely to the business of taking the adverse party's deposition, and that he has to show his face there.

Mr. Cherry. Yes.

The Chairman. It is moved that that be stricken out. All in favor, say aye.

(Chorus of ayes, and the motion was declared carried.)

Mr. Donworth. Section (c) is something like that -- something in the way of a joke:

"Any witness, whether a party or not, when called for oral examination by one party, may be examined on behalf of any other party".

That is perfectly routine, and all right. But next we have this:

"and any party, present at such examination, may then and

there have his own deposition taken by oral examination." That is, a party, without letting you know that he is going to take the deposition, may take it at the time and place when and where he is taking another deposition.

The Chairman. You ought to know, and he ought to give notice of it.

Mr. Olney. I move that all of section (c), after the second word "party" in line 25, be stricken out.

Mr. Cherry. I second the motion.

The Chairman. All in favor, say aye.

(A chorus of ayes, and the motion was declared carried.)

Mr. Dodge. How many times can the deposition of a party be taken by the adverse party? I do not see any distinct limitation.

Mr. Cherry. There is none.

Mr. Dodge. It can be done on more than one occasion, can it?

Mr. Cherry. Surely.

Mr. Dodge. A party may terminate the deposition, and then give another notice?

Mr. Morgan. You get him down, the first time, and then you cross-examine him on his first deposition.

RULE 34.

CONDUCT OF EXAMINATION UPON WRITTEN INTERROGATORIES. PREPARATION OF RECORD. OBJECTIONS TO EMPLOYING THIS METHOD.

The Chairman. Now we are down to Rule 34. I thought that four days is too short.

Mr. Pepper. Sometime ago we transferred from another

rule to this rule that note and reference to interrogatories or letters rogatory.

Mr. Lemann. Yes; we voted to do that in connection with an earlier rule. We voted to take the references about interrogatories from Rule 29 and put them over here. You have a note on that.

Mr. Sunderland. Yes; I have a note for that.

Mr. Morgan. Yes; that can easily be done. You practically have that provided for, here, have you not?

I have that in the proposed re-draft of Rule 34 (a):

"When a party serves notice, under the provisions of Rule R-29, of the taking of a deposition upon written interrogatories, he shall serve therewith the written interrogatories".

Mr. Sunderland. Yes, I have that.

Mr. Morgan. You have that?

Mr. Sunderland. Yes.

Mr. Morgan. That is taken care of.

Mr. Sunderland. Yes, that is all right.

Mr. Loftin. Mr. Chairman, in my state you can file redirect interrogatories.

Mr. Sunderland. You have only a plan for written interrogatories; you do not have the oral examination, do you?

Mr. Loftin. Yes.

Mr. Sunderland. You have them both?

Mr. Loftin. They can, and do, at the time of taking the deposition on the written interrogatories. And either side may supplement it by oral examination.

Mr. Sunderland. Do you have the original scheme of

citing for oral examination?

Mr. Loftin. No.

Mr. Sunderland. It seems as though, since we have both systems here, if the matter is complicated we had better start with the oral examination.

Mr. Lemann. Yes, I think so. And then you have section (c) here, which provides that if the application is to take it on written interrogatories, then you can go to the judge and say, "This is the type of witness who should be cross-examined."

The Chairman. Why bother to go to the court and get an order? Why not get on a train and go out there and cross-examine him?

Mr. Lemann. Then there must be a provision as to when the testimony is to be taken. But ordinarily when you take the written interrogatories, you did not fix a time, and the witness just takes it at his convenience. But if you have the other arrangement, you have to give notice when he is to appear. And I think that it is better to leave it to the judge, and let him say, "You have to specify, in this particular case."

The Chairman. I think that you are right.

Mr. Olney. We also have a right to examine orally. Now, if you do not give notice that you are going to examine orally, I think that you are opening the door for all kinds of chicanery.

I objected to paragraph (c) because it apparently contemplates that the interrogatories and cross-interrogatories are going to be submitted to the witness, without either party

knowing when.

Mr. Lemann. No. If I go to the court and say, "Judge, I have notice that there is a witness to be examined on interrogatories by my opponents, but I think he should be examined orally" ---

Mr. Olney. (Interposing) That is in section (c)?

Mr. Lemann. Yes.

Mr. Olney. Then I have no objection, whatever.

Mr. Lemann. It seems to me it gives all the protection you need.

Mr. Olney. It does.

Mr. Lemann. I think I mentioned, here, that the party should have that right.

The Chairman. No; he mentioned it, and I withdrew it.

Mr. Olney. I shall repeat the objection I had with regard to "(b)"; Apparently it is provided, there, that the interrogatories and cross-interrogatories shall be submitted to the witness by the officer by whom they are sent, without any notification to the parties of the time and place when they will be presented to the witness. Now, the parties ought to have notice of the time and place when they are going to be presented to the witness, so that they can be present at the time, and see what goes on.

The Chairman. That is not required by any code or rule that I know of. And it makes it bad, because -- as has just been said -- when you are using the interrogatory system and do not see fit to apply to the court for permission for an oral examination, one of the advantages is to send this out by an officer and have it all taken care of at the person's

convenience.

Mr. Cherry. Why not use (c)?

Mr. Olney. You do not get the point of my objection in the matter: I do not have any objection to these interrogatories' being put to the witness, and his answers taken. But having witnesses, the witness may answer it one way, or he may answer that interrogatory in another way, depending on what is said to him at that particular time by the officer who is presenting it.

Mr. Lemann. Well, particularly in taking interrogatories, I know I have seen it done, that the witness' answers are discussed in advance, fully. I think there ought to be a protection against that abuse.

I thought that section (c) was adequate to meet that. I think there ought to be some protection against it, but my only answer was that I thought that (c) gave it.

Mr. Morgan. Well, who is going to take them, on interrogatories and cross-interrogatories, if it is really a controversial matter?

Mr. Lemann. Well, in the future, you will not be permitted. If you think that the answers are going to be written in advance, you will say, "Do not take them."

Mr. Olney. If I am dealing with a responsible counsel, I am not going to bother with the time or place when the interrogatories are presented. But if I am not dealing with responsible counsel, then I am going to have someone to represent me, wherever it is.

Mr. Dodge. No; I think that the parties should not be allowed to be there. Because the rich man will always have

someone there, and the poor fellow will not.

The Chairman. The whole thing is to have the official properly chosen. I do not know of any statute or rule, either federal or state, insofar as the matter of written interrogatories is concerned, which says that either one party or the other shall be given the right to go there.

Mr. Lemann. I understood Mr. Loftin to say that he has a provision of the sort you mention. But that is because there is no such provision as (c) here.

Mr. Dodge. You must provide in section (a), I think, for redirect interrogatories. Something new is often brought out on examination.

Mr. Lemann. How can you do that? How do you know what the answer is going to be? How can you frame the redirect interrogatories, unless you first have the answers?

Mr. Morgan. Usually only for completion purposes.

Mr. Lemann. You mean redirect?

Mr. Morgan. No; your cross-interrogatories, even. And then your redirect interrogatories get the explanation, frequently.

Mr. Dodge. Yes; I saw some, last week, with three redirect and two recross. And they were entirely in accord and satisfactory as to what had been asked in the examination.

The Chairman. Is it suggested that the provisions for interrogatories, permit of insertion of interrogatories for redirect? Is that your proposal?

Mr. Dodge. Yes. They should be allowed to have redirect and recross, if desired.

Mr. Sunderland. And ten days more.

Mr. Dodge. No; not over five, and I would say three.

Mr. Lemann. We only allow three, originally. And I should think that five might perhaps be long enough, ordinarily.

The Chairman. Yes. Ten days is a long time; and you can string your deposition along for two or three weeks, before you get it started, and then have ten days overtime.

Mr. Loftin. Mr. Sunderland, have you any provision with respect to the situation where one party names the officer to take the deposition and the other party is not satisfied with that officer? In that case, do you have any provision whereby the party who is not satisfied, may object and may ask for another officer?

Mr. Sunderland. He may object only upon the ground of disqualification.

Mr. Loftin. In my state, if you are dissatisfied, you can ask for another officer to be named as the person to take the deposition.

Mr. Sunderland. We have no such thing.

Mr. Dodge. We have the provision that it may also be sent to a notary public.

The Chairman. What is your wish with regard to providing for written recross interrogatories and redirect interrogatories?

Mr. Tolman. Yes; written.

The Chairman. All in favor, say aye.

(Chorus of ayes, and the motion was thereupon carried.)

The Chairman. Is there anything else, in Rule 34?

Mr. Sunderland. Do you want the original time reduced

to five days, and then three days for the other?

The Chairman. Yes; let us do that.

RULE 35.
DISCOVERY OF DOCUMENTS AND THINGS.

The Chairman. Well, if there is nothing more with regard to 34, we shall pass to Rule 35, Discovery of Documents and Things.

Mr. Dodge. This does not seem to lead to a discovery of the documents, themselves, as headed.

Mr. Morgan. The court may order them produced, though.

The Chairman. It also asks whether the party furnishing the list is willing to permit the same to be inspected and copied or photographed; and, if unwilling, for what reasons.

And then there are later provisions.

Mr. Morgan. I should suggest to Mr. Sunderland that the orders should not be mandatory but should be discretionary with the court. He said that "The court shall order". I should think it should be, "The court may order".

Mr. Dodge. As I said last November, it is a perfectly impossible rule to handle.

Mr. Sunderland. If you are trying to find out, you can get as many as you can, to begin with; and then you can serve additional copies for other things which are suggested by what you do get.

Mr. Dodge. I do not object, unless you have the provision of (b).

Mr. Lemann. Yes; I think that (b) is very important.

Mr. Dodge. If you represent a corporation which is sued

for triple damages, under the Sherman Act, and can tell in advance what of its documents are going to be material, I think you are going rather far.

Mr. Lemann. But you serve the other side with a list of what you want.

Mr. Donworth. But he is not as honest as we are!

The Chairman. If there is no further suggestion with reference to Rule 35, we shall pass it.

Mr. Dobie. Sections (c) and (b) take care of Mr. Dodge's suggestion.

Mr. Dodge. Yes; I think so.

RULE 36.
PRODUCTION OF DOCUMENTS AND THINGS, FOR INSPECTION, COPYING OR PHOTOGRAPHING.

The Chairman. Now let us consider Rule 36.

Mr. Morgan. It was in Rule 36 that I thought the order should not be mandatory, but that the phraseology should be, "shall be entitled to an order".

Mr. Sunderland. "Entitled to an order that, only at such time and place and in such manner and under such conditions as the court may designate" --- Now, there is the complete protection by the court.

Mr. Morgan. But suppose the court says, "I do not think this is a proper case for an order"?

Why shouldn't it read this way:

"The court may order, upon application and after such notice" ---

and so on, as the court shall find reasonable:

"The court may order such party or person to

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produce".

Mr. Olney. Oh, I think it should be this:

"The court shall, except for good cause shown, make his order".

In other words, I should put the burden of "good cause" for the court not to make the order, to rest upon the party making the objection.

Mr. Morgan. "The court shall, unless cause to the contrary is shown"?

Mr. Olney. Yes.

The Chairman. Well, they would have to be relevant, and they are privileged.

Mr. Cherry. What would the cause be?

Mr. Dodge. Because the rights of a third party are involved, and there might be some case where a third party ought not to be called upon to disclose information had in a fiduciary capacity.

Mr. Dobie. Does this include outside persons affected?

Mr. Sunderland. Yes.

The Chairman. If any of you want to put "discretion" in here, instead of "absolute", I am for it.

Mr. Morgan. Of course, I think Mr. Sunderland agrees that you should not order discovery or inspection or production in these cases, without an opportunity to be heard.

Mr. Sunderland. No.

Mr. Morgan. And you want the opportunity to be heard only on the question of relevancy, privilege, and so forth? Is that it?

Mr. Dodge. You must show sufficient cause. And that

means that the court has power to do it, anyway.

Mr. Lemann. In the Illinois statute I see that there is a provision providing that you can file supplemental documents -- going back to the preceding rule.

Mr. Morgan. But he allows that.

Mr. Sunderland. Yes, that is in there.

Mr. Olney. But it may not be supplemental, at all.

Mr. Dobie. We had a case, down in Virginia, in which in connection with an old transaction, the four men concerned with it, signed it and sealed it, and it was only to be opened on the death of the last one -- hideously confidential, but tremendously important. And the rule should be that you can make them "dig it out".

Mr. Dodge. If sufficient cause is shown.

