VOLUME 6

PROCEEDINGS OF

U. S. SUPREME COURT ADVISORY COMMITTEE

ON RULES FOR CIVIL PROCEDURE

Monday, November 18, 1935

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INDEX TO VOLUME 6.

(over)

Budlong
ELK 1
Nov. 18
follows
Morgan

AFTER RECESS. (Nov. 18, 1936.)

The conference reassembled at 1.30 o'clock p.m., upon the expiration of the recess.

C. DEPOSITIONS BY WRITTEN INTERROGATORIES.

RULE 56. MANNER OF TAKING.

(Continuation of Discussion)

Mr. Mitchell. In connection with Rule 56, which we are considering, I think we agreed that there ought to be some cross interrogatories except where the adverse party is examining; and we were discussing the question of sending the deposition to the witness or to some one else.

Mr. Loftin. The rule now provides only for sending it to the witness. It occurred to me that there were instances where the witness would be so illiterate that he would not know what to do with it, how to fill it out. It seems to me there ought to be some provision in a case of that kind. Of course he could take it to the notary, or the officer before whom it is to be executed, and ask the officer to fill it out for him. Had you given any consideration to that?

Mr. Sunderland. What I tried to do there was to get just as simple a procedure as possible. I thought that would be used primarily in cases where there were some simple matters respecting which there would not be any particular controversy; the witness would not be a hostile witness, so

2

that ordinarily there would be no occasion for cross examination, but you want to get some evidence which you can produce in the simplest way merely to make some formal proof. I thought that is what this would ordinarily be used for.

Mr. Mitchell. Do we need to provide any machinery at all there? Can we not merely say generally that the interrogatories shall be submitted to the witness, and that he shall swear to his answers before a certain officer? The lawyer who sends them out may send them to the witness and say, "Take these and go before an officer", or, if he thinks the witness is ignorant, he can send them to a local lawyer or to some official and say, "Get hold of this fellow and explain this to him." Will it not work automatically, without requiring him to send the interrogatories to the witness or anybody else?

Mr. Sunderland. It does not say to whom the interrogatories shall be sent.

Mr. Mitchell. No.

Mr. Wickersham. If it is as simple as that, if there is no dispute over it, the parties could stipulate. If it is as simple as that, I do not think much of a rule would be needed. You can always enter into a stipulation if some uncontested question is brought up.

Mr. Mitchell. Suppose there are interrogatories and cross interrogatories, and they are interested in having the proper answers: What reason is there not to leave it to the

lawyer who is taking the deposition to see to it that it gets to the witness in the way that will produce results? Why say he must send it to a notary, or send it to an examiner, or send it to the witness? Why not just leave it open?

Mr. Sunderland. I should think the more things you can leave open the better, as long as it will work.

Mr. Mitchell. I should think that would work.

Mr. Dobie. Mr. Chairman, I believe Major Tolman, or possibly Mr. Loftin, has just put before me here a memorandum-- I believe I made the motion about the cross interrogatories -- asking if I would mind including in it provision for oral cross examination. I should be guided very largely by what Professor Sunderland said on that subject, but I am inclined to think it is not a desirable practice to mix up the two.

Mr. Loftin. Oral cross-examination?

Mr. Dobie. To provide for oral cross-examination by the other side.

Mr. Sunderland. You mean in connection with the written interrogatories?

Mr. Dobie. Yes.

Mr. Sunderland. I would rather not do it.

Mr. Dobie. That is my idea.

Mr. Mitchell. Is it the sense of the meeting on the matter we have left unfinished that the Reporter shall avoid explicit directions about the method of written interrogator-

ies reaching the witness? Is that agreeable?

Mr. Dodge. I am inclined to think that the thing ought to be set up with some formality, because you have cross-interrogatories to be appended to the direct-interrogatories, and possibly re-direct. I should think the bar would want to be advised as to just how to do it.

Mr. Lemann. In our practice, which is not very cumbersome, you file your interrogatories with the clerk, unless you cover the matter by stipulation, as you often do; but, assuming no agreement, we file the interrogatories with the clerk, and serve a notice of costs on the opposing party. He has three days within which to file the costs. The clerk then issues a commission directed to any justice of the peace, notary public, or other officer authorized to administer oaths, appending interrogatories and cross-interrogatories, and gives them to counsel, who would then send them usually to a correspondent, with instructions to request that he arrange to have the answers taken. It is not very complicated.

Mr. Sunderland. There is no advantage in filing them. You might just as well serve them; might you not?

Mr. Lemann. Mr. Dodge spoke of the desirability of some formality. I think he had in mind a commission of some sort.

Mr. Dodge. You want to be sure that the interrogatories and cross-interrogatories go together. Who is going to send the cross-interrogatories if we leave it to counsel?

Mr. Sunderland. How are they going to get filed if they go to counsel? They are just as sure to go to the witness as they are to go to counsel.

Mr. Dodge. Who is going to determine whether the cross-interrogatories have been submitted to counsel within the five days? Have you not got to have a court filing, and have a court commission issue? It is a very simple thing.

Mr. Lemann. It can be done in the same way you issue a deposition.

Mr. Sunderland. Judges do not like to be bothered with all these little matters. In a city like New York, where they have a lot of Federal judges, you can get an organization to handle those things; but it is a different matter in the small districts.

Mr. Lemann. Nobody more than the clerk, I should say.

Mr. Loftin. The judge is not bothered with that at all. That is all done by the clerk.

Mr. Dodge. It is just a case of issuing the document.

Mr. Mitchell. In subdivision (3) of Rule 56, where it says --

"That the witness shall swear to the truth of his answer before some officer of the United States or of the State or Territory in which such answers are made" --

And so forth, I should be in favor of simply stating there that the interrogatories and cross-interrogatories, if

any, shall be sent to some officer of the United States, etc., who shall submit them to the witness, who shall then make his oath, and that officer shall return them. That does not require any court order; and the very officer who is going to take the oath, whoever he may be, or submit it, will have the papers sent to him.

Mr. Lemann. What does it say -- "to an officer of the United States"?

Mr. Mitchell. It says here:

"That the witness shall swear to the truth of his answer before some officer of the United States or of the State or Territory in which such answers are made, who is authorized to administer oaths."

Why not simply say that the interrogatories and cross-interrogatories, when prepared, shall be sent to some such officer, who shall submit them to the witness, and take the oath of the witness to his answers, and return them to the clerk?

Mr. Lemann. You put in some requirement for serving your cross-interrogatories, do you?

Mr. Mitchell. You have to serve them on the other side.

Mr. Lemann. And allow three days.

Mr. Mitchell. And get an admission of service; and then, when the deposition came back, if somebody had lost the cross-interrogatories, you would have proof that you served them, and the whole deposition would fail.

Mr. Lemann. I think that would be all right.

Mr. Mitchell. I think it would work. You do not have to get any order in that case.

Mr. Loftin. That is the practice we have.

Mr. Clark. If you are going to have interrogatories, it would make some difference about your twenty questions on each side.

Mr. Sunderland. I do not suppose that would apply to the cross-interrogatories.

Mr. Dodge. You have twenty anyway.

Mr. Sunderland. The payment in the first instance was necessary with the machinery that I had adopted. I was sending this to the witness. You cannot make the witness pay money out of his pocket to get that document back; so you have got to pay him something, at least enough to cover sending the document back; and I thought it would be a very good thing to hold down the extent of these interrogatories so that you would not have the trouble they had in Massachusetts of these interminable questions. So I have put in there a fee of $2, which would always be enough to send that document back, and then another dollar for every question in excess of twenty, to hold down the size of them. That was my scheme.

Mr. Loftin. If we adopt the practice that has been suggested, you will have to pay the officer.

Mr. Sunderland. You would have to send along some money

to the officer to get the thing sent back.

Mr. Mitchell. I do not think we need to prescribe that, because the law under which that officer serves fixes his fees. You would have either to pay them or to pay something else that he agreed to take.

Mr. Sunderland. You would have to arrange with him.

Mr. Mitchell. You would not have to specify that in your rules.

Mr. Sunderland. I do not think so.

Mr. Mitchell. Let us take the sense of the meeting on the question of whether the provision may not be inserted, instead of sending the deposition to the witness or sending the interrogatories to the witness, that they shall be sent to one of these officers, some officer authorized to administer oaths, who shall submit them to the witness, obtain his answers, and transmit them to the clerk -- some rule to that effect.

Mr. Tolman. I move that that be done.

(The motion was seconded and unanimously carried.)

Mr. Sunderland. Would you put any such limitation as this on the number of questions? Of course I think there is much less danger of the questions running to embarrassing lengths, since it is merely an alternative matter. In Massachusetts they did not have any alternative method, and they had to do everything with written interrogatories.

9

Mr. Dodge. But there is no limitation on the number except in the case of interrogatories filed in court to be answered by the opposing party. In a deposition there is no limitation on the number.

Mr. Sunderland. Is there not a statute in Massachusetts now limiting the number?

Mr. Dodge. Only as to those which are filed in court to be answered by the opposite party. That is very different from a deposition. There is no limit on a deposition.

Mr. Mitchell. May we not strike out that clause about the fees of witnesses, under the circumstances?

Mr. Loftin. I move that it go out.

Mr. Mitchell. Your question remains whether any attempt should be made to limit the number?

Mr. Sunderland. Yes.

Mr. Mitchell. I do not think so.

Mr. Loftin. I do not think so.

Mr. Lemann. Mr. Loftin said the practice in Florida permits cross-examination where the plaintiff attempts to file interrogatories. Somebody had suggested to Mr. Dobie that oral cross-examination be permitted on written interrogatories, and Professor Sunderland said he preferred not. It is very difficult to get effective cross-examination on interrogatories, and I have often had the feeling that oral cross-examination would serve a useful purpose if it would not be too complicated.

Mr. Dodge said, "Well, if you do not like what you get, you take another deposition of the witness yourself, orally."

Is every adverse witness a hostile witness? Does the language used here about examining the witness without making him yours use the word "hostile"? I thought it did, and I just wondered, "When is a witness a hostile witness?" Does "hostile" mean an opposing witness, or does it mean a witness who is hostile in a more narrow sense?

Mr. Loftin. As I understand the law, he must be hostile in the sense that he says something that is against your interest. If he merely disappoints you, he is not a hostile witness.

Mr. Lemann. Is the other man's witness always a hostile witness?

Mr. Loftin. No; not necessarily.

Mr. Wickersham. Sometimes your own witness is a hostile witness.

Mr. Lemann. The reason I asked the question is to get in my mind the scope of your right to examine a witness without being bound by what he says.

Mr. Sunderland. You are never bound by what he says, anyway. That is, you can always contradict anything he says.

Mr. Loftin. You cannot impeach him.

Mr. Sunderland. You cannot impeach his character, but you can contradict anything he says.

Mr. Lemann. Yes; I suppose you can.

Mr. Loftin. But you cannot impeach him directly by bringing in a witness to show that he made a statement at some other time and some other place that was different where you made him your own witness. That is what I think Mr. Lemann has in mind. You do vouch for him to that extent.

Mr. Sunderland. To the extent that he is credible; yes.

Mr. Loftin. You cannot impeach his testimony.

Mr. Sunderland. You can introduce contradicting testimony.

Mr. Loftin. You can introduce the testimony of other witnesses that will conflict with his; but you cannot bring in a witness to swear that he made a different statement at some other time and place.

Mr. Sunderland. I think that is true.

Mr. Dodge. You can in some States, if you first confront him with the alleged prior contradiction.

Mr. Loftin. That was not so at common law.

Mr. Lemann. I was thinking of a case where my adversary has submitted written interrogatories, and I have to cross-examine on written interrogatories. It is not a very effective way of cross-examining. It is awfully mixed up to get in an oral cross-examination.

Mr. Dodge says, "Well, if you want to ask that fellow questions you can summon him yourself"; but I read here that if I do that I am precluded by his testimony to the same

extent as if I called him in court, and that does not seem to me very satisfactory. So I was just wondering whether we were passing rather quickly over an opportunity to give a more effective cross-examination. You had made the suggestion, but we had not really stopped on it.

Mr. Loftin. I said that the practice in Florida -- in fact, it is statutory practice -- provides for making commissions and filing interrogatories and cross-interrogatories, with a further provision that at the time of examination either party may propound oral interrogatories supplementing the written interrogatories.

Mr. Lemann. Why is not that desirable? I think that practice exists in a number of States.

Mr. Mitchell. If that is done, and the man opposing the witness intends to go there and submit some questions other than the written interrogatories, how does his adversary know that?

Mr. Loftin. His adversary has the same privilege of doing that.

Mr. Mitchell. Yes; but he ought not to be required to go there without --

Mr. Lemann. He ought not to be allowed to go there without telling the other fellow he is going. The only other way would be for both of them to be on hand.

Mr. Mitchell. Then what is the use of having these written interrogatories?

Mr. Sunderland. Yes; that is the point I make. What is the use of having them?

Mr. Lemann. But the Chairman's point, I think, would not go to the extent of not making the provision subject to a stipulation that you must let the other fellow know, at least the cross-examiner. I do not think your point would go to the merits of that suggestion, that cross-examination be permitted by personal attendance and oral examination. Maybe he ought to be required to tell the other fellow; but I was just addressing myself to the case where I represent the defendant, and the plaintiff is examining a witness by written interrogatories. Under the present procedure as we would have it, you could only cross-examine by written interrogatories. That is a very ineffective way of cross-examining. I like it very well if I am taking the testimony, but I do not like it at all if it is being taken against me. (Laughter.)

Mr. Mitchell. Then, if you are going to allow that, your whole procedure changes, because you have to give notice of the time and place, and so far we have not had any.

Mr. Sunderland. You are also changing the provision that you have to have a commission.

Mr. Dobie. Yes; that would be open to General Wickersham's suggestion that you might go down there and embarrass him very much, with nobody to rule on the competency of the testimony, etc.

Mr. Lemann. It would be very easy to provide the

machinery. You could provide for the written interrogatories, and that the plaintiff should specify the place and time at which he expects to have the answers taken, and the defendant could specify at the time of filing, when he would be called upon to file his cross-interrogatories, whether or not he wants to be there.

Mr. Wickersham. The only purpose of that is where you have open the right to appear personally and cross-examine.

Mr. Lemann. Yes.

Mr. Wickersham. But, as a rule, when you are sending out a commission to take testimony on written interrogatories, you settle the direct and cross-interrogatories in advance; and then it does not really matter when the witness is presented to answer these written interrogatories.

Mr. Lemann. No.

Mr. Wickersham. On the other hand, if either party thinks the examination ought to be oral, for one reason or another, he will apply to the court for an order, and if that objection is sustained the commission will go to take the testimony on oral interrogatories and cross-interrogatories. The time and place must be fixed then.

I think this rule is designed, as Mr. Sunderland had it originally, to take testimony where there is no dispute, but you have to get in evidence of some formal thing, or something as to which there is no controversy.

Mr. Lemann. It may be used much beyond that, though.

Mr. Wickersham. It may, and that is the reason I objected to cross-interrogatories.

Mr. Lemann. I think we could easily determine whether the majority of the committee felt that there ought to be some provision for cross-examination. If so, I think it would not be too difficult to provide for it. Perhaps the majority feel it is not important enough to provide for.

Mr. Sunderland. Perhaps if we adopted the scheme as it has been suggested here, -- that the interrogatories would all be submitted to adverse counsel for the purpose of adding cross-interrogatories -- conference between counsel would develop whether the case were one in which these interrogatories were suitable; and, if not, then they would drop the thing and have an oral examination.

Mr. Wickersham. Is not this the way it goes: I move for a commission to take testimony on written interrogatories. The witness, we will say, is living in Sweden. My opponent says, "Well, now, hold on: That is a pretty important witness. I do not want to have him examined on written interrogatories." You go to the court and ask leave to cross-examine orally. Then in all probability the plaintiff's attorney would say, "Very well, then; instead of having a commission on written interrogatories, let us have it on oral interrogatories, and we will have counsel there and examine the witness orally."

Mr. Sunderland. Would it not work all right, then, to leave it as it is?

Mr. Lemann. No; not unless you give the opposing counsel a right to go to court and ask for cross-examination.

Mr. Sunderland. Any party -- either party.

Mr. Lemann. I would make him my witness if I examine him orally. Have I got to get a separate order for a separate examination? Where have you got any provision here that if my adversary proposes to examine a witness on written interrogatories, I should have the right then to cross-examine him orally? I do not think it is here.

Mr. Sunderland. It is not.

Mr. Lemann. Perhaps it ought not to be.

Mr. Dodge. I think Mr. Wickersham has it exactly right. I do not think you can mix up the two methods. If the plaintiff's counsel knows the defendant's counsel is going out there, he will have to go himself. It seems to me the deposition must be taken one way or the other; and if it is to be taken in writing, the interrogatories should be filed, and the other side should have a chance to move the court that "This witness is too important; we must have an oral cross-examination."

Mr. Wickersham. On the other hand, if he is content to leave it on written interrogatories, he can file his cross-interrogatories.

Mr. Lemann. As long as you give the right to move the court for an oral examination.

Mr. Mitchell. Then is it the sense of the meeting that there be a provision inserted -- that is all that would have to be done now -- that if the opposing party thinks an oral examination ought to be had, he shall have the right to apply to the court, on a showing, for an order to that effect? That is the substance of it.

Mr. Wickersham. Yes.

Mr. Mitchell. All in favor of that proposal will say "aye".

(The question being put, the proposal was unanimously carried.)

Mr. Clark. I have one minor question of language. I wonder if the word "cause" would not do as well as the word "action". I think I usually use the word "action". I do not insist on it.

Mr. Wickersham. Where is that?

Mr. Clark. It occurs right at the beginning, and it occurs not only in this rule but in several others, in (a) and also in (b). Why not have it read "in the action", just for the sake of uniformity?

Mr. Mitchell. He wants to substitute "action" for "cause". That is a verbal change.

Mr. Clark. We would have to polish it up in our style work. I think probably we can bear it in mind and pass it over.

Mr. Wickersham. You mean "in the action" instead of "in the cause"?

Mr. Clark. Yes.

Mr. Dodge. Have you acted on the question of a copy of the pleadings?

Mr. Sunderland. That provision would go out under this change that we made about submitting to counsel in the first place.

(At this point Mr. Tolman asked a question which was inaudible to the reporter.)

Mr. Mitchell. Major Tolman wants to know if we are going to insist on this rule that when you have written interrogatories they should be immediately filed in the cause, or whether you can wait until the deposition is taken and then they are filed and returned. The latter would be my recommendation about it.

Mr. Wickersham. Then you must provide, must you not, for service of the proposed interrogatories on the other side?

Mr. Mitchell. That is taken care of in the next phrase:

"Written interrogatories shall be entitled in the court and cause (or action), and a copy shall be served upon the adverse party or his attorney of record and upon the witness if he is not a party."

So we just strike out, "shall be filed in the court where the cause is pending".

Mr. Dodge. Is this word "served" defined somewhere?

Mr. Mitchell. We have made a general direction to the Reporter to have a paragraph which covers fully service, manner, time, etc. We disposed of that the other day.

Mr. Dodge. I hope he is not going to eliminate the ordinary method of simply serving by mail.

Mr. Clark. You may be quite sure I am not. If it is in my hands, the simpler that may be made, the better.

Mr. Donworth. There is another clause in this first sentence of Rule 56. Under this discussion it is quite plain that the requirement for service on the witness should go out. The witness may be in Addis Ababa or anywhere.

Mr. Mitchell. Right. You do not have to serve them on the witness.

Mr. Sunderland. Not under this scheme that we have.

Mr. Loftin. The new setup will eliminate the witness.

Mr. Donworth. Anyway, you would have to serve them upon the party as a prerequisite to proceeding at all. It is incidental that the witness gets the original, or gets access to the interrogatories; but this contemplated that at the inception of this particular application there should be a service on the witness.

Mr. Mitchell. We have stricken that out by common consent, I think.

Mr. Donworth. I thought there was a question raised about it.

Mr. Mitchell. Strike out the words, then, "upon the witness", if he is not a party.

Is there anything else on Rule 56?

Mr. Sunderland. Of course other parts -- section (4), for example -- would go out. This will have to be recast in accordance with our change.

Mr. Mitchell. I think we have covered it, then, by instructions to the Reporter.

Now we will pass to Rule 57.

RULE 57 -- INTERROGATORIES REGARDING DOCUMENTS AND TANGIBLE THINGS.

Mr. Donworth. I do not know whether or not this requires attention; but, in regard to the production of documents, the Supreme Court of Washington rules -- I do not remember whether that is in accordance with the weight of authority or not -- that in accident cases the report made by the motorman, say, to his company is a privileged document, and that the plaintiff cannot require its production. That suggests the question of a privileged document. Have we made the machinery whereby a man would not be in contempt for refusing to present a privileged document?

Mr. Sunderland. It probably ought to be expressly introduced there.

Mr. Donworth. There should be something on that subject.

Mr. Mitchell. This is important, I think.

Mr. Sunderland. Certainly what Judge Donworth suggests ought not to be subject to disclosure. I should think we could introduce the phrase there "not privileged". Perhaps it would follow anyway, but I think it ought to be in.

Mr. Mitchell. Do you think "privileged" is the right word to apply to a memorandum a lawyer has in his files stating what a witness has said to him? Is that a privileged document?

Mr. Sunderland. It is a confidential communication; is it not?

Mr. Olney. This does not provide any means by which you could literally force the inspection of a privileged document.

Mr. Sunderland. This rule itself applies only to listing.

Mr. Olney. It applies only to listing, and he would not have to list privileged documents.

Mr. Donworth. You would unless there is some protection; would you not?

Mr. Olney. You are permitted to make your objection and state your reason. You simply say that it is a privileged communication.

Mr. Mitchell. Where does the rule so provide?

Mr. Olney. (Reading):

"(2) Whether the party is willing to permit the same to be inspected and copied or photographed, and, if unwilling, for

what reason."

All he has to say is that it is privileged.

Mr.Mitchell. That is only inspection. He has to list them and give a description of them.

Mr. Sunderland. He lists those that he is willing to have inspected, and he lists those that he is not willing to have inspected.

Mr. Donworth. According to this, he must list everything. That is the trouble.

Mr. Sunderland. Yes, but he must state as to each one what he is willing to have done.

Mr. Donworth. He must list, if he is a lawyer, that he has a confidential letter from his client, etc. In the case of a railroad company, he has a report from the motorman, etc. It seems to me that "unless privileged" should extend to the listing as well as to the production.

Mr. Olney. Just insert, after the words "known to him", the words "not privileged".

Mr. Sunderland. "Known to him" is taken care of later:

"Supplementary lists may be filed to include items originally omitted, within a reasonable time after the discovery of their existence or of their relevancy".

Mr. Olney. "Which are known to him, not privileged, and are relevant."

Mr. Sunderland. I see -- right there; yes.

Mr. Mitchell. Are there any other suggestions as to Rule 57?

Mr. Cherry. Under that statement which has just been changed to include the privileged idea, what would become of the second paragraph on page 3? --

"No item which is not listed, or which is designated as one which the party is unwilling to have inspected, shall be admissible in evidence for any purpose at the instance of the interrogated party."

That means, then, that if he does not list it because it is known to him to be privileged --

Mr. Sunderland. Then he himself can introduce it.

Mr. Olney. I am wondering just what is the necessity for a section of this sort. I have not thought the thing out. It occurs to me that in view of the very wide provisions for a discovery, such a section as this may be quite unnecessary. If there is any question about the matter, just take the testimony of the witness.

Mr.Mitchell. This is a much shorter, easier way. You could do it the other way, but I understand this is provided as a quick way, without the formality of taking depositions or examining the man under oath.

