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P R O C E E D I N G S

OF

CONFERENCE OF ADVISORY COMMITTEE

DESIGNATED BY THE UNITED STATES SUPREME COURT

TO DRAFT

UNIFORM RULES OF CIVIL PROCEDURE

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

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

Washington, D.C.,

Thursday, November 14, 1935.

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

The following members of the Advisory Committee were present:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RULE 2.

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

RULE 2 (CONTINUED.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I think that is the fundamental thing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Dobie. I think so.

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

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

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

Dean Clark. Yes.

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

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

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

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

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

a procedure of that kind could be worked out.

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

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

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

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

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

Mr. Lemann. You have abolished all distinctions?

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

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

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

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

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

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

Dean Clark. Massachusetts does.

Mr. Donworth. Does Massachusetts have the old form?

Dean Clark. Not in an equity suit.

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

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

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

Dean Clark. That is correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

this language and that of New York.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dean Clark. Well, that is another question.

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

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

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

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

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

Dean Clark. That is correct.

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

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

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

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

Mr. Mitchell. Is there any second?

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

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

Mr. Cherry. I second the motion.

Mr. Mitcehll. Is there any further discussion?

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

Mr. Mitchell. But I understand that before the thing

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

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

Mr. Olney. Will you read the full definition?

Mr. Wickersham. Here is the definition:

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

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

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

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

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

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

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

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

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

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

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

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

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

Dean Clark. Meaning as to the scope of review?

Mr. Lemann. Yes, as to the scope.

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

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

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

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

Mr. Mitchell. Mr. Lemann?

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

Mr. Cherry. I second it.

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

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

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

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

language with the words "heretofore existing" cut out?

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

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

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

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

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

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

Mr. Loftin. As I understand, Dean Clark preferred

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

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

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

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

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

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

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

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

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

Mr. Mitchell. We will consider Rule 4.

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

Mr. Mitchell. I should think so.

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

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

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

Mr. Dobie. I think that is all right.

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

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

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

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

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

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

Mr. Wickersham. There is some statute about that.

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

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

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

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

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

Mr. Olney. Then what is the ambiguity?

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

Mr. Olney. I have written out thissuggestion:

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

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

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

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

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

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

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

any determination of a question of fact.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

court.

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

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

order.

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

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

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

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

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

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

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

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

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

Dean Clark. Do you include in that chambers?

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

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

Mr. Lemann. Is there a technical definition of

"chambers"?

Dean Clark. I do not think there is.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Could not hear at this point.

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

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

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

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

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

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

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

Mr. Dodge. Are there objections to Rule 1?

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

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

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

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

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

court house or where the judge personally uses his office.

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

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

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

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

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

"in the clerk's office."

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

Mr. Lemann. Yes.

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

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

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

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

Mr. Donworth. This section covers that.

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

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

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

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

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

(The motion was unanimously adopted.)

Mr. Mitchell. The next is Rule 5.

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

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

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

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

Dean Clark. No, quite the opposite.

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

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

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

Mr. Wickersham. I think that is true.

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

Mr. Olney. It is a very small matter.

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

Mr. Lemann. Does it include a deputy,

Mr. Wickersham. I suppose it would.

Mr. Lemann. Somebody beside the janitor.

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

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

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

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

proceedings, etc., without reference to the court.

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

Mr. Sunderland. Yes.

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

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

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

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

Mr. Olney. I think that is specifically provided.

Mr. Sunderland. In these rules,

Mr. Olney. Yes, in these rules.

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

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

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

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

Mr. Olney. Yes.

Mr. Lemann. I second the motion.

(The motion was unanimously adopted.)

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

Mr. Hammond. I do not know.

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

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

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

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

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

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

Dean Clark. I think that would be better.

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

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

order book?

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

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

Mr. Morgan. That would include every action taken.

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

Mr. Morgan. Chronologically.

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

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

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

final judgment.

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

Mr. Wickersham. Yes.

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

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

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

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

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

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

book shall include the journal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Sunderland. We cannot improve the statute.

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

(The motion was unanimously adopted.)

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

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

strictions of the term.

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

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

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

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

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

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

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

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

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

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

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

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

action where service is evaded.

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

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

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

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

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

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

Mr. Sunderland. We have nothing like that.

Dean Clark. Yes, we have Rule 14.

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

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

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

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

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

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

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

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

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

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

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

Mr. Lemann. It might be a divorce suit.

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

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

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

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

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

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

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

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

I think the rule should be substantially like this:

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

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

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

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

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

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

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

Mr. Dobie. I think that is reasonable.

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

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

Dean Clark. Yes.

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

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

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

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

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

Mr. Cherry. Yes.

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

Mr. Mitchell. Under the Equity Rules--

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

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

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

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

Mr. Mitchell. By the clerk?

Mr. Tolman. Yes, by the clerk.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Mitchell. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

than in the observance.

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

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

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

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

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

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

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

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

Mr. Dodge. Massachusetts goes a way beyond that.

Mr. Tolman. What do you do in Massachusetts?

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

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

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

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

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

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

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

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

Mr. Lemann. Is it the English practice?

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

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

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

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

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

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

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

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

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

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

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

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

Dean Clark. Rule 10.

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

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

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

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

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

Mr. Wickersham. How is it in California?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Wickersham. Yes.

Mr. Dodge. Yes.

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

Mr. Olney. How about the State courts?

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

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

suit by mere service upon the defendant?

Mr. Wickersham. Yes.

Mr. Mitchell. Yes.

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

Mr. Mitchell. Yes.

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

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

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

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

Mr. Mitchell. It is the only way.

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

Mr. Mitchell. Yes.

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

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

by the clerk.

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

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

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

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

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

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

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

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

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

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

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

Mr. Dobie. I second the motion.

Mr. Mitchell. Do you want to discuss it?

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

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

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

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

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

Mr. Donworth. Do you mean exactly that?

Mr. Mitchell. I mean precisely that.

Mr. Donworth. You said "simultaneously."

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

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

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

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

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

Mr. Morgan. I second the motion.

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

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

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

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

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

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

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

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

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

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

Mr. Donworth. Yes.

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

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

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

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

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

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

Dean Clark. Suppose he does not deliver it?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dean Clark. You would not get jurisdiction there.

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

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

Mr. Wickersham. Not unless you went further.

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

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

Prof. Sunderland. Those are important cases.

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

Mr. Wickersham. Before foreclosing a mortgage in the

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

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

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

Dean Clark. I beg your pardon.

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

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

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

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

Mr. Dodge. That amends Rule 10.

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

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

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

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

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

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

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

Mr. Wickersham. That is a very common case.

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

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

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

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

publication.

Mr. Lemann. Not with a non-resident.

Mr. Wickersham. You are out of luck there.

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Olney. Yes, I make that motion.

Mr. Lemann. I second it.

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

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

of the motion and 6 against it.

Mr. Wickersham. The Chairman has the deciding vote.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

that that will be satisfactory.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Wickersham. I do not agree with that.

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

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

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

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

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

Mr. Dobie. Yes.

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

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

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

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

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

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

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

Mr. Wickersham. How long does that run?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Lemann. How does the question now stand?

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

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

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

Dean Clark. Yes.

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

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

to be tried. That is the usual provision.

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

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

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

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

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

Mr. Mitchell. Is that in the Federal suit?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

cover it.

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

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

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

Dean Clark. Well, suppose you leave that out.

Mr. Dobie. Then what happens?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Prof. Sunderland. I think so.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Lemann. That would not dismiss the action.

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

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

Mr. Wickersham. You skipped Rule 14.

Mr. Mitchell. That is another question.

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

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

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

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

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

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

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

Mr. Mitchell. There is no motion pending.

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

dismiss the action.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Mitchell. Why not do it that way?

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

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

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

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

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

Dean Clark. Yes, he loses a day.

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

Mr. Morgan. That is the second paragraph.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

cut how do the States go?

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

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

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

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

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

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

Mr. Mitchell. You are required to file then?

Mr. Loftin. Yes.

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

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

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

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

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

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

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

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

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

Mr. Dobie. I second that motion.

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

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

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

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

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

Mr. Donworth. For instance, what would the clerk be doing?

Mr. Dodge. He would have to fill the gap.

Mr. Mitchell. I think the matter of burdening the clerk with this job is a very serious consideration.

Mr. Olney. This is a matter which seems not very important, and yet it is a matter that a local lawyers may resent very decidedly.

Mr. Dobie. They would not object to being given the option.

Mr. Olney. No, I think not, if they have the option.

Mr. Dobie. I think that was Judge Donworth's motion.

Mr. Olney. Perhaps not, but the clerk may claim that it was lost in the mail, or something of that sort.

Mr. Loftin. I see practical difficulty on that very point, that is, that the clerk shall mail it if he is not represented by an attorney. Suppose a party has filed a personal appearance, not giving any address. The question is, how will the clerk know where to mail a copy to him?

Dean Clark. Well, we have covered that by the provision for appearance later on. Now, on the matter of hardship of not receiving a copy, nothing very drastic is likely to happen anyway. You see, the judge can adjust all questions of penalty.

Mr. Olney. What will take place is this: That the party, the defendant, for example, will have actually received the paper, receives it by mail, and then denies that he ever got it, long after the time.

Mr. Wickersham. Of course, he has been served with a summons, and therefore he has had notice and he has had a copy of the complaint. Now, the question is about the answer. The clerk has the answer, and if the party does not get it he sends to the clerk's office and gets it. Then suppose there is a reply to the--

Dean Clark(Interposing). All you can do is to make a motion for default, because he has not done it, and he now knows it is there; and the judge says, "File the pleading at once," and there is almost no chance of his being really harmed. He may be able to get a little delay, if the court believes him. But the penalty for not complying ~~for~~ with the day-limit is not very severe anyhow.

Mr. Mitchell. Another thing is that this rule has nothing to do with anything except pleadings.

Mr. Donworth. Well, a motion is defined by the rule to be a pleading.

Mr. Dodge. A motion is a pleading.

Mr. Donworth. It is under the rule.

Mr. Mitchell. Is there a motion before the Committee?

Mr. Cherry. Mr. Donworth has a motion. Prof. Sunderland, I would rather cut out that provision as to the clerk. I think this is a matter that goes along from the words and the general system and we should not have a number of provisions that we would be startling the lawyers with.

Mr. Mitchell. That is very true. We can cover the whole thing by service.

Mr. Wickersham. Why should it not be sufficient to require him to serve the complaint on the defendants--

Mr. Donworth (Interposing). In my State that is the rule. In reference to my motion, I am perfectly willing to

withdraw it, at the sense of the Committee that this method of returning a copy shall be the only method. I have no choice.

Dean Clark. Well, but should you require any service anyhow? In Louisiana and Florida they get along without any proof of service.

Mr. Wickersham. Well, is not that the important thing? Filing seems to me not to be the important thing. The plaintiff files his suit and must get an answer. Now that joins the issue. What should be required of the defendant is to serve his answer on the plaintiff's attorney. I think that is fundamental. Let him file it if he wants to. But the first thing is that the plaintiff who has brought the suit should know the answer of the defendant.

Dean Clark. Of course, here is another point where any rule established is going to cause a good many lawyers to change their habits now.

Mr. Wickersham. Well, throughout the country do not the defendant's attorneys serve their answer on the plaintiff's attorneys? Is that not the customary procedure? The complaint is served by somebody on the defendant, and the defendant serves his answer. Is that not the rule?

Prof. Sunderland. Yes, that is the general rule.

Mr. Loftin. They furnish copies.

Mr. Wickersham. Perhaps so; but why not say, "Give a copy to the defendant"? Why not give it to the defendant

requiring him to answer, which contributes to making up the issue to be tried.

Mr. Dodge. I think that is true, and I think it should be in Rule 7, that where answer is made a copy shall be given to the other side.

Mr. Wickersham. I think that is a burden that should be on the defendant's attorney, rather than on the clerk.

Mr. Mitchell. I think the same should be true of all cases; the answer and motion ought all to be covered by general rule, and the method of furnishing your adversary with a copy should be retained. I do not see any distinction between the answer and any other provision. It is clear, I think, that the great majority of lawyers do those things themselves and do not rely on the clerk. I understood Judge Donworth to include that in his motion. I am not sure about that.

Mr. Donworth. I imagine from the discussion that the majority of the Committee favored the existing method, in use among lawyers. I think that might be a more drastic motion. So that if somebody will make the motion that the reporter be instructed that this provision be that service be through the parties or their attorneys, instead of through the clerk's office, I think that will be a good idea.

Mr. Wickersham. I make that motion

~~papers after the complaint be made, not by the clerk's office,~~

Mr. Mitchell. Your motion is that the service of all papers after the complaint be made, not by the clerk's office,

but be made direct by the parties or their counsel. Is that correct?

Mr. Wickersham. Yes.

Mr. Donworth. And that that be put in the appropriate rule.

Mr. Mitchell. The Reporter will have to revise it on account of the action taken.

Mr. Donworth. The other part of this is a wholly different matter. It seems to me that this should come more appropriately in connection with answers.