Mr. Dobie. Yes; I think that is right.

The Chairman. I agree that there ought to be some qualification in there.

Mr. Dodge. That sufficient cause shall be shown.

Mr. Morgan. It is not in there.

Mr. Dodge. "An application to the court, if the case is pending, shall have cause therefor".

Mr. Morgan. That is just the application.

Mr. Dodge. The application showing cause.

Mr. Sunderland. Yes. Did this cover the point?

The Chairman. Yes.

Mr. Morgan. All right.

Mr. Sunderland. Yes, it does.

Mr. Dobie. The court, then, always has power to judge the sufficiency of the cause.

The Chairman. Whether you make any order at all, or not.

Mr. Sunderland. Yes, I suppose so.

The Chairman. That is a little safer. As long as you have to go before the court, at all, then you might as well give him reasonable discretion.

Mr. Olney. On taking a deposition, is it not proper to have a subpoena duces tecum?

Mr. Sunderland. No; we have no provision for that.

Mr. Olney. Then, in a distant state you have to invoke this section, too.

Mr. Morgan. Don't you provide for a subpoena?

Mr. Sunderland. Not a subpoena duces tecum.

Mr. Morgan. But isn't a subpoena duces tecum just a species of a subpoena?

Mr. Sunderland. No; I think this is a little different. If you have a subpoena duces tecum, you force the disclosure of that document, whether or not you have a ruling of the court. I thought that our feeling was that we were going to require a showing only on a court order.

The Chairman. But suppose you take a deposition in a New York case, and the witness is in Illinois: Suppose the witness refuses to produce these documents. You ought to be allowed to go before the United States District Court in Illinois and get a subpoena duces tecum there, just the same as you would get it from the trial court, for the production of the papers in court. Otherwise you are helpless.

Mr. Morgan. Mr. Sunderland thinks it does not follow. Are you sure of that?

Mr. Sunderland. No, I am not sure. But it is not mentioned.

Mr. Morgan. I know; but I supposed that it followed.

Mr. Loftin. So did I.

Mr. Lemann. If Mr. Clark is right in the idea advanced last night, that did.

The Chairman. We dismissed the question of whether a subpoena duces tecum ought to be issued.

Mr. Lemann. I think that we discussed that and asked you to provide for it.

Mr. Dodge. I move that the reporter be directed to provide, somewhere, that in taking depositions, subpoenas duces tecum may be issued in connection therewith.

Mr. Loftin. I second the motion.

The Chairman. All in favor, say aye.

(A chorus of ayes, and the motion was declared carried.)

Mr. Lemann. What does the word "concerned" in line 5 mean?

Mr. Sunderland. We are going to change that to "effect of the order".

Mr. Lemann. Why don't you change it like the Illinois statute?

Mr. Morgan. You have to give notice to people who have possession.

Mr. Olney. The word "concerned" just won't do.

The Chairman. That is a matter of form, and will have to be changed.

RULE 37.
PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

The Chairman. If there is nothing further on Rule 36, let us go to Rule 37. We threshed that out rather fully at the last meeting.

Mr. Dobie. Of course, that implies that the court could put it off when a person is in a very definite condition.

Mr. Sunderland. Oh, yes; it is all under the control of the court.

Mr. Morgan. And isn't it only after a hearing, following such notice as the court shall direct?

Mr. Sunderland. On application to the court and on reasonable notice to the adverse parties.

Mr. Morgan. I should want more than that.

Mr. Sunderland. You mean, to the person?

Mr. Morgan. To the person; yes.

Mr. Sunderland. It is the physical condition of such party.

The Chairman. It is the physical or mental condition of a party to the action.

Mr. Sunderland. We are not concerned with third parties here.

Mr. Morgan. But if it is a mental condition, the court has to prescribe notice to some person who is responsible for the person whose mental condition is in question.

The Chairman. But he is in court and is a party to the suit, and is represented by counsel or by a guardian ad litem. And you serve notice on him or on his attorney, that you want to examine him. Of course, if he does not have an attorney ---

Mr. Morgan. I do not believe that, at all. I think that there are plenty of people who start actions without any guardian, but who need a guardian. And if the defendant wanted a physical examination or a mental examination of the plaintiff who started the action in his own right, it might very well be that the court would want to order notice to someone other than the plaintiff.

The Chairman. You mean, where the plaintiff does not have an attorney?

Mr. Morgan. Well, he might have an attorney, but he might come into court per se.

I simply have in mind a couple of cases; one where the person appeared per se, and another case where a man appeared by an attorney who died of paresis in about six months. And it seems to me that, in those cases, to have served notice upon the attorney or upon the plaintiff, himself, would have been just foolish.

Mr. Donworth. But what can be a substitute for him or for his attorney, when he is entitled to notice?

Mr. Morgan. Well, such person whom the court may designate, under the circumstances.

Mr. Donworth. Well, that reads:

> "In any civil action in which the physical or mental condition of any party is involved, any other party shall be entitled, at any time, on application to the court in which the cause is pending and on reasonable notice to the party to be examined and all other parties in the action, or their attorney of record".

It seems to me that that would meet it.

Mr. Morgan. You mean, reasonable notice to the man; and that if he were not capable of taking it himself, some other person would be designated? Is that it?

Mr. Donworth. No; my point is that, being a party to the action, he is entitled to notice.

Mr. Morgan. Of course he is. But I think that the notice might be defective, because of his condition.

The Chairman. Well, he cannot receive notices in a cause, in such a condition. You are assuming that he is not competent to handle his lawsuit; and you cannot assume that.

Mr. Olney. I am not particularly familiar with this sort of thing. But I should think that before the court made any order of examination, there ought to be a hearing as to whether that order should be made or not.

Mr. Morgan. I am sure of that.

Mr. Olney. That is not provided here. The only notice provided here is the notice to the party, that he is going to be examined at such and such a time.

Mr. Sunderland. No; this is a notice preceding the order: On reasonable notice, then an order can be made. But the notice precedesthe order.

The Chairman. There is no question about that.

Mr. Donworth. Professor Sunderland tells me that the reason he did not put in "the party to be examined" there, was because he meant this notice to go not only to the party to be examined, but to all other parties except the party making the application:

"In any civil action in which the physical or mental condition of any party is involved, any other party shall

be entitled, at any time, on application to the court in which the cause is pending and on reasonable notice to the party to be examined and all other parties in the action or their attorney of record, to an order for the examination of the physical or mental condition of said party, at such time and place, in such manner, by such persons, under such conditions, and in respect to such matters as the court shall designate in such order."

Mr. Morgan. My suggestion is this: That any party to a civil action, in which his physical or mental condition is involved, may by order of the court in which the action is pending, be required to submit to an examination of his physical or mental condition. Such order may be made only after a hearing following such notice as the court deems reasonable, and shall specify the time, place, manner, and conditions of the examination, and shall designate the person or persons by whom it shall be made.

Mr. Donworth. Should you not insert, after "reasonable", the words, "to all parties in such action," so that if there are two or three plaintiffs, they will all have notice?

Mr. Morgan. Well, if the court deems that reasonable. It is my point that the court should determine those who should be before it.

Mr. Sunderland. Then you just go to the court and ask for an order prescribing those who shall be notified?

Mr. Morgan. Yes.

Mr. Sunderland. Before there would be a hearing?

Mr. Morgan. Well, there might be an ex parte application, to begin with.

Mr. Donworth. But in my suggestion, you give your notice and all the people come in for just one hearing.

Mr. Morgan. Well, that might be better. But you would want it to all parties except ---

Mr. Donworth. Including the party to be examined, who will get notice.

Mr. Morgan. I suppose so.

Mr. Sunderland. In Detroit, this is all handled on the pre-trial docket. On a personal injury case, the pre-trial judge asks what doctors shall be designated to make the examination.

Mr. Morgan. The only trouble I had was to get the plaintiff's attorney to agree to submit him to a particular doctor.

Mr. Sunderland. You get practically the same situation as we get every day, in the pre-trial docket.

Mr. Morgan. They have had a lot of trouble with this, in New York, and even with the power of the court to order submission to a physical examination.

Mr. Sunderland. Yes, I know that. But it works very smoothly, as soon as it gets going.

Mr. Morgan. Yes, it usually does. If you get a provision of this kind, you generally never have to apply to the court.

RULE 38.
ADMISSIONS OF DOCUMENTS AND FACTS.

The Chairman. Let us pass to Rule 38, gentlemen. I have a suggestion, there. Section (a) of that rule provides:

"Any party to a civil action, at any time, by notice in writing to any other party or his attorney of record, (may) request the admission in writing, within not less than four days thereafter, of the genuineness"--and so forth.

And I suggest that "ten" be substituted for "four". Because that allows the demand to be made four days before the trial, and is too short a time before the trial, I think. The New York rule requires the demand to be made ten days before the trial, and Equity Rule No. 28 requires the demand to be made not less than ten days after joinder of issue.

And it seems to me that the demand should be made earlier.

Mr. Loftin. I move that that change be made.

Mr. Olney. I second the motion.

The Chairman. All in favor of substituting "ten" for "four" in line 4 of Rule 38, say aye.

(A chorus of ayes, and the motion was declared carried.)

The Chairman. Is there any further proposal with regard to Rule 38?

Mr. Olney. I was a little afraid of the language in section (b):

"shall not constitute an admission to be used against the party making it on any other occasion, nor in favor of any person other than the party giving such notice."

It "shall not constitute an admission."

I thought it was well to say more definitely just exactly what was in mind, and that was that it should not be used at all, on any other occasion.

1b
fls g

I just made this note here so that it would read:

"Any admission made pursuant to such notice shall be for the purpose of the pending cause only, and shall be competent for use only in that cause and by the party giving the notice, against the party making it."

The Chairman. If there are three parties in a cause, and one of them gives a notice and gets an admission, I am wondering why any other party in the case should not rely on that admission, and why he should have to get a notice to the same thing. Why not let anybody use it, who is a party?

Mr. Sunderland. I think that is better.

Mr. Olney. I think we should clear up what we have in mind when we say "shall be for the purpose of the pending cause only, and shall not constitute an admission to be used against the party making it on any other occasion."

The Chairman. Well, I think we should have something in the reporter's statement about what shall not constitute an admission. Suppose a man makes an admission, and then you say that it shall not be used. Well, perhaps that excludes it.

Mr. Olney. It was just that point that I had in mind.

The Chairman. I suppose that covers it.

Mr. Olney. I think that that is something that can be considered in connection with the form of it.

The Chairman. Why not say "shall not constitute an admission or be used against the party making it, on any other occasion"? Then you have it going and coming.

Mr. Morgan. That is so.

The Chairman. And say "or be used" instead of "to be used."

2b

Mr. Morgan. You are going to stop with "on that occasion"?

The Chairman. Yes. The reporter accepted that.

RULE 39
CONSEQUENCES OF REFUSAL TO ANSWER
QUESTIONS OR GIVE DISCOVERY

The Chairman. Now we come to Rule 39, the consequences of refusal. Is there anything in section (a)?

Mr. Sunderland. I understood that a witness could refuse to answer a question, on these discovery requests, and the only procedure would be to go in court and compel him to answer.

Mr. Dobie. That is probably when made in good faith, and for reasonable cause.

Mr. Donworth. This refers both to trials and depositions.

The Chairman. It ought not to, ought it?

Mr. Morgan. Section (b) goes more into detail on that, Mr. Dodge:

> "And thereupon, on reasonable notice to the persons concerned, may apply to the court from which the subpoena issued, for an order compelling such answers."

Mr. Dodge. I wondered if there should be any contempt of court until there has been an order of court.

Mr. Morgan. I agree.

Mr. Dodge. In other words, I wondered if we should not stop with (b).

Mr. Morgan. Yes; and strike out the last sentence of (b).

The Chairman. This only relates to proceedings on depositions, does it not?

Mr. Sunderland. Yes.

The Chairman. Someone made the point that this covers proceedings in the court, on trial.

Mr. Donworth. There is nothing in the heading that limits it.

The Chairman. The title will show that.

Mr. Lemann. As submitted to us, there is a subject title showing that it all relates to depositions.

You suggest, Mr. Dodge, that there be no contempt until after the court has ordered him to answer?

Mr. Dodge. My suggestion was to strike out (a) and the last sentence of (b).

Mr. Sunderland. Don't you think that where a witness, in obviously bad faith, simply undertakes to stall, he should then be punished for contempt? Of course, you cannot punish him without an order.