Mr. Dodge. You say, "supplementary lists <u>may</u> be filed". Should not that be "must"?

Mr. Sunderland. He takes his chance. If he does not

want to file it, then he cannot introduce it in evidence. He uses the supplementary list to protect himself. If he discovers other things, and wants to be able to use them, he will put in a supplementary list so that he can use them.

Mr. Mitchell. I should think you could say, "No item which should have been listed, but is not", because he does not have to list things which are not known to him at the time, and he may discover them afterward. If you say it cannot be admitted if it is not listed, you include items which he himself discovers after the list is made up.

Mr. Cherry. I wonder if we are clear about what we have done about these confidential items, also. Suppose Judge Donworth's case of the motorman's report. There might arise a situation, not contemplated at this time, where that report would be desired to be used. Now, if I understand Mr. Sunderland correctly, what the amendment has done is to exclude that completely. But suppose you get the kind of impeachment where it is alleged that he has recently fabricated the story he now tells on the stand, and by way of the then permissible corroboration you want to show that otherwise privileged document: That would, in terms, be out; would it not?

Mr. Donworth. Perhaps, by giving that example, I narrowed the idea.

Mr. Cherry. I was just using that illustration. You might have a number of others.

Mr. Donworth. That is what the court held it could not be used for at all.

Mr. Cherry. By his own people?

Mr. Donworth. By his own people.

Mr. Cherry. By his own people, for corroboration, if he has been impeached on the basis of recent fabrication?

Mr. Donworth. No.

Mr. Cherry. That is its common use in our State, for example.

Mr. Loftin. Take the case, Judge, of the motorman who is put on the stand by the defendant, and he makes a materially different statement from the statement that he made in his report.

Mr. Donworth. You mean by the plaintiff, do you not?

Mr. Loftin. No; by the defendant, and then the defendant wants to impeach him.

Mr. Donworth. Impeach his own witness?

Mr. Loftin. Ordinarily, he would exhibit the statement to him and ask him if this was his statement, and if he did not make it. Then, later, if he did not admit it, he would introduce the statement for the purpose of directly impeaching him.

Mr. Donworth. That question has never arisen.

Mr. Loftin. I am talking about impeaching the witness where he proves adverse, surprises the party.

Mr. Donworth. I would not want to narrow this question.

I think my illustration was unfortunate. What I mean is, oftentimes if I have a letter from my client, and the adverse lawyer says, "Have you got a letter stating so and so?", I always feel warranted -- it is a question of ethics -- in saying, "No"; I mean, if I have to answer categorically. I am not on the stand, but I would not let my "no" be any doubtful answer, that I probably did. I think a good many lawyers feel that if a thing is nobody's business, they have a right to answer in the negative. To compel you to list a thing that later you are going to claim privilege on gives rise, it seems to me, to very unnecessary disclosing of confidential communications.

(Mr. Donworth later said: Mr. Chairman, if I had time I would qualify the views that I expressed on the ethical question. I would not like to be bound by the earlier statement made, and I suggest that it be stricken out. It is a very difficult question. It is withdrawn.)

Mr. Mitchell. We have agreed to put in, after the words "which are known to him", the words "and not privileged", on the listing business.

Mr. Donworth. I understand; but the trend of the discussion is to take that out, is it not?

Mr. Mitchell. No; it has the effect of this clause on the next page, which bars the subsequent use of it.

Mr. Sunderland. I do not see why your suggestion, Mr.

Mitchell, does not take care of it. You say, "No item which ought to be listed, but which has not been".

Mr. Mitchell. But it does not. Suppose you have a confidential report from a witness in your files: That is privileged; is it not?

Mr. Sunderland. Yes, and it ought not to be listed.

Mr. Mitchell. But that has been listed.

Mr. Sunderland. Then the situation does not apply to it.

Mr. Donworth. You would have to say, "no item which ought to have been listed, but which is not".

Mr. Mitchell. That is what I have here -- "No item which should have been listed, but which is not".

Mr. Sunderland. It seems to me that would take care of it.

Mr. Mitchell. Is there anything further in regard to Rule 57?

Mr. Clark. At the very end, I wonder if it would be at all effective as a threat to make the provision extend to oppressive requests as well as refusals.

Mr. Sunderland. There could not be an oppressive request to list documents.

Mr. Clark. I should think there might be. Suppose you wanted to tie up a corporation in some corporation suit, and asked a corporation to list its whole files. I do not think

these prohibitions would be terribly effective, but they might discourage some lawyer from trying to do that sort of thing.

Mr. Sunderland. It seems to me you ought to let that request for documents be very free. There are no restrictions in the jurisdictions where it is used. In England, for example, you can get it as of course -- a complete list of documents.

Mr. Wickersham. There is another suggestion that has been made, that this paragraph is making a rule of evidence, not really procedure. You have a provision that any unreasonable or oppressive refusal to permit inspection, etc., shall be a basis of contempt of court; but, on the other hand, this is practically a short method of discovery; is it not, with a provision that if you do not fully discover, then no document which you have not discovered shall be admitted in evidence?

Mr. Mitchell. You are estopped from using it.

Mr. Wickersham. Yes. That is pretty drastic. I do not know about it.

Mr. Olney. It is not really a rule of evidence, General Wickersham.

Mr. Wickersham. It is a rule excluding evidence for failure to do something.

Mr. Olney. It is a rule of procedure.

Mr. Mitchell. It is a penalty for not complying with the rule of procedure.

Mr. Olney. Yes.

Mr. Lemann. I have just asked Mr. Dodge about this matter, and he says he has a case in which he has produced 954 documents so far. I take it that under this rule, if before he began trial his opponent called upon him to give him a list of all those documents, he would have to sit down in advance of the trial and think of all the documents he was going to use, and give a list of them. Have you made up your mind how many more you are going to have, or do you know now?

Mr. Dodge. I do not know now. This rule in certain cases would be a tremendously difficult thing to comply with.

Mr. Olney. It did not come within my own personal experience, but I was talking with a party within the last month in a case where he had been served with a subpoena or a request to produce documents which he said would require a truck to carry them, just out of all reason. He had been laboring in the courts to get the thing limited in some way or other so that he could be required to produce only what was really necessary.

Mr. Sunderland. This does not call for any production at all. If you want to get production you have to get an order of court and specify your documents.

Mr. Dodge. I was not thinking of production. I was thinking of the burden of calling upon you, the defendant in the case, to sit down and list everything you are going to use long before the trial of a case. I have not done a

great deal of trial work, but I very often do not make up my mind which ones I am going to use until shortly before the trial. In this way my adversary, as I understand it, can call on me at any time and say, "I want a list of all you want to use", and if I do not give him a correct list I cannot use anything I have not listed.

It may be that we ought to go so far, but we ought to know where we are going when we do it.

Mr. Wickersham. There are two things that occur to me here.

The penalty for not listing everything is, in the first place, that no document which you have not listed is admissible in evidence. That is automatic.

The next provision is that an unreasonable refusal to produce is a contempt of court.

Mr. Lemann. I think that is less serious than the first.

Mr. Wickersham. It seems to me that exclusion ought not to be automatic, but it should be subject to the ruling of the court.

Suppose, when you come to trial, the party who has had such a request served on him, and who has not listed something, offers the document in evidence. Objection is made. Then it is for the court to determine whether that refusal at the time was a reasonable one or not; whether it was a willful attempt to mislead or to keep from the other party something he ought

to have known, or whether it was a reasonable one. But it seems to me you are going pretty far if you automatically provide that under no circumstances shall that document be used in evidence.

Mr. Mitchell. That is pretty drastic.

Mr. Sunderland. I think if you make it subject to an order of the court, the coercive effect of it would be just about the same, because he would not take a chance.

Mr. Wickersham. The court then would have the facts and circumstances before it, and have an opportunity to rule, whereas otherwise it is automatic.

Mr. Sunderland. I think that would be all right. I do not think it would weaken the rule very much.

Mr. Wickersham. I do not think so, and I am in favor of the whole theory. In other words, the theory of this rule is that people shall not keep back important documents from each other, but that each side shall have a right to learn what the essential written evidence is which shall be produced in the case. But I do think to say absolutely that if you do not list something, no excuse whatever shall be accepted, you cannot ever use it, is going too far.

Mr. Mitchell. Instead of having an arbitrary rule that it shall not be admissible, can we not state that the court may, at the trial, exclude any document which is not listed if he believes that it has been willfully withheld in bad faith from the list, etc.?

Mr. Wickersham. Yes; I am in favor of that.

Mr. Sunderland. Any document may be excluded by the court?

Mr. Wickersham. Yes.

Mr. Olney. It really had not dawned on me how far this provision went. It goes to the extent of requiring a party, on the demand of the other party, practically to list up all the documents which he may expect to use at the trial, under possible penalty that he will otherwise not be permitted to use those documents. Now, in many cases that is going to be an almost impossible task, one that is apt to result in great hardship.

Mr. Mitchell. Assume the case of a transaction which extends over years, and you have reams of letters on the thing.

Mr. Olney. Yes. What I am getting at is this: We should have here, very emphatically, a rule whereby, if a demand is made upon a party for inspection of a document which is in his possession, he either gives that inspection or else its contents are presumed to be contrary to what he pretends that they are, or else he cannot use it at all. That is where demand is made upon him for inspection; but this matter of going further, and covering the subject of listing up in advance, is something that I am inclined to think had better be left to the methods of discovery by way of deposition.

Mr. Dodge. It really imposes a practically impossible burden in some cases. I have in mind a case where a defendant is one of two corporations sued for violation of the Sherman Act, and the inquiry will range over years, and I have a file in my office now containing, I suppose, at least 2,000 documents. I do not know what line the plaintiff's case will take, which of those documents will be material. Have I got to list the entire 2,000?

Mr. Sunderland. You have his complaint before you.

Mr. Dodge. Yes; but suppose it is expressed in the most general terms, as those complaints always are: I cannot see how, in some cases, you can possibly comply with this rule. I do not know what is material or what is going to be material.

Mr. Clark. Would it be possible to insert, in paragraph (a) (2), the word "feasibility" where you state your reasons--you say it is not feasible?

Mr. Sunderland. That would destroy the rule.

Mr. Wickersham. Is not the essential protection that the court must pass on it?

Mr. Mitchell. That is the English system.

Mr. Wickersham. There is no other protection; but to say automatically that you must exclude every document which has not been listed, with no judicial review, would seem to me to be going too far.

Mr. Donworth. I think we would all agree that the matter of court protection should go in. The question is, what should be done in a case such as Mr. Dodge has just referred to, where suit is brought against your client for violation of the conspiracy laws, and thirty days later you are called upon to furnish a list of all the documents you are going to use. Of course we have written in that the court is to protect you if you leave them out, but you are going to take considerable risk if you rely on the court to excuse you for not producing them. It seems to me you will have to prepare your case right then and make up your mind. If you should leave out half a dozen, the court might protect you; but if you have a thousand documents, and you leave out a hundred, I am not sure the court would protect you.

Mr. Donworth. Suppose the United States sues you for income tax. Your income tax involves quite a lot of items; or sometimes you have a lot of stocks. Do you not think it is going to be pretty hard for you to list the documents until you know what the plaintiff has brought out in his case?

Mr. Wickersham. I think it puts a great burden on counsel, who would then have to prepare a case two or three times. You cannot make up such a list until you are preparing the case for trial. We all know how difficult it is to get documents from our clients, to find out what documents there are to get; and it is not until you are sitting down to prepare the case for trial, and you are interrogating the

various officers of a corporation, for example, and finally, some day, somebody turns up with a document, and you say, "Why did you not send that to me before?" "Why, I did not know that was important."

Mr. Lemann. And you think of more things yourself as you go along, just as we do here.

Mr. Wickersham. Certainly.

Mr. Mitchell. Is there any jurisdiction, Mr. Sunderland, in which it is permissible to require the other side to list or produce documents without application to the court?

Mr. Sunderland. That is the practice in Illinois.

Mr. Mitchell. Without any order?

Mr. Sunderland. Yes; no order is required.

Mr. Mitchell. I was reading the English rule here. It may be of interest to read it.

Mr. Dodge. How does it read?

Mr. Mitchell (reading):

"Any party may, without filing any affidavit, apply to the court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the court or judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or

make such order, either generally or limited to certain classes of documents, as may, in their or his discretion, be thought fit: Provided, that discovery shall not be ordered when and so far as the court or judge shall be of the opinion that it is not necessary either for disposing fairly of the cause or matter, or for saving costs."

That is discovery, you see. Now we come to the matter of giving lists, which we are dealing with.

Mr. Wickersham. Is this the English rule you are reading?

Mr. Mitchell. Yes. (Reading:)

"On the hearing of any application for discovery of documents, the court or judge, in lieu of ordering an affidavit of documents to be filed, may order that the party from whom discovery is sought shall deliver to the opposite party a list of the documents which are or have been in his possession, custody or power relating to the matters in question. Such list, as nearly as may be, shall follow the form of an affidavit in Form A, providing that the ordering of such list shall not preclude the court or judge from afterward ordering the party to make or file an affidavit of documents."

Then it goes on to say that it shall be lawful for the court or judge at any time to order production.

You see, it provides for both inspection, discovery, and lists, and in both cases they throw around it the pro-

tection of getting an order, so that the demands shall not be unreasonable.

Mr. Donworth. Why would it not be a good idea to make our rule just as it is?

Mr. Sunderland. In Ontario, where they follow the English practice pretty largely, they have abandoned that limitation on the English practice; and there an order of the court is no longer required, and discovery may be had upon mere notice.

Mr. Mitchell. I am not sure that that is not all right; but the thought in the back of my head here is that we are opening up people's files pretty generally, and there is going to be disturbance and question about it among the bar. Now, if we try to go the whole way, as far as we think it may ultimately go, we are taking some chances. If we are a little cautious, and throw the protection of a court order around it, we will get by with it, it seems to me.

Mr. Sunderland. You would suggest a court order merely on the list, in which the court would specify what classes of documents should be listed?

Mr. Mitchell. The way they have done it in England is this: You do not apply for a list at all there. You apply for the documents, or a discovery, or copies, or inspection. Then the court, if he wants to, instead of ordering that, can compel a list to be furnished, and perhaps on the list he

may order some further discovery.

Mr. Sunderland. Of course what you have done is to provide for a listing without going to the court at all; and then, after you get your list, those that you want you cannot inspect without an order.

Mr. Mitchell. It sounds, theoretically, all right; but I have had a great many cases extending over a great many transactions covering a great many years, and the other fellow would just simply dump a request on me to furnish a list of all the documents in my possession which are material to the case. It may be that the corporation or defendant or plaintiff may have reams of letters and documents of all kinds, and it would be an unreasonable burden in certain cases. There is so much that is asked for that may be material. It is like a subpoena duces tecum, to produce all the documents you have bearing on the case. That may be unreasonable.

Mr. Sunderland. Of course in a great many States, under a subpoena duces tecum, and in connection with it, you can give a notice for discovery.

Mr. Mitchell. Do you not have to get an order from the court for a subpoena duces tecum generally?

Mr. Donworth. Everywhere I know about.

Mr. Wickersham. Mr. Sunderland, is there any case where, in consequence of failure to comply with the requirement of furnishing a list, that is attended with an auto-

matic exclusion of the documents not listed, without the court ruling on it?

Mr. Sunderland. I should say it was clear that that ought to be put in.

Mr. Wickersham. It seems to me that that is a matter which should be in the discretion of the court.

Mr. Sunderland. I think that is true.

Mr. Dodge. You cannot tell, from the declaration, what documents will be necessary. You cannot answer the question, from the declaration, "What documents have you that are relevant to the action?" I cannot tell until I know, within the broad scope of the pleadings, what the plaintiff is going to introduce.

Mr. Wickersham. You have had the experience of trying to dig out documents from a corporate client, and after you have done everything you could, just before the trial, some official turns up with a paper that you never heard of before. You say, "Why did you not give me that before?" "Well, I did not suppose that was necessary. I did not know about it."

Mr. Mitchell. This subject divides itself into two parts. The first is, how broad are we going to allow the rule to be in regard to permitting one party to demand from another? The second is, what the penalty shall be for failing to list things. I should think we could take care of the latter point by merely providing that if they are not listed when they

should have been, the court may, at the trial, exclude them if he thinks they were wilfully or unfairly withheld. That would take care of the penalty.

Mr. Wickersham. Yes.

Mr. Mitchell. We are talking now, however, about the initial thing -- unreasonable demands that may be made for listing voluminous stuff.

Mr. Lemann. It seems to me that with something as new as this, we ought not to go beyond the English rule, and give the judge an opportunity to say whether, at that stage of the case, in view of all the other circumstances, it was reasonable to call upon the defendant to list every document which might be used at the trial.

Mr. Sunderland. I should say, on the matter of discovery, that we have gone much farther than England outside of England. That is, some English dominions and some of the American States have gone quite beyond England.

Mr. Donworth. What is the Illinois rule? Have you got it handy?

Mr. Sunderland. Just what we have here. Of course this means, if you cut out this whole thing, you cut out written interrogatories as a method of getting a list of documents. You go to the court in every case, and if you are asking for a list you might just as well get an order for their production; so that you really cut out this simple means of getting

a list.

Mr. Mitchell. Let us say the applicant does not have to go to the court in the first instance. He can serve his list on you without getting an order from the court; but if you think it is unreasonable or burdensome, then you can take it to the court yourself.

Mr. Sunderland. Why would not that be a solution?

Mr. Mitchell. That would do away with the unnecessary machinery of getting an order when a request is a reasonable one; and the burden is on the person to whom the request is directed. If he thinks he has been overloaded unreasonably, then he steps up to the court and says, "Here: I want this order modified and this demand made more reasonable."

Mr. Sunderland. That is the same machinery we are providing in the case of interrogatories. Where the opposing party thinks the case is one that is not adapted for it, he can go right to the court and get an order for oral examination instead of interrogatories.

Mr. Donworth. One difficulty about that is that if the action of the court is dispensing from a rule, of course the court is going to be loath to do it. If the action of the court is, in the first instance, to decide what is proper under the rule, making it broad and discretionary, as it is in England, then the court decides prima facie what ought to be done, rather than the rule. It seems to me the English rule

is as far as we ought to go in this novel matter.

Mr. Cherry. But could not this so-called exception or ground of the party objecting be stated so that it gave the basis of the objection, and would not be considered merely an exception to the rule, Judge? That is, just as has been suggested where it would be burdensome, etc.

Mr. Mitchell. In many cases these requests would be made, and they would be complied with. They would be reasonable and fair. If that is the case, why make the demanding party go to the court for an order first? It would be an ex parte proceeding, perhaps, or even a hearing.

Mr. Sunderland. That is still worse.

Mr. Mitchell. Why not let him serve his demand for a list of documents, and let it stand unless the other fellow finds it is unreasonable and burdensome in a particular case; and then he can go to the court and have the court settle what ought to be ordered produced?

Mr. Sunderland. That is about a middle ground between the English practice and the Illinois practice.

Mr. Mitchell. It throws a protection around the person on whom the demand is made, but it does not require the useless formula of a court order where a reasonable demand is made.

Mr. Sunderland. Many cases are so simple that there would not be any question about what the documents were.

Mr. Lemann. I think in the simple cases they would not

use it much.

Mr. Donworth. It would be the complicated cases where it would be used, and that is where the burden is.

Mr. Olney. Does not the suggestion made by the Chairman, that there are two parts to it, throw enough safeguards around it? In the first place, when the man gives the notice, the first safeguard is that the other side has the right to go to the court and have the extent of the notice reduced if it is oppressive, or perhaps stricken out entirely.

Mr. Cherry. Or postponed.

Mr. Olney. Or postponed. The other safeguard is that at the time of trial the exclusion of the document which was not listed is not absolute, but it is excluded in case the court finds that it was not disclosed for the purpose of concealing the real facts in the case, or something of that sort. With those two safeguards in there, I think probably it would be all right.

Mr. Mitchell. Is that all right, Mr. Dodge?

Mr. Dodge. Yes; I think if we had that proviso at the end, giving that power to the court, it would be all right. In many cases, as Mr. Sunderland says, it is entirely proper. In other cases it is absolutely unworkable.

Mr. Donworth. A great deal would depend upon the phraseology of the rule to embody this idea that we have expressed.

Mr. Mitchell. If there is no objection, then, it will stand that way, with those instructions to the Reporter in framing the rule.

Mr. Sunderland. The New York Commission on the Administration of Justice has just recommended that all restrictions on this in New York be withdrawn, and that there be no limitation about asking the names of the witnesses. In general that is not done, though. In general you cannot get a list of the names of the other man's witnesses.

Mr. Wickersham. It would be very hard to say that a man should be precluded from calling witnesses whose names he had not given, because you know sometimes at the eleventh hour an unexpected witness walks in whose testimony is perhaps conclusive. You never heard of him until he appeared at your office the day before the trial.

Mr. Sunderland. Discovery is used perhaps more frequently in Wisconsin than in any other American State. They cannot directly ask for lists of witnesses, but they have to fish them out in connection with oral examination on other points. They are able often to fish out a good deal of information that they desire; but it is all incidental.

Mr. Mitchell. Can you hold a man in contempt of court for merely unreasonably refusing to list documents where he has not previously been ordered by the court to furnish them, in subdivision (b)?

Mr. Wickersham. I have included that in my objection

to the penalties being automatically applied.

Mr. Mitchell. I just asked the question whether it is competent to do that or not. Is it contempt of court not to serve a pleading twenty days if the rule requires it?

Mr. Sunderland. I think we provide in here that it is contempt unreasonably to refuse to answer these interrogatories that are merely sent out. There is no subpoena.

Mr. Mitchell. Well, let us pass that. That is a minor detail. I am anxious to get through as many of these rules as we can while we are all here.

Mr. Donworth. Does not the general law of contempt cover all these things about refusing to obey the order of the court?

Mr. Mitchell. There is no order in the case I am talking about.

RULE 58 -- EFFECT OF ERRORS IN WRITTEN INTERROGATORIES.

Mr. Mitchell. Rule 58, effect of errors. That is a minor rule. I think we might pass that over and chew it over if there are any verbal changes in it.

Rule 59: --

Mr. Dobie. Do you not think you ought to strike out "law or equity" there?

Mr. Sunderland. That will go right through. I did not

have the wording of the other rules.

Mr. Dobie. All right.

D. ADMISSION OF DOCUMENTS AND FACTS.

RULE 59. REQUEST FOR ADMISSION.

Mr. Mitchell. Rule 59 -- request for admission of genuineness of documents. Is there any objection to that?

Mr. Sunderland. I think we have that already.

Mr. Olney. It is more than admission of documents. It goes to the admission of other matters as well.

Mr. Mitchell. Yes -- admission of facts. If there is no objection to that, it may be approved.

RULE 60 -- EFFECT OF REFUSAL TO ADMIT.

Mr. Mitchell. Rule 60.

Mr. Sunderland. That merely puts the expense of proof on the party who refuses to admit, if the fact or document is subsequently proved.

Mr. Mitchell. Is there any objection to that?

Mr. Dodge. "Within the time fixed in such request."

Mr. Wickersham. I am wondering one thing -- whether this leaves any discretion in the court. I suppose the court would have to determine whether that failure was an unreasonable failure.

Mr. Sunderland. Yes; the last sentence says:

"Unless it shall appear to the satisfaction of the court

that there were good reasons for the refusal."

Mr. Dodge. Why not give the court power to extend the time without waiting until after you have refused and taken the chance?

Mr. Lemann. Could you make a general rule somewhere in these rules giving the court the right to change time requirements on cause shown, to save repeating it constantly?