Mr. Lemann. Well, it will cover other papers. There is room for other pleadings than answers, and I think we might make it a more public in a general statement that would apply to all proceedings. I think we might vote on that theory at this time.

Mr. Mitchell. The question is on Mr. Wickersham's motion. Is it the sense of the Committee that the service of all papers after the complaint be made, not through the clerk's office, but by service by the parties or their attorneys?

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

Mr. Lemann. Will such service be permitted by registered mail?

Mr. Mitchell. I think you will find a very simple statement as to that if you will turn to the Minnesota rule;

you will find that you can get judgment after service by mailing it--if counsel is in a different State you can mail it to him and attach an affidavit.

Mr. Lemann. Can you mail it to him in town?

Mr. Mitchell. No, you cannot.

Mr. Wickersham. You can leave it at the office with whoever is in charge.

Mr. Mitchell. Yes; and you can cover the whole thing in one provision.

Mr. Lemann. I thought of cases where it was in the same town, but four or five miles away.

Mr. Wickersham. In New York we have to send somebody to Richmond, or to the wilds of Brooklyn.

Mr. Mitchell. Then let us deal with whatever else there is in Rule 7.

Mr. Dobie. The rest is practically a repetition of the Equity rule.

Mr. Morgan. It is very important as to the time running for appeal, and so on.

Dean Clark. What was your question?

Mr. Dobie. I say this is practically Equity 4.

Dean Clark. Yes, with the pleading provision added. You will note that I have suggested eliminating a lot of jobs. I want to go back to the question of mailing. Do you think additional time is necessary? I believe three days more is

allowed in New York. Where there is a 20-day limit that is not important; where there is a 5-day limit, it is.

Mr. Wickersham. Well, that is for subsequent pleadings, and you have to serve it within that time. But if you serve it in one day, then the reply pleading may be served at any length of time.

Dean Clark. That is a question I wanted to have clear, whether to put in an additional provision. Now, in that connection, with motions there is a provision that a party may file opposing reasons within five days.

Mr. Wickersham. He may file that with the clerk. That is a different thing. Then you have made a provision that a statement of the reasons must be filed with the clerk.

Dean Clark. That is, you are not to serve a motion on the clerk. Now, I had the idea of treating all these things the same way.

Mr. Wickersham. Well, can we do that? Is there not a difference between pleadings and papers on motion? Very often you have a motion on 24 hours notice. But your pleadings are a different thing.

Mr. Lemann. That brings up the question of what a pleading is. As I understand it, you abolish the system as to the abatement of the cause. Well, now, suppose that a motion is filed. How do you get to fixing a hearing, if it is to be an oral hearing?

Dean Clark. Well, of course I was trying to avoid oral hearings, unless the court ordered it. The thing that I was trying to get there was, in the case of a demurrer, in the old days, or in this day an answer, You file your supporting reasons. I suppose it will be served on opposing counsel, and counsel will reply. There will be no hearing unless the court orders it.

Mr. Wickersham. Well, take a case of summary judgment, for example. I think it is very important that those things should be orderly, because that leads to the merits of the case. And I think you wil find it very wrong that summary judgment be rendered merely on written papers.

Dean Clark. Yes, but what I am trying to do is to get away from a motion like the old demuerrer.

Mr. Wickersham. Yes, but there are a good many motions that are so important in the controvery that they ought to be heard orally.

Mr. Donworth. It seems to me that the question raised by Dean Clark ought to be ~~connoted~~ upon notice. The question raised by Dean Clark is a different thing. But when it comes to pleadings, I think if you are going to provide proper security, provision must be made for protection of the adverse party, and I think there should be a rule on that.

Dean Clark. We might leave that until we get to these other pleadings.

Mr. Wickersham. For the purpose of eliminating unnecessary technicalities, there are grouped here in this rule pleadings, orders and judgments, and it is sought to include them all in one rule. I am inclined to think that pleadings ought to stand categorically by themselves.

Mr. Dodge. It is certainly going pretty far to call a brief a notice.

Mr. Wickersham. Well, there is a subsequent provision that a motion shall constitute part of the pleadings.

Mr. Donworth. I think there is a difference between the short motion and the notice of motion If there is no hearing, you do not need any notice.

Dean Clark. Then probably we will have to wait until we get to those provisions.

Mr. Mitchell. Do I understand that the last provision in Rule 7 is satisfactory to the Committee?

Mr. Loftin. What do you think about the words "court or judge"?

Dean Clark. I want to leave out the words "or judge." You see, in Equity Rule 4 it includes the judge. But I think under our decision we can eliminate that.

Mr. Wickersham. Well, as I understood, a motion was adopted applying to pleadings under Rule 7.

Mr. Morgan. It does not apply to all pleadings.

Mr. Donworth. I would like to ask this: Should a

party who has not appeared be entitled to a copy of the judgment? Oftentimes you name a lot of defendants, and this rule says "Neither the noting of order or judgment in the docket or its entry in the order book or journal shall of itself be deemed notice to the parties or their attorneys; and when an order or judgment is made without prior notice to and in the absence of a party," it seems to me it is not necessary to send notice to all the defendants who may be in default--or in the case of any default judgment.

Mr. Olney. Why should a copy of the judgment be served on the man?

Mr. Donworth. Well, through courtesy, generally we hand the opposing party a copy of the judgment, if he has appeared in the case.

Mr. Olney. In our practice we require them to furnish the other side a copy of the proposed finding. Judgment is something he is required to make a copy of himself.

Mr. Morgan. Well, you have to give notice of the judgment in order to start the appeal or review time running.

Mr. Olney. Yes.

Mr. Morgan. That is not a copy.

Dean Clark. This is where it is made in the absence of a party.

Mr. Morgan. Would you want all parties included who had not appeared?

Dean Clark. I think it should be limited to those who

have appeared .

Mr. Mitchell. Do you accept that, Dean Clark?

Dean Clark. Yes, I accept that.

Mr. Mitchell. Is there anything else in that 7th rule?

Mr. Olney. How can you say the judgment is rendered without notice? The judge takes it under advisement, perhaps, and then renders his judgment. Both parties are required to take notice of the action of the court.

Mr. Donworth. I had an idea that Dean Clark's motion was, what Dean Clark had in mind was that the judge rendered his judgment, and perhaps the defendant was not there.

Dean Clark. This is an attempted reconstruction of the Equity rule. I think it could be said in that case that the judgment is made after notice, because it is made at the hearing. But if you want to try to improve this language you can do so.

Mr. Lemann. If you put in that construction, that would be all right.

Dean Clark. Is a judgment made after a long trial a judgment made without notice?

Mr. Donworth. Why make any change? The question is understood. When it comes to a copy of the judgment, that is another matter.

Dean Clark. Well, if you left out judgment then

what is a judgment by default? Is that an order or a judgment?

Mr. Olney. A judgment, I think.

Dean Clark. Well, why should it not comply with the rules? There should certainly be notice given of that. You see, there can be defaults where there has been an appearance; that is, a failure to comply with the rule, and that is a penalty for it.

Mr. Lemann. It should apply to any failure at all.

Mr. Donworth. We have in our State a provision that the time does not begin to run until he has entered judgment. I think there is a reason for that clause.

Dean Clark. Would this meet the objection? Without sending a copy say "Shall forthwith be notified thereof" instead of sending a copy.

Mr. Wickersham. Would that not apply to personal service?

Mr. Lemann. Could you not say "When an order is made in the absence of a party"?

Mr. Wickersham. Well, that covers--~~you are speaking~~ you are speaking of an ex parte order.

Mr. Donworth. No; the court has rendered an opinion, and you are not obliged by law to give a copy of that judgment in advance, as I understand. You usually do. He has filed his answer in the regular way.

Mr. Wickersham. You send him a copy of it.

Mr. Dodge. It is an important question whether the court ~~shows us~~ draws up the order or the opposite party. The obvious duty of the clerk is to require it.

Mr. Mitchell. Well, if he has sent a copy of the judgment he has to pay for it. The usual practice is to send a notice of judgment entered for the defendant, and then for the man to go there and find out what it is.

Mr. Lemann. You could cut out the word "copy."

Mr. Mitchell. "Send notice of the entry thereof by mail to such party or his attorney, who has appeared; ~~or to the attorney who has appeared~~."

Mr. Cherry. Well, if you put in both, you will not have to repeat it; then you can say "such party" below.

Mr. Dodge. Where you say the entry of the order in the order book of the noting of an order, you can simply say the noting of an order.

Mr. Donworth. As we have mentioned both order and judgment?

Mr. Dodge. We did mention both here.

Mr. Mitchell. Is the order usually effective until it is filed?

Mr. Olney. It may not be; but what we are doing is to notify the man of the making of the order. That means nothing, and you are adding nothing when you say that.

Mr. Mitchell. It says "notice of the order". That

might apply to sending a full copy of the contract, and somebody would have to pay for it, and the other side would have to be furnished a copy. I merely suggested the word "entry" because of the fact of the making of the entry that was required to be obtained by the notice. I may be wrong about that. I think the Reporter can work that out.

Dean Clark. All right, I will do that. Was that a suggestion to take out the final word?

Mr. Cherry. Yes; say "in the absence of a party."

Mr. Chairman, I think the Committee should stop and consider whether, when it adjourns it will adjourn until later in the evening or tomorrow morning.

Mr. Wickersham. I move that we adjourn until 8 o'clock tonight.

(The motion was duly seconded.)

Mr. Mitchell. Is there any discussion of the motion?

(The motion to adjourn was unanimously adopted.)

(Thereupon, at 5:30 o'clock p.m., the Committee took a recess until 8 o'clock p.m.)

EVENING SESSION.

Thursday, November 14, 1935.

The Advisory Committee met pursuant to adjournment at 8 o'lock p.m.

Mr. Mitchell. Where did we leave off? We finished with Rule 7, I believe. We are now up to Rule 8.

Dean Clark. That Rule 8 is now mainly Equity Rule 5. In that I think I would eliminate the words "for entering judgment by default." Now, we have been using the word "default", without saying "judgment by default", and trying to keep the idea of default, or order of default as not in the nature of a final judgment, on the theory that the entry of a default makes the case ex parte, and there must be further proceedings to go forward and establish the amount by another judgment. In other places we have limited the expression to just "default". And the other point I have in mind, to take out the words "or the judge" is the same point that we have discussed before. Those are the words used in the Equity rule.

Prof. Sunderland. Did we not adopt something about the judge as distinguished from the court?

Dean Clark. We did not do very much; and it is possible that we should do more. But you will remember that we provided that

"Any district judge may, upon reasonable notice to the parties, make, direct and award, at chambers or in the clerk's office and in vacation as well as in session, all such process, commissions, orders, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court."

That is Rule 4. Now, it is possible that the word "such" is a limiting word in that expression. That is in Rule 4 that I am referring to.

Mr. Dodge. Is it customary to file motions in the clerk's office for things that the clerk can do himself?

Mr. Morgan. If they have to be done after notice, I think he will have to have a notice of motion or a motion.

Mr. Lemann. Well, that is for anything he can do; that is just a ministerial thing, and we can just send a messenger or office boy. I do not think we would ever file a motion.

Mr. Morgan. Do you have to give notice of that?

Mr. Lemann. No.

Mr. Morgan. Suppose the clerk taxes costs and you have to give notice of taxation of costs. In good many of the code States, you do not file a notice of motion. The notice is not in writing.

Mr. Lemann. That stands a little different from the oral application granted as of course, just to issue a

complaint, or file something of that sort.

Dean Clark. That is the process of initiating suit.

Mr. Mitchell. Yes.

Dean Clark. That is true except in a case of provisional remedies. I am not sure the word "process" is not misleading here.

Mr. Donworth. Dean Clark suggests eliminating "judgment by default", which I think is an improvement.

Mr. Lemann. Suppose the defendant is defaulted for not appearing in court at the time of the trial, and default is entered at once, the clerk's function would be what there?

Dean Clark. We have not made any specific provision, except that the case shall be proceeded with ex parte, and I suppose judgment then must be entered by the judge.

Mr. Lemann. Are you speaking of when he first appears for trial?

Mr. Dodge. Would that be a default?

Mr. Morgan. There could be default in appearance, in pleadings, or at the trial.

Mr. Lemann. Well, does default cover default at the trial? In our State we use it only in default in answering and not in appearing at the trial.

Mr. Morgan. Then you would have two cases where you would use it; the first where there was no appearance of

the defendant, second, where there was no pleading.

Mr. Lemann. We have no special way of entering an appearance. The only way you appear is by a motion or an answer.

Mr. Morgan. So that you cannot plead unless it goes on later.

Mr. Lemann. No. We take a trial judgment by default, and two days later a final one.

Mr. Morgan. Yes, but the defendant could not appear at the hearing on damages.

Mr. Lemann. He has two days after answering in which to ~~appeal~~ plead.

Mr. Morgan. How does he plead?

