THIRD DAY

CONFERENCE OF ADVISORY COMMITTEE

ON

UNIFORM RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Saturday, November 16, 1935.

The Committee met at 9:30 o'clock a.m., pursuant to adjournment.

PRESENT: The members of the Advisory Committee and their advisers and assistants as hereinbefore noted.

Mr. Mitchell. Gentlemen, we are still on Rule 44.

Dean Clark. I should like to make a suggestion which is general, because, as I indicated last night, there are some points of difficulty here. It seemed to me that we ought to provide for the court going ahead, so far as we were authorized to do so under the present Equity rules and the statutes. That is, our rule ought not to be a limited one. I would rather go the other way; but Now, I am not sure what, along with the last sentence of the rule, which is a statement by implication that plaintiff need not join parties who would oust the jurisdiction of the court, we ought also to state it affirmatively. And that raises the question whether Equity Rule 39, which appears on the left hand side, really does not mean necessary party, instead of proper party.

Mr. Dodge. I did not think in the Equity rules they used that phrase "necessary parties" at all.

Dean Clark. They did not.

Mr. Dobie. In Rule 37 it does not say "necessary parties"; it says a party whose presence is necessary or prope to complete the termination of the case." But they did n simply use the adjective affecting parties.

Mr. Donworth. Would it not be a good idea to strike ou "proper parties"?

Dean Clark. I think so. I want to put in there "necessary parties" and take out "proper" and say "whenever possible the plaintiff shall set forth in his complaint the names of persons not joined who are necessary ~~xxxproperx~~ parties, and state why they are not made parties--as they are not within the jurisdiction of the court and cannot be made parties." It seemed to me that that is what is meant. I arrived at that conclusion, not merely by Rule 39 alone, but also because of the statute. What I have done here in effect is, as was suggested last night, ~~was~~ to put the Equity rule and the statute one after the other, so to speak. I did that because of a little hesitancy. I thought it would be, perhaps safer, if I put them both in. I should be glad to go to the full length, which it does seem to me is justified, saying that "necessary parties"need not be included when they are not inhabitants of the State, or when they are persons

who would oust the jurisdiction of the court."

Mr. Dobie. Yes.

Mr. Donworth. Would not your thought be met by striking out the parenthetical clause? If you read it without the parenthetical clause, is there any objection to stating in the complaint the reason why you do not join the particular party? The present rule contemplates that, and is there any real objection to stating it? And if you leave out this parenthesis it will cover the case.

Dean Clark. But if "proper" means proper there is no necessity to state that. The reason you have not got that in is because you do not want it. With, howveer, "necessary parties", it is different; and then you will state it. In other words, how would it do to pass ~~it through~~ this rule, entitled "necessary parties" only, and with the change I have indicated? You do not need to join even necessary parties when they are within the jurisdiction, or when they would oust the jurisdiction of the court.

Mr. Mitchell. Well, there is confusion about indispensable and necessary.

Dean Clark. That is quite possible. I think I would just as soon say nothing about indispensable, in the hope that we carry it along so that indispensable parties will eventually disappear, because I do not believe there is any such thing.

Mr. Tolman. It seems to me that we do not need to deal with proper parties at all; they present no difficulty. The difficulty is that with parties that ought to be made parties and cannot; and I think what we ought to name is necessary parties, without committing ourselves to that delicate question whether they are necessary or indispensable.

Dean Clark. Yes, that is my view now.

Mr. Dobie. But you cannot dispense with the indispensable. (Laughter.) But I agree with everything you have said, that since you cannot dispense with the indispensable, you do not have to make provision for it.

Dean Clark. Yes.

Mr. Morgan. I suppose there are cases where you could just make a decree or judgment as between A and B, without necessarily affecting the rights of C, and that would be indispensable, would it? ~~Could you~~ We do not need to say anything about it; if it is a matter of substantive law, they could not get on without it.

Dean Clark. That is the way I would rather leave it. You do not have to say "indispensable parties", because the court can take care of it. But in answer to a question, I am not quite sure that there are cases.

Mr. Morgan. I do not know.

Mr. Dobie. What kind of cases are indispensable?

Dean Clark. I do not mean legally indispensable.

Mr. Dobie. Well, I can read you a few cases of the Supreme Court such as Williams vs. Bankhead, where A, B and C were all separately claiming an entire fund. They are indispensable.

Dean Clark. No--I thought that would be the case.

Mr. Dobie. Suppose you and Major Tolman and Mr. Mitchell claimed all of this fund. The decree is necessarily for Mr. Mitchell and Major Tolman and you, all of you, and no one else. That is the Supreme Court, and not Mr. Dobie speaking.

Dean Clark. Why does that need to be indispensable? Of course, if it is a judgment against all defendants, it should, but why can it not be a judgment between A and B?

Mr. Lemann. We cannot settle that question as to whether there ought to be indispensable parties. The Supreme Court has held that there are indispensable parties, and I cannot think of any cases where that should be so.

Mr. Dobie. A corporation in a suit by a stockholder.

Mr. Lemann. It is true that it has been decided that there is such a thing as indispensable parties, and it is beyond our province to discuss whether that is well taken or not. I agree with you that we ought to make it plain, in the interest of clarity, and I do not know whether I am sympathetic with Dean Clark's viewpoint; but we ought to make this ~~plaintiffs~~ necessary but not indispensable.

Mr. Mitchell. I rather shrank from approving a rule

which, on its face, was a rule which provided for giving the court power to grant a judgment against a party who was not there and your rule will so read?

Mr. Lemann. That is true.

Mr. Mitchell. But in a party's absence, it is impossible to render a decree against him. Otherwise, the court may render a judgment against a party who is not there, and it seems to me it is a mere matter of making your rule not to appear to go further than you can. It will not go further, I admit, even if you do not, but it will look as if you are trying to do so. That is all I had in mind.

Mr. Morgan. Do you think that is true, Mr. Chairman, for making this statement in the light of the precedents of the United States Supreme Court, which decisions distinguish between necessary and indispensable parties?

Mr. Lemann. Well, is there any objection to saying indispensable except wasting three words?

Mr. Donworth. In an action to foreclose a mortgage, all of the courts hold that the original holder of it is an indispensable party to the foreclosure of the mortgage.

Mr. Dobie. A suit by a stockholder to enforce, in the name of the corporation, is another one that they have insisted upon--the corporation is indispensable there. You know those cases, and I agree that we cannot touch that.

Mr. Lemann. I move that the reporter be instructed to

state after the word "necessary," the words "but not indispensable."

Mr. Olney. But when you are dealing with"necessary, indispensable or proper partiesy you will need really great study to properly word it.

Mr. Donworth. Why is it not met by striking out the parenthesis and striking out the words "or proper" above? I am saying that because no rule of court, so far as I am aware, has used the word "indispensable." The courts have worked that out as substantive law, and if you strike out "or proper" above and strike out the parenthesis, there is no trouble.

Mr. Olney. There is no difference between a necessary party and an indispensable party; there should not be.

Mr. DDobie. There should not be, but there is under the Supreme Court terminology.

Mr. Olney. That may be; but we do not want to work up phrases and then leave it to the Supreme Court. The word "necessary" means indispensable, and there is no difference between them in the English language.

Mr. Mitchell. Why not use the two words "proper" on the one had and "indispensable" on the other and leave out "necessary."

Mr. Olney; If you say there "indispensable", then they will proceed anyhow--

Dean Clark (Interposing). I think Mr. Donworth's sug-

gestion is that there is a definite ~~term~~ principle back of the law, and I regret to do that anyway. You see we already have the statute, of 28 U.S.C., 111, whatever that may be.

Mr. Morgan. Yes.

Dean Clark. And I hate to put in anything which restricts that statute. That statute will, perhaps, be construed more broadly than it has.

Mr. Dobie. Certainly you want to go as far as the Equity rule and the statute combined?

Dean Clark. Yes. If we limit this rule to the proper parties we have certainly gone back to the Equity rules.

Mr. Olney. I cannot imagine any case, excepting a case in rem in which a party is generally indispensable.

Dean Clark. I cannot either.

Mr. Olney. But we feel that we want to be very careful about this, because we may go further than we have any idea of doing and provide something that will get us into trouble.

Dean Clark. Well, if this is the holding with reference to the use of the term "necessary parties", we are not doing any violence to the language of the Supreme Court if we use that expression.

Mr. Mitchell. The thing that occurs to me is that if you use "necessary", and say that that does not mean what it says, you have got to follow it with "indispensable" in order to--

Mr. Dobie(Interposing). I agree with Mr. Olney that it is a hideously bad term, but we cannot help it.

Mr. Olney. The Supreme Court uses this terminology and if we want to take a shot at that , very well.

Mr. Lemann. There is a difference in law between "necessary " and "indispensable." Judge Olney thinks not; he thinks they mean the same thing.

Mr. Dodge. I think they mean the same thing.

Mr. Donworth. Let us remember that in this last sentence we are simply dealing with an allegation to be inserted in the complaint.

Mr. Lemann. The second sentence is what is important.

Dean Clark. In the second sentence I wanted to take out the words "or proper."

Mr. Wickersham. In both places?

Mr. Dobie. I would eliminate that.

Dean Clark. And also the reference to "proper parties" in the last sentence.

Mr. Loftin. The last or next to the last.

Mr. Morgan. The last.

Mr. Olney. I can see no reason why, if the judgment is really to have any effect between those who are actual parties to the litigation, it should not proceed, although there may be others who really should be parties to the litigation who cannot be brought in without the permission of the

court. But if there is a case wherein the court simply cannot proceed effectively even as between those who are before it, we ought not to provide a rule which would apparently permit the court to do so and result in an ~~interlocutory~~ nugatory or harmful decree or judgment.

Mr. Wickersham. of course, you cannot directly affect the rights of a party who ought to have been brought in, but you can certainly prejudice them if the court goes ahead and makes a decree that really affects his rights, so that he could come before another court and say, "I was not a party." And I wonder whether we are not up against that ~~decision~~ situation. I do not believe in attempting to do the improper thing by adjudicating his rights in his absence.

Mr. Mitchell. I think we are all agreed about that.

Mr. Wickersham. Well, certainly the word "necessary" has acquired a pretty settled meaning.

Mr. Dobie. I think it has. It is ~~unheeded~~, but an unhappy one ~~xxxy~~ fairly well crystallized.

Mr. Wickersham. But everybody uses the phrase.

Mr. Dobie. The Supreme Court has used it again and again.

Mr. Wickersham. Yes.

Mr. Lemann. Do all courts use it?

Mr. Dobie. I do not know, about the State courts, but the Federal courts do.

Mr. Lemann. All that I know do.

Mr. Olney. The courts constantly use names and expressions that are perfectly opposite to the case ~~to the case~~ before them, but you take it in connection with another case, and it may not be.

Dean Clark. My thought is about the same as Major Tolman expressed. I want to go as far affirmatively as I think we are entitled to go. I do not want to stand in the way of the Supreme Court going further, as I have a feeling that they are going to go if the question comes up. To put it the other way, if we do not go as far as applying this rule to "necessary parties," we are limiting the present law, and that is the worst thing that we can do. If we go as far as "necessary," we go as far as the court has nowgone; and my guess is that the court is probably going eventually to make "indispensable" and "necessary" the same thing, as they ought to be, and we are not saying anything about that.

Mr. Wickersham. If we used a word that they have used right along from time immemorial, the court can give as wide or as narrow a content to it as it chooses. But that is a well settled term. I do not know why we should start a new term.

Dean Clark. It would not be absolutely impossible to accept Mr. Lemann's suggestion of adding "indispensable"; but personally I do not want to put that in, because I do not want to suggest bad ideas to anybody.

Mr. Donworth. Well, you never will get the Federal court to hold that if my neighbor has given me a mortgage on his home, and I foreclose that mortgage, I can omit my neighbor, the owner of the fee, merely because there are five or six subquent lienors who live in Idaho.

Mr. Mitchell. We all agree to that. My point was that we ought not apparently to say so.

Mr. Lemann. That is the same point I was making.

Dean Clark. That case is one of those little examples that do not mean anything in connection with this case; ~~other~~ as to ~~than~~ "indispensable parties," how can you find the amount of the judgment when the defendant is not there? It is a case of the proper issue not being presented without the party. I do not think you need any particular reference to "indispensable parties" to show that you cannot find the amount due on a mortgage without the presence of the person who owes the money.

Mr. Dodge. It looks to me as if the court tried to avoid the use of the word "necessary" as to a party. Why can we not do the same thing, and speak of "proper party"?

Mr. Dobie. That is worse; "proper" is worse.

Mr. Dodge. The Supreme Court uses it in a number of cases.

Mr. Dobie. I know they do; but "proper" is between the "formal" and "necessary." But I think, as Dean Clark says, that "necessary" is a stronger word than "proper." And I

should think we certainly ought to go as far as the Equity rule and the statute combined. I think if we strike out "or" and that stuff in parenthesis, we are all right.

Mr. Dodge. In the former Equity rules, they sought to avoid the anomalous statement that a necessary party need not be a party, and they succeeded in avoiding that all the way through.

Dean Clark. Well, of course, if you apply the meaning of the word "proper" as we use it generally--that is, if you do not try to give it a Federal significance, the rule means absolutely nothing, because in ordinary course you do not need proper parties anyway. It is generally a matter of your choice.

Prof. Sunderland. Yes, it is a matter for the plaintiff.

Dean Clark. Yes, and you ask plaintiff settle the question.

Prof. Sunderland. The court, of course, will have something to say about it.

Dean Clark. The court will have something to say about, but generally, under the code, the defendant joins with the plaintiff in that class of case.

Mr. Dobie. To get things to a head, I move that this rule be adopted, omitting the words "or proper" in the fourth line~~xxxxxxxxxxxxxxxxx~~ from the bottom and striking out the parenthesis "(in the case of proper parties)" in next to the last line.

Mr. Donworth. Let us get that again. In the fourth line you strike out "or proper."

Mr. Dobie. Yes.

Mr. Morgan. And in the fourth line from the bottom you strike out "or proper".

Mr. Donworth. The fourth line from the bottom.

Mr. Dobie. Yes.

Mr. Tolman. Did you not mention the material in parenthesis?

Mr. Dobie. Yes-- "(in the case of proper parties)."

Mr. Donworth. Strike out that parenthessis. The same thing?

Mr. Morgan. The same thing you suggested before.

Mr. Dobie. Strike out that in parenthesis.

Mr. Loftin. I second the motion.

Mr. Olney. May I r ad this leading authority?

"An indispensable party is one without whom the suit cannot proceed, and one in whose absence the court could not enter a decree. His relation to the suit is so direct and vital that without him no decree could be entered determining the rights of the parties. Even in his absence the decree would affect his interest. It is therefore necessary that he be before the court. There can be no dispensing with indispensable parties."

Now, here are the illustrations, and they are of distinct value:

"Thus if A, B and C, each claim an entire fund, they are all indispensable parties to a suit concerning the disposition of the fund; and the award of any part of the fund to one is necessarily a decision as to this part against the other two. In a suit to rescind an entire and indivisible contract, we will say, on the ground of fraud, all the parties to this contract were held to be indispensable."

"How, can you rescind a contract where there were two parties on the other side, and rescind as against only one of them, if it is an indivisible contract. So, in a partition suit, all the parties in joint interest were declared to be indispensable parties; the court could not give a decision for the partition of property unless all the parties are there. A corporation was held indispensable in a suit by a stockholder against a third party. The person in possession is held to be indispensable in suits to recover possession of real or personal property.

"How can you get a judgment in a suit for ~~real or personal property~~ possession, unless you have before you the man who is in possession. An insurance company sued a man to cancel a policy to be paid to his wife if living, and otherwise to his children. Both the wife and the children were held indispensable parties. It is again a question of an indivisible contract."

It means that there are cases in which for the court

to render a judgment at all, you have got to have all of the parties before you.

Now, that being so, we can in this case go this far, that we can provide here that the court may proceed, except in those cases where the judgment, or for the effect of the judgment, there have got to be other parties before the court, where the judgment is really nugatory.

Mr. Mitchell. We are agreed to that. I think our trouble is here: Here is the word "necessary." In ordinary usage the word "necessary" means what it says; it is the same thing as "indispensable." But the courts have given a secondary meaning to "necessary" in this connection, and they have used it as applying to a class of parties who are not indispensable, whose presence would ordinarily be exacted. Now, how are we going to phrase it so as to cover that?

Mr. Olney. I am pointing out that if we simply use the expression "necessary" here, the court and litigants are going to consider also the case of "indispensable parties." In other words, we authorize the court go go ahead, even though the parties that are absent are necessary parties. Now, if we do that without defining and making a distinction ourselves between "necessary" and "indispensable", we are going to give an opening for litigation and trouble.

Mr. Dobie. Do you want to add the words "necessary but not indispensable"?

Mr. Olney. That might cover it.

Mr. Dobie. It is a hideous terminology.

Mr. Olney. Yes, it is.

Dean Clark. Did you ascribe that work to me that you are reading?. (Laughter.)

Mr. Olney. No.

Dean Clark. I was just going to disclaim that Supreme honor.

Mr. Mitchell. Instead of saying "necessary or proper", we could simply say a person who ordinarily should be a party and is not a party, the court can proceed to render judgment to the parties who are there, and so on.

Mr. Olney. Mr. Chairman, as I see it, we are all agreed upon the principle here. We want to go just as far as the court can really go, but there are certain limitations which we cannot overcome ourselves, and the Supreme Court itself could not overcome.

Mr. Mitchell. And you do not want to appear to be trying to do so.

Mr. Olney. No, we do not want to appear to be trying to do so. And it seems to me that we cannot sit here in this Committee and be certain that we formulate a rule that covers as difficult a question as that as to "proper". And I suggest that it simply go back to the draftsman for a little reconsideration of the subject, in view of this discussion, and see if

particular point cannot be covered, so that the lawyer that picks up the rule and the judge that picks it up and reads it, will see on its face just exactly what it means.

Mr. Donworth. Would not the thought be met by inserting these words: Take in the middle sentence, it says: "But the judgment rendered therein shall be without prejudice to the rights of the absent parties," and then it can go on and say, "unless indispensable, the judgment shall not count as to them."

Mr. Olney. Well, you are going to have an awful time with the litigants and the courts as to the difference between indispensable and necessary.

Dean Clark. I should prefer not to have it come back without some suggestion. There is not much that I can do except to come back to you and say, "In February I think as I did in November." Now, there is not any question about the fact that the Supreme Court has made a distinction between "necessary" and "indispensable." Some of the Federal courts have suggested that the terms "necessary" and "indispensable" have the same meaning. But nevertheless, the distinction has been put somewhat like this: "Where necessary parties are so interested in the controversy that they should be made parties in order to enable complete justice to be done, yet if they are separable from the rest, they are not indispensable parties." Now, I do not know how the court can proceed.

Mr. Mitchell. That is in line with my suggestion to

strike out the word "necessary" and say "parties that normally should be joined;" that the court can proceed and render judgment against the parties before it, provided the absent parties are not completely indispensable to the granting of the relief sought." And then you will avoid the use of the word "necessary." They have not used it in the Equity rule. I concede that the courts have given it a meaning that is apparently inconsistent with the ordinary use of the word "necessary," and why should we confuse the lawyers about it? I doubt if one lawyer in 50 who brings a suit is familiar with the decision distinguishing between "necessary" and "indispensable." And we use the word, and if we do not accept "indispensable parties" they do not know what we are talking about.

Mr. Cherry. May I ask if it is not likely that, in whatever form these rules come out, there will be published in the professional magazines some notes of this Committee. I wonder if it would not be the place of a note to state that.

Dean Clark. I want somebody to raise that question.

Mr. Cherry. I raise it only because I think it pertinent here.

Dean Clark. As to what we should have in the way of annotations; but it seems to me that we should have at least a reasonable amount. But I wanted to get the judgment of the Committee somewhat on that point.

Mr. Morgan. Mr. Chairman, how are you going to construe

your phraseology "~~he~~ who normally should be made parties"? It seems to me just as bad.

Mr. Mitchell. Well, take the Equity rule.

Mr. Morgan. You say "normally should be made parties"--I do not know what that means.

Mr. Mitchell. I did not mean to do any more than to impress the idea that it would avoid the word "necessary."

Mr. Olney. This expression would cover it, "parties whose appearance before the court would be required for a complete determination of the controversy."

Mr. Morgan. No.

Mr. Donworth. No; where the controversy is divisble, they do go on and determine what they can; so far as it is indivisible--

Mr. Olney (Interposing). No; that would cover both proper and necessary and all the rest of it--the expression that I have used. Where he uses the expression "normally", it was intended to cover all kinds of parties who might be proper parties.

Mr. Mitchell. Well, the question before us, the one on which the motion has been made, is ~~xxx~~ to adopt this rule, with those omissions; and the opposit on suggests that the matter be referred back to the Committee and let them s truggle with it a little further to see if they can phrase it as to meet this difficulty and the use of the word "necessary."

Mr. Donworth. Should we not make some progress? So that, tentatively, I offer this motion: That the motion of Mr. Dobie, I think it was, striking out "or proper" be supplemented by adding after the word "within the district", just below the middle of the page, the words "or indispensable," with the idea that when we get it revised, we will have to reconsider, perhaps, and non-joinder of parties who are not inhabitants of nor found within the district shall not constitute a matter of abatement or objection to the suit."

Mr. Dobie. Would you repeat that again, in the last sentence.

Mr. Donworth. No, I do not think it is necessary, because this relates only to the allegation in the complaint.

Mr. Mitchell. Is there a second to the amendment?

Mr. Dobie. I am willing to accept that, because I think that has an advantage, because it does say that we are in this rule making a distinction between "necessary" and "indispensable."

Mr. Mitchell. That is thepoint.

Mr. Doge. This is not a question of pleading, it is a question of parties.

Mr. Donworth. The last sentence is a question of pleading.

Mr. Dodge. It is a question of parties.

Mr. Mitchell. The last paragraph is a wuestion of parties.

Mr. Dodge. The last paragra ph is a question of parties.

Mr. Mitchell. Yes.

Mr. Tolman. Did Mr. Donworth move to s trike out the last paragraph?

Mr. Mitchell. No, Mr. Dobie moved to strike out the words "or proper" in the fourth line from the bottom and from the top, and also the matter in parenthesis; and the amendment of Mr. Donworth was to add after the words "within the district", just below the middle of the page, the words "unless indispensable."

Mr. Dobie. Yes, I think that has an advantage, because it shows the two words are used in two different senses

Mr. Donworth. In the sixth fifth line from the bottom.

Mr. Wickersham. "Unless indispensable."

Mr. Donworth. Yes.

Mr. Wickersham. I see.

Mr. Olney. I think it had better go in after the beginning of the sentence.

Mr. Wickersham. We understand that, but t he average lawyer might read that rule as meaning three things--"necessary parties" "indispensable parties" and "proper parties."

Mr. Dobie. No, we left that out.

Mr. Wickersham. So far as it would meet our thought, I think it is all right, but as to the average lawyer--

Mr. Mitchell (Interposing). Let us let the subcommitte chew it over and try to think of something better and not close our minds against their suggestions. What is your pleasure on that amended motion?

(A vote was taken and the motion as amended was unanimously adop

Dean Clark. May I ask a further question. I am wonde ing if I ought not to insert in that sentence: "but when such persons are neither inhabitants are nor found within the distri in which the action is brought"--ought I not to put this in, to tie it up with the last sentence: "or their joinder would oust the jurisdiction of the court as to the parties before it."Now, you see in the last sentence I have more or less set that up by implication but not directly.

Mr. Dobie. That was my point at the start. I am in favor of saying everything directly that you can.

Mr. Dodge. Is it the sense of the meeting, Mr. Chairman, that the phrase "necessary parties" must, ~~if it is~~ must continue to be used in the Supreme Court, apparently, still, without using it in the Equity rules--your suggestion that the word "proper" be used, as they did, has not been definitely passed on here, has it?

Mr. Mitchell. No, we made some changes in this which we recognize may not be satisfactory, but we made an attempt to refer the thing back to the drafting committee for further suggestion.

Mr. Dobie. I think a note there would be very helpful. I think that is one of those cases in which you just put a note there.

Mr. Mitchell. You could put that note in yourself.

Dean Clark. All right.

Mr. Mitchell. Now, we go back to Rule 26.

Mr. Dodge. I should like to have the reporter consider whether the terminology adopted in Equity Rule 39 cannot be safely adopted here, to avoid the technical phrase "necessary parties."

Dean Clark. I am worried about that. It seems to me that the expression is "proper parties". As a matter of fact, I would prefer really to accept this rule, although I will say frankly that I think it goes further than anything else.

Mr. Mitchell. Well, you can consider that.

Dean Clark. Equity Rule 39 has stood for 30 years and has not caused trouble.

Dean Clark. All this discussion by parties in Supreme Court cases cause trouble.

Mr. Dodge. Was that under the Equity rules?

Dean Clark. Yes. I have a series of cases in my book, going through the 1920s and also some late ones.

Mr. Mitchell. Well, we are on Rule 26.

Mr. Dodge. I want to ask one other question, Mr. Chairman. Have we covered all of the points that are covered by

Equity rules just preceding Rulex 44--that is, Rules 40, 41, 42 43 and 44?

Dean Clark. We have left out certain of the Equity rules I have a note on all of them. You will note that at the end of my Rule 44, I have said:

"In view of this and other rules on joinder of parties herein contained, it is believed that Equity Rules 40, 41, 42, 43 and 44 are unnecessary, and that Equity Rule 41 should also be omitted as unnecessary as well as misleading. Equity Rule 40 is "nominal parties." Equity Rule 41 is "suits to execute trusts, of will,-heir as party." Equity Rule 42 is "joint and several demands". Equity Rule 43 is "defects of parties"--resisting objections." Equity Rule 44 is "defect of parties-tardy objection." It seemed to us that we had covered all thos things.

Mr. Mitchell. Have you covered the questions to when you shall raise the question of defect of parties?

Dean Clark. Yes.

Mr. Mitchell. That is that clause that these shall be deemed pleadings. (Laughter.)

Dean Clark. It may be. I will have to watch that.

Mr. Mitchell. Well, you have that in mind.

Dean Clark. Oh, yes. The Committee may want to go over these rules that I have omitted and raise any question you like after looking them over. Under Equity Rule 41 in

particular, the heir at law need not be made a party. That seems a curious thing; but when you look at the history of it it comes from the English chancery practice, where they have probate power, and it had no principle at all.

Mr. Mitchell. Mr. Hammond has raised the question as to whether the rules as they now stand provide time limits for raising objections, and I merely suggest that to you.

Dean Clark. I thought I had covered it when the motion was a pleading, but now that the motion is here or the suggestion that we do not know what it is, perhaps we will have to do something new about it.

Mr. Lemann. I thought we were now to consider that last sentence in the second paragraph, as to when you should set up various objections. I think that point is not merely a point as to parties, but various other points. This says, "amotion"--well, this motion presents that point. I suppose that means one motion. I had an equity suit where the party presented a motion to dismiss after a motion to dismiss. I could not find that anybody had ever tried to present a motion to dismiss where it said you could not do it. And he did it. (Laughter.) If his motion to dismiss is denied, and files his answer in five days, and another motion to dismiss, there is no express language in the rule saying he could not do it.

Mr. Morgan. You can make a motion to strike a motion to strike.

Mr. Olney. In my State it is by demurrer.

Mr. Mitchell. The reporter has that to check on.

Mr. Donworth. I think the rule I drew yesterday covers that. You must answer the summons within 20 days. The motion may be made, but if frivolous the court may impose terms.

Dean Clark. Yes. Now, Mr. Lemann's point, which is a little additional, as to the number of days for pleading, is one thing, and your question is one of the inclusive nature of the motion. I want to say frankly that I would like to make these objecting motions all inclusive. That is one reason why I started out to make the motion that on this rule your answer is the all-inclusive document. Then, as I indicated when we discussed this before, I thought some people might consider that too harsh, and I put in this alternative, of which I am ashamed; but nevertheless, it was yielding to necessity--

Mr. Loftin (Interposing). Is it not a good thing on the question of jurisdiction you can dispose of the case on a preliminary motion?

Dean Clark. Well, that is true, but that being so, why should not that motion apply to all objections except--

Mr. Morgan (Interposing). You have a rule to that effect in Connecticut, that a demurrer, for example, must include all grounds of attack--

Dean Clark (Interposing). We did have it, but when they revised the book they forgot and left it out.

Mr. Mitchell. You could make that optional amendment

prior to "include all", so as to include dilatory motions. Some of them are motions that could be heard on affidavit, and in some of them I am told that the party is entitled to a trial by jury. Now, if you make it all-inclusive, the point might be made that where the right to trial by jury exists, you will have to hold a separate jury trial on a preliminary motion, and that should be avoided, unless you hve covered it by the phrase that the court may immediately proceed to hearing and decision.

Dean Clark. Now, I suggest that this particular question might be passed until we consider further just what the motion is going to be. Afterward we have decided that, we can decide its omnibus character. Now, I sent around ~~there have been~~ some suggested substitutes for the last paragraph. There are two alternatives. The first is an alternative which I consider as broad as my original statement, but avoiding the use of that word, which seemed to be a fighting word, namely, "defense", and using something else, leaving that out. Now, I take it on that that the law now is that very occasionally a jury trial might be claimed on that matter presented by motion on certain limited things, notably on such things as that involving venue where the defendant lives. I think, however, that that would be so very occasional that it probably would not cause much trouble. The times when you would actually have that sort of preliminary jury trial would be very occasional indeed.

The alternative I have suggested, however, would limit this motion very decidedly, and may be that would be a good thing. That is at the end of the document I sent around. That is to provide that this preliminary motion will be merely to affect the summons and prompt service. In that case, you avoid the necessity of jury trial, and you would have limited this preliminary motion to one very definite and limited thing, and everything else would have to go in the answer, except this little thing. So that the first form I took was: "When the defendant desires to present matters to prevent further proceedings against him which do not go to the merits, he may present such matters by motion in advance of his answer and ask a hearing thereon," etc. Your alternative is that the defendant may, in lieu of/and in advance of the answer, move with regard to the summons and proper service, and ask for a further hearing.

Mr. Mitchell. I like thebroader phrasing better. If it turns out that some of them are triable by jury, the court may, in its discretion, say that they should be dealt with at the trial, and that would solve the whole problem.

Dean Clark. Yes.

Mr. Dodge. Well, I have tried a case for three days on the question whether the corporation defendant was doing business in the State. It is rather unusual to have a trial upon a motion. That question, whether the defendant is a resident

of the district, also might involve some days trial. It is not a hearing on a motion. It is a trial of a question of fact.

Dean Clark. Well, I do not see that it presents any difficulty. The facts are presented, or the issue is raised in that way, and the Chairman suggests, the court might say, "This is an important matter and we are not going to proceed to a hearing on this.

Mr. Dodge. It would never go on the motion list. It would go on the trial list of the court.

Dean Clark. Yes.

Mr. Mitchell. Well, there is a clause here in the original broad rule: "Whereupon the court, in like manner, as set forth, may proceed to a hearing and decision of such evidence." Now, when the matter comes before him, if he finds that there is going to be a trial with a lot of witnesses, he will say, "Well, we will put that off until the trial on the merits." And if he finds the issue simple, he may, in his discretion, proceed as a trial or a hearing on it immediately.

Mr. Donworth. Mr. Chairman, it seems to me that there is a very well thought out way here. We have just 50 years of experience; and I hesitate to see something which is said to be just as good or better introduced in lieu of it. Novelty may seem to be an improvement, but you lose the benefit of all the decisions that have been made. Now, here is the practice

that I understand has prevailed from time immemorial, and this would consist in leaving the rule as written, but adding this: "Any objection the defendant may raise concerning the sufficiency of the service of process upon him, or on the ground that he is not subject to suit in the district where the action is brought, must be raised by motion before the time for answer expires, an shall be decided on preliminary hearing." Now, I have before me the case of Quality vs. Mining News. I will not read it. But we know the facts, as they have been mentioned here. The Mining News Co. claimed that they had never been served with process, although its opponent had. What did it do? It was a State court proceeding. It filed a petition for removal, coupled with the fact that it presented it and made a special appearance. That is all it did in the State court. When the matter got to the Federal court, then it made a special appearance and moved to quash the service of summons. One of the chief points in the case was whether a petition for removal constituted a general appearance, so that a special appearance could not be made on that motion. The court held that there was nothing in that, and that the method of raising the objection was proper.

There is here another case that is somewhat typical of probably 50, where the courts held that, although the word "venue" is not in the federal statute, ~~when~~ the immunity to ~~venue~~ suit, other than a certain district where one is an inhabitant

etc., is really a venue question, and unless seasonably objected to byspecial appearance or motion, it is waived, and they have held--here is a case where a man is answering to the merits, and by the permission of the court, he withdrew his answer, and then put in a special appearance, on the ground of the wrong district, and the court held that it was too late; that by withdrawing his answer he could not do away with the effect of it, and so that he was liable to suit in that district. Now, it is rare, although, as Mr. Dodge says, it occasionally happens, that there is a trial at all upon those matters. You may have affidavits, etc., but oftentimes--for instance, the wrong district may appear upon the face of the complaint. If often does. And all the defendant has to do is to say "I ~~am~~ object" on his special appearance. In the same way, suppose the return of service of summons shows delivery of the copy to the man next door, why, then, he rules that it is quashed. It seems to me, gentlemen, that the bar all over the country knows that a special appearance on a motion is the way to raise those two points. They have been thoroughly accustomed to it, and to compel them to go through some other process that is entirely novel and I do not think as good or as effective, or as simple to solve this question in limine--I do not think it is right to depart from this well established practiced.

Dean Clark. Well, of course, there is not a very great

difference after all between what Mr. Donworth has suggested and what is suggested here. The only difference I thought really was--well, there are two differences. One was a distinct specification of the things that were to be raised by motion, which was what my second alternative did, although we put in other things; and the other was that this matter could not be raised by answer. I think those were the only two.

Mr. Morgan. Well, it certainly is true that in most of the code States it can be raised by answer.

Dean Clark. It can be raised by answer; that is the proper place to raise it, and I must be say I should be surprised if that is not the case in the Washington State practice.

Mr. Donworth. That is not done there. The question of traversing matter alleged, even though it be in abatement, for instance, like the appointment of an executor or guardian--that matter in abatement must be raised by answer; but the question of the sufficiency of the service on the defendant I have never known in any court to be raised by answer.

Mr. Dodge. It is strictly in accordance with the rule that the defense is that the allegaton of the complaint ~~a/m~~ that the defendant is an inhabitant of the district is not true, and that question is ordinarily raised, in the practice I am familiar with, by an answer in abatement, which

raises that question of fact; and I do not see how it can be dealt with as a mere matter of the question of service.

Mr. Donworth. That is two different questions. The question of service is one thing; the question of venue is another.

Mr. Loftin. What is the objection to including in the answer ~~that~~ when the defendant desiresto follow that course where he has the option of doing it the other way at his discretion?

Mr. Donworth. I do not understand this rule[redacted] gives him that option. But it is for the interest of both sides not to prepare your case--sometimes it costs a man $1000, just the preparation of the case, when he is raising the point whether he is in court or not.

Mr. Loftin. The defendant may not think very much of that, but he could include it in his answer; but if he thought it was really something that would end the case, he could present it in his motion.

Mr. Mitchell. Suppose he puts both in and went to trial, and as the trial proceeded, he figured that he could come in on the merits, and waive the other point, and then he found that he was not going to win on the merits, then he would insist on the point. It sort of gives the defendant the position where he can get in, and if judgment is going to be his way he can submit to the jurisdiction; if not, he can get out from under.

Mr. Morgan. That is the way it is with a motion.

Mr. Wickersham. Oh, no; it goes in the motion first.

Mr. Morgan. I know, but if it goes against him, he can appeal in most States. You have a practice whereby you can appeal from all sorts of orders.

Mr. Wickersham. That is in the State practice.

Mr. Mitchell. That is not quite the same. You have in mind an appeal.

Mr. Morgan. No, I have in mind if you are ruled against on your jurisdictional point, then can go on on the merits, and then in the appellate court you can try them both.

Mr. Mitchell. But suppose your jurisdictional point is good, and you know you can get out, and you are willing to give them a trial on the merits and see which way the cat jumps.

Mr. Morgan. All right; but I do not see that it makes any difference whether it is in your answer or motion. Now, where you try a case where there is a plea in abatement, and a plea on the merits at the same time, and your provision is such that there is no waiver if you are trying them both before the jury, you can get separate findings on each defense. That is what the Federal court said is the proper way to do.

Mr. Mitchell. If he puts it in the motion.

Mr. Morgan. You can put it in the motion first. Are you intending that we ought to have a motion as the exclusive

way of doing it?

Mr. Mitchell. I was just raising the point of giving the option of putting it in the motion or answer--a thing like an objection to the service.

Mr. Morgan. Yes.

Mr. Mitchell. Why, the defendant could say, "Well, I think my process point is good, but I am willing to go along and see how the case goes on the merits. And if the court is friendly to me, I will forget the process point, but if it is unfriendly I will insist upon the process point." Now, if you move in advance of the answer to set aside the service, and waive the point, he must make up his mind then and there whether he is going to insist on that point; and he makes the motion, and it is a good one, and the case is dismissed, but he is not given his option to juggle with the result. So that I think there are some of these suits, so far as the motion to set aside is concerned--where he ought to be forced to make his selection before action.

Mr. Cherry. Could you not enforce that anyway, whether he has put in a motion or an answer, because of that provision ~~XXXX~~ this we have already discussed by which the court may order on its own motion, or on the adversary's motion, the separate hearing of one of those matters, and that is the kind of matter that would be heard first, I suppose, whether in the motion or the answer.

Mr. Mitchell. That probably would solve it.

Mr. Cherry. I was wondering whether it would solve it, but I think it would take care of the supposition of the defendant juggling with it. He could only do that if the plaintiff did not protest and allowed it.