Mr. Lemann. Suppose that at a hearing before an examiner of the Interstate Commerce Commission, the examiner asks a question and the witness refuses to answer--and similar situations before other commissions; the Federal Trade Commission, and so on: Is it a technical contempt?

Of course, it is not exactly an analogous case.

The Chairman. It is not analogous because the writ of subpoena they issue is not a judicial subpoena, so you cannot make that contempt, constitutionally.

But the subpoena in this case is a court process, and you can constitutionally make violation of it a contempt.

Mr. Sunderland. It seems that a witness ought to be entitled to refuse to answer questions, when he is acting in

good faith.

Mr. Dodge. Then you would agree to striking out the words "with reasonable cause"?

Mr. Sunderland. Yes.

Mr. Dodge. That would be all right.

Mr. Morgan. I think that is better.

Mr. Lemann. You are going to say "if not made in good faith, but bad faith"?

Mr. Sunderland. "If not made in good faith."

Mr. Pepper. Does this imply that a subpoena is a writ not merely to compel attendance, but to give testimony?

Mr. Sunderland. Yes.

Mr. Pepper. I was thinking that the obligation of the witness to give testimony is a consequence of his being in court and having been sworn to tell the truth, the whole truth, and nothing but the truth. What difference does it make, if he is there and has been sworn, whether he has come in obedience to a subpoena or whether he has appeared in response to such a request as we are talking about?

The Chairman. Because until you have a court process, you do not have contempt.

Mr. Pepper. I am just wondering whether he does not discharge the duty laid upon him by service of subpoena, by appearing.

Mr. Sunderland. This is not a court. When he goes into court, the court has power over him.

8 Mr. Pepper. But I understand that "subpoena" means "that this you are not to omit, under a penalty of 100 pounds," or whatever the old formula was. The thing you were not "to

omit" was appearance at the place where you were directed to be.

The Chairman. Every subpoena I have seen has read "appear at the place and give testimony."

Mr. Pepper. But I am asking whether what is implied here is the form of subpoena to which the chairman refers.

Mr. Sunderland. I think it is.

Mr. Pepper. If it is, everything is all right. If it is not, then the contempt consists not in violation of the subpoena, which may be met by appearing, but contempt by violation of the admonition of the court to tell the truth.

Mr. Donworth. If your adversary takes the deposition, and usually does not have a subpoena, and then turns the witness over to you and you ask a question which the witness refuses to answer, then there would be no contempt.

The Chairman. You could go to the court and get a subpoena.

Mr. Lemann. You could go to the court and get an order for an answer.

Mr. Sunderland. You might even go to the clerk.

Mr. Lemann. Well, with that kind of a fellow, I think I would go to the judge.

I think Mr. Morgan's phrasing is a little bit more carefully worded, perhaps.

The Chairman. Isn't that a matter of style?

Mr. Lemann. I think so.

The Chairman. I think we can refer that suggestion to Mr. Morgan and the reporter, and treat it as a matter of expression.

Mr. Donworth. In section (b) I think that the plural "questions" and "answers" should be singular.

Mr. Sunderland. I think that the whole question of using singular and plural forms is one to be thoroughly considered. All the language of this rule should be gone through and harmonized, throughout.

The Chairman. Yes. That is a matter of form and style.

Mr. Cherry. Here is a matter that may be one of form, but I am not so sure: It seems to me that subdivision (a) is a designation or description or a word-calling of the conduct of a person who, without good faith, refuses to answer. It says, "It may be deemed a contempt."

Isn't his refusal to answer, a contempt where it is not in good faith? Why would it not be well, in section (a) to say "refusal" and so on,"if not made in good faith, where such party is under subpoena, is a contempt of the court from which the subpoena issued" -- and then a provision to declare the reason why he did not answer, and the facts; and that comes in (b), with the consequences.

I just submit that for consideration, as a more direct statement.

Mr. Morgan. Yes.

The Chairman. Is there anything else to be considered, in connection with Rule 39?

Mr. Donworth. Of course, contempt of court is not only punishable by summary proceedings, but it is also a matter of indictment, as I understand it. So this should be considered carefully, in that regard: A man opens himself to prosecution, criminally.

Mr. Morgan. Oh, in lines 17 and 18 you want this:

"Unless the court otherwise directs."

Because that may say that you can purge yourself of this contempt by answering now--as he frequently does.

Mr. Sunderland. Yes, I think that is true.

Mr. Lemann. I understand that in all these matters of form, while we are not passing directly on suggestions that have been made by Mr. Morgan and others, nevertheless they are all to be considered by the style committee and the reporters, and that our failure to take them up specially does not indicate that we do not approve of them.

The Chairman. That is right. All these comments that come in, in the way of suggestions as to form, will be considered by the drafter and the reporter, when that goes back for revision, and may also be considered by a style committee.

And if any member of the committee has any further suggestions as to form, it would be a great aid if you would note them and send them in.

Mr. Dobie. Send them to the reporter, with a copy of the section.

Mr. Lemann. I just wanted to guard against the inference that failure to bring them up for discussion was a matter of not wishing to make them.

The Chairman. I have not bothered to keep these things in my head. So send them to the reporter.

If we do not have anything further on this rule, let us go to the next rule.

Mr. Dodge. It is 5:30, Mr. Chairman.

The Chairman. All right; we shall take these things up

at 8 o'clock, beginning with Rule 40.

Mr. Dodge. No, Mr. Chairman; we have three or four more sections of Rule 39.

The Chairman. I thought you did not have any more discussion of that section.

(Thereupon, at 5:30 o'clock p.m., an adjournment was taken until 8 o'clock p.m. of the same day.)

NIGHT SESSION

(The committee resumed at 8 o'clock p.m. on the expiration of the recess.)

The Chairman. We are on Rule 39, and there is nothing special pending. You wanted to look at that further.

Let me ask if there is any member of the committee who is going to leave before the end of tomorrow's session. I have one or two things that I want to bring up while you are all here, and if anybody is going to leave I would like a little notice of it.

Mr. Loftin. I have to leave midnight Monday, Mr. Chairman.

The Chairman. All right. I do not mean it is all right, but I thank you for letting me know.

Does any one of you find anything that you want to discuss about Rule 39?

Mr. Olney. Just a little change in form; it is small.

The Chairman. Well, just submit that to the reporter.

Let us pass to Rule 40.

RULE 40
MOTION FOR SUMMARY JUDGMENT UPON DEPOSITIONS AND ADMISSIONS

Mr. Donworth. I take it that this is in addition to the motion for judgment on the pleadings, that was passed upon the other day?

The Chairman. Yes, we thought it included another method of getting judgment on the pleadings.

Mr. Sunderland. Technically I think it does.

The Chairman. Well, let it stand.

Mr. Sunderland. It certainly can be used.

Mr. Loftin. There is no limitation there, is there?

Mr. Sunderland. No limitation.

Mr. Donworth. In the other case you were expected to file affidavits.

The Chairman. But you are not required to file any of those; you can go on with the pleadings.

Mr. Donworth. Do not lines 5 and 6 provide for affidavits?

The Chairman. Yes, but it is permissive.

Mr. Dodge. It is not applicable to the pleadings like the old motion for demurrer.

The Chairman. Suppose there is nothing but pleadings on file. You can get judgment on the pleadings if you want to.

Mr. Dodge. The basis of the order of the court is the documents on file.

The Chairman (reading):

> "Any party may, on notice to the adverse party, move for a judgment in his favor upon the pleadings, depositions, and admissions on file."

Suppose nobody wanted to file any depositions or admissions. The pleadings are on file; you can get judgment on the pleadings.

Mr. Dodge. Look at the last sentence.

Mr. Sunderland. The last sentence does not include the word "pleadings," but I think it should.

Mr. Morgan. Put it in.

Mr. Lemann. We had under discussion yesterday or the day before that there was to be a rule in Mr. Clark's section that he could get a judgment on the pleadings apart from these

depositions.

Mr. Morgan. You get it one way or the other. You can't get away from it now.

Mr. Donworth. To some extent they overlap, but there is no harm done.

Mr. Morgan. No, none at all.

Mr. Pepper. Yes, any reasonable opportunity that there is to accelerate the end of the controversy is all to the good, I think, where it is not a question of taking a snap judgment.

Mr. Sunderland. At any period after you begin taking depositions, if you think the thing is in a situation to settle it right there, why, you ask for it.

Mr. Pepper. It is an unimaginative defendant who will not be able, when you file notice of motion for judgment, to satisfy the defect in his pleadings. It will be an unimaginative defendant who will not come across to fill the gap.

Mr. Sunderland. The affidavit may not save him in this case, because the court may provide for depositions or examination of witnesses.

Mr. Pepper. I see.

The Chairman. Well, I guess there is nothing wrong with Rule 40.

RULE 41
MOTION FOR SUMMARY JUDGMENT UPON AFFIDAVITS

The Chairman. Now we come to Rule 41.

Mr. Lemann. Going back for a moment to Rule 39, Mr. Morgan has stated in Paragraph (h) that "the court may order the arrest of such person for such contempt."

On the page before that, line 74, it reads, "the court

may * * * order the arrest of any party or agent of a party * * * ."

I presume that that sentence should make him realize he is on his way to jail, but would you not change the language to say that he may be held for contempt?

Mr. Sunderland. I think we ought to have uniform language throughout.

2 Mr. Morgan. What is that part? You don't like to have "arrest" staring you in the face?

Mr. Lemann. I just thought that perhaps we would not say it quite so plainly.

Mr. Olney. In Rule 41 there is a change which is perhaps one of form and yet really constitutes one of substance in a certain sense.

It says that if these affidavits that are introduced on behalf of the moving party

> "(1) shall set forth substantial evidence of facts sufficient to sustain the claim or counterclaim of the moving party, or some part thereof, including any claim or counterclaim for declaratory relief, and shall show the character and amount of relief to which such party is entitled, or (2) shall set forth substantial evidence of facts sufficient to sustain any defense of the moving party, whether affirmative or in denial, a judgment shall be rendered thereon in his favor, unless the adverse party shall, prior to or at the time of hearing said motion, serve and file opposing affidavits setting forth substantial evidence of facts sufficient to constitute an affirmative defense to such claim or counterclaim or part

thereof, or to raise a substantial issue thereon, or sufficient to avoid such defense or to raise a substantial issue thereon."

It would seem to me that instead of using the expression "sufficient to constitute an affirmative defense" the idea should be to "serve and file opposing affidavits sufficient to raise substantial doubt as to the right of the moving party to relief or as to the sufficiency of his defense."

If there is a substantial doubt there, the motion should be denied. That is the real principle that should be applied to a case of this character.

The Chairman. Is this language taken from New York?

Mr. Sunderland. It is not taken from anything, except that I tried to take it from this great mass of federal cases which lay down a test for taking a case from the jury.

I tried to draw this rule so the cases, where they are taken from the jury, would be cases that fall under this, the federal test being substantial evidence.

The Chairman. Why do you say "affirmative defense"? Why do you not just say "defense"? That "affirmative" has something in it that looks like it is something different from "denial."

Mr. Sunderland. Well, it does. I covered them in different ways.

Mr. Morgan. Mr. Chairman, I have great objection to this as drawn for an affirmative judgment if the affidavits set forth substantial evidence, and so on and so forth, but I do not believe that that is substantial evidence in the sense which, so far as I know, the courts use it, as enough evidence

to justify a jury in finding a verdict for a party. I do not think that ought to be enough for summary judgment. There might be substantial evidence which, if introduced, would compel the court to let the case go to the jury, and yet it might not convince the court that the plaintiff had a good case even when it was undenied.

There are plenty of cases where there is substantial evidence to go to the jury, a motion for a directed verdict is denied, and the defendant wins. As far as I know, substantial evidence means merely enough to get the case to the jury. That is enough to prevent summary judgment.

Mr. Olney. That is just the idea I had followed in the suggestion I was making.

The Chairman. Mr. Morgan's suggestion relates properly to subdivision one.

Mr. Olney. Rule 41, 1 and 2, an affirmative defense which, I think, convinces the court as to the validity of the defense.

Mr. Pepper. Does this mean that notwithstanding that the defendant has advanced by way of affidavit--

Mr. Morgan (interposing). No.

Mr. Pepper (continuing).--facts which if proved on the trial would make the court let the case go to the jury, a summary judgment may be taken?

Mr. Morgan. No.

Mr. Pepper. Will you clear that up for me?