Mr. Lemann. The only way he appears is to plead. He can cut off a dilatory plea. You could not ask for a bill of particulars any more.

Mr. Dobie. You mean you do not have any such thing as an appearance without pleading?

Mr. Lemann. No. Well, if the defendant pleaded and does not show up, and usually somebody says what has happened to them and they grant a continuance; but if the judge is hard-boiled he might say, "Go ahead and try your case," and the judge tries the case for the defendant.

Mr. Morgan. That is it, if he does not appear at the trial; but if he joins issue and there is a trial but if

he has not put in an answer, in a good many States, you can just appear before the clerk.

Mr. Dodge. We would have him defaulted for liquidated damages.

Mr. Morgan. If it is liquidated damages; if it is not, you would have to have a hearing on damages.

Mr. Dodge. Yes.

Mr. Morgan. But if he has not appeared he is not allowed to appear as to the damages.

Mr. Dodge. No.

Mr. Lemann. I think that is doubtful, unless he had the default removed.

Mr. Morgan. In some States he can appear and give testimony on damages.

Mr. Lemann. Perhaps he can, I do not know.

Dean Clark. Rule 17 deals with default; the last paragraph.

Mr. Mitchell. I will call Dean Clark's attention to the fact, that, under this system we adopted this afternoon, the summons may be served without a copy of the complaint attached, and the complaint placed on file. We can revise those provisions, so that the 20 days begin to run after the summons is handed to the defendant. The general rule is, if we follow that system and elect to serve the sum-

mons without complaint attached, that the defendant may demand a copy and the plaintiff has a few days to hand it to him; and then he answers it. That is a mere detail.

Mr. Donworth. I thought we had adopted the system whether or not the complaint is filed with the clerk.

Mr. Mitchell. No, we passed a resolution that a man can either file his complaint with the summons, or in certain cases not file it, but state that he attached a copy, and state in the summons that copy is attached. But when a man asks for a copy of the thing, he has 20 days. That I understood would be worked out by the drafting committee.

Dean Clark. I think we can work that out by the drafting committee. I think we can work that out. When you say Mr. the comp'aint is on file, cannot the defendant go and look at it?

Mr. Morgan. Yes, but he will not have twenty days to answer. The time allowed will be shut off.

Mr. Mitchell. I was speaking of the customary provision for the serving of summons with copy of complaint.

Mr. Dodge. Twenty days is allowed to answer; but suppose you serve a summons without a copy of the complaint, the usual system is to allow him to demand a copy of the complaint and then give him twenty days after he has received it.

Mr. Morgan. I thought he had only ten days after he had received it. I think it is only ten days in New York.

Mr. Wickersham. No, twenty days after the service of a pleading he has to reply.

Mr. Morgan. If he demands a copy, then he is allowed twenty days.

Mr. Mitchell. No, ten days is allowed him to ask for it. I think that is a detail that they can work out.

But now, about Rule 17, as to default. I was wondering whether this rule, and all of these that we are considering make sufficient provision for default in practice by providing how the plaintiff shall prove the default and get a judgment entered without action by the court.

Mr. Lemann. Does not Rule 17 contemplate a pleading? Suppose I enter my appearance.

Dean Clark. Yes. Now, on the appearance I had a rule that covers that, that filing an answer shall be an appearance. But in the case of other parties, under Rule 16, they can enter their appearance. That is quite the point that Mr. Mitchell has in mind.

Mr. Mitchell. No. You say here if the defendant does not file an answer the plaintiff may take a default against him, and thereafter the action shall be proceeded with ex parte. Now, my experience has been that where there is lack of answer in default, the rule ~~and~~ under the code statutes should provide for the entry of judgment, and in cases where the claim is liquidated the clerk enters the judgment. If it is an unliquidated claim, there has to be machinery provided for the ascertainment of the amount of damages. And I was wondering whether the drafting committee has covered those alternatives.

Mr. Donworth. Do you think the clerk under any circumstances should have the right to enter a judgment? Under our practice it is always done by the judge. I do not know how extensive the practice is, if it exists at all, about the clerk entering the real judgment.

Mr. Mitchell. Well, when I talked about the Code States, I was referring to States like Minnesota, Iowa and North Dakota, and perhaps a number of those States in the Northwest. And

their statutes provide that a case is in default--and the summons, in the first place, has to be either for a liquidated sum stated in the complaint, or an unliquidated damage claim. If it is an action on a note, for instance, for a specific sum, you file your affidavit with the clerk, following the answer, and the clerk pro forma enters judgment in the amount of the claim. But when the claim is an unliquidated claim for damages, for malicious prosecution or personal injury, then the statutes provide for the assessment of damages and the clerk can enter judgment on default if the claim is of a liquidated type like a note.

Mr. Donworth. I see the distinction, but there is a little difference in the two forms of action, but in any case the proceeding is before the judge.

Dean Clark. Well, we did not cover that. We had a little hesitation about doing it. If the Committee thinks it should be covered, of course it can be very easily done along the line suggested. The Equity rules do not cover it. This is in effect the Equity rules taken over. The Equity Rules say the order shall be taken pro confesso. Of course, that is if it is liquidated.

Prof. Sunderland. In our State it is a question of how you ascertain it.

Mr. Mitchell. When a party or his lawyer is in

default I think it ought to be like a liquidated judgment.

Mr. Morgan. It ought to be covered one way or another.

Mr. Loftin. In our State we also have the practice of entering judgment on liquidated damges. Do they do that in Massachusetts, Mr. Dodge?

Mr. Dodge. Yes.

Mr. Lemann. That is done by the clerk, is it?

Mr. Mitchell. Yes. The set of rules prepared by the Bar Association of the State of Minnesota provide--and it is generally the same in the middle west: "Default judgments--It shall be the duty of the defendant to appear and file in the clerk's office a demurrer or answer to the complaint within twenty days after the service of the summons, or such additional time as allowed by law, unless the time shall be enlarged by stipulation of counsel, or by a judgment by the court for cause shown. In default thereof judgment may be entered as of course upon the filing of an affidavit of no answer ~~or~~ in actions upon contract for the payment of money only, in which there is a demand for a sum certain. In all other actions, after default, the plaintiff may apply to the court to have the relief to which he is entitled, ascertained either by the court or by a jury or reference for that purpose, and when so ascertained judgment may be entered therefor."

Now, that, generally speaking, is the problem I wanted to bring up, and I could not see anything here about it.

Dean Clark. We just did not make express provision as to how the court would fix the judgment. If it is to be done by the clerk, without action by the court, a few words here may be changed:--The plaintiff may take a default against him, and the action shall be proceeded in ex parte as to him, and the clerk may enter judgment for the appropriate relief, subject to the power of the court to reopen the case as hereinafter provided.

Mr. Mitchell. They would apply to the judge in every case for judgment by default.

Mr. Morgan. Do I understand that in Louisiana the judge merely enters an order?

Mr. Lemann. We enter a judgment and the clerk gets it on the minutes, and two days later we appear and move to confirm that default. If it is a promissory note, we offer it in open court.

Mr. Morgan. And what does the judge do?

Mr. Lemann. The judge says, "Let there be judgment."

Mr. Morgan. He signs the judgment?

Mr. Lemann. Yes, he signs the judgment, just like he does in a contested case.

Mr. Morgan. He does not in a contested case in many States.

Mr. Wickersham. Why is not the Equity rule a good one to follow? It could be adapted to common law practice. If

it is an equity case the rule says the plaintiff"may take an order as of course that the bill be taken pro confesso;" that is, in other words, the decree that the defendant is in default and that judgment shall be entered.

Mr. Lemann. Is that not signed by the judge?

Mr. Wickersham. No, that means by the clerk. Now, when the bill is taken pro confesso the court may proceed to final decree, and so on. There you have got the distinction; first, the decree pro confesso, which is taken in a common law action judgment by default, then, if there is anything to be shown in the way of damages, that proceeds ex parte and the judge enters the final judgment.

Dean Clark. Yes, that is what follows. The only difference would be to put in the expression. We could have it as I have indicated, and after "the action shall be proceeded in ex parte as to him", then put in this expression, "and the court may proceed to final judgment."

Mr. Mitchell. Well, under that rule, there is a question in my mind as to how you will get judgment. Will you have to go to the court and get an order, or get a judgment as a matter of form from the clerk?

Mr. Donworth. Under our practice, even on a promissory note, the twenty days have expired, and you go into court one morning and the judge says, "Are there any motions?" And you say, "Yes, I have an action in which the defendant is in

default." it is always with the judge. But as I say, the other method is all right. We have followed the same practice in unliquidated cases as well as liquidated cases; except that the judge will require proof on an unliquidated claim, and on a liquidated one he would say, "What is this about?" And you would say, "A promissory note," and he would give judgment.

Mr. Mitchell. I think the other raises the question as to who shall settle what is to be done.

Mr. Lemann. In some places it is done one way and in other places it is done in other ways.

Mr. Mitchell. That is what I am getting at.

Mr. Lemann. The usual rule may be for the clerk to do it; and I can see where it would be objectionable to put it on the judge; and perhaps we might compromise and fix it so that the clerk could enter what corresponds to pro confesso or preliminary default.

Mr. Wickersham. Well, if there is a default, and there is no question of unliquidated damges, and the action is on a promissory note, for example, why should not the order on that be entered by the clerk? For example, in Pennsylvania they have a practice by which a man who borrows $500 and gives a promissory note--what they call a shirt-tail note, there is a provision that, in the event of failure to pay, the

maker of the note constitutes any attorney in the State as an attorney for the purpose of entering judgment against him. So that when that note become due, if it is not paid on presentation, any lawyer who is the holder of the note goes over to the court and presents the form, and the clerk signs and stamps it, and that is the judgment.

Mr. Lemann. Now, is there to be a distinction in law cases and equity cases? In our State we have a preliminary judgment by default pro confesso and a final judgment. Now, in law actions generally, under the code, you do not have that.

Mr. Loftin. Not where it is a liquidated sum under contract; that could not be equity.

Mr. Lemann. I understand that. Now, so far as it is tort action and there is a default--in case of personal injuries where the person was run over by an automobile, what happens?

Mr. Loftin. There would be no preliminary judgment.

Mr. Lemann. You would get your judgment right off?

Mr. Loftin. That is it.

Mr. Lemann. Whereas, under our statute you would have a period of grace to come in and defend, except that equity allows a large period of grace and we allow a small one. Now, it seems to me that these uniform rules are intended to reconcile those differences; that is the first thing to decide.

Mr. Loftin. What good does that period of grace do?

Mr. Lemann. For instance, if you have a default taken, you had better go down and do something about it.

Mr. Loftin. In our State you cannot enter judgment by default, unless you have a notice. But in our State the defendant never answered until you got a judgment against him, and then if he did not answer ~~xxx~~ the court passed a rule that they could put in a default judgment--and the legislature repealed that rule the next term. You see, it is just another reason for delay. I think interlocutory judgments are just a stench.

Mr. Mitchell. Let us look at it from a practical standpoint. In the administration of justice, the courts are overworked. Now, we have two systems to choose from in the case of default on a liquidated sum under contract: Either you can take five or ten minutes of the court's time to make an order, or under the other system you would file an affidavit with the clerk for a liquidated claim, where the demand is a sum certain, and save five or ten minutes of the judge's time. Now, that is the practice. My experience has been that where you have this code system in a liquidated claim, in an action under contract for a sum certain, and the clerk can enter judgment on an affidavit and no answer is filed, it works perfectly and saves five or ten minutes of the judge's time.

Mr. Lemann. What would you do with unliquidated claims?

Mr. Mitchell. In unliquidated claims you file an action, and by court action get the assessment of damages.

Mr. Lemann. You would have no period of grace.

Mr. Mitchell. No.

Mr. Lemann. Then what do you do with days of grace in equity if you are going to have but one system? I suppose that goes out.

Mr. Mitchell. Yes, that goes out. You could file an affidavit that no answer has been filed, and it shows a default, and the court goes on and has summary hearing to see whether you are entitled to the relief sought.

Mr. Lemann. But here you have a final judgment, because you get that judgment right off the bat. Is that right?

Mr. Mitchell. No, there have been two decrees.

Dean Clark. I think there are two different questions that need not necessarily be taken up at one time. One is the question of the affidavit to be used with the clerk. The other is to use stamps, even if the clerk does it. Now, under the question of whether you have two steps, how about the situation where default is entered for something other than non-appearance? It is now provided in the rules, that a failure to comply with the rules may result in the entry of a default; and then you should provide that notice must be

given of that entry of default; in that case you would not have it in two steps.

Mr. Morgan. You might have it in two steps. This notice might be merely to make a motion to have the judgment set aside, for neglecting, and so on.

Dean Clark. Yes.

Mr. Donworth. I would like to ask Mr. Mitchell to state the practice in Minnesota. Does it have to be on notice and does the court have to pass on it?

Mr. Mitchell. No.

Mr. Donworth. That is on a promissory note, or something of that kind?

Mr. Mitchell. That is an unliquidated claim for damages, such as damages for personal injury, and there you have to have the court rule on the amount.