Mr. Wickersham. Well, if a man is improperly served, and the court has not some jurisdiction over him, ought not that question to be settled at once? Why should the court be burdened with the consideration of a case, perhaps going as far as the trial, when he has not proper jurisdiction over the defendant? It seems to me that point ought to be open, at least, to the defendant to make at the very out set. Why should he be put to the expense of preparing for trial, when he is not there in court?

Mr. Lemann. I understand that in this last paragraph, by motion that you would have to put in that motion and everything else that you wanted to present against the plaintiff.

Dean Clark. That point is not decided yet. I suggested that that was desirable, but that is another point.

Mr. Lemann. Well, you either do that or else give him no opportunity to present in advance of the answer any other point.

Dean Clark. Certainly, I do not think we ought to have more than one of these preliminary proceedings.

Mr. Lemann. I am not willing to have cases dragged out,

but I have had one or two extraordinary experiences, where it was outside the district. Some years ago the e was a suit in New Orleans in the Federal court, and then theplaintiff decided to sue them in New York for $1,000,000, and he sued them in New York, on the ground that they were doing business in New York, but they had correspondents in New York and they had collateral in New York and we went in and pleaded to the jurisdiction. It was in the Federal court, and the case went to the Supreme Court of the United States on the jurisdictional point, and it was held that we were not doing business in New York. We had to try the question of fact, and my recollection was that there was a fine imposed upon him. Now, under the rules that case, I suppose, is typical of many cases that might arise. Under the proposed rules, we could not raise that jurisdictional question without raisin all the other questions that we might want to raise in respect to that complaint. Of course, we did not know anything about the New York practice, we did not know anything about the sufficiency of the complaint under the New York law, and did not want to mess with any of it. We wanted to know whether we had to respond to the New York judge or not, and we wanted that decided. There was no question of delay about it. We wanted to know if we had to litigate in New York, and I think we were entitled to have that decided.

Mr. Mitchell. You say you could not do that under the

proposed rules?

Mr. Lemann. As I understand the last paragraph the way it now stands, we could have made a motion, and then considered any other dilatory objection that we wanted to make to that complaint. We are not abolishing the dilatory objections.

Mr. Morgan. But you are discouraging them. ~~We wi~~

Mr. Lemann. We were, therefore, called upon to consider that situation under the New York law, the sufficiency of that plea, when from our standpo nt it was outrageous that there should be any attempt to haul us into the New York court. I think it boils down to that. Is the danger of abuse that you gentlemen think the ~~petitioners~~ practitioners are predisposed to increased by delay so greatly from this particular question--I am not talking now about technical defects in the summons, whether it is properly made out, or whether the return is properly made; but is the danger of delay or abuse from permitting the defendant to challenge the jurisdiction of the court on that alone, wit out using a s ingle other defense, so great that you are going to deprive him of that and to say that "You cannot do that; you must do some other things at the same time."

Mr. Wickersham. May I ask about this substitute paragraph, where it says in the last paragraph--

Mr. Lemann (Interposing). I agree to that. I think the plaintiff ought to know whether is in or not.

Mr. Wickersham. Yes.

Mr. Lemann. I said yesterday that I think it is often to the advantage of the plaintiff to have the defendant state his position right, whether he is in court or out of court. And very often, by having such a rule, you give the plaintiff the advantage of having the defendant waive the point. But I would say it must be heard in three days or 24 hours. You can make the delay as short as you want, but I do think it is fundamentally important to give the defendant the right to raise that question of whether he is subject to the jurisdiction of that court.

Dean Clark. I think one of the defects of civil jurisdiction has been right here, on the possibility of dilatory pleadings. It goes back to the days of the common law, when they were afraid to examine the defendant in rebuttal, and he had lots of excuses that he could make to postpone his answer. This seems to me to be just a throwback in the experience genenerally to the old days of the common law system. In England it is customary to try these matters all together at one time, so that the defendants cannot successively raise these dilatory points--and it seems to me to be a great mistake to go back to that old system. Here is a case where a party might long delay a trial on the merits, and in Connecticut you might do it by successive actions, motions to expunge, demurrers, etc., each one requiring a formal hearing. Now, the requirement of shortening the time does not help very

much because we all know the extensions that are allowed for filing these things, and that they are very easy to obtain, and there is not only the delay of getting the pleadings in, but there is the delay of getting them heard and decided, and when you have got a separate hearing day and decisions successively by the judge, you have a chance of delaying the case for years--and I mean years really. Now, the Supreme Court has held not very long ago that a plea to the jurisdiction for lack of service could be joined to a plea in abatement, where authorized by State practice. That is the case of the Scandinavian Insurance Co., decided in 1929.

Mr. Dobie. Any rule you make--of course that will be safeguarded; it is very obvious that, of course, if the point goes to the jurisdiction of the court as a Federal court, there is nothing we can do about it. That is always before the court as in that Mitchell case, the ticket case. So that all of this is limited to points that do not go to the jurisdiction of the court as a Federal court.

Dean Clark. I put that point in this last draft--that jurisdiction is not raised.

Mr. Olney. I think if we adopt a rule here which does not require the defendant to present promptly any objection to the service of summons upon him, you are simply going to open the door to all sorts of delay and motions that will put off the hearing on the merits. It will work just the oppo-

site to what we endeavor to provide for. The defendant should not only have the right to come in and make a motion that the service be quashed, but he should be required to do it and present it only in that way. So that that matter whether or not the court is entitled to go ahead is determined right at the outset, and if you follow any other practice you are just going to open the door.

Mr. Mitchell. Would you be satisfied with the rule as it stands, with a substitute for the last paragraph and the addition of a provision that motions as to points about the sufficiency of the service must be raised in advance?

Mr. Wickersham. Not only the sufficiency of the service, but the jurisdiction of the court. Take, for instance, the quest on of service on the corporation--

Mr. Olney (Interposing). No; one moment. I make a very sharp distinction between objections pointed to the fact that the court has not yet acquired jurisdiction of that individual defendant.

Mr. Wickersham. That is right.

Mr. Olney. And all other objections. If there is an objection to the jurisdiction of the court on general grounds, or if there is a plea in abatement or anything of that sort, they are in an entirely different category.

Mr. Mitchell. Then you include not only sufficiency of service of the summons, but suit in the proper district,

as one of those things that ought to be raised in advance.

Mr. Olney. I would not permit the defendant to raise in his answer thepoint that the summons had not been properly served. That is no place for it. When he answers he answers on the merits.

Mr. Mitchell. Would you include the point that thesuit is not in the right district?

Mr. Olney. The point that the suit is not in the right district is a matter of defense.

Mr. Morgan. No.

Mr. Mitchell. I am wondering whether the question whether the point that the defendant is sued in a district of which he is not an inhabitant is another objection that should be raised in advance along with the objection that there has not been sufficiency of service.

Mr. Olney. Let me tell you the general scheme that should prevail in cases of this character: When the objection is merely that the defendant has not been served, that objection he should be required to ~~make~~ be made at the outset and it should not be in his answer. It is a separate motion. He is not yet responsible to the court and not yet required to answer.

Mr. Mitchell. Now, is that all?

Mr. Olney. No. When it comes down to defenses or objections that the court has not jurisdiction, that it is in the wrong district, they can all be put in the answer if desired. But there should go along with the rule a provision

whereby those things can be called up in advance and heard and determined. You take this matter, for example, of a plea in bar. There ought to be a provision here whereby the court has the power to hear that in advance of anything else if it wishes to do so.

Mr. Dodge. That is there.

Mr. Dobie. That is all in there.

Mr. Olney. I am not objecting to the rule.

Mr. Mitchell. In view of that statement; and having in mind what the rule should do; having in mind those things, I should say that the rule is acceptable to you, with the substitution in the last paragraph, but with the addition of a provision that objection to the sufficiency of the service must be made in advance. Now, that is Judge Donworth's motion; only he included--he was a little broader than that; he did not limit his motion to objection to the service, but he tried to include matters of residence in the district; and Mr. Olney has raised the question that that might involve a new trial; and that is where you get.

Mr. Donworth. I would like to remind Mr. Olney that objection to the jurisdiction of the court, because there is nothing in the Fede al court giving jurisdiction--of course, that can be raised at any time. That depends upon facts that ought to be alleged in some answer. But defendants should bear in mind that the courts have held that where, under the

general power of the district court to decide cases, the authority is conferred to dispose of that case; it is held that suit in the wrong district is merely a matter of personal objection in limine. For instance, there is a suit, we will say, arising under the Federal laws against Judge Olney. Suppose he is sued in Nevada as he passes through there on the train; but bear in mind that if he answers to that suit in Nevada the case is there and he cannot get it out. If he wants to object to the district, on the ground that he is not an inhabitant, he must do so just preliminarily, as in case of service of process.

Mr. Olney. I had that case in mind. It ought to come in the same category.

Mr. Dodge. I think if that involves an allegation of pleading a question of fact, it should be a plea rather than a motion.

Mr. Wickersham. Suppose the pleading alleged that the defendant was a resident and citizen of the Eastern District of Massachusetts, for example, and that was denied by the defendant, who claimed residence in New Hampshire.

Mr. Dodge. That is a novelty to raise the question of fact in an allegation of the complaint by a mere motion.

Mr. Wickersham. Would you try that out on motion? You say that where there is a question raised by a pleading, you go to trial on that?

Mr. Dodge. Yes.

Mr. Wickersham. Now, suppose the defendant has an xx office in Boston, but lives in Concord, New Hampshire, and has always lived there. Now, if that issue can be tried out either on the pleadings, or perhaps, under this rule, by motion, if he is served in Boston--?

Mr. Dodge. If you can by motion raise a question which is a denial of the allegations of the complaint, yes.

Mr. Lemann. If you mean the paper by which you can do it, I suppose so.

Mr. Wickersham. The preliminary question of whether the court has jurisdiction over the defendant ought to be triable in advance of the pleadings on a motion.

Mr. Lemann. Why not supplement the rules by a special provision that objections of the defendant to the jurisdiction of the court must be raised immediately by a pleading--call it what you will--to be filed within a specified period, and make it short, and that must be immediately disposed of? That is the way I would put it.

Mr. Morgan. Take Mr. Wickersham's case. Suppose the defendant, in order to get diversity of citizenship here, your allegation had to be ~~he~~ true--the allegation that he was a resident of Massachusetts rather than a resident of New Hampshore. Suppose it was a citizen of New Hampshire suing the defendant as a citizen of Massachusetts, and he alleged that

he was a citizen of Massachusetts. I take it that there you could not prevent the defendant raising that point by his answer or his plea, because the court would have no power to proceed there. That is a jurisdictional question.

Mr. Lemann. Where it alleges that he is a citizen of another State when he is not?

Mr. Morgan. Yes.

Mr. Lemann. That goes to the question of jurisdiction.

Mr. Dobie. Jurisdiction as a Federal court.

Mr. Lemann. Yes.

Mr. Morgan. That is jurisdiction over the person. It is not jurisdiction that cannot be obtained by consent, but it is jurisdiction over the person.

Mr. Dobie. In the case Mr. Morgan is talking about--that is a proper allegation about diversity of citizenship. For example, that Mr. Wickersham is a citizen of Massachusetts and he lives in New Hampshire, if it is not denied, that is sufficient for entering the Federal court.

Mr. Morgan. Yes.

Mr. Dobie. But if it is denied, as Mr. Mitchell states--the Supreme Court of the United States raised it for the first time--they will get into the record if it is denied; and then of course, unless the record disposes of the question, the Supreme Court is going to dismiss the case as in the Mitchell case and the Gilman case.

Mr. Morgan. Suppose we provide that the only way to raise that would be ~~in~~ by motion in advance of trial?

Mr. Olney. That is not Mr. Lemann's suggestion, as I understand it.

Mr. Lemann. No. I am not sure that I would object, on further thought, to saying that he must do it; but I had not thought of it sufficiently up to now. I was not thinking of that kind of plea.

Mr. Wickersham. Would that be valid on the point we are speaking of here? Suppose you have shown diversity of citizenship, and as a matter of fact live in the same State, and that fact appeared on the trial --I think the court would dismiss the case.

Mr. Dobie. It would throw it out.

Mr. Mitchell. A rule that he had to make it by motion would not be worth anything.

Mr. Olney. The point that Mr. Donworth and myself had in mind relates only to objections to the jurisdiction which can be waived by the defendant.

Mr. Mitchell. Judge Donworth raised that.

Mr. Olney. And he must either waive them or insist on them, then and there.

Mr. Mitchell. Let me read Mr. Donworth's motion. He wants to add to Rule 26 this:

"Any objection that a defendant may raise concerning the

sufficiency of the s rvice of process upon him, on the ground that he is not subject to suit in the district where the action is brought, must be raised by motion before the time for answer expires, and shall be decided on preliminary hearing."

Mr. Morgan. That w ll not do. If he is not subject to suit in the district where the action is brought--that is the very case I put.

Prof. Sunderland. You put a case of diversity of citizenship.

Mr. Morgan. Yes; I put a case of diversity; and that is exactly what he is objecting to.

Mr. Mitchell. This is not diversity.

Mr. Dobie. It is not diversity; it is jurisdiction of the district court, but not jurisdiction of the District Court for the Eastern District of Massachusetts.

Mr. Lemann. Theonly objection I raised to that portion is, ~~If~~ it claimed that when you get that out of the way, the court overrules it, and I say, "I ought not to be sued in New York" and the court says, "You are wrong"--that then I have my right to have my bite at that declaration for further particulars, or any other information I want, before I file my answer.

Mr. Donworth. No, not on my motion. The only question, in my opinion, is, Is the defendant in court?

Mr. Lemann. Suppose I am in, and I say I had better get

a New York lawyer; I have to fight this case. And I get a New York lawyer, and the New York lawyer says, "This case is terrible for us, and that will not do at all." I say, "Can I not raise that?" He says, "No." And he says, "That motion has been overruled, and everything else you put in your answer."

Mr. Mitchell. And your point is whether the rule so worded would require him, in case he did make a motion to set aside the service, to not only include that but put in a further dilatory motion?

Mr. Lemann. In advance, yes.

Mr. Morgan. You are not going to have all of this question of ~~that defendant~~ Mr. Lemann getting a New York lawyer in the Federal court.

Mr. Lemann. If the rules are adopted, I will not need him.

Mr. Wickersham. A New York lawyer is all right. (Laughter.

Mr. Donworth. If you find that you are in court, and everything goes on as though you had not made a motion, you start de novo.

Mr. Lemann. That is all right then.

Mr. Loftin. Judge Donworth, where is this to come in?

Mr. Donworth. I would not disturb anything that Dean Clark has put in.

Mr. Loftin. The original rule, with his suggested change

for the last paragraph; and then your suggestion follows that.

Mr. Donworth. Well, I think the Committee on style may, perhaps, amalgamate the last paragraph of Dean Clark's and mine; but it is the substance of it that I am for.

Dean Clark. May I ask this: If Judge Donworth's motion for procedure goes in, I do not need my last paragraph.

Mr. Wickersham. Will you read that again, Mr. Chairman?

Mr. Mitchell. "Any objection that the defendant may raise concerning the sufficiency of the service of process upon him, or on the ground that he is not subject to suit in the district where the action is brought, must be raised by motion before the time for answer expires, and shall be decided on preliminary hearing."

Mr. Loftin. Then, Dean Clark, if that takes the place of your paragraph, then a further defense must be included in the answer.

Dean Clark. Yes, except that I suppose these motions to clarify the pleadings would still come in.

Mr. Loftin. Well, Judge Donworth's motion confines it to those two specific things, and if you strike out your last paragraph entirely, those are the only two things you could put in your motion.

Dean Clark. No, let us go back to the sentence in the rule: "Every defense or objection ~~in~~ in point of law or fact, and whether to the jurisdiction or in abatement or bar, going to

any matter set forth in the complaint or counter-claim, except as stated herein or in Rule 37 (Motion to correct or strike out), or in Rule (blank) (Motion for summary judgment) be made as a defense in the answer to the complaint." Now, there are three exceptions later on.

Mr. Wickersham. Does Mr. Donworth's suggestion follow this?

Dean Clark. No, Mr. Donworth's suggestion would be a substitute for the last paragraph, but I do not know ehether the last paragraph should be saved or not. But in substance Mr. Donworth' motion would be a substitute for the one I have here, and there will be two differences between what I have here and his: First, a distinct substitution of the kind of things you can cover, and second, the requirement that it must be done in advance.

Mr. Wickersham. Yes.

Mr. Lemann. You said you should start out de novo if that is overruled, and then you said you agreed to something else.

Mr. Donworth. Will you state your question more clearly?

Mr. Tolman. I move that we accept Mr. Donworth's suggestion.

Mr. Wickersham. I second the motion.

Mr. Dodge. Before voting, I will ask for the interpretation of it.

Mr. Lemann. If the jurisdiction is questioned on the ground stated, and the challenge is overruled, must the defendant then answer, or would he have the right then to raise the questions which he would have been entitled to raise if no jurisdictional point had been raised?

Mr. Donworth. My understanding is that if the court grants this motion he starts out at scratch.

Mr. Wickersham. Of course, on appeal, the decision of that motion would be one of the points raised.

Mr. Mitchell. Well, if you adopt Judge Donworth's suggestion in lieu of the last paragraph, the only thing you can put in, the only objection you can make in advance of the answer is that you can make a motion to strike out, as has been indicated.

Mr. Lemann. So that you wouldhave to have a special change in order to accomplish what he has in mind.

Mr. Mitchell. If you want to start at scratch, as he said, to the greatest advantage, then you have to make some further provision in language beyond what he has.

Dean Clark. It depends on what you mean by "starting at scratch" and if you are starting at scratch, I think he is still correct. I might say that, if you want to answer further things in advance of the answer, I think it would be one of the worst steps backward that we could make. I think even on Mr. Lemann's plan of consulting the New York lawyer

that it would be true.

Mr. Lemann. I do not have to be penalized by my desire for information as to jurisdiction; and that is what we have here.

Mr. Mitchell. I do not see your point. If you have a right to make a motion in advance on the service of process, or that you are sued in the wrong district, and it is denied, then what is the next move? You must then put in an answer and include every point, except that you have the right to make motions directly to strike out, or motions for judgment. Does that satisfy you?

Mr. Lemann. I will put my point this way: If you are sued in New York, and claim they have no jurisdiction there, and that you are not in court, as I understand, you can file a motion before your answer and raise any questions you want that are not covered by Rule 37 or Rule 70.

Mr. Morgan. No.

Mr. Mitchell. No. We are assuming that the motion of Mr. Donworth, instead of being in addition, is a substitute.

Mr. Lemann. Everybody is going to be permitted to do it. Then you have met my point.

Mr. Mitchell. Yes. He did not put it in the form of a substitute, but Dean Clark said it ought to be. I understand it is a substitute.

Mr. Donworth. Either way. It can be a substitute or

added.

Mr. Wickersham. I suppose it will be a substitute.

Mr. Loftin. Dean Clark, what about your provision as to special appearance?

Dean Clark. I am not sure how that comes in.

Mr. Loftin. He said strike out your last paragraph entirely. That included theprovision for a special appearance.

Dean Clark. I think that ought to be continued, after Mr. Donworth's motion.

Mr. Wickersham. Ought there to be a special appearance, or must there of necessity be a provision for special appearance?

Mr. Mitchell. To get this to a head, I understand that Judge Donworth's motion as amended is a motion to substitute his provision for that part of the last paragraph commencing "when the defense is such" and ending with the words "decision on such defense." It leaves in the provision that no special appearance is necessary.

Dean Clark. I changed the wording ~~I have in word~~ of that, in my substitute, and I said, "The defendant may present", and so on. I am not sure I will not have to change it further; but I wish to add this: "The filing of such objection shall constitute a special appearance."

Mr. Wickersham. That is thepoint.

Mr. Morgan. Yes.

Mr. Wickersham. In other words, you do not submit yourself to the jurisdiction of the court.

Mr. Olney. I should like to ask Dean Clark a question which bears on this point. Take the second sentence of Rule 26. It says: "Every defense or objection in law or fact, and whether to the jurisdiction or in abatement or bar, going to any matter set forth in the complaint or counter-claim shall, except as stated herein," and so on, "be made as a defense in the answer." Why should it be limited to matter that are set out in the complaint or counter-claim? Every real defense ought to be set out in the answer. Is that not the theory?

Dean Clark. I thought that was what we were saying. I do not get your point.

Mr. Olney. You limited it by saying "going to any matter set out in the complaint or counter calim." Should not those words go out?

Dean Clark. Perhaps they should.

Mr. Olney. "Every defense or objection in point of law or fact, and whether to the jurisdiction or in abatement or bar","shall, as stated herein," and so on, "be made as a defense in the answer."

Dean Clark. I guess that is all right. I do not think they add anything particularly, and they might ome out.

Mr. Mitchell. Take out "any matter set forth in the

complaint or counter-claim"?

Mr. Olney. No, I would bring it down to the point I had in mind: "Every defense or objection in point of law or fact, whether to the jurisdiction or in abatement or bar, other than the objection that the court has not acquired jurisdiction of the defendant"--

Mr. Mitchell (Interposing). That is covered by "except as herein stated".

Dean Clark. Is there any danger, if you put that in ~~im~~ or made that change, it might occur that there are, according to Mr. Donworth's motion, other matters of jurisdiction that are not included, and those other matters must come in somehwere, because jurisdiction is a very wide term.

Mr. Olney. All I am seeking to do is to get in--you have not only "every defense", but you have "every defense or objection."

Dean Clark. Yes.

Mr. Olney. And you say they must be in the answer.

Mr. Mitchell. "Except as herein stated."

Mr. Olney. "Except as herein stated." Well, that is all right.

Mr. Mitchell. As I get it now, before we submit any motion, you have stricken out the words in Rule 26, "going to any matter set forth in the complaint or counter-claim shall," and you have stricken out ~~that~~ last paragraph, and

the words, "when the defense is such," down to the words "decision on such defense" and you have changed the rest of the last paragraph to read, "The filing of such motion shall constitute a special appearance"; and then you have substituted for this last paragraph, except that last sentence that I just read, Judge Donworth's proposal. I will state it/that was to get it on the record.

Mr. Dodge. Suppose a motion is denied after hearing, but the special appearance shall continue thereafter to get the jurisdiction over the person pending the proceedings?

Dean Clark. I think that should be changed, and if that is the sense of the Committee I will study this. I do not think that probably the filing of a motion alone should be all that constitutes a special appearance. I think the filing of a motion and answer in abatement--I mean not as a technical expression, but simply to convey my thought--both should constitute a special appearance.

Mr. Olney. Is that by way of abatement?

Dean Clark. That is the expression they use in the code.

Mr. Dodge. Nothing is thereafter submitted to the decision of the court if his position is wrong as to his suability there. He should be allowed, of course, to go ahead and defend the case on appeal on the jurisdictional point.

Mr. Mitchell. Your point is that a proper sentence should be put in there that, ~~x~~having once made the motion he has in mind, he is at liberty to go on and defend without prejudicing his point.

Mr. Morgan. In the Federal court that is ~~better~~ settled by decision. If he saves his exception, we are going to have another rule that both exceptions shall be saved. So I think that will be covered.

Mr. Dodge. If you make any reference to special appearance the full extent of it should be made plain.

Mr. Olney. It would be of advantage to the ~~profession~~ profession if it is clearly stated that if a man comes in and makes his objection to the court's jurisdiction as to him personally, that is, as to the service of summons, and the objection is overruled, and then goes on to answer as he should be required to do, that his answer is not taken as a waiver of his first objection.

Mr. Mitchell. Well, that is agreed to; but the only question ~~is~~ is whether it is not automatic under the decisions, or whether it has to be expressly put into that effect.

Mr. ?Donworthy. I think there is a diversity of decisions of the courts ~~xxxxx~~ as to whether, when you have lost, the special appearance may continue, whether you have preserved that.

Mr. Wickersham. There is a diversity of opinion.

Mr. Olney. I think we will all agree that a man should

not be put the hazard, if he makes a special appearsnce and oves to quash the summons and it is denied--put to the hazard of either taking his chance on the correctness of his motion and having the order of the court overruled on appeal, or else xfxsx allowing the judgment to go by default against him. In some Statss he is out in that position, and it is not right.

Mr. Morgan. I think about half the States put him in that position, I think they are right.

Mr. Dodge. Well, I disagree with that.

Mr. Morgan. I know you do.

Dean Clark. Of course, if we go further, we might get into appeals.

Mr. Morgan. We cannot do anything on that, because the Supreme Court of the United States rules on that.

Mr. Mitchell. Are we ready to vote on that question?

Mr. Dodge. Which question?

Mr. Mitchell. The adoption in substance of the rule.

Mr. Dodge. I wanted to raise only one other question: What has a motion for summary judgment got to do with this?

Dean Clark. Well, certain of these objections you can raise summarily. As a matter of fact, I am not sure how far this exception goes.

Prof. Sunderland. Well, of course, the motion for summary judgment is not an answer. So you have got to have the exception.

Dean Clark. Yes.

Mr. Mitchell. They may be raising some of these points on motion for summary judgment. That would seem to be inconsistent with this rule about putting in an answer. So they except that.

Mr. Dodge. Do you mean the defendant moves for summary judgment without filing an answer?

Dean Clark. Yes.

Prof. Sunderland. Not without an answer.

Mr. Wickersham. Well, if in lieu of a demurrer, the defendant moves to dismiss the complaint.

Mr. Cherry. If we find that is not needed when we come to summary judgment it is easy to strike it out.

Mr. Mitchell. We can settle whether any exception of summary judgment is needed after we find what the summary judgment procedure is.

Mr. Lemann. I just want to know what wehave.

Mr. Donworth. My motion has no effect on the suit. It just lets the defendant out.

Mr. Dobie. In case of service of process, there is a possibility of answering as to venue later.

Dean Clark. We cannot touch fundamental jurisdiction over subject matter. That can be called to the attention of the court anyway. So, if you call it to the attention of the court through a motion to dismiss--or I suppose you

could even do it orally at the trial.

Mr. Lemann. I was not speaking of the jurisdictional point.

Dean Clark. I am deciding that.

Mr. Lemann. In other words, if you want to state that the complaint does not constitute a cause of action, how will you do it?

Dean Clark. In the answer.

Mr. Lemann. That is my understanding from the course of the discussion.

Dean Clark. Then if you want a preliminary hearing, you will ask the court for a preliminary hearing.

Mr. Mitchell. On the question of the adoption of Rule 26, in substance, as changed, all in favor will say "aye", those opposed "no."

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

Mr. Mitchell. Rule 27.

Prof. Sunderland. May I suggest before we pass this that the term "suggestion" might be considered. "motions and suggestions in support thereof." The term "suggestions in support of the motion" seems anomalous. Might it not be worded as a motion, stating the grounds, etc.?

Dean Clark. All right.

Prof. Sunderland. That is in the middle of Rule 26.

Mr. Wickersham.

In the middle of Rule 27 it says: "Averments other than those of value or damage, when not denied, shall be deemed admitted." Is that not too broad? You might have an averment of value which did not go to the measure of damages, but which was a mere allegation of fact. Why should it not be answere , or if it not answered admitted?

Dean Clark. I did not get your point fully. You wanted to leave out "of value."

Mr. Wickersham. I do not quite understand that sentence. It seems to me that in some cases an averment of value or damage might be a material fact that ought to be answered.

Dean Clark. I took this over from the Equity rule.

Mr. Wickersham. I know, but I just wondered whether that is not too broad. Of course, if it is simply a part of the demand for judgment, that is one thing. But take, for instance, diversity, and you want to get jurisdiction in the Federal court, and you aver that the vause of action involves a claim for more than $3,000, and then it appears as you go along that the claim could not be $3,000, because everything involved was not more than $1,000.

Dean Clark. Well, I would be prepared to leave that out. I just put it in because it was in the Equity rule. It was new to me, so far as code procedure was concerned, I do not believe it would do any harm to leave it out, because I suppose the court would not go ahead and give judgment without some proof of damage.

Mr. Wickersham. I presume so.

Dean Clark. Then suppose we strike out the words "other than those of value or damage"?

Mr. Wickersham. I think that would be well.

Mr. Morgan. Well, do you need that at all? The rules ordinarily provide that by failure to answer--

Dean Clark (Interposing). Absolutely, they always do.

Mr. Wickersham. Yes.

Mr. Morgan. I supposed that was a matter of interpretation without any rule.

Dean Clark. And you may remember that Prof. Miller, of Northwestern University, has a long, profound article, going back to the early days, about admission by failure to demand.

Mr. Loftin. This says he shall by his answer set out his defense to each claim in the complaint, admitting, denying or explaining, and so on.

Mr. Wickersham. My only point is why we should make an exception of allegations of value and damage from any other allegation.

Mr. Mitchell. Yes; why was that?

Mr. Morgan. Well, it says damages are not admitted by demurrer.

Mr. Wickersham. That is/the question of damages.

Mr. Mitchell. How about value?

Mr. Morgan. I do not know. That is new to me.

Mr. Dobie. What that in the ancient equity rules, or was that put in the new rules?

Mr. Morgan. There are some cases saying that the allegations of the complaint as to the value of a chattel in an action of replevin are not admitted by failure to answer.

Mr. Dobie. I wondered if it had something to do with the ancient law of warranty.

Mr. Olney. I can see no reason why, if the defendant does not answer, you cannot take judgment for value and every allegation in the complaint be taken pro confesso. It is a purely superfluous proceeding, as a rule. It just requires a little more action by the court.

Mr. Mitchell. Well, if the claim is not denied the court always has--

Mr. Dobie (Interposing). There are some cases holding that that is a question of opinion and not of fact, and I wonder if it could have crept in in that way.

Dean Clark. I do not find that it goes back. The note to Rule 30 in Hopkins says, "A new rule largely based on the English practice but so different from that practice that the English decisions will be of small benefit to the American partitioner." And I do not find it in the section of the Equity rule as to the answer; that is very short, and it says the defendant must swear to his answer.

Now, as to the code provision about admissions. The New York provision, and the provision generally found in many code jurisdictions is that the material allegation of the complaint not controverted by the answer, and so on, must be taken as ~~proof~~ true for the purposes of the litigation.

Mr. Wickersham. Is there not something in the old Equity rules that the answer must be responsive to the bill, and except where the rule permitted that the defendant shall neither admit nor reply, he must reply to every allegation; he did not admit by not answering, but he could be required to answer every allegation of the bill. Perhaps this grew out of that.

Mr. Olney. That rule was responsive to the idea that the original bill in equity was in the nature of a bill of discovery.

Mr. Wickersham. Yes.

Mr. Dobie. It is evidence as well as pleadings in some States, and it takes two witnesses to controvert it, and under those circumstances value ought not to be there.

Mr. Wickersham. I fancy that that consideration of a bill in equity under those conditions was that, while he would not admit other allegations by not answering--

Mr. Olney(Interposing). Let me put it this way, is there any reason why, if the defendant refuses to answer the complaint, the plaintiff should not have just the relief he

asks for in the complaint, without anything further.

Mr. Morgan. You would not go so far as to say that that would prove an allegation of unliquidated damages?

Mr. Olney. No, he alleges the amount.

Mr. Morgan. Suppose he has a broken leg, and claims damages of $50,000.

Mr. Olney. Why not allow it?

Mr. Morgan. No court would allow it.

Mr. Wickersham. Legs become more valuable as time goes on. (Laughter.)

Mr. Olney. Will he come in and answer?

Mr. Mitchell. It is a universal practice, where it is unliquidated and they must assess damages, and we ought not to change that.

Mr. Dobie. That would result in allegations of absurd damages.

Mr. Wickersham. If the reporter is willing totake out that sentence, I move that it be stricken out--"averments other than those of value and damage", when not denied, shall be deemed admitted."

Dean Clark. What did you want to take out?

Mr. Morgan. "Averments other than those of value or damage, when not denied, shall be deemed admitted."

Mr. Morgan. Yes.

Dean Clark. Would that suit you?

Mr. Wickersham. Yes. Would that suit you?

Dean Clark. Yes.

Mr. Mitchell. The English rule does not say anything about value. I am positive about value, but I should hesitate to adopt a rule that would be an innovation. The only objection is that the answer shall be deemed admitted. And I think it is unsafe to do that.

Dean Clark. This is the Equity rule.

Mr. Mitchell. But they do not say "value." They say ~~That was~~ damage. Otherwise, they may say that the allegations of damages may be taken as admitted even in an unliquidated case.

Mr. Cherry. You would suggest leaving out "value or"?

Mr. Mitchell. Yes.

Dean Clark. Suppose we put in"averments as to the amount of damage."

Mr. Mitchell. That is two more words, and I think it means the same.

Mr. Olney. Does it really. I doubt that. The amount of damage is the question --the allegation is that the man was damaged in a personal injury case.

Mr. Dobie. And that the damage was caused by the defendant. That is admitted, is it not?

Dean Clark. That is what I was trying to differentiate

Mr. Mitchell. By the amount?

Dean Clark. Yes.

Mr. Mitchell. How about this: "Averments other than those as to the amount of damage."

Mr. Wickersham. That is all right.

Mr. Dodge. You preserve the general denial.

Dean Clark. Yes. I have this: This is the place where this comes up: Now, on the point just suggested as to the so-called general denial. I have provided that they should deny each and every allegation. I have not called it a general denial. Of course, in substance that is what it is. I say: "Denials may be specific denials of distinct allegations or paragraphs of the complaint, or in proper cases, as provided in Rule 21"--Rule 21 is a certificate that the denial is made in good faith, etc.--"or, in proper cases, as provided in Rule 21, of each and every allegation or paragraph of the complaint."

Now, there has been, of course, a good deal of discussion as to the use of the so-called general denial. After all, that is a label. I do not see anything to be gained by making the defendant use as many paragraphs of denial, denying paragraphs in the complaint, when he really wants to deny them all, and it seems to me that that is all this does. If he is going to deny everything he can do it under any rule I know of, and this just provides a short way of doing

so. And as I read thecases, the attempt to tie down the defendant really does not get anywhere. And if he is going to make denials, he will. It is an attempt to search his conscience, and the court may try to enforce it, and really cannot, and will waste time. When I was in Portland this summer I spoke about these rules, and Ralph King and other lawyers came up and spoke about this. And Mr. King said, "I hope you are not going to abolish the general denial", and the lawyers all agreed that it would be a foolish thing to try to do so.

Mr. Morgan. The only question I had on that is that wherever I have practiced you could put in a general denial, and could deny anything if it was not literally true in the manner alleged. I notice that the Connecticut rules attempted to get away from that and provided that if the purpose was to deny merely the qualification, or if the facts stated were true with qualification, there should be an admission of the statement so far as it was true and a denial of the qualification. I do not know how that works in Connecticut. Of course, we put in general denials in Minnesota in my practice when there was no question that the facts stated happened, but had not happened in just that particular way. And the result was that these attempts to get the pleadings to disclose the issues never did disclose them. The

plaintiff put in everything he could think of, and then the defendant put in a general denial.

Mr. Wickersham. That is like the practice of moving for a bill of particulars or making the complaint more definite. It was a hang-over from the old common law pleadings. In common law actions the tradition of the actions at law persisted, and they did not adopt for common law proceedings the concept of a bill of equity, such as demanding a categorical reply to every allegation.

Mr. Donworth. It is often difficult to make a specific denial without making it a negative pregnant.

Mr. Morgan. Yes.

Mr. Donworth. For that reason, a general denial is better.

Mr. Dodge. Why refer to Rule 21 here? It is a general rule applicable to all pleadings.

Dean Clark. It is not necessary here. But I did it because people might say, "You ought to have specified denial."

Mr. Lemann. In my State in the last fifteen years we have had this requirement as to particular allegations, that you must answer each one, and if you ask for the psychological reaction, I think there has been a residuum of effect in tying down.

Dean Clark. This raises a question that I discussed with my own Chief Justice in my Connecticut Law Journal. I

feel strongly convinced that the way pleadings are now developed in our jurisprudence, you cannot get out by way of pleading fine points of admission. It is hopeless to expect it, because the judges are not going to enforce the only penalty that counts, namely, loss of the action, and it is a waste of time to try to ~~abolish it by~~ polish up in that way pleadings. It so happens, however, that by starting ~~a comparatively~~ an apparently new procedure "summary judgment" we can do just that thing.

Mr. Morgan. Discovery before trial will do it.

Dean Clark. Well, I am referring to the whole matter of summary procedure, which does not have the history and back ground of pleadings generally. It seems to me there is less reason now to worry about this if we have ~~sufficient~~ efficient summary procedure.

Mr. Dobie. May I ask this question? You countenance here the combination of admissions and denials. Some courts have said you cannot do that.

Dean Clark. Yes.

Mr. Dobie. For instance, in a personal injury case a man wanted to admit that the defendant was a corporation and that he was in its employ and deny everything else, the court said, "You cannot do that," but it seems to me that where you have a very large number of statements, you might admit that that is desirable.

Mr. Olney. In my State ~~there~~ we have had a lot of troubl

but I think the profession is so wedded to it that it is not advisable to strike it out.

with general denials, and he is put to proof? I want to ask Dean Clark if you cannot accomplish everything you want by requiring an answer to each specific allegation of the complaint. As I say, that would be too revolutionary for our purposes. But I will call attention to this, Dean Clark: I think the way you have worded this in regard to Rule 21 might be taken by the profession and misread. You say, "or in proper cases, as provided in Rule 21." Now, there are no "proper cases as provided in Rule 21." What you mean there is--

Mr. Mitchell (Interposing). "proper cases."

Mr. Olney. In cases in which it is proper to make a general denial it might be done.

Dean Clark. I think your criticism is correct. What I really meant is "in proper cases."

Mr. Dodge. I do not see why that should be in here and not anywhere else.

Mr. Morgan. It is just to warn the people, and he says that does not amount to anything anyhow.

Mr. Dodge. If the general denial is abolished, you will have the same allegation repeated ten times, and it involves a considerable waste of time.

Prof. Sunderland. In my State it was abolished about five or six years ago and the bar feels very well satisfied.

Mr. Morgan. Does it work?