Mr. Donworth. The suggested rule 37(c), which has been submitted to the Reporter for consideration, reads:

"In all cases where by these rules a thing is required to be done within a specified time, the court, for cause shown, may enlarge such time as in its discretion it shall deem proper."

Mr. Mitchell. Then we have attended to Rule 60.

RULE 61 -- RESTRICTED EFFECT OF ADMISSION.

Mr. Mitchell. Rule 61.

Mr. Clark. How about adding, at the end of Rule 61, "or his successor"?

Mr. Sunderland. At the end of Rule 61?

Mr. Clark. How about the substitution of parties? That is provided for earlier.

Mr. Sunderland. Yes; I think I have that written in in some other copy.

Mr. Mitchell. This simply says that an admission made

pursuant to such notice shall not constitute an admission to be used against the party, nor in favor of any person other than the party giving the notice. I think the Reporter has in mind the point of cases of substitution of parties giving the notice.

Mr. Sunderland. I have that point in mind.

Mr. Mitchell. We can pass that, then, and go on to Rule 62.

E. INSPECTION OF DOCUMENTS AND THINGS.

RULE 62 -- APPLICATION AND ORDER.

Mr. Wickersham. Again you take out "at law or in equity".

Mr. Mitchell. It is understood that phraseology of that kind will be modified by the Reporter without special instructions.

Mr. Wickersham. Just one word: The language is --

"Books, papers, or tangible things which are relevant to the rights, liabilities, damages or relief involved in said cause."

Should it not be "which are competent"? This rule refers to an order addressed to a party in possession of any documents, you say, which are relevant. A thing may be relevant, but it may not be competent evidence.

Mr. Sunderland. "Relevant and competent".

Mr. Wickersham. Yes;"relevant and compent."

Mr. Loftin. Should you not insert there "and not privileged"?

Mr. Sunderland. "Competent and not privileged" -- yes; I suppose so.

Mr. Clark. Do you get this order if he has admitted his willingness to produce?

Mr. Lemann. It is an alternative method, I suppose.

Mr.Mitchell. This is not the act of the party, but of a third party. This is getting documents from somebody who is not a party to the suit.

Mr. Sunderland. It is either one. This is the inspection. We have been dealing heretofore with mere listing. Now we are getting to the inspection.

Mr. Clark. I suppose, if a party says he is willing to have it inspected --

Mr. Sunderland. If he is willing to have it inspected, that is the end of it. You arrange with him when you will see him, and that is the end of it.

Mr. Cherry. You commonly proceed without any order. They do in Wisconsin.

Mr. Sunderland. Oh, no!

Mr. Charry. I say, in actual practice they will get the inspection without an order.

Mr. Sunderland. If you have a rule under which you can

get inspection, you very seldom have to use it.

Mr. Cherry. That is the point I am making. In Wisconsin they do not bother about orders in most cases.

Mr. Sunderland. They will not bother about it at all.

Mr. Wickersham. You just ask for what you want, and, if you are entitled to it under the rule, you get it.

Mr. Sunderland. Yes.

The point has been raised by the committee in Ohio about the inspection of a thing in the custody or control or possession of somebody not a party being an invasion of constitutional rights against search and seizure, and all that sort of thing.

Mr. Mitchell. The word "privileged", which you just stuck in, would take care of that.

Mr. Sunderland. But here is the thing: For example, an automobile gets smashed up, and then it is sold to somebody else, and the litigation goes on after the party to the action has parted with his property in the machine. Can you get an inspection of that machine when the party has disposed of it? So far as the third party, the purchaser, is concerned, is this an unconstitutional invasion of his right not to have anybody interfere with his possession?

Mr. Wickersham. You could subpoena him to appear and bring the machine.

Mr. Sunderland. If you can subpoena him to bring the

machine at the trial, is it anything more than a change of procedure to have the same inspection prior to the trial? Is a mere change of date anything more than a matter of procedure

Mr. Donworth. I think that is all right. The only thought that occurred to me was that perhaps it should be safeguarded, in the third line, after the words "in which the cause is pending", by inserting the words "showing cause therefor". According to this, the mere application, on reasonable notice, brings the order. It should be accompanied by an affidavit why you are doing this somewhat unusual thing, I think. There should be more than the mere application; it seems to me it should be supported.

I am merely suggesting for consideration the insertion, after the word "pending", of the words "showing cause therefor", so that it would read:

"On application to the court in which the cause is pending, showing cause therefor."

I think that might soften the point Professor Sunderland has mentioned.

Mr. Dobie. I believe that is desirable.

Mr. Sunderland. What would you do to show cause?

Mr. Donworth. You would ask the man to see the machine, and he would refuse, simply saying that the action of the court is necessary.

Mr. Mitchell. It is not unreasonable to ask him to

exhibit it physically. There is no use of applying to the court unless you have some showing.

Mr. Sunderland. That is true. You have to show something.

Mr. Dobie. What he means is that it seems too automatic.

Mr. Mitchell. It is suggested that we put in a clause there "on proper cause shown", or "on sufficient cause shown"--something to that effect.

Is there anything else in Rule 62?

Mr. Tolman. In line 9, I think the second word "or" should be "and".

Mr. Mitchell. That is a typographical change which we will make at our later revision.

F. PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

RULE 63 -- APPLICATION AND ORDER.

Mr. Mitchell. Rule 63 -- physical and mental examination of persons.

Mr. Wickersham. That includes not only parties but third persons.

Mr. Sunderland. Yes; it does.

Mr. Wickersham. And I was just wondering where we would get that. Here is an order for physical examination of a person who is not a party to the action.

Mr. Sunderland. That would be a very rare case, but

the mental condition of such a person might be involved, because somebody might claim derivative title through an incompetent person.

Mr. Wickersham. Do you find that in any statutes?

Mr. Sunderland. As applied to one not a party?

Mr. Wickersham. One not a party.

Mr. Sunderland. I do not think so.

Mr. Mitchell. You cannot enforce against a third party. You cannot enforce it against a party to the action by compelling him to submit. The only penalty you can put on him is a dismissal of his case, or presuming the fact to be true.

Mr. Lemann. Would not this be a contempt?

Mr. Mitchell. You cannot force any man, under the Constitution, to exhibit his person; can you? He may lose his suit if he does not; but can you actually take the marshal and drag him in and put him in jail if he does not?

Mr. Lemann. In the case where you require him to produce the automobile or some other thing which he considers his own business, if he does not do it, somebody thought it would be an unreasonable search and seizure to sentence him for contempt; did they not?

Mr. Sunderland. Yes.

Mr. Mitchell. Perhaps you are making a distinction between an automobile and a man.

Mr. Wickerhsam. A good many automobiles are worth more than some men.

Mr. Lemann. When the question is whether or not X is crazy, we would say, "We should like to examine X's father to see if he did not have some hereditary disease which might be likely to transmit itself and cause this insanity in X. Here, Mr. X's father: You come and submit yourself for examination". That is rather an obnoxious case.

Mr. Sunderland. Yesterday, when we spoke about things absurd on their face, I was thinking about this very item.

Mr. Wickersham. How often would you want to have a physical examination of somebody who was not a party to the action?

Mr. Sunderland. I do not know that you ever would.

Mr. Wickersham. I think it would be better to leave it out, because it will occur so very rarely.

Mr. Sunderland. And probably leave the other out on general principles.

Mr. Lemann. I think it would give fuel on which to attack.

Mr. Wickersham. I think you had better leave it out as applying to such person who is not an adverse party.

Mr. Dobie. There should be a provision for a reasonable there, too,
showing ~~thereafter~~ I think.

Mr. Clark. Do you not want to put in aliens when you

catch them here? This is unreasonable discrimination in favor of aliens.

Mr. Sunderland. This exclude witnesses entirely. This physical examination of parties works beautifully when it gets going. We have it in Michigan just as a matter of course. In every case, in the pre-trial docket, the judge says, "Whom do you want to make the physical examination?" The parties are both there. They name some doctor. "All right; that is the order."

Mr. Cherry. We do not even go to court about it.

Mr. Sunderland. They have to go to court on the pre-trial docket, but it is just a matter of course. It is a beautiful practice.

Mr. Dobie. I understand you are limiting this now to parties.

Mr. Sunderland. Yes.

Mr. Dobie. You want to put the reasonable showing in here, too; do you not think so -- the same thing we had in the other?

Mr. Sunderland. Wherever the "physical or mental condition" of a party "is material to the question of rights, liabilities, damages," etc. -- it is always material.

Mr. Dobie. You do not think that is necessary there?

Mr. Cherry. What about the penalty of dismissal of the action? Is not that commonly included in the sections?

Mr. Sunderland. I do not know just what you would show, except that it was material. You would have to show materiality to make the rule out of it.

Mr. Cherry. Suppose you get your order, and it is not complied with -- the point the Chairman raised a while ago: Would it not be wise to state the penalty for failure to comply?

Mr. Wickersham. You mean in Rule 63?

Mr. Cherry. Yes. You have your order, and there is no compliance. The penalty is usually dismissal; is it not? After all, the United States Supreme Court held, before you had an equity rule on the thing, that you could not do this. That is the case of Union Pacific Railway Company vs. Botsford.

Mr. Dobie. They held that it could be done if there was a State statute.

Mr. Cherry. I say, without those things it could not be done. The purpose of it is for use in a suit.

Mr. Sunderland. I do not see what harm it would do to put that in.

Mr. Cherry. I should say that was the primary thing. If he does not want to press his suit, he is not in any contempt of court. If his suit is dismissed, that is the end of the matter.

Mr. Sunderland. Dismissal or default, as the case may be.

Mr. Cherry. Dismissal or default, because of course it might be the defendant.

Mr. Donworth. Am I not right in the recollection that the Supreme Court has decided that rendering a judgment against a defendant because of his failure to comply with an order of the court is lack of due process? I am pretty sure it was so decided.

For instance, you may sue a man for any sum of money -- $1,000 or $50,000. Can you enter judgment against him because he refuses to obey an order of court? I think that should be looked up. I am quite sure there are some cases on that point. Of course dismissing the case is easy. That does not do any particular harm; but to mulct him in large damages is quite different.

Mr. Mitchell. As far as the defendant is concerned, would you not simply give the court power to take the fact involved against the defendant, whatever it was, or something of that kind?

Mr. Sunderland. There would not be any fact involved here. It is a question of physical examination.

Mr. Wickersham. But what is the theory of the physical examination? To find out the extent of the injuries, for example, in a personal injury case; to find out a man's mental capacity in case that were involved. The physical capacity must be an important factor in the case before you

58 can get an order to examine him.

Mr. Mitchell. Suppose it is the defendant and not the plaintiff? If it is the plaintiff who refuses to comply with the order, the remedy is by dismissal. If it is the defendant, instead of ordering judgment against him, if he refuses to comply with an order, you can just assume the fact against him.

For instance, if he is defending on the ground that he is mentally incompetent to do a thing -- a case of a guardian ad litem, for instance, or something of that kind -- or was incompetent at the time the thing occurred, a physical examination of him may be material to determine whether his defense is good. If he refuses to comply, the fact may be taken against him. That is not lack of due process; is it? It is equivalent to an admission by him.

Mr. Donworth. Would it not be well, for the sake of passing this, to agree as far as we can along the lines of the Chairman's suggestion -- first, that this be confined to parties; second, that in the case of a plaintiff dismissal of the suit shall result; and that the Reporter shall make an investigation of how far we can go in the case of a defendant?

Mr. Mitchell. If there is no objection, that will be understood.

G. ANCILLARY JURISDICTION TO ENFORCE SUBPOENAS AND ORDERS OF OTHER COURTS.

RULE 64 -- SUBPOENAS AND ORDERS.

Mr. Mitchell. We will pass to Rule 64.

Mr. Lemann. Did we not consider this the other evening, and agree that the Reporter would look further into the question of what the statutes provide as to the jurisdiction of the court for purposes of issuing subpoenas, and that you would remodel this in the light of the examination, if required? I know we had some discussion about it.

Mr. Mitchell. I think Rule 64 comes under the general subject that we discussed before, as to dealing with process of summoning witnesses living outside of the district. I do not see any objection to this. It is applying to the court in the other district for an original subpoena.

Mr. Lemann. It is really a form of application.

Mr. Sunderland. In a way; yes.

Mr. Mitchell. Why should we adopt this practice as a substitute for existing statutory practice? Why is not the existing practice sufficient? We are accustomed to it. Instead of getting your subpoena issued out of the original court, you go to the other court.

Mr. Sunderland. The only reason I did this was because I did not go to the court for an order. My theory was to stay out of court under an original proceeding for discovery. Since we had no order of court upon which a subpoena could be

issued, we had to get the subpoena directly out of the court.

Mr. Lemann. Was not that question also raised? You have provided here that this subpoena may issue out of the court, for instance, in Delaware, to Pennsylvania.

Mr. Sunderland. No -- well, yes.

Mr. Lemann. You issue it upon the Delaware court, and you impress it with the seal of the Pennsylvania court, and then you say it is the process of both courts. I think there was a question raised by the Chairman as to whether the Delaware court, under existing statutes, could issue a subpoena that would be considered a subpoena in Pennsylvania. This really undertakes to do that as well as the other thing. I think we voted to ask further examination of the subject.

Mr. Mitchell. There is no reason to have an order for production of documents, made by the United States District Court in New York, filed with the United States District Court in New Jersey, as this provides, except to make disobedience of that order a contempt of the United States District Court in New Jersey. You make it the order of that court instead of the New York court.

Mr. Lemann. He makes it both.

Mr. Mitchell. Now, getting down to fundamentals, is it possible for us to say that if you get an order in New York from a judge for the production of documents, and merely go and file it and get it stamped by the clerk in the other

district, that is the order of the other district, for disobedience of which that court may punish?

Mr. Lemann. He says it is an order of both courts.

Mr. Mitchell. Well, that is all right; it is still the order of the original court.

Mr. Lemann. Can the New York court order you to do something in New Jersey? I think that is the point you raised.

Mr. Mitchell. Yes; I made the point that if there was a disobedience, if the man stayed out, the process of the New York court would not run in New Jersey. The order does not run in New Jersey. That is right. That is what I did say yesterday.

Mr. Lemann. We have a double barreled point here, I think. I have no doubt the machinery can be arranged for directing the order to the Pennsylvania or New Jersey court. If this is not sufficient machinery, we have some machinery now to do it which may be just as good; but whether you can do the other thing that he wants to do by any machinery I do not know.

Mr. Sunderland. I do not think it makes very much difference. I think you might just as well drop out that question -- the original court.

Mr. Mitchell. Drop that out. The object of going to the other court is on the assumption that the original court

cannot enforce the order outside of his district.

Mr. Sunderland. Yes.

Mr. Mitchell. If you drop that out, then you bring up my other point; and that is, if the New York court makes an order for the production of documents or other things, inspection, etc., and then you just go and file that in the court of another district --

Mr. Dobie. Under its seal.

Mr. Mitchell. And get the clerk to seal it, there has been no consideration of it by the court in the other district at all in an ancillary proceeding, just filing it there and getting it sealed -- whether that places the court in the other district in a constitutional position to punish for contempt. I should doubt it myself.

Mr. Lemann. Especially if you assume that the original child is illegitimate and invalid, and you have presented that child to the second court and had it adopt that illegitimate child, as it were.

Mr. Sunderland. But you do not assume that the first child is illegitimate.

Mr. Lemann. But if you assume that the original court cannot issue its process --

Mr.Sunderland. But it can, and if you find the party in that State you can get him. If he happens to get over the line, you still have a perfectly good subpoena.

Mr. Mitchell. I recommend that Rule 64 be referred to the Reporter in connection with the prior rules with a view to examining and seeing whether it is legally permissible to make such an order, filed in the other district, an order of that court and basis for contempt.

Mr. Sunderland. That is done now on commissions to take testimony. The order to take testimony is made in New York. You take it to Pennsylvania and file it and get a subpoena.

Mr. Mitchell. You get a writ of subpoena.

Mr. Sunderland. That is the practice now, as I understand.

Mr. Mitchell. You draw an analogy between a writ of subpoena and an order to produce. You say they are just about the same thing.

Mr. Sunderland. It is all a matter of form as to what they use.

Mr. Dobie. I think the procedure you provide for here is entirely constitutional. I think questions of process like that are statutory problems. Congress can make subpoenas and process run through districts pretty much as they please. For example, criminal subpoenas do run all over the United States. I doubt if there is any constitutional problem involved in this thing. I am not sure.

Mr. Sunderland. There might be a question of statutory

power, whether the rule-making power given to the Supreme Court carried authority to say where the subpoenas should run; but I do not think we are really getting a subpoena running over State lines. We are really getting a new subpoena based upon a proper authority in the new district.

Mr. Wickersham. You have the statute authorizing subpoenas to run from one district in any other district, provided the witnesses do not live more than a hundred miles from the place of trial.

Mr. Sunderland. Yes; we still have that.

Mr. Wickersham. We still have that. That is in the statute.

Mr. Sunderland. Yes.

Mr. Dobie. I think that is served by the marshal in the district where he is. It is not the process of the first court; is it? I bring suit in Virginia, and I want to get a witness in North Carolina, Elizabeth City. I bring suit in Norfolk, 50 miles away, and I want to serve that subpoena. That process is the process of the court of the eastern district of North Carolina, is it not?-- not the Virginia process.

Mr. Cherry. It is the Virginia process.

Mr. Wickersham. Here is the statutory provision:

"After September 19, 1928, subpoenas for witnesses who are required to attend a court of the United States, in any

district, may run into any other district, provided that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than 100 miles from the place of holding the same."

That is section 654 of the Judicial Code.

Mr. Mitchell. I am satisfied. I think it is the kind of rule that probably can be maintained. If the court does not think it is constitutional, it can say so. It is a good rule. Let us go to 65.

H. PENALTIES.

RULE 65 -- POWERS OF THE COURT.

Mr. Clark. On Rule 65, there is a question of nomenclature. We had this question of these provisional orders. We thought, in order to get a uniform name for procedure at law, too, a writ of arrest would be better.

Mr. Sunderland. Instead of an attachment.

Mr. Clark. Yes; so that later on we have called this sort of thing an arrest. It seems to me it is a little bit more descriptive. I do not know that I have any final view on it; but if you want "attachment" here we probably had better make it the same way later. The only thing is that later on, in that section where we deal with it, we have attachment of property, too.

Mr. Dobie. It is sometimes called "body attachment".

Mr. Clark. This, I suppose, is a body attachment, but we

have used the word "arrest" to differentiate it.

Mr. Lemann. "An order of arrest may be issued"?

Mr. Clark. Yes.

Mr. Sunderland. I think that is much better. I think "attachment" in this connection is confusing.

Mr. Dobie. It is. It is a bad term.

Mr. Donworth. Of course the reference to "physical or mental examination of the person, whether or not such person is a party," will be rephrased.

Mr. Sunderland. Yes; just a party.

Mr. Donworth. The constitutional question that I raised applies to subdivision (b) here, which I suppose the Reporter will investigate, as to whether you can render judgment by default against a defendant. Of course you can for his not pleading; but for violation of a routine order, I think it is doubtful.

Mr. Sunderland. I really listed those things up pretty much in accordance with the new proposals of the New York Commission for the Administration of Justice. They have a very full list of penalties, and I have practically taken the list from there.

Mr. Wickersham. They have not been enacted.

Mr. Sunderland. No; that has not been enacted, but I thought it was a very good list, and I used that list.

Mr. Wickersham. Yes; it is a very good list and a very

good commission.

Mr. Sunderland. Yes; it is.

Mr. Mitchell. The main part of Rule 65 will have to be modified, because we have stricken out the provision for physical examination of persons not parties to the action.

Mr. Sunderland. Yes.

Mr. Mitchell. Note that change there.

Mr. Dobie. "Attachment" is in the third line of "(b)," too, Mr. Sunderland.

Mr. Sunderland. Simply cross out the last clause of "(a)", and that will be all right.

Mr. Lemann. The language of (b), I think, would cover the matter touched upon a while ago as to what the penalty would be for failure on the part of a man to submit himself for examination. There are pretty broad powers as to what might be done.

Mr. Dobie. What is your constitutional point, Mr. Donworth?

Mr. Donworth. That a statute is unconstitutional which provides that, as penalty for disobedience of a routine order by a defendant, the court may render judgment against him. The punishment does not fit the crime. One man is punished $50,000, and another $100. I am not sure of that, but I think it is so.

Mr. Dodge. If the defendant in any kind of case fails

to answer interrogatories he can be defaulted, as I understand, and the only question left is the assessment of damages. I understood the practice was that that could be done.

Mr. Sunderland. That is what I supposed.

Mr. Dodge. That will be investigated.

Mr. Mitchell. Mr. Sunderland, you have made a provision back here for disobedience of order for physical examination--a penalty of dismissal or taking the fact against him. In Rule 65 you add contempt to that.

Mr. Sunderland. Yes. I think both should exist.

Mr. Lemann. Does not that indicate that you need not make any change in the prior rules, because it is really all covered?

Mr. Sunderland. Yes; it is all covered, so we need no specification in the prior rule.

Mr. Mitchell. Are we agreed that it is competent to declare a man in contempt for refusing to submit to a physical examination?

Mr. Sunderland. It is only a party now.

Mr. Lemann. I should think it would be a contempt.

Mr. Wickersham. You have that decision in Union Pacific Railroad vs. Botsford.

Mr. Mitchell. What did it say?

Mr. Wickersham (reading:)

"The single question presented by this record is whether,

in a civil action for an injury to the person, the court, on application of the defendant, and in advance of the trial, may order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for. We concur with the Circuit Court in holding that it had no legal right or power to make and enforce such an order."

Mr. Lemann. Is that 141 U.S.?

Mr. Wickersham. That is 141 U.S., 250.

Mr. Mitchell. That is because there was no statute permitting that.

Mr. Wickersham. It goes on to say:

"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Mr. Lemann. But in a later case where there was a State statute they held that the Federal Court could require it to be done.

Mr. Mitchell. I suppose they can penalize a man civilly for not doing it by dismissing him or defaulting him. I raised the question in my own mind whether you could put him in jail. He could stand on his rights and lose his lawsuit, in other words.

Mr. Cherry. Is not that typically the provision of State statutes?

Mr. Mitchell. Contempt?

Mr. Cherry. No; the other -- default, or losing the fact?

Mr. Mitchell. That is what I say.

Mr. Cherry. This examination goes only to that. If he loses the fact, or his case is dismissed --

Mr. Mitchell. Why put him in jail?

Mr. Cherry. You have a complete remedy for the thing.

Mr. Lemann. I do not think the judge would ever put him in jail, but the question is presented whether he would have the power to do it.

Mr. Cherry. Your contempt is to force a man to do it. That is one of the purposes of contempt. Why should you have any right to force him if he is out on the fact as to which it is material?

Mr. Wickersham. That is especially true because this question would arise almost always in connection with the examination of the defendant.

Mr. Mitchell. The plaintiff.

Mr. Cherry. Physical examination of the plaintiff.

Mr. Wickersham. The plaintiff -- yes; that is right.

Mr. Mitchell. In nine hundred and ninety-nine cases out of a thousand it is physical examination of the plaintiff.

In fact, I never heard of a case where it was desired to inspect a defendant.

Mr. Wickersham. That is quite true. You are quite right.

Mr. Lemann. This rule would still remain with fair general application if you put in the preceding rule the statement that the penalty should be merely dismissal of suit.

Mr. Mitchell. You would strike out of this section the words "or for the physical or mental examination of the person".

Mr. Lemann. What would that leave the penalty of a defendant who refused to submit himself for examination?

Mr. Mitchell. He would lose the fact, as Mr. Cherry says. The fact involved would be taken against him.