Mr. Wickersham. Well, ought not the rule to set forth the proceedings when the suit is for a fixed sum of money?

Mr. Mitchell. Yes.

Mr. Wickersham. Whether or not it is unliquidated or for other relief?

Mr. Mitchell. Yes. You have a choice of putting it up to the court and getting an order from the court in every case. The other is to have in certain types of cases judgment entered by the clerk and in the other entered by the court.

Mr. Wickersham. Well, with regard to liquidated

claims, where there is no question of judicial action in acting in the amount of relief to be granted, but it is a pure matter of computation, ought that not to be entered as of course by the clerk? Then when you come to unliquidated damages, you must have proceedings by the court, and when you come to the proceedings followed in equity, then you must have an injunction.

Mr. Mitchell. That is the Western code system.

Mr. Wickersham. That is a logical system.

Mr. Mitchell. It works well and saves a lot of time for the court.

Mr. Wickersham. Yes. There is no use using the time of the court. He does not use any more judgment in those cases than the clerk; and the defendant retains a remedy. He can make an application to the court to reopen the judgment.

Dean Clark. I think that is quite all right; but I think that is a definite change from the Federal procedure. I suppose we can change the form of proof. In fact, I was rather inclined to argue in general that we could change the rules.

Mr. Morgan. I understand that is the rule.

Dean Clark. But as I understand the rule now, the clerk does not enter judgment.

Mr. Mitchell. If the court thinks it wants to be relieved of that, I see no reason why it should not be.

Mr. Lemann. In your Federal courts, do the clerks

enter judgment?

Mr. Dodge. No.

Mr. Lemann. On a liquidated claim?

Mr. Dodge. No; it has got to be approved by the judge.

Mr. Lemann. And the judge signs the order?

Mr. Dodge. He does not sign anything; he directs action.

Mr. Donworth. How about in Minnesota? Does the judge perform the action?

Dean Clark. Well, I am more familiar with it in our State. In our State courts it is done. The Federal court clerk says he never enters the order.

Mr. Morgan. He follows the usual rule, that he has got to have either a rule of the court or a statute; otherwise the clerk has no power to enter judgment.

Mr. Donworth. How about a foreclosure?

Mr. Mitchell. The rule is the same. A foreclosure action is heard on motion day.

Prof. Sunderland. There are two steps on that.

Mr. Mitchell. Not two steps in a foreclosure. You get an order for a judgment of foreclosure. Of course, there is a second rule. I think When he reaches that stage, the thing for him to do is to take a rest. He cannot do the impossible.

It is a matter of discretion.

Mr. Wickersham. These discussions are off the record.

Mr. Mitchell. I suppose we ought to be more orderly in our proceedings, by requiring each person who speaks in this conference to address the Chair.

Mr. Lemann. How would it do to pass this, with the understanding that the Reporter will make an investigation as to the actual practice in the Federal courts with regard to entering judgments, and report on that at our next session. I do not at all oppose the idea of entering judgment on liquidated claims, if that is done. I do say that that is not usually done in the Federal courts today.

Mr. Olney. It is done in our courts.

Mr. Wickersham. Would not the court follow the local practice?

Mr. Olney. Certainly, it is done in California.

Dean Clark. It is not a uniform practice. I wonder if it would not necessarily follow the "Uniformity Act" anyway? It is a matter of evidence.

Mr. Mitchell. My attention has been called by Mr. Hammond to the fact that the Federal courts follow the State practice, and in our State they do allow default in liquidated cases. It follows the rule in Minnesota.

Dean Clark. Is there a local rule?

Mr. Mitchell. Yes, there is a local Federal rule.

Mr. Morgan. We have a local Federal court rule.

Mr. Mitchell. I thought we could find out from the Secretary of this Conference. You do not know, Mr. Hammond, do you?

Mr. Hammond. No, I would not know that.

Mr. Dobie. Suppose that investigation shows that the practice is not uniform, and under the Uniformity Act the court would not permit the clerk to enter judgment. We want the clerk to enter judgment in the case of liquidated claims. Is that the idea?

Mr. Morgan. The judge is willing to have it done where it is the Federal court practice, and saves considerable expense.

Mr. Olney. In what cases are they allowed to permit judgments to go without proper default? That means in those cases judgment is a purely ministerial thing, and requires no judicial action in any sense, but can be left to the clerk, instead of being ordered by the judge. In cases of that kind I am not willing to permit judgment to go merely upon default.

Judicial action is required, and there should be some kind of a hearing before the judge, and this should be along that line.

Mr. Mitchell. Yes, and we ought not to be hide-bound by the practice. Where the system is entry of judgment by

the clerk, and it is an efficient and satisfactory one, we ought to insist upon it and not be too timid about upsetting the old system in the Federal courts.

Mr. Lemann. Why not refer the question to the Reporter, with instructions to draft something along that line?

Mr. Mitchell. Well, is there any motion?

Mr. Morgan. Is there any doubt that ~~in~~ this group, ~~where~~ that where the claim for a liquidated amount, no judicial action is really necessary?

Mr. Lemann. I thought everybody was agreed about that but let us keep a record for the Reporter, let us make a record of that fact.

Mr. Mitchell. Suppose you make the motion to raise the question.

Mr. Lemann. Yes, I make that motion.

Mr. Morgan. I second the motion.

Dean Clark. Would you require then an affidavit, or would it ~~be~~ simply require a showing of the instrument of indebtedness?

Mr. Morgan. An affidavit of default.

Dean Clark. That is what I supposed; that is, the plaintiff files an affidavit of indebtedness and shows the instrument, if there is one.

Mr. Mitchell. That is right, and then he gets a judgment by default.

Mr. Wickersham. Where the claim is in a fixed sum which is ascertainable by ready and easy computation.

Mr. Mitchell. Yes, you will find that in our code.

Dean Clark. Yes. Judge Olney suggested that this was a ministerial act, because there was nothing more than a default, and he did not quite mean that it requires any kind of proof other than the affidavit.

Mr. Mitchell. Other than the affidavit; but I think you will find in many States that if it is on a note you are required to file the document.

Mr. Cherry. That is by rule of the court.

Mr. Mitchell. That is a matter of ~~skill~~ detail that can be worked out.

Well, the motion is clear. All in favor of that will signify by saying "aye", those opposed "no."

(The motion was voted upon and unanimously adopted.)

Mr. Lemann. I think the affidavit should also bring out the amount of difference, ~~because that is not customary.~~

Mr. Mitchell. It has to show, the form of affidavit, non-appearance, and I suppose they have to show the sum claimed, and that there is no appearance.

Mr. Olney. May I inquire if this affidavit that you have in mind is an affidavit as to the merits?

Mr. Mitchell. No.

Mr. Olney. That is the affidavit simply of default?

Mr. Mitchell. The affidavit states the sum under contract, and gives the amount with interest, and states that there is no appearance and no answer, and on that affidavit the clerk makes entry and gives judgment for the exact sum.

Mr. Lemann. It is not an affidavit on the merits in the final sense?

Mr. Mitchell. No.

Mr. Lemann. You shake your head, so that is not settled.

Mr. Cherry. In Minnesota, you stick that in your bill of costs, but it is not sworn to.

Mr. Donworth. You make an affidavit of non-appearance.

Mr. Cherry. That is all.

Mr. Olney. If a man has not answered in the prescribed time, that is the end of the matter.

Mr. Mitchell. Yes, if he has not that ends it.

Mr. Olney. The clerk adds the interest and includes it in the judgment.

Mr. Mitchell. Yes, it is purely a ministerial act.

Mr. Morgan. And the clerk also taxes the costs at that ~~time~~ time. If a person is in default, he is not entitled to notice of default.

Mr. Lemann. Well, there are two kinds of claims. If it is a liquidated claim, you get it from the clerk; if it is an unliquidated claim you get it from the judge.

Dean Clark. In cases where the judgment is not for failure to originally appear, but for some subsequent default--

Mr. Wickersham (Interposing). There should be an entry of an order from the judge.

Mr. Donworth. It is only for non-appearance.

Mr. Mitchell. There is only one thing, that you affidavit is merely for non-appearance. In New York, in the State procedure, do you not have to file a verified claim?

Mr. Wickersham. Of course you have to file a verified ~~paper~~ claim.

Mr. Mitchell. My impression is that that is not as it is done in Minnesota.

Mr. Wickersham. In New York the verified complaint sets forth a cause of action. If it is on a note, the proceeding is of the simplest character. Nevertheless, it is a verified pleading.

Dean Clark. Now, the complaint does not have to be verified, unless the clerk chooses; in this case it would have to be verified.

Mr. Wickersham. In this case it would have to be verified; otherwise he would have to go to court and prove his claim.

Mr. Mitchell. In Minnesota the clerk can give judgment for the sum when an affidavit is filed.

Mr. Lemann. If the man does not come in and put in an appearance.

Mr. Morgan. Yes, you are answering it on his non-appearance, and not default. And by not answering the thing he has personally confessed it; just as by answering only one allegation you can take judgment on the other.

Dean Clark. I think in some respects Minnesota is better than New York.

Mr. Wickersham. Mr. Hammond calls my attention to one variation of that rule in New York. You can serve a summons with notice, and that notice is a demand for a fixed sum, with interest. In that case, you do not have to file a complaint if there is no appearance or answer; you can take judgment by default.

Dean Clark. Do you not have to file a verified complaint in that case?

Mr. Wickersham. No. That is a variation.

Mr. Mitchell. We can provide that he can file it where it is for a definite sum.

Mr. Wickersham. In New York we have that variation of a summons on a note. That is, that in the summons he says, "Take notice that the plaintiff demands the sum of_____ dollars, with interest on such a date." Now, if there is no appearance and no answer to that, then you may enter judgment by default. But ordinary cases you have to serve a complaint and verify it before you can get judgment.

Mr. Donworth. Well, this clause remains, by which after mentioning these things it says it may be rescinded or sus ended by the court on special cause stated.

Mr. Cherry. In Minnesota, you issue a summons and you state the consequences of default, and if it is a liquidated amount that you will take judgment.

Mr. Wickersham. That is substantially the same as our notice in New York.

Mr. Morgan. If you say you are going to demand the relief stated in the complaint.

Mr. Mitchell. If you have a liquidated claim, then you can take judgment for a stated sum, plus interest from a certain date, and it works very well.

Mr. Tolman. Mr. Chairman, there is one other clause here that it seems to cover an entirely separate thing. That is this clause which says, "and for other proceedings in the

clerk's office which do not require any allowance or order of the court or of a judge." I am wondering where we can ascertain, either under these rules or elsewhere, what are those proceedings?

Mr. Morgan. What rule is that?

Mr. Tolman. Rule 8, "and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge."

Dean Clark. Major Tolman is quite right. The Equity rule did not specify, and I frankly did not know what to do myself about it. It is left somewhat doubtful in the Equity rules.

Mr. Wickersham. That language was taken from Equity Rule 5.

Mr. Tolman. It seems to me that the situation is different.

Mr. Wickersham. I mean that language is taken from that rule.

Mr. Morgan. What about the taxation of costs? In a good many of the Code States that is provided for.

Mr. Wickersham. The matter of taxation of costs is determined by the court.

Mr. Morgan. The costs may be disbursements.

Dean Clark. This Equity rule goes back to the earlier Equity Rule of 1822. The court said as to that, that ~~what~~

what constitutes a motion for the grating of costs is to be inferred from the 5th Rule of Equity.

Prof. Sunderland. That same idea is included as to the court; it says when they are not granted by the court. It is the same question as raised in the other case.

Mr. Mitchell. We have got to have all of these rules, under any view that is expressed here, on the theory that they will go to the court in order to get judgment.

Mr. Morgan. Then we do not have these double steps now when the clerk takes the second step.

Dean Clark. There are still certain things that the clerks can do with the writ of saquestration or attachment, where the party has complied with the decree. That is in the provision for execution of judgment, at the end. Also I find in one of the courts that the admission of the attorney is taxed as costs. (Laughter.)

Mr. Wickersham. I did not know there was any State left where that was still true.

Dean Clark. None in the Federal court. In the State court, you have to have a lecture from the presiding judge. (Laughter.)

Mr. Mitchell. Dean Clark, in view of the fact that it seems sort of inconsistent here, do you not think you have sufficient

instructions to put that in shape?

Dean Clark. I think I have sufficient instructions with regard to Rule 17.

Mr. Olney. Before we leave Rule 17, I notice that you use the language, "If the defendant does not file his answer or other defenses in the time provided, the plaintiff may take a default against him, and thereafter the action shall be proceeded in ex parte as to him." That would not leave out my way, I think, that the complaint or the bill would be taken pro confesso. It would not be taken pro confesso; but the man would be required to produce some kind of proof of all the averments of the bill. He would be proceeding ex parte without any opposition, but he would be required to bring proof.

Dean Clark. Yes, that is what we contemplate, that he would have to produce some evidence.

Mr. Olney. Of all the allegations of his bill.