Prof. Sunderland. It works very well and they think

it is an advantage.

Mr. Lemann. I say there is a residual advantage that that it will also save time. I do not think they should all be admitted--but it should be done even if you say "Look out for Rule 21."

Mr. Mitchell. The only doubt I have is whether it is not advisable to put in this Rule 27 something like what Mr. Morgan suggested, a sentence stating that of the allegations in the complaint some are admitted and some are not; it may be that some of it is true and he could deny only the remainder. Because if you deny the whole thing, there is some untruth in it; and the conscientious lawyer would think of that.

Mr. Morgan. We used to see if we could not deny generally.

Dean Clark. I will try to work that out, but the general denial is specifically permitted in Connecticut.

Mr. Dobie. Are you against the abolition of the general denial?

Dean Clark. Yes, very distinctly, because I think it is a cluttering up of another rule that does not mean anything. And I say that with all respect to Illinois lawyers, who like to say, "Now, we will be specific," and set up that part, and it does not mean anything.

Mr. Morgan. Do you know how that qualification of the

rule works in Connecticut? Do they just slam in general denials?

Dean Clark. General denials are very freely used there.

Mr. Donworth. Is it not true, that you may call upon the other side to state facts, by a discovery?

Mr. Morgan. I think discovery is the ultimate way to get it. Because otherwise a lawyer never wants to disclose any more than he can help, and the judge is trying to make him disclose.

Prof. Sunderland. That is true. I do not think you get far with your requirement of general denial.

Mr. Morgan. I think it does some good.

Mr. Tolman. Mr. Chairman, I would like to call the attention of these gentlemen to the fact that in these suggestions of local committees and members of the bar which accompany this rule, they all make the unanimous request for the abolition, or the discouragement, at least, of general denials, and a specific setting up of the defense, as is required in Equity Rule 30.

Mr. Olney. If that is the case, I am in favor of it, because my ~~concern~~ experience is different from Dean Clark's. In my experience you do get something by requiring a general denial

Mr. Lemann. You have my testimony as to the three states that I know of. Now, the only thing on the other side is that Dean Clark says it is useless and to abolish it.

Dean Clark. You ought to look at the cases where they struggle to enforce therule, and it gives a nice chance for dilatory proceedings. Now, there is not any overwhelming statement from local committees. There is only one of these suggestions from local committees--when they think of it they put in certain affirmative recommendations, but not many but when you put in the reconstruction I think you will find quitea good many practitioners will object.

Mr. Lemann. You hve had no difficulty with theplaintiff being required to plead in paragraphs. Now, in my jurisdiction, I will say they would be presented by the defendant objecting that the plaintiff had not complied with the rule, that he must plead in paragraphs--more than there wouldof the plaintiff complaining that the defendant had not answered in paragraphs. As has been suggested, you just could tell your stenographer ~~to use~~ paragraphs numbers X to XX; you could just say, "Deny these paragraphs."

Mr. Dobie. The Equity rule says avoiding general denials it does give some countenance to them.

Mr. Dodge. We would not permit it in equity.

Mr. Lemann. There is a requirement of separate paragraphs.

Mr. Morgan. This rule applies to the Equity rules.

Dean Clark. The Equity rule does not prohibit general denials.

Mr. Morgan. It says "avoiding general denials."

Dean Clark. It is distinctly an admonition. As to the rule as to paragraphs, if a judge is going to throw a person out for not putting paragraphs, that rule as to paragraphs, or that whole section on the form of pleading I did not take as mandatory. That is a suggestion to the bar as to how to draw their pleadings. I do not believe a judge will throw them out.

Mr. Morgan. He may strike the pleadings.

Mr. Lemann. It may open the door for objection.

Dean Clark. I do not think he will strike, unless my rule on motions to strike is stronger than I think. I think it is very limited.

Mr. Tolman. Last night we put in this expression of omitting a mere statement of evidence, and here we leave it out. That is to say, it is in Rule 30, and we have not got to that yet. But we did act last night on that rule.

Mr. Mitchell. On the general denial business, the general opinion of lawyers about it is that, while it may not be necessary or desirable to require the defendant to go ahead and answer or deny specifically each allegation, we can accomplish something that will satisfy the members of the bar if we propose that general denials be abolished, and putting in a sentence or two along the line of Connecticut, that Mr. Morgan has referred to, and simply specify that in dealing

with any allegation you can admit part or deny part, but they must answer it all, and specifically admit that part that is true, and get rid of the opening given a lawyer to deny the whole allegation, even though much of it is true, merely because there is some little qualification in that that he can deny. I think we can accomplish something along the line of the Equity rules, which recommend avoiding general denials and the recommendation of the Bar Association and the experience of many lawyers, by putting something of that kind in. I will go so far as to say that they should be required to deny or admit every specific allegation. But we all know that where an allegation is inaccurately stated and it gives us an excuse to deny the whole thing, we ought not to be able to do that. We ought to be able to accept that which would get at the meat of it. There is no penalty for it.

Dean Clark. I am willing to put in that provision.

Mr. Morgan. I move that that be done.

Mr. Dobie. Will you state that again?

Mr. Mitchell. I would rather have Mr. Morgan state it. I got that from him.

Mr. Morgan. It is the rule of practice in Connecticut that I had in mind. I am not prepared to give the phraseology, but it is to the effect that in denying an allegation which is made with qualifications, the party denying must

specify those portions of the allegations which he really denies and admit the portion--have uou the rule there, Dean Clark?

Dean Clark. No, I have a reference to it. It is the the Connecticut Practice Book, Section 199.

Mr. Mitchell. Can we not leave that to the drafting committee with the recommendation that they try to draft something along those lines?

Mr. Olney. I move that that be done.

Mr. Morgan. I second the motion.

Mr. Mitchell. Does that include Rule 27?

Mr. Olney. No.

Mr. Tolman. Should not some regard be given also to the consideration of Equity Rule 30?

Dean Clark. Well, I think it ought to be clear. As a matter of fact, I wanted to leave this expression in, and I took it that the Bar Association men would leave this expression in and ~~I prefer the~~ add the further sentence.

Mr. Morgan. That is right.

Mr. Mitchell. That is right.

Mr. Morgan. A denial of every allegation, if he has to take out the qualification, I am satisfied. I agree with Mr. Dodge that there is no use of repeating.

Mr. Mitchell. All those in favor will say "aye", those

opposed "no."

(The motion was unanimously adopted.)

Mr. Wickersham. In this rule as to the answer, Rule 27, I should think we might insert, before the last sentence, in the fourth line from the bottom, "Facts which constitute matters of defense should be stated plainly, omitting any mere statement of evidence;" that is substantially what you have in the provision as to the plaintiff.

Mr. Dodge. You mean affirmative defense?

Mr. Wickersham. Not merely affirmative defense, but facts constituting matters of defense.

Dean Clark. Have you in mind this provision in the first sentence of Rule 35. I think it is covered there. I do not know that I object greatly to inserting this, but I object to doing it over again. It is not in here.

Mr. Morgan. I think Rule 35 will take care of it.

Mr. Wickersham. But you have got a provision as to the plaintiff in Rule 23, and that requires the complaint to contain a short and plain statement of the grounds upon which the court's jurisdiction depends, thus omitting any mere statement of evidence.

Mr. Morgan. What is the matter with the first sentence of Rule 27, that the defendant by his answer shall set out in short and simple terms his defense."

Mr. Wickersham. "Shall set out in short and simple terms the facts constituting his defense or defenses."

Mr. Morgan. Yes.

Prof. Sunderland. Well, if your defense is a denial, what are the facts?

Mr. Wickersham. Well, of course, you could get an affirmative defense.

Dean Clark. Well, why does not the general Rule 35 cover it? This really does not mean anything anyway, as the course of decisions on facts shows that it is just an admonition, and I put in the admonition at the top of Rule 35.

Mr. Mitchell. There is a provision in the Equity rule about "omitting mere evidence."

Mr. Morgan. You could put in "omitting mere evidence."

Mr. Mitchell. Yes, you could say here, "omitting mere evidence."

Dean Clark. Yes.

Mr. Wickersham. My thought was that Rule 23 was a specific rule as to the contents of the complaint, and Rule 27, dealing with the answer ought to be as specific a rule as Rule 23, as to pleading facts.

Mr. Tolman. "Omitting mere ststements of evidence"?

Mr. Wickersham. Yes.

Mr. Mitchell. Will you make a motion stating where you think they ought to go in in Rule 27.

Mr. Wickersham. Well, it could go in line 3, after the word "claim" asserted in the complaint" or later on in the provisions as to answer. I leave that to the drafting committee, as a matter of style, but I should insert something--~~I believe~~ "facts constituting a defense" should be stated, omitting any mere statement of evidence."

Mr. Mitchell. The thing you want in is "omitting any mere statement of evidence."

Mr. Cherry. Is it not a question whether that should be stated here, andin Rule 23, or only once as a matter of drafting by the style committee?

Mr. Wickersham. That will be all right.

Mr. Cherry. That is a matter that should be left to consideration and redrafted by the drafting committee.

Mr. Wickersham. I think the ~~thing to be accomplished is simply~~ difficulty and the effort to get away from the code expressions as to the complaint "statement of facts constituting a cause of action", and in the answer "statement of facts constituting a denial or defense."

Mr. Cherry. I am merely suggesting whether it should go in each one of these rules or be stated only once in Rule 35 and be left to the drafting committee.

Mr. Mitchell. Well, if it is satisfactory we will hav it so understood, that they will put that clause in "Without any mere statement of the evidence" both as to the answer

and the complaint; and leave it to them to determine whether they will put it in Rule 35, or scatter it around.

Mr. Loftin. I would like to ask the reporter one question. In his draft of Rule 27 he has the words "averments other than those of value or damage" which is theprovision of Equity Rule 30. But there follows in Equity Rule 30 an exception reading, "except as against an infant, lunatic, or other person non compos and not under guardianship." I wanted to ask whether he ~~did~~ omitted that advisedly?

Dean Clark. I did it after consideration , maybe not advisedly, but after consideration. I might say that I have studied that a good deal, and I cannot see any fairness in a provision that you could not in effect go ahead against an infant, lunatic, or person noncompos. The provisions are included that persons under disability shall have a guardian ad litem, or may be represented by guardian. That is provided later. And if an infant is properly represented, which is the duty of the court, why should not the representative of the ~~interest~~ infant have to plead like everybody else? I take it that if you have in this restriction, it is doubtful what it means, but I suppose it means that you have got to prove everything.

Mr. Wickersham. The infant's answer by his guardian is in effect a general denial.

Dean Clark. It has got to be a general denial; but

why should be the rule?

Mr. Wickersham. That should be the rule on the theory that the guardian ad litem ought not to be able to bind or prejudice the infant's rights. The infant is a ward of the court and the court will look out for him. The guardian must do the best he can and trust the court, but he cannot prejudice the infant by any admission.

Dean Clark. What basis should there be for such a rule?

Mr. Wickersham. The basis is that the infant is the ward of the court and a mere deputy of the court could not prejudice the duty of the court to protect the infant.

Dean Clark. That is why the provision ought not to be in.

Mr. Wickersham. You do not want to have the infant protected?

Dean Clark. No, I do not see why you should interfere with getting cases tried when the infant must be adequately protected.

Mr. Wickersham. The only theory is that an adult can give instructions to his attorney, but that an infant or an incompetent, not being of sound mind or full discretion, cannot give instruction, and therefore ought not to be prejud judiced by the action of the vicarious representative.

Mr. Mitchell. I would like to know whether the phrase "not under guardianship" applies only to a person non compos,

or applies only to an infant; it says "except as against an infant, lunatic, or other person non compos and not under guardianship." Now, does this suggestion relate only to infants not under guardianship, or to these others?

Mr. Dobie. I think the phrase "not under guardianship" limits only the other persons. It is absolute as to the infant or lunatic, even if they have a guardian.

Mr. Mitchell. But I do not see why there is any distinction there. It may be a rule to protect any of these people, if there is not a general guardian. I do not know what it means.

Mr. Dodge. I think the rights of these people are covered elsewhere than under pleading.

Mr. Morgan. It is a question of substance. Ordinarily, the court will not allow them to bind the infant.

Mr. Mitchell. Are you ready to vote on Rule 27?

Mr. Loftin. Do we understand, Mr. Chairman, that the reporter will give some further consideration to the points that have been raised?

Dean Clark. Yes.

Mr. Loftin. It should be in this rule or some other rule.

Dean Clark. I am not sure what those requests mean. I have considered it, and my own view is decided upon it. It

is a provision for the protection of the infant, and there is a later provision for the appointment of a guardian ad litem. Now, when I am told to give further consideration, does it mean that I reverse my decision or not?

Mr. Loftin. Do I understand that your decision was that if there was a guardian ad litem, any decision he made should be binding?

Dean Clark. Yes.

Mr. Morgan. In pleading?

Dean Clark. Yes.

Mr. Wickersham. I object to that.

Dean Clark. An infant is properly represented under the care of the court. And that being true, why should not the representative that does the work have the same power to bind him as with adults?

Mr. Wickersham. Because he would consult with his principal and take his principal's instructions. In other words, his duty is to see in a general way as to the infant's interests, and he has no power to bind him, because he can not take instructions from the infant.

Dean Clark. Of course, the guardian ad litem is acting under the control of the court right along.

Mr. Wickersham. Yes.

Dean Clark. And all this means is that in any case where there is an infant in it, you have to have every single

allegation of the complaint approved by the court.

Mr. Wickersham. We are familiar with that practice, and it gives rise to no complaint.

Dean Clark. I do not think we are familiar with it.

Mr. Wickersham. We are familiar with it.

Dean Clark. In code practice, we do not find that.

Mr. Wickersham. But whether it is code practice or not, everybody knows that a guardian cannot bind the infant.

Dean Clark. You do not find anything in the New York rules on pleading to that effect.

Mr. Wickersham. It is so well established in New York that--

Mr. Mitchell (Interposing). The rule is not a rule of pleading at all.

Mr. Wickersham. It is a rule of substantive law.

Mr. Mitchell. It is the duty of the guardian to deny everything. The result is, as a matter of practice, that he always does deny.

Mr. Morgan. Surely.

Mr. Wickersham. I should be very much surprised, if the matter is embodied in rules in the various courts of New York, and it is so well settled that in the 50 years that I have dealt with it--and I have been a special guardian--and you know what your duty is. In other words, theoretically the court takes care of it, and there many things which an

adult can do in instructing an attorney that the infant cannot do.

Mr. Morgan. I was not objecting to the rule, but to Dean Clark's interpretation of it. He said it meant, certainly, that he was bound by admissions, etc., and forced to deny.

Dean Clark. Do you mean to say that a formal allegation, such as that the plaintiff is a corporation, must be proved in every case against an infant?

Mr. Morgan. I am not sure about that particular one.

Mr. Wickersham. There is a statutory provision about that.

Mr. Donworth. I think the practice is to deny it, but not to be meticulous about the method of proving it. As far as the pleadings are concerned, it is denied.

Mr. Morgan. Yes--everything.

Mr. Mitchell. It is denied because he puts in a denial. It is not denied because he does not admit it.

Mr. Olney. What about a guardian denying something that he knows is perfectly true?

Mr. Dobie. In Virginia some of the statutes say this: "The infant cannot waive anything, but it is taken as objecting to everything according to his admissions." No directions.

Mr. Wickersham. That is a general rule, because he cannot speak for himself. His attorney or guardian is only his representative.

Mr. Tolman. Well, is there any dispute about that?

Mr. Wickersham. I understand that Dean Clark wants to change that.

Mr. Tolman. No, he was speaking about his individual belief.

Dean Clark. No, I do not.

Mr. Dobie. Somebody is going to raise that question.

Mr. Loftin. We are generally basing these rules on the Equity rules. Now, we omit something that is in the Equity rule, and the question might arise, Why did we leave that out?

Mr. Mitchell. These rules are going to have the force of law and become statutes, and if you state specifically that everything that is not denied is admitted, even against the infant, are we not in trouble?

Mr. Loftin. If they have the force of law, then you might change the law.

Mr. Mitchell. Would it not be better to take the Equity language on that and put it in and add a little to it, and end the whole controversy?

Dean Clark. I suppose so. I do not think it makes much difference. This carries a provision in the rule that does not exist, so far as I know, in all the code States. You do not find in any code any requirement of this kind.

Mr. Wickersham. Well, if you make that point, I would insert in the seventh line from the bottom, after the words

"shall be deemed admitted", the words in Equity Rule 30, "except as against an infant, lunaitc or other person non compos and not under guardianship."

Mr. Loftin. Do you make that as a motion?

Mr. Wickersham. Yes.

Mr. Loftin. I second it.

Mr. Mitchell. Is there any further discussion?

Mr. Olney. I will suggest that, with all the experience that I have had, quite a number of times, and that was recently emphasized--I had to draw an answer to a long and very discursive ~~discusrion~~ and involved complaint--

Mr. Mitchell. Does that relate to this guardianship business?

Mr. Olney. No.

Mr. Mitchell. We have a motion pending in regard to infancy that we would like to dispose of.

(A vote was thereupon taken, and the members except one voted in favor of the motion.)

Mr. Mitchell. Now, is it something under Rule 27, Mr. Olney?

Mr. Olney. Yes, Rule 27. As I say, I had to answer a long and very discursive complaint. The only way to effectually put before the court the position of the defendant was to tell his story affirmatively. It could not be done by mere denial. It was necessary to do that in order

to give the court an idea of what the real facts were. And so we simply took the bull by the horns and made the answer in two parts, and in one I set out affirmatively the affirmative defenses. It was a long story; but there they were set out very carefully, to give the court a quick idea. But in order to make double measure, I had to go to work and deny specifically every allegation of that complaint, and it took me several days to do it in that fashion--although I think the affirmative answer should have been taken in itself as a denial.

Now, the proper idea of pleadings is to present to the court in advance a real statement of the position of the parties so that they can be understood and the court can get an idea of what they are. Now, I have made this suggestion for your consideration, and I am not certain it is worth while or might not involve some further question that I do not quite see:

"The answer or reply by way of traverse ~~may~~ need not be made in terms of express denial, but may be made by affirmative allegations of facts which, to the extent to which they are inconsistent with the allegations of the opposing party, shall be taken to be a denial thereof."

Mr. Mitchell. Can you continue the same thing into the answer by stating in the last paragraph "denying each and every allegation of the complainant."

Mr. Olney. I am not sure about that.

Mr. Dobie. It worked in that case.

Mr. Olney. I did it both ways.

Mr. Mitchell. You ought not to be afraid, unless the rule requires a specific denial paragraph by paragraph, and that we have not insisted on.

Mr. Lemann. You could have denied each allegation.

Mr. Olney. It was impossible to do that in connection with each paragraph of this complaint. You had to tell your story as a whole.

Mr. Mitchell. Were you operating under a set of rules that required you to specifically every allegation in each paragraph?

Mr. Olney. No, but every specific allegation of the complaint.

Mr. Mitchell. Now, we have such a rule here; that is, as I understand your statement, you did not have to go down paragraph by paragraph and review the allegation.

Mr. Olney. Well, you have got to do it, unless you put in a general denial.

Dean Clark. The general denial, I understand, still stayed in?

Mr. Olney. I know it did.

Mr. Mitchell. That would solve your problem.

Mr. Olney. I think the profession fails to appreciate that they can put in a good denial by way of affirmative

allegation. It may be worth while to call their attention to it, because, if that practice is followed it will clear up a good many absurd pleadings.

Prof. Sunderland. In Michigan, we have a rule that where the defendant in support of his denial relies upon an affirmative set of facts, he must set them up.

Mr. Morgan. That makes him pleading his evidence.

Prof. Sunderland. Yes, he pleads his evidence, but that situation is required and certainly gives notice.

Mr. Olney. You take the average answer; if it is at all complicated, with the desire on the part of the defendant attorney to avoid--

Mr. Morgan (Interposing). Argumentative denials.

Mr. Olney. No, not argumentative denials, but a negative pregnant--the court can read that answer, and he cannot tell for the life of him what it is all about. There are a lot of denials in there, but it would take him a long time to determine what is denied. But if the answer tells the defendant's story affirmatively, it is going to present a much better picture to the court that tries the case.

Mr. Wickersham. I have always been accustomed to do that--after responding to the allegation, then set forth the story of the defendant, where it is desirable to get the whole story before the court, as a separate defense.

Mr. Olney. Well, this was just a suggestion, and I

think the suggestion had better be withdrawn.

Mr. Mitchell. Are we ready then to vote on Rule 27? All in favor of the adoption of the rule as modified will say "aye"; those opposed "no."

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

Dean Clark. May I, in passing on the point we have discussed, point out that in this rule Rule 21 provides specifically on the matter of consent of persons under disability to procedure. It is a question of special authorization.

Mr. Wickersham. How do you mean--special authorization for what?

Dean Clark. For consent by the guardian or next friend, with the consent of the judge.

Mr. Morgan. If there is an order of the judge, then there is no occasion for that.

Dean Clark. Express authority for what we have now taken away.

Mr. Morgan. No.

Mr. Mitchell. Now, we are down to Rule 28.

Mr. Dodge. Is there any provision in these rules for penalizing the violation thereof? What happens if a plaintiff files a prolix complaint, manifestly not complying with the rules?

Dean Clark. There is a certain provision for default

for not doing things on time. The provisions for mistakes in pleading are covered only by the motion to correct, which I think is Rule 37. And you will notice when we get there that that is of a very limited scope.

Mr. Dodge. Well, the court must have authority to non-suit such a plaintiff.

Dean Clark. Possibly we had better take that up when we get to Rule 37.

Mr. Mitchell. Rule 28 relative to counterclaim.

Mr. Dobie. Would you be willing to broaden that first sentence, "The answer must state any counterclaim arising out of the transaction." I hate that word, but if you do not leave it there I want to make it as broad as possible.

Dean Clark. This is a compulsory ~~pleading~~ filing of the counterclaim.

Mr. Dobie. Yes. Well, that is not so bad.

Mr. Wickersham. You have brackets around the clauses in the second line of Rule 28. What do you mean by "The claim is deemed ~~xxxxxxxxxxxx~~ to be waived" unless it states any counter claim arising out of the transaction. What do you mean by that?

Dean Clark. I wanted to suggest the two alternatives.

Now, in the other brackets it says "arising out of the
Mr. Wickersham.
act and occurrences."

Dean Clark. Yes, I meant them as two alternatives

I might say that one suggestion was that we used both "transactions" and "occurrences." I was not sure all of those things added very much, and I put in the two alternatives. Where this requirement of compulsory filing is adopted it is usual to have the term "transaction." I do not like that much better.

Mr. Wickersham. I do not either. I like "cause of action" much better.

Dean Clark. "Cause of action" will not do it. This is broader than anybody's conception of "cause of action."

Mr. Wickersham. But now you are saying that a defendant in a lawsuit loses the counter right of action against the plaintiff if he does not plead it, if that counterclaim arises out of either the transaction which is the subject of the action, or out of acts and occurrences which are the subject matter of the action.

Mr. Mitchell. Does not the second clause there make a distinction between that sort of case and the counterclaim which may be the subject of an independent action?

Mr. Wickersham. Yes, but that is voluntary.

Mr. Mitchell. Yes.

Mr. Wickersham. That is voluntary, but I am speaking of this provision which ends all right of a man to a counterclaim unless he brings ~~counterclaim~~ counterclaim in the action

against him.

Mr. Mitchell. I do not so read it. The next sentence is if it is thesubject of an independent action it may be stated.

Mr. Dobie. Yes it is "must" in the first, and "may" afterward.

Dean Clark. Let me explain. I think Mr. Wickersham is correct in saying that he does not like it. Some of the codes provide that if you do not file counterclaims arising " out of the affair", you lose it, an that is what is attempted in the first sentence.

Mr. Olney. You take the case of a set-off.

Dean Clark. The States are California, Idaho, Montana, Nevada, and Utah, and ~~follow~~ Equity 30, on the ~~left~~ left. Now, other codes try to put some penalty on it. Other codes provide that if the defendant fails to set up such a counterclaim he cannot recover cost--Indiana, Ohio, Oklahoma and Wyoming.

Mr. Wickersham. Well, do you understand that under that Equity rule if the defendant does not set up that counterclaim, he is barred forever from suing on it? I do not so understand it. It does not say so.

Mr. Dobie. It says "must."

Mr. Wickersham. I knowit says "must" but there is no penalty.

Mr. Olney. That is the rule in every jurisdiction.

You take the case of a set-off, and of course set-off comes under the same thing.

Mr. Wickersham. I do not know about that.

Dean Clark. The rule in some codes reads: "Every counterclaim shall be set up or be deemed abandoned." I think that rule should be amended. There is a long string of Federal sitations.

Mr. Dobie. Not Supreme Court ones.

Mr. Morgan. The rule does not say "or may be deemed abandoned".

Mr. Wickersham. No, it does not say "may be deemed abandoned." It says must state in short and simple form. Now, that is rather directed to the form of the statement than the provision that the counterclaim may be inserted.

Dean Clark. I think there is a Supreme Court case. There is the case of the American Exchange of New York.

Mr. Donworthy. I would like to ask whether that is not opposed to the idea here--for instance, a physician sues for professional services, and the defendant claims malpractice, and it is tried out in a counterclaim in that suit.

Mr. Wickersham. Yes, I would be in favor of taking the first alternative in brackets"(arising out of the transaction which is the subject matter of the action)." I would be in favor of that. But I was wondering how far this Equity rule had been construed. The Equity rule does not seem to go as far as

this.

Mr. Dobie. May I interrupt you? There are Supreme Court cases--American Mills Co. vs. American Surety Co., 260 U.S., and Moore vs. Cotton Exchange, 296 U.S. 270. But my statement is that these must be set up in the answer or will be deemed abandoned and cannot be set up in a subsequent suit. The word "transaction "must be given a broad meaning.

Mr. Wickersham. I would not object if it was "arising out of the transaction."

Mr. Mitchell. You make a motion to accept one of these alternatives?

Mr. Wickersham. Of course, I like "cause of action" better.

Dean Clark. "Cause of action" would not answer at all. Now, as to the alternative, I would say that they are supposed to have the same significance. It is just a question of trying to improve on the word "transaction," as to which I do not think there can be anything much worse.

Mr. Mitchell. Well, we have ~~a code~~ an equity rule with that phrase in it and a decision of the Supreme Court construing it. Why put in a new phrase?

Mr. Dobie. May I read this? This is Mr. Justice Sutherland, not Dobie:

"Transaction" is a word of flexible meaning; it may ~~be~~ comprehend a series of many occurrences, depending not so much upon the weakness of their connection, but upon their relationship." That is from 270 U.S. 593; the quotation is on page 610.

Mr. Morgan. Is not "transaction" a flexible word which means transaction? (Laughter.)

Mr. Dobie. Well, they have at least given it a much broader meaning than the New York courts.

Mr. Morgan. Very much so.

Mr. Wickersham. If that is the word used in the Equity rule, I think it might be well to follow it.

Mr. Mitchell. No, we are limiting it.

Dean Clark. You mean extending it.

Mr. Lemann. I should think extending it.

Mr. Morgan. "Subject matter" is another thing that has been fought over.

Mr. Lemann. It has been or will be fought over.

Mr. Morgan. It has been fought over on joinder and counterclaim.

Prof. Sunderland. "Subject matter" and not "subject."

Mr. Olney. Gentlemen, we have the rule and a very broad construction put upon it by the Supreme Court. Why change the rule under those circumstances?

Mr. Wickersham. I move to accept the first alternative.

Mr. Morgan. I second the motion.

Mr. Mitchell. All in favor of accepting the phrase "transaction which is" will say "aye"; those opposed "no."

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

Dean Clark. Now, Mr. Dobie, do you want to make a motion?

Mr. Dobie. No, I will withdraw that.

Mr. Olney. Now, where there are counterclaims ~~where~~ That a man is required to present, should they be excepted from the counte claims of which the court would have original jurisdiction?

Mr. Morgan. You have that later.

Mr. Dodge. That is Rule 29.

Mr. Olney. Then it ought to go in here.

Dean Clark. Now, I was considering Rule 28 and Rule 29 together, and Rule 28 gets very cumbersome. It could be in Rule 28, except that there is a lot in Rule 28 altogether.

Mr. Olney. The only suggestion I had to make was this: "The answer should state any counterclaim arising out of the transaction which is the subject matter of the action and within the jurisdiction of the court." That is all that is required--

Mr. Wickersham(Interposing). I do not think that

is necessary under the authorities. I was troubled about that, I had a u estion about that, and had it looked into very carefully, and I tried to find how far the decisions have gone in sustaining jurisdiction where there is jurisdiction of the original suit of the counterclaim, even bringing in third parties, as between t he defendant and the third party, ~~and~~ where they would not have jurisdiction of that cause of action as between those parties if brought by original suit.

Mr. Olney. Well, if the court can go ahead with it, it is a thing which I am suggesting is not necessary.

Dean Clark. Yes, your suggestion is based on Rule 29. Rule 29 is based on the idea that you do not need original jurisdiction.

Mr. Olney. When my suggestion is not valid.

Mr. Dobie. In those cotton cases they held that it was not necessary that original jurisdiction should appear as to a compulsory counterclaim.

Mr. Donworth. That is the same case--in 270 U.S.

Mr. Dobie. Yes, that is the same case, Moore vs. Cotton Exchange, 270 U.S. Would you like to see that case?

Mr. Donworth. No.

Mr. Olney. The expression that the counterclaim is deemed waived is not really accurate. The counterclaim is really barred in that case.

Dean Clark. Yes.

Mr. Olney. Yes, it is not waived; it is barred.

Mr. Morgan. Yes

Mr. Olney. Do you not think that should be changed?

Mr. Mitchell. The Supreme Court has held as to Equity Rule 30--it does not even say "waived" there; it merely says the counterclaim must state; it does not say a word about waiver, or ~~xxxxxx~~ bar or anything else, and then they have gone on and held that, in the absence of anything of that kind, the claim had to be sued on again.

Mr. Olney. But Justice Sutherland used the expression "barred".

Mr. Mitchell. Maybe he did, but I think the Equity Rule upon which that decision is based does not say a word about waiver or bar.

Mr. Olney. Further than that, it was not necessary to put an express provision in; but if any is in I should think that it should be "~~bar~~ barred," and not "waived."

Dean Clark. I think it should be "~~bar~~ barred." Of course, I do not suppose you really need it in now that the court has spoken, but it seems to me that, as the court has spoken, it is well to tell lawyers about it, so that they do not have to go back and look up these cases.

Mr. Lemann. Is it "barred" or "deemed barred"?

Mr. Morgan. "Deemed barred;" you would not say that.

Mr. Lemann. No, I say, "is barred."

Mr. Donworth. Without talking about what is already gone over, is it understood that the defendant can amend his answer?

Mr. Morgan. Yes.

Mr. Donworth. This bar or waiver does not take effect until the thing is merged in judgment; and as long as he can amend, that isall right.

Dean Clark. Yes, that is stated in the amendment section, and it is staed later here, five lines from the bottom. "And the court may allow the amendment of an answer to include a counterclaim upon such terms as it shall deem fit."

Mr. Wickersham. I do not understand this last part. You have got that the answer must state in a counterclaim; and then it says down below "The right which is sought to be enforced by the counterclaim may be one acquired by the defendant, or arising or maturing, after the commencement of the plaintiff's action and at any time before final judgment is ~~rendered~~ entered, and the court may allow the amendment of an answer to include a counterclaim upon such terms as it shall deem fit; provided that it may dismiss a counterclaim which was ~~be~~ acquired by the defendant, or arose or matured after the commencement of the plaintiff's action, if it shall find that the defendant seeks to press the counterclaim for the purpose of harassing the plaintiff and delaying his action. The court may at its

discretion order a severance of a counterclaim which could be made the subject of an independent action or a separate trial of any counterclaim until the second judgment or all judgments are entered in the court. or delay in the execution of the first judgment

Dean Clark. Which one is that? Did you say the pleading of a counterclaim which is matured, or at various stages?

Mr. Wickersham. Yes.

Dean Clark. That is one as to which there is a good deal of complication?

Mr. Wickersham. Yes.

Dean Clark. Some of the rules are restricted and some rules make the point of time the time of the arising of plaintiff's claim, which throws it away back. What we have tried to do is, first, to provide a definite rule to avoid question, and second, to provide pretty free rules for pleading and yet to allow the court to prevent any--

Mr. Wickersham. I do not object to it.

Mr. Dobie. Is not the code provision that a contract is a contract, and there it cannot arise; as to the other, it can arise. I think that is the general provision. I think there are cases that way. And some of them say that is the idea--that I may be suing you to keep you from going out and buying a claim against me.

Mr. Mitchell. You have a motion, Mr. Wickersham?

What is your motion?

Mr. Wickersham. That we accept it.

Mr. Olney I would like to get one change in language which I think is ikportant. As this first sentence reads it says: "May state any counterclaim which may be the subject of an independent action, and is within the jurisdiction of the court, in accordance eith the provisions of Rule 29." Now, it is not within the jurisdiction of the court in accordance with the rules, but it may be "in accordance with the provisions of Rule 29, a counterclaim which is within the jurisdiction of the court."

Dean Clark. Yes, I guess we will transpose that.

Mr. Mitchell. We will transpose that.

Mr. Olney. Also in the nexy sentence it says, "Such counterclaim shall include any claim," etc. Now, that word "shall" should be "may", by all means, because you have got in there cases in which it is not mandatory to present the counterclaim.

Dean Clark. I afraid that is the fault of my expression. What I meant is that the term "counterclaim" shall include." ~~It is a word as to which~~ I thought we ought to have a definitional section. This is a definition. We had a little discussion about that, whether we wantedto have the formality, even, of the appearance of a statute which

would have, first, a section on definitions, and so on; and so I have put in such definitions as came up along through the rulesin this way. This is a definition.

Mr. Olney. But all that is required is to change "shall" to "may."

Dean Clark. That is all right.

Mr. Olney. Down toward the bottom of the page you say "The right which is sought to be enforced" by the counter-claim may be one." Should that not be put more strongly--that the rights which may be enforced shall include those".

Dean Clark. I should think that is all right. I am not quite clear that it is any different. I should think you way you put it is all right. I am not sure why you feel that the change is ncessary. Is not either way the same thing, except that you think it should be made in the plural?

Mr. Olney. Well, you put it in the singular, when there may be quite a number.

Mr. Dobie. But it would apply to each one.

Mr. Olney. This is not particularly important.

Mr. Mitchell. Instead of saying "a right," you want to say "the rights."

Mr. Olney. Yes. There is one other thing.

Mr. Dodge. While you are looking at that, I will ask you a question. Is the law at present that a cross complaint not arising out of the same transaction must be

within the jurisdiction of the court?

Dean Clark. There is nothing said in the Equity rule about it, as you will notice.

Mr. Dodge. I mean in actions at law if there is a set-off or counterclaim arising out of an independent contract may it not be set up, although it involves only $100, and therefore would not be within the jurisdiction of the court.

Dean Clark. Well, the cases go such a distance that I think that many argue that. I do not think that it has been clearly decided.

Mr. Lemann. Will that not come up under Rule 29? Suppose you have a claim against me for an automobile accident for $3,000, and you owe me $500 for a job of work.

Mr. Morgan. You cannot do that now.

Mr. Dodge. This rule may cut off the right of set-off as it now exists.

Mr. Lemann. Are you sure you cannot now?

Mr. Morgan. No. I think the counterclaim is under contract, and if it is tort it arises out of the same transaction. I think that is the usual rule.

Mr. Lemann. But suppose you sue me on a contract.

Mr. Wickersham. It would depend on the lawsuit.

Mr. Lemann. Suppose you sue me on an automobile for $3,000, and I say you owe me on a grocery bill $500;

can you do that?

Dean Clark. You are confusing two questions. I think Mr. Dodge's questinn was a limited one.

Mr. Dodge. I say if itwas an independent suit.

Dean Clark. I do not think you can.

Mr. Dodge. You cannot set out a counterclaim of $100 in a Federal court in a matter of contract.

Mr. Donworth. I do not think you can as an independent matter in a Federal court.

Mr. Dobie. Are you talking about the jurisdictional amount now?

Mr. Lemann. Yes.

Mr. Donworth. Yes.

Mr. Dobie. I do not know about that. The leading case is the American Soda Fountain case, in which Chief Justice ~~Fair~~ Fuller wrote the worst opinion he ever wrote. There is no discussion of the question. He says all things considered, it may very well appear that the jurisdictional amount is there. He then cites 69 cases, ~~every~~ not one of which is in point; because every one of them depended upon appeallate procedure, in which the rules are very different.

Mr. Mitchell. We have no authority to make any rule that makes any change in jurisdictional questions.

Mr. Lemann. But as I understand it as to the juris-

diction, the Supreme Court has the final say where the jurisdiction is uncertain, and if it is uncertain you could make any kind of claim you wanted to, and the Supreme Court would approve it.

Mr. Mitchell. Gentlemen, it is a little after 1 o'clock, and I have a request from photographers who want the privilege of taking photographs of the members of this conference.

(Thereupon, at 1:10 o'clock p.m., the Advisory Committee adjourned 1:45 o'clock p.m.

AFTER RECESS

Saturday, November 16, 1935.

The Advisory Committee met at 1:45 o'clock p.m., pursuant to recess.

Mr. Mitchell. We are still on Rule 28.

Dean Clark. May I speak of two different kinds of questions that were presented to me during the recess, and dealing with somewhat the same problem. That is the material at the foot of the page.

Mr. Wickersham. Rule 28?

Dean Clark. Rule 28, the counterclaim question. And this is the same part that you originally asked the question about, Mr. Wickersham. Mr. Olney thought that the provisions beginning with the word "provided", and providing for dismissing a counterclaim acquired by the defendant afterward was rather doubtful, and suggested striking it out altogether. In particular, he raised the question that no counterclaim, under the mandatory section, ought to be stricken out, which, is true. When we drew it we thought there would be no counterclaim under the mandatory section, because it was supposed that a counterclaim arising under the transaction originally sued upon would undoubtedly mature at the time of the original one. He suggested that while that usually be true, it would not always necessarily be true, and his idea was to

strike that out. Mr. Dodge suggested that he thinks the allowing of a counterclaim at any time before final judgment is going too far, and that it ought to be at any time before trial. I was wondering, combining those two points--if we move the time up to the time of trial, and then struck out the proviso, how that would appeal to the Committee.