Mr. Lemann. That is provided here, but I guess it is simpler to put it in the preceding rule.

Mr. Mitchell. No; this only says where the party is guilty of such contempt, and unless you make it contempt this would not cover it; so you have to have the thing put in the other rule. But my question is whether, having now provided that failure to comply with order for physical examination shall result in dismissal of the suit of the plaintiff, or loss of the fact if it is a defendant, it is either necessary or safe to go a step further and say that he shall be put in jail, too.

Mr. Dobie. I doubt it, and I think a lot of them would be much more ready to approve the rule if you cut that out.

Mr. Mitchell. Why do we not strike out "or for the physical or mental examination of the person" in the contempt section?

Mr. Dobie. I think that is the answer. If we make him lose it as to that suit, the other man has no complaint.

Mr. Sunderland. It might be better to handle it in some other way than to interfere with this section as I have it.

Mr. Mitchell. It would not interfere with it, except to strike out punishment by contempt for failure to obey an order for physical or mental examination. The whole section relates to contempt.

Mr. Dobie. Just exclude that from the definition.

Mr. Sunderland. Yes; that is true. I get the point; but I think it may work out better to draft it a little differently.

Mr. Dobie. We will leave that to you.

Mr. Mitchell. Is there anything further in Rule 65?

Mr. Tolman. One suggestion, Mr. Chairman. A communication from one of the committees suggests that all penalties be united together in Rule 65, instead of having some special penalties in certain other rules. I just wondered whether Mr. Sunderland has considered that suggestion.

Mr. Sunderland. I did not get that question.

Mr. Tolman. There has been a suggestion made by the

Ohio committee that all penalties and sanctions be gathered together and put in Rule 65, instead of being put repeatedly in other sections.

Mr. Sunderland. Yes; I thought that would be a good thing to do. That is the reason I said I might not want to strike this thing out of Rule 65, but adjust the other rules.

Mr. Mitchell. You understand that we agreed that the penalty for failure to comply with an order for physical examination should not be contempt?

Mr. Sunderland. Should not be contempt -- yes.

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I. SUMMARY JUDGMENTS ON DEPOSITIONS OR ADMISSIONS.

RULE 66 -- WHEN OBTAINABLE.

Mr. Mitchell. We are up to Rule 66 now -- summary judgments.

Mr. Wickersham. Mr. Sunderland, this rule applies, as I understand, to any kind of an action.

Mr. Sunderland. Rule 66?

Mr. Wickersham. Rule 66 -- summary judgments.

Mr. Sunderland. Any kind of an action.

Mr. Wickersham. The New York rule, which is comparatively new but which is working pretty well, is confined to certain classes of action under Rule 13.

Mr. Sunderland. They have been gradually extending that.

Mr. Wickersham. I know; but Rule 13, as amended, is the latest.

Mr. Sunderland. No; then I followed the Commission, which recommended taking away all restrictions.

Mr. Wickersham. You followed the recommendation of the Commission?

Mr. Sunderland. Yes.

Mr. Wickersham. I think probably the limitations in the New York rule were put in out of precaution, as it was a new remedy, and they did not want to make it too offensive to the bar right away; and they have been extending it gradually.

Mr. Sunderland. Of course they have done the same thing in England. They have been extending that gradually, and they have got it extended now so that it includes everything except three or four torts such as malicious prosecution, libel, slander, and so forth.

Mr. Wickersham. How would the bar through the country take this generally? How far is summary judgment adopted through the country?

Mr. Sunderland. It is not adopted in very many States.

Mr. Wickersham. I did not think so. I was just wondering whether we would be prudent to follow the prudence of the New York court.

Mr. Sunderland. I got the reaction of the Ohio committee on this.

Mr. Wickersham. What did they say?

Mr. Sunderland. They were very favorable to it.

Mr. Dobie. Are there any particular reasons for the exclusion of any particular types of suits such as malicious prosecution?

Mr. Sunderland. If you are going into unliquidated claims at all, you might just as well go the whole way.

Mr. Wickersham. I am inclined to think so because of the New York rule, and the procedure taking place under it.

Mr. Mitchell. What about the constitutional right to a jury trial? I am not familiar with summary judgments; and I notice, for example, in subdivision (b) of Rule 69, that where there still remains a dispute as to the amount of damage, you leave the court to determine it without a jury. I do not think you can do that.

Mr. Sunderland. I do not think there is any constitutional right to a jury trial on damages. That is the only provision there is in the case. I do not think there ever was at common law. That was always done as an inquest of office by the sheriff. It never was done by a jury or a suit in a common law court.

Mr. Wickersham. Once you admitted the cause of action--

Mr. Sunderland. Once the question of personal liability is out, and it is only a question of amount.

Mr. Wickersham. In other words, suppose there is a demurrer to an answer, and the demurrer is sustained, and leave to amend, and no amendment filed.

Mr. Sunderland. Or on default.

Mr. Wickersham. You take an inquest --

Mr. Sunderland. An inquest as to the amount.

Mr. Wickersham. An inquest as to the amount; the same as to default.

Mr. Mitchell. Suppose I sue a man for damages, and he comes in and answers. Perhaps it is a negligence case. He admits the negligence, admits he is liable, but denies the amount of my claim. Have I any right to a jury trial for that?

Mr. Sunderland. I do not think so. You usually would get it if you were in court and had your jury. You would get it.

Mr. Mitchell. You mean, if the matter on the merits was not disposed of, and the jury was impaneled, you would go ahead with it?

Mr. Sunderland. Yes; if the question was not disposed of ahead of time, so that the jury was impaneled, perhaps you would dispose of it by an instruction to the jury to find for the plaintiff; but if you instructed them to find for the plaintiff, then you would have to leave to the jury the question of how much.

Mr. Mitchell. Why, if it is not a constitutional right?

Mr. Sunderland. If the case goes to the jury at all, it all goes; but if it does not go to the jury on any

question affecting liability, then you are outside the realm of jury trial.

Mr. Dodge. It does not seem quite right to me. I think if the plaintiff in a tort case has claimed a jury trial, the defendant by defaulting does not prevent the plaintiff from insisting on his jury in the assessment of damages.

Mr. Clark. For years in my State they did just that. It was an interesting bit of local history. All the railroads, trolleys, etc., would regularly allow judgment to go against them by default, and then there would be only a hearing before the court in damages; and the court right along would find, if it felt like it, that there was no damage because there was no negligence. Of course it would give costs against the defendant. The defendant expected to pay costs, but that is all.

Mr. Mitchell. I am not talking about default. If there is a default, I will admit that the man who is in default has no right to insist upon a jury to assess the damages; but he is not in default in the case I specified. He has come in and resisted. He has appeared and resisted the demand for summary judgment. He has left the question in dispute as to the amount of recovery on an unliquidated claim. My question is the mere question, Does our Federal Constitution guarantee him the right to a jury trial? He is not in default.

Mr. Olney. I have known cases where the defendant

came in and admitted that there was negligence, but denied the amount of damages. Now, is the plaintiff in that case entitled to a trial by jury?

Mr. Sunderland. Which is the provision you are referring to?

Mr. Mitchell. Subdivision (b) of Rule 69. We were just discussing the general aspects of summary judgments, and I was wondering how far a requirement for a jury trial entered into the thing.

Mr. Clark. Of course summary judgments in State procedure have been attacked constitutionally and have been upheld, the general theory being that the process determines that there is no defense; the defense is only sham.

Mr. Sunderland. But not on this point.

Mr. Lemann. That is what you mean by the words "matter of law" in Rule 66, I take it, because I raised the general question when I read it. I said, "What are you going to do in jury trials?" He said, "You only get the judgment where it is a matter of law", which I suppose meant that the judge would have to instruct the jury. Were there not some cases where the district court wanted the court of appeals to tell the plaintiff if he got an excessive verdict that he had to give up a remittitur of so much damages as a condition to getting his judgment, and they held that he could not do that?

Mr. Clark. They could reduce it, but they could not increase it.

Mr. Sunderland. There, the question of liability was before the jury. If they have that question they have it all; but if there is no liability before them, it seems to me --

Mr. Lemann. I think we ought to have some plain law on that. Is there such a decision?

Mr. Dobie. In connection with that, it seems to me this Redman case is very important. You remember that, do you not? In the Redman case they said it was quite all right for the upper court to enter an absolute judgment without sending it back, where the judge in that case reserved the question of law; and in his opinion Mr. Justice Sutherland laid very heavy stress on the fact that that practice was known to the common law. Now, if the practice was known to the common law that the court should fix the damages without the interposition of a jury, I believe the Supreme Court would give very great weight to that.

Mr. Sunderland. Those things come up mostly in connection with default cases. There is a very learned case by the Supreme Court of Rhode Island, covering fifty pages or more, in which they go back through the yearbooks, and they just fill their report with quotations from black-letter stuff, and carry the thing clear down.

Mr. Mitchell. That is a default case.

Mr. Sunderland. Yes; that is a default case.

Mr. Mitchell. I am not worried about that.

Mr. Dodge. Why do you not say that if a plaintiff

applies for summary judgment, he waives his jury on the question of damages?

Mr. Sunderland. That might be a way out.

Mr. Donworth. Is there any one here who favors taking away the right of trial by jury on the amount of damages? I do not think there is. The sentiment throughout the country would be so muchagainst that that I do not think we would entertain it, even though we found plenty of cases on the subject.

Mr. Mitchell. I think you are right about that.

Mr. Wickersham. Here is the rule in New York:

"If the plaintiff or defendant in any action set forth in subdivisions 3, 4 or 5 hereunder shall fail to show such facts as may be deemed, by the judge hearing the motion, to present any triable issue of fact other than the question of the amount of damages for which judgment should be granted, an assessment to determine such amount shall forthwith be ordered for immediate hearing to be tried by a referee, by the court alone, or by the court and a jury, whichever shall be appropriate. Upon the rendering of the assessment, judgment in the action shall be rendered forthwith."

Mr. Sunderland. I first wrote my rule that way. Then I shifted to this. I think as a fact that this is going to raise a lot of opposition.

Mr. Loftin. What about this question, Mr. Sunderland:

Suppose it is constitutional. Suppose also that you get past the objections at the bar, and get the rule adopted as you have written it. What about this further thing: Is it not a fact that the whole question of summary judgment where it has been tried depends a good deal on how the judges look on it, whether they like the idea or do not? Even in England, is not that true? In one respect they started out with a very liberal attitude in that particular respect, and took it back later on. Now, if it is going to involve taking away what is ordinarily considered at least a jury question, the determination of damages, would not that have a bad effect on the judges in granting it or in dealing with the question of granting summary judgments?

Mr. Mitchell. He has given the court discretion in paragraph (b) to call a jury if he wants to. He has not forced it.

Mr. Loftin. No; he has not forced it, but I think on the whole jury question that your use of the statute is much more important than the question of whether damages go to the jury or not.

Mr. Sunderland. I have wondered whether, if damages did go to the jury, there would be a tendency to avoid the use of this remedy on this ground -- that the court would decide as a matter of law that the defendant, say, was liable, and then they would impanel a jury, and the jury would be told, "This

defendant is liable; now, how much?" I think the lawyers might think that with this initial announcement that he was liable, and the only question was how much, the jury would be likely to render a much larger verdict.

Mr. Cherry. I do not think so, and I have tried those cases on both sides.

Mr. Dobie. In the Refining case which you remember, the Supreme Court sustained the new trial solely on the question of damages.

Mr. Sunderland. Of course that is true if that is part of the whole issue.

Mr. Dobie. They sent it back for a new trial solely on the question of damages. They said, "The question is foreclosed. The plaintiff is entitled to a verdict, and we send it back." Judge Buffington wrote a very elaborate decision, you may remember, against it, and the Supreme Court very cavalierly overruled him; but there is that problem, it seems to me.

Mr. Lemann. I think Mr. Sunderland is right in saying that any lawyer would think the chances were very great that the jury, if the issue of liability was out, would bring in greater damages than otherwise.

Take the ordinary suit: There is always a pretty good chance that some of the jurors think there is no liability. Then they compromise with the fellows who think there is liability by some trading on the subject of damages. I am

speaking of the practical aspect of it.

Mr. Cherry. But that is just what the defendant should not have when he has not any defense.

Mr. Lemann. I was not making any argument for it in principle. I was just addressing myself to what Mr. Sunderland said about the response from lawyers as to the practical result, and I understood you to say that that would not happen.

Mr. Cherry. Not necessarily. There is that element of trading; that is true, but I have tried those suits on both sides.

Mr. Dobie. Of course in Virginia, under this demurrer to the evidence -- which is a hideous procedure -- the jury fixes the damages subject to the ruling of the judge as to whether or not the defendant is liable; but the only thing that is given to the jury is damages. They know, in that case, that the judge may afterward hold that there is no liability.

Mr. Sunderland. You have more to talk about to the jury when the liability is still in the case.

Mr. Donworth. The mandate of Congress has made the language just as emphatic as they can. After authorizing the combination of law and equity, they say:

"Provided, however, that in such union of rules the right of trial by jury as at common law and declared by the

Seventh Amendment to the Constitution shall be preserved to the parties inviolate." That is awfully strong language.

Mr. Sunderland. Of course this has nothing to do with the combination of law and equity.

Mr. Dobie. The Supreme Court could not give us the right to violate the Constitution anyhow.

Mr. Donworth. They could use such emphatic language.

Mr. Dobie. I know they could, and of course the bar has harped on that; but of course we have to respect the Constitution.

Mr. Clark. It must be preserved inviolate, anyhow.

Mr. Lemann. I was wondering if they could get this far: if we had no constitutional right to take away the damages, that would end the discussion.

Mr. Dobie. Unquestionably.

Mr. Lemann. Whether or not we have a right to do that is something that I do not think most of us here would know without some study of the law to reach a conclusion; so I do not think we would be able to reach any conclusion here today. Therefore, if the decision is going to hinge on that, I think we ought to postpone it until we get a memorandum that we could look at.

Then it comes down to the question of whether the decision would hinge on that, or whether the committee would feel that, apart from that legal right, the matter of damages should

go to the jury anyway. Is not that right? Perhaps we could shorten the discussion by determining whether that is the way the committee feels.

Mr. Mitchell. Assuming that we have a constitutional power to permit the assessment of damages without a jury in these cases, what is your sense about the policy? Will somebody make a motion one way or another about that?

Mr. Olney. I move, on the matter of policy, that in every case where there is nothing left but the question of damages, it be left to the jury to determine.

Mr. Dodge. If it was a jury case originally.

Mr. Olney. Unless you do that, you are going to have trouble all down the line.

Mr. Dobie. Is that only in case of unliquidated damages?

Mr. Olney. Yes. I have in mind particularly personal injury suits.

Mr. Dodge. I second the motion, limiting it to a case that is already a jury case.

Mr. Dobie. Where the jury is not waived.

Mr. Clark. Could you not use the New York language if you do that? They say "where appropriate", or something like that.

Mr. Mitchell. That is a detail as to form. The principle that there ought to be a right to a jury trial preserved in summary judgment cases, where the damages are

86 unliquidated, is involved.

(The question being put, Mr. Olney's motion was unanimously carried.)

J. SUMMARY JUDGMENTS UPON AFFIDAVITS.

RULE 70 -- IN WHAT CASES AVAILABLE.

Mr. Clark. If that particular matter is settled, I want to bring up something that may be rather broadly a matter of form. You notice that the rule we have just been considering deals with the summary judgment on depositions or admissions. Beginning at Rule 70 we have the summary judgment on affidavits -- perhaps the more usual one. I wonder if we can not save space, and even clarify, by putting the two together. Further, referring to Rule 67 here, I do not know that it is quite foolish on its face, but it almost says that all summary judgments shall be on the merits unless they are not on the merits. (Laughter.)

Mr. Sunderland. No, it does not. The point there is not to get a mere dismissal without prejudice.

Mr. Clark. I understand. Rule 68, partial judgments and their enforcement, and Rule 78, nature and amount of judgments, I should suppose would be subject to the ordinary rule as to judgments, and notably Rule 99, partial judgments. So I am wondering whether (a), Rule 66, could not be put practically into Rule 70.

Mr. Wickersham. Rule 68?

Mr. Clark. And whether Rules 67, 68 and 78 could not be covered only by some general phrase, that the judgment when so rendered shall be subject to the rules hereinafter provided for judgments on the merits, or something like that, without further specification.

Mr. Sunderland. The latter, I think, is clear -- that those three rules ought to be covered by a general rule. Of course I did not know what general rule was going to be drawn, so I put these in; but I think you are clearly right that the general rule would cover the whole thing. Whether you could put 66 into 70, I doubt.

Mr. Olney. Could not that matter be covered by Dean Clark making his suggestions to the draftsman?

Mr. Mitchell. I think the Reporters would get together on that.

Mr. Clark. I think the matter of rules 67, 68 and 78 is clear; but momentarily they seem to be a little at odds on whether 66 and 70 can be combined.

Mr. Olney. What does Rule 67 mean?

Mr. Mitchell. The question is in regard to combining Rules 66 and 70 -- not 67.

Mr. Olney. I do not want that passed without an explanation of it.

Mr. Clark. That is so that there will not be a dismissal merely; that the judgment will be on the merits. It is a final judgment.

Mr. Sunderland. If we make it a final judgment on the merits, and not a dismissal, I want to be sure that it is not a mere dismissal without prejudice.

Mr. Dodge. I think that idea could be stated a little more clearly than this.

Mr. Clark. I should think so.

Mr. Sunderland. Would that go into one of these general rules -- the matter of judgment on the merits?

Mr. Clark. Why do you not say, "The judgment so rendered shall be judgment on the merits, subject to all the provisions of these rules."?

Mr. Sunderland. But it might be a defense and abatement, in which case it could not be on the merits.

Mr. Wickersham. There is no provision in the New York rule on that subject -- that is, no statement that it shall be a judgment on the merits.

Mr. Sunderland. But it ought to be. If you are going to resort to these summary judgments where the plaintiff has tried to state a case, and he has not stated one, the judgment should be positive and final against him on the merits.

Mr. Wickersham. In other words, is it not exactly as though, taking it for the plaintiff, the defendant served no answer; the time for answer expired, and the plaintiff got a judgment?

Mr. Sunderland. Yes.

Mr. Wickersham. That would be a judgment on the merits; the same way if the plaintiff fails to show a real cause of action.

Mr. Sunderland. At common law they did not treat the two parties alike. If the plaintiff failed, it was just a dismissal, but if the defendant failed it was a final judgment on the merits; and that is unfair. Both ought to be treated alike, and that is all I am trying to provide for here.

Mr. Wickersham. You see, the complaint is dismissed because, on inquiry, it appears that the plaintiff has failed in his complaint to establish a cause of action sufficiently to entitle the plaintiff to judgment. I am speaking now of the New York rule. Is the decision on that state of affairs, the judgment then rendered, a bar to a subsequent suit on the same cause of action, with an additional statement of facts, perhaps?

Mr. Clark. It certainly ought to be under the New York provisions, which provide that you can bring up the statute of limitations, payment, and several different things of that kind.

Mr. Wickerhsam. But I do not think this particular thing is provided for. The question is as to the effect of this judgment. As I say, the New York rule provides that if the fact is ascertained that the plaintiff has not set up in his complaint sufficient facts to entitle him to judgment,

the court may enter summary judgment against him. It does not say that shall be considered a judgment on the merits. I am just wondering how far that would be a judgment on the merits.

Mr. Sunderland. Under a later rule, do you not provide that the dismissal by the plaintiff is allowed only before the introduction of testimony?

Mr. Clark. Yes.

Mr. Sunderland. Well, on these summary judgments there is testimony.

Mr. Wickersham. There may be.

Mr. Sunderland. There is bound to be.

Mr. Wickersham. No.

Mr. Sunderland. There is bound to be testimony by the party who asks for the judgment.

Mr. Wickersham. You have to have an affidavit.

Mr. Sunderland. It is either deposition or affidavit.

Mr. Wickersham. (reading:)

"The complaint may be dismissed or answer may be struck out and judgment entered in favor of either party on motion upon the affidavit of a party or of any other person having knowledge of the facts, setting forth such evidenciary facts as shall, if the motion is made on behalf of the plaintiff, establish the cause of action sufficiently to entitle plaintiff to judgment, and if the motion is made on behalf of the defendant, such evidenciary facts, including copies of all

documents, as shall fully disclose defendant's contentions and show that his denials or defenses are sufficient to defeat plaintiff, together with the belief of the moving party either that there is no defense to the action or that the action has no merit, as the case may be, unless the other party, by affidavit or other proof, shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to a trial of the issues."

Mr. Sunderland. So we have a case, really, where we are in the stage of the production of evidence. It is in the preliminary stages of the proceeding, but the party has shown what he has in the way of evidence. Now, after he has shown what he has, and has a full and fair and complete opportunity to show whether he has any evidence at all, and what he has, then it seems to me that if he fails --

Mr. Wickersham. Suppose subsequently he gets facts which would entitle him to recover, and he brings a new suit, on the same cause of action, but sets forth facts not known to him at that time, but which show a good cause of action. Query: Is the first judgment, the summary judgment, a bar to his bringing that suit?

Mr. Mitchell. It ought to be.

Mr. Sunderland. It ought to be.

Mr. Wickersham. It ought to be, but I question whether it is.

92 Mr. Sunderland. That is what I am trying to make it.

Mr. Clark. I do not think there is any question but that it is barred. Of course that motion by the defendant has not been very much used.

Mr. Dodge. A judgment for the defendant cannot help him on final judgment. Who could reopen that?

Mr. Olney. There might be a plea in abatement.

Mr. Sunderland. It might be merely a dismissal on the part of the defendant. If it is a judgment for the plaintiff it has got to be a bar; but suppose it is for the defendant.

Mr. Clark. On the statute of limitations, say.

Mr. Mitchell. In case of a dismissal of another action in the same jurisdiction, you might get summary judgment for the defendant without producing any evidence.

Mr. Sunderland. But suppose the defendant raises the point by denial of something that the plaintiff has alleged. The plaintiff has no evidence whatever. Under this rule the defendant can ask for a summary judgment either on affirmative defense or on a denial. He raises the point on denial. He says, for instance, that there was no consideration whatever. The plaintiff has the chance to put in opposing affidavits, and he makes the best case he can, and there is not a particle of evidence of consideration. Then why should there not be a final judgment on the merits against the plaintiff instead of just a dismissal?

Mr. Dodge. There should be, and I think any court would

so construe this kind of a case.

Mr. Sunderland. I am afraid they would not.

Mr. Mitchell. The rule ought to be drawn so that if the issue is one which would dispose of the case, then it is a final judgment. If it is something like dismissal because there is another action pending in the same jurisdiction, or something that does not go to the merits, which ordinarily would result in a dismissal without prejudice, then it ought to be that.

Mr. Sunderland. But Mr. Clark has drawn another rule, a provision to the effect that the plaintiff may dismiss at any time before the trial gets to the point of introducing testimony. Now, this happens before that occurs. Why, then, might not the court say "This is nothing but a dismissal" if he has not proved the case?

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Nov 18
afternoon

Mr. Clark. I think we can take care of that.

Mr. Dodge. Nothing for the plaintiff to dismiss.

Mr. Sunderland. I believe we can take care of it in a general rule.

Mr. Mitchell. Like most lawyers around the courts, in the Federal courts, we all have in mind the requirements for trial at common law, and I think it is very important, in fact, that the language will make it perfectly clear that you are not deciding the case on the summary judgment application on statement of facts on affidavit. I know you do not intend to do that, but just taking that rule as worded, some lawyers will say that means that you can go into court and have affidavits, and one fellow's affidavit looking better than the other, you can render summary judgment.