Dean Clark. Well, that is what I had in mind, that your affidavit would be on the merits.

Mr. Morgan. Not on the liquidated claim.

Mr. Olney. When you were speaking of the judgment on default of unliquidated damages, for example, the practice was never for the court to concern itself with the merits of the case, or with anything but merely the question of the amount of damages. That has always been my understanding.

Mr. Mitchell. Will the rule not have to be com-

pletely recast, Dean Clark?

Dean Clark. Yes.

Mr. Olney. That expression in my jurisdiction, in my State, would mean that that judgment is the same as pro confesso.

Mr. Morgan. While you are on that, you might change that property rights in the action shall be proceeded in, and so on.

Mr. Donworth. Are we adopting that now?

Mr. Mitchell. We have adopted the principle, as I understand it, that in case of liquidated claims the clerk may enter judgment, but where it is unliquidated it will have to go before the court; and I think Rule 17 will have to be recast.

Mr. Donworth. There is an independent point in Rule 17 that I would like to discuss. That is, I do not find anything in the rule regarding the form of the summons. In some jurisdictions the form of the summons is set up. I think it is objectionable to allow the court to extend the time for service of the summons. In all cases, the defendant should be allowed 20 days. Now, if there are additional remedies those are taken care of by motions or special notice. For instance, we often in an injunction case file a complaint, and the summons is in an invariable form, but we apply to the court for an order to show cause in 10 days why the defendant should not be enjoined so-and-so. Now, that is in 10 days.

Dean Clark. The rule, Judge Donworth, leaving out the question of the form of the summons, is in Rule 11; that gives the form of the summons, and then there is the provision in brackets, which seems to cover what you have in mind.

Mr. Donworth. I think it is objectionable to require an invariable time for the answer; but I think there should be no change whatever in the form of the summons or the answer.

Dean Clark. Rule 11 does provide for the form of the summons, and if this provision of Rule 7 should remain the summons would have to state the time. That is the provision in brackets in Rule 11. Now, on the matter in brackets, that was merely put in there to show what the Committee thought about it. But as a matter of fact, we desired to have justice expedited; and on purely formal matters is there not something to be said about the power of the court to shorten proceedings. In a good many matters, there is nothing but formal proof; and that is why we have provided for this method; it is a method of speeding up the process.

Mr. Donworth. The court may make an order ex parte.

Mr. Morgan. Yes, ex parte; that is the trouble.

Mr. Olney. Well, although the court makes an original order shortening the time, if that is injurious to the other party, he can go to the court and have that time set aside and be allowed additional time.

Mr. Lemann. Is that the rule in California?

Mr. Olney. Yes.

Mr. Morgan. You are putting more work on your judge.

Mr. Lemann. That is a new thought to me.

Mr. Dodge. It is frequently done in Massachusetts. The complaint is filed and the time for answer is set, and the defendant comes in, and the court orders the case up forthwith; and it is referred to a master. It is a great engine for speed.

Mr. Cherry. Except for the temporary injunction, that would be for the defendant's protection.

Mr. Dodge. Not necessarily.

Mr. Lemann. Of course, on your temporary injunction, that allows you time to plead to the bill

Mr. Dodge. The judge may want the case to be decided at once, in order that the whole issue may be determined quickly. It is an important power for the court to have.

Mr. Wickersham. How would it be, instead of having a uniform rule, to have an exception that in actions to recover a fixed sum of damages, the answer must be served in 10 days.

Dean Clark. In many States, I think in actions concerning the holding of real estate the time is made very short, in order to get a speedy determination.

Mr. Wickersham. In summary proceedings you mean?

Dean Clark. Yes.

Mr. Wickersham. But in certain cases in the city

courts it is 6 days after service of summons and complaint. But in dealing with these Federal district courts, you might if you want to expedite the thing provide for a further time in action to recover a sum certain. It may be ten days instead of twenty.

Mr. Donworth. It seems to me that it would be difficult to get support for the rule with anything as unusual as that shortening of the time on an ex parte application, because it will be considered tyrannical; and the possibility of a tyrannical proceeding is not to be thought of.

Mr. Dodge. Suppose it is on a return day, on short notice.

Mr. Morgan. It does not apply to time to plead after the return date.

Mr. Dodge. I thought the rule required that the answer would be ready in 20 days.

Mr. Cherry. No, the question is whether the court can, on an ex parte order, fix that time.

Mr. Lemann. If you have a suit you can file your complaint in the clerk's office, and go to the judge and say, "Judge, I would like to have quick action, and I would like you to issue a summons for the defendant to answer in ten days." And the judge may say, "I think you are right. We will make this ten days." And of course the man may

come in and say, "Judge, look here. That fellow is not telling the truth. I need the twenty days," and there will be an argument.

Mr. Wickersham. Now, as a matter of fact, now important a subject is this? The number of suits to recover a fixed sum, actions at law in the Federal court, is not very large. Those cases get into the Federal court largely by removal at the instance of the defendant but if you have a suit on a promissory note for $3,000 or $5,000, you do not sue in the Federal

court; you sue in the State court. It is a simple remedy. It is an exceptional case where you will go into the Federal court to recover a fixed sum for damages under contract.

Mr. Olney. If you think there is going to be much trouble, and you bring suit on a promissory note, you bring it in the Federal court in order to make sure of getting the correct result. (Laughter.)

Mr. Lemann. Are we going to give any consideration, when we are talking about this, as to the logical time being 20 days and then, as mentioned, refer to an earlier day, to provide for some elastic time. We have ten days now; but it may be advisable to make it twenty days. But in Wyoming they think that 20 days is short; and in New York or Philadelphia they think it is a long time. We could make it not exceeding 20 days. But if you make that less than 20 days in any case, your argument would not be so potent. Otherwise, if you had a provision that might give you 40 days, it might be more potent.

Mr. Loftin. I thought we adopted this afternoon a motion to fix the time at 20 days. There were two alternatives, 20 days and 7 days, and I made the motion to make it 20 days.

Mr. Lemann. I thought we had just settled that. It is res adjudicata.

Prof. Sunderland. If there is no defense, could you use a summary procedure? If there is going to be

contest, there is no objection to 20 days. If there is no defense, you want a short notice.

Mr. Lemann. Do you mean by default?

Prof. Sunderland. Summary judgment on affidavit proof.

Mr. Lemann. Well, could you force them to answer?

Mr. Mitchell. There are some special provisions later on about summary judgment. We jumped over to Rule 17; and I had an idea that if we went back to Rule 8 or 9, we would reach that in due course.

Dean Clark. On Rule 8, I think you asked if I had sufficient instructions. Of course, I have not quite know how to make that more explicit. It was not very explicit in the Equity rule. Possibly you do not want it in at all; you do not want any attempt to define the clerk's job. But I should say that anything we can do to have the clerk do things this is desirable. We have later on, in the provisions for making up the record, if the provision stands, giving certain powers to the clerk in the first instance--to determine as to the record, and determine as to the limination or condensation of the record, with an appeal to the judge.

Mr. Mitchell. Why would it not do to let it stand for the present and later on we can decide whether we want it back?

Mr. Tolman. That is true. I can prepare something and submit it as to that.

Dean Clark. All right; that will be very fine, and

we will be glad to have it.

Mr. Mitchell. Then we will pass on to Rule 9.

Dean Clark.

Rule 9 is in part a development of of Equity Rule 6. Without requiring the motion day once a month--that is a part--because the latter part of the provision is new and is designed to make unnecessary a good many of the hearings; and the latter sentence is an attempt to provide that the normal course shall not be an oral hearing on a motion. As to that, this is like the English procedure, and there were several suggestions from different places. Judge McDermott, of the Illinois district, has a rule, and there were other suggestions that I think we have here from the local committees. I have not got the hang of these papers yet. I will ask Mr. Hammond about it. (After conferring with Mr. Hammond). Now, if you take the suggestions of the local committee, Kansas has such a suggestion; and as I say Judge McDermott has one. And I think the Colorado district judge made a suggestion of that kind.

Mr. Loftin. As I understand, Dean Clark, there is no such practice in any State at the present time?

Dean Clark. Yes, there is. It is true that the practice is not very general. The practice exists, as I understand, in Texas. It is substantially the English provision. It exists in the Federal court in Illinois, as I understand it, Judge McDermott said that he applied it when he sat in the

district court. He is now on the Circuit Court of Appeals. He applied it without formal rule.

Mr. Lemann. Is there not practice in New York by which you hand up the papers to the judge, and he deliberates without any hearing or oral argument?

Mr. Wickersham. It all depends upon the judge.

Mr. Lemann. There is no rule?

Mr. Wickersham. No, there is no rule. Of course, on appeals from certain orders of the Appellate Division, there are certain matters of appeals in which no oral argument is heard unless the court requests it.

Mr. Lemann. I think in our district, the judge would take a long time to decide it; unless you decide it then and there it will a long time.

Mr. Wickersham. I think in New York the judge decides motions, generally speaking, on the argument and closes out the matter in the district court.

Mr. Loftin. That is so in Florida, and I have considerable doubt in my mind, whether this will expedite handling the business. In other words, take it from the lawyer's standpoint. If the lawyer knew he was to say anything, or what the judge thought about it, he may file a much more elaborate brief in support of his motion than he ordinarily would if he prepared an oral argument. And the same thing would be true of

counsel on the other side. And as I see it, there would be much more time taken by counsel, to begin with. And then it is submitted to the judge, with elaborate briefs on both sides; and he might not be ready to take them up and it might be some time before they are disposed of. Whereas, on oral argument, they are sometimes handed ended abruptly.

Mr. Lemann. In my State, I would ask the judge to decide it very quickly. But this can do no harm, Mr. Loftin.

Mr. Dodge. It is not optional with counsel.

Mr. Loftin. No, it is not optional with counsel.

Mr. Lemann. I was about to say that the second party, the moving party, may apply for a motion.

Dean Clark. May I say that the general trend has been to cut down the stages of preliminary trial, and it does not get you anywhere, and that is why the movement for the abolition of the demurrer has been so extensive. And then, by the Equity rules, the word was abolished. And hence the attempt made in the English rule. And we tried to carry it out in Rule 26, as to defenses in an effort to avoid, generally speaking, a preliminary argument on the law, except in cases where it seemed apparent that that preliminary ground of battle, so to speak, would get you somewhere. Generally speaking, it does show that very strikingly. Rarely not. Some of the judicial statistics that we worked out

is a case decided on demurrer. You have all the time and trouble of moving around.

Now, this is another attempt to prevent another kind of sham battle that can be made generally by the defendant, and can slow things up very dedicedly. The whole attempt here is to get away from a formal hearing, to shorten the time of the ~~party~~ parties to bring the case on, and to speed the whole process up, and generally speaking, I take it that it will mean that most motions will be denied, as they should be, and the whole practice of filing motions will be lessened; because if you file for purposes of delay, you will not get anywhere.

Mr. Dodge. This seems to me to include a motion for defining the issues. That is not a motion that would be denied in an ordinary matter. And a later rule provides that the motion shall be decided after hearing.

Dean Clark. Yes, it is possible that that particular provision ought not to be exempt. I am not sure that is not correct. The later provision, as to the formulation of issues is in Rule 38.

Mr. Lemann. Would there be any more delay in other cases, rather than less delay? If you want to level some motion at your opponent's pleading under this, you would file it and have five days, and the other fellow would have five days and the judge gets down to it when he can.

Mr. Olney. This would work exceedingly well if the judge had a good secretary, a good law clerk, who would go through these briefs for him and present a report. But if he himself has to go through and examine and read the briefs and look into all the points to see what is there, it is not going to prevent any delay or help him at all.

Mr. Wickersham. That is a matter for the sub-judicial officers that they have in England.

Mr. Dodge. Yes, that would be a matter for them; but I doubt if it would work otherwise. Would you describe that as the equivalent of the judge taking a case under advisement?

Mr. Mitchell. The English have statutes providing for a standing master.

Mr. Wickersham. Yes, they provide by statute for standing masters, and they do not bother to take the time of a judge with a salary of ten thousand pounds a year for passing on this.

Mr. Morgan. Do you think it would result in the judge spending any time on the briefs? He might just depend on his conscience.

Dean Clark. That is true. I was trying to get it so that you need not file a brief. He could file a brief stating reasons in support, and not a brief.

Mr. Wickersham. You cannot take out the briefs.

Mr. Olney. You would have to limit the number of pages that could be used if we are to change it.

Mr. Lemann. I think there is nothing so clarifying as the oral hearing. The judge says, "Mr. Smith, what is your point?" Mr. Smith says, "The point is so-and-so." The judge says "Denied." (Laughter.)

Mr. Wickersham. There spoke the experienced judge.

Dean Clark. That shows the different ways those things come up. When these cases are heard first, the defendant files a motion to respond, and then he files a demurrer, and so on, and then he does not do anything more, and after that, after a time the other side has it set for hearing, and at the first hearing the excuse is made that counsel wants to go fishing, and it goes over several motions days, and is eventually heard. And the parties talk at length and get nowhere. When I was in practice I remember one case where the judge held up the decision for over a year.