Mr. Mitchell. Strike out entirely the proviso?

Mr. Wickersham. It is at least an improvement over saying "before final judgment."

Dean Clark. The only question there is one that I raised before, that the trial might conceivably be mixed, and you might have what would be claimed to be several lawsuits.

Mr. Cherry. Especially under these rules, with provision for severance and separation.

Mr. Dobie. That precise question has been raised in connection with removal of cases on account of prejudice and local influence. That has been changed, so that now it means the first trial.

Mr. Dodge. It would naturally be the first trial.

Mr. Dobie. That is what the Supreme Court has held.

Mr. Cherry. But that might not be so where there is but one trial.

Mr. Dodge. On the merits.

Mr. Cherry. No; under this provision we adopted

a rule calling for severance of the different parts of the case.

Mr. Wickersham. Would it be better to say, instead of "trial ~~before~~ upon the issues", "trial ~~before~~ upon the main issues"?

Mr. Mitchell. I would say "before the final submission of the case."

Mr. Morgan. Yes.

Mr. Wickersham. Yes.

Mr. Morgan. I would like to have it allowed during trial.

Mr. Mitchell. That leaves in the idea that it must be before the trial.

Mr. Morgan. Instead of trial, say "before final submission."

Mr. Mitchell. What do you think about that, Mr. Dodge?

Mr. Dodge. I think it is all right.

Dean Clark. "Before final submission."

Mr. Mitchell. It may be better to say "before completion of the trial."

Mr. Donworth. After what word does that go in?

Dean Clark. Sixth line from the bottom, where we have "before final judgment is entered," and this is a variation of that.

Dean Clark. What about striking out the proviso?

Mr. Wickersham. I think that is permissive with the

court, and like that. If on its face, a late application appears to the court to be made simply the purpose of harassing the plaintiff, the court would have almost a right to do that.

Dean Clark. You think, then, it would be necessary, as Mr. Olney thought it would, to limit this to only the permissive counterclaims?

Mr. Wickersham. The only what?

Dean Clark. To only the permissive counterclaims. You see, under the first sentence of the rule--

Mr. Wickersham. Yes; well, do you not mean that that is so?

Mr. Dobie. The other has to be in the answer.

Mr. Morgan. Yes, you would have to have an amendment.

Mr. Dobie. The compulsory counterclaim has to be in the answer; if it is not it is waived.

Mr. Cherry. Your control of the amendment would cover the other, would it not?

Dean Clark. Yes. Judge Olney thought up the point that I may state your proviso at the bottom of the page, and also a suggestion from Mr. Dodge, which has been more or less taken care of by the suggestion that, ahead of "at any time before final judgment," it be "at any time before completion of the trial." And then we were just discussing

whether you thought the proviso unnecessary. Mr. Wickersham said he thought it was permissive, and therefore helpful; and therefore, the question whether the mandatory was conclusive, as pointed out in sentence 1 of the rule--that the counterclaim must be in the answer or it is barred--that that would not come up here anyway.

Mr. Mitchell. You cannot very well bar a counterclaim that has not arisen. Why not put it in your rule so that that would not be construed to mean that?

Mr. Dodbie. What is the harm in leaving in this last provision giving the judge this power?

Mr. Donworth. I think it is a very wise provision. Otherwise the defendant may before trial come in with a claim. But you could prevent all nonsense.

Mr. Morgan. He would not have a right to do that thing, except by amendment, or something supplemental of the pleading, for which he would have to get permission.

Mr. Olney. It seemed to me that there might be some difficulty in it.

Mr. Dobie. This is after the commencement of the plaintiff's action?

Dean Clark. Yes.

Mr. Dobie. So that he may put it in his answer, and it may arise in his answer, and it may come out at the trial that he went out and bought this counterclaim. I favor

putting it in.

Mr. Olney. When that situation arises, it simply means that his counterclaim would be overruled and thrown out, and a judgment in bar rendered against it.

Mr. Dodge. Does this word "dismiss" mean dismiss on the merits?

Dean Clark. No.

Mr. Dodge. It means get rid of it, so far as this case is concerned?

Dean Clark. Yes.

Mr. Dobie. And bringing an independent action on it later. I make that motion, that this be left in.

Mr. Lemann. I second the motion.

Mr. Mitchell. All in favor of that motion will say "Aye"; those opposed "No."

(The motion was unanimously adopted.)

Mr. Dodge. I just raised the question whether that word "dismiss" applies where you refer to a claim growing merely out of this particular case.

Mr. Dobie. How about "dismiss as a counterclaim in this case"?

Mr. Dodge. That would make it plain.

Mr. Dobie. "Dismiss as a counterclaim in the instant case."

Prof. Sunderland. Or dismiss without prejudice.

Mr. Dobie. Yes, that is better "dismiss without prejudice."

Mr. Wickersham. Where would you put that?

Mr. Olney. Do you think that would accomplish anything at all from a practical point of view?

Mr. Dodge. The court might have allowed the amendment, and then on further consideration find it had been brought to harass the defendant.

Mr. Morgan. Yes.

Mr. Mitchell. Are there any changes on the second page of Rule 28 that you want to make? It does not seem to me that that next sentence is worded right. It says, "The court may at its discretion order a severance of a counterclaim which could be made the subject of an independent action or a separate trial of any counterclaim or a delay in the execution of the first judgment to be entered until the second judgment, or or all judgments are entered." I do not understand that.

Dean Clark. Perhaps a comma would help. It could be made the subject of an independent action, (comma), or the separate trial of any independent counterclaim, (comma).

Dean Clark. "The court may at its discretion order a severance of the counterclaim," and so on, or order a separate

trial.

Mr. Morgan. Put in between "ay" and "order."

Mr. Donworth. If you put the words "in its discretion" further back, you do not need any further change--"the court may, in its discretion."

Mr. Wickersham. You do not want two "mays" in there. "The court may, at its discretion, order a second trial", and so on.

Mr. Morgan. Yes.

Mr. Olney. The first sentence is not very limited, so as to require that that claim be one of which the court would have original jurisdiction. In other words, the plaintiff could bring suit against John Doe, and, we will say John Doe and Richard Roe; and then John Doe can proceed to sue Richard Roe, although on a claim of which the court would not have jurisdiction at all.

Dean Clark. Which provision is that?

Mr. Olney. Rule 30.

Dean Clark. Well, you are ahead of us. (Laughter.)

Mr. Mitchell. We have not finished with Rule 28. We are on the second page of Rule 28.

Mr. Wickersham. I move that those changes be made and that we adopt Rule 28.

Mr. Loftin. I second the motion.

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

Mr. Mitchell. Now, as to Rule 29.

Dean Clark. This presents the question of jurisdiction that we were discussing before. We had debated it in a limited way, more or less, to avoid raising a question than otherwise. I have no great wish to limit jurisdiction over counterclaims If we can go further, I will be very glad to go further, and as Mr. Dobie has pointed out, the law is confused on the subject.

Mr. Donworth. I am in sympathy with that idea. I think the phraseology might be very much improved. Think of this situation: When the c unterclaims must be pleaded pursuant to Rule 28--

Dean Clark. That is in the alternative--or "arises out of the transaction or acts and occurrences which are the subject of the action."

Mr. Donworth (Continuing). "No independent grounds of jurisdiction need be pleaded, unless the counterclaim is pressed after the action is dismissed for want of jurisdiction." Does that mean that you are going to amend after dismissal? I had thought, subject to Dean Clark's idea, that in the fourth line, where it says, "unless the counterclaim is", we might insert these words "intended to be presse

and then beginning on the next line "~~xxxjxxxxxx~~ substitute/"even if." That is, when a man files his counterclaim, he must show the jurisdiction at that time, and not wait until the suit is dismissed and then ask to amend.

Dean Clark. I think that is all right. Of course what he would have to do then would be to amend. The way ~~we xxx~~ stated it, if he has not actually pleaded that counterclaim, we allow him to amend. So that we reach the same result.

Mr. Donworth. I do not care.

Dean Clark. But I think that is all right.

Mr. Lemann. If we are uncertain about the jurisdiction, let us say nothing about it, and take up Rule 29, and leave it "within the jurisdiction of the court." We cannot determine that~~xxxxxxxx~~if we do not know just what its purpose is--and this seems to imply, in the case we discussed, that perhaps there would be no jurisdiction. I said to Mr. Dobie that that is not clear. I have gone over this Rule 29--and I have gone into the question of where there was no jurisdiction where the amount was less than $3,000. And if we are in doubt, let us say nothing about it.

Mr. Dobie. They have held, in the case of a compulsory counterclaim, that no jurisdictional facts may appear; that is, facts to justify the jurisdiction of the Federal court as a court.

Mr. Dodge. What have they held as to voluntary counter claim?

Mr. Dobie. I do not think that appears.

Mr. Lemann. Your idea is where there is a counterclaim for less than the jurisdictional amount?

Mr. Dobie. Yes. That is what the Supreme Court held in the Soda Fountain case, without a technical discussion; and I guess that is the law. There have been some minor cases in which some of the judges pointed out that it is perfectly clear that, where the plaintiff claims $900 and the defendant claims $2,600, he can add them together; it is not a counterclaim. I doubt whether we should go into that.

Mr. Lemann. I do not think so.

Mr. Dodbie. But they did hold in the Cotton Exchange case that, as to compulsory counterclaim, it was not necessary that Federal jurisdiction had to appear.

Mr. Dodge. But it is very unfortunate that a man sued for $3,000 should not be allowed to bring up a set-off of $500, but would have to go in the State court.

Mr. Morgan. If you get any cases of that kind, where the plaintiff sues for $3,000 and the defendant wants to bring in a counterclaim for $500, that can be taken care of--not arising out of the same case.

Mr. Dobie. Independently?

Mr. Morgan. Yes.

Mr. Dobie. In the Soda Fountain case, they held that they might add the two together.

Mr. Morgan. I do not care about adding the two together I want you to knock out the defendant. You sue me for $3,000 on a personal injury, and I put in a claim for $1,000 on a promissory note.

Mr. Dobie. I think that is all right. I think jurisdiction once vested would not be taken away by the counterclaim.

Mr. Morgan. I grant that; but suppose theplaintiff moves to strike the counterclaim because it is not within the jurisdiction of the court and does not arise out of the same transaction, and he could not bring it in a Federal court as separate lawsuit; and now he says that you cannot counterclaim anything arising out of the same transaction unless your counterclaim would have been itself within the jurisdiction of the Federal court."

Mr. Dobie. As I read the Federal cases, I do not think it is clear. If the plaintiff's claim is $3,500, the defendant cannot divest jurisdiction.

Mr. Morgan. We know that.

Mr. Dobie. I mean, he can bring in his counterclaim.

Mr. Lemann. That is what we want to know, if he can

bring in his counterclaim.

Mr. Dobie. Yes, the court would have jurisdiction, even if there if his counterclaim was for $100.

Mr. Lemann. I think we should leave that out and leave it to the Supreme Court.

Mr. Mitchell. Has not that not been covered by cases?

Mr. Dobie. I think so.

Mr. Wickersham. I think so. I think if the court once had jurisdiction, you can file a counterclaim for less than the amount you would have to sue for if you were seeking original jursidiction.

Mr. Dobie. I agree with you.

Mr. Morgan. Even though it does not arise out of the same transaction.

Mr. Lemann. I move that until an investigation is made --and that on this question of law, we have a memorandum on it, and if we can do that, that we pass it now.

Mr. Mitchell. We can certainly include it.

Mr. Wickersham. What is the law as to jurisdiction of a cause of action by way of counterclaim where jurisdiction has been acquired? But I think it ought to be restricted to something growing out of the same transaction.

Mr. Lemann. That we think is settled. What we are wondering about is where that goes beyond that.

Mr. Wickersham. I do not think you ought to be able to

do that.

Mr. Mitchell. It is not a question of adding the two together.

Mr. Wickersham. No, it is simply to bring a new controversy by way of counterclaim.

Mr. Mitchell. To bring in a new controversy where it has not connection with the claim sued on, and the only claim is that it lessens the jurisdictional amount, and your claim is that you can do that, notwithstanding that it is less than $3,000.

Mr. Wickersham. I think they can do that. I was surprised to find that, but I think the decision sustain that.

Dean Clark. We have been talking now about the ordinary cases of a money claim.

Mr. Morgan. No, I am talking about any kind of claim.

Dean Clark. I want to ask you if you go that far. Suppose it was $1,000 against $3,500. Suppose it was an injunction on independent grounds.

Mr. Mitchell. That is hardly a counterclaim.

Mr. Morgan. It is according to this.

Dean Clark. Yes, it is according to this.

Mr. Donworth. Suppose it was an assault and battery ~~case~~, and the defendant says,"my damage is $2,000. "

Mr. Lemann. Of course, he would never say that the

damages were $3,000. (Laughter.)

Mr. Dobie. I think the Supreme Court would sustain that.

Mr. Lemann. But my point is that you might owe me $2,000 for groceries, and you have got me in court and I think if the court passes on your claim for $3,000, it would pass on my claim against you for $2,000.

Mr. Dobie. I think that would be so.

Dean Clark. Suppose against that suit against me for assault I want to put in a claim for specific performance of a contract.

Mr. Donworth. There is one theory upon which the counter-claim, while independent of theoriginal suit, is within the jurisdiction, although involving less than $3,000, and that is when a plaintiff brings suit for anything, and he brings into controversy an entire adjustment of the ~~counterclaim~~ accounts and claims, tort and contract between him and the defendant, and that is the inside offer in his complaint-- "I want to adjust all points." If that is so, the original jurisdiction would cover it.

Mr. Dobie. I think so. There are cases holding that where a State is sued on a contract for prison labor, this man can come back on a contract, although he could not have ~~tried~~ brought an independent suit.

Mr. Dodge. Well, that is the sovereign.

Prof. Sunderland. That is on the theory that it is a common law recoupment.

Mr. Dobie. That is right. I do not believe you could do that otherwise.

Mr. Dodge. Will you look that up and make a memorandum, Dean Clark?

Dean Clark. I had my associate, Prof. Schumann, work on this. I have not his memorandum here, and I will have to depend on memory. But what he had chiefly in mind was the broader kind of claim I spoke of, and it does not seem to me that that would come in. That was his judgment--that specific performance case. Do you think so?

Mr. Dobie. I think on jurisdictional grounds it would be all right if the rules permitted it. In other words, the court already has jurisdiction of the case and it has attached, and they would be apt to "shoot the works" out.

Dean Clark. Well, specific performance of a contract on realty?

Mr. Dobie. Yes, that would be my case.

Dean Clark. That is going pretty far.

Mr. Morgan. But you are not going to distinguish between different kinds of claims which do not arise out of the same transaction, and you are going to go back to the old English distinction between set-off and counter-claim. We have gone beyond recoupment.

Mr. Dobie. I would be inclined to take the chance and put it up to the court.

Dean Clark. Of course, that is one way of extending Federal jurisdiction--which Congress has not been very anxious to do, or if not extending it, at least clarifying the law in such a way as to be pretty extensive.

Mr. Mitchell. The real principle underlying this defense of counterclaim is that the plaintiff is going to get a judgment against you and get something out of you, and if he does and you are not allowed to litigate and collect your claim against him, he may run off with your money, and you may never get yours. It seems to me that, in the case that has been suggested, the plaintiff is suing for money and the defendant is not seeking any relief that will diminish what the plaintiff gets; he wants specific performance of a contract for real estate. I do not quite see the reason behind the idea that he should be allowed in a Federal court to bring in a case that otherwise is not within its jurisdiction as an independent suit, where it is not a subject matter that is worth $3,000, and where it has not relation to diminishing the plaintiff's recovery in any way.

Mr. Olney. Suppose A sues B, who is a State officer in the Federal court, to restrain him from taking certain action which he is authorized to do under ~~xxxxxx~~ State statute,

because it is claimed that that State statute is unconstitutional by reason of the provisions of the United States Constitution. Suppose the Federal court takes jurisdiction of that suit for injunction, on the ground that a Federal question is involved, and then suppose that officer turns around and files a counterclaim against the plaintiff for $3,000 on a promissory note, and they both are citizens of the same State.

Mr. Mitchell. Why should we not follow Mr. Lemann's suggestion and refer this back to the Committee, with an understanding that a thorough examination of the authorities will be made and determine what the Federal courts allow now, and make the rule conform to it?

Dean Clark. That is all right.

Mr. Mitchell. I think you all are in the dark until we know the authorities. So that I suggest that we refer it back to the Committee to look it up, and then we will know what the law is.

Mr. Dodge. That was Mr. Lemann's motion.

Mr. Morgan. I second that motion.

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

Mr. Tolman. I wonder if we should not ask Dean Clark that this memorandum of authorities be referred to us?

Mr. Mitchell. We had better see it before our next meeting.

Now, we will pass Rule 29 with that understanding, and go to Rule 30.

Mr. Olney. There in the first sentence the same question comes up. It says,"The answer may state any claim, whether based on legal or equitable grounds or otherwise, arising out of the transaction which is subject of the action,who shall reply as provided in Rule 31." That claim made by one defendant against the other, does ~~not~~ that come within the Federal jurisdiction?

Mr. Mitchell. It arises out of the same transaction.

Mr. Wickersham. This just elects which one of those causes in brackets in Rule 30 we will adopt. I think before we use the phrase "transaction which is ", we had better determine that.

Mr. Morgan. And you use "subject matter" instead of "subject"?

Mr. Wickersham. Yes.

Dean Clark. Yes.

Mr. Mitchell. And to be consistent we will strike out "acts and occurrences which are."

Mr. Wickersham. "The transactionx which is the subject of the action."

Mr. Morgan. "Subject matter of the action."

Mr. Wickersham. Yes.

Mr. Morgan. We ought to make them uniform at any rate.

Mr. Wickersham. Yes.

Dean Clark. On the point of jurisdiction, I think independent grounds are not needed; but here the question is by no means clear.

Mr. Dobie. That is true; and in the case of Moore vs. New York Cotton Exchange--and Mr. Wickersham was in that case; it says George W. Wickersham and Henry W. Taft for the New York Cotton Exchange--the court said, "We are of opinion that this counterclaim comes within the first branch of the rule." (That is the compulsory claim branch, and we need not consider the second branch, that Federal jurisdiction must appear." Then they cite and inferior court Federal case.

Mr. Lemann. In the middle of the second paragraph of Rule 30 it says, "The third party shall file his answer or other defense in the cross action, and he may also plead defenses to and otherwise dis ute, " and so on. I was a little uncertain of what that language meant--whether the third party could do anything different from what the original defendant could do--whether in case of "other defenses" the defenses could be presented by the answer.

Dean Clark. I intended to include in that "his answer or defenses." I want to make it inclusive and to cover this man motion that I provided for under Rule 26--which I guess does not need to be considered here now; and if a motion to strike were correct, which I consider a defense, and possib-

motions for summary judgment or other procedure.

Mr. Lemann. It seems to me you ought to be as definite about this as you were in the specification as to the defendant; otherwise the difference in language might --

Dean Clark (Interposing). I think I am. I have forgotten just what we did, but I think we probably tied the defendant down, and now we tie this man down.

Mr. Lemann. He should be equally tied.

Dean Clark. Yes. Now, if you want I will go back over it, or if you wish I will just change it to make that third party to be tied like the defendant.

Mr. Cherry. Why not tie them by the same cord, by reference?

Dean Clark. That could be done. But the next part of it, "he may also pleaded defenses to and otherwise dispute the plaintiff's claims," --

Mr. Cherry (Interposing). That would go in, yes.

Dean Clark. Let me say on that that some of these cases have said he could not do that unless the plaintiff ~~plotted~~ pleaded against him. But I never saw any reason for that limitation. But if he ultimately may bring a very good case why should he not dispute it whether the plaintiff claims a judgment against him or not?

Mr. Lemann. But he could not do that in any way that the original defendant could not.

Dean Clark. That is correct. Now, on this jurisdictional point question, may I say that in the note I said: "It is not believed that independent grounds of jurisdiction and venue are necessary here; but further examination of the authorities will be made." Now, my staff did investigate further, and they feel that it is not--at least, perhaps it is not beyond question, but is reasonably clear, but I guess I had better include that in the memorandum that you want.

Prof. Sunderland. I did not understand which way they indicated.

Dean Clark. Not necessarily--

Mr. Donworth. Independent grounds.

Dean Clark. Independent grounds where you want to bring in a third party; it is the same transaction.

Mr. Lemann. It seems anomalous to have that rule that you could not do the other thing.

Dean Clark. I want to make that clear. This is on the co-defendant. I do not think there is anything under any Federal practice about bringing in a third person, but it is a claim against a co-defendant who is already in.

Mr. Lemann. Well, in a receivership, you can sue a third person without regard to the amount. If you get a receiver appointed in a Federal court, in Louisiana, that receiver can bring in any defendant without regard to the amount. He can sue anybody for any amount, although the

corporation for which he is a receiver was a Louisiana corporation and could not have sued that man in the Federal court. But the original plaintiff was a citizen of Massachusetts, and he came to Louisiana and got a Federal receiver appointed, and that Federal receiver brought in defendants where the corporation could not have done so.

Mr. Dobie. That is on the question of ancillary jurisdiction.

Mr. Lemann. Yes. I think that justifies the third person.

Mr. Olney. I do not think it justifies the co-defendant rule. That jurisdiction is maintained there as ancillary to the first suit, because he is an officer of the court.

Mr. Lemann. But I think it is on the theory that he is in the court--not on the theory that depends on his citizenship.

Mr. Olney. No, because he is an officer of the court.

Mr. Lemann. Well, I think at least we ought to examine the law.

Mr. Olney. There might be an entirely different controversy that exists in the receivership, and still the receiver can bring that suit.

Mr. Dobie. There a number of cases that Prof. Jevie brings up where interpleader has been sustained.

Mr. Lemann. I think it all should be covered by the memorandum, and see how far it goes.

Mr. Dobie. I think so too, and we need not discuss it further.

Mr. Mitchell. Shall we pass Rule 30, then, subject to this disclosure of this memorandum later?

Mr. Olney. There is one thing--I do not know whether the reporter has considered it or not. That is, if you are permitting here a suit by one defendant against another, would it not be advisable to insert some provision that unless the original plaintiff's right to relief is attacked in some way, he should be protected against delay by the filing of this claim in which he is really not interested.

Dean Clark. I think perhaps it would be a good idea to put it in specifically. We have, I suppose, our general provisions as to consolidation which I suppose cover it; but I see no reason why that should not go in as a specific precaution.

Mr. Mitchell. Did you notice that suggestion of the Minnesota Committee as to contribution or indemnity?

Dean Clark. Yes, I want to speak about that. In the last three lines of the first page of Rule 30, providing for separate trial, I have not said any more than, "The court in its discretion, as it finds convenient."

Mr. Only. I know, but I think this thing is going

to strike the bar as a possible way of delaying matters, and it might be well to have some special provision in there.

Mr. Lemann. I think it will delay matters anyway. It is an admonition which may be passed. We might limit this, If you put in, where the plaintiff is harassed or limited--perhaps we could leave it out. Now, this rule is more limited than some people wanted. For instance, Prof. Gregory of Chicago gave me a draft much broader than this. In general, this third party practice is reasonably new. They have it somewhat in New York and Wisconsin. It is rather a desirable thing, but the question is how broad is it to be made? You will notice for one thing that I have limited it to things arising out of the same transaction.

Mr. Mitchell. It is purely an indemnity provision, is it not?

Dean Clark. Yes.

Mr. Mitchell. To get indemnity there and third party contribution.

Dean Clark. Yes. Now, I have limited it because I thought it was a new thing to most of the States. I did not want to ask them too much. But I should be glad to have my caution overruled. I am naturally conservative, and if the Committee wants to be more radical I am willing. (Laughter.)

Mr. Wickersham. We will all take notice of that.

Mr. Mitchell. In Minnesota, they have said the thing n a very few words, so far as contribution and indemnity are concerned. They have said if he is a third party and not a party to the action he is entitled to contribution or indemnity. Then they go on and add two other cases. What do you think about this?

Prof. Sunderland. Those are probably the English cases. There are three branches of the English rule, and they probably apply them all.

Mr. Mitchell. What are the other two branches of the English rule, and why should they be excluded?

Dean Clark. One difficulty does arise about the difficulty of extending Federal jurisdiction. First, it is a question whether you can extend Federal jurisdiction, and second, whether you shoud. Now, as to how far you go, the broader you make the rule bringing in a third party, the more you run into this question of independent grounds of jurisdiction or if you are not doing that, you are really are drawing in third parties who could not otherwise be sued under the rules in the Federal court. That is about the problem. It is mainly here, I think, ~~is the~~ a question of Federal jurisdiction which makes this situation a little harder than it would be in the State practice.

Prof. Sunderland. Those second branches of the English rule are very technical. I do not think anybody

would know what they meant.

Mr. Mitchell. I do not.

Prof. Sunderland. But the first part, as to contribution, and indemnity, is very clear.

Dean Clark. They have not put in the details.

Mr. Mitchell. No.

Dean Clark. That is, that contribution or indemnity would only cover that sentence.

Prof. Sunderland. Yes, the last part of the first sentence.

Mr. Mitchell. I did not mean to press it. I just wanted information.

Dean Clark. I would like to know, Mr. Wickersham, if the Committee would like to extend this rule.

Mr. Wickersham. I am in favor of extending it, as far as the decisions of the courts allow.

Dean Clark. Well, this is not covered by decisions. Of course, the State courts are doing it.

Mr. Wickersham. Well, there are a number of Federal decisions where third parties were brought in under the New York rule, for example, and they sustained it. One of them is the case of Wichita Light Co. vs. Public Utilities Commission, 260 U.S. In that case A and C had a contract whereby C, the light and power company, agreed to supply A power at a certain price. A and C were both citizens of

West Virginia doing business in Kansas. B, the Kansas Public Utilities Commission, declared a rate higher than the rate in the contract, and directed C to supply A at that rate. A brought suit against B, a citizen of Kansas, on the ground that that order violated its contract rights with C. C. intervened in the suit between A and B. The Supreme Court said that the intervention of the Kansas company in the same suit did not take away theground of diversity of citizenship, on the ground that jurisdiction existed when the suit was begun. And it said that jurisdiction once acquired of that kind is not divested by a subsequent change in the citizenship of the parties; nor is such jurisdiction defeated by the presence of a party whose presence is not material. They said the Kansas company was a proper party but not a necessary party.

Mr. Mitchell. They talked about that, but they did not say whether they decided the case on that.

Mr. Dobie. I think that is plain. They did consider the intervention.

Mr. Wickersham. Yes, but there was jurisdiction which did not depend upon the citizenship of A and B.

Dean Clark. Yes, but the Federal court in New York has held that there must be diversity between B and C, or some other ground before jurisdiction can exist in the Federal court. I may cite for that 29 Fed. Repo (2nd) 72; 28

Fed.(2nd) 897). Mr. Wickersham. Yes

Dean Clark. It was said that diversity is not required for intervention, nor for cross-suits between defendants. But we are now dealing with bringing in a new party. Now, of course, what we have done is to try to make it more limited, with the hope of making the new practice stick.

Mr. Lemann. Would it not be better to ~~add~~ do this--that we could always find some case that ought to be within it, and we could always amend it--that the reporter has fixe it as far as it ought to go.

Mr. Donworth. I second the motion.

Mr. Mitchell. All in favor of adopting Rule 30, subject to this further examination of the Federal decisions on the jurisdiction will say "aye"; those opposed "no."

(A vote was taken and the rule, with the qualification, was unanimously adopted.)

Mr. Dodge. I want to raise one question about Rule 30 which is not jurisdictional. At the very end, the rights of the plaintiff against the new defendant are nothing at all. He has no rights, and the defendant gets execution only when he pays the plaintiff's judgment. Now, this being a rule applicable to both equity and law, I am wondering if that interferes with the right of a plaintiff who may be rich and applies as against an impecunious defendant of the right of the latter against a solvent guarantor. That, I think, i

a familiar ground of equity jurisdiction which gives the plaintiff direct relief against the guarantor, and I trust we are not interfering with that by providing that the plaintiff shall have no right against a new defendant.

Dean Clark. Well, you will notice that the plaintiff does have some rights against the defendant. The plaintiff may amend his pleading to include the third party, as if he might have originally joined such party.

Mr. Dodge. By an amendment in his pleading?

Dean Clark. Yes. All we have done is to stop it where he could not originally have joined him in the suit.

Mr. Mitchell. Let me interrupt to say that the court attendants are anxious to know what hours we are going to sit tomorrow, Sunday.

Mr. Tolman. I am going to suggest that we meet at 2 o'clock tomorrow, and have an afternoon and evening session so that we can really get a little rest in the morning. I think we will accomplish more if we do that.

Mr. Donworth. I second that motion.

Mr. Tolman. Another thing about it is that we can not get anything to eat in this neighborhood on Sunday; we would have to go a long way to find a restaurant.

Mr. Mitchell. That is why I was going to suggest that we meet at that hour: Instead of adjourning at 6 o'clock tomorrow and then coming back, we might run through until

7 o'clock, and make take a rest of 15 minutes during that time, and we can sit until 7 or 7:30 o'clock and then adjourn for the day, instead of running off and coming back and sitting late. I favor that as a good suggestion.

Mr. Wickersham. If we remain in session for five hours tomorrow we will do pretty well.

Mr. Olney. My impression is that you will not do as much in a straight five-hour session as you could in a broken five-hour session.

Mr. Lemann. I was wondering if you could. If you did that you should not come back at night.

Mr. Doble. What is your proposition about tomorrow?

Mr. Lemann. I should say begin at 10 or half-past 10 and meet for three hours and then come back later for three hours and then not come back at all at night.

Mr. Wickersham. Would we not do more if we met at 2 o'clock and sat until 7? I move that tomorrow we meet at 2 o'clock and sit until 7.

Mr. Olney. At the end of three hours you will find that ~~they~~ drag.

Mr. Wickersham. Well, we will take a 15 minutes recess.

Mr. Loftin. The only objection to that is that I have an engagement tomorrow afternoon.

Mr. Lemann. Mr. Morgan goes tonight.

Mr. Morgan. Yes.

Mr. Dobie. I believe that 2 o'clock is a good suggestion. I think at half-past 4 we should take a short recess.

Mr. Mitchell. You made a motion, Mr. Wickersham, that we meet from 2 o'clock to 7.

Mr. Wickersham. I did.

Mr. Donworth. Subject to such recess as can take.

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

Mr. Dobie. Then it is definitely settled that we will not sit tomorrow night or tomorrow morning?

Mr. Mitchell. We will not sit except from 2 to 7. And we will pass on to Rule 31.

Dean Clark. How about tonight?

Mr. Mitchell. I assume that we will sit tonight.

Mr. Loftin. Yes, I make that motion.

Mr. Mitchell. We will so understand it, unless there is some objection.

Mr. Donworth. In Rule 31, in the third line, there are two typographical errors. "His motion" should be "its motion" and the next word should be "or"; in other words, it should be "upon its motion or the motion."

Mr. Wickersham. In what line?

Mr. Donworth. The third line.

Mr. Wickersham. Well, that is a repetitionthere.

Mr. Dobie. It ought to be "its motion or the motion."

Mr. Wickersham. Yes.

Dean Clark. Yes, that is right.

Mr. Morgan. And following that, we say"The action shall deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied"--I should say there "new or affirmative matter therein," "the plaintiff may meet by denial, defense or counterclaim." I do not think you want to deem it denied, because that always put the other party to theproof, even though it is going to be confessed and avoided--

Dean Clark. Wait a minute. I think you are changing the effect of the rule. I think that is all right, but let us consider it. This provides for no reply except when it is required as a counterclaim.

Mr. Morgan. Yes.

Dean Clark. In other case you may have it on the order of the court. If you do not have it you have no reply, and then if you have no reply it has got to be deemed denied or you are unfair to the defendant.

Mr. Morgan. Not at all, if you provide that he may meet it in the evidence by denial, defense or claim such as

he may have. If you are going to deem it denied, then under other circumstances he has got to be put to theproof on it.

Dean Clark. Well, as a matter of fact, this is the ordinary code provision.

Mr. Morgan. I know it is and I always have objected to it.

Dean Clark. Well, I do not think it means very much in the course of a trial.

Mr. Morgan. It may not; but it means that you do not need to reply, and that you go to trial without an issue and without an affirmative defense.

Dean Clark. This is new to me, but will you give it again?

Mr. Morgan. My point is that when you abolish a reply that you go to trial without an issue whenever there is an affirmative defense, and that the case is then tried on the evidence without the pleading.

Mr. Wickersham. Is that not the whole theory of it?

Mr. Lemann. What is your suggestion? What language do you want to take out or leave in?

Mr. Morgan. I want to take out the notion that any new or affirmative matter in the reply shall be deemed denied.

Mr. Lemann. Would it suit you to take that out and say "The plaintiff may assert any defense without further pleading"?

Mr. Morgan. Yes, "and the plaintiff may meet it by denial or affirmative defense.

Mr. Wickersham. Then you have to have rejoinder.

Mr. Morgan. No. You are talking about the evidence.

Mr. Lemann. Could you get it by omitting the words from the word "any", the last word in line 4 down to the word "he" in the sixth line, and inserting the words "and the plaintiff." It will then read, "The action shall be deemed upon the filing of the answer, and the plaintiff may assert any defense or claim which he has to any new or affirmative matter set up in the answer."

Mr. Lemann. What do you mean by "assert"?

Mr. Morgan. No. My notion is that he may meet the affirmative matter in evidence, by denial, defense or claim.

Mr. Lemann. "Make any defense to the counterclaim." Would that cover it?

Mr. Morgan. It is not a counterclaim I am talking about. It is where you have an affirmative defense other than a counterclaim made by reply.

Mr. Wickersham. The usual provision is that all of that shall be denied without rejoinder.

Mr. Morgan. Quite so.

Mr. Wickersham. That is the Equity rule.

Mr. Morgan. Yes, and my assertion is that it is a mistake; it does not mean anything.

Mr. Wickersham. Yes, it does.

Mr. Dobie. The defendant has to prove that new matter.

Mr. Wickersham. Yes.

Mr. Dobie. You do not want to put him to that trouble.

Mr. Morgan. No, I do not. All I want to put in is it can be at issue and then he can put in any evidence or disclosure in avoidance that he has.

Mr. Mitchell. This puts the burden on the ~~defendant~~ plaintiff to disprove the allegations of the answer; whereas if you put it in the answer it puts the burden on the defendant to establish it.

Mr. Morgan, Suppose you have your opening statement. You have your affirmative defense and it is not met by reply. Then you have your opening statement. Will not the opening statement disclose whether the plaintiff intends to meet the averment of the defendant by defense and avoidance, or by denial? If you put it this way, he may put the defendant to the burden of an affirmative defense, and then he can put the defendant to the proof, when there is no dispute in fact on the matter.

Mr. Dobie. Take a suit for the sale of goods, and in the answer the defendant sets up infancy. Now, the plaintiff is perfectly willing to admit infancy, and wants to say that these goods were necessaries. I think that is the kind

of case Mr. Morgan has in mind.

Mr. Wickersham. I have never known embarrassment to arise out of the provisions of the code, that in pleading facts in replym any facts alleged in reply which were not responsive to the answer shall be taken as though put in issue, without the need of any additional pleading.

Mr. Morgan. I have not either, but I do not see why you should say that they should be deemed denied.

Mr. Wickersham. That is the language used in all codes.

Mr. Tolman. And in the Equity rule.

Mr. Wickersham. Yes, in the Equity rule.

Mr. Olney. I would like to ask the reporter if the intention conception of these rules is not that, as between the plaintiff and defendant, the pleadings shall stop with the answer?

Dean Clark. Yes.

Mr. Olney. Then what do you mean by saying, "Unless the answer assert a counterclaim, no reply shall be filed." You cannot reply in any case.

Dean Clark. In case of a counterclaim you do. But we call that answer a reply.

Mr. Olney. But you go on and say, "No reply shall be filed without special order of the court."

Dean Clark. Yes.

Mr. Olney. Why should he file an answer unless his counterclaim is filed?

Dean Clark. Well, this is essentially the New York rule.

Mr. Wickersham. In New York you may move to require the plaintiff to reply to new matter inserted in the answer; and you get then an admission or a denial, and you do not have to go to work and prove a lot of things that are admitted

Mr. Olney. Is that satisfactory, or does it cause delay?

Mr. Wickersham. I have never known them to require it. It is very seldom used.

Mr. Morgan. That is to limit the plaintiff.

Mr. Wickersham. Yes, that is to limit him.

Mr. Olney. I do not know of any code State that requires that.

Mr. Wickersham. It is to eliminate endless controversies.

Dean Clark. The rules on reply--some of them have it as to all new matter.

Prof. Sunderland. I think California is very peculiar, in that it has no reply.

Mr. Olney. So far as the counterclaim is concerned, that is different, but suppose there is affirmative matter set up by way of defense.

Prof. Sunderland. It is very common not to allow reply.

Mr. Morgan. Supose you have a personal injury action, with a defense of release, and if the release is deemed denied, has the defendant got to go on and prove the release, when the real defense is that it was obtained by fraud?

Prof. Sunderland. Under the language of this I think he would have to do so.

Mr. Mitchell. I think, too, it is a question of the burden of proof. It seems to me that if you strike out that clause "Shall be deemed to be denied and leave it "Shall be deemed at issue" it will be all right.

Mr. Morgan. All I am trying to do is I am trying to ~~require~~ ask why you should put the defendant to any greater burden with reference to his affirmative defense than you are doing with reference to the palintiff, with reference to his claim. You have taken great pains here to require the defendant to admit the matters which are not to be in controversy, and here you are making a special provision that the defendant has got to be deemed to have denied every one of his affirmative defenses, and then theplaintiff may not only put him to proof, but he may confess and avoid.