I think some phrase ought to be put into the rule to make it obvious what the court is getting at by the affidavit, not a decision sticking to the facts, but to ascertain whether as a matter of law there is any issue of fact at all. You may have done it but I am not sure that you have.

Mr. Sunderland. The language means, as a matter of law, from said deposition or affidavit---if such party is entitled to judgment it shall be rendered forthwith.

Mr. Sunderland. That is very specific. You might put it in the title as well.

Mr. Mitchell. No; there is a question.

Mr. Clark. Have you looked at the later Rule 70. I refer to motion on summary judgment as in New York. This is on depositions and admissions.

Mr. Mitchell. Depositions and affidavits.

Mr. Sunderland. It is not under what we call summary judgment procedure. It is something that is added to that extent to depositions and it does not belong in any of the statutes that deal with socalled summary judgments.

Mr. Tolman. I would like to make a suggestion in the form of expression there that I think will meet the chairman's point and not conflict with yours. The sole ground for sustaining these judgments, summary judgments, is that there is no substantial issue of fact. Then why not say there is no substantial issue of fact?

Mr. Sunderland. That is all right. In fact, we have said that over in the other part.

Mr. Mitchell. Say it again. It must appear that it is in the discussion.

Mr. Dunworth. My thought was to put in after these rules relating to summary judgment, Rules 66 to 70, whatever they are, to put in the next rule something like this: the right of trial by jury, unless waived, is preserved,---

provisions of Rules 66 and 67---trial by jury is preserved where any issue of fact arises on the pleadings as finally submitted, not disposed of by the admission of the parties concerned, no matter what the affidavits show. My idea is that under the circumstances unless a man admits the point, that is, the issue he has raised, he is entitled to trial by jury unless he waives it. Our friend says we cannot amend the Constitution. I have not heard that pleaded as a reason for passing unconstitutional legislation. It is our duty to keep away from any violation of the Constitution, not to put in something that is of doubtful constitutionality and rely upon the courts rather than the Constitution to cut off so much. I think it is our duty to keep away from those things and to preserve trial by jury in every case where it is not waived, and where there is an issue of fact in the pleading not done away with by an admission of the parties concerned.

Mr. Dobie. I do not object to that at all.

Mr. Clark. That goes to the very heart of the summary judgment rule. That makes it so that you cannot use it in the summary judgment rule cases on whatever theory. It does not go on the theory of admissions at all, but only on the theory that there is a sham defense, as at common law, and by going further learning whether it is sham, on affidavits.

Mr. Dobie. As a matter of law.

Mr. Clark. Yes.

Mr. Wickersham. Here is a decision of the Court of Appeals of New York on that point, in a case against the Interborough Rapid Transit Company, where the argument was that the rule of summary judgment infringes upon the trial by jury guaranteed by the Constitution; and that court says:

"The rule in question is simply one regulating and prescribing procedure, whereby the court may summarily determine whether or not a bona fide issue exists between the parties to the action. A determination by the court that such issue is presented requires the denial of an application for summary judgment and trial of the issue by jury at the election of either party. On the other hand, if the pleadings and affidavits of plaintiff disclose that no defense exists to the cause of action, and a defendant, as in the instant case, fails to controvert such evidence and establish by affidavit or proof that it has a real defense and should be permitted to defend, the court may determine that no issue triable by jury exists between the parties and grant a summary judgment." (235 N. Y.; 202 Appellate Division.)

There is reference also to two appealed cases, Fidelity & Deposit Co. v. United States, 187 U. S. 315; the Peterson case, 253 U. S. 300; and then, in the Appellate Division of New York, 202 App. Div. 504, affirmed in 235 N. Y. 534, the court said:

"It is not the object of this rule to deprive any one who has a right to a jury trial of an issue of fact, but to require a defendant, when it is claimed that in fact he has no honest defense and no bona fide issue, to show that he has at least an arguable defense, that he has not merely taken advantage of a technicality in the form of pleading for the purpose of delaying the enforcement of an honest claim to which in fact he has no colorable defense. The court does not try the issues but ascertains whether in fact there is an issue. * * * As we have already stated, the requirement that an issue of fact in the actions enumerated in section 425 must be tried by a jury, does not deprive the court of the power to ascertain whether there is in truth an issue of fact to be tried. To say that a false denial, which defendants are unable to justify, must nevertheless put the plaintiff to his common-law proof before a jury, although the result would be a directed verdict in plaintiff's favor as a matter of law, is to exalt the shadow above the substance."

Mr. Clark. Of course that raises the further thought in my head whether or not the rule as drawn makes these facts at issue clear.

Mr. Dobie. It does if you add the words you suggested.

Mr. Clark. If it is made to appear as a matter of law in any such deposition or affidavit that there is no

5½

substantial issue of fact.

That, as I understood it, was your suggestion.

Mr. Cherry. The substance of it might be as worded, but you might argue plausibly that there is a decision on questions of fact under the affidavit.

Mr. Clark. They use the term bona fide, which if copied here, would be a very good thing.

Mr. Sunderland. Why use the term?

Mr. Clark. We are not using the exact term, but I have written it down substantially.

Mr. Sunderland. I think that is the word because substantial evidence is a term that is very commonly used in Federal jurisdictions, and in fact, that is the language that is used in any other rule for summary judgment on affidavit because that is a well-established concept in Federal courts,---if there is substantial evidence it goes to the jury; if there is not it does not.

Mr. Cherry. You think it is appropriate here, too?

Mr. Dodge. Both of these rules provide for entrance of judgment, and it would be the court's duty as a matter of law to direct a verdict if all the facts shown by the papers were put in evidence.

Mr. Sunderland. If they were conclusively proved.

Mr. Dodge. It would be the duty of the court to direct a verdict for the party.

Mr. Donworth. Does not that compel a man who does not want summary judgment to put in evidence on the question of fact?

Mr. Cherry. Yes.

Mr. Donworth. And that is what the Constitution says you cannot compel him to do. He is not trying any cases on

that.

Mr. Dobie. He could show by affidavit that there is an issue of fact.

Mr. Dodge. Suppose you have ten affidavits of ten reputable persons setting out facts for judgment for the plaintiff, and then the defendant offers affidavits of three witnesses, two of questionable character, and one of uncertain character, you do not know whether credible or not. If I were the judge and I read the ten affidavits and the three affidavits and I heard them then on the witness stand testify to what they said, I will say this case is too plain for any one to think about it; those ten men are men of high character; here are three fellows on the other side, two of whom have criminal records, and the other fellow is very uncertain. I would charge the jury on that case. Could I charge the jury?

Mr. Dobie. No. You cannot take the problem of credibility of the witness away from the jury.

Mr. Dodge. If I cannot charge the jury I cannot try the case on affidavits.

Mr. Cherry. No.

Mr. Dodge. The question of credibility of the witnesses must go to the jury.

Mr. Clark. A great many of these cases do go to the jury. The figures have been gotten from New York. There are now about 60/40---forty not sent to the jury. A great many cases still go to the jury because the other party shows

by affidavit that he has a real jury question.

Mr. Donworth. Suppose you take the 40 per cent that do not go there. The defendant is standing up straight and saying that this is the way I allege, your Honor, I want a jury trial.

Mr. Clark. Of course, it is a matter of appeal if the jury trial right is denied. It is like any other case, the question of whether there is a jury trial or not.

Mr. Mitchell. I would like to see some clause at the end of this stating that nothing contained herein shall be construed to interfere with the right of trial by jury.

Mr. Sunderland. That is Mr. Donworth's suggestion.

Mr. Mitchell. Put it this way, construed to preserve trial by jury.

Mr. Sunderland. We know the Constitution.

Mr. Mitchell. The same wording that the New York Court of Appeals has used,--that he shall be entitled--as the Recorder has presented, that there is no substantial question of fact, genuine question of fact entered. I think the Recorder has the idea.

Mr. Wickersham. Would it not be good to put in substantially the language of the Court of Appeals of New York?

Mr. Mitchell. I recommend that it be referred to Mr. Clark and let him take that decision and let him phrase it so clearly that no lawyer can have any doubt about it.

Mr. Dobie. I will venture one more suggestion. You

mentioned the S eventh Amendment.

Mr. Donworth. Repeat the language of our minutes.

Mr. Dobie. Trial by jury guaranteed by the 7th Amendment.

Mr. Donworth. It is much better to state it that way without having to make references to the Seventh Amendment like an apology for fear we did something wrong. If we set it out in terms of the New York court's decision that is something real. It is not an apology.

Mr. Wickersham. An explanation.

Mr. Dobie. Yes.

Mr. Wickersham. Am I right by assuming we all agree on this, that the matter is referred to the Recorder to have something for submission at the next meeting tomorrow, Mr. Clark?

Mr. Clark. I will come back to the discussion with Mr. Sunderland; I wandered just a little. I know what he has in mind with Rule 66, but I wonder if there may not be something to be said about having Rule 70 changed? If we change that Rule 70 alone it would not be more difficult for a party to make use of and bring in Rule 66; he would have to file his affidavit and would do it on the basis of depositions, admissions on file. I am a little afraid of the complications. My own suggestion is to run it into Rule 70, but that might be a little confusing, and if we only had Rule 70 the only difference I can see is this, that the party who wishes to rely on admissions and depositions will file an affidavit, practically showing that and not relying on anything further.

I do not object to it myself but I am a little afraid to make the thing too complicated, unlike New York and the other places where we have the summary judgment rule.

Mr. Sunderland. The difficulty of combining them is this, that summary judgment on depositions is something which comes along now after you have your depositions all in, look them over and say, here is a case, and you ask for the judgment. In the other you begin at the beginning and pursue a regular technical course, starting with affidavits, and you ask for your judgment after the affidavits are filed. There is a regular procedure that you start and continue with as a definite method of getting judgment which you propose to get from the beginning, and I think that it is a wholly different situation. One comes along as an afterthought, having already gotten your depositions for other purposes, whereas the summary judgment on affidavit is the result of a procedure which you definitely adopt at the very beginning and carry along. I do not see how you can make them but I would be glad to do it if it could be done, and if Mr. Clark can suggest any way I certainly approve it because I have struggled here to get those two together. Maybe they cannot be put together, but I approve putting them together if it is possible to do it.

Mr. Clark. If any of the committee have any ideas I would like to get them. I will think it over and see if I can suggest something to you.

Mr. Mitchell. Is that a matter for the Recorder?

Mr. Dobie. I move that be referred to the two Recorders.

Mr. Mitchell. It will be understood, without objection, to see if they can properly condense the two. Is there anything further now on Roman I, Summary Judgment on Depositions and Admissions?

Mr. Dobie. Was there not some suggestion about this further, about clearing it up by the insertion of the words, admission without prejudice, or something of that kind?

Mr. Mitchell. We agreed there that judgment should be rendered in the case of the defendant without making the motion, making judgment appropriate to the nature of the defense; it might be an admission or on the merits.

Mr. Dobie. It might be on the merits; it would not be the mere admission without prejudice. There is no case of that kind.

Mr. Mitchell. Yes. How would you make an appropriate expression to that effect, without attempting to lay down the language?

Mr. Loftin. I also understand that this rule as drawn applies to all of these without exception.

Mr. Clark. Yes.

Mr. Loftin. I will ask Mr. Sunderland if there is any jurisdiction where this kind of procedure applies to all kinds of actions.

Mr. Sunderland. There is not.

Mr. Clark. Not in this country. I think some of the British colonies have.

Mr. Sunderland. They have quite a tendency in England to enlarge. England has been enlarging; they have got almost everything in, but not yet.

Mr. Mitchell. What do they except?

Mr. Sunderland. They except malicious prosecution, slander, libel, and fraud. I do not know why.

Mr. Wickersham. Under Summary Rule 113, New York Rules of Civil Practice, when an answer is served in an action to recover a debt or liquidated demand arising on a contract, express or implied, in fact or in law, sealed or not sealed, or to recover a debt or liquidated demand arising on a judgment for a stated sum, or on a statute where the sum sought to be recovered is a sum of money other than a penalty; or to recover an unliquidated debt or demand for a sum of money arising on a contract, express or implied, in fact or in law, sealed or not sealed, other than for breach of promise to marry; or to recover possession of specific chattel or chattels with or without a claim for hire thereof or for damages for the taking and detention thereof, or to enforce or foreclose a lien or

mortgage, or for specific performance of a contract in writing for sale or purchase of property, including such alternative and incidental relief as the case may require, and lastly, for an accounting arising on a written contract, sealed or not sealed.

Mr. Clark. Then you have the other rule where the defendant moves.

Mr. Wickersham. That is in the same rule. In that class of cases, the eighth category, the provision is for an application to dismiss, or the answer may be stricken out and judgment entered in favor of either party on motion upon affidavit of the party.

Mr. Clark. Yes, but there is another provision, Rule 112, I think, providing that the defendant may show by affidavit certain cases, statute of limitations, statute of frauds. That is in the other rule.

Mr. Wickersham. It is the other rule.

Mr. Clark. Yes; 107. It may have been amended, but when I saw it in 1934," within 20 days after service of the complaint, the defendant may serve motion for judgment dismissing the complaint, following the course of action stated there, complaint on affidavit stating facts to show (1) that the court has no jurisdiction of the person of the defendant, (2) that the court has no jurisdiction over the subject of the act, (3) that the plaintiff has no legal

capacity to sue, and (4) that there is another action pending between the same parties for the same cause."

Mr. Wickersham. That has always been the law in New York.

Mr. Clark. No; this came in by rule under the Civil Practice Act.

Mr. Wickersham. It might be the previous practice. You can always pass judgment for one of those things.

Mr. Sunderland. With affidavit.

Mr. Wickersham. No.

Mr. Clark. Those four I have read were the original ones; but in 1921 they drew up these:

"5. That there is an existing final judgment pending in a court of competent jurisdiction determining the same cause of action between the parties;

"6. That the cause of action did not accrue within the time limited by law for the commencement of an action thereon;

"7. That the claim or demand set forth in the complaint has been released;

"8. That the contract on which the action is founded is unenforceable under the provisions of the statute of frauds;

"9. That the cause of action did not accrue against the defendant because of his infancy or other disability."

Mr. Wickersham. Those are things that at common law

may be raised in the plea and may be raised by answer. The procedure is made something by law, and could be raised by affidavit.

Mr. Sunderland. I have incorporated that in a separate rule authorizing motion by the defendant supported by affidavit, incorporated that whole practice into the summary judgment rule so that either plaintiff or defendant can ask for summary judgment.

Mr. Loftin. The question I have in mind is, without knowing very much about this summary judgment procedure, whether we are going too far, whether there is some reason why it should be limited to certain classes of actions.

Mr. Wickersham. I think it was because the bar was not familiar with it; and in order to get it over with the bar we gathered a limited number, and have been gradually extending, adding to it. You have in that pamphlet I handed you Sunday, toward the end there, the number of cases that have been brought under this and the disposition of them, a very interesting statement.

Mr. Sunderland. I have a statement here in the report of the Commission, January 25, 1934. They say the total number of summary-judgment motions for the 9-year period October 1, 1921, to January 1, 1931, was probably 5,600, or 15.4 per cent of the probable total number of contract cases on the trial

calendar; that of these 5,600 motions, over 700 were withdrawn or marked off the calendar, indicating that a satisfactory adjustment had been reached or was despaired of. Of the 4,900 motions remaining, an average of 57 per cent, or 2,800, were granted, and after appeals had been exhausted the ultimate number granted was reduced to 2,774; a total elimination through summary-judgment procedure of approximately 3,474 cases.

Mr. Dodge. Do you think it is important to have these actions in tort?

Mr. Sunderland. Of course that raises a question whether you could, by taking that thing in two bites, first have an interlocutory judgment that deals with liability, and then another based on a verdict of a jury to determine the amount. If you limit it to liquidated claims, then you do not bother with a jury at all; you settle the whole thing at once. If you cover the unliquidated claims, then your judgment must be interlocutory, settle liability, and then verdict, and then final judgment.

Mr. Mitchell. In New York the law does include unliquidated contracts.

Mr. Sunderland. Yes; and England began with liquidated value, and they finally enlarged it to bring in all the others. New York began with liquidated value, and they enlarged it to bring in all the others. Michigan has liquidated value. Illinois has liquidated value.

16½

Mr. Mitchell. Massachusetts has.

Mr. Lemann. In unliquidated damage cases the judgment for the plaintiff provides for the jury to fix damages.

Mr. Sunderland. Yes. The rule is that it shall be

determined by the court, by the master or by the court, without a jury, or by the court with a jury, as shall be appropriate. In other words, they are protecting the right of jury trial on the theory that the amount of damages is passed on by the jury.

Mr. Lemann. In many cases where you have a right to take into consideration in assessing the damages under some statute the plaintiff's negligence or the defendant's negligence, the assumption of risk may be taken into consideration in diminishing recovery and not bar him. Under such a statute, of course, as you point out, you have to have a double-barrelled result, and your jurywould have to consider the facts to some extent, but only for purposes of damages.

Mr. Sunderland. Yes, and it would affect the scope of the trial.

Mr. Wickersham. What would you think of putting into the rule something like that in New York, where in case there is no prior issue of fact but there is a showing on the question of damages, assessment shall be had to determine the amount, or tried by referee, by the court alone, or by the court and jury, whichever shall be appropriate?

Evidently in drawing that rule there was some apprehension that in some cases where there was no real issue of fact on the main controversies, nevertheless on the question of

damages there was a right to trial by jury.

Mr. Sunderland. It seems to me on the general theory we ought to do what we reasonably can to prevent superfluous wasting of the court's time and introducing evidence on matters respecting which there is no issue.

Mr. Wickersham. Quite; but suppose there is a real issue as to assessment of damages.

Mr. Sunderland. Then you get rid of all the other through summary judgment procedure; you eliminate what might take up time and keep it down to what is the real issue.

Mr. Wickersham. That is what this really seeks to accomplish.

Mr. Sunderland. Even if we have to do it through the procedure of interlocutory judgment, civil liability, subsequent verdict, and final judgment.

Mr. Wickersham. It is not a very summary process. The provision is that in case we find there is no prior issue of fact except in the amount of damages an assessment to determine the amount shall forthwith be ordered, after immediate hearing to be tried by a referee or the court and jury as may be appropriate.

Mr. Sunderland. Under the case mentioned by Mr. Clark, if there was no defense, a trial to fix the amount of the damages would be the simple, straightforward thing and take probably not a quarter of the time to try the whole thing.

19

Mr. Wickersham. Sometimes there is a great deal of force to it on the question of accident or injury.

Mr. Sunderland. You would get rid of all the facts and try liability.

Mr. Wickersham. Under this rule they are trying to do that. You have nothing to try now but the question of damages.

Mr. Sunderland. Nothing to try but the damages.

Mr. Wickersham. If the defendant says, I think I ought to have a jury on that, is it not considered as something which he has a right to and an immediate trial can be ordered.

Mr. Sunderland. I think according to the advice of this committee that is what ought to be done.

Mr. Wickersham. With the Seventh Amendment staring us in the face, and the act of Congress authorizing the rules.

Mr. Sunderland. I should think as a matter of policy and interest to the bar and propriety of procedure, that it would be a good thing to preserve trial by jury as to damages.

Mr. Wickersham. This simply enlarges the New York rule.

Mr. Sunderland. This rule is drawn here excluding that as to non-jury damages.

Mr. Loftin. From the study you have made of that question, do you think it would be well to extend it to torts?

Mr. Sunderland. Yes, I do, and I might say we have tried this out on a typical committee, the Northern District of Ohio, and they showed far more apprehension over the deposition procedure than they ever did over summary judgment. I think they were quite unanimous in favor of the summary judgment. They viewed with alarm some of the things here gone over.

Mr. Wickersham. And that we point to with pride.

Mr. Sunderland. I think that the summary judgment will appeal to the bar. It appeals to the Illinois lawyers.

Mr. Loftin. I notice the two committees in Florida seem to view it with great alarm. One of the committees apparently approved it without limitation as to the kind of action. The other committee had it limited to certain classes of action.

Mr. Lemann. I think you should dissociate summary judgment from depositions, but not link them together as though they were combined. That might cause the opponents of one to be antagonistic to the other.

Mr. Sunderland. There is something in that.

Mr. Mitchell. I have not studied these rules closely enough to know whether I am asking an intelligent question

or not. Suppose a motion for summary judgment is made and the court inquires into the record made to see whether there is some substantial issue to preserve by trial? As I understand it, the rule is drawn so that you can either grant summary judgment or deny it. You can provide machinery for denial on the ground that there is some issue left and you can exclude all others and say, we will set the case down for trial on that particular issue. The English rule, as applied in summary judgment, the court may not grant it, makes an order for direction of trial and limits the issues to allow for submission only on those issues that are substantial. Is that covered by your rule?

Mr. Sunderland. No, it is not, because the pleadings are not in when plaintiff makes his application for summary judgment, and the defendant's pleadings are not in, so that you can clearly settle the issues to be tried at that time; it would be for plaintiff and defendant to settle, although still there might be a case where a trial would be necessary. That does not wait until the pleadings are all in here.

Mr. Mitchell. Suppose the court is sitting in a case without any answer to say whether there are substantial issues of fact requiring trial, he must without answer decide whether there are, and suppose the showing made was a sham one, ought he to be allowed to throw the sham issues

into the wastebasket, deny the motion for summary judgment, make an order for direction of trial on the issues, the only substantial issues that are disclosed? I just ask that for information.

Mr. Lemann. Rule 68 would cover that, rules for judgment on depositions, for admission.

Mr. Mitchell. No, because that provides not for specifying the issue on the trial but would go to the denial of the motion for a particular claim. It is a little different.

Mr. Clark. The rule provides for partial summary judgment.

Mr. Mitchell. That is not what I am driving at.

Mr. Clark. We have to go back to the other rule on formulation of issues.

Mr. Mitchell. That is what it amounts to.

Mr. Clark. You remember the committee did not want to do that unless the parties were agreed.

Mr. Mitchell. We have got this summary judgment matter to iron the whole thing out to see whether there are any real issues of fact which are finally sound and no others. Are you going to give him power to deny motion for summary judgment where there is one issue left and that is all you will be ready to try, and not simply deny the motion and let the parties go to trial on the whole business?

23

Mr. Sunderland. There should be a general provision that upon the hearing of motion for summary judgment, if judgment is not rendered the court may make such order expediting the case as may be proper. Leave it to him to see what the situation is.

Mr. Olney. Here is the situation. We reject any machinery for formulating the issues outside of the pleadings, that is, the cutting down of the issues made by the pleadings, simply because we did not have here in our court the machinery to do it or the means by which it could be done. Now, when you have a proceeding of that character which goes before a judge, he either has practically to perform the function which the Master would perform in England, but I can see no reason under these circumstances why we cannot take advantage of the examination which he had to make to limit the issues to be drawn to those on which he finds he cannot, or by reason of which he finds he cannot render a summary judgment.

Mr. Mitchell. That is my point exactly.

Mr. Sunderland. But if they find the defendant has not presented the case.

Mr. Mitchell. That does not make any difference. He has a proper case on affidavit.

Mr. Danworth. What did we do? My impression is we left it in.

Mr. Clark. Thisis my understanding of what you did. My understanding is that you wanted the rule here in until the next proof and that you did not want it to go beyond when the parties were agreed.

Mr. Sunderland. No.

Mr. Cherry. We did not decide on it.

Mr. Dunworth. I was wondering whether this discussion related back to that.

Mr. Clark. I know that several of you men raised questions as to whether it should be beyond agreement and I guess probably you did not decide it.

Mr. Mitchell. I would say refer back to the Recorder the question whether or not he cannot take advantage of the summary judgment procedure where the summary judgment is denied, for framing the issues, limiting the issues, and excluding those which he ruled out as chaff. I think it is important and we ought to take advantage of it.