Mr. Wickersham. Well, that is not the rule in the Federal District Court in New York. There they are disposed of very promptly.

Dean Clark. Yes, in New York they might not as well make the motion at all.

Mr. Wickersham. Unless it has substance. If it has substance the judge will give it attention, but if it is the

ordinary motion, he will delay.

Dean Clark. I understand that in the State courts you can hardly get the words out of your mouth before you are out.

Mr. Dobie. If I understand it correctly, if he files a statement of reasons his opponent is to have five days to reply. So that in all cases you must have five days.

Dean Clark. Yes.

Mr. Lemann. How does that work if they stay there five or six days? He may not stay there five days. In the Western District of Louisiana the judge goes to different places and spends two or three days in each place.

Dean Clark. He can pass on these things anywhere. On your point about the five days, of course not, according to the rules, it goes for a month, or such part of it as you have to wait for motions day.

Mr. Wickersham. Well, of course, you have got to give your notice of motion in the first place, and then you have him file a motion and file a brief, and the other side would not have to appear for five days, and if he has got that time to file a reply, I think that would answer that. I was wondering whether the suggestion made is not a sound one, as it would really shorten it too much.

Mr. Lemann. If the judge does it in his bedroom, it would not delay it, and unless it has to happen in the court room it could be speeded there.

Mr. Dodge. Why not provide for standing masters and give them the function that standing masters in England have?

Mr. Wickersham. That brings up there questions of appropriations by Congress. I have always advocated standing masters. I think they are just like referees in bankruptcy. Those are standing appointments, and I have always advocated that. We will come to it later on, when we come to consider the question of examination before trial, and discovery, and that sort of thing. I feel very strongly that those examinations ought to be in the presence of some judge or officer having power to rule on evidence. There you have a use for a standing master.

Mr. Dodge. There are many cases where he could be could used.

Mr. Wickersham. Yes; it would save a very large increase in the judiciary if we had standing masters.

Mr. Mitchell. We will have difficulty in setting up, or attempting to set up, additional machinery; and I am afraid we will run into difficulties about that, because this Congress will not appropriate money for the job.

Mr. Wickersham. It might give a place to the unemployed. (Laughter.)

Mr. Mitchell. Dean Clark, what do you think of the suggestion of Judge McDermott about the time in which a notice

of motion shall be filed? Judge McDermott is a pretty clever fellow. There is no limit as to the time in which to make a motion to reform the pleading. Should there not be some provision for stating the term?

Dean Clark. That is covered by the 20-day provision. It goes back to the provision that within 20 days after the summons, the answer or other pleading must be served, and I provided that a motion is a pleading.

Mr. Mitchell. But suppose your motion is directed at the answer, should there be a time limit?

Dean Clark. That I attempted to cover by the time for the reply, which is 10 days.

Mr. Mitchell. That ought to be in Rule 31.

Dean Clark. Yes.

Mr. Mitchell. This Rule 9 seems to relate to motions with reference to the form of the answer, for instance. Gentlemen, we are still on Rule 9. Now, what is just the problem that you are going to decide there?

Mr. Lemann. Does it not mean that the discussion is that we should strike out all after the words "disposed of" in the fourth line?

Mr. Dodge. All after the word "causes," is it not?

Mr. Mitchell. Up to the word "causes", you would let that stay in?

Mr. Morgan. That is the first sentence.

Mr. Mitchell. Yes.

Mr. Lemann. Yes; strike out all after the word "causes".

Prof. Sunderland. I think many lawyers would resent that restriction.

Mr. Loftin. I talked with one of our leading lawyers about this very thing, and he made just this comment--that it would deprive a party of his right to be heard in court.

Mr. Mitchell. Why could you not say: "Unless the court shall direct otherwise, each motion directed to a pleading or concerning the formulation of the issues in an action may be determined primarily on such hearing as the court may allow." Now, provide for the oral argument and the brief and allow the time. That would give the judges some flexible authority.

Mr. Dodge. I think that is about as much as you can hope to accomplish. Under the present organization of our courts, I think you can accomplish as much by such a provision as you can any way.

Mr. Lemann. Would it not well enough to provide "Summarily, within such time as the judge may decide"?

Mr. Dodge. I should say "heard and determined", instead of "determine."

Mr. Mitchell. "Heard and determined."

Mr. Loftin. The only thing about that is that you must appear the second time, and have two trips to the court and two actions of the court if you say "Such time as the court may fix."

Mr. Lemann. Would you say "disposed of promptly",

Mr. Loftin. If you could fix the time, rather than go to the court to fix the time.

Prof. Sunderland. The rule applies to a r egular motion.

Mr. Mitchell. Your point is that the motion should specify the date of hearing?

Mr. Loftin. Yes.

Mr. Wickersham. Yes, the usual practice today is to move the court, on a certain day at a certain time and place.

Mr. Mitchell. Well, do you think a motion of that kind ought to be stated after the pleading?

Mr. Wickersham. The court may pass an interlocutory order. There are all sorts of things that might be determined, and how can you fix the time in which a motion may be made?

Mr. Mitchell. Well, this says it is a form of pleading.

Mr. Wickersham. I was getting at the purpose of the rule itself. The proposed rule is not so limited.

Mr. Lemann. Judge McDermott or his successor could

try the supplemental rule.

Dean Clark. He has tried this rule and says it works well.

Mr. Lemann. It might work in some cases but not in others. There might be a supplemental rule.

Prof. Sunderland. Now, things that would work with Judge McDermott might not work with many others.

Mr. Dodge. It seems to me that it is a novel thing that the formulation of the issues should be treated in this way.

Dean Clark. I think you are correct about that. That should not have been put in here.

Mr. Mitchell. That may be formulating of the issues in an equity case, and not in a jury case.

Mr. Dodge. Yes.

Mr. Mitchell. Are you willing to strike out the phrase "or concerning the formulation of the issue"?

Dean Clark. Yes.

Mr. Lemann. Had you Perhaps you had better not have a broader motion?

Mr. Dodge. Would you not confine this to a motion directed to the sufficiency of the form of the pleadings?

Dean Clark. Yes.

Mr. Dodge. Of course, that is the character of motion you have in mind.

Mr. Dean Clark. That is true.

Prof. Sunderland. That is not sufficient as to the form.

Dean Clark. There are certain provisions that you can raise the questions in advance of trial, provisions that the defense may make motions to abate the action.

Prof. Sunderland. And questions of law you raise on the answer?

Dean Clark. Yes.

Prof. Sunderland. That would be sufficient.

Dean Clark. Yes, that provision at the end is Rule 26.

Mr. Mitchell. I confess that I have no clear in my own mind a motion directed to the pleadings.

Mr. Morgan. A motion to make it more definite and certain.

Mr. Wickersham. Or to strike out.

Mr. Morgan. Yes.

Prof. Sunderland. Anything going to the sufficiency would come under Rule 26, I should think, and would not require an answer.

Dean Clark. I suppose that is so. It would require a preliminary motion to abate the action.

Mr. Wickersham. Well, we are not discussing Rule 26

yet, are we because I want to say a few words about that.

Mr. Donworth. In view of the fact that Rule 37 deals with motions to correct or strike out, it would it not be well to strike out everything here after the word "cause"? To get it before the Advisory Committee, I make a motion to that effect.

Mr. Loftin. I second the motion.

Mr. Mitchell. The words from there on are to be stricken out. Is there any discussion about that? Dean Clark, is there any objection to that?

Dean Clark. Well, I am sorry to see it go out.

Mr. Mitchell. You did have a motion as to pleadings, and Rule 37 provides explicitly for that.

Dean Clark. Are we going to leave it in in Rule 37?

Mr. Mitchell. That is all that is left here.

Mr. Donworth. There might be a stump speech.

Mr. Mitchell. The question is on Judge Donworth's motion. All in favor of it will say "aye", those opposed "no."

(The motion was adopted, all voting in favor of it except Dean Clark.)

Mr. Mitchell. It is carried. Now, you can take up Rule 37, if you want to say something about prompt hearings. We are on Rule 10.

Mr. Dodge. Rule 10 we have dealt with before, have

we not?

Mr. Olney. There is one correction in Rule 9.

Mr. Mitchell. Rule 11, "Form of summons." Now, that will have to be changed to provide a form for unliquidated claims and liquidated claims in the usual way.

Mr. Donworth. I do not think so, Mr. Chairman. I think that requiring him to file his answer in 20 days, that takes care of the whole matter.

Mr. Mitchell. This is Rule 11, form of summons.

Mr. Donworth. I do think he should be required to serve his answer on plaintiff's attorney.

Mr. Mitchell. This says something about the form of summons. Now, we have already agreed that we are going to have a system by which the clerk may enter judgment as of course in a claim for a specific liquidated sum under contract; and wherever that system is used the form is in the alternative. If it is a liquidated case, it states the amount; if it is not, it asks for such relief as the court may assess. So that the form of summons may--

Mr. Wickersham (Interposing). How about adopting the original New York Practice Act on that point, of summons with notice?

Dean Clark. You mean the provision for liquidated damages?

Mr. Wickersham. The form of summons for liquidated

damages.

Dean Clark. I might say that I am a little reconciled about your judgment by default.

Mr. Wickersham. Well, that particular system has worked very well.

Dean Clark. I mean about not requiring an affidavit.

Mr. Wickersham. There is some question there.

Dean Clark. I mean it is a question of fact under the New York law.

Mr. Dodge. Is it not following the English practice?

Dean Clark. I think it is.

Mr. Dodge. It is the same thing.

Dean Clark. Mr. Wickersham's suggestion is that we follow the New York practice, but I think that is what he had in mind.

Mr. Mitchell. It is just a matter of detail. If you have a liquidated claim, you state the amount you are asking for; if you have not you state you are going to ask for judgment for the relief claimed.

Mr. Lemann. It seems to me that you have to attach the summons and file it in the clerk's office, and it might be simple to say that you sign the complaint which is attached, and a copy filed in in the clerk's office.

Mr. Mitchell. That is the form used. It says, "Within the time stated the plaintiff may take judgment against the defendant or apply to the court for judgment.

Mr. Lemann. It is the same form.

Mr. Mitchell. Yes, it is the same form in either case.

Mr. Morgan. It will give him notice of what will happen.

Mr. Donworth. Is there anything in that about having to serve a copy of the answer upon the plaintiff?

Mr. Mitchell. Yes, it says you are required to serve your answer within 20 days after the service of this summons. And it seems to me that if he fails to answer the complaint within the time stated the plaintiff will take judgment for the amount asked, or will apply to the court if it is unliquidated.

Dean Clark. Of course, this requirement of filing an answer with the court and filing the pleadings should be changed.

Mr. Lemann. Under this rule, he does not have to serve his answer on the plaintiff, and does not have to file it in court at any time.

Mr. Mitchell. There is another rule which requires the pleading to be filed.

Mr. Dodge. Rule 17 provides for a period of 20 days for filing the answer or other defense.

Mr. Mitchell. I think we have covered that.

Dean Clark. There is just one other matter, in regard to the matter of service. This matter in brackets goes back to Rule 7.

Mr. Lemann. May I ask about this rule of requiring a man to file his answer in court--does that include that?

Mr. Loftin. Yes.

Mr. Mitchell. That was the intention. The summons requires him to serve his answer, and not file it. Dean Clark has just called attention to that. He said the words "file his answer" should be changed to "serve his answer."

Mr. Lemann. But there is a later rule on that.

Mr. Wickersham. That later rule is about advancing the time; but the general consensus of opinion is against that.

Mr. Lemann. Well, what are we doing about requiring the defendant to file his answer in the court?

Mr. Mitchell. Right; but my understanding is that under the system we have adopted, the practice is to serve his answer.

Mr. Lemann. And not file it?

Mr. Mitchell. And not file it.

Dean Clark. Well, Mr. Lemann, we still have the pro-

vision that the claim must be filed in the court within 20 days, that is, we have the summons and complaint, and then we go right into court within 20 days. Now, what are we going to do with the answer?

Mr. Lemann. That is what I had in mind. Mr. Dodge referred to Rule 17, and I turned to Rule 17 and put it 7 days, and if that is the way we will leave it, the summons ought to cover that.

Dean Clark. Of course, we could say "serve and file."

Mr. Lemann. Yes; "serve and file."

Mr. Mitchell. We ought to be consistent. If we are not going to require the plaintiff to serve his complaint, there is no sense in requiring the defendant to serve his answer. My theory is that they ought to allow them to be served on each other. The question of filing is a matter of having the court deal with it, and the system that I have in mind simply contemplates filing the pleading a sufficient time before the trial so they will be there and the court can find them, and the case is tried. And that system usually provides that pleadings shall be filed when a notice of trial is served, and note of issue filed. Why file them sooner if they do not have to be filed when they are served?

Mr. Olney. Suppose a man files pleas and motions in abatement, and so on?