Mr. Mitchell. Well, take the release case that you referred to. There is an allegation and an answer as to the ~~relief~~ release claimed.

Mr. Morgan. Yes.

Mr. Mitchell. Now, on your theory if it is done the way you want it, suppose the plaintiff not only claims the release was obtained by fraud, but denies that it was ever executed?

Mr. Morgan. Yes.

Mr. Mitchell. Now, would it not be true under your system that the burden would be on the plaintiff to show in the first instance that he did not sign it?

Mr. Morgan. No.

Mr. Mitchell. Or would defendant be in the position of having to go on the stand and prove that it was signed?

Mr. Morgan. My notion was simply this: That the defendant can meet that in any way he sees fit, by denial; but maybe the burden of going forward by my system would be great.

Mr. Mitchell. That is just it. In trying my case I will want the defendant to go on the stand and have the burden of proving that the document was never signed, and the privilege of cross-examining him, instead of having put my witnesses on and having the burden of proving that it was signed.

Mr. Morgam. I did not want that. All that I am saying is that there ought not to be a statement in the rules to the effect that the matter is necessarily denied. My point is

that you ought to say nothing about it, and the opening statement of counsel would state whether it is or is not denied. Because in these cases, if the pleadings do not say what the theory of the controversy is, you can get the theory of the controversy from the opening statement of counsel. You go to trial without an issue in all these cases.

Mr. Wickersham. You ought not to.

Mr. Morgan. But you do.

Mr. Wickersham. You ought not to, and we ought to avoid as far as possible haling the defendant or plaintiff into court without knowing what he is going to meet. Now, the only reason for this provision was to do away with the necessity for rejoinder for new matter set up in the answer; and it seems to me that it is in the interest of justice that the plaintiff confronted with new matter, or the defendant having new matter, should know whether his assertion is going to be disputed by the plaintiff, and the best way to do that--there are two ways. Oneis by rejoinder and you do not file pleadings for indemnity; therefore the new facts are taken as denied and are put in issue.

Now, under this new system, and with some of the codes, you get an examination of the parties before trial, and that brings it out. But the pleadings which, after all--the sole purpose of pleadings is to show what the intentions are between the parties. I think you ought to have some kind

of issue framed on the answer, except as to new matter.

Mr. Morgan. I withdraw my suggestion if you think it will not make any difference.

Mr. Olney. I will renew my question to Dean Clark. He said that the idea was that in certain cases the reply might be required.

Dean Clark. It is ordered by the court.

Mr. Olney. If it is ordered by the court, then your words here "shall be filed" should be changed to "shall be required."

Dean Clark. Of course, I should change "filed" anyway. I suppose it is served on the other side. But perhaps "required" would be better. "Filed" is the word that I use all the way through, meaning what you mean by "served" I suppose.

Mr. Olney. No.

Dean Clark. But "required" is all right. I mean no reply shall be required without special order of the court.

Mr. Dobie. Without even very much evidence, by affirmative order of the court if a man files it would it not be stricken out?

Dean Clark. Yes, I should say "no reply shall be had. On the idea that Mr. Morgan had, on any plan excepting by changing our scheme and going to the Minnesota rule, which is to reply to any new matter, which is not a new--

Mr. Morgan (Interposing). Then you have to have the same provisions as to new matter in the reply. So it does not make any difference where you "get off."

Dean Clark. Yes, but whether we put in your language or not, the defendant would not know until the trial what he was up against; then he would know something about it.

Mr. Morgan. Well, that is all right.

Mr. Dobie. There are a good many theoretical ideas that can support what Mr. Morgan says, but I do not think it is very important.

Mr. Morgan. I do not think it is very important.

Mr. Dodge. How about the provision in that rule that new matter must be regarded as in issue without further pleading? And leave out the suggestion that it shall be deemed to be denied.

Mr. Morgan. Yes.

Mr. Wickersham. Yes; but you go further and allow the plaintiff or defendant under certain circumstances, where there is new matter, to require a reply.

Mr. Dodge. Yes, in a release case he might require it.

Mr. Morgan. Yes; I think the motion for reply will take care of it.

Mr. Olney. I think any reply should be submitted to the court.

Mr. Dodge. Yes. Wherever it is required at all.

Mr. Olney. They carried that out under the common

law to an unreasonable extreme.

Mr. Dodge. It will not arise often.

Dean Clark. Yes, and it is a compromise which is already in the Equity rule, which is another reason for following it. In the State codes there are three rules on this subject. In a limited number of States no provision is made for reply, although in some they speak of "answer to a counterclaim"--California and Arizona. In a greater number provision is made for reply to the counterclaim which is denied, and that the court may order a reply. The third rule, in a greater number of States, is that a reply is necessary in order to reply to and avoid any new matter contained in the answer. Now, on that latter rule, which is probably more frequent in the code States, you have a certain ambiguity as to whether you have new matter or not; and the matter is left somewhat up in the air; and in trying to strike a balance, backed also by having the Equity rule pointing the way, I took the middle course.

Mr. Morgan. I think that is a good reason for taking the Equity rule in the report.

Mr. Wickersham. I move that, on the general subject that Rule 31 as drafted shall stand.

Mr. Lemann. We are going to change the language.

Mr. Wickersham. Yes, I do not mean the language,

but the general scope of it.

Mr. Tolman. I second the motion.

Mr. Olney. With that ~~permission~~ for service remaining.

Mr. Lemann. Yes, and the reporter has another change.

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

Mr. Mitchell. We will now take up Rule 32.

Mr. Donworth. In the fourth line, reading it right through from the beginning it says:

Rule 32.

"Answer or reply to amended complaint or answer.--- When an amendment to the complaint shall be made ~~as to~~ after answer filed, the defendant shall put in a new or supplemental answer within ten days after that upon which the amendment or amended complaint is filed, unless the time is enlarged or it is otherwise ordered by the court."

It will often happen that the amendment is of such an inconsequential character that ten days is utterly too long. Of course, it might have to be extended, but the implication here is very strong that at least ten days delay follow from a new answer. How would it do, at the end of the fourth line, where it says "unless", to make it read: "unless a different time is ordered by the court."

Mr. Cherry. Yes.

Mr. Morgan. Very frequently the court says that the original answer may extend to the amended complaint.

Mr. Donworth. Yes, "unless a different time is ordered by the court."

Mr. Mitchell. There is nothing said here to the effect that unless a new answer is put in your answer should be deemed to stand as a denial. Would that be sufficient?

Mr. Cherry. Well, if you say "unless ordered by the court," because that would include also the Chairman's suggestion that the answer stands as a denial unless there is an inconsequential amendment.

Mr. Donworth. Yes, I think that will have a stronger implication xxx that the ten days should stand.

Mr. Morgan. Yes, and make it "unless otherwise ordered by the court."

Mr. Mitchell. Why do you hawe to get an order from the court?

Mr. Cherry. Well, this amendment after answer would be on a motion, and it would be part of the order allowing the amendment, I take it.

Mr. Mitchell. Not necessarily, because you can get an amendment before the time--

Mr. Cherry (Interposing). Not under these rules.

Mr. Mitchell. Not under these rules?

Mr. Cherry. No.

Mr. Mitchell. You can amend within the original time to answer. Suppose you have twenty days to answer and it

is amended within ten days; you cannot answer within twenty days.

Mr. Morgan. No.

Mr. Donworth. Well, probably a very large proportion of amendments do not requires any answer. Why do you not say "may"?

Mr. Mitchell. Instead of "shall"?

Mr. Donworth. The tendays as a matter of course is very liberal. Of course, it may exceed ten days, but allowing ten days as a matter of course is very liberal.

Dean Clark. Yes, I think so. All of this rule, even the part you are improving, is the Equity rule.

Mr. Loftin. Why not put in "in an absence of an amended answer the answer shall be deemed to be to the complaint as amended"? That is the practice in my State.

Mr. Morgan. That is the practice in my State.

Mr. Mitchell. I do not think it is necessary to get an order to that effect.

Mr. Loftin. Not an order, but a straight rule. That would leave it up to you to allow it either ~~leave~~ your answer stand to the amended complaint or file a new one.

Mr. Wickersham. If you put it "may" it would cover that.

Mr. Mitchell. Do you not think there should be something, Mr. Morgan, that would cover that?

Mr. Dodge. Suppose it should read "If the amendment requires other answer"?

Mr. Loftin. I make that motion, that some phraseology of that kind be used.

Mr. Olney. In providing for the answer in case of amendment, you have to differentiate between the case where an amended answer is put in--that is an answer in toto, and the case where an amendment is merely a special amendment by itself, or where there is [illegible] the amended answer put in--which is frequently done--or a plea to the amended complaint is put in, the original answer can stand. But when it comes down to a special amendment going in, as is frequently the case, your original answer cannot act.

Mr. Loftin. I am not insisting that it shall. I only insisting that if the defendant thinks his answer is sufficient to the amended complaint, that he can let it so stand. But if he thinks it requires an answer then he can answer it.

Mr. Olney. If nothing more than an amendment is made to the complaint, the original answer stands without any order or anything further.

Mr. Loftin. The rule does not say so. It says he shall answer.

Mr. Wickersham. No, it says "may."

Mr. Loftin. It says, I think, "shall."

Mr. Wickersham. I thought you took that out and said "may."

Mr. Donworth. When the new matter comes in I think the plaintiff is entitled to know whether the defendant denies or admits, and so there should be some provision requiring either a new answer or the defendant to stand upon his old answer.

Mr. Loftin. That is the suggestion I made, and I made a motion to that effect.

Mr. Morgan. And I seconded the motion.

Mr. Donworth. And unless the time is enlarged, it should be changed to read "unless otherwise ordered by the court." Is that the idea?

Mr. Cherry. Yes.

Mr. Mitchell. There was a motion made about putting in some provision about allowing the answer to stand as an amendment to the claim.

Mr. Donworth. It does come often.

Mr. Lemann. Your point is that the defendant must say what he wants to do; he must say within a time not to exceed ten days. Is that what it comes to?

Mr. Loftin. Yes.

Mr. Mitchell. Somebody has made the point, however, that he put in some new and important stuff, and the may not make any reference to it, and he allows his old answer to

stand. Does that embrace that?

Mr. Donworth. Well, if his old answer is not so framed as to admit that--

Mr. Mitchell (Interposing). He has admitted it.

Mr. Donworth. Yes, he has admitted it.

(The motion of Mr. Loftin was thereupon voted upon, and it was unanimously adopted.)

Dean Clark. Then the brackets come out, because you do not have a default.

Mr. Mitchell. You will have to recast that whole section.

We can pass on that Rule 33.

Mr. Olney. Before we leave that, I understand that when an amendment is made to a complaint, that the provision simply is that the defendant has the right to allow his old answer to stand, or to answer it if he wants to do so.

Mr. Mitchell. Yes; it does not make any difference.

Mr. Wickersham. It is an amended complaint, an amendment to the complaint. There is a distinction between those.

Mr. Olney. Then what is the requirement as to the answer?

Mr. Mitchell. If it is not answered, and the defendant allows his old answer to stand, the situation is very different; but the chances are that the defendant will put

in a new answer, and he does not want to admit the new allegations in the complaint which are not affected by his orignal answer.

Mr. Olney. I think if an amendment is made, it should be answered absolutely.

Mr. Mitchell. It is absolutely safe as it stands, if he denies it. Why should he have his stenographer write it over again?

Mr. Olney. The rule is that he shall answer; if he can stipulate in the matter, or getting a special order, all right; but so far as a general rule is concerned, he should be required to answer.

Mr. Mitchell. He has answered, and has an answer in that he thinks the provision is all right. But if he is wrong, the provision as to new matter is admitted.

Mr. Dobie. What he would do is just to file the old answer again.

Mr. Olney. You are failing to distinguish here betweem an amended complaint the motion of the plaintiff, and where an amendment is made to the complaint by the insertion of new matter. Now, the answer is already made to the complaint as it originally stood. The amendment inserts new matter, and that new matter ought to be answered.

Mr. Mitchell. Of course, if the old answer does not

answer it, then it is admitted, is it not? And that is so worded as to deny it; then why should he write it over again?

Mr. Olney. The wording of this rule as you have it would not, in our State imply that at all. We frequently specify, when an amendment is made in open court, that the answer shall stand as an answer to it. But implied in that always is the idea that the new material is denied, and must be proven by the plaintiff. It does not make any difference whether the old answer touches it or not. The implication always is, when that statement is made, that the plaintiff must prove his new matter. It is just a loose way of practicing; but that is what it means; but when you put it into a rule, it does not mean that.

Mr. Donworth. I have the impression that, when we had changed all the allegations of that paragraph, and new matter was in a new paragraph 10, and he left his answer stand, he has again denied all that is in 10, even though it has been changed.

Mr. Olney. What I am saying is that the court, under those circumstances--which frequently take place--will say, "We will let the old answer stand", and they mean by that that the new matter is denied.

Mr. Mitchell. They do not mean that. They mean it is admitted. They mean that the old answer is to be deemed

filed; and that if the old answer has allegations which amount to a denial it is denied, but if the old answer is so drawn as to admit the new allegations in the complaint, why, they are admitted; but if he has a general denial of the complaint in his answer, it follows that he has denied everything. The defendant always has to make up his mind whether or not the old answer means that he wants to meet the allegations of the amended complaint. If he is satisfied with his old answer, and would not change a word as an answer to the amended complaint, then he allows his answer to stand, and the effect of that, in substance, is to save the old answer. That is the common practice that I have been accustomed to.

Mr. Lemann. I do not think there is any doubt about that. If he is satisfied, and the defendant thinks nothing of it, and he lets ten days pass--or any other time--then he has stood on his original answer.

Mr. Mitchell. Yes.

Mr. Lemann. If there is something in the amended complaint which he has not answered, it is admitted.

Mr. Wickersham. That is right.

Mr. Mitchell. Yes, that is right. And it saves a lot of unnecessary repetition.

We will now pass to Rule 33.

Mr. Morgan. What is the idea of exceptions? That is an equity term, and it is not applied to law cases.

Dean Clark. Perhaps that is not necessary. But since exceptions were abolished in equity, perhaps we do not need to repeat that.

Mr. Morgan. I should not think so. You ought to put"demurrers"if you put "exceptions" there.

Mr. Wickersham. I think we ought to retain that because it applies to exceptions in suits in equity.

Mr. Morgan. It applies to demuerrers also.

Mr. Mitchell. When you deifine things which you can or cannot do in the pleading, that excludes everything else.

Mr. Morgan. Well, why should we not abolish "exceptions"? Could you not take exceptions to a plea in equity?

Mr. Wickersham. How could you take exception to a plea inequity ? You move to dismiss, on the ground that it fails to state a cause of action or for some other reason, but you take exception to it.

Mr. Donworth. You did under the old common law practice.

Mr. Wickersham. The old chancery practice.

Mr. Morgan. Yes.

Mr. Wickersham. For that reason, they put in this rule abolishing exceptions.

Dean Clark. We have put in a provision as to that, and as to demurrers.

Mr. Morgan. All right; but I do not see why you

should aboliish exceptions to the answer, and not to the bill.

Mr. Dodge. If there is any such thing as exception to the bill.

Mr. Morgan. Was not that the term we used?

Mr. Lemann. We excect to petitions at law.

Mr. Morgan. It may come from the so-called civil law.

Mr. Mitchell. I wonder, when we state specifically what matters the exceptions are allowed, that does not exclude all other exceptions, and it is not necessary to go on and say, "This is abolished and that is abolished", if our formula is complete.

Mr. Donworth. Further, they have already been abolished, and we should only say there therefore"abolished?" (Laughter.)

Mr. Dobie. It does not hurt anything in there. The old Equity rule states it, and that was a well known device in the old Equity rule , and you are following that practice to a great extent. Would it not be well to leave it in?

Mr. Mitchell. If you leave it in, is there not a question whether demurrers are left in?

Mr. Dobie. Well, that was the procedure under the old Equity rule.

Dean Clark. That goes back t the old Equity rules, as to the old demuerrers and exceptions, and pleas and ex-

ceptions to answers.

Mr. Dodge. I wish you could wish you could put it in some ways o that it would seemto be a new act of abolishment. It is continued as abolished. (Laughter.)

Mr. Dobie. That may revive some ancient things.

Dean Clark. We should say "exceptions to the answers are abolished."

Mr. Mitchell. How about "shall not be applied"?

Dean Clark. That is the other expression I used.

Mr. Dodge. "Shall not be applied," that is better.

Mr. Lemann. I notice in these suggestions of the local committees, that one of them fixes the time for filing a motion to strike; and it raised a question of whether it should be one day or fifteen days after the filing of the answer. That was the suggestion of one of the local committees; and your suggestion is that it be permitted to be done in part. I do not know whether that would work better if you strike part of it out.

Mr. Mitchell. This time proposition is a matter that has been referred back to the Committee for their consideration. There were changes made in the prior rule that upset the whole schedule.

Mr. Lemann. But there is no time limit in this draft

here.

Mr. Mitchell. Well, we had some limit about when pleadings generally should be interposed, and we should word it as to include a pleading in any--

Dean Clark (Interposing). Yes, we have to put in something new. Mr. Donworth suggested a rule on that, and I think we will have to adopt his rule or some similar rule. We have suggested it as an addition to Rule 37.

Mr. Mitchell. I think it is important somewhere in the rules to have a definite statement of just the time that is allowed for these things--lawyers will look for that.

Mr. Lemann. How about the suggestion to strike out "exception for insufficiency of an answer or abolish," I am just asking for information, and to direct attention to it, and not suggesting that he should strike that out.

Dean Clark. Well, I suppose you are referring to the defendant's counterclaim, and where it says, "to strike such defense or counterclaim."

Mr. Lemann. But the Rule says that the plaintiff may move to strike for insufficiency, "on showing that the decision of the motion would finally dispose of the action." I do not quite catch that.

Mr. Morgan. That is the end of that.

Mr. Olney. Well, if it finally disposes of the counterclaim, why submit an amendment, instead of taking

the motion as amended.

Mr. Cherry. That raises the question that I intended to raise.

Mr. Lemann. I have a case now in which I may wish to strike in the Federal court, which may not dispose of the action, but may dispose of a large part of it, so as to clear up the matter and know that there are certain things about it that I need not worry about. I do not know whether it is a question of procedure or not, but I do not know whether I could do it under these rules. At first I thought we could not do it under these rules, because it might take out the whole case. Now, my man may not want to take out the whole case; only two-thirds of it. The answer sets up an affirmative defense and may be now good. It may be good as to a small part of the case. I should have to strike all of it out.

Mr. Wickersham. This only covers that part. When you have got that stricken out, in other words, it may be a good defense.

Mr. Lemann. But as I read this at first, I thought it required me to get rid of the entire defense.

Mr. Morgan. That is what it means. That is to prevent you from making motions to strike out this sentence or that sentence; you have to take the whole defense or

counterclaim.

Dean Clark. Yes.

Mr. Lemann. I assume he did not mean to recommend that.

Dean Clark. What I meant was that you had to take the counterclaim as a whole, but do not have to take the answer as a whole.

Mr. Wickersham. Well, you have got in the provision for summary judgment. The answer does not require summary judgment.

Mr. Olney. This is not a motion to strike out particular sentences. It is a motion to strike out the ground of insufficiency.

Mr. Wickersham. Of the facts?

Mr. Lemann. Not the whole answer.

Mr. Olney. The insufficiency of the particular answer or counterclaim that is alleged.

Dean Clark. Correct.

Mr. Olney. If a man is making a motion of that character, why should he be required to say if the motion is granted it will finally dispose of the matter?

Mr. Wickersham. Do you mean of the whole suit?

Mr. Olney. I mean reading this language here--you refer to the rule as worded here, and you will see what the point was.

Mr. Wickersham. I understand from this that the effect of the motion--it is the affirmative defense on the counterclaim that you may to strike out.

Mr. Olney. Well, if he is moving on the insufficiency of the counterclaim.

Mr. Morgan. It takes the place of the old demurrer and separate defense on counterclaim; is that it?

Mr. Olney. No, I am saying that the words here--he cannot move to strike out the affirmative matter on the ground that it is an insufficient defense.

Mr. Morgan. I thought he could.

Mr. Olney (Continuing). Without showing in addition, as a preliminary condition precedent to making that motion, he has got to show that the decision of the motion may finally dispose of it.

Mr. Morgan. Of the case?

Mr. Olney. No; of the stricken matter; that is the ground of it.

Mr. Mitchell. I should think striking it out would finally dispose of it.

Mr. Olney. Yes.

Mr. Mitchell. Do you mean you cannot amend?

Mr. Olney. No, you cannot amend, it is granted. I do not know what they had in mind.

Dean Clark. I was trying to limit motions to ~~striking~~ strike

out portions of the answer, and I do not think it is done quite as clearly as it might be. What I meant was that the plaintiff may move to strike out, and the decision of the motion would ~~be one that would~~ merely be one that would pass upon the defense or counterclaim.

Mr. Morgan. Does that mean that the old demurrer would do?

Dean Clark. Yes, and that you cannot strike out a portion.

Mr. Olney. That is not done by this rule.

Dean Clark. I think the language could be improved.

Mr. Lemann. You can move to strike the answer; you cannot move to strike thebill. Is that right?

Mr. Dodge. Yes.

Mr. Loftin. I think we went all over that in Rule 26.

Mr. Wickersham. Now, you have in Rule 33, according to this "but if an anaswer set up an affirmative defense or counterclaim, the plaintiff may move to strike it out for insufficiency", and so on; "and if the court finds that such decision will so dispose of it, the court may proceed to a hearing of the motion and strike out the matter or permit amendmnnt in accordance with the provisions of Rule 22."

Mr. Mitchell. Judge Olney's point is that he objects

to the words ~~saying~~ "on showing that the decision of the motion may finally dispose of" the matter. The point, as I see it, is why put that in, when in the next provision you have a provision for allowing amendment, which would prevent the granting of the motion finally disposing of it. Is that it?

Mr. Olney. Exactly. I think the idea that Dean Clark and the object he is seeking to accomplish is absolutely good, but it seems to me that it does not go to motions to strike because of the insufficiency of the answer. If you are to provide here--it might be very wise to put in a rule that there should be no motion made to strike out matter as redundant, evidential or immaterial.

Mr. Wickersham. Or impertinent or scandalous.

Mr. Olney. Or impertinent or scandalous, unless it appears that the granting of that motion will facilitate the final hearing of the case.

Dean Clark. That is what I am trying to do in this latter rule.

Mr. Olney. That does not go to motions to strike for insufficiency. That is really the old demurrer.

Mr. Dodge. What is the matter with "Equity Rule 33?

Dean Clark. I was trying to limit the filing, that is, I was trying to make it where you have a defense that is insufficient and it can be heard; I was trying to avoid things being put to a hearing when there was not anything

of substance there. I think you are correct. The language does not very well say what I had in mind.

Mr. Lemann. Why should you permit them to strike out an answer as insufficient when you would not permit them to strike out a bill?

Dean Clark. Well, so far as the complaint is concerned, you attempt to set up the insufficiency in your answer. There is no answering an answer.

Mr. Lemann. No; but you set down a case under Equity Rule 29.

Dean Clark. 26.

Mr. Mitchell. There is a difference between the two if he makes a motion of that kind.

Mr. Wickersham. There is a motion for short judgment, which is a short way for testing the sufficiency of the suit or answer.

Dean Clark. That is true.

Mr. Wickersham. And is a much more efficiency way than this, because it is not limited to the defendant's pleading.

Mr. Olney. I do not see how you can put on a restriction on the right to strike out the answer as insufficient, but you can very well put a restriction on any motion to strike out part of an answer as redundant or immaterial.

Dean Clark. I think I could put in here something similar to the provision I have in Rule 37, that you would

not have a hearing unless there was a preliminary finding that it would--

Prof. Sunderland(Interposing). I says here that it will always dispose of it; if it is attacked on the ground of insufficiency it will always dispose of it.

Mr. Mitchell. The trouble is you say it will always dispose of it, and then in the next breath say that it can be amended, so that the granting of the motion would not finally dispose of it.

Prof. Sunderland. That may be.

Dean Clark. I put it in because of what I had taken away earlier--and which you have now taken a way from me. (Laughter.) I put in, you will recall, that no motion would go to a hearin unless it was found that it would dispose of things; that all motions would come in, with the reasons attached. That was in Rule 21, or whatever it was.

Mr. Lemann. Rule 26.

Dean Clark. No, not Rule 26, Rule 21. You remember it?

Mr. Morgan. Yes.

Dean Clark. And you would never have a hearing if that rule applied, so that I have stated the converse here, that you would have a hearing if there was ~~xxx~~ any motion.

Mr. Olney. I think I have now what Dean Clark had in mind; so I suggest that this rule be passed back to him for

redrafting.

Mr. Morgan. Is there anything more than that you may strike out for insufficiency?

Dean Clark. Well, that, plus limiting it and having it limited by the court, unless you did something.

Mr. Morgan. Oh.

Dean Clark. Rule 22 is the amendment rule, as I understand it. Rule 9 is the one where I provided for no hearing ordinarily, and you remember that you took it out there. Now I had this drawn on the basis of that previous rule; there would be no hearing ordinarily, and this was a way of getting a hearing.

Prof. Sunderland. Your point is Rule 33?

Mr. Tolman. I submit this suggestion: Let the rule stand as it is until line 4 and the first three words of line 5, and then insert in relation to the rest of that rule, the last sentence in the Equity rules.

Dean Clark. I think that will probably do it, but this has got to be recast, and I shall be glad if you will let me fix this.

Mr. Mitchell. I think we have it plain that we can do that, unless there is objection? Are there any other suggestions?

Mr. Olney. I would like to have this suggestion of Dean Clark's carried into the new rule, that there be put a

restriction upon motions to strike out part of an answer as immaterial or edundant or evidential. Those motions are constantly used for purposes of delay, and there ought to be a restriction putupon their making, unless it appears definitely that they will facilitate the final determination of the cause.

Mr. Mitchell. We will now go to Rule 34.

Mr. Donworth. With your permission I would like to go back to Rule 32 now for a moment. Before I give the language, I would like to say that I think the whole administration of justice depends very much upon the facility of trial amendments. It so often happens that the case of a plaintiff or defendant is a little different from what he alleges, but it occasions no surprise, and I think trial amendments should be incorporated. Now, this makes no provision for trial amendments, and implies that there shall be making of amended pleadings in a very extreme case. That was true of the Supreme Court practice when I was a master. And without asking approval of this, as Dean Clark has rewritten Rule 32, I want to end up this proviso as follows: "Provided, that in the case of amendment to the complaint or to the answer made during trial, the time allowed for pleading thereto by the adverse party shall be in the discretion of the court."

Dean Clark. I think that is a good suggestion. I do think there very likely might be amguity between Rule 32 and 22. Rule 22 was a rule for very free amendment, and this looks as if this were an amendment in advance of the time.

Mr. Donworth. That is all I have to say.

Dean Clark. I think in the first line of Rule 34 the word "either" might well become "a", so that instead of saying "upon application of either" it will say"upon application of a party."

Prof. Sunderland. And in the first line of the second sentence the word "necessary" should be "permissive."

Dean Clark. "Shall be permissive."

Prof. Sunderland. "It shall not be permissive in any supplemental pleading to set forth any of the statements in the original pleading, " and so on.

Mr. Olney. Shall not be permissive.

Mr. Cherry. Unless--

Mr. Dobie. "Unless the special circumstances of the vase may require it."

Dean Clark. I think theidea of both is the same, but it seems to me that here you are likely to have a mandate and then nothing to carry it out.

Mr. Cherry. Well, as you have it it says "shall not be necessary unless special circumstances require it."

Mr. Morgan. Yes.

Mr. Donworth. Suppose a new suit occurs. That is the usual situation. You have got a release, perhaps. Is it not necessary sometimes to set forth, by matter of inducement, some of the things you said in the original pleading? You say it is not necessary to do that, but you can tell your story.

Dean Clark. I am shocked at the way you Minnesota gentlemen criticise the Supreme Court. (Laughter.)

Mr. Cherry. I do not care whom you criticize.

Mr. Wickersham. It has become the fashion. (Laughter

Mr. Cherry. But I have noticed that some of your worst language comes from those old rules. I did not suppose we could not criticize that more freely than your language.

Mr. Mitchell. Is that sentence necessary at all?

Mr. Cherry. No.

Dean Clark. They have a separate rule in equity on the opposite page.

Mr. Dobie. Rule 35.

Mr. Mitchell. That is a different thing.

Mr. Dodge. ~~That is a different thing.~~ That is supplemental? Who would ever think it was supplemental.

Mr. Mitchell. Supplemental and only covers enough to show that it is additional. I do not think we need that sentence.

Mr. Donworth. While we are discussing that I do

want to criticize the Supreme Court. Take that expression "or if which he was ignorant when it was made." That is in the old rule. That has never been the practice, to amend your complaint when you discuss some important fact of which you were ignorant when the first complaint was made--never been the practice to make a supplemental pleading.

Mr. Morgan. Certainly not. That is an amended complaint.

Mr. Donworth. Although the Supreme Court said that, I did not think it should be in here.

Mr. Mitchell. That ought to be stricken out and left to the amendment clause to take care of.

Mr. Dobie. That is the best usage.

Mr. Mitchell. Is that agreeable, Dean Clark?

Dean Clark. Yes.

Mr. Mitchell. We are only striking out "or of which he was ignorant."

Mr. Donworth. I also move that the sentence "shall not be necessary," down to "require it", shall also be stricken out.

Mr. Mitchell. Is there any second to that motion?

Mr. Cherry. I second the motion.

(The motion was unanimously adopted.)

Mr. Olney. In that connection, it is not really neces-

sary, but it might assist as a practival matter if you add some such statement as this "Statements in the original pleading to which the supplemental pleading is a supplement shall be deemed included in the supplemental pleading." So that that would get out of the practice of repeating. But there is nothing important about that at all.

Mr. Cherry. It is a supplement.

Mr. Dobie. That is what"supplement"means.

Mr. Olney. Other lawyers do not look at it that way.

Dean Clark. I do not suppose there will be much trouble anyway. We have a provision for incorporation by reference.

Mr. Mitchell. Is that all of Rule 34?

Mr. Dobie. Does that last sentence go in, the one in brackets?

Mr. Donworth. There has been no motion made as to the matter in brackets.

Dean Clark. The reason I put those brackets is because I thought it would be implied without stating it. Do you want to state it?

Mr. Wickersham. I would say it is not necessary. I move that it be stricken out.

Mr. Cherry. I second the motion.

Mr. Lemann. I was wondering whether the sentence is worth saving. Are any lawyers going to ask about it?

Mr. Mitchell. As was said a moment ago, that restatement can be general; it does not say anything else could be

done. If we say nothing about supplemental pleading, are we adopting it?

Mr. Lemann. I would think that the lawyers might believe that the Committee had overlooked this thing.

Mr. Cherry. And they have been going under the Federal equity practice.

Mr. Wickersham. We have in a provision for supplemental pleading, have we not?

Dean Clark. Yes, this is such a provision.

Mr. Cherry. Did we have it under the Equity rule?

Dean Clark. No.

Mr. Mitchell. I suggest that that be taken care of, because you are applying to the court for an order to allow something, and in the order you should fix what time you need to answer in; whereas your clause here, Dean Clark, might be construed to be perfectly useless. Why not put in an appropriate provision allowing the supplemental pleading within an appropriate time, and the court may make such order as may seem appropriate.

Mr. Tolman. Within such time as the court may fix.

Dean Clark. That is for the original supplemental pleading, not the answer.

Mr. Mitchell. No, the court can adjust the answer at a time allowed, without having a fixed rule.

We are through now with Rule 34. We will take up

Rule 35.

Mr. Wickersham. I note the same correction there that I have in other places--of the failure to use the term "cause of action." (Laughter.)

Mr. Mitchell. I am going to rule that it be understood that you take an exception for the failure to use that phrase without further reference to it. (Laughter.)

Mr. Wickersham. That is all I want.

Dean Clark. We cannot use those words here.

Mr. Wickersham. I could.

Now, as to this Rule 35, I will note that in the other rule we used the words "facts," instead of "acts," as in this rule.

Mr. Morgan. "Acts, omissions and occurrences," yes.

Mr. Donworth. Well, we came to a pretty definite conclusion in regard to the complaint, did we not?

Mr. Morgan. We used "facts", yes.

Mr. Wickersham. "Shall state the facts."

Mr. Donworth. What is that rule as to the complaint?

Dean Clark. Simply a plain statement of the facts.

Mr. Donworth. Do you know the number of the rule?

Dean Clark. That is Rule 23, I think.

Mr. Morgan. Yes, 23.

Mr. Wickersham. "Facts or grounds" we left it.

Mr. Cherry. Well, this is subject to instructions

already given to the reporter, is it not, this morning?-- that either it is all stated in here, in Rule 36, or it is stated wit r eference to each pleading? Did we not do that this morning?

Mr. Morgan. We asked him to consider that.

Mr. Cherry. Well, in redrafting, I thought it was the policy that we elected that it should go in one place or should apply to each pleading specifically.

Mr. Wickersham. We required that the plaintiff state a plain statement of the facts upon which the plaintiff bases his claim or the demand for relief, omitting any more statement of evidence. Now, if we say "statement of facts", without detail, upon which the claim of the pleader as based, it would conform with the provisions of Rule 23.

Mr. Morgan. Would you call a denial a clai?

Dean Clark. Surely; but do you not think we could say that directly?

Mr. Morgan. Yes, we could say it directly.

Mr. Tolman. To be consistent, I think we should change "acts" to "facts" and strike out the next three words.

Dean Clark. Yes.

Mr. Tolman. I intended to submit a memorandum on that subject. in addition to thd one that was presented by Judge Olney.

Dean Clark. I wish you would. I feel a little

heartbroken about that. (Laughter.)

Mr. Cherry. Then we will have to bring up "cause of action again." (Laughter.)

Mr. Mitchell. Well, we will take another shot at that when you submit that.

What more is there in Rule 35?

Dean Clark. Well, if you want to pass it as settled.

Mr. Wickersham. I like the alternative better than the original. The alternative is from the English rule,

is it not?

Dean Clark. The way I put it, the first way, the American provision, "In pleading the performance or occurrence of conditions precedent, it shall be sufficient to allege generally that all conditions precedent have been performed or have occurred." That is, it is still theplaintiff's job to allege performance, and the denial specifies the particular theory. That is, you have got to have a particular denial; but after he has denied it, the plaintiff must prove that condition and its performance.

Now, the English rule is, "Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be, and subject thereto, and averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading."

Mr. Morgan. But do you get the idea that that changes the burden of proof?

Mr. Mitchell. Yes.

Mr. Morgan. It has nothing to do with theburden of proof.

Mr. Lemann. No. The defendant can deny it, and if he does deny it the plaintiff has to prove it.

Prof. Sunderland. If it changes the burden of proof

it is not a condition recedent, but a condition subsequent.

Mr. Morgan. What is it precedent to? As far as I can make out, "precedent" and "subsequent" has to do only with proof and pleading.

Prof. Sunderland. Only with proof.

Dean Clark. I was going to say that I could not understand for a moment what it meant. (Laughter.) "The performance or occurrence of which is intended to be contested shall be distinctly specified." Now, unless he distinctly specifies it there is no way of knowing he is going to deny it.

Mr. Morgan. Not necessarily. It might be a counterclaim.

Mr. Lemann. Suppose it was a defendant who wanted to contest it. Then, under the English rule he wouldhave to specify it; and it is the same thing under the reporter's rule, is it not?

Prof. Sunderland. But by implication, remember that the counterclaim goes back.

Mr. Lemann. And the plaintiff would have the burden of proving that the condition had been performed. The defendant would have to deny it, but the plaintiff would have to prove it.

Mr. Dobie. He cannot prove it under special denial.

Prof. Sunderland. It is by defendant's specifica-

tion in his answer.

Mr. Lemann. But the result is the same in the reporter's rule.

Mr. Morgan. Except that by the reporter's rule, the defendant has to allege in general terms what the English implies.

Mr. Lemann. Then if the defendant denies it the plaintiff must prove it.

Mr. Dodge. The English rule merely says "or condition precedent."

Mr. Morgan. It says he has performed all things on his part to be performed. Is that not the code language?

Mr. Dobie. I move that we adopt the reporter's statement of that, rather than the English rule.

Mr. Cherry. But not the reporter's interpretation.

Mr. Dodge. I second the motion.

Mr. Mitchell. The question is on the adoption of the reporter's rule, with reference to conditions precedent, instead of the English rule.

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

Mr. Lemann. Have you got everything in here, Dean Clark that ought to be in here?

Dean Clark. Do you mean the rest of it?

Mr. Lemann. Yes.

Dean Clark. Certainly not. There is nothing there that should go out. You mean have I got everything in that should go in?

Mr. Lemann. Yes.

Dean Clark. Certainly.

Mr. Donworth. I would just call attention to the distinct recognition that the pleader may employ all the common counts. Now, in reading that, it is an exception to stating facts; there is no doubt about that.

Mr. Dobie. That is generally recognized under the codes.

Dean Clark. I was going to say that we were pleading facts, but if I say we are pleading facts, I would still keep it down.

Mr. Donworth. There are so many things like that.

Mr. Morgan. You can say, "goods sold and delivered, services rendered," etc.

Prof. Sunderland. Why should he not file a bill of particulars?

Mr. Morgan. Without a demand?

Mr. Dodge. We have to have a bill of particulars.

Mr. Dobie. In the other case a man knows what it is, and does not want a bill of particulars.

Dean Clark. I do not see why, if you have a bill

of particulars, you should not have the common counts. "The Lord giveth and the Lord taketh away."

Mr. Tolman. It seems to me that the provision--not as a criticism of pleading, but as to the common count, if you put in the word appropriate there so that he will file the appropriate counts, I do not think there is any intention--I do not mean to criticize, but if we allowed old fashioned common counts, and have to put in all of them, when it is simply a claim for merchandise--I do not think that is necessary.