Mr. Morgan. If the opponent advanced enough evidence so that he would get to the jury if it were offered at the trial, the motion for summary judgment must be denied; but the

case Mr. Sunderland and I are thinking about is where the plaintiff in his affidavits shows--or the moving party--shows

3 evidence which would be uncontroverted.

Mr. Pepper. In other words, you are not running up against the question of constitutional rights?

Mr. Morgan. No, no; that is taken care of in the latter part of this section, Senator, I think you will see.

The Chairman. I see your point. How would you word that?

Mr. Morgan. My suggestion-- I think this is subject to discussion--is:

> "If such affidavits shall set forth substantial evidence which convinces the court of the validity of the claim or counterclaim of the moving party, or some part thereof, and shall show the character and amount of the relief to which such party is entitled, or show substantial evidence which convinces the court of the validity of any defense of the moving party, the motion shall be granted, unless the adverse party shall," and so forth.

The Chairman. Does that help matters?

Mr. Morgan. It is enough, I suppose, in the absence of any evidence offered by the opponent. This is to be granted only in case the opponent does not put in an affidavit showing that there is a question for the jury.

Mr. Olney. It is quite important in a matter of this sort that the record upon which the lower court grants the judgment be such that it can be properly reviewed in the upper court.

Mr. Morgan. I agree.

Mr. Olney. The only principle you can apply there--you say there is no opposing evidence by the defendant, and the judgment is rendered for the plaintiff--the one rule you can apply there is that the evidence submitted either by affidavits or otherwise on the part of the plaintiff shall establish a case such that the court would not be authorized to deny a verdict or to take it from the jury and render judgment.

Mr. Morgan. I would be afraid of going that far, Judge, because I don't know how it is in the federal courts. In a great many states if the witness is interested you can't direct a verdict. In Massachusetts you can't direct a verdict on oral testimony in favor of the party having the burden of proof.

Mr. Olney. I was not thinking of the exact word. I have never heard of any such rule as that. What I mean to say is that the case presented to the court must be such as to entitle the party as a matter of right--that being the only evidence in the case--to a judgment.

Mr. Sunderland. Suppose the plaintiff puts in substantial evidence of a cause of action and the defendant puts in a case which contains no substantial evidence against him; wouldn't the court take that from the jury?

Mr. Olney. It might not.

Mr. Morgan. No.

Mr. Olney. It might not fairly do that.

Mr. Lemann. I got the impression that this provision for judgment on affidavits is really to cover the case where there is no real controversy at all. If there is any real

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controversy, the parties are entitled to cross-examine. It is easy to get up affidavits. I could write a fine affidavit for my client and witnesses, and nobody would ask any questions on the whole. If you got up ten affidavits on one side and they came in with two on the other, if I had those witnesses under cross examination, with that result I could well understand that the judge might direct the jury. He has got to be satisfied when he reads it that there really isn't any doubt about the facts. If there is any doubt about the facts, he ought not to sustain this motion for summary judgment. Even though these facts are developed under cross examination in open court, he might direct a verdict.

Mr. Morgan. I would not go that far, because if the facts are such that he would have directed a verdict, then there is no use in going to law.

Mr. Lemann. There is a great deal of difference between getting the facts on affidavits and getting them on cross examination.

I do not think it is made plain in this rule. I think the average lawyer is going to feel that he can get judgment on the affidavit, or if the judge knows the people making the affidavits and they are a pretty good set.

As I understand it, the real thing is that the motion should be issued only if there is no real difference between the parties as to the material facts. Why not put it that way, if that is right? I think that is what the lawyer ought to understand, and I do not think he would get it here this way.

Mr. Morgan. If he does not get it, we have got to re-

frame it.

Mr. Pepper. May I ask how Mr. Sunderland feels about that? Do you assent to the apparent agreement between Mr. Lemann and Mr. Morgan?

Mr. Sunderland. I do not think the court has a thing to do with the number of witnesses on this rule. If you can put up a single person to present a single fact in opposition to the plaintiff's claim, he does not get his judgment.

Mr. Lemann. That is practically what we were saying. If there is any difference between the parties as to facts, the judge will not grant the rule for summary judgment.

Mr. Sunderland. "unless the adverse party shall, prior to or at the time of hearing said motion, serve and file opposing affidavits setting forth substantial evidence of facts sufficient to constitute an affirmative defense or to raise a substantial issue."

The Chairman. Here is the language of the New York practice rule.

Mr. Morgan. Is that section 113?

The Chairman. Yes.

"The answer may be struck out and judgment entered on motion and the affidavit of the plaintiff or of any other person having knowledge of the facts, setting forth such evidenciary facts as shall establish the cause of action sufficient to entitle plaintiff to judgment, and his belief that there is no defense to the action;--"

That is where there is no counter-affidavit--

"unless the defendant by affidavit, or other proof, shall show such facts as may be deemed by the judge hearing the

motion sufficient to entitle him to defend. If the defendant in any action set forth in subdivisions 3, 4, and 5--"

That is the different types of cases--

Mr. Sunderland. I tried to get away from that language.

The Chairman (continuing).

"shall fail to show such facts as may be deemed by the judge hearing the motion to present any triable issue of fact other than the question of the amount of damages for which judgment should be granted and assessment to determine such amount shall forthwith be ordered."

Have you made any provision there that if there is no issue as to damages, he can order assessment by jury?

Mr. Sunderland. I left that for the general rule by Mr. Clark.

Mr. Pepper. Has it been your opinion, as a matter of drafting, that it is an advantage to try to state these rules in such fashion that they will be applicable to either the plaintiff or the defendant?

Mr. Morgan. Yes, that is what he is trying to do.

Mr. Pepper. I find it leads to a good deal of flexibility of statement. It might take a little more time to state the case where the plaintiff moves and the case where the defendant moves, but I can't help feeling that the attempt to cover the reciprocal action of the parties in a single statement leads to a little obscurity.

Mr. Sunderland. I undertook to consolidate those two statements in one rule, but it might be easier to understand if they were separated.

Mr. Pepper. I think if you start with your clear language of what you intend to express, your statement is admirable, but I think if you concede ignorance to the reader, there is a little obscurity. He is thinking from the point of view of what the plaintiff can do or what the defendant can do, and he is a little embarrassed by the complexity of the double statement.

Mr. Sunderland. He is thinking from both points of view at once.

Mr. Donworth. I think it is important to have it clear that we are not trying to introduce a rule which will substitute trial by affidavits for trial by jury. There is a large body of lawyers in the country who would be on the lookout to criticize these rules if they seemed to err against the poor man, plainly, and I fear that as this is written now it leads to the idea that either side can put in some affidavits and then can get the court to deny a jury trial. I think it should be plain that this is confined to a situation where there is no real defense--where the defense is assumed or fictitious.

Mr. Morgan. That is really what it is a substitute for.

Mr. Donworth. One thing that bothers me somewhat, and which has been suggested by other gentlemen here, is this: Suppose a man was knocked senseless by an accident. He has then got to put in some affidavits of his own, and he cannot simply say to the court, "I want to cross-examine those affiants who saw this all one way, and I have the right to cross-examine and test their credibility before a jury," as the chairman has suggested.

I am bothered by those questions which may interfere with what seems to be substituting the judgment of the court on ex parte affidavits for a trial in open court. I think there should be worked out clearly that where there is no real defense the court could act, but not otherwise.

Mr.Sunderland. The plaintiff establishes by affidavits a prima facie case--

Mr. Morgan (interposing). I want to know what you mean by that. Is that just enough to get to the jury? When you talk about prima facie case or substantial evidence, there are several interpretations, and you can't tell what any court means when it says it.

Mr. Sunderland. Suppose we say there after "necessary," "necessary to establish a right to recover is shown by affidavit."

TheChairman. "conclusively."

Mr. Sunderland. No, I don't care about that; just shown at all. Now, the defendant can't put up anything against that.

Mr. Morgan. Suppose a reasonable man could draw inferences from that evidence. Then it does not seem to me it is any case for summary judgment.

Mr. Lemann. I think no matter how convincing the plaintiff's affidavits appear to be, if the defendant's affidavits show that he has got some defense, why, as I understand it, that case should be tried.

Mr Sunderland. And it is under this rule.

Mr. Lemann. The Illinois Act uses language plainer than this Code, and it says that the plaintiff shall get

this judgment on his affidavits unless the defendant by his affidavit shows that he has sufficiently good defense on the merits to entitle him to defend the action. That, to me, is clearer than this language.

Mr. Morgan. That is the idea.

The Chairman. The triable issue of facts is the vital part of it. I think there is no doubt in our minds as to the fact that we are all agreed that the language ought to be open to no mistake at all on the fact that the court cannot grant a summary judgment if there is any triable issue of fact.

Mr. Sunderland. There is no doubt of that.

The Chairman. I do not believe that this committee sitting around here tonight or at any other time can work out the language of that rule; I think we ought to let it go with the understanding that the reporter will work on it and that our style committee will work on it. The substance we are agreed on.

Mr. Pepper. I move that this article be referred for digest to the reporter.

Mr. Dobie. Suppose these affidavits of the plaintiff are uncontradicted and that they state a lot of facts, in a negligent case, from which two deductions might normally be drawn. Would that be enough? A reasonable man might or might not infer negligence from the facts stated.

Mr. Olney. That is just exactly what Professor Morgan is driving at. Suppose there are no affidavits in opposition to the plaintiff's motion. On those affidavits it must appear, assuming them to be true, that the plaintiff would be entitled to judgment as a matter of law.

Mr. Pepper. Seriously, Mr. Chairman, do you not think that the minds of the members of the committee are as one as to the objective? It does make an undigested mass, but I think it can be digested as a matter of form by the reporter.

Don't you feel, Mr. Sunderland, that you have got the idea?

Mr. Sunderland. I think so. I think I know how to go at the thing the committee wants.

Mr. Pepper. I move that that which has been stated to be the sense of the committee in this informal talk be referred to the reporter for formulation.

Mr. Loftin. I second the motion.

6 Mr. Donworth. I should like to add--and it may be repetition--that at the former hearing I offered a motion that summary judgments be restricted to a particular class of cases--money demands and a few others. The committee voted against me on that and voted to make it all-inclusive--any kind of case. I accept that judgment, but I think that now that you make it all-inclusive we have to be very much more particular than if it was restricted to promissory notes and similar things. There is a large body of men in the country who will say, looking up the antecedents of each of us, "See what they did."

Mr. Olney. They will say first, "See who they are."

Mr. Donworth. I am in favor of keeping away, as the Supreme Court has said, from unconstitutional points if they are open to doubt. I feel that that is what we should do here.

Mr. Tolman. Before you go to 41--

The Chairman (interposing). Well, we have a motion now. All in favor of that motion say aye.

The ayes have it.

(The motion was carried.)

The Chairman. Now, what did you want to say, Major?

Mr. Tolman. In answer to a question asked yesterday by Senator Pepper, I desire to call his attention and that of Dean Clark to the last word on line 5 and the first word on line 6 of this Rule 41, the one we are on right here.

Mr. Clark. I got your suggestion, but Colonel Dobie has shown me a case where the court used the word "mover." We have a judicial precedent, at least, for "mover."

The Chairman. That is a matter of style. I do not think we ought to take the time up for those matters.

Before we pass 41, on another phase of it, the New York practice permits the court to find that certain issues are not triable and resolves them against one of the parties and submits the evidence to trial. Is that all covered by your subdivision B?

Mr. Olney. May I make a suggestion in connection with Rule 41, in line with the suggestion of the chairman just now?

We have rules preceding this for the elimination of immaterial or, we will say, frivolous issues, issues that do not amount to anything. Now, as to the provisions that have preceded this I have very much doubt whether they would work in this country without the elaborate machinery which the English courts provide, but it does seem to me that here, following the practice set out in Rule 41, we might well have a way of eliminating issues of that character and reserving

there the genuine issues for trial. I myself should like to see this amplified to such a point that it would include or permit the court to say that these issues are no longer in the case.

The Chairman. Does it not do that? Have you read it?

Mr. Olney. Yes.

The Chairman. I thought it did, quite clearly. It is Rule 42, the rule we are on. It expressly deals with that and makes it as clear as a bell.

Mr. Olney. It seems to me, then, coming back to the previous rule we have discussed, it should be entirely eliminated and the matter left on this.

The Chairman. No, because that previous rule relates to a case where nobody would think of making application for summary judgment. It would be foolish to make it, but nevertheless you can apply for limitation of issues. This thing comes up only when a man thinks he has got a sure enough case to try for a motion for summary judgment.