Mr. Mitchell. Well, then the court will say "close

your pleadings and file your answer."

Mr. Olney. Suppose the defendant makes a motion to strike something from the complaint and the plaintiff has not filed the complaint?

Mr. Wickersham. Well, he serves it with his notice of motion, and it comes up under his notice of motion and the court will have nothing presented to it before that.

Mr. Olney. But it is the other man who is moving; the defendant is moving.

Mr. Wickersham. Well, how does he move except on the complaint? He moves on the complaint with notice of motion.

Mr. Olney. Why should not the plaintiff file his complaint?

Dean Clark. I thought we decided that in Rule 16 which we discussed, and that is where we had our discussion of what to do if the complaint was not filed, and the suggestion was made that the filing be left with the court, and we make such reference to the filing as the court may deem proper. As I understand it, that was the decision, that it should be filed in not less than 20 days.

Mr. Dodge. It seems to me that if this case is pending at the time in the court, other parties may be interested in knowing whether the case is pending. I do not think that litigation ought to be kept out of the court, as a private matter.

Mr. Mitchell. The papers ought to be filed in time for the court to pass on the merits.

Dean Clark. If the answer is served, why should it not be filed?

Mr. Lemann. Why could that not be 20 days, stating that he must serve his answer on the plaintiff and file it in court.

Dean Clark. Later on we have a provision that when the pleadings are closed, the case goes on the trial calendar. Of course, you can change the rule. That follows Equity Rule 56. At the expiration of that time, the case goes on the trial calendar. Now, the new rules provides that when the pleadings are closed, the case automatically goes on the trial calendar.

Mr. Mitchell. Several members of the Committee suggested to me that we ought not to sit after lo o'clock, and that time has passed by five minutes. I think you are right about it.

Mr. Wickersham. What time shall we meet in the morning, Mr. Chairman.

Dean Clark. Eight o'clock. (Laughter.)

Mr. Mitchell. You cannot floor this gentleman.(Laughter.)

Mr. Wickersham. I move, Mr. Chairman, that we meet at half-past 9 o'clock tomorrow morning.

(The motion was unanimously adopted.)

(Thereupon, at 10:05 o'clock p.m., the Advisory Committee adjourned until Friday, November 15, 1935, at 9:30 o'clock a.m.

Rec'd from Mr. Morgan 9/5/36 - pp. 266-289 1 orig 2 carbons

IX

P R O C E E D I N G S

OF

CONFERENCE OF ADVISORY COMMITTEE

DESIGNATED BY THE UNITED STATES SUPREME COURT

TO DRAFT

UNIFORM RULES OF CIVIL PROCEDURE

FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

UNDER THE ACT OF CONGRESS PROVIDING FOR SUCH UNIFORM OR UNIFIED RULES.

Washington, D.C.

Friday, Nov. 15, 1935.

The Conference of the Advisory Committee designated by the United States Supreme Court pursuant to act of Congress, to draft proposed Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia, in both law and equity cases, met in the Conference Room of the United States Supreme Court Building on Friday, November 15, 1935, at 9:30 o'clock a.m., pursuant to adjournment on the preceding day.

Present: All the members of the Advisory Committee and its assistants and representatives of the Department of Justice, as noted at the beginning of yesterday's session.

Mr. Mitchell. I want to go back for a moment to Rule 11. That is the rule that requires the defendant to answer within 20 days; and I want to call the attention of the Reporter at this time to the fact that we will have to deal with the question of answer in removal cases. I do not find any rule on that, and under the present law, in a case of removal, I believe 30 days is allowed to answer after the removal is made and the papers are filed in the Federal court. There has been a good deal of complaint about that, and the Association of the Bar in New York unanimously passed a resolution for a change in the statute to shorten that time. And I merely bring it up now so that it will not be overlooked, that we ought to consider the question of the time in connection with those cases.

Dean Clark. Perhaps you may turn for a moment to Rule 115.

Mr. Mitchell. Have you got it there?

Dean Clark. Yes.

Mr. Mitchell. I had overlooked that. Then we will not bother with it now.

Dean Clark. What we did in the second sentence of Rule 115 was to provide that in a removal case if the defendant

has not answered he must present his defense pursuant to Rule 26 at the time of filing the transcript of record.

Mr. Mitchell. Let us drop it them for the present.

Rule 12 we seem to have agreed on, and we are down to Rule 13, "Manner of serving summons."

Mr. Olney. In regard to 12, there is one little change in the language that might be suggested. It may make it clearer if you say "The summons may be served" and not "shall be served" by the marshal or by any person, and so on. It does not make much difference, but I think it is a little better.

Dean Clark. Are we on Rule 13?

Mr. Mitchell. Yes.

Dean Clark. I was going to say that this presents a problem of putting in a short setence all the variations in fact calling for various differences in service; and we tried to cover that by a series of paragraphs, as you will see; and the first sentence in effect does not upset the present Federal practice. There are some Federal statutes a s to service, particularly service upon the United States, by serving a copy, often with the Attorney General or the United States Attorney, and I think there is another statute about foreclosure of liens which was passed very recently, which I hope to add if we refer to the Federal statutes by name.

Mr. Wickersham. Why would it not be just as well to

say where there is a Federal statute on the subject?

Dean Clark. I am not sure it would not better.

Mr. Wickersham. Yes. Otherwise we might overlook something.

Dean Clark. Yes. We put it that way, because you can not always tell--but there is a difficulty that some may be overlooked.

Mr. Lemann. There is one point of phraseology in several places in these rules. In a large number of cases there is a provision "Unless otherwise provided by Federal statute". Now, we are superseding a lot of statutes, and that expression I think is too broad, because we are changing a number of statutory provisions. I think that might be cured without changing the wording in the different rules, by a rule that wherever a Federal statute exists it is not superseded by these rules.

Dean Clark. I think that can be very well done at the end, that wherever a Federal exists it is not superseded by these rules.

Mr. Mitchell. I notice in Rule 10--I did not raise the point before because I thought it was a question of form rather than of substance--that says "~~that where~~ except where otherwise provided by special requirements of specific Federal statute." I do not know whether there is any legal definition of "specific

Federal statute." I do not know what the phrase means.

Mr. Dobie. That takes care of a particular case. They will have a provision under the Interstate Commerce Act or something of that kind. I think the language is "except where otherwise provided by special requirement of specific Federal statute."

Mr. Mitchell. What is a "specific Federal statute"?

Mr. Dobie. I think a specific Federal statute is one that takes it out of the general rule. For instance, in patent cases, ~~then you~~ the venue can be in any place where the infringement takes place.

Mr. Mitchell. My thought is that "Federal statute" has no particular meaning, and I do not think the word "specific" identifies the statute.

Mr. Olney. I think it is a statute making specific provision.

Mr. Mitchell. Well, all statutes make specific provisions.

Dean Clark. We might have in mind the arbitration agreement, where you could go in court on a simple motion in five days. I suppose if we put that in we hit arbitration.

Mr. Mitchell. I think we will find difficulty in finding just what was meant by that phrase.

Dean Clark. Subdivision 2 is perhaps the main one in Rule 13, that service upon the defendant may be made personally

upon him by leaving a copy of the summons and complaint at his usual place of abode, with some adult person. Subdivision 3 of Rule 13 is an attempt to cover service on corporations. Subdivision 4 is an attempt to cover service, if the defendant is subject to the jurisdiction of the court, according to the law of the State in which the action is brought.

Mr. Dodge. Suppose a man lives alone?

Dean Clark. In that case he cannot do it. Of course, in my State, and probably in yours, you do not need that. It is sufficient if served at the usual place of abode; so that you can leave it at a man's home when he is in State prison.

Mr. Dobie. Are there not a number of States that provide that you can mail it on the door?

Dean Clark. Yes, there are a number that provide that. This is more directly following Equity Rule 13. I have no objection ~~about~~ to taking out the clause about delivering it to an adult.

Mr. Wickersham. If you leave it with a designated person it ought to be an adult, because a child would not do.

Mr. Mitchell. The language used in many States is "on a person of suitable age and discretion."

Mr. Wickersham. Yes. That would exclude a child.

Mr. Cherry. Do you prefer this detailed provision to the alternative, Dean Clark?

Dean Clark. No, I do not.

Mr. Cherry. I rather like that alternative provision. I think that uniformity in method of service is of no particular consequence, and the comfort and convenience of lawyers who are able to serve in the way in which they are accustomed to do so in the State court of their own jurisdiction, where it is pretty well settled by decisions what the meaning of statutes and rules of their own court may be, would be much more important than uniformity.

Dean Clark. I do like the alternative better. The alternative is on the next page to the tentative rule. in brackets; it is a short provision, and provides that service shall be according to the law of the State, except where a different method is specifically provided by Federal law.

Mr. Lemann. The alternative leaves out one clause that is found in the third line of the rule, and that is that the summons must be served in the district where the action is instituted; but in the alternative Rule 13 there is no specific mention as to that.

Dean Clark. Yes, that is true.

Mr. Loftin. I will also call your attention to the fact that it has been decided, under the previous rule, that it can be served by the marshal or some other person. I think there might be some question there as to whether there is a conflict. In my State it could not be served by any one but an officer.

Mr. Cherry. I would not suppose there would be a conflict in that. It is a question of method.

Dean Clark. Well, of course, if there is any question I suppose the best thing would be to say at the end, "Provided that nothing herein shall prevent service,"—

(Interposing)

Mr. Morgan. According to the law or rule in that jurisdiction.

Mr. Dobie. Of course, that raises the problem of how far in these cases you want to adopt a local practice, which, of course, does not accomplish uniformity but just the other situation, and particularly in connection with the Circuit Court of Appeals and the Supreme Court of the United States, in those cases ~~that~~ they have to go technically into the law of the individual States, which is quite a burden.

Mr. Cherry. Well, I have in mind on the other hand, this thought: That subdivision 2 is just minor differences. For example, in the Minnesota statute it would be likely to plague a lawyer. Now, that would be true whatever form that detailed rule might take. There will be minor differences from the local practice, not of any special significance, but any rule that was adopted would have to be different in almost every district, in a matter which there is no necessity for uniformity. I should like to modify a part of the alternative rule.

Mr. Morgan. That is, to rephrase it?

Mr. Cherry. Yes.

Dean Clark. On that, I want to raise this question: The reason we did not put any of these provisions in this alternative rule is that we tried to keep it very limited as to matters of service, and of jurisdiction. Now, you will notice the language of the rule is "Unless waived by voluntary appearance or otherwise." In this rule we have not stated anything about jurisdiction at all. Now I do not know if we can cover all we ought to cover by putting in that the summons must be served in the district. And should we put in anything about waiver?

Mr. Lemann. Could you not put in, "unless authorized by Federal statute, or waived by voluntary appearance or otherwise by the defendant in the action, the summons shall be served in the district in which the action is instituted, ~~in the same manner as this~~ except under the laws of the State in which the district is located, service by publication." Would that not cover it?

Dean Clark. Yes; do we need the affirmative there? Would you say "where service is covered by special provision of Federal statute," or is that sufficient?

Mr. Lemann. I thought you would take the first two lines of the original rule and put that in the alternative.

Mr. Tolman. I think there is one objection to this rule. Instead of determining the precise way in which the service shall be had, why do you not make a rule authorizing

the service to be had by different methods? One I think would be the matter of service by a private person; another by the marshal; and the third in the manner provided by the local statute. Would you not in that way have a single conformity rule, rather than make a number of conformity rules? Then let the lawyer act according to whatever practice he wanted to. And in precise conformity I find a difficulty in those States where the law and equity practice have not been made uniform, where there are different methods of serving the process in law and serving the process in equity, so that a doubt arises in my mind as to just where you are.

Mr. Lemann. There is something in that suggestion.

Mr. Tolman. I suggest that we have another paragraph regarding service of summons, which should consist of definite alternatives.

Mr. Mitchell. Well, if a State law makes a different method for law and equity, Rule 13 would require you to analyze your case at once, in order to know how to make service.

Dean Clark. Yes.

Mr. Dodge. I did not know there were ever any differences in methods of service.

Mr. Cherry. Well, ~~if the State is different~~--you could just say "law."

Mr. Lemann. In other words, where the State practice is different, adopt the law rule?

Mr. Cherry. Yes.

Dean Clark. Maj. Tolman, what States do you think would have a difference in the two forms of service?

Mr. Tolman. I have a memorandum on that subject; and I find three States, Delaware, Florida, andMichigan, where there are distinct provisions; and I find a list of five other States in which it looks as if there were differences, but I have not been able to make a careful analysis to determine.

Mr. Wickersham. New Jersey is one.

Mr. Cherry. Three would be enough.

Mr. Dobie. Do I understand that Maj. Tolman did not finish?

Mr. Mitchell. Would it meet your point, Maj. Tolman, if you inserted the word "law" in Rule 13?

Mr. Tolman. I think that particular point would be met.

Mr. Dobie. Do I understand that Maj. Tolman desires the manner of service prescribed, and if so, will the service be good if it does not comply with the rule that we formulate, but if it is good under the State law? Is that the way you originally drew the rule, Dean Clark?