Mr. Lemann. It is just a provision which permits a man to put it in ten different ways; in count 1 he says it one way; in count 2 he says the same thing over in a different way.

Mr. Dobie. No.

Mr. Morgan. That the defendant is indebted to the plaintifffor money received, for goods sold and for services rendered. In some States they have them printed, and all you have to do is to put the figures in.

Mr. Donworth. But he repeats the thing.

Mr. Olney. That is the man pleads the facts, and then pleads all the common counts in a separate count, and then the case is tried. ~~It is described.~~

Mr. Lemann. Why not prohibit it?

I move that when you use the common count, you use a bill of particulars.

Mr. Donworth. It is done in Washington, and causes no embarrassment.

Dean Clark. I think if a bill of particulars is required with the common count, that does away with all good of the rule. It is to avoid fighting over immaterial things. Now, where it is material you can go after the plaintiff and get it; but in the simple money judgment, the simplest way is a brief statement.

Prof. Sunderland. What objection is there to the ~~plaintiff~~ things you get in a bill of particulars?

Dean Clark. Because you do not need it.

Mr. Loftin. Suppose it is for goods sold and delivered, you do not have anything except the amount, and nothing as to the items.

Mr. Dobie. Very frequently it is but one item, and the man knows exactly what it is.

Mr. Loftin. But very often it is for a number of items, and I do not see how you can separate them without going into court for an order.

Mr. Dodge. That is, every common count must be accompanied by a bill of particulars.

Mr. Olney. In nine cases out of ten the defendant knows exactly what he is sued about when he is sued on a

common count.

Mr. Donworth. I think there are arguments in favor of leaving it in, because that is what is allowed under the code system.

Mr. Cherry. That is right.

Mr. Olney. That is a matter of the common count under our system of pleading to change or destroy that would be wholly opposed to the theory that the bar is accustomed to. It is used constantly and is extremely convenient for many apparently small matters, and is far more important in State courts than here, where the court has jurisdiction only in cases involving more than $3,000. For these reasons I think it is advisable to use it; but like Dean Clark, I can see no reason for requiring a bill of particulars to be filed with it and allowing this method to prevail, because the bill of particulars itself will be the equivalent of the regular complaint.

Prof. Sunderland. You cannot attack the insufficiency. That is the real reason why we have the common count; they cannot attack the insufficiency. And if you attack the bill of particulars, you can safely attack the sufficiency.

Mr. Lemann. If you want to expedite the pleading and get a more sensible system, why use this simple system and then come with a bill of particulars and have the delays.

If you want to cut out the delays, why do you not cut out the bill of particulars?

Dean Clark. I do not think you are going to cut out delays, but will promote them. Unfortunately, many States they did not know what the common counts were and we have a hybrid system which is not common count.

Mr. Wickersham. I was not in favor of the common count, because no lawyer in New York under 45 years knows what it means.

Mr. Morgan. Do they not ever use it?

Mr. Wickersham. No.

Dean Clark. There are quite a few cases that I know of that do.

Mr. Wickersham. They are away back.

Mr. Morgan. I think you are mistaken, Mr. Wickersham, in that.

Dean Clark. There are some cases.

Mr. Wickersham. There may be, but they are very far back. I was brought up under the old common law system, so I know what they mean.

Mr. Mitchell. What is your pleasure about this "balance due on accounts" and the common counts? Shall we adopt the rule as it stands? There was a motion made to require a bill of particulars to be attached. But I heard

no s econd.

Mr. Dobie. I move that it be adopted.

Mr. Donworth. Well, the alternative rule provides that "~~including~~ In pleading the balance due upon an account or upon an instrument for the payment of money, it is not necessary that the pleader set forth the items of account." Is it not usual that he must furnish those items or a copy of the instrument, if demanded? Have you covered that in some other way? Now, a man can sue on an agreement and give the substance of it, and he will get by all right, but the defendant is entitled to a copy. Is that covered?

Mr. Morgan. There are other provisions about getting copies of written instruments.

Mr. Dodge. There is nothing in this rule, however, about pleading ~~w~~written instruments. Is that left out intentionally, Dean Clark?

Dean Clark. I did not leave it out intentionally, although I did not care very much about it. I have provided that you can bring suit on written instruments. The usual way is that you can state them either according to the facts or state them in exact form of agreement or attach them as exhibits.

Mr. Dodge. Is that in some other rule?

Dean Clark. There was a provision for summary judg-

mentment procedure. I did not see why you had to require copies here, when you had some other procedure for obtaining copies. This is a matter of pleading.

Mr. Dodge. It is more important than that I think. It is harder to determine how to plead a contract than how to plead facts.

Mr. Mitchell. The question is on the motion for the adoption of the fourth paragraph of this Rule 35, which startsout, "In pleading the balance due on an account," and then adds the ~~paragraph below~~ material below ending withthe words Rule 37.

Mr. Tolman. How about the amendment ~~khexx~~ suggested? Do you accept it?

Dean Clark. I am not ready to accept it.

Mr. Morgan. Do you mean to say that you are only going to allow a common count upon an account for the payment of money?

Dean Clark. No.

Mr. Morgan. Why do you have them in the same paragraph?

Dean Clark. Perhaps they should be in different paragraphs.

Mr. Morgan. I think so. It looks as though you were limiting them to that.

Dean Clark. And take out the wordx "also."

Mr. Wickersham. Making it read "may employ."

Dean Clark. Yes.

Mr. Mitchell. All in favor of that motion will say "aye"; those opposed "no."

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

Mr. Donworth. I vote "aye" with the understanding that in some case a defendant sued on a written agreement may get a copy, but I suppose there is something on that somewhere else.

Dean Clark. What is the requirement for that?

Prof. Sunderland. There is no requirement.

Mr. Morgan. There is a rule for the discovery of things in possession of the other party.

Prof. Sunderland. But the question is whether you should be required to resort to discovery in a matter of that kind.

Dean Clark. I do not think it is really important enough for that; but if some of you gentlemen feel that that would help let us put it in. I will make a note that he "must furnish such items or a copy of the instrument."

Mr. Morgan. On demand?

Dean Clark. Within ten days.

Mr. Olney. Suppose you have no copy. That may sometimes take place.

Mr. Donworth. Had you better not leave it that the defendant may apply to the court.

Mr. Morgan. That is taken care of in another place.

Mr. Lemann. In the case of a promissory note, is that all right under another rule?

Mr. Morgan. Yes, but I want to get the original. You can get both an inspection of the original and a copy ~~of the~~ demand. That is safe.

Mr. Dodge. The method of pleading on a written contract is covered somewhere else.

Mr. Donworth. Not the method of pleading.

Mr. Dodge. Is not that very important. The commonest form of action is on contracts. Do you have to annex a copy of the contract?

Dean Clark. No, you do not. That may be done, however, by exhibit. What you have done is to provide permissively for the use of exhibits.

Mr. Dodge. That is in one of the other rules?

Dean Clark. Yes.

The next paragraph of Rule 35 is one of pleading a judgment or the decision of a court; it is three lines. Is that satisfactory?

Mr. Lemann. What guided you in picking out these things? That would not impress me as very common. Is that a matter that would come up?

Dean Clark. Yes, that will come up, and most of those things are covered by statute in one jurisdiction or another.

Mr. Lemann. And you think it is important enough to require special treatment?

Dean Clark. Yes. This is I suppose less important,

ant, but we have several different statutes.

Mr. Olney. From a practical point of view it is exceedingly important. We frequently have orders of court, such as for the appointment of an administrator; and you do not have to go back and allege that the man died in such a jurisdiction.

Mr. Mitchell. If there is no objection to those three lines they will stand as accepted.

Mr. Lemann. The next is "It shall not be necessary to allege the capacity of a party to sue or be sued."

Mr. Wickersham. I move that that be accepted.

Mr. Tolman. I second the motion.

Mr. Mitchell. If there is no objection those four lines will be considered as accepted.

Dean Clark. Perhaps at the end of that whole clause we ought to add "if known to him."

Mr. Cherry. "If known to him." He does not know whether there is or is not anybody.

Dean Clark. What do you think of that suggestion " If known to him"?

Mr. Cherry. As it stands, should he tell him to whom to sue? Suppose he does not know.

Mr. Morgan. Suppose there has never been any guardian?

Mr. Lemann. Well, say I sue Mr. Dodge and he says,

"You cannot sue me." Should he tell me whom to sue? He will say, "I do not know."

Mr. Dodge. What other cases have you in mind?

Mr. Morgan. A great many cases do not have any guardian.

Mr. Donworth. Well, you sue John Smith as executor of an estate.

Mr. Dobie. In some cases there is nobody to be sued until a personal representative is appointed.

Mr. Lemann. Yes, that might be another point that the court would have to consider.

Dean Clark. I should think all of these things would be ~~xxxx~~ implied; but I see no objection to saying, "The proper party to be sued," and I assume "if known to him."

Mr. Dodge. Could this party be sued without permission of the court?

Mr. Morgan. No. Would he have capacity?

Mr. Dodge. That is a question. I do not know what "having capacity means."

Mr. Cherry. At least I would like to have him limited in what he is required to do by what he can do. That is why I suggested "if known to him."

Mr. Morgan. I want to know if there is any such thing as "incapacity to be sued." He can sue an infant or he can sue an insane person; then there is the provision

for having a guardian ad litem for them.

Dean Clark. What I meant particularly was the case of corporations. Perhaps that language can be improved--if I should say if the capacity of the plaintiff to sue or the defendant ~~is~~ to be sued is in issue.

Mr. Morgan. ~~I~~ Suppose you sue as a corporation something which is not a corporation, what good will it be? I just want to know whether there is any such thing as incapacity to be sued.

Dean Clark. I think that is simply a definition of words.

Mr. Morgan. No, I do not think it is. I want to know. I am not quarreling on terminology.

Mr. Olney. It is very easy to have John Doe.

Mr. Olney. Suppose you sue a messenger; and the question involved is whether it is incorporated or unincorporated.

Mr. Morgan. The only case I know about is that against the St. Paul Hypothetae, a labor organization, and they demurred, both on the ground of incapacity and on the ground it did not state sufficient facts, and the court sustained the demurrer on theground that it did not state sufficient facts.

Dean Clark. What I had in mind in stating a representative capacity--whether the language is proper or not--

was that in many States you have the question whether the corporation is incorporated. In New York you are required by special rule to allege it, and there it is just a formality. And that is what I want to hit. Now, if you look at the rule in the Southern District of Florida, you will see, perhaps, a better statement of the subject--that they limit it to the capacity in which the plaintiff sues.

Mr. Morgan. Well, of course, that is the usual provision limiting it to the plaintiff, is it not?

Dean Clark. That is not the usual provision.

Mr. Morgan. I thought it was.

Mr. Dobie. There are cases holding that you cannot do it; the Missouri courts hold that.

Mr. Morgan. Yes, you have a conflict on that, for the plaintiff it is perfectly clear.

Mr. Dodge. Does this mean that if you sue a labor union, that the labor union in its reply must allege who are proper parties to be sued?

Prof. Sunderland. If you sue a labor union by its name, you have not sued anybody, because there is no such person.

Mr. Morgan. You have not sued anybody. That is the point. I do not see how anybody who has no capacity to be sued can come into court and say that you have not sued the proper party.

Prof. Sunderland. They can come into court and admit ~~the facts.~~ their capacity

Mr. Morgan. That is what I mean.

Dean Clark. Well, if you take the corporate or representative capacity--

Mr. Morgan (Interposing). If you take the representative capacity, he must come into court and deny that he has that representative capacity.

Mr. Olney. It means no general denial; that is all.

Dean Clark. That is all.

Mr. Wickersham. You include in that clause t he case of suing an executor or administrator outside of the jurisdiction where he is appointed. You cannot sue him in his representative capacity other than in the State in which he is appointed, or he cannot sue, perhaps. That could be lack of capacity to sue or be sued in that representative capacity.

Mr. Morgan. Yes; that is what Dean Clark said.

Mr. Wickersham. Now, it says here "shall also allege the proper party to be sued." I am inclined to doubt that.

Mr. Olney. Would this not besufficient? "It shall not be necessary to allege the capacity of a party to be sued nor shall it be necessary to plead such capacity unless it be specifically denied," and stop there?

Dean Clark. That is all right.

* Insert dict cyl. here *

Mr. Morgan. I think it would be all right to leave that stand.

Mr. Olney. Just stand as it is, except a period after "opposing parties."

Mr. Donworth. It is an anamolous situation in this, that it requires the defendant or plaintiff to deny something not alle ed; but I suppose that is because the allegation is implied.

Mr. Olney. Yes, I think so.

Mr. Donworth. It denies that plaintiff was ever appointed administrator of the estate of so-and-so.

Dean Clark. But it seems to me it should be a clear implication anyway.

Mr. Donworth. I think that is all right.

Dean Clark. Suppose the John Jones corporation brings suit, and then you require them to prove later on that it is the John Jones corporation.

Mr. Tolman. Could that anomaly be removed by changing the word "it", to "lack of capacity", so that it will read, "unless the lack of capacity be specifically alleged."

Mr. Morgan. Yes.

Mr. Tolman. I suggest that because of the statement that you denied something that is not alleged--

Dean Clark(Interposing). That is all right. That is a good suggestion.

Mr. Donworth. But still the burden is on the party who alleges incorporation or executorship to prove it; and Major Tilman, would not your suggestion change the burden of proof? How would you word it?

Mr. Tolman. It would be this way--I will read it from the beginning:

"It shall not be necessary to allege the capacity of the party to sue or be sued; nor shall it be necessary to prove such capacity unless lack of capacity be specifically set up by the opposing party."

Mr. Donworth. Would not that lead to the conclusion that the opposing party must always prove that lack of capacity?

Mr. Tolman. Yes, I think so.

Mr. Cherry. No--shall not be required to prove that capa_city unless the lack of capacity is alleged.

Prof. Sunderland. Lack of capacity would not have to be proved. That is a negative.

Mr. Cherry. That is correct.

Mr. Wickersham. Does that include the general rule that where a corporation sues or is sued, it is not necessary to aver or prove the fact of incorporation, unless it is specifically and affirmatively denied. That is the New York rule.

Prof. Sunderland. I doubt whether the word "capacity"applies to that.

Mr. Wickersham. I believe it does.

Dean Clark. What case is that?

Mr. Wickersham. In a case where a corporation sues, it is not necessary to sue the incorporation unless the fact of incorporation is specifically denied.

Mr. Morgan. That would not cover this.

Mr. Wickersham. I do not think it would.

Dean Clark. Why would it not cover this? I do not understand.

Mr. Wickersham. That is what I want to know. A B brings a suit, and avers thst this corporation is incorporated under the laws of the State of Ohio. Unless the answer affirmatively denied that fact, the mere fact that there is a general issue does not raise that and compel the plaintiff to prove the incorporation; and the same thing applies to the defendant. In other words, to save the bother of proving the fact of incorporation in the case, unless that is a real issue, or is made the real issue by affirmative allegations.

Dean Clark. That is what I wanted to hit here; and I wanted to go further and make it unnecessary to make even a formal allegation in your complaint.

Mr. Donworth. Of course, in cases of diversity of citizenship the allegation must be in there.

Dean Clark. Yes.

Mr. Wickersham. Yes. But I thought "capacity" did hit that. If it does not I suggest that you put in "capacity."

Mr. Wickersham. But if you have a corporation in some controversy, there might be reasons why that corporation could not be sued or might not be able to sue.

Mr. Morgan. Yes--for instance, because it had not paid its taxes.

Mr. Wickersham. Or because it has not filed a certificate. And I want to raise that point because somehwere I think we ought to have a provision for removing the necessity of proving in corporations where it is not the real issue.

Mr. Morgan. Or even alleging it.

Mr. Wickersham. Well, its capacity to sue would accomplish that. I think there is a difference.

Mr. Mitchell. Yes.

Dean Clark. All right; let us say "It shall not be necessary to allege corporate existence or capacity or representative capacity. Nor shall it be necessary to prove the same, unless lack ~~of~~ thereof is specifically alleged."

Mr. Mitchell. I do not think it would be necessary to say "corporate existence."

Dean Clark. If you have a suit by John Jones

administrator
~~executor~~/of the will of James Smith, you have that in your summons and in your caption, and so on, and then go on and say, in paragraph 1 of the complaint, that he is duly qualified as an administrator oor trustee--I do not think that is necessary.

Prof. Sunderland. You hardly state a cause of action if you sue as a representative and you do not say you are. You sue the defendant personally, and then say that you are the representative of somebody else.

Mr. Morgan. The caption would incorporate that.

Mr. Wickersham. Suppose an executor is sued or an administrator is sued in another jurisdiction; a foreign executor is sued and he has lack of capacity to be sued there. Of course, if you allow that issue to be raised indirectly, or by general denial, and it ought to be raised by denial, but if there is no controversy over it, it could be covered. But I think it ought to be clear, and if we can bring in that provision about representation--

Mr. Mitchell (Interposing). Your point is that it is not clear from these lines that it relates to thepoint of corporate existence. That is your point?

Mr. Wickersham. Yes. The point of corporate existence, or in case of the representative, theexistence of the representative in his capacity to sue in ~~any~~ that capacity.

Mr. Mitchell. That is covered.

Mr. Wickersham. I supposed so but was not sure.

Mr. Donworth. Is it not better to leave this as it is from this point of view? A great majority of cases are based on diversity of citizenship, where the allegation is essential on jurisdictional grounds. Perhaps the bar may not think that, but we have somewhat implicitly tried to omit the allegation of the incorporation in some case, and it is presumed--and I am afraid of that. I do not like to put in, where such allegation is essential on jurisdictional grounds--I do not like to make that exception, and I should think the best way is to make no reference to corporate capacity, which would lead to a result that it has to be proved.

Mr. Wickersham. I think it is a distinct point to have a distinct clause as to corporations. A great many cases are brought against corporations. I think it should be provided for specifically that there is no necessity for alleging incorporation unless it be specifically denied. I think that clause should be by itself, as it gives rise right away as has done here to the question whether you mean to bring in the fact of incorporation.

Mr. Lemann. I move that the reporter be requested to redraft the language in thelight of this discussion, so as to cover corporate existence, as well as capacity and representative capacity.

(The motion was duly seconded, and a vote was taken and it was unanimously adopted.)

Mr. Mitchell. The next is "In all cases damage, actual or threatened, shall be specified, and when items of special damage are claimed they shall be specifically stated."

Prof. Sunderland. Does that contribute anything to what we already have in here?

Dean Clark. Very little. The main reason for putting it in is to cover the item of special damage, and of course that is pretty usual. Maybe that is not necessary, but Mr. Lemann. is already suspicious that I have not any rule like this in anywhere.

Mr. Lemann. I was not suspicious.

Mr. Mitchell. What difference have you made between special damage and general damage? General damages shall be specified, and then special damages.

Dean Clark. I think special damages should be alleged.

Mr. Mitchell. You have not told anybody what special damages are.

Mr. Wickersham. Suppose there is a suit for $10,000 for an injury; is that special damage?

Mr. Morgan. No.

Mr. Wickersham. Then all cases of damage I think should be specified.

Mr. Olney. Well, that is capable of interpretation that you would have to allege injury.

Mr. Wickersham. If it was in your complaint and you say you are damaged by it in the sum of $25,000--

Mr. Morgan. That is general damage.

Mr. Wickersham. That is general damage. Now, in special damage you have to allege special facts to sustain it?

Mr. Olney. So far as the damage is concerned, would it not be sufficient to say where special damages are claimed they should be specifically stated?

Mr. Wickersham. Yes.

Mr. Mitchell. That is where items of special damages are claimed they should be specifically stated.

The next item in Rule 35 is as to allegations of fraud or mistake.

Dean Clark. This rule is often stated ~~in~~ at much more length than it is here.

Mr. Lemann. See page 215 of Clark on Pleading. Mr. Dobie cannot take away everything from you. (Laughter.)

Mr. Dobie. He is the leading authority on the subject.

Rule 37

Mr. Lemann. The footnote in ~~X~~/I think is the language you apparently have in mind.

Mr. Wickersham. It says "In all allegations of fraud or mistake the facts must be stated with full particularity"; but when it comes to malice, intent, and so on, they do not have to be. I mean leave that sentence out.

Mr. Morgan. Do you mean the last part?

Mr. Wickersham. Yes, that would go without stating it.

Dean Clark. No, because we put in the facts that refer to the state of mind of a person. If I may quote from the authority referred to it says, first, that where the party relies on fraud or mistake, the facts must be stated with full particularity; but when it is material to allege malice or any condition of mind of a person, it shall be sufficient to allege it as a fact, without setting up the circumstances from which the same is to be inferred.

Mr. Morgan. I think you said the same thing in the rule in fewer words.

Mr. Olney. The only objection I have to it is that word "full".

Mr. Morgan. Yes.

Mr. Wickersham. Yes.

Dean Clark. All right, take out that word "fully". There is an English order on this subject, and the New York Board of Consolidation recommended one. (Laughter.)

Mr. Mitchell. Well, with/that word "full", out that paragraph will stand, unless there is some objection.

The next one in that rule is, "When a party is in doubt as to which of two or more statements of fact is true,

he may state them alternatively in a single claim or defense or separate claims or defenses, and in insufficient alternative shall not affect a sufficient one."

Dean Clark. This is to provide distinctly for alternative pleading, which was prohibited at common law, but which ought not to be prohibited under the code, and is legal under the code; so that it was found desirable to do it by specific provision, which is done in sveral States.

Mr. Morgan. Is there any State which has that last provision as to"an "insufficient alternative"? What do you mean by "an insufficient alternative shall not affect a sufficient one"?

Dean Clark. Shall not render it insufficient.

Mr. Morgan. But if you say that "John Smith or somebody else kicks me, and you serve that only on John Smith, the first alternative states a cause of action against John Smith, and the other does not. This is a rule that is advocated in "Clark on Pleading."

Dean Clark. What page? (Laughter.)

Mr. Morgan. But I doubt whether there was any case in the world which suggested that such a leading was good against demurrer.

Mr. Dobie. It is a case stated if either one of them is true.

Mr. Morgan. If either one states a cause of action--

Mr. Dobie. Yes.

Mr. Morgan. But if one alternative does not state a cause of action, when you reduce the complaint to its lowest terms, either I have or do not have a cause of action against you, and you could state that against anybody in the world.

Mr. Mitchell. If you did it to somebody else, why not ignore it?

Mr. Morgan. I do not know whether you want to go that far--that if he alleges "either or," that he does not then have to select the one which states a cause of action.

Dean Clark. You will notice the Chairman's reaction, which I think was interesting. He says, "Why not ignore it?"

The Chairman. Yes, why not ignore it.

Dean Clark. "Clark on Pleading" says it is not clear whether the alternative should not be rejected as surplusage.

Mr. Morgan. I think it is very clear why it should not be.

Mr. Olney. Because the man does not allege it.

Mr. Morgan. Yes, because the man says he either has done it or has not.

Mr. Lemann. I thought it meant this kind of a case: That I was walking out and Mr. Morgan hit over the head with a brick; and the alternative is that he did not; that Mr. Dobie hit me with a brick.

Mr. Dobie. Those are different causes of action.

Mr. Morgan. That would be a kind where you would fall between two stools.

I am not objecting to that. I only want to know what we are doing.

Mr. Donworth. It might be put in as a stump speech, to stir up prejudice against the defendant.

Mr. Morgan. Of course, you can put it in count 1, you put in one alternative and in count 2 you put in the other.

Mr. Lemann. That is about the same as common count.

Mr. Morgan. No.

Mr. Lemann. You are going to have them both. (Laughter.)

Mr. Dobie. A case of the other kind would be under the doctrine of the "last clear chance", in which the State, at least the engineer, so that your foot was caught in the frog, or in the exercise of due care might have seen it. The first of those makes a cause of action, while the other one does not.

Mr. Donworth. There is a division of authority on that.

Mr. Dobie. Can you take out that last clause of that paragraph?

Dean Clark. No. Why not put it this way; what is wrong with this, "and an insufficient alternative may be rejected as surpkusage."

Mr. Olney. There is no insufficiency of the alternati in the statement that a man either hits me or he did not.

Dean Clark. If the allegation that he did not hit you is insufficient, take it out; let it stand that he hit you.

Mr. Wickersham. It is not an insufficient alternative. It is either a truthful alternative or it is not. You say, "This is the fact, or if it is not something else is the fact." The first thing you will be met with is a motion to make more definite and certain, under the present practice, because the defendant will know it is that you claim, and if it is somebody not the defendant, then thedefendant, "Why sue me then?"

Mr. Mitchell. Would this cover ~~xkx~~ a case where it mentions two partners and covered either one or the other?

Dean Clark. No.

Mr. Mitchell. It is the case of different statements against the same defendant?

Dean Clark. Yes.

Mr. Mitchell. So that that illustration cannot arise.

Mr. Wickersham. I think the phrase "an insufficient alternative shall not affect a sufficient one" should go out.

Mr. Mitchell. It is already out.

Mr. Dobie. How did you state it?

Dean Clark. "An insufficient alternative should be rejected as surplusage."

Mr. Tolman. I think it is useful. A year ago I tried an important case that had two inconsistent alternatives.

Now, if one of them had been tested by a motion to strike and it had been stricken, I do not think any of us would have thought that that affected the other, would it? This announcement here would make that point perfectly clear.

Mr. Donworth. There was a very humorous and ancient thing that was done under the old English law. The allegation was that the defendant borowed the plaintiff's kettle in a new condition and returned it greatly damaged. The defendant put in a defense, first, "I never borrowed it; second, it was cracked when I got it; and third, it was all right when I returned it." (Laughter.)

Mr. Morgan. You can do that with three separate defenses under the Statute of Anne.

What were those words proposed?

Mr. Morgan. "May be rejected as surplusage."

Mr. Wickersham. Why not put it in the alternative? I do not know what it means.

Mr. Mitchell. You are recognized, Mr. Morgan.

Mr. Morgan. I am even willing to stand for this heresy of Dean Clark. I just eant you to know that it is a heresy, and it is one that will shock kmkk most lawyers.

Mr. Lemann. Did it shock you?

Mr. Morgan. It shocked me very much, yes. But I have gotten used to that, because I have read "Clark on Pleading" so often. (Laughter.)

Mr. Mitchell. If you were shocked, how would you change this?

Mr. Morgan. I would strike out that clause, "an insufficient alternative shall not affect a sufficient one."

Mr. Dobie. Judge Olney has an amendment that he wants to offer.

Mr. Olney. No, my amendment is exactly what Mr. Morgan offered. It is to use that paragraph of the rule down to the words "in a single claim or defense or separate claims or defenses", and stop. Now, you can test that effectively and let the court take care of it.

Mr. Lemann. Do you think that would reach a sufficient result--or might?

Mr. Olney. Might.

Dean Clark. Well, the New York courts hold the other way.

Mr. Lemann. Well, is this what "Clark on Pleading" allows and recommends, or does this overrule Clark?

Dean Clark. This is what he recommends.

Mr. Mitchell. Under Clark on Pleading and the New York decision, you may state two alternate allegations against the same defendant, and if one of them turns out to be insufficient your whole case falls, does it not?

Mr. Wickersham. No.

Dean Clark. Well, if there is something else.

Mr. Mitchell. I mean under that New York decision .

Mr. Wickersham. What case is that?

Dean Clark. The case of Johnson, reported in the

Mr. Wickersham. What does that hold?

Dean Clark. That where the allegations are in the alternative each alternative must be sufficient.

Mr. Morgan. That is the regular rule.

Mr. Wickersham. That is the regular rule. Of course, that is subject to a motion which can be made at once to select which one you are going to proceed under.

Mr. Olney. That objection is made to one of them, and if it is stricken out he can promptly amend.

Dean Clark. Under the case of McGinness vs. Surety Co., unless each one is sufficient, the allegation is not good.

Mr. Mitchell. Unless both are good.

Mr. Morgan. Yes--unless each one states a cause of action.

Mr. Lemann. Not"either"but "each", which means both. This would not do any harm, and might reach a result that is desirable, and why not leave it in?

Mr. Mitchell. The answer to that is this: ~~To~~ You make an allegation which states a good cause of action, and you say "maybe that is so" Now you have not stated a cause of action, and ~~may~~ state something else which ~~is~~ does not. I think that is logical, perhaps.

Mr. Morgan. Absolutely logical.

Mr. Olney. It permits a man to bring an action for one thing and then state a differant cause of action.

Dean Clark. What he will do is to start his complain on one alternative and then start over with another alternative, on two different counts.

Mr. Donworth. This is what it does:, "An insufficient alternative will not act as a sufficient one," but it may be stricken out on motion.

Mr. Morgan. That is what Dean Clark wants.

Mr. Wickersham. I do not know what an insufficient alternative is.

Mr. Mitchell. Suppose I undertake to state a cause of action--

Mr. Cherry (Interposing). Either you assaulted me or bought me a dinner. (Laughter.) That is my alternative.

Mr. Wickersham. It says "When a party is in doubt as to which of two or more statements of facts is true, he may state them alternatively in a single claim or defense or separate claims or defenses." Now, if one ofthem is not substantiated and does not hold, if one of them is insufficient, it shall not affect theclaim of the other. I am spelling it out, to see if that is what you mean.

Mr. Mitchell. Yes.

Mr. Wickersham. Then I think you couldget better language to express it.

Mr. Morgan. But you see it will not come in that way ordinarily.

Mr. Wickersham. It comes up on motion.

Mr. Morgan. It has been dismissed on the ground that the whole action is insufficient, we will say.

Mr. Wickersham(Interposing). It is a ~~cause for the~~ case of insonsistency.

Mr. Morgan. No.

Prof. Sunderland. The whole case goes out.

Mr. Wickersham. This does not say that if you have two causes of action and one of them is inconsistent with the other you may still plead them both in the same pleading as a cause of action or defense. It simply says where the parties are in doubt as to which one is true, they may state them alternatively a single claim of defense or a separate claim of defense and an insufficient alternative shall not defeat a sufficient one.

Mr. Morgan. Yes.

Mr. Wickersham. That is, in the same statement of the cause of action you might have an allegation of facts. You might, "Either I was knocked down and run over by John Smith or an automobile belonging to John Smith, I do not know which." Of course, that is perhaps a perfectly good alternative, as you are suing John Smith the owner of the automobile.

Mr. Mitchell. Yes, but it does not state a cause

of action against Smith.

Mr. Wickersham. No.

Mr. Donworth. Take this case: The plaintiff allege first, "My house was destroyed; its value was $1,000 and I am out $1,000. That house was destroyed, ~~xxx~~ either because the defendant employed some men who undermined that house, which I suspect, or in the alternative defendant was excavating on the adjoining property, and he deprived me of lateral support. It seems to me it is something like that. The house was destroyed, and the defendant was reponsible, whether he did it by hiring these men to undermine it or whether it was negligence.

Mr. Lemann. Both of those allegations can be stated.

Mr. Wickersham. There you have a single action against the defendant for injuring your property by negative action. Now, you state, "Either it was that or something else."

Mr. Morgan. And each states a cause of action.

Mr. Lemann. Yes, both.

Mr. Wickersham. It is a question whether he was guilty of negligence or not--

Mr. Morgan (Interposing). That was bad at common law.

Mr. Wickersham. But not under the code.

Prof. Sunderland. How about stating them alternativel in a single claim or defense, ~~xxxxx~~ with the same legal

effect as though it was stated separately?

Mr. Mitchell. Now, as long as you can dodge the thing by stating them separately--and we will admit that--

Mr. Morgan (Interposing). Oh, certainly.

~~Mr. Mitchell.~~ Then what is the harm of saying that the insufficiency of either of them shall not affect the other? So I am in favor of leaving it as it stands.

Mr. Dodge. I so move.

Dean Clark. Do you like it, Mr. Morgan.

Mr. Morgan. I do not dislike it.

Mr. Mitchell. All in favor of the paragraph as it stands here will say "aye"; those opposed "no."

(The motion was adopted, all voting in favor if it except Mr. Wickersham.)

Mr. Mitchell. It is carried.

The next sentence in Rule 35 is "For the purpose of testing the sufficiency of a pleading," and so on.

Dean Clark. That is/~~xx~~ a provision that allegations of time or place shall be taken as true, but amendments shall be allowed to correct errors; and you will recall the old common law rule that allegations of time and place have to be made but did not have to be proved as made. Hence, you could never bring such pleadings as the statute of limitations, because allegations as to time did not mean anything. This is an

attempt to tie down the pleading a little more so that you can more quickly get to the issue involved.

Mr. Mitchell. I do not understand that. Do you mean that an allegation as to the time and place does not mean anything?

Mr. Morgan. There is a case in the books where the plaintiff alleged that a contract was made in such a date in the year 1082, and the other side demurred, and he said, "It does not make any difference what theory you go on, you have a ststute of limitations which cannot be renewed for 800 years and the court, instead of regarding that as a misprint for 1882, said, "Yes, that is true; but you do not have to prove your dates as alleged at common law, and consequently you can go ahead with your case at any time before the statute actually runs.

Mr. Dobie. In the same way, they can say that a certain thing happened on the ocean which happened in the city of London.

Mr. Morgan. Yes.

Mr. Mitchell. This says the allegations of time and place shall be taken as ~~true~~ True.

Mr. Morgan. That is as an allegation or pleading.

Mr. Wickersham. No, I do not think it shall be taken as true.

Mr. Dodge. Are not the cases that you have in mind

very rare?

Mr. Morgan. Not so rare. That is the reason for most of the rules in most o the States that you cannot take up the statute of limitations on demurrer.

Mr. Wickersham. Because the statute may be waived.

Mr. Morgan. Well, some of the explanations are t hat the dates do not count so that the court can tell whether the statute has run or not.

Mr. Wickersham. Well, do you not go too far when you say they shall be taken as true

Dean Clark. Well, for the purpose of testing the sufficiency.

Mr. Mitchell. What it means is that you have got to prove them as alleged.

Mr. Morgan. Yes.

Mr. Mitchell. I think we must change the wording of this, because most of the lawyers will not know what you mean by that.

Dean Clark. This question comes up now, and I have a note from a distinguished professor as to allegations of time in pleading, and then he goes on discusses the defense of t he stat te of limitations. That is published in the Oklahoma Law Review.

Mr. Wickersham. Well, allegations of time and place

should be subject to amendment.

Mr. Morgan. Yes.

Mr. Wickersham. But that is different from saying that they should be taken as true. Suppose you bring it for the purpose of testing the sufficiency of the pleading. You make a motion to dismiss the complaint citing the allegations of time and place. Of course the court may amend ~~or may not~~, on motion and they amend rather freely, but I do not think they are taken as true necessarily. It is just as to the sufficiency of the pleadings.

Mr. Mitchell. I think the reporter gets the idea, that where there is an allegation of time and place, the court on demurrer says, "We do not have to take the date because we do not know whether that is the date or not."

Mr. Wickersham. No, the allegation might be immaterial, but might go to the very whole root of the action.

Mr. Morgan. Yes.

Mr. Mitchell. I suggest that be left to the reporter to see if he can devise any better language than saying it shall be taken as true.

Mr. Olney. Well, for the purpose of testing the sufficiency of a pleading, allegations of time and place shall not be binding upon the pleader.

Mr. Mitchell. Is that not the idea, Mr. Morgan?

Mr. Morgan. I think that is the idea.

Mr. Donworth. "Or shall be assumed as alleged."

Mr. Mitchell. Well, I think we can ~~kix~~ pass that to the reporter.

The next paragraph of that rule is that the defendant or plaintiff shall raise by his affirmative pleading, and not by mere denial, all matters which show the action or counter-claim not maintainable.

Dean Clark. Yes. This part of the rule is substantially that of England, New York and Connecticut. The old provision was that the answer shall contain a denial, and also new matter, without specifying it; and it has been a matter of a great deal of doubt whether a certain situation should be called new matter or should come in as denial. This is an attempt to particularize, and I think the great value of these rules is probably not in the general provisions, but in the list of specific things.

Mr. Lemann. Is contributory negligence purposely omitted from this?

Mr. Dobie. I had that in mind--and the fellow servant doctrine and the assumption of risk.

Mr. Lemann. Contributory negligence is more important.

Mr. Morgan. In Federal pleading, contributory negligence has to be pleaded specially.

Mr. Dobie. That is a general rule.

Dean Clark. I am afraid that we split on this question.

Mr. Lemann. Is there a Federal rule on contributory negligence?

Mr. Morgan. Yes, the Federal rule makes contributory negligence a matter of affirmative defense which is pleaded and proved by the defendant, and they have held that that has got to be applied under the Federal Employers' Liability Act, even when the case is brought in the State court.

Dean Clark. I am not so sure about that.

Mr. Morgan. I am.

Dean Clark. The burden of proof is on the defendant, but the evidence is admissible under the general denial.

Mr. Morgan. That is in New York and in the Second Circuit in New York.

Mr. Donworth. Then it ought to go in. Contributory negligegence should then be ~~amended~~ mentioned as one of those things that must be ~~xxxxxx~~ set out.

Mr. Morgan. Yes.

Mr. Dobie. I had that in the fellow servant doctrine or assumption of risk, under general denial. I think they ought to be set up in here, if you gentlemen are agreed.

Mr. Dodge. Well, you have not got in there waiver. I should think the exclusion of something of that kind might

caused trouble. Most of these things mentioned here might come in under new matter. The case of payment is peculiar; the defendant has to allege payment and the plaintiff has to allege non-payment.

Mr. Lemann. You could put in certain specific things without enumerating them all generally; but to cover Mr. Dodge's point, you ought to enumerate them after saying "including".

Mr. Wickersham. Or "for example."

Mr. Lemann. Yes.

Mr. Donworth. I think that is an unfortunate phraseology here beginning with the fourth line, "And all such grounds of defense or reply, as the case may be, which if not raised would be likely to take the opposite party by surprise," and so on. It is the raising of them which takes the other party by surprise, namely, the raising of them at that time.