Mr. Olney. My objection to that preceding rule, which I had, was that it did not provide specifically enough for the procedure by which an issue made by the pleadings might be eliminated.

The Chairman. At a proper time, or now, if you like, we will go back, and if you have any specific suggestions to make, we will take them up; but it is a little bit out of order at this time.

Mr. Olney. Quite decidedly out of order.

The Chairman. Now let us take up Rule 42.

Mr. Morgan. May I go back to Rule 41 for just a moment?

18b

There is one thing I wanted to know.

Mr. Sunderland has provided here that you should attach the papers--the pertinent papers--on which the party relies. I wonder if when you are doing this thing by affidavit--papers--and they are important in the case, they ought not to be attached.

Mr. Sunderland. I mean papers that are part of the case that the party is trying to make by his affidavits.

Mr. Morgan. In line 20, "Supporting and opposing affidavits shall be made on personal knowledge, shall contain such facts as would be admissible in evidence, shall show affirmatively that the affiant, if sworn as a witness, could testify competently to the matters stated therein, and shall have attached thereto sworn or certified copies of all papers or parts thereof upon which the party relies."

I should say, "all pertinent papers or parts thereof," whether he is relying on that point or not.

Mr. Sunderland. Of course, he needs to show none except those that constitute a part of his case.

7 Mr.Morgan. But if he has pertinent papers in that case, he might not be relying on them, in one sense of the word, and yet he might be misinterpreting that. I wonder if any papers really pertinent to the suit and in his possession ought not to be attached to let the court see them.

The Chairman. Can't the court insist on them if he does not get enough information?

Mr. Morgan. I suppose he can.

The Chairman. If counsel does not put them up, he will lose his motion.

Mr. Pepper. Mr. Sunderland, we have preserved in a general way the chronological sequence in the development of these rules, taking things up in the order in which they are likely to occur. May I ask which would be likely to develop first, the situation dealt with in Rule 40 or that dealt with in Rule 41? As I understand it, Rule 41 is something that happens immediately upon the completion of the pleading; 40 is something which may happen later in the game. Am I right or wrong on that?

Mr. Sunderland. I think that chronologically probably Rule 41 would come before Rule 40, but it seemed to me inadvisable to start out with the rules dealing with the proposition in Rule 41 before covering or developing the theory of the deposition procedure. It seemed to me that it would be clearer when we got to 41, although chronologically it would happen the other way.

Mr. Lemann. You could proceed under 41 before an answer was filed?

Mr. Sunderland. Yes.

Mr. Lemann. You could certify your petition at once.

Mr. Donworth. I think that is premature. I think that will have to be changed under the general reference.

Coming to Rule 42, I would suggest to the reporter that in line 3 the word "subsequent" should go out. It is liable to create an inadvertent idea. It would imply that what has taken place already is the trial.

The Chairman. Well, Rule 42 covers your point, Judge Olney.

We will now go to Rule 41, Claim for Jury Trial--Waiver.

RULE A1, CLAIM FOR JURY TRIAL--WAIVER.

The Chairman. I have some matters of substance on that.

Mr. Donworth. I move that we extend an expression of thanks to the reporter on these rules.

The Chairman. That will be unanimously agreed to.

Now, coming down to claims for jury trial, the first crack out of the box we have a requirement that you have got to demand a jury trial within ten days after issue is joined.

Mr. Lemann. When do you file these answering affidavits? Suppose the plaintiff serves his petition and then he proceeds to file affidavits right away with motion for judgment. I have got 20 days to answer, but he wants judgment right off the bat. Do I have to file the answering affidavits? Do I get 20 days to do it, 5 days, or what?

The Chairman. A notice of motion can be brought on within how many days under your rule? It is pretty short for summary judgment procedure.

Mr. Lemann. I think that had better be made quite plain.

The Chairman. A good suggestion.

Mr.Sunderland. How much time would you suggest?

Mr. Lemann. It does not do much good to take 20 days to answer if you have to get the affidavit in in five.

Mr. Clark. Your defendant does not need to do anything for twenty days.

Mr. Lemann. That is what I don't know. I asked Professor Sunderland on the side, because I thought I had overlooked something.

Mr. Sunderland. If motion for judgment is made, is there a rule that you have drawn, Mr. Clark, that will fix the time

when the other party must file affidavit?

Mr. Clark. I don't think there is. That is a little outside the scheme that we have. We provide for answer and reply, and so on.

Mr.Sunderland. But you have no certain rule to provide a certain number of days when no other time is fixed.

The Chairman. I think Mr. Lemann is right. You have to check up to give ample time to the other side to put in its defending affidavit.

Mr. Morgan. Does he not have to do that in response to the motion?

Mr. Clark. He presents it right at the hearing.

The Chairman. Suppose I serve notice for summary judgment. Under Dean Clark's rule I can bring that on in three days' notice. Is that enough time for the defendant to scurry around and get his affidavits?

Mr. Morgan. If he does not, he can appear on the motion day and get additional time.

Mr. Olney. He ought to have twenty days to answer and twenty days to resist summary judgment.

Mr. Lemann. That would be awfully fast to get judgment.

Mr. Sunderland. I think we have six days in Michigan, and I don't think there has been any complaint about it.

Mr. Donworth. On restricted classes of cases.

The Chairman. All in favor of giving more than twenty days to make application--

Mr. Morgan. I am strongly opposed if that motion is made after his answer is in. I am not going to give him twenty days to put in a motion. When you move to strike, his

answer is assumed. That is what you do under Rule 113 in New York under summary judgment. You are not going to give him twenty more days.

Mr. Lemann. Nobody had that in mind.

Mr. Morgan. Then, we shall have to fix the rule.

The Chairman. Suppose you make it ten days and in any event not sooner than the answer is due. That gives him up to the time of his answer and at least as much more as he needs to make ten days.

Mr. Dodge. I think he might well be given twenty in any case, but I don't feel very strongly about it.

The Chairman. The motion is to make it twenty days.

Mr. Olney. Twenty in any case?

The Chairman. That is what Mr. Dodge's motion was.

Mr. Dodge. These affidavits have to be on personal knowledge, and people are not always likely to be available, and there is likely to be constant application to the court for further time.

Mr. Lemann. I would not personally objectif it is not before the answer comes in. If you give him twenty days for answering, he certainly ought not to have to file affidavits here in any less time.

The Chairman. My suggestion was that you give him until the time to answer expires and in any event not less than ten days from the date of the motion.

Mr. Dodge. That is all right if it clearly appears that the court has power to extend the time.

Mr. Sunderland. We should have a general rule somewhere that any time limit made by these rules might be extended by

the court on cause shown.

The Chairman. Yes, there should be.

Who favors making it until at least the answer is due and in any event not less than ten days after the notice?

Mr. Olney. I favor not making it until the time the answer expires, but I think you can cut down your ten days for filing without any difficulty.

The Chairman. No, he might wait until the answer is in and then serve three-day notice on you, and your witnesses are scattered all over the country.

Mr. Olney. You can get an order from the court under those circumstances.

The Chairman. You do not want to make it so short that they are always applying to the court. I think the majority of the members are in favor of the ten days.

Mr. Donworth. I think the summary judgment will be rightfully granted in very few cases if the party has a very good lawyer.

Mr. Morgan. He has a poor lawyer, who defends a case that has no defense.

Mr. Olney. If he has a good lawyer, nine chances out of ten no suit will be brought against him.

Mr. Donworth. I am in favor of retaining trial by jury inviolate and not in any instance substituting trial by affidavit, whether the party is in good faith or not.

I think this is one of the most serious rules in our whole group, and it will be the one subject to the most criticism unless you throw every safeguard around the man who wants his case tried by a jury. Trial by jury is the safe-

guard of the man who otherwise would not get a square deal. I am very much opposed to giving any color to the charge that these rules in any way encroach upon that right.

Mr. Dodge. The legislatures in several states have enacted such laws.

Mr. Morgan. Yes, and it has met with tremendous success too in England.

The Chairman. We are on Rule 1A now, gentlemen. There are several things that are interwoven there, and I should like to go over them.

In the first place, the requirement is here that you have to demand jury trial within ten days after the issue is joined or you will lose it. That is the most rigid and most exacting rule on that subject that I know anything about.

I am opposed to requiring demand for jury trial within ten days after answer or reply, for the following reasons:

First, there is no necessity for it. It is enough if the demand is made when steps are taken to place it on the trial calendar.

Second, we have adopted elaborate machinery available between the time issue is joined and the date of trial for discovery,narrowing of issues, production of documents, and admission of facts. Until this process is finished, the parties are not in a position to judge whether they want a jury trial. Even requiring a demand, when request is made to place the case on the calendar, may force too early a decision on the jury question, but I do not see how to avoid that.

Under most laws you can make a demand any time up to the

time of trial.

Third, the statute under which we are acting requires that the right to jury trial shall remain inviolate. The requirements of this rule as drawn have the appearance of shutting the right off too peremptorily.

There is also a question in my mind as to whether requiring the thing at that stage with no reason for it would be sustained. There is a decision in the appellate division in New York sustaining the New York requirement as to demand.

Mr. Clark. The Connecticut case upholds the rule that is stated here.

The Chairman. The Connecticut case does?

I do not know of any reason why we should try to have the appearance here of shoving a man out of a jury trial if there is any good reason for making it ten days. Then you must justify it.

Mr. Morgan. Have we determined the manner in which a case is to be put on the calendar for trial?

The Chairman. No, we have not.

Mr. Morgan. In Connecticut it is automatically put on the trial list and then moved from the trial list to the ready list by special term, as I understand it.

Mr. Clark. We don't use quite those terms, but that is the idea.

The Chairman. Of course, Mr. Morgan, if you don't fix a rigid time limit right after issue is joined, I think you are put to it to make your demand in time when your request for trial is filed.

Mr. Morgan. In Connecticut, as I understand it, they keep

? on pleading until they get to issue. They don't cut them off with trial.

The Chairman. Let me finish my statement, and then I will withdraw and let you go on with that. I am going to deal with that very thing in here.

If you are going to have ten days as the limit, and I see no reason for it, then the question is, When do you have to make your demand? The natural time to make it, under the New York rule, and the time it is really necessary to make it, is when you put it on the calendar. If you are going to adopt the first of these three alternatives you had the other day and require the party to file complaint to the papers as fast as they are made out, the best way is the practice of having the case automatically go on the trial calendar by action of the court. On the other hand, if you are going to adopt the hip-pocket system I have suggested, then there is no automatic placing of it on the calendar, but there has to be a notice of issue or notice of trial served.

Fursdon
fls
9 o'clock

Now, I suggest a rule like this:

"The right of trial by jury as at common law and declared by the Seventh Amendment to the Constitution of the United States shall be preserved to the parties inviolate."

That language is a pious declaration by the reporter. Congress may think we did not have to make it because even if they wished to they could not authorize us to violate the jury provision. That was put in there as a pious declaration and I think it is good politics to say that right at the start.

Mr. Pepper. That is our slogan: "Piety is good politics."

The Chairman. I think it is good policy to say right at the outset that that is what we are trying to do instead of making Members of Congress and lawyers around the country hunt through the rules to see whether we have done it or not. They may hunt anyway but we have at least shown the purpose. We are no worse off than Congress is because they have done precisely the same in the statute.

"Any party may demand a trial by jury of the issues of fact in any civil action by serving upon the other parties a written claim therefor. In this claim, a party may specify the issues which he wishes so tried, otherwise he shall be deemed to have claimed such trial for all issues of fact. Any party filing a note of issue as provided in Rule A-3 ---"

We have made some suggestions about getting it on the calendar, and if you take my hip-pocket rule, or even the

rule that requires pleadings to be filed, there must be some specific date after they are served, necessary in either case---

> " * * * shall, at or before the filing of such note of issue, serve and file with the clerk his claim for a jury trial. Any party on whom such note of issue is served, and upon whom no such claim is served or who desires to have additional issues tried to a jury, shall serve and file his claim, with proof of service, before the expiration of ten days after the service of the note of issue. If only part of the issues are specified in a claim, any other party may, within ten days after the service thereof upon him, serve and file a claim for jury trial. A party who has served a demand for jury trial shall not withdraw it without the consent of the party served ---"

The rule says it can be withdrawn with the consent of the court, but the court has nothing to say about it and it ought not to be withdrawn without the consent of the adverse party.

> "Unless a party shall have made claim, or had a claim served upon him by another party, as herein provided, he shall be deemed to have waived all right to a jury trial."