Dean Clark. Yes, that is the way I originally drew

the rule; because you will notice that subsection 4 of Rule 13 provides that service according to the State practice will be good.

Mr. Lemann. Even so, if you have that variation, then in order to determine how to follow your full rights, you would have to have a cause of action and fall back on that; otherwise you might have to have your action presented under paragraph 4.

Mr. Mitchell. Maj. Tolman's suggestion is that we provide for a rule of our own, and another to follow the State practice; and that has another merit; and that is that the court may raise a question about generality and uniformity; and that would leave it in the position of either adopting it or striking it out, as to the local practice, and you would still have one method left.

Dean Clark. Well, I think you would have to have that considered the main rule, because this (indicating) is my attempt to state a rule of our own.

Mr. Wickersham. The point that Maj. Tolman mentions, I understand, is to adopt the fourth paragraph of Rule 13, "in addition to the methods of service above set forth, any service, other than service by publication, shall be valid if made upon a defendant, subject to the jurisdiction of the court, in accordance with the law of the State in which is located the district"--if you add--"according to the law

of the State applicable to common law actions."

Dean Clark. Yes, I think we should have that provision in there.

Mr. Lemann. "Common law actions."

Mr. Donworth. Take out the word "common."

Mr. Lemann. Yes, "actions at law."

Mr. Wickersham. Actions at law.

Prof. Sunderland. Would it not be possible to extend the territory over which summons could run? The summons is required to be served in the district. It seems that it ought to be served anywhere in the State; it ought to be "within the State;" it ought to be, it seems to me, in order that the end of justice might be served.

Mr. Wickersham. "The law of the State applicable to common law actions."

Mr. Dobie. This provision in the Federal statute, I think, where there are different defendants in the same State in different districts in the same State should be considered.

Mr. Lemann. I have a case now where there are 36 defendants, and one lives in the district; so that there are 35 who do not; that comes under Section 113, Revised Statutes. There is considerable resistance on the part of the other 35 defendants; and if you extend that to

Mississippi--and one lives in Louisiana and another in Mississippi--I think you would increase that considerably. Of course you can leave it to the discretion of the judge.

Mr. Mitchell. You would have one great difficulty in extending the right to serve a man outside the district: You will have an almost insuperable objection in Congress. They are extremely jealous of any attempt of a Federal court to require a man to respond in any district in which he does not reside; and the practical situation is such that it is hard to overcome. I know that many lawyers think that service in the Federal court ought to be permitted anywhere within a radius of 100 miles from the place where the case is brought, but where their attorneys may be in other States. There is much to be said in favor of that, but Congress is jealous.

Mr. Dobie. This is a broad general question; but it will affect all we do here. Do you anticipate that when the rules are adopted by the United States Supreme Court, with such variations as the Court wishes to make, there is going to be any active attempt in Congress to try to analyze them step by step, and have long debates, and have a committee appointed on them?

Mr. Mitchell. Well, nobody knows. There is considerable opposition among members of the bar. Lawyers always

disagree; and the matter will undoubtedly be referred to the Judiciary Committee in both Houses of Congress, and they may have hearings; and if somebody pops on to the provision as to jurisdiction of Federal courts, etc., outside of their own district--by service, I mean--you will have difficulty right away. I do not think you can enlarge or alter the venue or t heright to compel a man to respond by service outside of the district of his residence, without raising trouble.

Mr. Dobie. You do not think there will be any difficulty about permitting service in different districts in the same State? I think the Congressmen will think in terms of the State.

Mr. Morgan. Do you think this shouldbe considered as a matter of venue, rather than jurisdiction--allowing service anywhere in the United States, in order to change the venue?

Mr. Mitchell. No, I do not think so. Does the law now permit service outside of the district where a man is temporarily staying?

Dean Clark. If he is a resident of a State, he can be served in the district, even though it is outside the district where suit is brought.

Mr. Morgan. Is that true at the present time?

Dean Clark. Yes, that is the present Equity rule.

Mr. Morgan. But not thelaw?

Dean Clark. But not the law.

Mr. Mitchell. Well, I just wanted to mention the practical difficulties--that is, those connected with Congress.

Dean Clark. How far did yours go, Prof. Sunderland? Is it limited?

Prof. Sunderland. This permits service anywhere in the district.

Dean Clark. Now, by Section 113 you can sue in suits of a legal nature which will affect defendants residing in the district. Have we got a copy of the United States Code?

Mr. Dobie. What section do you want?

Mr. Lemann. These sections, 112 and 113, are in our book. But in the first place, Section 113 of the U.S.Code provides for service in the district. Suit may be brought where defendants reside in different districts; suits may be brought in any district but service of the summons must be made in the district where the man resides. But if suit is brought in the Western District of Louisiana and the man resides in the Eastern District, the summons is sent down to the Eastern District. But that is only within the State.

Prof. Sunderland. But that is under Rule 13.

Mr. Lemann. Well, it says, "unless otherwise authorized by Federal statute."

Mr. Donworth. No; this would supersede that.

Mr. Dobie. Well, that is one of those specific cases; at least, that is my impression.

Dean Clark. But the cases that are specially authorized in particular suits are usually suits involving the United States.

Prof. Sunderland. Why not change that and say "in the State?"

Mr. Lemann. And also it provides for a place in which summons must be served, and under this the summons must be served in the district where he resides. So that is this not right anywhow?

Dean Clark. Well, Prof. Sunderland, I take it, is suggesting a rather small change in the statute, that is, that it does not need to be served in the same district.

Prof. Sunderland. Yes.

Dean Clark. But could we do that? Could we have a process of duplicate writs?

Mr. Lemann. Well, in the first place probably we would not get him except where he lives; so it does not make much difference.

Prof. Sunderland. But it would give the Federal court the same power as the State court.

Mr. Wickersham. You take a man who lives in Albany and has an office in New York City, and he lives in New York City most of the time, and goes home frequently for the weekend. He lives and votes and pays his taxes in Albany, in the Northern District of New York; and you

ought to be able to serve him with a summons wherever you find him in the State. But the suit has to be brought in the district where he resides.

Dean Clark. Now, there is something that I want to call to your attention. I do not know whether the rules need to be changed or not. The practice now required by the statute is that you must go to the other district and get process in that district to serve. Now, we are not requiring that. We have the simple service of summons by the attorneys of the plaintiff. Now, why cannot we require that summons to be served in Alabany?

Mr. Donworth. I think we are superseding Section 113 of the U.S.Code, and if we want to keep in force the portion of Section 113 which Mr. Lemann called attention to, we should specifically reenact it in our rule.

Dean Clark. I think you are right. Something should be done about it; and I am not sure but what Prof. Sunderland's suggestion is the final one--the summons may be served in any district in the State in which suit is brought. Would not that be all right?

Mr. Donworth. I think so.

Mr. Lemann. But if you put it that way--if you omit the present statutory requirement, that there must be another defendant in that district for that to be done--your language would permit me to be sued in the Western District

of Louisiana, where there is no other defendant.

Mr. Mitchell. No; he is not touching venue; he is touching service.

Mr. Donworth. Well, I do not think that is so, because in actions between persons in different States, the venue may be fixed by the residence of the plaintiff and he may sue the defendant in New York; and we make this a general rule.

Prof. Sunderland. The residence of the defendant must be the district where the defendant resides.

Mr. Cherry. That is true. It has got to be the district.

Prof. Sunderland. Then having located the suit in that district, can you summons him in other districts?

Mr. Dobie. Yes, you can summons him in other districts in the same State, but not outside the State.

Prof. Sunderland. I would put it outside the State, but that would raise such a furore that it would not be worth while to try it.

Mr. Donworth. As it now exists, the plaintiff can not sue a man who is outside theplaintiff's own district, in the district of the plaintiff, because of this single defendant. Now, if you make this general as to venue, the statute says it may be in the residence of the plaintiff

or defendant. If you leave it purely to the venue statutes, then I can sue a man in Spokane, Washington, a single defendant, and you cannot do that under existing law.

Dean Clark. Well, now, let us see--

Mr. Dobie (Interposing). You are talking about Seattle and Spokane in the same State.

Mr. ~~Lemann~~ Donworth. Yes, but different ~~States also~~ districts.

Mr. Dobie. Then in that case jurisdiction is not based on diversity of citizenship, and therefore it must be a Federal case, and in all those kinds of cases it must be the district of the defendant. I live in Charlottesville, and if I want to sue a man in Norfolk under the Federal statutes, and we are both Virginians, I have to go down there and sue him. I cannot sue him in my district. It is a single defendant, and both he and plaintiff are residents of the same State, and you have to bring suit in the defendant's district. That is true if the two bases of jurisdiction occur. It has been ~~successfully~~ specifically held that only where diversity of citizenship is the sole ground of jurisdiction can you do otherwise.

Mr. Mitchell. Is it not the sense of the Committee that the rule ~~is~~ be so drawn as to permit service anywhere in the State, provided it is not so drawn as to change the venue or require the defendant to respond in a different

district in any different way than the present law does? Is that not what we want to provide? Can we not agree on that, and let the Reporter work it out?

Dean Clark. Perhaps I did not get it. The summons must be served in the district in which the defendant resides.

Mr. Wickersham. Is that the present law, that it must be served in the district in which defendant resides?

Dean Clark. That is the present law; and then you can make it clear that we are not changing the venue statute. or if you think that is not enough to do, you can add another phrase, "the district in which the defendant resides, and when the defendant is subject to the jurisdiction of the court."

Prof. Sunderland. You cannot do that.

Dean Clark. Why not? We are not changing the venue statute. This is simply a requirement of service, and the only requirement as to service is that it must be in the district where the defendant resides.

Mr. Wickersham. It goes further than that.

Mr. Olney. Why not simply provide that it can be served anywhere in the State? You have your venue already established, and you are not changing that in the slightest; and if you can serve anywhere in the State, the case--

Dean Clark (Interposing). I think that this is extending the statute a little.

Mr. Olney. The venue?

Dean Clark. No; srving on the defendant anywhere in the State. It does extend the present statute a little.

Mr. Dobie. Yes, it extends the present staute.

Mr. Dodge. You can sue him in Brooklyn where he resides; but you can summons him in Manhattan, or wherever his office is; and I make the motion which Judge Olney suggests, that without affecting venue at all, service may be anywhere in the State.

Dean Clark. I think that is desirable but I think that does change the statute.

Mr. Olney. Is that not the idea that the Chairman expressed a few moments ago?

Mr. Mitchell. That is what I intended to express, to permit service anywhere in the district, provided you are not hampering with the rule regarding where the defendant must be found. I said in the district, I meant in the State. It seems to me that Dean Clark's suggestion that he be allowed to be served in the district of the defendant's residence goes too far; because in cases of diversity of citizenship, you can bring the suit either in the residence of the plaintiff or that of the defendant; and if you say that the man in Alabama may be sued by a man in Mississippi and you may serve the summons in the district of the defendant's residence, you would require him to respond in another

State, without changing the venue. Is that not right?

Mr. Dobie. I am heartily in favor of what Judge Olney suggests and allowing service of ~~process~~ process in different districts in the same State. Now, Section 113, U.S. Code--the first provision, down to the semicolon, is a venue statute; and after the semicolon it is the service of process, and any duplicate writs may be addressed to the marshal in another district in the State.

Mr. Olney. What rule are you talking about?

Mr. Dobie. Section 113 of the U.S. Code, which is Section 52 of the Judicial Code.

Mr. Wickersham. That would require a suit in the district where the defendant resides, but it does not provide for the service of process in that district, because that requirement is imported by the following paragraph which applies in a case where two or more defendants reside in different districts.

Mr. Dobie. That is true.

Mr. Wickersham. Now, it does not seem to me that the requirement that the suit shall be brought in one district precludes the provision that process in that suit may be served in another district in the same State. Like the instance stated by Mr. Dodge a few moments ago, a man living in Brooklyn, in the Eastern District of New York, in the

same State, and he has an office in the City of New York, and suit is brought against him in the Eastern District, where he resides--that is, in Brooklyn--but he goes over to New York City--the Southern District of New York every morning, and perhaps stays over there occasionally at night; and in order to get jurisdiction over him, it seems to me you ought to be able to serve summons on him wherever he is found in the State, although it is across the river.

Mr. Dobie. You do not mean to limit that to people who have offices?

Mr. Wickersham. No, I am just giving that as an illustration.

Mr. Dobie. I am heartily in favor of Judge Olney's suggestion. I think it is an excellent one, and I do not think there will be any question about that in Congress, because I am satisfied myself about it--but I defer to the political experience of Mr. Mitchell and Mr. Wickersham. I am glad to say that I have had very little to do with politics, but I do not think there is any objection at all to what is a process statute and does not concern venue.

Dean Clark. That reminds me that when we recommend that a statute be superseded--such as this Section 113--we will have to say "superseded in practice."

Mr. Dobie. It is the practice applicable to process