Mr. Dunworth. It might be tied up with Rule 38.

Mr. Olney. That will take care of the question of jury trial where the sole issue is amount of damages, unliquidated damages, the only issue left, such as in injuries.

Mr. Mitchell. In any case where there are several issues attempted to be raised, if they found some to be sham, the court although he had to deny the motion, would render judgment on the one ground on which he had to deny the motion. Where is the English rule you showed me first?

There is a provision here affecting that.

Mr. Loftin. In your Illinois procedure, Mr. Sunderland, did you extend that procedure to all causes of action?

Mr. Sunderland. No, only the liquidated.

Mr. Loftin. Did you have any reason at that time for not including torts?

Mr. Sunderland. Of course, as a matter offact, it is in the liquidated claims that there was a large percentage of cases that are adopted. If you cover liquidated claims you have got most of the cases that practically can be handled that way.

Mr. Mitchell. I just want to call the Recorder's attention to the English rule in summary judgments. It says: where relief is given to the defendant the judge will have power to give such directions as to insure action. That might be given on directions. That is the attitude there, which is what I suggested.

Mr. Donworth. That is Rule 38,---~~examined by~~ summons for direction.

Mr. Mitchell. What is in the other, 14--paragraph 8-a?

Mr. Wickersham. Allow a defense to be introduced only on terms if the affidavit shows ~~an sufficient~~ a sufficient defense. They may require the defendant to deposit the full amount of the judgment into the court as a condition, and they do it sometimes. I had quite a great time in a judgment where the party sued on it in this country, where the defendant asked

for leave to answer, and after hearing the court granted leave on condition that he deposit the full amount of the judgment and to cover costs in the registry of the court. He did not do it and the judgment went against him, and then that was sent out to this country and I apprehended some question to be raised as to that, but we got a compromise out of it.

Mr. Mitchell. Directing the rule about framing the issues, as to the ground that it is going to burden the court too much, that does not mean when burdening him with motion for summary judgment, that he cannot do that job at that time.

Mr. Donworth. I was going to suggest this. I do not know whether Mr. Sunderland has said all that he cared to say on the question about limiting the summary judgment to contract cases. I do not wish to pursue the point very much. I think the reasons for summary judgment are much more strong in the case of contract than torts.

Mr. Lemann. How about equity cases, contracts?

Mr. Donworth. Yes.

Mr. Sunderland. If you extend summary judgment to defendant you will find the defendant in this summary judgment, tort cases as well as contract, may have a defense to which the plaintiff has no reply.

Mr. Dodge. Unless the statute of limitations shows

release. We have not any precedents on that; there has been no practice at all.

Mr. Clark. In New York?

Mr. Dodge. On tort. I can see how the plaintiff in an action might get an advantage out of this if the defendant had a right himself to establish liability, and then get a jury to pass unrestricted on the question of damages. A very nice thing for the plaintiff.

Mr. Wickersham. That statement shows the number of torts, contracts, the number that were torts, in New York.

Mr. Lemann. New York permits that procedure in tort cases---all torts?

Mr. Donworth. No.

Mr. Wickersham. Not all torts. To recover possession of title to chattels, hire thereof, or damages for retention thereof. Then the equitable cases are foreclosure, liens on mortgage, and specific performance of contract to purchase property.

Mr. Clark. The New York rule was extended in 1932. It started in 1921; that is only these very limited cases. In 1932 Presiding Justice Finch, of the Appellate Division, in New York State, was very active in pressing for a reform and he added a lot of other provisions, but I am not sure that it still goes to tort. They added: to recover

unliquidated demand for a sum of money arising out of contracts, express or implied, in law, sealed or not sealed, other than breach of promise to marry, and to recover possession of specific chattels with or without claim for damages; (6) to enforce lien on a mortgage; (7) specific performance of a contract in writing for the purchase of property including such alternative relief as the case may require; (8) accounting arising out of a written contract, sealed or unsealed. That is the last actegory.

Mr. Wickersham. I do not think there is anything since then, but only a tort claim---to recover possession, or damages for the conversion of a chattel.

Mr. Sunderland. Mr. Loftin asked about the Illinois rule when you get summary judgment on a contract, express or implied, or a general judgment or decree for payment of money, or of any action to recover possession of land, or any action to recover possession of specific chattels.

Mr. Mitchell. There may be jurisdiction in tort cases, but they have not excluded it simply because they are unliquidated, and included contract cases with unliquidated damages. That is no reason for excluding. May it not be that there is something essential in the nature of an issue of fact in a tort case and the kind of evidence that makes it rather difficult or impracticable to use this system? I hesitate myself to speak in a class of cases. Every

jurisdiction has some reason back in their heads for not excluding.

Mr. Sunderland. As having had something to do with the behind the scene operations of the Illinois act, I can say there were none of those reasons, just general timidity based on nothing.

Mr. Olney. Can we not settle the question? I think the committee would finally conclude to a right to trial by jury; in every case where that question of unliquidated damages comes up we are going to have a trial by jury. Either party may require it. I think we are coming to that conclusion. That being so, is it not enough, as far as operation of this summary judgment goes, to simply say that wherever an issue of fact as to the amount of damages or unliquidated damages is presented and the court finds that there is no issue except that, it shall then follow the lines suggested, making an order that will limit the issue to that thing and go ahead and try it in the regular way.

Mr. Mitchell. Is that the question we are talking about, whether tort cases should be included? That is what thediscussion is.

Mr. Olney. That will cover tort cases as well as any other.

Mr. Lemann. Have we not already voted that in every case respecting the amount of damages, to be tried by a jury?

Mr. Mitchell. Whether the Constitution requires it or not.

Mr. Lemann. I understand we have settled it today.

Mr. Mitchell. That is the point we have to settle.

Mr. Lemamn. You raised the question whether it was wise to include tort cases and Mr. Olney's question is on that. I would say include tort cases but in all causes restrict the court to formulating the issue.

Mr. Olney. What I had in mind is simply this: that even in a tort case very frequently the judge in taking up a matter of that sort, motion for summary judgment, would feel that there was really no defense and that the sole question is just upon the damages. In a case of that character would it not come within this rule which we discussed, which I think we adopted although I am not sure,---that the court is authorized on those proceedings of summary judgment in case he finds that he cannot grant a verdict, largely because there is an issue of fact, some one issue of fact and the others are eliminated by the nature of the pleadings, to limit the trial from then on to a determination of those issues?

Mr. Mitchell. We agreed to that and instructed the Recorder to see whether he could not insert in the summary judgment provision a limitation of the issue. That is all over.

Mr. Olney. Then I put it this way. If that is followed, is there any particular reason for not including the tort actions in this summary proposition?

Mr. Mitchell. I raised the point that every jurisdiction has its own rule in the nature of the issue, not on the damages end of it but on the merits of it.

Mr. Sunderland. I can give an explanation why Michigan does not vote for it. It is nothing; no reason whatever.

Mr. Donworth. There is an atmosphere about the ordinary personal injury or civil suit or anything that limits and narrows the right to go to the jury such as that it is a manufacturing business and all that, and it is against the common man. I think it is an atmosphere that has some basis, too, because in a damage case I think the jury reflects the sentiment of the community even in their verdict.

Mr. Olney. The whole idea is to preserve the trial by jury.

Mr. Cherry. Dean Clark has given us the length to which a corporate defendant went in Connecticut to keep it from the jury, which makes your point, illustrates your point, and even there they were still in default on the main issue because by rule they did not go to the jury on damages but plainly they were still in default on the issue of liability. I think you are dead right, whether you call it damages or whatever you call it, there can be a very great

burden imposed on this summary judgment. I think when it goes to a jury there is, perhaps, a rule by the court to cover liability.

I understood from Mr. Sunderland that even as between liquidated and unliquidated claims in States where they have it and restrict it to contracts, that the great bulk of the cases where it is used are liquidated claim cases even in contract actions.

In other words, so far as we can judge, and we cannot judge about tort cases because we do not think it is applicable to them, it serves its main function now where there are liquidated claims. A fortiori I would say it would be less likely ever to get in use in tort cases.

Mr. Lemann. It might limit this discussion, that it would be more helpful to the defendant than the plaintiff, if the defendant moved the statute of limitations, but the plaintiff will always have to go to the jury. You have to have the jury anyway to fix damages.

Mr. Cherry. He may waive it.

Mr. Donworth. I ask unanimous consent to take leave this evening, Mr. Chairman. I unfortunately have an engagement that will take the next hour. Are we to have a meeting at 8 o'clock?

Mr. Mitchell. I so understand.

Mr. Olney. When is the committee going to adjourn this session, not today?

Mr. Mitchell. That is the pleasure of the committee.

Mr. Donworth. Could that go over until 8 o'clock?

Mr. Mitchell. We will take it up tonight.

Mr. Donworth. I have expressed my views and I will not be in the debate during the next hour, but I make a motion, to bring it before the committee, that the matter of summary judgment be according to the New York practice illustrated here by these eight matters that have been read.

Mr. Mitchell. Can you make it to include torts because there are several statutes we ought to consider?

Mr. Clark. You want the defendant moving the statute of limitations, etc?

Mr. Donworth. Yes, the two matters that have been raised.

Mr. Sunderland. New York has a separate provision that really amounts to the English summary judgment, but they have it in another form, and we have consolidated the two here.

Mr. Donworth. I submit that matter to the good judgment of the committee and thank you for being excused.

Mr. Clark. Might I say, carrying out Judge Olney's idea a little, that I am wondering if we haven't really preserved the right of trial by jury, or that it does get awful

cumbersom to do it the other way, and the tendency seems to be in all the States where they have summary judgment and it works, to keep on extending so that any results you have got in New York and in Connecticut and elsewhere, are that you have some nine classes now on the side of the plaintiff and some nine classes on the part of the defendant, and you make a very cumbersome proposition. I rather agree with Judge Olney if it does not go any further than the latter. The only reason for doing it, and it may be sufficient, of course, is to make the bar comfortable.

Mr. Mitchell. Are you talking about excluding tort cases?

Mr. Clark. I am talking about leaving that in subject to limitations. We have already put in the trial by jury. If we do not do it that way you have got to go to listing all these separate things.

Mr. Mitchell. I do not see what trial by jury has to do with it. It seems to me the question is whether the issues in tort cases are such that the nature and atmosphere of torts influences the attitude of the bar, and we ought to provide in any tort case for summary judgment procedure? Whether you make a list of certain kinds of contracts is one thing. Whether you take the New York listing or the Connecticut listing, or whether you just put a general clause in excluding tort actions and let every other kind of action

go into summary judgment, is a matter of discretion. The point that I would like the sense of the committee on is whether tort actions ought to be included.

Mr. Dodge. Is it not a fact that the New York Commission which has been referred to here, included torts?

Mr. Mitchell. Yes.

Mr. Dodge. Is that the new commission?

Mr. Wickersham. The Dean of the Law School of Cornell is chairman of it and has done very good work.

Mr. Dodge. Which commission?

Mr. Wickersham. I was speaking of the Commission on Administration of Justice.

Mr. Sunderland. Burdick, Dowling, and Duncan are on it.

Mr. Wickersham. The Committee on Administration of Justice.

Mr. Sunderland. McGinnis, Moley, Thorne, and so forth.

Mr. Wickersham. Ex officio members of the legislature.

Mr. Sunderland. As I recall the history, that commission was regarded generally as, and there was under this group a judicial council of the Commission on Administration of Justice, and after that I think they separated the functions.

Mr. Wickersham. Yes, I think the Commission on Administration of Justice has made a report very recently.

I had a copy of it; I think that is the copy you have there.

Mr. Sunderland. 1934. It only came out this spring.

Mr. Clark. The Burdick Commission has made a report in 1935, but that deals with substantive law. It is not the commission on adjective law. This was made in 1934.

Mr. Wickersham. The Burdick Commission has made two reports, the last one a few days ago.

Mr. Clark. This is not that one.

Mr. Wickersham. The 1934 report of the Burd ick Commission?

Mr. Clark. Yes.

Mr. Sunderland. Here is their conclusion.

Mr. Dodge. Conclusion of members of the legislature?

Mr. Wickersham. Ex officio, members of the legislature.

Mr. Dodge. The report of the whole commission?

Mr. Wickersham. Members of the senate and speaker of the house.

Mr. Dodge. They probably state they represent the common people.

Mr. Sunderland. This is their conclusion: To conclude, the benefits of summary judgment clearly demonstrated by a decade of trial in New York show a tendency to discourage litigation upon contracts, interposition of sham defense, effectuate settlements, to expedite judgments and to lessen

court procedure. All these things have been a marked contribution to the cause of speedy justice, doing away with unnecessary, protracted litigation, and summary judgment has not caused criticism. On the contrary its scope has been broad and it is being urged that it be further extended to all cases regardless of type equally on behalf of the defendant and plaintiff. Careful statistical analysis of the way that this amended rule is operating promises to be useful in making further decision on that point and indicates a very important and constructive problem.

Mr. Lemann. Does that mean we urge it or other people urge it. They said "we."

Mr. Sunderland. I am not sure. In another place they may have a definite proposition on it. It is split up.

Mr. Lemann. 58 pages. The report of the committee is in one part.

Mr. Dodge. For instance, in cities like Boston where it takes three and a half years for the poor plaintiff's case to be reached.

Mr. Wickersham. This has been enormously useful in expediting trials where there is no real distinctive issue. As I understand Professor Sunderland, the reason it has not been extended to torts in States in which he has had

intimate practical experience is very largely timidity. He seems to think on principle, and that is my idea, that we ought to extend it to torts, and I think we should, unless it is the sense of this committee that by so doing we will imperil the success of the whole motion or get the bar against us, or possibly not lead to its adoption by the Supreme Court on our recommendation. On principle I think it ought to be extended to include torts, and the tendency has been steadily one of extension, but no State that ever adopted it has ever restricted it. The committee is feliciter audax.

Mr. Olney. Take a typical case in which it must often arise or most numerously and that presents the most numerous difficulties; that is, cases of damages for personal injuries. Suppose a suit of that sort on a broad action of that character is brought and the judge takes it up on summary proceedings and he finds that there is any issue raised, an issue of facts raised, he cannot grant the judgment. If he finds, however, that there are issues raised there which are not real issues---they are just sham---he can eliminate those under the suggestion that has been made, and direct that they should be used for the purpose of directing the issues, and we take a typical case where it comes down finally to such a thing as release, something of that sort, a release, the defendant in the nature of things ought to be permitted to show the release unless there is something to dispose of it in the way of a judgment against the action. Suppose

we then have the case where there is no issue raised; it clearly appears the defendant is negligent and there is no defense to the action; the sole question is the amount of damages. Why under those circumstances should anything more be done with that case than try that question of damages before a jury, and who is going to be hurt by it? The plaintiff has the jury. It is there before him if he wishes it, and the defendant can have the jury also if he wishes it tried right then and there before a jury. It is going to have this result in some cases. It will result in some situations, in accidents from torts that are likely to inflame the jury, that they will largely increase the damages beyond what they ought to be. That is one effect I can see it will have from a practical point of view because when the mere matter of damages is submitted to the jury, their attention will be directed much more strongly to that particular element than they are now when it is a general trial of the law of the matter, and if I were representing a defendant in a case where my client had no defense---a man might have been guilty of outrageous conduct and it came to a question of damages---I would rather have that submitted on that issue and nothing else rather than have a lot of other matters, how badly he behaved previously, to influence the jury to go out and, as a matter of fact, lose sight of the real question which is the amount of damages, and add on a considerable sum

because they were completely aroused by the defendant's actions. That is the one thing which this matter will really affect.

Mr. Mitchell. There is something about the nature of the issues in personal injury cases which makes it difficult for the court when he comes to summary judgment proceedings, to sift it out and say whether there is any substantial issue of facts in the nature of these other actions. There are cases of that kind, personal injury cases, going 40 miles an hour and he loses his life---how fast were you making the turn? It does seem to me the very nature of the issue in personal injury cases is such that they are only for the court to sift out and say there is not any showing before them.

Mr. Lemann. The issue of contributory negligence.

Mr. Olney. If there is anything of that sort left in the record, the court has no license to take it away from the jury.

Mr. Mitchell. In most cases theproceedings will have been futile. There are some where they would not be.

Mr. Lemann. The only argument I can see to it is that there may be cases where it would help. If you permit it and it cannot work in the majority of cases, it has not done any harm.

Mr. Dodge. I would say there are some cases of

absolute liability in some States where an unregistered car is liable, and if the plaintiff can establish that fact maybe he can get summary judgment. In other cases it is conceivable that beyond the matter of law there may be documentary admission on record which establishes the negligence. That would happen rarely.

Mr. Sunderland. Sale of securities.

Mr. Dodge. Where they fail to comply with the Blue Sky Law, ordinarily cases of contract requiring money paid, which cannot be established by documents.

Mr. Sunderland. Will someone make a motion to settle the question whether that is included---torts?

Mr. Dobie. I move that we include torts.

Mr. Dodge. Second the motion.

Mr. Tolman. Your expression of tort is broad. Here is a case I know of myself. A woman brought suit for breach of promise to marry, against a married man who could not make that kind of a contract, and in that case they tried the best way they could to get the case up for trial or disposed of. It was brought purely for speculative purposes. I do not think you can put all tort cases in that particular category.

Mr. Wickersham. They are expressly included in the New York rule.

Mr. Mitchell. If this motion is passed there will not

be anything to exclude.

Mr. Dodge. That is my motion.

Mr. Mitchell. If the motion is passed there will not be any exclusion? I put it in the form of a question.

Mr. Wickersham. The motion was only that tort cases be excluded.

Mr. Mitchell. The motion was that they be included and that leaves nothing excluded.

Mr. Olney. Your own judgment is that would be taken by the bar as going a very long way?

Mr. Mitchell. I do not know any more than you do. We have discussed that this afternoon, and I also think there may be reasons in every jurisdiction to leave types of actions out. I do not feel very surefooted about putting them in. I do not know why they leave them out.

I am trying to examine whether the judges want to be bothered with sifting out these tort cases that way, whether they would kick about it.

I have not any conviction about it. I am not going to vote against it.

Mr. Olney. My only action in the matter is that I can see no reason why it should not be extended to torts.

Mr. Mitchell. Let us vote on it.

Mr. Olney. I am fearful of all these exemptions and changes we are making in the accepted practice of years and this whole matter of summary judgment is new in a great many States. I am a little afraid of going too far along that line and hazarding the final accomplishment of our object.

Mr. Sunderland. There is another thing along that line. If we are afraid that something will arise, great antagonism, let us put it in and then it can be taken out to satisfy the bar. Put it in for trading purposes.

Mr. Dodge. The bar will get this before Congress gets it, if there is tremendous opposition to this.

Mr. Mitchell. We could change it. Nobody will get it before the court gets it. We make no release until the court gets it. It does not go to Congress until the bar has it and has had a chew at it, and if we put in to include all tort actions and the bar comes back to us and recommend to the court that it be stricken out, that is all right.

Mr. Lemann. We can make it plain there is nothing to exclude whereever there is a question of fact for the jury, that it must go to the jury.

Mr. Wickersham. Judge Olney spoke of this. It would apply to tort actions. My recollection is that the litigation of that kind in the Federal courts is a very small part of their business. Those tort actions in general are

brought in the State courts but occasionally they are removed. Most of the cases that come into the Federal court come by removal, and I do not think we are talking, as far as the Federal court is concerned, of a very large amount of their business. I just have the impression that the cases of that kind in the Federal court constitute a very small part of that side of their work. I have not the statistics before me. Therefore, I think, perhaps, it would be a good thing to try it on in the Federal court and see how it works.

Mr. Mitchell. Try it on the bar and see how they like it.

Mr. Dobie. I think very few personal injury cases are tried originally in the Federal court. The plaintiff does more to go up there, and quite a large number of them are removed, particularly automobile cases.

MOTION FOR SUMMARY JUDGMENT TO INCLUDE ALL TYPES OF ACTIONS.

Mr. Mitchell. All in favor of the motion to make the summary judgment provision include all types of actions say aye. (CARRIED).

I think we have covered the instructions to the Recorder down to Rule 70. Is there anything we want to say specifically about that as distinguished from the other

RULES 70 to 78, referred to Recorder.

45

The two recorders are going to consider whether they may not combine the earlier provisions for depositions or admissions.

Mr. Wickersham. Leave Rules 70 to 78 to the Recorder.

Mr. Mitchell. I think we might. They are along the same line. We decided the question of principle for them. Is there anything special you want to take instruction on down to Rule 78?

Mr. Sunderland. I think not. I think the two main questions are the scope and type of cases and whether available to the defendant as well as the plaintiff. I think that covers the main question of policy.

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VII. TRIALS.

RULE 79. CLAIM FOR JURY TRIAL--WAIVER.

RULE 80. TRIAL TO THE JURY AND TO THE COURT.

Mr. Mitchell. Let us pass on to Rule 79.

Mr. Clark. May I say from that section on that I have not included anything which is foolish on its face?

Mr. Mitchell. We will give Mr. Clark a Congressional medal after we give one to Mr. Sunderland.

Mr. Clark. Particularly as to Rules 79-80, leaving out for the moment the question of the exact form or detail, I think that they are among the most important rules we have, since I view them as the rules which really make the union of law and equity work practical and simple. The real

difficulty about making the union work is, of course, the jury trial, and we want to get something that will operate simply and yet efficiently, and I think that the history pretty well shows that we want to get something so that the jury trial right cannot pop up at you as an after-thought when one side finds itself losing. If you want to give the jury trial to a man who feels he wants one, all right, under the Constitution, give it to him; the trouble comes when later on he has lost in one way and wants to come back and try it another. He would do the same thing if he could, on any ground, whether rights or some other technicality, and whenever there is something to grab hold of and you are losing, you grab hold of it. The scheme here in general is that you must when you want the jury trial frame it affirmatively within a certain period, and if you don't do it, it is waived subject to the power of the court to send the case to the jury at any time even on its own initiative.

Another angle ofthat matter in my judgment quite desirable is to allow cases which, perhaps, are not technically jury cases or which are not entirely jury cases, to go to a jury trial when nobody objects. In other words, the rule gains simplicity when you let it work the other way. If you do not take any action with reference to the jury, the case automatically is labelled on your docket, not labelled as a

jury case, which means it is not a jury case, and it goes on the calendar for trial by the court. The court may still, if it wants, direct it to go to the jury, but it will probably be a rare case, and in that case it will go on simply to trial, and on the other hand, if the other party within the time limit which in most instances is 10 days after the last pleading is filed, files his written claim, then automatically the clerk labels it a jury case and it goes on to the jury calendar and is so tried unless one of two things happens, unless the court strikes it, and I doubt if the court is going to do very much of that---it can if it thinks the case is not a proper one to go to the jury; or unless the opppsing side moves to strike, and if the opposing side moves to strike it, then you have the issue of a jury trial presented starkly and clearly on that motion, and then, of course, if there is a Constitutional right you go right back to cases. If there is that ends it. If there is no Constitutional right the judge may say, "I do not think there is a Constitutional right, but in my discretion I order it tried by the jury", or he may then say, "There is no Constitutional right of the defendant to go there."