I can see holes in that myself as I read it, but the idea is you do not have to demand a jury trial until the time approaches when there is some need for it. That is all I want to say about jury trials. We will come to A-3 and A-4 on this question of note of issue later on.

Mr. Pepper. I suppose if we make too short a period, Mr. Chairman, for this limitation of the time for jury trial, it will always be demanded and it will cut off the possibility

that time might be saved by giving a little more leeway for a determination that some other form of trial will be better.

The Chairman. How can you say you want a jury trial until you have had all these discoveries and know what the issues are?

Mr. Clark. May I explain that situation as I see it? I think there is a difference, as the chairman has pointed out, going back to the way we decided the pleading matter. If the hip-pocket rule is adopted, I do think we should follow Mr. Mitchell's suggestion, and I want to make it quite clear that if the hip-pocket rule goes I think this is the best way to settle it. I may say in passing that to my mind that is perhaps the question that seems to me is a little more doubtful about that rule than many other things, because it does take it out of the hands of the court to push the case along, but, at any rate, if that rule is adopted, I think this is the rational system.

If it is not adopted, I think the system in the original rule is the better one. You will notice that the original rule allows the judge in the third rule here, A-3, to provide for the case going automatically on the jury list for trial and to be disposed of in that way.

Now, on the point of desirability of an early claim, one thing which has complicated the whole question of the union of law and equity is to allow the question of the trial and whether there is waiver or not to go off into the trial stage. The thing that makes the difficulty is that you cannot tell whether there is waiver or not, there is nothing clear-cut in regard to waiver. If you were in New York where they have the

note of issue proceedings, and you have to file your note of issue about two years before you can get a trial, because that is the state of the calendar, that is early enough, of course; but if you are in a place where your case is going to go on the calendar for trial about the time when it is ready, that is, where the court is up to its work, you are going to have the two running together again, and what I tried to do is to get a clear-cut division between the time of waiver and the time of trial, because, as I say, that is the difficulty that has come in all these cases. You do not have the question of waiver out of the way before you go to trial.

And there is a difficulty that we run into right along in taking care of the situation in the metropolitan districts where trial is delayed, and in the other places where it is not, and where the judge is somewhat anxious to keep his docket up to date.

I do not know how we can settle that completely. I think we have got to take one rule or another, and if we take the pleading rule, that the pleadings are not in court, I think this is quite rational. If we do not take it, I think it is better to follow this rule.

The Chairman. Let us assume that we have the rule that you file your complaint and get a writ of issue and summons issued by the clerk and everything has to be filed as we go along, so that all the papers are on file, and as soon as issues are joined the court automatically, without any note of issue, places the case on the calendar, that is the logical way of getting on the calendar. Now, if you follow that, why should you require the man to demand a jury trial ten days

after the answer is served?

Mr. Clark. Well, you want a period before it goes on the calendar.

The Chairman. All right, make it so many days before it goes on the calendar.

Mr. Clark. In the original draft, in the tentative draft I, where the rule which is now A-3 was considered, that provided for its going automatically on the calendar. You may recall that it could not go on the calendar until ten days after the last pleading was filed. You had your ten days to make your claim and it did not go on the calendar until then, and it went on the calendar automatically then. It was hitched up together.

Now, if you do not make that automatic, I do not see how you get your waiver unless you go back to the note of issue, to tie up the court to a note of issue when it is not necessary when the pleadings are in the court. I think it is necessary when they are not in court.

The Chairman. Let us leave the metropolitan district alone for a minute and take the general situation around the country. Take the United States District Court in the District of Minnesota, which is typical of scores of the states outside of the metropolitan district.

There the court has terms. It will meet the first of June and it will meet the first of December, and at a stated time, maybe 30 days before the term opens, the clerk gets out and starts to make up his calendar, and automatically puts the cases on it.

Now, suppose I have started a case in June and got an

answer on the 20th of June, and the next term of court is in December; the clerk does not care whether this is a jury case or a court case until, maybe, the middle of November.

Mr. Morgan. Then you do not file the note of issue until that time?

The Chairman. You do not have to file the note of issue because they have an automatic system. You file your claim and get a summons issued by the clerk. Why should I file a demand for jury trial the first of July and then go on during the summer and sift the issues to find out I do not want one?

Mr. Dodge. Mr. Chairman, I have lived all my life under this 10-day rule and I have never heard any complaint about it at all. When a man brings a suit he knows, 99 times out of a hundred, whether that is the kind of a case in which he wants a jury or not, and he always endorses right on the original paper, "Trial by jury claimed", and if he neglects to do it the court may let him put one in late. It is always done as an original step in an accident case or any kind of a case where a jury would naturally be wanted by the plaintiff. Very frequently, at a later stage the parties may conclude that the case can be tried without a jury, or they may agree on the facts, but it is a very rare case when the party's right for jury trial is not fixed by the nature of the case, and not by the defendant's answer or by affidavits, or evidence that may come in on deposition. It is done by the nature of the case. That is almost the universal rule, I should say.

Mr. Morgan. Mr. Dodge, may I ask, is it not true that you have equity and law separated in Massachusetts?

Mr. Dodge. Yes.

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Mr. Morgan. And it is only in the law cases that this happens? Now, Mr. Clark here is, I think, hoping that this kind of rule will avoid the difficulty that caused him so much mental anguish over Jackson v. Strong in New York. I myself have not the same confidence that he has that this sort of thing will do it.

In Jackson v. Strong the plaintiff starts out in an action that was clearly an equity action, for an accounting of partnership funds. The defendant, instead of putting in just a general denial, put in an argumentative denial to the effect that it was not a partnership but works, labor, and services for reasonable value, and it went to a referee. The referee found in favor of the defendant's claim, that it was not a partnership and there was no accounting, but he awarded a reasonable value for the services to the plaintiff, as to which, of course, the defendant would have been entitled to a jury trial. The court upset that, judgment was entered on that, and the court of appeals upset it and sent it back for a new trial. They used a lot of language to the effect that the whole case was to be dismissed.

Now, it seems to me that on any system, if the plaintiff asks -- suppose the plaintiff asks for purely equitable relief; if the defendant demanded a jury trial it would necessarily be denied, would it not?

Mr. Donworth. Not under these rules.

Mr. Morgan. Would it not ordinarily be denied?

Mr. Donworth. Not under these rules.

Mr. Morgan. Why?

Mr. Donworth. Because, as I understand these rules,

and I would like to have that made plain if I am in error, where a man is entitled to a jury trial under the Seventh Amendment, he gets it if he demands it. In a case where he is not entitled to a jury trial under the Seventh Amendment he is still entitled to it if he asks for it.

Mr. Morgan. Oh, no. Heaven forbid.

Mr. Donworth. That is the way I understand it.

Mr. Clark. Oh, no.

Mr. Donworth. There is nothing in these rules, as I read them, which says this, which I am going to offer as an amendment:

> "Nothing contained in these rules shall be construed either to expand or restrict the class of actions or issues in which trial by jury is demandable as a matter of right."

Mr. Morgan. I did not suppose they did.

Mr. Donworth. That clause should be in there.

Mr. Clark. Judge Donworth has not fully understood what we are driving at. This is true, that he may request a jury trial; in that case, if no action is taken the clerk will put it on the jury calendar. The next step is that your request ---

Mr. Morgan. (Interposing) Move to strike.

Mr. Clark. Then it becomes a matter of discretion of the court because the court can order a jury trial whenever it wants. That is a provision we put in explicitly, that the court may order a jury trial, as it could under the old equity practice.

The Chairman. And the court has also got discretionary

power on his own motion ---

Mr. Donworth. (Interposing) Not under the rules.

The Chairman. Just a minute. He has the power on his own motion to transfer the case from the jury calendar to his own calendar, if it is wrongly on the jury calendar, if it is not a matter of right.

Mr. Donworth. As I understand it here, there is nothing which says, as Mr. Morgan has said, the rules do not seem to recognize a distinction between law and equity at all, even on the question of the right of jury trial if a man demands a jury.

Mr. Lemann. The court under A-2, as I understand, can find that the right to a jury trial does not exist under the situation, and further find that he has not a right to trial by jury. So, the procedure, as I understand it, is that the plaintiff could demand trial by jury under A-1, and under A-2 the court could say, "I find it is not a case on which the Seventh Amendment gives you a right to be tried by a jury."

So, that leaves it to the judge to take the jury trial away, Judge Donworth, if he finds he has the power to do it under the Seventh Amendment. He gets it, but it is a sort of Indian giver.

Mr. Morgan. The point I was trying to make was this, that if the action appeared clearly to be what we call an equity action under the old system, so there is no right to trial by jury, if the calendar was anything like the usual calendar and that was put on a jury calendar, it would be stricken immediately and put on the court calendar and the defendant could not object to that.

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Now, then, the plaintiff falls down in his proof of his right to equitable relief and it is not the kind of case where the court could have given equitable relief as an incident to the action because of the failure to prove the right to equitable relief, which did not result from some fault of the defendant which the plaintiff did not know of before the action was brought, and so forth; now, as I understand, Mr. Clark wants jury waived in that kind of case unless it is claimed, so that even though the action is begun at an action where there is clearly no right to trial by jury, if the defendant does not claim the right to trial by jury and at the trial it develops that the plaintiff is entitled to legal relief, he is going to get it from the court. Isn't that what you are trying to get at?

Mr. Clark. That is right.

Mr. Morgan. To get away from Jackson v. Strong. I do not know whether we want to go that far.

Mr. Dodge. That is a rare kind of case. You may be entirely right that combining law and equity tends to do away with my point that this has always been perfectly satisfactory.

Mr. Clark. I do not see why it does.

Mr. Morgan. I think it does, because the kind of case where you would claim a jury trial would be a case which would ordinarily go on the law side, because it would not be an equity side case at all.

Mr. Clark. What has that got to do with the point of ---

Mr. Morgan. (Interposing) We have a trial by jury.

Mr. Clark. Yes.

Mr. Morgan. I think it is nonsense, if a man is sued

for specific performance, for example, to demand a trial by jury in a case where it is perfectly obvious he has not a right to trial by jury.

Mr. Clark. That was not the point Mr. Dodge brought up. The question was whether requiring you to file your claim for jury trial at an early time was harsh on the parties or not. Mr. Dodge said the practice in Massachusetts was to require it and it resulted in no hardship.

Mr. Morgan. On the law side I think that is true because we automatically claim jury trial in every case where we want it anyhow. We file it right with the papers in the beginning.

Mr. Clark. That would mean you do not have many jury-waived cases on the law side?

Mr. Dodge. Yes, we have a great many.

Mr. Morgan. Yes, but they waive later.

Mr. Dodge. Frequently it is waived after it is claimed.

Mr. Morgan. That is what I refer to in Rule 2, line 4. It says issues claimed for jury trial go on the jury calendar to be tried by jury unless the court on its own motion or its own initiative shall find that a right of trial by jury of some or all of those issues does not exist under the Constitution or statute and shall further order such issues otherwise tried.

Mr. Donworth. Yes, my statement was stronger than I should have made and I wish to qualify it. But I still say that under these rules the man who in a specific performance case does not want a jury trial, or in an injunction case, has got to get in and object to it affirmatively. In the

ordinary proceedings under ordinary rules the distinction between law and equity is so plainly marked that it is an exceptional case where a court grants a jury trial in an equity proceeding. Here, if any party demands it, then he gets it unless the court of its own motion takes it away, or the other party gets in and raises a contest. There is nothing to the effect that the findings of the jury are advisory, and they would seem to have the same effect in an equity case as in a law case.

The Chairman. In the practice I have been familiar with you do not have to make that formal claim for jury trial. When you serve the note of issue you are supposed under the rules to say "Jury case" or "Court case" on the note, and whatever the lawyer says, goes on the jury or the court calendar. Now, if he is fool enough to label it a jury case when it is an action for specific performance, of course it is necessary for the other side to move a transfer from one calendar to the other, or if the court takes a look at the pleadings, he will do it of his own initiative, and that works all right.

Mr. Clark. May I just say, in the first place, I do not think this is so very far different from the Washington procedure, as I understand it, and it is not different from the New York procedure now in metropolitan New York. It is not different from the procedure, I think, in Minnesota. The difference, if any, is in this, that when you make your claim the rest of it follows along.

There were two things we were trying to do: The first is to require the claim to be made at a time which is perfectly

definite so that you can say that if it is not made in that time it is waived; and the second is to get some machinery, not too complex, to have the issue of the former trial tried out or discussed and decided. If and when it is decided, apart from the later trial itself -- and that is all this does, it is a device so that the way you have a contest, if you must have one, is on your motion to strike from the jury list, and there isn't any intent of putting the burden of the argument on one side or the other. This is not a case for evidence; it is just an argument to the court; it is just a device to separate that question from the trial itself.