Mr. Dobie. Under the general denial.

Mr. Donworth. "Which ~~not~~, if not seasonably raised, might take the opposite party by surprise."

Dean Clark. Or if not pleaded.

Mr. Morgan. If not pleaded, yes. This is from the English rule, is it not?

Dean Clark. Yes.

Mr. Morgan. That is where we got the notion that you had to plead payment, I think.

Dean Clark. That is, the defendant shall "raise by his affirmative pleading"--that phrase might not be good-- "all matters which show the action or counterclaim not to be maintainable." You see it goes back to the beginning.

Mr. Morgan. Why do you not say "affirmatively pleading"?

Dean Clark. I am doubtful about the law, as I have stated--I mean in the Federal court. And unless specifically required in the Federal court, I am not sure it should go in, because there is quite a difference. Take New York, for example; you do not have to plead it, and you are going to try to change the habits of New York.

Mr. Morgan. In New York, you can raise contributory negligence on the general allegation, on the ground that it is caused by the negligence of the defendant; it is to be read as an allegation of the defendant, and solely an allegation of his.

Mr. Lemann. That is the case in every State where you do not have to plead it.

Mr. Morgan. No; New York says also that the burden of proving due care is on the plaintiff; in everything except a wrongful death case, and that is put on the defendant by special statute. Massachusetts and a good many of the New England States, and in Michigan, as I understand it,

and at common law, it made the plaintiff allege due care .

Prof. Sunderland. Yes.

Mr. Morgan. But it is changed in Massachusetts by statute now and in Connecticut, as to the wrongful death I think.

Dean Clark. Yes.

Mr. Lemann. It can happen in New York and elsewhere, because there are many jurisdictions where contributory negligence must be pleaded.

Dean Clark. Yes.

Mr. Dobie. And you can either leave it as it is now--

Mr. Mitchell. I think if we put it in that it must be pleaded--

Mr. Dobie (Interposing). There are even a number of cases where plaintiff must show that he is not at fault, and he has a general denial. Then you say that you cannot prove contributory negligence under the general denial, and that is surplusage, and I would like to see the fellow servant doctrine and contributory negligence included in there.

Mr. Donworth. I wouldlike to make this general observation, that we should be cautious about adding anything as to the method of proof. There is a general feeling about the country that in the Federal court, in a contributory negligence case, the plaintiff does not get quite a fair chance,

and that the defendant goes into the Federal court for that reason; and sometimes they pass statutes in the State for the purpose of getting rid of a Federal rule like this. And I would not like to have any Member of Congress have a chance to say that we changed that situation by anything we have done here. I do not know to what extent this goes, but Ithink the reporter should carefully consider whether we are on a safe line. If anything is on the doubtful side I would rather not put it in, rather than run into the idea that we have made it what we do for the purpose of defeating a contributory negligence action in the Federal court.

Mr. Mitchell. This would go the other way. This makes it wider.

Mr. Cherry. Yes, thismakes it wider.

Mr. Dobie. We say here, as to the fellow servant doctrine, assumption and contributory negligence, you must set that up; that is favorable to the plaintiff.

Mr. Lemann. It strikes me that these two sterling works discuss the point as to contributory negligence.

Dean Clark. I am sorry that you have not read "Clark on Code Pleading;" that is not a sterling work; nevertheless I recommend it to your attention.

Mr. Morgan. On the question of burden of proof, the Federal court, wherever it has arisen, has said that the

burden of proof was a matter of substance and governed by Federal law, and not of State law, under the Conformity Act.

Mr. Dobie. And the Federal court will follow the rule I have stated; and then in the case of Harney vs. Southern Pacific, it was said that you could not take it away from the court and make it any different rule by some constitutional provision of a Western State, and Chief Justice Hughes in a ringing decision said they could not.

Mr. Wickersham. "Shall plead affirmatively." Is that not better?

Dean Clark. Now, do you like "former recovery" or do you like res judicata?

Mr. Morgan. "Former recovery." "Former recovery" is in there.

Dean Clark. Do you want any assumption of risk with the fellow servant rule?

Mr. Dobie. I should like to see that there.

Dean Clark. How much of that is there in there? Does not that make it inadequate?

Mr. Loftin. Look at the Employers' Liability Act.

Mr. Wickersham. Is that not a question of substantive law?

Mr. Dobie. I wonder if it is a matter of pleading.

Mr. Wickersham. I mean essentially that is not a question of pleading, but of substantive law.

Mr. Morgan. You mean where assumption is risk is

a defense?

Mr. Wickersham. Yes.

Mr. Morgan. Yes.

Mr. Mitchell. What is your point, Mr. Lemann?

Mr. Lemann. Dean Clark thought"former recovery" was as good as res adjudicata on this list, and Mr. Morgan said he thought "former recovery" was better; but some of us think that most lawyers would recommen res adjudicata as a more familiar term in this enumeration. And I would want to make a different answer from Mr. Morgan.

Mr. Mitchell. Let us take a vote on it.

Mr. Morgan. I do not object. I like the Latin, and I am glad somebody is familiar with res adjudicata.

Mr. Wickersham. I agree with that.

Mr. Olney. Res adjudicata goes further than "former recovery."

Mr. Donworth. There might not have been recovery; he might have been beaten.

Mr. Morgan. Yes.

Mr. Mitchell. We have not settled that. What is the sense of the meeting on "former Recovery"?

Mr. Loftin. Mr. Morgan withdrew that.

Mr. Dobie. I move that res adjudicata be put in there.

Mr. Donworth. I move that that be put in there without"ad", just making it "res judicata."

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

Dean Clark. All I can say is that it is certainly

very helpful to have these suggestions. This is a matter that is fought over very often.

Mr. Lemann. With regard to contributory negligence, it is important to know whether it is an affirmative defense.

Mr. Wickersham. Did I understand that Dean Clark was willing to insert after the word "pleadings" the words "such as, for example"?

Mr. Donworth. The word "license" is put in that list. What the drafter of the rule really means is the absence of a license. That should be m de license or the lack of license.

Dean Clark. No, what I suppose is meant is legal license.

Mr. Donworth. Oh, yes.

Dean Clark. Maybe it is not important enough to change. It is an amalgamation from England, New York, and Connecticut, mostly England.

Mr. Morgan. When they want to put in thegeneral issue they put this down.

Mr. Donworth. The corporation must pay an annual license; otherwise it cannot bring suit. But that is another matter.

Mr. Mitchell. Then we are passing on--

Mr. Olney(Interposing). Mr. Chairman, it is 20

after 5 o'clock.

Mr. Mitchell. Well, we probably had ~~mmk~~ better not take up a new rule now, then.

Mr. Morgan. Mr. Chairman, I have to go, ~~but~~ before I go I would like to say, in case you discuss it before your adjournment that I would like to see the setting up of a permanent Advisory Committee; and I hope that ~~that~~ suggestion of Dean Clark's will not be rejected without very serious consideration; because I think that is about the most important thing that can happen, besides getting a set of rules here that will get by the first time.

Mr. Mitchell. I talked with Dean Clark about that, and we all agreed that that was an important thing. The thing that we can put up to the court by way of suggestion in the next three or four months--

Mr. Morgan (Interposing). I do not care how you put it up.

Mr. Mitchell. So that I suggest that if you do not happen to be present at the time we discuss it, or even if you are, that if you or any other members of the Committee have views about it, and will state ~~them~~ in writing, I will see that the Chief Justice gets them. So that we will take care of that in that way.

M. Lemann. I would like to move, Mr. Chairman, that we elect a Vice Chairman, if that is in order.

Mr. Olney. Yes, I meant to do that.

Mr. Lemann. And I name Mr. Wickersham.

Mr. Mitchell. If there are no further nominations, I will make the request that the Secretary be so instructed.

(The motion was adopted, all voting "aye" except Mr. Wickersham who did not vote.

(Thereupon, at 5:25 o'clock p.m., the Advisory Committee took a recess until 8 o'clock p.m.

EVENING SESSION.

Saturday, November 16, 1935.

The Advisory Committee met at 8 o'clock p.m., pursuant to the taking of a recess, Hon. William D. Mitchell, presiding, all the members present as heretofore noted, except Prof. Morgan.

Mr. Mitchell. Gentlemen, we are on Rule 36. Are there any suggestions as to that?

Mr. Tolman. I would like to ask Dean Clark if this expression in Rule 36, "Any forms of general allegation accepted in common law or equity pleading," and so on, means any allegations that equity accepted?

Dean Clark. Yes, I think so.

Mr. Tolman. Otherwise there would be some doubt as to the general allegations--that you are contrasting it with specific allegations.

Dean Clark. Yes, I did have some idea of the general ~~fraud~~ broad allegations, but I think the way you put it possibly means more than theother way.

Mr. Mitchell. Is that not a rather dangerous clause, giving him a chance to go back and have it written over?

Mr. Lemann. The expression seems proper, "Any forms of general allegation accepted in common law or equity pleading shall not be taken," and so on. The expression "No

form and so on is rather peculiar.

Mr. Mitchell. Well, I was looking at the general expression. We have a lot of other rules that cut out a lot of things.

Mr. Dobie. You go back to the general clause of a bill in equity.

Mr. Olney. It seemed to me that it read pretty well.

Mr. Mitchell. Shall we strike out the sentence beginning "any forms," down to the words "grounds of relief"?

Mr. Tolman. I so move.

Mr. Dobie. I second the motion.

Mr. Lemann. Do you mean take out the second sentence?

Mr. Mitchell. I think the last or second sentence.

Mr. Lemann. The second sentence is out.

Mr. Mitchell. The next is Rule 37.

Mr. Wickersham. In the ninth line, should it not be "further facts not material within theknowledge of the defendant"?

Dean Clark. No, it is "that there are further facts peculiarly within the knowledge of the plaintiff." That means that they are not within the knowledge of the defendsnt.

Mr. Wickersham. Well, it is defendant and not

plaintiff there, is it not?

Dean Clark. No.

Mr. Dobie. Does the defendant move?

Dean Clark. Yes, I am trying to provide that he does not get very far, unlessit will mean really something to have him have the information.

Mr. Wickersham. Well, the defendant is moving, is he not?

Dean Clark. Yes.

Mr. Wickersham. Well, those particulars may be ordered if the court may find that there are further facts not peculiarly within the knowledge of the moving party.

Dean Clark. Well, that is just a negative.

Mr. Wickersham. Well, is not the point that the mover is ignorant of the facts? And it is the defendant there.

Dean Clark. Well, it is the plaintiff there and the defendant knows nothing. In most of these cases the defendant knows just about as much as the plaintiff.

Mr. Wickersham. If they are peculiarly within the knowledge of the party, why should he move?

Dean Clark. They are not within his knowledge, but within the knowledge of the plaintiff. The plaintiff has some knowledge which the defendant has not.

Mr. Wickersham. Then leave as it is, "peculiarly within the knowledge of the plaintiff."

Dean Clark. Very well, but there is a "not" put in there.

Mr. Mitchell. I t means within five days of the service of the motion.

Mr. Donworth. Before the motion is determined.

Mr. Olney. In that connection, I am afraid that word "peculiarly." Is it not better to say "presumably within the knowledge of the plaintiff but not alleged"?

Mr. Wickersham. Instead of "peculiarly."

Mr. Olney. I am substituting for that "presumably."

Prof. Sunderland. "Peculiarly" is the usual express-

Dean Clark. I wanted a little more than "presumably." I wanted something theplaintiff knew and the defendant did not.

Mr. Dodge. Sometimes the defendant, even if he knows the facts, has the right to have the issues narrowed, as to what is material, and I do not think in the specification it should be limited to facts of which the defendant is ignorant.

Dean Clark. That is a philosophy that I do not agree with, because I think these things are almost always a waste of time, and that you make a great step in advance if you

put the burden on the fellow who is going to move; make it so that it is not an easy way of raising a question. And I do not believe the idea of narrowing the issues is worth anything. That is just the idea of trying to perfect the written documents before trial.

Mr. Wickersham. Is it not a little more? Under this modern system of prosecution it is exceedingly important to know what the plaintiff's action is, and quite difficult at times to know what the defense is, and anything that tends to make clear the issue, it seems to me, is of value both to the court and to the parties.

Dean Clark. As to clearing the issues, we put in a provision later so that either party can go to the judge for formulating the issues. But this is a matter of perfecting the pleadings and just a way of delaying the case. You move for a more specific statement; and you know how many times a defendantwho does not know the case, might once in a while--suppose a case where it is not known, particularly where it is a claim against an agent, but in practically every case when you really get in court the defendant, at least, knows as much about the case as the plaintiff--or he had better get a new lawyer.

Mr. Wickersham. Very often he does not know just what the plaintiff is going to claim.

Mr. Mitchell. That is covered later by clearing the

issues up.

Mr. Wickersham. That may be.

Mr. Dodge. This motion ~~motion~~ is only available where the plaintiff has not stated in his pleading as much as the defendant is entitled to have him state. He has stated his pleading in such general langauge that, as a matter of pleading, the defendant is entitled to have him state more narrowly what his claim is. It seems to me that it does not turn on the question of the knowledge of the defendant, but rather on having the pleadings definite and proper as they ought to have been originally.

Dean Clark. Well, if these rules stand there will be a rare pleading that will be too general,

Mr. Loftin. I raise the question whether you think the penalties are not inclined to be rather severe for not pleading; that is the filing of judgment against the plaintiff; or whether the same thing might be accomplished by dismissing it without prejudice.

Dean Clark. Well, yes. I suppose what I really mean is the default judgment, or that default may be entered against the plaintiff.

Mr. Olney. Default against the plaintiff is dismissal.

Dean Clark. Dismissal is what you mean, yes.

Mr. Mitchell. Without prejudice.

Mr. Loftin. I suggest "dismissing without prejud'

Mr. Dobie. You cannot dismiss against the defendant.

Mr. Cherry. Without prejudice you could.

Dean Clark. Yes. Now, I am very anxious indeed to get back in here what was taken out of Rule 9. I do think these motions ought not to call for a hearing unless the court orders it. I think that submitting these motions, at least with a reststement of the reasons, and the court passing on them at once, is most desirable--because here is a procedure for dragging the case out without getting anywhere sofar as the case is concerned.

Mr. Mitchell. It does not always follow tha if the court is going to expedite oral argument it is going to expedite the case; The delay comes up in a case where the motion is denied without hearing, and if he files a brief he puts it in a position to be delayed without hearing. It does not always follow that oral argument delays a case. In a busy court in a big city I think motions are disposed of much more promptly and correctly if they are argued one after the other.

Mr. Lemann. You generally have one day a week which is motion day, or rule day, and the judge will go through frequently 50 Or 60. It is very rare that he does not do like that. I think often he puts it in his portfolio and he gets a whole bunch of them. I know of one case which is very simple, and the judges have not passed on it in eight

or nine months.

Dean Clark. Well, of course, there is a difficulty of trying to cover the whole country. I suppose that would be true in the large cities. In the cities that are not so large, you have a regular prepared argument and hearing; but I am speaking of theprocedure where the judge holds up the proceeding, and as I said before in one case, the judge held it up for over a year after having an argument. You will remember Judge McDermott's suggestion on this; and I had no idea of suggesting a brief. I think that the motion in itself should contain all the reasons and say nothing about a brief.

Mr. Mitchell

In cases that have been held up for a year that you think should have taken a much shorter time, the remedy could be to allow a very short time for oral argument, and most of the courts allow five, ten or fifteen minutes.

Mr. Dodge. You might give the plaintiff the election in the smaller cities of filing his statements in writing.

Mr. Donworth. How about the defendant?

Dean Clark. Well, the defendant usually wants to tak the longest way around.

Mr. Olney. You cannot establish a rule for a c of this character by individual experience, or particul exprrience. The probability is that this judge who d

this matter a year delayed a great many other things. He was one of the delaying kind. I think as a rule the judge will dispose of these things more quickly on oral argument than he would by this method. There would be one condition in which that would not be true, and that would be where the judge had a good law secretary, who could go through all these things and prepare a memorandum for him and report on these things, and under those circumstances they would be disposed of very quickly.

Mr. Mitchell. None of the district judges have them.

Mr. Loftin. No, none of them have them.

Mr. Olney. No.

Mr. Mitchell. I do not really feel that you are gaining time by denying an oral hearing on a motion like this. In fact, you get action much more quickly that way.

Mr. Olney. If the judge is the right sort, you get it pretty soon; if he is not, lawyers are reluctant to come before him with those motions. They feel pretty uncomfortable about doing a thing of that sort.

Mr. Tolman. Mr. Chairman, it has been my experience that nearly every case is delayed in which a motion is filed. We have found that to be true; perhaps we ought to have a rule to present a motion to the judge every day. (Laughter.)

Mr. Lemann. I think that is the experience generally.

Mr. Olney. Yes, the experience of the bar generally.

Mr. Lemann. In this class of cases, the motion to make more definite and certain is the most particular class of cases in which you are likely to get a verbal statement. That was the case before you had Rule 9.

Mr. Mitchell. You mean when you had Rule 9?

Mr. Lemann. If he has one of these things before him he is going to get the record, and read the complaint, and read it over again, and read the memorandum, and say, " What is your point?" And then he says, "This motion does not come in under this." Why do you not tell him?

Mr. Mitchell. I think in Rule 9 you raise a more serious question than you can by an oral hearing.

Mr. Loftin. We struck it out of Rule 9, but we can put it back in this.

Dean Clark. Yes, we did strike it out of Rule 9.

Mr. Loftin. Well, I made the motion to strike it out of Rule 9, or, at least, I made a long argument on that, and I repeat it, but I am very much in sympathy with the desire of Dean Clark to expedite procedure, but I do not believe it can be accomplished by submitting the motion to a judge in writing.

Mr. Mitchell. In writing?

Mr. Loftin. In writing.

Mr. Wickersham. Well, before a district judge sometimes these motions are complicated. You take a long and involved pleading, and the judge cannot spend more than five or six minutes on each case, and he says, "I wish you would file a memorandum on that Tuesday" and a copy will be given to the other side, and he will have an answer. In the meantime, he gets a chance to read the thing carefully and thinks it over, and when he gets the memorandum he decides it. But on the argument it takes time to stop and go over it. I think you ought to realize that as a rule, judges will discourage that business or peocedure, but if they have to take the thing under advisement and wzzzs take a lot of time on it, thejudge ought to have the right to do so.

Mr. Mitchell. If you allow an oral hearing, there is nothing to prevent the judge saying, "Submit briefs by Monday or Tuesday."

Mr. Loftin. He frequently does that.

Mr. Wickersham. Yes.

Mr. Loftin. And if he has not made up his mind he says, " A memorandum must be submitted," But more often, according to my recollection, he decides it right there.

Mr. Wickersham. In a large number of cases I think he does; so that when you get a difficult or involved one,

he does not want to take the time to talk it all out, as he would if he had not any special amount of business.

Mr. Mitchell. What you have here is a prohibition against an oral hearing, and I do not think that will save time.

Mr. Wickersham. Yes; and Rule 9 is stricken out.

Mr. Loftin. Yes.

Mr. Cherry. And this refers to Rule 9. Where it says "as provided in Rule 9," strike that out. Well, Dean Clark, would it be practical to say, "The court shall proceed to consider the motion expeditiously"?

Mr. Wickersham. Yes, finally.

Dean Clark. Yes.

Mr. Wickersham. Summarily.

Mr. Mitchell. And then leave it to local rules.

Mr. Donworth. "Summarily" would not do; it means without notice, does it not?

Mr. Mitchell. Yes--"expeditiously."

Mr. Wickersham. "Expeditiously."

Dean Clark. Now, back in the motion days the requirement was for motion days for at least once a month. I have provided this procedure by which the motion would not have to come up formally; so I changed that wording "as often as the business shall require." It may be that if you are going to have hearings, you ought to have a limit of at

least once a month.

Mr. Wickersham. Are you speaking of Rule 9, or--

Dean Clark. One of those rules; I do not whether it was Rule 9 or not.

Mr. Donworth. The judges in many districts have to move around, and they hear motions in each place. And I do not think you can be too specific on that.

Mr. Mitchell. Is that not a matter that we should leave to be filled in by local rules?

Dean Clark. Well, of course, that was the provision of the Equity rules, that the court should fix motion days, but it makes the motion days at least once a month.

Prof. Sunderland. And lots of them did not do it. They could not do it, because they were not there once a month.

Dean Clark. No. I have left that out, on the theory that you would not need as many, but you are now going to.

Mr. Donworth. You are suggesting now "as often as business may require." That would be all right.

Dean Clark. That is Rule 9, but now I think it ought to be oftener than the business requires.

Mr. Loftin. It says "as often as business requires".

Dean Clark. Well, back in Rule 9, you will recall that it said, "Each district court shall establish regular

times and places, at intervals sufficiently frequent for the prompt dispatch of business." Now, the Equity rule, quoted on the opposite page, has it "Regular times and places, not less than once each month."

Mr. Dobie. They had to do that unless the circuit judge dispensed with it. I do not believe that was observed, however.

Mr. Mitchell. Well, take a situation where they are organized on the divisional system; that is, the State is a single district, and there are four or five divisions, such as in Minnesota. There are four or five divisions in my own district, and the judge can only attend, if he is out in another division, once or twice a year. Now, there is a motion made in that division, and it is filed with the deputy clerk in that division. I do not see why you cannothave a motion day at his headquarters in the Twin Cities, or in Duluth, where the parties are.

Mr. Cherry. Where they have divisions and more than one judge, that is a practical matter that affects one judge in the district in one way and another in another. They do that in Minnesota. The two judges change places, since they went on the Federal bench, they comply with that idea so that if they are actually in term or session, they are available for a good many of these things in the division where they reside.

Mr. Mitchell. Well, there is not a judge in every division. There is no judge that lives at Fergus Falls, for example.

Prof. Sunderland. The Western District of Michigan has to handle a lot of these cases also; we could not ask the judge to do that.

Mr. Lemann. We have a judge in the Western District of Louisiana that has to hold court in five different places.

Dean Clark. What I have in mind that the defendant has to go along until just after the judges leaves, and then suppose I file my more specific statement, and then I go back and collect my fee from the defendant, because things will be held up until the judge comes around; and you see it is next year.

Mr. Lemann. In most places it is twice a year.

Prof. Sunderland. In my State it is four times a year.

Dean Clark. That is what I am trying to get away from.

Mr. Lemann. Yes. I do not know just how far they have the power to require counsel to attend other than in their own division.

Mr. Cherry. They do have the power.

Mr. Lemann. They have a right to tell a man to attend?

Mr. Wickersham. Well, they do.

Mr. Donworth. That fixes it so that the judge can hold court anywhere in his district.

Mr. Wickersham. Surely he can say, "I am going to hold court at such-and-such a place next week."

Mr. Lemann. I think what Dean Clark has in mind is this: The judge could do it and get expedition if he wanted to.

Dean Clark. Yes.

Mr. Lemann. Of course, it may be that the judge will not do it, and if there is any way we can make him do it--

Dean Clark (Interposing). We can put in a provision that where the motion day is some time away, it can then be disposed of on written papers only.

Mr. Mitchell. You can put in a clause that motions of this type can be heard in oral argument or on brief, as the court in its discretion may determine.

Dean Clark. I think that would be of some advantage.

Mr. Loftin. I think that would be a good idea.

Mr. Mitchell. Do not prohibit them from having an oral hearing in a busy district in a city.

Mr. Olney. If you want to do that, would it not be well to provide that he may, if he wishes, have it submitted on briefs, and may by rule provide that motions of this character may be submitted on brief in particular business?

Dean Clark. I think that would be a good idea, and of course that would give a little scope to judges like Judge McDermott that want to do it.

Mr. Olney. Well, we have a number of places where the district court sits in California--such as Fresno, for example, and I have an impression that the judges do not like to go to Fresno, and I know they usually delay the disposition of cases that are in that particular district. Well, if there were a provision there so that it had to be made in writing and submitted on briefs, it might be disposed of down in Los Angeles, which is the headquarters of the court. But it can be provided for by local rule.

Mr. Lemann. Can we do anything here that will prevent that?

Mr. Olney. No.

Mr. Mitchell. We can say here that they are going to be permitted to have local rules on the subject.

Mr. Olney. What I had in mind is thatif your aim is to expedite action by providing that it can be submitted on briefs, it goes without saying that to make it clear and emphasize it, I should think you will have to have some special provision such as I have indicated.

Dean Clark. I think really you have got to have a special provision. But it is quite true that we ought to

provide some notice of the hearing. Of course, I have not provided for a hearing, and so I did not have that in. Now, Judge Donworth has given me a rule providing for notice:

"After a party has appeared in an action, he shall be shall be entitled to written notice--not granted as course--which notice shall be served on his return."

It does seem to me that we should have some provision of that kind, in view of the changes we are going to make. Now, if we have some provision of that kind, that takes the ordinary course, and unless we go further and provide that the judge may by local rule provide for this other course, of course we will not have it.

Mr. Mitchell. I suggest what I said a minute ago, that we put in a general clause that a motion of this kind may be heard orally or on written brief, as the judge may in his discretion determine. He can either do it by rule, or use his discretion in a particular case, if you put that in.

Dean Clark. All right.

Mr. Mitchell. You cannot force him to make a rule.

Mr. Lemann. I think I should put it in, but it may be merely psychological.

Mr. Olney. The only thought I had was that if you put in the bare alternative it does not amount to much, but if you put it in for the purpose of expedition, that the

local court may make a rule whereby he may require written briefs, and the court gets that idea, it will be better. That is the only idea I have about it.

Mr. Lemann. Specifying that he may make a rule in a certain case.

Mr. Mitchell. I would not use the expression "rule." I would say the court may for the purpose of expedition have an oral hearing, or on written briefs, as he may specially determine. That gives him the right to make a rule or use his discretion in individual cases.

Mr. Lemann. You could say where expedition requires that the court shall require it.

Dean Clark. I think if you do not say anything about a rule that the interpretation will be that the judge in each particular case must so decide which means that the judge does not know anything about it until a matter comes before him; and suppose comes up in the Northern District of Michigan--

Mr. Lemann (Interposing). No, it couldbe sent to him, and you could refer to this rule and say, "Judge, here is a rule that is expedite matters, and it is your duty to hear this without oral argument, and delaying it thirty days or two months.

Dean Clark. Then he has got to, or he has not got to, but he will write to the other party and say, "Have you any

objection to having this submission on papers?" And the other party will say, "I want to be heard."

Mr. Donworth. The point that Judge McDermott had in Rule 9 was that a brief in writing was better method than the oral argument. We disagree with that. That being so, why are we worrying about this one case in ten thousand? The judge has jurisdiction in Seattle and Bellingham. He lives in Seattle, and is in Seattle practically all the year, and twice a year he goes to Bellingham; and he has a term there about three days in a week. Now, I have not had occasion to know what takes place, but I have no doubt that if an attorney in Bellingham made a motion, he would say, "Will you not set it down in Seattle," where they can go in two hours?--I have no doubt that the judge does it. The things works out practically. I do not think there is any mischief here which needs any remedy of stirring up the whole country about it.

Mr. Lemann. There is certainly nothing, I think, that the judge could not do if he wanted to. I had a case where the judge said, "I will not be there for six months," and we said that we wanted action, and he said,"All right, I will do it." And we go to another point in the Western District.

Dean Clark. I am sorry, but it does seem to me that this is more important than those of you who have spoken

think, particularly in the country--in places where the distances are long. And I think it is expecting a good deal of a judge who is in some other part of the State and who is busy with a case before him which he is trying--to expect him to drop that and start expediting a case in which he has no immediate present interest. He can say, "I will read it when I get around to it."

Mr. Wickersham. That is what he will do anyhow. And conditionally that is what he must do. When he gets to another case he will xxy take it up. He cannot stop a lot of important business for a motion.

Dean Clark. He can consider it in two minutes.

Mr. Wickersham. I do not want him to consider it in two minutes--not my motion.

Mr. Lemann. It would make it a good deal better if you make it that he might provide by rule, because I think we would be doing our job much better.

Mr. Cherry. Why not have it three ways? You could have it this way, provide by rule, and ppovide in each individual case. And you can provide language for that. If you said that provision could be made for the submission and decision the way you had it in Rule 9, that would cover, would it not, the individual case and rule?

Dean Clark. Yes.

Mr. Cherry. I would like to see that left open so that any combination of these three, or any two or one of them, could be used, as turned out best in the district. I wonder if we do not lose sight of the fact that since the Judicial Conference has been pretty active--certainly in the Eighth Circuit--I think there is some observation of that; every judge in the circuit has a feeling that the business in his district must be dispatched, and even if the judge is not so anxious to have it decided, is it not better to leave this open, and have these things go out with a strong suggestion?

Mr. Wickersham. Well, almost all the Federal judges today are busy men. If they are not specially busy in their own districts, they are drafted to other districts. Now, it strikes me that we have got to trust them to get back the business as they best can. If you tie them down with too rigid a rule, you will just irritate them and the lawyers, and it will not help.

Mr. Mitchell. And the conditions are so different in the different districts.

Mr. Dobie. If you say nothing, those three courses are open to them.

Dean Clark. Well, that gives flexibility. This other course says, "Notice," and so on.

Mr. Lemann. Yes, there is nothing in this question

to prevent the judge from requiring the matter to be submitted on memorandum, is there? I am perfectly willing to leave it to the judge. If you leave it to the average judge, I am pretty sure he would be of the same opinion we are here.

Mr. Wickersham. Who is to tell him about it?

Mr. Donworth. At the end the judge says very often, "You may submit a memorandum to me."

Dean Clark. Well, they do not get to him until the end of his calendar, and that is what troubled me.

Mr. Wickersham. But really is there any obligation here that is so great that we need to deal with it in this particular way? I think the Federal judges, in my experience, in general are very prompt; they dispose of matters expeditiously; they give adequate hearings when hearings should be had. They are pretty snappy where there is nothing to do; if there is anything important they take a memorandum, and I do not know of any case where the Federal judges unduly delay the disposition of business, there may be exceptions, of course, but that is the general rule.

Dean Clark. Well, this is not a matter of criticism. It is a matter of machinery which gives the defendant the opportunity, by the very set-up to delay the case. Now, suppose it were generally known that here was one prolific source of delay civil actions.

Mr. Wickersham. Well, when a case is pending in a

Federal court--say there is a motion which the defendant or plaintiff expects to be of real importance. He has a right to be heard on it and he has a right to have that motion properly considered, and he has got to let the judge settle the way the business of his court is to be disposed of. I do not think we ought to provide for that.

Mr. Mitchell. Out in the less thickly settled districts of the West, you do not have to wait for motions day. Suppose you have a motion of this kind and you want to bring it on, and you call the judge on the telephone, and if he happens to be in his chambers, in Minneapolis, and motion day is Monday, and this is Wednesday, you can say, "I have amotion that I want to get on for hearing. Are you going to convene on next Monday?" And he says, "Yes, at 10 o'clock;" and so you get out the papers and notify the other fellow that it will be heard at 10 o'clock in the judge's chambers at the courthouse, and you go to his chambers and argue it out. There is very little formality there.

Mr. Wickersham. Yes. Now, in New York it is a different thing. It is well arranged and promptly disposed of, and they do it under their own rules, adapted to conditions in the community. I do not think you ought to put in general rules of practice particular provisions as to where he should

hear it and whether he should take a brief or not. I think that is interfering with the expedition of business.

Dean Clark. Now, we are going to tie it up, the hearing. It is true that the judge can say when the hearing comes on, "I want papers," and when he does that that is another opportunity to the defendant to take more time.

Mr. Dodge. I have never heard of a case where the ultimate result was delayed one day by motion for specifications; it is going to be filed in the early stages, and is disposed of at an early date, and I cannot think of anything that has caused delay in any case, and I have frequently had these motions filed against me.

Mr. Dobie. We have one judge in the Western District of our State. He goes to seven places, he goes to these little towns, and you cannot see him with a telescope, and then he goes back to where he lives. I do not think this is an evil at all. I agree with Mr. Dodge. I do not think it is a prolific source of delay.

Mr. Mitchell. In any matter having to do with the organization and dispatch of their own business, we have to let these district judges make their own rules in their own district, and if we try to do it in a rule, we are going to have a good deal of trouble about it.

Dean Clark. That is the only thing I was suggesting,

and it seems to me that you are just tying them so that they cannot do that.

Mr. Mitchell. You think that the rule as it stands now forces them to have an oral hearing?

Dean Clark. Yes.

Mr. Cherry. May I submit intangible form what I have ?

Mr. Mitchell. Yes.

Mr. Cherry. I think it would very well come in Rule 9: "For the expedition of business, ~~the~~ a rule may be made for the submission and determination of motions upon briefs ~~written~~ statements in support and opposition, without hearing."

Mr. Mitchell. "Hearing" is oral hearing?

Mr. Cherry. Well, I was copying the language that Dean Clark had in the rule.

Mr. Mitchell. Why not leave it to the judge?

Mr. Donworth. That means the judge may do it in his discretion.

Mr. Cherry. ~~Such~~ Special provision may be made. I was using what I thought it might cover either a rule for a particular district or a partitular kind of motion in a district, or a provision in an emrgency or a particular situation.

Mr. Lemann. Why not say "The court ~~may~~ shall make provision by rule," and so on?

Mr. Donworth. The court should be the boss.

Mr. Lemann. Then the court should make provision either by rule or order.

Mr. Olney. I might suggest to Dean Clark that he thinks the delay of the law are largely due to these dilatory motions. In my experience, the delay in getting a case on for trial is due primarily to two things; first, the lawyer for the plaintiff, who does not care particularly to push it on. He knows about the difficulty that the district judges have in getting time to try their cases--not the dilatory motions, but getting it on the calendar and bringing up the trial, so that the judges have time totry it. That was the troubel out in my district for a long time.

Mr. Dodge. That is my experience.

Mr. Olney. You have plenty of time, if you can ever get the case ready for trial, to get rid of the dilatory motion.

Mr. Lemann. We had this experience, that the judges were three years behind; and some men who want to get their case tried could get it in three months--and they are still three years behind.

Mr. Donworth. In my State there is no trouble getting the case at issue. When it is at issue the trouble is about getting the case disposed of.

Dean Clark. I think Mr. Cherry's motion is good.

Mr. Cherry. I make that as a motion, as an amendment

to Rule 9: "For expedition of business, the court may make a rule or order for the submission and determination of motions upon brief written statements in support and opposition, without hearing."

Mr. Donworth. Without oral hearing.

Mr. Cherry. That is all right.

Mr. Donworth. Without oral hearing, it can be submitted in that way.

Mr. Mitchell. All those in favor of that motion will say "aye"; those opposed "no."

(The motion was unanimously adopted.)

Mr. Mitchell. Then we will leave in "as provided in Rule 9," in Rule 37.

Mr. Donworth. Well, is that so? That is not the only method, is it? Are these rules not supplemental, and can we not leave out the reference to Rule 9?

Mr. Mitchell. I guess that is right. We have already covered that.

Mr. Donworth. "And proceed to determine the motion promptly."

Mr. Cherry. Expeditiously.

Mr. Tolman. There is an entirely different aspect of this Rule 37 that I would like to cover, if you have finished.

Mr. Mitchell. All right; Mr. Tolman.

Mr. Tolman. This rule gives the plaintiff the option of five days to comply with this demand. And this rule--I did not recognize it until I studied it--then intends that notice shall be served on the other side, telling what additional information it wanted to have, and this rule does not permit the court to fix any time or determine the motion until after this five days has expired for the other side to get this information. Now, I think that is a very valuable feature. I think that this rule requires notice of this sort of thing to be served on the adversary first, with the hope, that by force of the rule, a custom will spring up under which the attorneys themselves will do the thing without running to the court, as under present conditions, and that that will save a very large amount of time and trouble. I think that ought to be the rule. I think the parties ought to be compelled, if not by rule, at least by decency, to stipulate if they can in advance in regard to the facts. I think that depositions, for example, should be conditioned first on request to submit the facts, and thus obviate the taking of a deposition, with the expense that would be incurred.

So, in order to make that clear, I have rewritten the first part of this rule, changing the phraseology a

little bit, and I have suggested to Dean Clark:

"At any time before the answer is due, a defendant may serve on the plaintiff's attorney a request for further and better particulars of any matter stated in any pleading, ~~putting~~ pointing out specifically the defects complained of or the details desired. The plaintiff may amend his complaint or supply the bill of particulars within five days of the receipt of such motion, or if he does not, the court shall proceed to determine the motion promptly."

Mr. Mitchell. That is what you have here in Rule 37.

Mr. Tolman. Yes, but there is nothing about serving it on the other side. I wanted to make it clear that this five days is the time within which he may act.

Mr. Mitchell. Then, it would be all right if we inserted here "The plaintiff may amend his complaint within five days after service of the notice."

Mr. Tolman. "After receipt of such notice," and the notice referred to is a notice pointing out the defects, possibly, complained of.

Mr. Mitchell. Suppose we refer that to the reporter for his consideration and have a memorandum on it.

Mr. Tolman. That is what I intended to ask.

Mr. Mitchell. Dean Clark, I would like to ask about that. Here we have a motion where prompt disposition is

important, and I notice that there is a provision by which the plaintiff can make that motion, but suppose he serves his motion and then does not bring it on for hearing, and the other opposing party wants it out of the way.

Mr. Donworth. I have a rule on that, in the next rules.

Mr. Donworth. Have we passed Rule 37 now?

Mr. Mitchell. All right.

Mr. Mitchell. Not quite.

Dean Clark. Well, the title may not be very important, but I am not sure that a better title would not mean a motion to straighten or strike out. I had in mind where, perhaps, "further statement" might be more descriptive.

Mr. Lemann. In that case is not the answer sufficient, without a motion to strike out.

Dean Clark. It might be, although the last paragrap is "strike out".

Mr. Lemann. Yes.

Mr. Mitchell. Is there anything further in Rule 37 that anybody wants to bring up?