In other words, I think I have taken care of everything required, and it also provides for the raising of the question when it is raised starkly and clearly and without its being tied up to the trial itself, of whether it is equity or

law or not. They should present the issue in a way that is not confused with anything else. This is the practice which was not clearly met under the Fields (?) code, and in the judgment of many of us one of the defects of that code was that it did not provide for such simple procedure. It is, however, the procedure which has now come about in many jurisdictions, some of them in not as direct a way as this but achieves the direct result, and many of them in a direct way. It is very much like the English system. It is like the Massachusetts system. It is directly analagous to the Connecticut procedure. It is now the procedure of the great bulk of the cases in metropolitan New York because there in order to get business really taken care of in that great city where there is congestion, they came to this way of doing it, and apparently hated to do it generally, and so by a fairly recent statute it is limited to the counties which comprise Greater New York. As I take it, however, that is the express language. It is about the same thing in California because, as I gather from what happened to California, if you do not make your claim when the case is called on the calendar it is waived. It seems to me this has an advantage because that standardizes it more, but the theory of waiving by not claiming is the one I have in mind, and the rest is more or less matter of detail. It has been held constitutional, as far as I know, wherever it has come up, and I can see

no reason why it should not be.

Mr. Olney. In many courts in California you have to claim the right to jury trial before it reaches the trial calendar.

Mr. Mitchell. Do you provide anywhere in your rule for placing cases on the calendar by notice for trial?

Mr. Clark. I have a provision here, and I will say it goes automatically on the calendar. Maybe we will have to change that.

Mr. Mitchell. I was wondering about that---automatically on the calendar, on the next ensuing calendar, is that?

Mr. Clark. Rule 81, the next one after this.

Mr. Mitchell. There is no notice of trial.

Mr. Clark. That was my idea.

Mr. Wickersham. Because we have the new law in New York that eliminates the necessity of filing notice of trial. You file issues and give copy to the other side.

Mr. Mitchell. That is the same thing.

Mr. Wickersham. It saves two notices.

That is the practice I am familiar with. You do not have to file demand for jury trial within 10 days after the answer is filed. The case may drag on, and I say before you file any notice or when you file your notice of trial, the notice of issue will serve both functions. You designate whether it is jury trial or court trial and that is

equivalent---it goes automatically on the calendar that way, and it is up to the other people by a motion to strike that from one calendar and put it on the other. If you haven't any notice of issue or notice of trial, that procedure does not apply.

(Rules 79-80; reference to Rule 81).

Mr. Clark. I have predicated that particularly on the expiration of the time for making application for jury trial. Under the provisions of Rule 79 it would be 10 days after you close the pleadings. The action shall be placed on the trial calendar by the clerk, that is, assigned for trial when reached provided the trial may be proceeded with---such as a motion for taking depositions or other causes agreeable to the parties, and I provided further, to develop my equity rule which is on the opposite page, that when it has been twice filed and stricken from the trial calendar and is then to be restored on motion, then I put the provision in for calling the docket yearly, and on that latter you will see there is a great deal of suggestions from judges who apparently, a great many of them, think something ought to be done to clear up the docket.

Mr. Mitchell. If he puts a case on the calendar automatically when the parties have not noticed it, the chances are they will not be ready and are not ready and they have to make a motion to strike off, but in the system

I am familiar with, when you leave it off the calendar the court pays no attention to it until you file your notice of issues. That is not usually done until you are nearly ready to take your depositions and clear everything up. Either party will notice the trial. It is an automatic arrangement in putting it on the calendar without having request, force it on, but either party may have it where he wants it.

Mr. Clark. What is the experience under the equity rule? That is the equity rule. I mean Federal equity rule. Has anybody any expression on that? How do liability cases operate now?

Mr. Mitchell. File it automatically under equity. Suppose he gets his papers on file and does not want them bothered with. That goes in actual records that are not disposed of. That is another reason why I have been urging that nothing has to be filed until you want the court to take action. Then they are not littered up withsuits that they want to force on the calendar to dispose of the way they used to be under the equity system. In other words, if you start a law suit, serve summons and complaint and get answer, you can carry it around in your hip pocket indefinitely and the court does not know it is there. He is not jumping at every one to dispose of it. Either party could force it on. Then when you want it on the calendar either

party can notice trial, file notice of issue, serve the other side, and on she goes, and then he has to do business.

Mr. Lemann. He does not have to do it in three years in New York.

Mr. Wickersham. Yes, you do put it on the calendar in New York, but in the district court it is two years before it comes up unless it has preference.

Mr. Clark. If you do not do it for two years then it would be two years afterward, after you put it on.

Mr. Wickersham. As a general rule a case is put on the calendar when it is at issue but then it is a general calendar and it is not reached for a couple of years and nobody pays much attention to it unless they want to take depositions, until it begins to loom up, and then you have got to get busy and prepare for trial.

Mr. Olney. And know whether it is a continuance.

Mr. Dodge. Were you proposing to change Rule 79 as to the time when claim for jury trial can be filed?

Mr. Clark. By this change in the 10 days requirement.

Mr. Dodge. Ten days after the issues are closed.

Mr. Clark. That is the way I intended to leave it. I do not want to change it.

Mr. Dodge. I think you are right. I thought there was something about claim had when a case went to trial.

Mr. Clark. The chairman has referred to the Minnesota practice. Of course you can do it that way. That postpones the time of waiver. It is something, I think, to postpone the time of waiver until they actually claim it for trial. I do not think it is a conclusive reason, but at the same time there is something to be said for getting at the question whether there is a jury trial or not out of the way by whether they are going to find out if the rule as operated is fair, and I have heard suggestions that they ought to be required to claim a jury when they file the pleadings.

Mr. Lemann. I was just wondering whether there is anything in that idea of jury attendance in Federal court. In my district they have weeks for equity cases, admiralty cases, bankruptcy cases, and another week for law, and the jury is required to be in attendance. Under that practice you do not ask for jury. Your case might be ordinarily assigned for trial in a week in which the jury did not happen to be there. I have wondered whether in some districts that might be a reason for requiring them to specify before you claim a trial.

Mr. Wickersham. Why should you file a case on the calendar?

Mr. Clark. That shows the court right away the kind of business.

Mr. Mitchell. About notices of trial, if you do not put it automatically on the calendar the usual practice is notice of trial served three weeks before the term.

Mr. Lemann. I would move that we adopt this rule as it stands. If the plaintiff has any demand, if he wants to waive it afterward he could.

Mr. Dobie. Ten days after issues closed?

Mr. Lemann. Ten days after something.

Mr. Clark. I have some alternative. Do you want your motion first?

Mr. Mitchell. Take up first the preliminary question on the system of filing claim for a jury within 10 days after the issues are closed.

Mr. Wickersham. Take the situation the chairman referred to in discussing this matter of filing. Suit brought and answer served; case at issue. If the rule requires this claim for a jury to be made 10 days after the issue is joined, you have got to at that time disclose that suit is pending anyhow.

Mr. Mitchell. File your answer then.

Mr. Wickersham. Why should you?

Mr. Clark. That is not the necessary consequence. You can still make it a matter of serving the claim on the opposite party and not final, that is, if we stick to what I think is still the view of, perhaps, the majority. That

case is already in court and pleadings are already in court and entry taken care of, but even if they are not, if they are in your hip pocket you could still have the showing that you must have service of the claim of jury. The other side does not need to go to court but when it does you have a showing you have served him within 10 days.

Mr. Wickersham. You have changed that?

Mr. Clark. Yes. We shall have to change the language.

Mr.Lemann. He would have to change this 10 days after something.

Mr. Wickersham. Suit brought and answer joined and neither side wantsto put it on the calendar because there are negotiations that ultimately will reach a settlement. Unless one side wants it on the calendar, why should we force them?

Mr. Mitchell. We voted onthat before but it might be reopened.

Mr. Wickersham. Why should you until one party or the other is ready to move and bring it on trial? Why force it on the calendar? I do not see any reason for it. It clutters up the calendar. That is what we found in those motions as suggested here, these orders, that once a year if you do not call the calendar you find an enormous amount of deadwood on the calendar because you put cases on that nobody ever actually files.

Mr. Mitchell. If you require a man to file his papers and entry with the clerk's office, I am in favor of it automatically going on the calendar.

Mr. Wickersham. When?

Mr. Mitchell. If you have the court calendar, if the court is interested in getting it not only on the calendar but the clerk's records cleared of it, I am in favor of it. It is only in the event you do not have to file papers, and your other alternative would be useful, not to place it on the calendar unless you file notice of issue. I do not think you ought to be compelled to file the pleadings or notice issue until the parties are ready to go forward.

Mr. Clark. That is not the exact tie-up here. The exact wording will have to be changed depending which way it goes, but you still can require, if it is in your hip pocket, service of this notice. What this does practically is that ordinarily the defendant when he files his answer or serves answer, if he wants jury will claim it, and it gives the plaintiff a little time after he has got the defendant's answer, to see whether they want to go to the jury. Another way of doing it would be to put it that way, that defendant in serving his answer must say it is a jury trial and the plaintiff will have 10 days after he serves the answer.

Mr. Cherry. The motion is 10 days after something. I second the motion.

Mr. Mitchell. Put that as a question---10 days after something, when issue is closed, files an answer. All in favor say aye. (CARRIED).

Mr. Olney. The answer of the question depends to a large extent whether you have the 10 days provision, whether the case is going on the trial calendar automatically. Out our way they have been adopting rules and passing statutes to the effect that unless an action be brought to trial within a certain length of time it should be dismissed. I can see no reason why a case should be brought on trial except on the initiative of some of the parties. When the papers are once on file there they lie until somebody gets busy about them. They do not do any particular harm. It is really an endeavor to hurry up the lawyers and the best way to hurry up the lawyers is to get the clients after them.

Mr. Mitchell. One great trouble out in our country is they put cases on the calendar automatically whether the lawyers want it or not. Every opening of term we have a calendar a mile long and case after case the lawyers do not know what to try,put it over,and they get angry and say,if you do not try it dismiss it,tired of seeing it on the calendar. Why put it on the calendar and disturb these judges until they are ready?

Mr. Olney. Exactly my point. In San Francisco they put my case that was at issue on the calendar and prior to that nobody got a case on the calendar unless he wanted it there, and then they put them all on the calendar, a regular

field day, all the lawyers in the court room, and out of all these cases there was not more than 5 per cent that wanted to go to trial.

Mr. Mitchell. Here is another thing. Under this system when you demand jury trial you have to pay jury fee. The case may not be reached for years in some districts and why make them dig up $10 for jury fee. A case may drag along. The proper time to pay the jury fee is when the clerk says the jury is empannelled and then you pay it.

Mr. Cherry. Minnesota has gone back on you there. You have to pay for it when you ask for it, Minneapolis, at any rate, because you do not get a jury trial automatically. You get a jury of six on demand on payment of the fee, and a jury of 12 on payment of the larger fee. I am very much in favor of that idea. It is to encourage the use of a six man jury and saves a lot of time, and as a matter of fact, you get a lot of smaller cases disposed of with a six man jury, with everybody convinced.

Mr. Dodge. What is the fee?

Mr. Cherry. Quite small, and you save $5 or $10.

Mr. Dodge. It is $25 in New York.

Mr. Clark. But you have to pay it in New York under this new amendment, in metropolitan New York.

Mr. Olney. Let us keep back this matter of when you are going to give notice. What I had in mind is, if a case is not to go on the calendar automatically, if it requires the party to give notice or askthat it go on the

calendar, then the proper time at which he should be required to state whether he wants the jury trial or not is when he asks to have it go on the calendar.

Mr. Wickersham. Then it goes on the jury calendar or the other calendar.

Mr. Olney. After he asks it. If it goes on the trial calendar automatically, the 10 day provision is all right, but otherwise I much prefer myself and think it serves the purpose of the court better, to require the party that wants the case tried to do something to have it tried, indicate it, and then at that time ask that it be a jury trial or otherwise.

Mr. Dodge. I think the defendant is entitled to know whether he is facing jury trial or not. The whole policy of his defense may be affected by it, and is he to be kept in the dark as to whether certain depositions which he would only take if it were a jury tried case, are to be taken or not, for a year? Why should not the fellow claim when he starts the case if he wants a jury trial.

Mr. Clark. I think it, too, could affect the question of settlement somewhat.

Mr. Mitchell. Which do you prefer, to have 10 days run, from the issues closed, or the other alternative?

Mr. Clark. My own preference would be for the other as being more definite.

Mr. Mitchell. The filing of answer.

Mr. Clark. Yes.

Mr. Mitchell. Let us take a vote on that. Which of those two alternatives do you want, one or two?

Mr. Wickersham. Let me understand---expiration of 10 days after filing of answer.

Mr. Mitchell. The question is whether the 10 days will run from the issues closed or from the filing of the answer.

Mr. Dodge. What is the difference?

Mr. Clark. I do not think there is any difference, but I prefer the first as being more definite.

Mr. Sunderland. Is not the second more definite? Under our rule 31, there may be reply come along by order of the court. You cannot tell when that will be although the rule, I think, says if no action shall be taken on filing of the answer, but if you say when issues are closed that will be on filing of answer.

Mr. Mitchell. If we had summary judgment proceedings and the court denied it, to frame some issues and exclude others, the issues would not be closed in a broad sense until that happened.

Mr. Clark. If the court orders the reply even though he orders the reply afterward, he has opened the door for 10 days for filing trial, but that does not mean much when

the court can order it to the jury anyway. It is just as definite in your case because it says, after reply if one is had, as provided by the rules.

Mr. Sunderland. That would make it 10 days.

Mr. Clark. The 10 days may have expired and the court postpones it under his discretion anyhow.

Mr. Lemann. Do you have anything to take care of a third person?

Mr. Clark. He files in his papers. He has time.

Mr. Lemann. The other fellow may want time from him.

Mr. Clark. Either side can do it. I did have the suggestion that each party must do it when he files his own pleadings, and that is your system.

Mr. Lemann. Yes.

Mr. Clark. There is something to be said for it.

Mr. Lemann. The defendant might put in a counter claim that makes you want trial by jury on that if you had not wished for it on your own behalf.

Mr . Clark. The issues are closed, in Connecticut. That is the Connecticut rule.

Mr. Lemann. I would prefer the other.

Mr. Clark. Yes, because I think it is more definite.

Mr. Wickersham. Does that mean in Connecticut that when the last admissible pleading has been served those issues were drawn? Is there reply submitted?

Mr. Clark. In Connecticut you can plead until the cows come home. We do not shut off pleading.

Mr. Wickersham. When the last pleading is served the issue is drawn?

Mr. Clark. You have 10 days after that.

Mr. Tolman. There was another consideration in favor of closing the issue. You really know better whether you want jury trial or not after you know what kind of a case has been made out on the pleadings.

Mr. Clark. Yes, but I think the first one means the same thing, no chance for quibbling. The first really means the issues are closed.

Mr. Lemann. It is more definite.

Mr. Wickersham. Suppose the defendant puts in answer and sets up an equitable cause of action and the plaintiff in considering that says, I would rather have the whole case before a judge, ought it not to be left to him at the time the issues are closed to decide? It will not go on the calendar until then.

Mr. Clark. In your case this is what would happen under those rules. The defendant puts up his defense,

either an equitable defense or counter claim. That defense arises from the pleadings. Either side within 10 days may claim it to the jury.

Mr. Wickersham. Yes.

Mr. Clark. If it is an equitable defense there is no right of trial by jury, but the other fellow may move to strike.

Mr. Wickersham. Suppose the plaintiff gets pleading from the defendant; suppose, too, there is an equitable cause of action in defense; I think he might have the whole case tried by the court.

Mr. Clark. Why does not your question operate automatically here as well as elsewhere? I do not think I have got your point.

Mr. Wickersham. My point is that until the issues are closed---if it is complaint and answer the issues are closed, if it is complaint and answer or reply then the issues are closed---why put plaintiff to a conclusion of what he shall demand until all the pleadings are in and he sees what the issues are.

Mr. Clark. That is true under either rule. Plaintiff as well as defendant has 10 days after the last pleading submitted, by the rule.

Mr. Mitchell. What is your rule about replies?

Mr. Wickersham. Filing an answer or reply is provided

in these rules, middle of Rule 79.

Mr. Clark. Rule 31.

Mr. Loftin. Is it not a fact that after answer is filed you can move to strike?

Mr. Clark. Yes.

Mr. Mitchell. Let me ask you this. Suppose you put in as an answer that under your rule the plaintiff may reply to it or may not want to?

Mr. Clark. I do not think that is under the rule. If there is an answer he cannot reply unless there is a counter claim or unless the court orders the reply.

Mr. Mitchell. Suppose there is an answer to it and reply is permissible as in the case of counter claim. Suppose the plaintiff does not want to file? The defendant may want jury trial. He is required to serve his demand in 10 days after the last pleading. He does not know whether the reply will be filed or not. If he lets the 10 days go by from answer, he is out of jury trial.

Mr. Clark. I do not see how you can interpret it that way. It says before expiration of 10 days after filing of reply if reply is had as provided in these rules.

Mr. Mitchell. Then he refers to his answer in every case because he does not dare to wait to see if reply is to be filed.

Mr. Clark. There is counter claim, and the rules

provide for reply to the counter claim, and he knows he has 10 days to reply. If there is no reply filed he gets a default anyway. That is the next step.

Mr. Mitchell. He may get default on the counter claim but not the main action. That comes on and he has lost jury trial because he did not get 10 days, because he has waited for reply 10 days after that, and the plaintiff did not see fit to put in reply.

Mr. Lemann. On the issues made up by his answer he must ask for jury in 10 days.

Mr. Mitchell. Ten days after the closing has expired but it does not make any difference whether he files or not.

Mr. Lemann. That would be bad unless you can say that there is a counter claim. Under rules like these the party also files his claim for jury under the pleading, but does not wait for 10 days, not in one case out of one hundred. There is not any divergence of time between filing of answer and claim for jury trial. The plaintiff will ordinarily file that after declaration of jury claim, and if he does not the defendant should file it with his answer. The period is so short that the parties always make it contemporaneous.

Mr. Sunderland. If we get rid of that we should not provide for not filing something for the court to pass on. We could have the party who serves the complaint attach to

it a notice that he wants jury and have the answer served and attached to it, and when those things are filed finally in court they will have then those notices passed on to say that it is going on to the jury calendar.

Mr. Clark. He can do that under this rule or we can provide it under that rule.

Mr. Sunderland. It will work either way but it will work with that, certainly.

Mr. Lemann. I move that the first alternative be adopted.

Mr. Dodge. I second it.

Mr. Mitchell. All in favor say aye.

(CARRIED).

Mr. Clark. You will note I have left in the parentheses (Rule 79) about the jury fee because I want you to consider that. That is not a necessity. On the other hand, the jury fee is helpful to send more cases to the court. That is the experience in New York because that is what they did in metropolitan New York, provided that when they claimed jury they paid jury fee.

Mr. Mitchell. I think instead of saying, jury fee of $10, we ought to say jury fee fixed by law.

Mr. Clark. The present jury fee is $20 in Federal courts, but that is only assessed after the jury comes in.

Mr. Dobie. Fix it and let them change it.

Mr. Mitchell. It is part of their revenue. That does not preclude from assessment the costs for juries.

Mr. Clark. Yes, the court has to pay for the jury.

Mr. Mitchell. Why reduce it from $20 to $10? I assume the revenue from jury fee is substantial and we ought not to be cutting it.

Mr. Clark. I am perfectly willing. I think the jury fee of $20 is better than $10. There is an argument that could be made because both parties may go and claim it in advance. When one side does not trust the other side claiming the jury you might get $40 out of them. But that is the main reason why we split this, each man doing it in advance of trial.

Mr. Mitchell. You do not mean that both of them pay jury fee?

Mr. Clark. No, they do not have to if he can rely on the other fellow. Suppose that under this system one fellow puts in his claim of jury trial and then withdraws it. The other fellow would lose his right except to appeal to the discretion of the court. In my first note I said it is deemed undesirable to insert provision for claim now pending and withdraw his claim for jury trial.

Mr. Olney. Can he withdraw it after that? The moment he files the claim for jury it goes on the jury calendar in the class of jury cases and he would not be

permitted to withdraw from that without the consent of the other side or without motion.

Mr. Mitchell. No. The other man would rely on his request and there is no need of duplicating that.

Mr. Clark. This is a question of detail that can be decided either way but after all if you want to get cases waived, why not?

Mr. Mitchell. That is a trap.

Mr. Dodge. Exactly.

Mr. Clark. That is my point. You see my first note there. I said I was not putting in a provision for claim after opponent had withdrawn his claim.

Mr. Dodge. Both parties could make the claim if each one wants it and not rely on the other man claiming.

Mr. Lemann. Each one put up the money?

Mr. Dodge. No.

Mr. Lemann. If the first fellow claiming it put up the money, the second fellow claiming it puts up the money.

Mr. Clark. This is the Federal rule at the present time. I have not stated that right. There is no official jury fee in Federal courts, that is, no fee to the government, but in jury cases the party receiving the verdict is entitled to $20 and stated costs and attorney's fee. I misstated it.

Mr. Mitchell. Let us strike out that clause.

Mr. Clark. Wait a minute. One efficient way we have in New York of making jury waiver work is to add a jury fee. Mr. Cherry suggests that is true in Minneapolis, too. Why not?

Mr. Lemann. Put up $12 apiece.

Mr. Clark. This gives a modest revenue to the government.

Mr. Mitchell. We could provide for a claim fee and on that filing then a filing fee. He will have a right.

Mr. Cherry. I hope not.

Mr. Mitchell. What business do we have dealing with jury fee?

Mr. Clark. This is a little different thing. We do this for a different purpose.

Mr. Mitchell. There is none in Federal courts. Give them jury trial under the Constitution without having to buy it.

Mr. Olney. I move that we leave out any provisions for collecting the fee.

Mr. Lemann. I think there is great force in the chairman's comment.

Mr. Clark. Do you not want to have the government to get that revenue?

Mr. Lemann. I want them to pay it and waive the jury. The practice of not adding this is an advantageous

practice. I would do anything we could.

Mr. Mitchell. In a $3,000 law suit the $10 fee does not make much difference.

Mr. Olney. It will attract a great deal of attention in the way of criticism by lawyers who claim that Federal courts are trying to work against juries and all the rest of it.

Mr. Mitchell. Do you not think that many of the cases in Minnesota are a couple of hundred dollars, small amounts?

Mr. Cherry. It is largely the smaller cases.

Mr. Mitchell. It is moved and seconded that we strik e out respecting paying jury fee. All in favor say aye.

(CARRIED).

Mr. Clark. Down to the next alternative about the exception of waiver, if you will read the second paragraph of my note, I tried to show why I put that in.

Mr. Lemann. It is a little long.

Mr. Clark. I think it extends jury trial. I do not like to do that. There are three possibilities. First, you can leave out both practices and I suppose that is the more usual rule. It is not so specified but you will have difficulty such as you did in the New York cases; or, second, you can take either one of those second and third alternative

What I wanted to reach by this alternative was that in cases where either party denies that there is any equitable ground at all, I think at that time both parties, or if not both parties the party that denies the existence of equitable grounds, ought to be required to claim his jury. In the Jackson v. Strong case, what happened was that the defendant denied that this was an equitable contract, and the court held he was right on that, but still there was damages, and it was held in effect that he had not waived his jury. The only practical thing was that he had not waived his jury.

Mr. Dodge. Do they have to claim a jury in New York when it is waived?

Mr. Mitchell. "In cases where the existence of grounds of equitable cognizance is denied" -- I do not know what that means.

Mr. Clark. In the New York case there was an action that would have been a partnership contract, but the defendant denied that it was a partnership.

Mr. Dodge. Is it the law of New York that you must claim a jury? Do you not have to waive it affirmatively?

Mr. Clark. There were several provisions in New York to waive it by written stipulation, and so forth, but also by going to trial, but in this case they went to trial before a referee.

Mr. Dodge. I think the rule as framed, and under

that bracket, would be construed as waiver of jury, no matter what happened in the case.