Mr. Donworth. Mr. Chairman, I suggest that the rule start in with the reference to the Seventh Amendment.

The Chairman. I did that. It is in the rule now but it is tucked down at the bottom of one of these rules, and I thought we might as well put a flag up at the start.

Mr. Donworth. I think that is an excellent thing, and I would suggest -- I do not make a motion -- that the next sentence should be the one I read. I think it clears the air wonderfully:

> "Nothing contained in these rules shall be construed either to expand or restrict the class of actions or issues in which trial by jury is demandable as a matter of right."

We cannot limit the jury trial but we can expand it, and I think this gives color to the idea that we have expanded the right of trial by jury.

The Chairman. I think that suggestion ought to be referred to the reporter for consideration, and if he has not got

it perfectly clear, to put that or some other clause in.

Mr. Clark. Mr. Chairman, may I speak a little about the protestations. Of course, I do not know -- if you really feel they ought to go in I do not suppose I ought to object, but I do not like them very much because you do not protest unless you think you are doing something wrong.

The Chairman. Judge Donworth believes the rule may be susceptible to the suggestion you are enlarging the jury trial. I do not know whether you are or not.

Mr. Clark. He is certainly wrong.

The Chairman. He thinks you are, and I thought the suggestion ought to be referred to you to check up his assertion.

Mr. Dodge. There is an intimation there that the burden of proof to take an old equity case off the jury list may be on the defendant, and I think there ought to be a provision that if it is not a case for a jury constitutionally it shall go off, and put the burden plainly where it is now, on the plaintiff, to get his jury issues as a matter of discretion.

Mr. Clark. Mr. Dodge, there is this difficulty about that: You see, in lines 7 to 10, we provide that the court may order a jury trial.

Mr. Dodge. Yes.

Mr. Clark. We are going to have it that the court may first pass an order saying that the case is stricken from the jury list and then at the same time pass an order putting it on.

Mr. Dodge. No, I think the order putting it on, if it is an equity case, should never be allowed except upon the

motion of the party who asks for jury issues. It should not be placed upon that list and prima facie remain there with the burden on the other side to get it off.

Mr. Donworth. That is said so much better than I tried to say it.

The Chairman. How are you going to help it unless -- you are going to have a motion to decide whether it is a jury case or not. Isn't the simplest way to do as the reporter has done? Suppose I want a jury trial; I put it on the jury calendar and if I am wrong it is stricken off or transferred. Suppose I serve a notice that I want it on the court calendar and the other fellow is not satisfied with that and he moves to transfer to the jury calendar; why make any preliminary hearing necessary until one fellow has made a mistake?

Mr. Dodge. If the cases go automatically off the list or they can be ordered off if there is no constitutional right to jury, that is all right; but who ever asks for a jury in a case where he is not entitled to it as a matter of right should specify just what issues he wants tried and should put that into a motion, and the action should be on that motion specifying the issues, and should not be the result of a mere jury claim as if it were a negligence case.

Mr. Clark. That makes the party decide every time in advance whether this is a jury or a court case, and it does not seem to me he ought to be required to do that, because that is where the argument has come, whether it is a jury or a court case.

You will get back to the situation where you will want to label these things law and equity, and have your law and

equity sides. It works out very simply this way, and anything else, if you are going to put it up to the man to pass on, is going to make it complicated in the cases where it does not come up. Of course, when somebody has made a mistake and it is brought before the court you have to argue it out, but that does not happen very often.

Mr. Morgan. If both parties would like to have a jury trial of an equity case, and one of them puts it on the jury calendar and the other does not object, are you going to list that case for a jury trial?

The Chairman. It is listed, and if the court finds it is wrong it strikes it off on its own motion under rule A-2.

Mr. Clark. The court on its own initiative may strike it.

Mr. Olney. If both parties want to try an equity case by a jury, why shouldn't they be permitted to do so?

Mr. Morgan. I should think the court might object to it very strenuously.

The Chairman. I do think Mr. Dodge has made a good point that the rules do not cover. You talk generally about one party making a motion to have specific issues in a court case submitted to a jury, but you have not said that in his motion he must define the issues he wants submitted to it. In the practice I am familiar with, when a man makes a motion to have issues presented to the jury, he is required to specify accurately the issues he wants submitted and not make the court formulate them for him, and I think that is a good point.

Mr. Clark. I think we could put that in. We had something quite like that in the first draft of the rule.

You will notice that we will have the Constitution of the United States in in three places then. We will have it in the first line as to the pious protestation; we will have it in a little further down in Rule A-1 that in cases not triable as of right, when he makes his motion he must define the issues; and then we will have it in Rule A-2 where we state the test of what is a jury case or not. I think we will be doing pretty well for the Constitution.

The Chairman. What is the harm, Dean, in putting it in there? I think it will take a Member of Congress a half a day to read the rules through and find out whether we have protected jury trial or not, and if we state so at the start in express terms, what is the harm?

Mr. Donworth. And if you add to that:

> "Nothing contained in these rules shall be construed either to expand or restrict the class of actions or issues in which trial by jury is demandable as a matter of right"

then you do not have to refer to the Constitution or anything else again after that. Then you know.

The Chairman. Maybe that is a good substitute for my protestation. I would not object to it.

Mr. Donworth. Your reference should start it. I think it is a good thing for Congress to see. Then I think if we say we neither expand nor restrict the right of jury trial, there is then a definite rule.

Mr. Clark. Of course we can put that in, but I wanted to make it clear that we have certainly got to refer to it twice more, because our test when you get a jury is whether

you can have it under the Constitution or the statute; we put it in Rule A-1 under the suggestion that in cases where it is not demandable you have got to define the issues; then you put it in A-2 as to the judge striking it from the jury list.

The Chairman. The whole gist of this is that you want this protestation stricken out at the top of Rule A-1? That is all it amounts to. Let us settle it.

Mr. Clark. I would a little prefer to have it stricken out.

Mr. Olney. What is the objection to letting the reporter refer to it in his draft? You cannot tell about it until you see it in final shape. What is the use of bothering about matters of protestation? Let us get down to the matter of substance.

The Chairman. That is why I wanted to get the matter settled.

7 Mr. Clark. Did you want to see the form, Judge Olney? Is that it?

Mr. Olney. No, I want to get down to the -- leave the matter of protestations for the reporter.

Mr. Lemann. We want to get down to the substance of what we are discussing. My reaction to what he said a moment ago was that Judge Olney had in mind that if you put in that you do not expand or restrict trial by jury, I would construe that to mean that in an equity case if I asked for trial by jury I could not get it.

Mr. Donworth. Not as it is here.

Mr. Lemann. Would that conclusion be corrected if we put in a statement that the right of trial by jury should not

be expanded?

Mr. Donworth. No.

"Nothing contained in these rules shall be construed either to expand or restrict the class of actions or issues in which trial by jury is demandable as a matter of right."

Mr. Lemann. Yes.

Mr. Donworth. That is all it is. It is discretion.

Mr. Lemann. I think that comes pretty close to the point I had in mind. I am trying to talk it out as we go along. "Demandable as a matter of right" -- Now, I come in and say I want a trial by jury, that this suit is for specific performance and there are going to be some issues of fact here; this is purely an equitable case and there is no question of considering that it involves issues at law; it is a thorough-going equity case but I want it tried by jury. My opponent comes in and says, "No, I object; I do not want a trial by jury; I want the judge to try this case."

Where do we leave that? Can the judge say, "Well, I will do as I please about it now. It is up to me entirely to take it or give the plaintiff a trial by jury or take it away from him." Or can the plaintiff say, "No, Judge, you cannot give him a trial by jury. I insist that he must not have it. You have no power to give it to him."

Then I say, "You cannot take it away from me."

I just want to know which way we are going to have it.

Mr. Dodge. I suggest that the rule read something as follows:

"A jury claim in a case in which there is no right

to trial by jury shall be ineffective, but the party desiring trial may ask the court to frame issues for a jury", or something to that effect.

I do not like to have any burden put on the other side to get it off the list.

The Chairman. Let us test that out practically. "--- shall be ineffective"; now, the only effect of it is to put it on the jury calendar. When the clerk gets a demand for a jury trial that is filed with the court and it is up to him to put it on the calendar. Is he going to decide whether it is ineffective or not?

Mr. Dodge. It does not make any difference what calendar it gets on; he cannot get his jury trial unless he is entitled to it as of right.

Mr. Clark. May I say I think that loses all the benefit of trying to get out of separating this issue from the trial itself, unless every claim has to go to the judge and be decided automatically when it goes, and that is a burden that we cannot expect to put on any judge, then it is thrown into the trial stage and you have no benefit of waiver in advance, because the question, whether it is ineffective or not, will be decided by the court when he starts the case and then he will find it is on the wrong docket and move it back and forth. This is just an automatic device to get that settled and out of the way before the trial stage. It seems to me you could have a clearer way of throwing it into the trial stage than the provision suggested.

Mr. Donworth. I have in mind a foreclosure action, and in different states the form of complaint of foreclosure

differs. In many states the foreclosure must be a suit in equity. You start in and allege your promissory note first, and then you set forth the substance of your mortgage, and then you pray for judgment, first, that you recover $10,000 from the defendant in ordinary form, and, second, that the mortgaged premises be sold, and so forth. Now, I desire to make it clear that the fact of demanding a money judgment in a foreclosure case does not give the defendant the right to trial by jury, and I think we should say we want to leave the right, so far as it is a right, exactly where it is today and not enlarge or expand or contract it.

Mr. Clark. There is a difficulty that Mr. Lemann brought out in that while Judge Donworth's statement is not inconsistent with lines 7 to 10 of Rule A-2, which is the discretionary power to send to a jury, it is not really inconsistent because he is talking in terms of right, but it seems to me that a good share of the people will think it is. You have got to state it out and say that it is not.

The Chairman. Let me see if we cannot make some progress here. We have talked the thing over generally and jumped from one point to another. Now, after this preliminary discussion, which has been useful, let us start in on Rule A-1. Now, bear in mind that the reporter has already been instructed to draw three alternate rules; to file pleadings under the automatic rule where every complaint has to be filed and everything else right away; then there is my hip-pocket system which he admits requires a note of issue to put it on the calendar; then there is this mongrel, intermediate system, where you do not have to file to start with, but you have to file within a

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limited time afterward.

Now, he has conceded, I think, that if the hip-pocket rule is adopted, my method of claiming a jury trial and following out by the note of issue is the only solution. Now, in connection with the hip-pocket rule, which he is drawing, will you favor the adoption of a rule along the lines I have outlined for a demand at or about the date the note of issue is served, without committing you as to the language of my rule, which will have to go to the revision committee? Now, are you willing to vote first on that? There doesn't seem to be any dispute about it.

Mr. Dodge. I so move, if you want a motion.

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

The Chairman. That is carried. Now, suppose we take up the automatic rule that he is required to draw, where all the papers are filed instantly and the case goes on the calendar automatically without any note of issue. Then you have to do something like he has done in A-1, fix a time limit there, so many days after the answer, or so many days before the trial, that you have to make a claim. Now, what do you want to do with this requirement that demand shall be made within ten days after service of answer? Is that all right?

Mr. Dodge. I move that that be adopted.

Mr. Morgan. Within ten days after?

The Chairman. Within ten days after the reply, if reply is required; ten days after the issue is joined, under the present system, where no note of issue is required. Is that about right?

Mr. Dodge. Or within ten days after any amendment which for the first time raises a jury question. That is in the practice there.

Mr. Morgan. I am all right on that.

The Chairman. Let us eliminate confusion by determining what we are going to do if the triable issue arises later. That I think we ought to take up and settle, and let us settle this one thing. Suppose there isn't any supplemental development, just a straight case, and you have the system by which the pleadings are all on file and the case goes on the calendar automatically; that is one of the rules he is drawing; you have to fix a time for demanding jury trial, and he has it ten days after the issues are drawn.

Mr. Olney. Why not ten days after it goes on the calendar?

Mr. Morgan. When it goes on the calendar it is marked court or jury, is it not?

Mr. Clark. Yes.

Mr. Olney. It can easily go on the calendar and give a man ten days to demand that it go on the jury calendar or waive his rights.

The Chairman. Sometimes it goes on the calendar, and if the court is up it may go on trial in ten days or two weeks.