Mr. Dodge. I want to bring up my question again, to the effect that this right to specifications should not turn on knowledge, because the defendant's knowledge is not a matter that may be determinative of the evidence; he is got to meet the case stated by the plaintiff. And I have in mind cases where the ~~plaintiff~~ complaint states in very broad language,

but enough to get by a motion to dismiss, or an old fashioned demurrer, but at the same time does not advise the defendant with sufficient definiteness of what the exact claim is he relies upon. Suppose, for example he charges the defendant with false representation. The defendant in answering the complaint says what he said to the plaintiff when he sold him the property. But the proof ~~of try~~ of the truth that is a very different thing. The defendant himself may have to get books and witnesses from a distance, and many other details may have to be covered to meet the defense, and he should be entitled to know specifically what the claim is that he has got to meet and ordinarily I have found that the object of themotion for specification is not to inform the plaintiff of any facts, but to inform the plaintiff of the fact as to what claim he has got to meet in that case.

Mr. Wickersham. Inform the defendant, you mean.

Mr. Dodge. Inform the defendant, ~~mak~~ as a matter of pleading, and not as a matter of prying into the affairs of the plaintiff. I think it would be better if the rule should read/that if in the course of the further statement it is found that there are further facts, that are matters of proper pleading, which are alleged in the complaint, a motion for specification may be made in order that the defendant may properly prepare his defense, and that it should

turn on that rather than on knowledge.

Mr. Wickersham. Yes.

Dean Clark. Well, I tried to get away from this idea of proper pleading, because there is no such thing nowadays.

Mr. Wickersham. Dean Clark wants these pleadings to be some kind of a story of what the plaintiff has to say and what the defendant has to say. My idea is that it is an allegation of facts on which the plaintiff is entitled to claim for relief, and an allegation of facts which the defendant claims protects him from plaintiff's complaint.

Mr. Mitchell. I do agree with Mr. Dodge that it is only fair to the defendant, that if it is ambiguous and uncertain there should be a complete statement. The defendant may know all the facts--that is not the point. The question is Which way is the cat going to jump? And he does not know until it is definitely stated and he can then say, "That is a thing that I have to meet and I will get witnesses for that if it is something else he will have to prepare to sue for that." That is an occasion for a great deal of perjury, and it gives the defendant a chance also to get ready for the particular thing the other man is going after. It is not the matter of knowledge in that aspect. When you get to discovery and documents and things of that kind, you are naturally in a different field.

Mr. Donworth. I think Mr. Dodge would not insist over Dean Clark's objection to the use of the words "as a matter of proper pleading." Would not Mr. Dodge's attitude be met if those words along there read something like this: "Or the further statement or completion of the statement tha if / defendant or the court finds that there are further facts which should be stated in the complaint in order for defendant properly to present his defense."

Mr. Dodge. That is all right.

Mr. Mitchell. Is there any comment on that?

Mr. Donworth. If there are further facts--strike out "within the knowledge of the plaintiff and not alleged." The word "further" indicates that they are not alleged--"further facts which should be stated in the complaint in order to enable the defendant properly to prepare his defense." Is that it, Mr. Dodge?

Mr. Dodge. That is exactly it. I put it the othe way, merely because I did not want Dean Clark to think I was trying to get away from other questions of pleadings. I do not want to make this a bill for discovery, but merely to insure the proper statement of a definite claim.

Mr. Mitchell. What is your pleasure on that? Is that seconded?

Mr. Wickersham. I second it.

Mr. Olney. I second it.

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

Mr. Dodge. That is as modified.

Mr. Donworth. Yes, it shouldbe stated in thecomplaint, in order to enable the defendant properly to prepare his defense.

Mr. Mitchell. Is there anything further in Rule 37?

Prof. Sunderland. Is the next sentence to be chang That is, that a man may at the same time file his answer. I think that is the rule in many courts.

Dean Clark. That w as in connection with the supplemental pleading, I think. It could be added here.

Mr. Mitchell. Why not do as we did there, and say that an order--

Mr. Donworth (Interposing). I think if you wait until the three suggestions I have to make are considered, that will dispose of it.

Shall I proceed to those?

Mr. Mitchell. All right; go ahead.

Mr. Donworth. These three rules are intended to keep the case moving along steadily and smoothly and give everybody a chance to be heard, but to cause no delay, and to fix the time within which each ~~specification~~ step must be taken after a ruling on a motion addressed to the previous step, until the

thing is at issue. I would like to read the three, and then comment on them.

The first is Rule 37a, and reads as follows:

(Mr. Donworth read his proposed Rule 37a, which was subsequently handed to Dean Clark.)

Now, by the expression "if any," I mean this, that where an answer does not contain a counterclaim, of course, no reply is needed. If plaintiff, on motion to make the other party answer definitely loses, that is the end of that. There is no further pleading necessary. But if the court rules that the other party must answer definitely, then the defendant must comply with the court's order within five days, or the further time required by the court.

Now, in my proposed Rule 37B, which is, I think, necessary under the system by which terms of court are largely abolished, you must be able to bring a motion up whether made by yourself or the adverse party. That proposed rule reads as follows:

Mr. Donworth read his proposed Rule 37B, which was subsequently handed to Dean Clark.)

Mr. Donworth(Continuing). That is, sometimes a party needs an order in a hurry, and does not want to give the three days, or the judge may be leaving. He can apply to the judge, and on showing cause he can get an order determinable on one day's notice--or any other time. If the other party comes in and says, "It is not right," the judge can change that order.

Mr. Dodge. Do you mean that that would be satisfied by service by mail?

Mr. Mitchell. When you get into that, you will have to allow more time. I have a note to consider that afterward.

Mr. Donworth. Now, as to my third rule, my proposed Rule 37C--this is more or less general, and something of this kind is in all the codes. It gives the court power to do certain things under the conditions named. It reads as follows:

(Mr. Donworth read his proposed Rule 37C.)

Mr. Mitchell. That means fraud or misrepresentation in connection with the proceeding.

Mr. Donworth. Yes, that is the intention, and perhaps that should be stated--of course, not outside the proceeding. Whether the rules are stated in the best way I do not know, but we should have soundly established mach-

inery for keeping the thing going in an orderly way, and subject to such terms as the court may prescribe, so that a procedure may be set up that anybody can pursue to get the matter at issue.

Mr. Mitchell. The feeling that I have so far about the rule is the question whether you would uptset in that way that orderly procedure, and introduce a feeling of uncertainty. We have a lot of suggestions scattered around here, such as that it takes a good deal of time to know how you should serve a man, and how much notice you should give, and then have a lot of things like Rule 37A, which says that after a ruling is made on a motion the party shall within five days thereafter do something. Now, we have no provision for any notice of the decision, either by notice served on the adversary, and we have no provision for notice when you start the five days running; and there are a lot of details of that kind. I feel that, instead of trying to work those things out here at this meeting, if you wish we can refer the supplemental rules to the reporter, to be taken up with the general concept of speeding this question of time, and seeing what is being done, and seeing that they are hooked up together.

Mr. Lemann. I think it might be a good idea to dispose of the Federal case under rules that we provide--rather than to make a time schedule.

Mr. Mitchell. You might get notice by mail, just as Mr. Dodge said; we must make some provision for those things And when you do that, that calls for another provision, and when you do that you might have to give him three days notice, or if you mail it six days' notice, or something like that, and I do not think you can work those details out here, but let us wait until the reporter has had a chance to go over the rules again and consider those points.

Dean Clark. I will say that I think the rules of Judge Donworth are very good, and some of them should go in. I will go over them and see whether they can go in generally Here is a thing that is possible: We could now provide another schedule, just as is now provided--we could put in another schedule of time requirements.

Mr. Mitchell. It would be useful to the bar if you could collect all your time schedules and have them as an exhibit.

Mr. Wickersham. I did that once under the income tax law.

Mr. Mitchell. Yes. I guess there is nothing more in Rule 37.

Dean Clark. Mr. Donworth, I am not quite sure what you mean by "preliminary."

Mr. Donworth. I mean that, instead of pleading you make some motion which will suspend the next plead

and then when the court rules on that, if you lose you have five days to go on with that pleading. That might be more happily expressed.

Dean Clark. Well, in a preliminary motion, the party makes a motion as to any pleading.

Mr. Donworthy. It goes back to the preliminary motion.

Dean Clark. Preliminary motion?

Mr. Donworth. Yes, the motion preliminary thereto. This is not intended to cover all motions.

Mr. Cherry. Well, if any pleading is to follow, the result of the motion, it would not matter what the motion is about, would it?

Mr. Donworth. No.

Mr. Cherry. So that if you say that the motion is ruled out then there is to be more pleading--

Mr. Lemann(Interposing). There are really only two kinds of motions provided.

Mr. Cherry. Yes; but if it were made more general it would be more easily stated, because you say "if any."

Mr. Donworth. "Whenever a decision is made on a motion, the party against whom it is ruled may, within five days, make such further pleading, if any,"

Mr. Cherry. Yes.

Mr. Olney. I should think it wouldbe possible to have a section to cover this matter of making motions. I

think it requires a general section which specifies the notice which is required, and likewise a genral section covering the matter of service of papers, and also in the section governing the making of the motion, general provisions as to the time that should be allowed the parties to respond to any order that was made upon the motion, and then we would escape putting in here, in all these various sections, what time is required and what notice shall be given. Just make it general.

Mr. Donworth. That is the very purpose of my proposed 37A, to make it five days unless the court shall fix some other time.

Mr. Olney. But make it a general rule applying to all motions, and then all the lawyer has to do is to look up that rule.

Mr. Mitchell. Well, that section is for the reporter to consider when he is solving the problem.

Well, that covers Rule 37. And we will now pass on to Rule 38.

Mr. Donworth. Well, this is new in the Federal practice. I believe it is common in State practice.

Dean Clark. No, this is not common in State practice. It is a little attempt to imitate the English procedure, and it is quite new.

Mr. Mitchell. Here we have the pleadings vainly limited to the complaint and answer; when we ~~have more~~ make an effort to plead after that, we ~~come~~ start in making motions. (Laughter.)

Mr. Wickersham. I do not like that last sentence. It says "The court may delay the entry of such order to ascertain if conciliation among the parties is possible."

Mr. Olney. That gives them all sorts of stage play, and chance for delay, and one thing or another.

Mr. Mitchell. Is this intended, Dean Clark, as the best way to have the rule, as analagous to the English system, where you have the master, or somebody, get the parties together and sit down in the case and find out ~~whether it~~ what it really is?

Dean Clark. Yes. It was my suggestion of what I thought was the best that could be done because we have no masters and I do not know how the judges could do it, but this does give the opportunity to the judge to do it. It is not required, but any judge who wants to try this will have an opportunity. But I do not believe we can go any further, unless we can get more personnel in the way of judges, masters, and so on. Now, on the point suggested as to conciliation, you will notice again that Judge McDermott has made suggestions along this line, and the editor of the American Juridical Society Journal has thought these were very fine. Judge McDermott has made suggestions in general. He has addressed

the Society, and they have printed his address, and the Journal has commented upon it in several different issues; and Mr. Harley, the editor, told me that one of the most important things we could do was to urge the judge to exercise some functions of conciliation. I suggest that as indicating the somewhat different point of view. Now, I am not very sure myself how much of that could be put in, but I did not know whether it might not be worth while to put in a provision so that when a judge like McDermott feels that something could be accomplished we could give him an opportunity to try it. If you will turn back to Judge McDermott's suggestion he has made in an address to the Juridical Society--it is two pages back. There is quite a discussion here about that.

Mr. Wickersham. Well, that, however, is a different thing. There it says "on the request of one party for the action, the judge may try to find out whether the controversy can be composed."

Prof. Sunderland. This whole matter has been developed further in the Circuit Court of Detroit than anywhere else. I think they have been more successful there than England. The Superior Court in Boston has recently incorporated the same statement as used in Detroit.

Mr. Wickersham. In one of those controversies in a State court I think it is a very appropriate procedure; but litigation in the Federal courts is very different. I

do not think there w uld be one case in a thousand in the Federal that will be susceptible to this.

Prof. Sunderland. It is not conciliation; it is adopting a process.

Mr. Wickersham. Well, it is a process of conciliation that is suggested.

Prof. Sunderland . Well, it may produce conciliation, but it will save a great deal of time. In Detroit all cases automatically go before three trial judges, and they are handled very rapidly.

Mr. Wickersham. You do not mean in the Federal court?

Prof. Sunderland. No. But when they are ready for trial they go automatically to the three-judge court so as to save very valuable time, and the issues to be tried are there determined, and what amendments to the pleadings shall be made, when the trial shall be had, and other other matters that will facilitate the case.

Mr. Wickersham. That is like the English method.

Prof. Sunderland. Yes; but it is done by the master, and/if it is done at a preliminary stage, it should accomplish a great deal. It is done after the case is at issue, and by that means they can write out the matters that are at issue. They can wipe out any pleadings, and the rule is that after

they have passed the three-judges no amendment of pleadings is made at all. That is the last chance they have, and after the suggestion of the judge if they do not make any change, they cannot do so afterwards.

Mr. Mitchell. Is that done by rule of court, or by statute?

Prof. Sunderland. By rule of court.

Mr. Mitchell. I suppose if the judge on hearing, rules that some particular thing is not material, and the other fellow things it is, he can appeal?

Prof. Sunderland. Well, he will not put down any admission that they do not make. If they admit it he writes it down.

Mr. Mitchell. When he promotes the issues, it is by agreement of counsel?

Prof. Sunderland. By agreement of counsel, and it is a very easy method. And that becomes a final limitation upon the trial judge--it may be a different judge who tries the case--now, in the State court he has this memorandum before him which fixes the scope of that trial; every fact which is noted as admitted is written down, and the issues ~~are~~ written down are the issues to be tried, and no other questions are permitted to be raised upon appeal.

Mr. Donworth. I am afraid this would be a very

prolific cause of reversals. You know the Federal judges, and you know as a rule they are good lawyers; they are self-confident and inclined to cast aside what they think are immaterial matters; and in view of the Constitution of the United States, which gives a party the right to a trial by jury on every issue of fact, you would find that these judges, because they did not understand the matter, and perhaps the last case is present in their minds--you would get a statement there that very often would omit something, and it would be a very fruitful cause for exceptions and reversals, because the party has been be deprived of his right of trial on his issue.

Mr. Mitchell. Your statement I will agree with perfectly, on the assumption that this rule gives the court the power to make an order of what the issues are that both lawyers do not agree to. As it is worded, I think it does give the court such power; but if both lawyers object, or one lawyers objects to saying that it is at issue and it is not, I do not think that can be done. But I understand the purpose of this rule is merely for the court to do those things that he has persuaded the counsel to agree to.

Prof. Sunderland. That is correct.

Mr. Mitchell. And unless the lawyers agree that this is the issue and that is the issue, and this fact and that fact are admitted, and another fact is denied, the judge

cannot put it down as a record to be followed. Now, I think the idea is fine. It can be used with our limited judicial force, and I believe a rule can be put in here that would enable the court to do it. But I think this rule should be amended to make it clear that the court is not making any order against the will of either party. But it is not objectionable to get them together and have them agree on what is really agreed on and what is to be fought out; and it is not a case where the judge can make an order against anybody, making the issues, and saying what is denied and what is not.

Mr. Lemann. We can do this now, can we not?

Mr. Olney. Of course, a first class judge at the outset of the case will do that very thing.

Prof. Sunderland. Yes, but the advantage is that this is done before you get your witnesses.

Mr. Olney. The judge can do it now. I have no objection to a rule such as the Chairman suggests, but if you accept that, a good trial judge will do it now.

Prof. Sunderland. This rule is just to suggest the idea.

Mr. Lemann. So that there is no objection to putting it in.

Mr. Mitchell. It will have the effect of forcing the other fellow to come in. As it is now, you will have

to take your adversary by the scruff of the neck and drag him there. By this rule you serve a notice on him and you sort of bind him. There is no penalty if he does not, the judge cannot force him; but somehow or other it seems to have that effect.

Mr. Lemann. It makes him feel more like signing.

Mr. Dodge. It is done in every case in Boston, in the State court; but it is more along the line of your statement, of getting them together and reaching the issues together.

Mr. Mitchell. Is it done under rule?

Mr. Dodge. Yes. Have you seen that Michigan rule?

Prof. Sunderland. It is not a State rule; it is a local rule.

Dean Clark. Those things are referred to in the Journal, but I do not know the exact wording.

Mr. Dobie. As I understand you, Prof. Sunderland, the experience of the Detroit court has been very happy.

Prof. Sunderland. Yes, it has had a very good effect.

Mr. Mitchell. Mr. Dodge, can you get a copy of your Boston court rules in regard to that?

Mr. Dodge. Yes, I will make a memoradnum to do that and send it to you, Judge Clark.

Dean Clark. Very well.

Mr. Tolman. Would a motion to that be desirable?

Mr. Mitchell. Yes.

Mr. Tolman. I move that the matter be referred to the reporter to be exast, in harmony with the statement made by the Chairman.

Mr. Mitchell. You mean the statements--

Mr. Tolman(Continuing). With the Chairman's view of what the rule ought to be; that it ought to be only by agreement, and the record will show that.

Mr. Olney. I want to object seriously to putting anything in the rule that the court may delay the entry of of its order, or anything of that sort, for the purpose of conciliation.

Mr. Mitchell. I think you might strike that out.

Mr. Olney. I think that will just make trouble; anything that would permit the court to exert pressure.

Mr. Donworth. Rule 38 as it stands reads:

"After the pleadings in an action have been completed, the court may, upon motion of any party showing grounds therefore, or of its own initiative, if it finds that the pleadings do not clearly define the issue to be tried, and after hearing the parties, enter an order setting forth the issues to be tried in the action, or directing such amendment of the pleadings as will clearly and precisely

set forth the issues; and the issues thus formulated and determined shall be the only ones considered at the trial."

You see now, the court, at the beginning of the trial, or at some stage of the trial--when the thing gets around to theproper stage, ~~xxxik~~ says, "Now, let us see. The plaintiff alleges in paragraph 1 so-and-so; the defendant in paragraph 1 denies so much of that," and so on.

Now, he is going to do that same thing in an order, and I do not quite see what he does here is any better than the parties can do, if the parties have conformed to the rules. I will not delay this. I will not oppose it; but it seems to me that it is going to get the parties and their lawyers before the judge, and take up valuable time on something that he ordinarily does in the trial.

Mr. Dodge. I am told that it works quite well, and it allows them to get together and brings about a good many settlements.

Mr. Lemann. I should think it might be more valuable in State courts in small cases than inthe average Federal court, where the lawyers as a rule and the case are much more important, and the lawyers know their pleadings better; and my general impression is that it is not likely to lead to a very successful result. But I do not see any objection to it. Why not wait and see what happens to it?

Mr. Dobie. I just want to make one more point. The rule says that if the court finds "that the pleadings do not clearly define the issues to be tried", and so on. As I understand Prof. Sunderland, even when the plea dings are quite specific and define the issues to be tried, the parties could get together and make a good many other issues. I do not think it ought to be limited to the case where they do not clearly define.

Mr. Mitchell. They deny it in the answer, and when they get before the judge they say, "I did not really mean that."

Mr. Dobie. That is the point I want to make. Sometimes the pleading defines the issues very clearly, and sometimes before the judge they may get a lot of other things agreed to by the parties.

Prof. Sunderland. All I meant was writing down theissues, in theform of three or four questions.

Mr. Lemann. Mr. Dodge, will you find out just how they do it in Boston?

Mr. Dodge. I will get the rule, yes.

Mr. Lemann. And you will send it to Dean Clark?

Mr. Dodge. Yes.

Mr. Mitchell. We will now take up Rule 30.

Mr. Donworth. There is one fault in that, Mr. Chairman. I think it is rather common, in the statutes

about the real party in interest, to permit suit by an assignee of a chose in action assigned in writing. Oftentimes, a claim is assigned because the real plaintiff does not want his name to appear in the public press, etc., and so he assigns his claim to John Smith, and John Smith is a mere formal holder and suit is brought by John Smith. I know in our statute we put that in so that the assignee of a chose in action assigned in writing may sue.

Dean Clark. That is a very restricted meaning, however. Generally, the real party in interest provision has been construed to mean assignee. Some States require a writing, but generally not. And I do not know why you need the writing.

Mr. Donworth. Well, he is not the real party in interest, you see.

Dean Clark. Well, it has been held that he is.

Mr. Dobie. That is, if he has legal title.

Mr. Dodge. If he has there is no question about it.

Dean Clark. Well, I do not object to that, but how about a subrogee?

Mr. Dodge. You just may say including a certain person, so that there shall be no mistake about it.

Dean Clark. Do you not cast doubt, then, on a case of

subrogation?

Mr. Dodge. Is not a man who is entitled to subrogation entitled to sue in his own name?

Dean Clark. Yes, he should be, but if you provide that an assignee may sue and do not provide for these others, how about it?

Mr. Donworth. Well, the word "assign" might mean assignee in bankruptcy, or something of that kind.

Mr. Wickersham. Assignee of a cause of action would be good.

Mr. Dodge. The right to subrogation is an individual right.

Mr. Dobie. If it is not assigned, I say the "subrogee"--if there is any such word--is not the assignee--that is, if it is not assignable; You might call it if you want to an assignable claim, but it is not.

Mr. Dodge. This right of subrogation is an individual right of his assignee.

Mr. Dobie. Yes, it has been specially held under the Federal assignment statute to that effect; so that if it is not an assignable claim ~~xxxxxx~~ the word "subrogee" is not added. It is not necessary that he should be if it is not an assignment.

Mr. Mitchell. That Federal statute is that he cannot come in on diversity of citizenship where he was not in

originally; is that it?

Mr. Dobie. Yes; that is it. I do not think subrogation is an assignment.

Dean Clark. That is what I thought. If you start and pick ur particular things beyond the New York rule, which is pretty bad, but at least has been construed, what they do with things that you do not include?

Mr. Donworth. Does the New York rule, either in this section or any general statute, permit an assignee of a chose in action to sue in his own name?

Dean Clark. It does permit it, but not by statute.

Mr. Mitchell. Well, that clause in brackets is commonly used as a statement of the rule, and if you qualify it by reiterating that present statute about an assignee--

Mr. Donworth(Interposing). Well, we are not dealing here, of course, with that question of jurisdiction. When you have an assignee in the Federal court, he takes from the parties the same interest.

Mr. Mitchell. I do not think we are in any way qualifying that rule when we define "party in interest."

Mr. Donworth. Possibly not. Is not that second clause, Dean Clark, better than the first one?

Dean Clark. The reason I prefer the first one is that the second one has caused quite a little litigation, because it was not known what it meant.

Mr. Mitchell. Is the first one any clearer?

Dean Clark. I hope so.

Mr. Wickersham. I doubt it.

Mr. Mitchell. You have got all the references to cases that arose under the first clause?

Mr. Lemann. I looked at your references to see what the differences were and I think those particular cases were cases of partial subrogation under fire insurance laws--that is, where there was, say, $10,000 insurance, and when the loss was due to the fault of a third person; there is a partial subrogation there. And I was wondering whether you would not have just the same question arise by saying "The person who, by the substantive law, ~~xxxxxxxxxx~~ has the right sought to be enforced." You see, the general rule is that they both must join under the "real party in interest rule." They suppose they would both have to join.

Mr. Mitchell. The reason of that is that they can not submit the claim--they must join; and when the insurance company will not join as plaintiff they must join as defendants.

Mr. Lemann.
I suppose you could not provide that he must hold it in trust for the insurance company.

Mr. Dobie. Some of the cases hold that it creates an express trust; other cases hold that he must sue, because

he has got legal title. But you would not avoid those difficulties, would you, by your alternative?

Mr. Mitchell. It has been so thoroughly threshed out, under the Equity rule that I think if you adopt an entirely new provision, it may cause as much litigation as the other.

Mr. Dobie. I think Dean Clark had the idea. He wanted to get an expression a little broader than that.

Dean Clark. Yes.

Mr. Dobie. I think in the hands of a liberal court, you would not have any trouble; and some of the early decisions to determine who is the real party in interest are terrible; they are very restricted and narrow.

Mr. Wickersham. I move that we adopt the language of the second draft.

Mr. Tolman. I second the motion.

Mr. Dobie. I want to hear more from the reporter. I think that is more important. If he can get a new phrase that he is sure the court will give broader meaning to, and is fairly clear, that would be better. Of course, in some cases/where it is a question of substantive law, I would be willing to substitute it; but I do not like to place that language in it. The second alternative is very much safer in the hands of a libera l court.

Mr. Mitchell. Dean Clark, will you give me an illustration of the ~~profession~~ difficulty as to the real party in interest clause?

Dean Clark. The chief difficulty did arise in connection with assignment and subrogation; especially in connection with partial assignment and subrogation; but there was often a question as to what was the meaning in the case of a technical division of the legal and equitable title. The difficulty ~~was~~ with the old Equity phrase was it seemed to carry some significance as to the beneficiary, and there was often litigation in the old days as to whether a trustee under this provision could sue, or whether the beneficiary ought to ~~see~~ sue, or whether the trustee could ~~be sued~~ sue under this last phrase and the beneficiary also sued; whereas it is well settled, and of course we all know that this did not occur; in many things connected with the estate, the beneficiary cannot sue and ought not to sue. Now, the division of construction which developed was right there, as to whether the real party in interest provision did mean the man who had the substantive right, or mean restrictively the man who had some beneficial interest. Now, taking the case where the matter was brought up of partial assignment or partial subrogation, which were two of the important cases, there was a good deal of holding that the partial assignment in such case was effective only in equity, and the original man must

sued, which meant that a man who had lost a good deal of his interest in the case was the one to use, or even in the case of partial subrogation, there was a question of whether the insurance company had much chance of protecting its interest.

Mr. Wickersham. Well, they got beyond that, did they not? by the later construction?

Dean Clark. Well, the better courts did, yes.

Mr. Wickersham. We have a volume of decisions on that now, and it is pretty well settled.

Mr. Mitchell. How does your substantive law provision remove any difficulty about this partial assignment? Just take a specific case here of subrogation. Why is there any clearer result under the first alternative than under the second in that case?

Dean Clark. There is no question, and it is everywhere taken that the insurance company has a very definite right. Of course, in the case of a partial subrogation, each has a very definite right--the assured and the insurance company. And this provides, in effect, that the one or ones to sue are the ones who have the right, not those who may have--

Mr. Wickersham (Interposing). Well, he is trustee then of an express trust, is he not?

Dean Clark. There is no express provision here. The rule is that both should sue together, or if one sues alone, he ought to make the other party a defendant; in that case I put it "who is the trustee of an express trust."

Mr. Wickersham. I think the insurance company is the trustee of an express trust.

Dean Clark. I should think there was chance of holding that the assured was.

Mr. Lemann. I think the assured is, because he has no interest and is trustee for the insurance company.

Dean Clark. That subrogation is supposed to be effective for the purpose of giving the insurance company an equity to make a claim. But this is a good example of the situation: Now, here are distinguished gentlemen before me who split as to who can come within the technical phrases of the old rule. You see, Mr. Wickersham one way and Mr. Lemann the other.

Mr. Lemann. I think he will agree with a little time for deliberation. (Laughter.)

Mr. Wickersham. Possibly I will.

Dean Clark. No, I think, with all due deference, to Mr. Lemann, that Mr. Wickersham is quite sensible in his reactions.

Mr. Lemann. I think he is sensible, but I think it is the other way. How about this provision "A person who,

by the substantive law, has the right sought to be enforced." Take Mr. Wickersham's view that the insurance company by substantive law has the right to be enforced, if it was the trustee--or if the assured was trustee for the insurance company. I do not object to getting another form if it is clearer, but I just want to be sure that it is clearer.

Mr. Mitchell. I want to ask also whether "a person who, by the substantive law, has the right sought to be enforced" would include a person expressly authorized by staute who has not any right at all?

Dean Clark. I should think if he is given the right by the legislature that he certainly had the right. Well, now, answering a little more directly, Mr. Lemann, of course we cannot say beyond any question that the court wants to do ~~the same~~ strange things, but you h ve got a situation--how can you get away from the fact that both parties, in the example that has been considered, the assured and the insurance company, have definite rights?

Mr. Cherry. By the substantive law.

Dean Clark. Yes.

Mr. Cherry. And that is so by your phrase just as much as by the other. I think that is where Mr. Wickersham and Mr. Lemann were in disagreement, as to what the substantive law was in that situation.

Mr. Lemann. Yes.

Mr. Wickersham. Well, whoever under the substantive law has the right is the real party in interest, is he not?

Dean Clark. Well, he should be, and I want to say so directly. Under the decisions by the better courts that is true, but not by the decisions of all the courts, and not by the--

Mr. Wickersham(Interposing). I think we had better stick to the evils we know of rather apply those that we know not of.

Mr. Cherry. If you use the real party in interest, what was the purpose of leaving out the statement in Equity Rule 37, "may sue in his own name without joining with him the party for whose benefit the action is brought?" Does not that get rid of one of the possible difficulties, or at least, putting it negatively, might it not invite some question if it were left out when it had been in the Equity rule?

Prof. Sunderland. What was the question you asked?

Mr. Cherry. I am asking the question, since it has been in the Equity rule--

Prof. Sunderland(Interposing). I heard that.

Mr. Cherry. One of the questions that Dean Clark raised was whether he had to join the other party with him as plaintiff if he would not join him as defendant? Now, that might tend to eliminate that--I do not say in all cases.

Mr. Wickersham. Were not those words "without joining with him the party for whose benefit the action is brought" perhaps, intended to avoid ousting the jurisdiction in the Federal court?

Mr. Dobie. I think that is likely.

Mr. Wickersham. By joining beneficiaries of the same State as defendant?

Prof. Sunderland. That is taken from our code.

Mr. Wickersham. Maybe so, but I mean the reason for putting it in the rules.

Prof. Sunderland. I do not know what it means, but it is in every code.

Mr. Dobie. Well, there is one thing--"a party in whose name the contract has been made for the benefit of another"; it might apply to that.

Mr. Wickersham. Now, you take that first clause of this rule, "has the right sought to be enforced." Now, the right sought to be enforced is vested in this report in the executor and beneficiary. The executor has the right of action; the right under the substantive law sought to be enforced is the right to the property, which is, perhaps, in the trustee, or in the beneficiary.

Dean Clark. No, it is not in the beneficiary.

Mr. Wickersham. I do not know.

Dean Clark. The law of trusts is that the trustee

must sue as to the trust property.

Mr. Dobie. He may recover and it may all go to creditors, etc.

Mr. Wickersham. "Under substantive law the right to ~~shall~~ be enforced," which is not the right of action. "his is the right under substantive law, as to who are the owners--in equity as well as in law--who are the owners of theproperty. It is not the executor. He might sue for the benfit of those who have the right.

Mr. Dobie. The law gives him the right to get that property in there.

Mr. Wickersham. That is the right of action; that is not the right under substantive law.

Mr. Dobie. That is the only right he is asserting there.

Mr. Lemann. What do you mean by "substantive law"? We are not asserting a right of substantive law. Do you mean a right under common law, or a right in equity? Because, as I understand, we are not abolishing the fundamental differences between common law and equity, but merely the procedure.

Mr. Wickersham. I do not know.

Dean Clark. Does substantive law apply to the particular claim sued upon?

Mr. Wickersham. Yes.

Dean Clark. That is, a right to a partnership

accounting is one thing, and a right to sue your trustee is another; a right to sue for trespass on trust property is another.

Mr. Lemann. Is that what you mean when you speak of a right under substantive law?

Mr. Wickersham. I think this would open up a lot of decisions and lead to litigation the end of which nobody can see.

Mr. Dobie. I think that is only in equity.

Mr. Dodge. Only in equity.

Mr. Dobie. Yes.

Mr. Wickersham. Well, I would do it with the provision that is in the Equity rule.

Mr. Olney. Am I mistaken about this? I have always thought that this rule of the code, which is one with which we are quite familiar, did not express what we really had in mind. I may be wrong, but I had the impression that what they were driving at when this code was adopted was to allow an action to be brought by the real party in interest, when, under the existing law, it would have to be brought, perhaps, by some one who is merely the formal owner, so to speak, and that what was really intended was ~~rex~~ more/a permissive statute than a limiting statute; but unfortunately, they put in words of limitation, that it must be brought by the real party in interest; and really what they had in mind was

that the real party in interest should be allowed to bring the suit, as well as the trustee, for example, who held bare legal title.

Mr. Dobie. I think some of the earlier cases have held that that statute was highly restrictive, and then the later cases have generally held that it was intended to broaden the rules of the common law and to give that right more, was it not?

Mr. Olney. It might be. What happened was that they put in this code section, by virtue of the necessities of the case, and theprogress in ideas, a meaning that gave it the permissive meaning rather than the restrictive one which it had according to this language. Now, what I am pointing out as to this--the only great advantage there is, if it is any at all, in this discussion, is that we ourselves should clearly see what we ought to do. What should be done here--the object we are striving for--is to permit of litigation, the commencement of the suit, either by the real party in interest, or by some one that genuinely represents him under the law, so that if this person representing him obtains a judgment, it is binding not only on him, but on the one who may be called the party having the beneficial interest.

Mr. Dobie. That was the test applied by a lot of

of the courts in those cases of assignment of bare legal title; they said, "The only viewpoint here is the practical one; if the defendant can make any defense against the assignee that he could have made against the assignor, and the judgment in the case is proper for the foundation of a proper plea of res adjudicata, that ends all question about it."

Mr. Olney. So far as this particular language is concerned, if we change that language with which the bar is so familiar in any respect, it is going to cause great question. It is given the construction it should have, of a permissive statute except of a restrictive one--and if we depart from that we are going to have a lot of trouble and litigation.

Mr. Mitchell. What do you think, Prof. Sunderland?

Prof. Sunderland. I think that is partly true. I think it is so thoroughly in our jurisprudence that the best thing to say is that that statute, if used, is to take care of a chose in action. I think if they made that one provision, that an assignee could sue in his own name, they would have done everything that is necessary in most cases, and would have avoided all this litigation; but they did not do it and the litigation is now over, and I think we should keep it.

Mr. Mitchell. It is in the Equity rule too.

Mr. Dobie. Do you want to eliminate this phrase, "Without joining with him the party for whose benefit the

action is brought", in the Equity rule?

Prof. Sunderland. Yes, I do not see any sense in it.

Mr. Donworth. Well, as Mr. Cherry has well said, if it is in every code, leaving it out is going to cause question to be raised.

Prof. Sunderland. Well, I never knew of a case where a judge even discussed it. I think it has been an absolute nullity.

Mr. Lemann. If you leave out a rule like that, and do not give your reasons, can you say in there, "We left this out because we thought it unnecessary."

Mr. Cherry. Well, our reasons would not be those of the Supreme Court.

Prof. Sunderland. Of course, if they edited it or changed it it would be different.

Mr. Lemann. Some courts might say they would.

Mr. Tolman. In Equity Rule 37, Mr. Hammond called my attention to the fact that it says, "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, etc. may sue in his own name."

Prof. Sunderland. That is true.

Mr. Tolman. Under that rule, was the executor the real party in interest? That indicates that he is not

the real party in interest.

Prof. Sunderland. Yes, that is right.

Mr. Dobie. He was always permitted to sue at common law.

Mr. Tolman. I used the parenthetical word "but".

Mr. Dobie. I think the reporter has used the word "but."

Mr. Donworth. The use of the word "but" has exclusive reference to the equity suit, because in the equity suit the executors are the owners.

Prof. Sunderland. As a matter of fact, when this was in the Equity code, "but" was in there.

Mr. Dobie. I move, Mr. Chairman, to get it before the Advisory Committee for action, that we adopt the second of those alternatives, "real party in interest" down there, and that we restore that last phrase in the Equity rule. Not that I have any great idea that it really means anything, but I do have a well defined feeling that if you take it out you will have to do a great deal of explaining.

Mr. Donworth. It will just cost a little printer's ink to leave it in there.

Mr. Cherry. I second the motion.

Mr. Mitchell. All those in favor of the motion will say "aye"; those opposed "no."

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

Mr. Donworth. Now, on the question of the guardian ad litem in this Rule 39, that is, of an infant, I want to read you from the suggestions of local committees, the suggestion of the Utah Committee:

"We recommend a rule which eliminates the distinction between guardians ad litem and the next friend of a minor, and that the guardian ad litem acts in both capacities, but only upon appointment by the court in which the action is pending, pursuant to such notice to all relatives of the minor and person having the custody thereof as the court shall order after the filing of an affidavit showing the circumstances. The rule should also expressly provide that the guardian ad litem cannot--"

And this is important for consideration--

"in any way collect the proceeds of a judgment in favor of the infant, but that a general guardian under the laws of the State must be appointed and qualified for that purpose."

Now, especially in personal injury accident cases, a recovery is often had, and as I understand it, the law is in amuddle as to the responsibility of the guardian ad litem appointed by the court.

Mr. Dobie. I do not think generally you can pay him; that is my understanding.

Mr. Donworth. ~~That is my understanding, yes, you~~ You can.

Dean Clark. Yes.

Mr. Dobie. I thought in most of the States you could not.

Mr. Donworth. He is not under bond, and it is a poor system; whether we should undertake now to change it I do not know; but I mention it for your consideration.

Mr. Cherry. We have a statute in Minnesota.

Mr. Wickersham. Now, should we add the language that is in the Equity rule, "a party especially authorized by statute may sue in his own name", you have that, "without joining with him the party for whose benefit the action is brought." I do not think that is necessary, but I just call it to your attention.

Mr. Dobie. We voted to include that.

Mr. Wickersham. You voted to include that?

Mr. Mitchell. Well, maybe we had better take up the guardian ad litem tomorrow. It is after 10 o'clock; and there is some question there that will necessarily take some little time.

Shall we adjourn now until 2 o'clock tomorrow afternoon, and sit from 2 until 7 o'clock?

Mr. Wickersham. Yes.

Mr. Dobie. Yes.

(Thereupon, at 10:05 o'clock p.m., the Advisory Committee adjourned until Sunday, November 17, 1935, at 2 o'clock p.m.)