Mr. Dodge. I think this is entirely satisfactory. I do not think it will cause trouble.

Mr. Morgan. Of course, anybody who wants a trial will just automatically demand it.

The Chairman. That statement struck me as a pretty rigid thing, ten days after issues are joined. I do not know

any good reason ---

Mr. Morgan. (Interposing) Mr. Mitchell, of course what will happen will be just what happens in Massachusetts. They can waive it afterward if they want to. Anybody who thinks he may want a jury trial is going to demand it right away.

Mr. Lemann. Our experience is that you get a jury trial only if you ask it, and you can get it any time until the case is posted for trial. But everybody, almost without exception, who wants a jury trial asks for it in his petition or his answer.

The Chairman. The only feeling I have about it is again the automatic rule, and that is that so many of the lawyers all over the country are practicing under the system where they can practically demand a jury trial up to the time the term opens or the case is about to be reached, and they see a provision that says that if in ten days they have not asked for it it is considered waived, I think that, as I said in my comment, is a little peremptory.

Mr. Lemann. What is the alternative?

The Chairman. The only alternative, I guess, is to make a longer time.

Mr. Lemann. What is the objection to a longer time?

The Chairman. The objection to a longer time is that calendars might be made up meantime and the court would not know whether to put this on a jury calendar or a non-jury calendar.

Mr. Lemann. Looking at it from the plaintiff's standpoint, he can say that he will just get it off the calendar while he makes up his mind, but how about the defendant?

The Chairman. He can make the demand and ask to have it put on.

Mr. Lemann. If the fellow does not specify that he wants the case tried by jury it just will not go on the calendar until he does specify, if you decide to do that. That would be the way to meet the point, by an alternate rule which will keep the case off the calendar. That is up to the plaintiff; if he wants to get on the calendar, let him decide.

Mr. Clark. I think it is a little more than that. You get it on the calendar and then you get confusion as to how it is going to be tried. Where a court is up to its docket it is going to go right ahead and try the case and then you have the parties scrapping over how it is to be tried.

Mr. Lemann. Are there many states where the court is that speedy in the federal court?

The Chairman. The alternative, instead of placing it after the time the pleadings are served would be if you had terms, you could say 20 days before the term, but we have not got terms. If you knew when the case was going to be tried you could say at least 30 days before trial, but you do not know. So, I am convinced that some ---

Mr. Clark. (Interposing) Why not make this a little longer; 20 days after the reply, or even 30,if you want.

Mr. Olney. Mr. Chairman, does not that difficulty arise from the fact -- of course, we are dealing only with the case where the pleadings are all on file, that is, where they are required to be filed; that is our case because the other offers no difficulty -- does not your difficulty in the case arise from the fact that the case goes on the trial

calendar automatically? If notice were required of the setting of the case, and that is the practice in California always, notice is required of the setting of the case, your difficulty disappears because you can require then that the demand be made at that time or it be waived.

Now, personally, I am quite in favor of not making up a trial calendar automatically. The cases should go on the trial calendar only by notice from one side or the other that they want a trial.

The Chairman. Here is the difficulty we have: One of the reasons these federal judges fret so over people in trying their cases is because you have not adopted the hip-pocket rule. You go and file your papers right along and then you haven't any idea of trying the case, you may be negotiating settlement or not. Under the absolute filing system the court jams the case on the calendar and then he calls it up on the calendar day and nobody wants it tried and he rants around and says, "If you don't try it I will dismiss it," and there is where the trouble comes. I think the trouble the federal courts have about that is because of the automatic system. They have the cases stuck up in front of them on the calendar, and they call them and call them and get tired of them. The other system is a good deal better. But you have got the automatic system if you file everything, and then they will insist on their being tried, I think, because they want to get the cases out of the clerk's files.

Mr. Olney. Putting the cases on the calendar automatically is no part of filing your pleadings at all.

The Chairman. I know it is not, Judge, but the moment

you force everybody to file and set a lot of cases that go bad on you, that are abandoned or settled or what not, they are laying around, they are on file because you are forced to file, and the judge wants to clear the docket.

I looked at the statistics of the Department of Justice, and they had 39 trial cases in one district in New York dismissed.

Mr. Lemann. Why wouldn't Judge Olney's suggestion of assimilating the hip-pocket situation help it? The judges, of course, would not be very happy about it but it would bring the results close together. In the hip pocket system you do not have to call for jury until you are near to trial. If you adopt Judge Olney's system, which is what we have in the state court, you would be reaching an analogous result in the cases where you have the other system. You could also give the judge the right of control. If any lawyer moves to put it on the calendar, he would specify whether he wants a jury or not. The judge could at a stated period call this docket and then call upon the lawyer to elect what calendar he wants that case to go on, jury or not, or dismiss the case. Could we not work that out?

Mr. Clark. Well, of course, it can be. There is nothing to stop it. It is true, as Mr. Mitchell said, that the matter of the federal courts' not being up to their docket makes some difficulty and some political complaint about it, and that is being accentuated by a new, and I think desirable, statistical system that the Department of Justice is using. It is the one that Mr. Hammond and the Major have noted here. Under that there are regular reports back to the

Department of Justice and I understand they are already making the federal judges clean up their dockets more. There is nothing in it that tells them they have got to, but they go through their record and make the report back and they see these cases and they do try to get rid of them somewhat.

Mr. Morgan. I noticed they did that in Connecticut when I was in New Haven.

Mr. Clark. In Connecticut they do that regularly. They are required to do it in the state courts.

Mr. Olney. This system they have of so-called clearing the dockets does not facilitate the actual administration of justice a particle. All they do is get rid of a lot of dead cases that appear on the record books, but the actual facilitating of the trial of cases is not accomplished.

Mr. Dodge. It moves the papers.

Mr. Olney. They move the papers from one place to another.

Mr. Donworth. What is your suggestion on that point?

The Chairman. I am afraid if we stick to the system of filing everything you would find the federal judges would almost entirely be against a note of issue putting it on the calendar. They want to put it on themselves and then ride the lawyers to dispose of it.

Mr. Pepper. Is there any question between us excepting the mere question how many days shall intervene, what the limit shall be of the time within which a demand for jury trial shall be made?

The Chairman. That is right, and our question is limited to those cases, to the condition that we ultimately adopt a

rule that all papers have to be filed immediately and a case put automatically on a calendar.

Mr. Donworth. What would you think of 20 days, that the demand for jury might be made within 20 days after the service of the final pleading?

The Chairman. I am agreeable to that.

Mr. Donworth. By that I mean the answer or reply.

Mr. Clark. That is all right.

Mr. Pepper. I will second that motion. Did you make it to that effect?

Mr. Lemann. I think that ought to be enough.

The Chairman. It has been seconded that this rule be made.

Mr. Lemann. It is a mongrel system, Mr. Chairman, this 20 days, but it is all right. We will let it go.

The Chairman. The motion is that we substitute "20" for "10" in line 4 of Rule A-1.

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

Mr. Olney. You will have to provide in that connection for the hip-pocket case.

The Chairman. That has been done already.

Mr. Lemann. Will you define that word, "note of issue"? We Louisiana lawyers do not understand it at all.

Mr. Clark. He has defined it in his substitute rule A-3. I do not suppose we need to name it that.

Mr. Lemann. I did not notice his definition.

The Chairman. Notice of trial, if you want to call it that.

Mr. Clark. I think "note of issue" would be better.

The Chairman. Probably.

Mr. Dodge. Line 10 has been changed, has it not?

Mr. Clark. Yes, somebody made a suggestion. I think it was Mr. Dobie.

Mr. Dodge. "Without consent of either party"?

Mr. Clark. Yes.

The Chairman. Well, we are down to Rule A-2, then.

Mr. Clark. Wait a minute. On this matter of the amendment in the brackets, I would just as soon have it go out. I suppose I can leave it.

Mr. Dodge. You have to have it in.

Mr. Clark. I don't think so.

Mr. Dodge. Why not?

Mr. Morgan. That is the whole point I am wondering about, and that is the point I tried to raise before, Mr. Dodge, as to whether or not if there is no issue joined in the case at the time this period expires and it later appears that there is an issue in the case that is triable as of right by jury, can you say that the man waives it by not having foreseen it and not having made a provision against all possible amendments?

Mr. Dodge. No, certainly not.

Mr. Clark. I am afraid that the result is the same whether it is in or not, this is a direct invitation, I think, and you do not need a direct invitation to raise trouble on this issue. You see, as we have it now, it is 20 days after the service of the last pleading that forms the issue, and when you have an amendment you have to have a new form of issue. I do not believe there is any final way of getting away from

the Jackson v. Strong case, I will admit that, but I think you need not invite it, so to speak.

Mr. Morgan. That is what I was wondering, if you thought you could get away from Jackson v. Strong.

Mr. Clark. You cannot make changes like that.

The Chairman. What is Jackson v. Strong?

Mr. Clark. That is this partnership case, or one they started as a partnership.

Mr. Dodge. That is a very unusual case, but suppose a fellow amends a specific performance action into an action for money damages, and the defendant then first gets his right to trial by jury?

Mr. Clark. Where the parties have played fair, I would certainly give it.

The Chairman. How can you take it away?

Mr. Clark. You cannot.

Mr. Donworth. As Mr. Clark says, there would be a new pleading there, and the 20 days would start de novo.

Mr. Morgan. You do not make a new pleading; the facts are the same and you just change the prayer for relief.

Mr. Lemann. We are all certain that the right exists and you cannot take it away. The only thing you are talking about is whether you will make the specific statement in the rule or let the lawyer reason it out for himself.

11 The Chairman. He has the right; therefore we ought to place a time limit on the exercise of it, and our original time limit of 20 days after the answer or reply is absolute. The time has gone by, a new issue comes up, and he has the right; shall we prescribe when he shall exercise it?

Mr. Lemann. I move we do, to make it plain, and fix it at 10 days in that situation instead of 20.

Mr. Morgan. Lots of times it is just absolutely impossible. Take a case like Jackson v. Strong; you just don't know whether there is a right of trial until the court has decided the question.

Mr. Lemann. Then the brackets will not cover.

Mr. Morgan. Of course they will not.

Mr. Lemann. Then we have left a hiatus, and that would be no reason for not retaining the brackets to prevent more?

Mr. Morgan. That is true, but the point is, if the plaintiff goes after equitable relief and the defendant puts in an answer which would call for equitable relief but not necessarily legal relief, the plaintiff has a right to have that case tried by the court unless there is a jury brought in in an equitable proceeding, and if it is on the court calendar the court is not going to strike it because the defendant is claiming there is no right to equitable relief. You cannot tell that until you try out the facts, just as in Jackson v. Strong you could not tell it until you tried the facts.

Mr. Clark. The defendant having speculated, wants a new trial. That is the way it came out in Jackson v. Strong.

Mr. Morgan. You mean, the defendant having speculated---

Mr. Clark. The defendant asserted it was a legal claim. He knew it was after he went to trial on the issue, being beaten then.

Mr. Morgan. He claimed it was a legal claim, and upon claiming it was an equitable claim it was tried as an equitable claim and the defendant won.

The Chairman. Is it your contention that he was not entitled as a matter of right ---

Mr. Morgan. No, it is my contention he was in constant control of the situation.

Mr. Clark. I think the defendant making that claim and not claiming a jury trial, and going to trial on the issue--

Mr. Morgan. That is only an argumentative denial. That is all that was. If he had put in a general denial he would have had exactly the same result.

Mr. Lemann. The difference in this Jackson v. Strong case, is that any reason why you should not retain this bracket? It may be a reason that the bracket is not enough, we might go further and do more, but is that any reason why it should not be retained?

Mr. Morgan. I think Mr. Clark's point is well taken. If you are going to have an amended pleading it will make a new issue.

Mr. Dodge. I move the bracket be inserted as written.

Mr. Pepper. I second it.

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

The Chairman. Is there anything more on A-1?

Mr. Dodge. Only the last line.

Mr. Clark. That was changed.

Mr. Dodge. "Consent of the court"?

The Chairman. That ought to be "consent of the adverse party".

Mr. Clark. Yes, all right.

Mr. Donworth. You have concluded with your suggested

amendment to the beginning of A-1?

The Chairman. It was adopted on the assumption of taking the hip-pocket rule.

It is 10 o'clock and we will take up Rule A-2 at 2 o'clock tomorrow afternoon.

(Thereupon, at 10 o'clock p.m., a recess was taken until 2 o'clock p.m., Sunday, February 23, 1936.)

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