Mr. Lemann. If I sue you and have a cause of action at equity, I do not claim for a jury because I do not think I am entitled to a jury. You come in and I do not claim it; it is inconsistent with claiming it. You say: this is not a suit in equity; it is an action at law, and the judge so rules.

Ought I not to have a chance then to say: if that is the case I would like to have a jury?

Mr. Clark. You are seeking it?

Mr. Lemann. I think as long as you permit it in this second bracket, in that first bracket it is hard to extend. Mr. Dodge thinks in the case I have put I ought not to have a jury trial; that I am willing to rest on it being a suit in equity and that I was not going to a jury. That is all.

Mr. Clark. I do not think you should either. You ought to know what your case is about and you do. What happened in this case is a good showing of what happens. The defendant in New York claimed there was no partnership, and brought the rule in and went to trial, and the judge ruled that his theory was correct but that he owed money, and when

he got to that stage he went to see what he could do to get out of the hole.

Mr. Wickersham. He must have raised the objection on trial.

Mr. Clark. No, he did not.

Mr. Dodge. Take specific performance of contract where the court says he is not entitled to it but is entitled to damages. That might result in such a case.

Mr. Wickersham. The plaintiff claims it was an equitable suit; the defendant says it is not an equitable suit, it is an ordinary contract claim and the court so held, and the judge went on and assessed the damages. I suppose the defendant's claim was that the moment it was held to be an ordinary contract action the judge had no power to assess damages, but he must have objected.

Mr. Clark. There is not a word appearing anywhere about any objection that I know of. I would like to read the record. I will not deny he could object in that kind of a trial.

The vice of that decision is that the court does not put it on that ground. If the court had said he raised objection before he went to trial with the referee because he was entitled to jury trial, I would say that case was all right, but he did not.

Mr. Wickersham. Did they discuss the question of waiver of jury trial?

Mr. Clark. No, put it entirely on terms of law and equity.

Mr. Wickersham. The decision was right but the reasoning wrong.

Mr. Clark. The decision was wrong, I think.

Mr. Wickersham. I have no doubt he must have taken objection somewhere.

Mr. Clark. I think there is a record in it. If the courts can be trusted I leave out both alternatives. Of course, following that the union of law and equity can not be trusted. No question like that could be raised in Connecticut and many courts in New York.

Mr. Lemann. I move that the courts be trusted.

Mr. Tolman. We have retained that rule in those cases.

Mr. Clark. Major Tolman suggests that any right which the party might have for trial by jury in a civil case shall be deemed to be waived unless so claimed.

Mr. Clark. Major Tolman presents this:----strike out the bracket that starts out: wherever in a civil action a party presents an issue of fact triable by jury he must do so-and-so, and unless he shall have done so-and-so, he shall be deemed to waive any right to trial by jury.

I think my language is at least as strong as Major Tolman's.

Mr. Dodge. The question of amendment might create jury issue the first time, by the amendment of the answer.

Mr. Clark. I do not think it should because both parties know what the case is before. Why should they have time to decide what the answer means and the theory they are going to try the case.

Mr. Mitchell. Suppose in my answer I put in counter claim?

Mr. Clark. That is a different thing.

Mr. Mitchell. It is provided here in that case that you can serve it.

Mr. Clark. I say because he has any time up until the time the last pleading is filed.

Mr. Mitchell. You have not said so. You may within 10 days after filing the answer.

Mr. Clark. Or reply, if reply is had, as provided in these rules. I wonder if there is not some question about my expression,---if a reply is had. Perhaps I ought to use something different there than had.

Mr. Dobie. Phrase it in terms of time, as if reply had been filed. Will that take care of General Mitchell's case where no reply is filed, or within 10 days of the time when reply is required to be filed.

Mr. Dodge. Might not the plaintiff amend the plain-

tiff's plea in such a way as to give defendant a right to claim jury?

Mr. Clark. That might happen when you have an entire shift in the case. I am a little afraid of that.

Mr. Dodge. He might amend the plea in equity as an action at law, for the first time giving the defendant a right.

Mr. Clark. He might amend different ways. Under our present procedure we see amendments from a claim for assault and battery to a claim for specific performance, or vice versa. I do not believe anybody will say that there will be any question but what you could get your jury trial when that change is made.

Mr. Mitchell. You say the court would rule that he would be entitled to a jury trial and that the rule requiring that you file an answer could not operate?

Mr. Clark. No, because there you have to have an answer.

Mr. Loftin. Is it not taken care of in the next rule---Rule 80, where it reads: "unless the court upon motion or of its own initiative shall find that the issues or some of them are not triable as of right to the jury and shall further order such issues otherwise tried. In actions not triable of right to the jury or when jury trial has been waived, the court may in its discretion and at any time order

all or a part of the issues of fact to be tried to the jury and may determine the sequence in which such issues shall be tried."

I assume it was your purpose fo take care of possible situations arising.

Mr. Clark. In view of this discussion I am wondering, as the more you specify the more you get into trouble, if there is any objection to leaving out both brackets? That is your idea?

Mr. Dodge. I had the same impression except an issue triable of right to the jury that arises on amendment to the pleading, then the party may demand trial at that time. You may have trouble if law and equity are mixed together and equity can be changed into law.

Mr. Mitchell. Or if an amended answer is filed, the man can make a demand then.

Mr. Olney. What about the case of this kind: If I bring an action for specific performance, when it comes down to the trial, perhaps it develops that the right to jury trial for specific performance cannot be granted, nevertheless I have a perfectly good contract which has been breached and may be entitled to damages. That would present a pure action at law, an issue. In those circumstances am I entitled to jury or not? I brought it in the first instance as an equitable action. The court ought to have the right,

and it ought not to be required of the plaintiff under those circumstances that he go back and start a new suit, yet I question whether the court would really have power to render judgment without trying that issue of fact before a jury if either party insisted on it.

Mr. Dodge. Not with us. If plaintiff goes into a court of equity in good faith and it ultimately turns out that equitable relief cannot be granted, the court may enter a judgment for damages. That is the rule in Massachusetts.

Mr. Clark. That is the rule usually.

Mr. Dobie. Under that theory.

Mr. Clark. There are two situations. If a plaintiff developed that he had no right to specific performance, he can get damages in equity or in his specific performance action. On the other hand, if it develops that he knew the defendant had sold to some one else when he was undertaking to claim for damages, in that case it might be well claimed that there is a jury trial unless waived. In that somewhat limited case I see no reason why they should suffer. They have not lost anything at all. They get a trial, jury trial or not; they waived. It did not really infringe on jury trial, which comes as an after-thought, and in cases of that kind I think it is desirable to have this definiteness of claim. Those situations that I have indicated come up in New York; Scott and others. I recall my jury

99

case situation, that is, the plaintiff knew, but they held he waived it by going to trial.

Mr. Dobie. Why do you not include the second bracket here, the failure of grounds of equitable cognizance? I think it would make some people feel easier.

Mr. Clark. That is right. I think that is a good reason for doing it. The only hesitation I have is that I do not like to extend jury trial very much.

Mr. Dobie. Cut out failure of grounds of equitable cognizance?

Mr. Dodge. Except the words -- on failure of equitable cognizance.

Mr. Wickersham. The first small bracket, and take out all the second bracket down to and including "equitable cognizance"?

Mr. Dobie. "On failure of grounds of equitable cognizance" -- those words go out. Then a party could demand jury trial by making claim as herein provided.

Mr. Clark. How about inserting this: "Then the party may demand jury trial on such issue" ----

Mr. Lemann (interposing). That would be all right.

Mr. Clark. --"on such issue at that time by making the claim herein provided."

Then it reads: "That if an issue triable as of right to the jury first arises upon amendment of the pleadings, then a party may demand a jury trial at that time by making claim as herein provided."

Mr. Lemann. You probably are going to have some one waive an issue as to this specific performance case.

Mr. Clark. Yes.

Mr. Sunderland. I wondered what that term, "at that time," means. Upon amendment. Amendment upon order, or when served or when signed?

Mr. Cherry. Ten days.

Mr. Clark. No, I do not want that.

Mr. Dobie. I do not know whether you include that in the subsequent provision, that the judge may at any time direct.

Mr. Clark. I intended to change the provision.

Mr. Wickersham. Demand jury trial at the time of such amendment.

Mr. Dobie. Ten days after service of the amendment.

Mr. Sunderland. Refer to filing of amendment, serving the amendment, or allowing of it, something definite.

Mr. Lemann. Is the amendment made when the court permits it, under these rules?

Mr. Clark. Referring to Judge Olney's situation, if this amendment is made at the trial, of course I can follow it out further---party may demand jury trial of such issue by making claim as herein provided within 10 days after service of amendment or if amendment is made at the trial at the time of the making of the amendment.

Mr. Wickersham. At the time of such amendment.

Mr. Olney. If you say, at that time, the courts will put a practical construction on it.

Mr. Mitchell. I think the question of time is a detail that the Recorder can work out and revise Rule 79.

Now, shall we pass to Rule 80?

Mr. Clark. Our Rule 80 supplements this.

Mr. Olney. I have objections. The objections are that an action is not triable if of right by jury,---or when jury trial is waived the court may at any time order that the particular issue affected be tried by jury and determine the sequence in which that is tried. The verdict in that case ought to be purely advisory. The discretion of the court to make it advisory should not be limited in equity proceedings.

Mr. Mitchell. I make the point that there is no provision for framing the issues. The party ought to have the right to move the court for trial by jury, if it is a case of equitable cognizance, and not leave it to the court.

Mr. Clark. If you follow my scheme all the way through it is taken care of. I am not sure whether you like the way I take care of it, but I have taken care of it in what I think is more desirable procedure.

Mr. Mitchell. To be handled as a special issue.

Mr. Clark. I do not draw it that way. That provision is between trials by the court and trials by the jury. You

will find probably the thing you have in mind under that section on finding.

Mr. Mitchell. I have not talked about finding but I am talking about equitable action, where you have a rule of action that gives the parties, either of them, a right to make a motion for framing the issues, submitting to the jury, in cases of equitable cognizance.

Mr. Clark. This is a rule that covers sending a case to the jury. The matter you have in mind is the effect of the verdict when rendered.

Mr. Mitchell. I am talking about request to get certain issues submitted to the jury, not the effect of the verdict.

Mr. Lemann. It is your idea in specific performance and there is an issue of fact, that either side ought to have a right to move the court?

Mr. Clark. I will explain a little more what I had in mind. What I think is desirable, so far as we can, is to develop not simply technical rules for the purpose of conduct upon the part of the bar, but I have a feeling beyond any real union of law and equity, that if we do not shift the emphasis from law and equity to jury or non-jury, that we gain a great deal in this respect with the bar when we shift, and it can be done because it is done in various States. I think it is pretty much done in Massachusetts.

I know it is done in States where there is a choice between jury and non-jury cases and it is automatically one way or the other. I indicated at the beginning it automatically goes on the calendar one way or the other. Under this system let us see what happens to an equity case. Either party can move for a trial of all or part of the issues to the jury. The court need not grant it. There is no constitutional right. I am quite clear there is no constitutional right. The court sends it to the jury. Here is the place where I have provided for the court to send it to the jury.

The further question then comes as to what is the effect of the verdict.

My own view is that unless you are assimilating the results in the two cases as much as you can you are not providing nearly as much as you can do for union of law and equity.

What I indicate by that reference is to do all we can do to assimilate the results in the two cases. I cover here sending the case to the jury in both situations, that is, in jury right and jury of privilege.

Mr. Olney. You are going to take a jury of privilege, that is, jury in the case of equitable cognizance.

That is,equitable recovery. What is the effect of sending it to the jury? Is the verdict the jury renders merely advisory or not?

Mr. Clark. In most States---probably true in most cases, advisory. In some States it is not.

Mr. Olney. Your rule provides in effect that it is not advisory merely.

Mr. Clark. It is today.

Mr. Olney. I object to it.

Mr. Lemann. In either case it has the same effect whether jury granted, privilege, whether the parties asked for it, or the judge directed it.

Mr. Clark. In any other situation they will have to fight their way through the courts as to equity and law, and you will preserve the old distinction, but it is not necessary because it is not done everywhere. You can decide which way you want as a matter of policy. If a separation is worth while it can be done.

Mr. Olney. One of the most notorious cases in California, tried when I was a young man, involving a very large amount of money, was a suit brought to set aside a deed on the ground that it had been obtained by fraud. The court called in an advisory jury and the jury returned a

verdict for the defendant and the court promptly set it aside and then simply said it was advisory, merely called them in as an advisory jury, did not agree with them at all, and rendered a verdict for the plaintiff. That is an actual instance, and I dislike this idea of the chancellor in an equitable cause not having the final responsibility for the result and passing it over to a jury.

Mr. Sunderland. Does not the same thing apply where the jury has been waived? If the party wants the judge to try the case, why not, instead of passing responsibility. That is a ground of complaint in my State. The judge insisted on turning the case to the jury where the parties waived it.

Mr. Dodge. There is a provision in the equity rules for trial by jury in equity court. Rule 23.

Mr. Mitchell. Yes.

Mr. Lemann. What is the effect there?

Mr. Dodge. The effect of it is that when a suit is properly brought in equity, ordinarily determinable by jury the court of equity may try the issue by jury and then the court by the light of the jury's verdict will proceed to adjudicate the equitable issue involved in the suit.

Mr. Dobie. What page is that on?

Mr. Dodge. Dobie on Equity, page 780.

Mr. Olney. That refers to distinction in cases of law

and equity. That is the old principle.

Mr. Clark. That gives the judge actually all the control he needs.

Mr. Olney. Mr. Dodge brings up this instance of the old equity practice that the court followed. When an issue as to some particular question of fact arose the equity court would very promptly refer that matter for trial by jury where the judge did not try it himself. It was tried independently of the court and then he took the verdict that the jury rendered. We have trials of issues of fact in the court itself with the jury right there, and if in an equity case the court does not agree with the verdict of the jury, he ought to say so and the decision ought to be in accord with his judgment and not the judgment of the jury.

Mr. Clark. Possibly. It would be quite possible to provide that the court should have no independent power of sending the case to the jury. There is so often that power in jury courts and also under equity practice, subject to the effect of the verdict. It seems to me that is a little difficult to provide, that the court should have no discretionary powers. That is one way of doing it. On the other hand, if you keep discretionary power in the judge as a matter of practice, we know the judge must have under the law great control over the jury anyway, directing

a verdict and what not, decides whether there is a jury issue, and so forth.

If, however, we carry it beyond jury trial and the party appeals to the distinctions between equity and law, we only get a limited union of law and equity.

It always seemed to me that one of the real difficulties that in New York has led to so many cases not going as far as they really could, was due to the fact that they had kept that distinction, the idea of keeping it generally. If you are making that distinction, make the distinction in the form of a trial, which thus preserves the constitutional right, a real union of law and equity.

You have the issue raised when you claim the case to the jury. That is where you make your division. Once made it is final. As a practical matter there is not so much difference anyway. It brings the two systems together much more.

What I have tried to suggest later in these rules is bringing the court, waiving the equitable situation, close together. I think most of the time the differences are differences of terminology. We talk about the proper court reviewing facts in one case and not in another. I have not seen much of any real difference in what the court actually says. The court actually reviews the fact when

they allow a conclusion of law and when it does not want to hear a jury case it says it is a question of fact, but I do not think the actual result is very much. It is a method which tends to keep law and equity separate and you thresh out in the upper court those distinctions and talk about in this case the judge cannot review because even though this is a jury-waived case, there is his constitutional right, and so forth. I think that we destroy a great deal of the effect of the union.

Mr. Dodge. You mean that you do not like this last sentence here?

Mr. Clark. No, I like that all right.

Mr. Dodge. Is it only the question of the effect of the verdict?

Mr. Clark. I think that even though the chairman did not want it you better look at my rule on finding because that is what it really comes down to.

Mr. Mitchell. I do not see it. I want to know how would that cover the case of a non-triable by jury question. Would he as a matter of right bring up reasons for certain issues.

Mr. Clark. Unless he submits it.

Mr. Mitchell. The only claim he files in the case is that when any civil action presents an issue of

fact triable by jury right, he files his claim. There is not another word here.

Mr. Clark. When he does not make his claim it goes automatically to the court.

Mr. Mitchell. How is he going to make the claim or demand or request of trial by jury of the issue in a case which is not triable of right?

Mr. Lemann. In every case where the Constitution says he must have it he gets it. In the other cases the court grants it.

Mr. Mitchell. Let us recess until 8 o'clock.

(Thereupon, at 6 o'clock p. m., the Advisory Committee recessed to meet again at 8 o'clock p. m., of the same day, Monday, November 18, 1933).

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Percy Budlong follows at 8 pm

EVENING SESSION.

VII. TRIALS.

RULE 79 -- CLAIM FOR JURY TRIAL -- WAIVER.

RULE 80 -- TRIAL TO THE JURY AND TO THE COURT.

(Continuation of discussion.)

Mr. Mitchell. When we adjourned, as I understand, some discussion was going on as to the effect of a verdict on issues in a case of equitable cognizance, the binding effect on the court, etc. Mr. Clark calls my attention to the fact that there is a later rule in which he thinks it is more appropriate to deal with that. If you are willing, in order to keep our order here, we will follow along with these rules, and bring up that question when we reach the rule that he thinks deals with it. So that brings us to Rule 80.

Mr. Donworth. May I make a suggestion about Rule 79?

Mr. Mitchell. Yes.

Mr. Donworth. I have a note here that either at the beginning of this rule or at the beginning of the rule that we have already suggested one of the Reporters formulate, I think it would be well to put in the caution of the statute there in its exact words, that the right of trial by jury shall remain inviolate --, just the exact language, showing that we have obeyed the mandate imposed upon us.

Mr. Dobie. I thought we adopted that motion, Judge.

Mr. Dodge. At the beginning of summary judgments.

Mr. Donworth. All right.

In the fifth line from the bottom of Rule 79, it is provided that "then a party may demand a jury trial." I do not know whether you would want to insert "of such issue".

Mr. Mitchell. That is what we agreed on. I have a note on it here.

Mr. Donworth. Then, at the end of the rule, you will notice that the last words say this:

"In his claim for a jury trial, a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have claimed such trial for all issues of fact."

I suggest adding this:

"In case only a part of the issues are so specified, any other party may, within ten days thereafter, claim such trial for any other or all of the issues of fact."

That is, if my associate, my co-defendant or my opponent demands a jury trial where he thinks he has the jury side of it, whereas I would have been satisfied with no jury at all, if he demands a jury on part of the case I think I should have the privilege then of demanding it on all.

Mr. Mitchell. As I understand the Reporter's theory, that is permitted already, because he proceeds on the theory that each man makes his own demand, and if you are not satisfied with it you put in your own, or duplicate it.

Mr. Donworth. Only within ten days.

Mr. Mitchell. Yes.

Mr. Donworth. And if, on the tenth day, my opponent demands a jury trial on a quarter of the case, it is too late for me to make it.

Mr. Mitchell. Oh, yes; I see.

Mr. Clark. I think what Judge Donworth has suggested can be adopted without infringing the symmetry of the picture. It may not be necessary, but it gives a little more jury right and less waiver. I have no great feeling either way about it.

Mr. Mitchell. As the rule is drafted now, even if a man makes a demand for a jury trial for all the issues within ten days, his adversary, in order to be safe, has to make a duplicate demand, because the first man can withdraw his, and the second man has to stand on his own. We raised the point in the beginning that if one man demanded it, the other man would rely on the demand, and the first ought not to be allowed to withdraw it. The Reporter advised us that it was the purpose of this rule to make each fellow make his own demands, and rely only on them.

Mr. Clark. That was the purpose as drawn. Again, I will say on that if you think that is going a little too far, it is very simple, of course, to put in that you shall have ten days after the other side has withdrawn its demand. I just

had the feeling that if you allowed each one his own time, it was up to him to look after it; but there it is. That does not make very much difference.

Mr. Sunderland. We might provide that no one could withdraw a demand without consent of the other party.

Mr. Clark. Yes; that could be done, too.

Mr. Mitchell. It seemed awkward to me to have two fellows demanding juries at the same time for all issues; if one man did it, to have the other man coming in and making a similar demand.

Mr. Sunderland. It seems redundant; does it not?

Mr. Mitchell. Yes.

Mr. Clark. That is a very simple change, and I do not think it will add very much to jury trials. I have no great feeling either way on that.

Mr. Loftin. I move that the suggestion of Mr. Sunderland be incorporated in that rule.

Mr. Mitchell. That will include taking care of Judge Donworth's proposition in some form.

(The motion was seconded, and, the question being put, the motion was unanimously agreed to.)

Mr. Mitchell. Before we leave Rule 79, is there anything else?

Mr. Clark. I really think perhaps I ought to suggest a matter you and I talked of, Mr. Chairman. I apologized

to the Chairman, and told him I had overlooked a matter that he said I had -- that is, that I had not covered specifically, although I thought I had -- the motion in the so-called equity case. There are two ways of doing it very simply. The way I prefer is to make Rule 79, "Claim", apply to all cases. It is only the court action which applies to this which is triable by the jury of right. That is one way. The other way is to insert in the last sentence of Rule 80 a provision that the court may act on motion; or, in other words, in actions not triable of right, etc., the court may, in its discretion, or upon motion of a party; either way will do it.

Mr. Mitchell. The Reporter is dealing with the question whether, in a case of equitable cognizance, the rules as now drafted make any provision for either party applying to the court for framing or submitting special issues to a jury; and it appears that the rule does not cover it. It ought to. I think we can leave it to the Reporter, with the understanding that he can put it in at the proper place, and we can consider the wording of it at our next meeting.

Mr. Clark. Another point right along that same line: Judge Donworth, when I was talking with him a moment ago, said that that matter after "actions" was not necessary, and of course it is not. That is now in Rule 80, the last sentence. That is what I am talking about. I put that in so people would know what I meant. The thing I refer to is not triable

of right by the jury, or when jury trial has been waived.

Now, you might do it in this way:

"In all actions, and at any time, the court may" --

Mr. Donworth. I thought, to make it very clear, that that should read:

"In all actions, whether or not triable of right by jury, the court may" --

I do not know whether the sentiment of the committee is against jury trials, if they feel that there are too many of them and that they should be cut down, or whether the draftsmen, the Reporters, favor that idea.

We often hear it said that the members of the legislature have to carry home something to their constituents. You have already heard the letter of Judge Bowen read, I think. The other two district judges concur with him. They are very set against this idea that they can be forced to try without a jury an action that is, by the Constitution and practice, a law action. They are very determined about that; and any of you gentlemen who have ever sat upon the bench will appreciate this -- what a relief it is to a judge, after having sat in an equity case or an admiralty case, where he passes upon the law and the facts, to get into a jury case. He gets on the bench, and the parties make their opening statements, and he sits there, and he can rest. (Laughter.) That is really true. I do not refer to these dynamic cases where the

lawyers are trying to run the court. Of course that is largely the fault of the judge, if he lets them do that. He should have everything orderly and quiet, etc., and he decides points of law. That is the only thing he has to do; and in my experience and my observation, the judges very much like that. They are very much opposed to your saying that if somebody thinks that a judge has a good reputation and is a fair man, both parties can say, "Here is a case involving an automobile accident; let us try it without a jury."

Our judges do not want to do that. I think there are very few judges in the country who do want to do it; and I think it should be very plain that just as it takes 13 men to rob a man in the courts, so it takes the judge plus the lawyers to waive a jury trial in a case that is, by the Constitution, triable by jury.

If I do not carry that home, I do not know what will happen to me. (Laughter.)

Mr. Mitchell. You have it here in Rule 80. The question is whether it is expressed to your satisfaction.

Mr. Donworth. I should like to have it made very plain. It will take less words than are there now. I should like to have you say:

"In all actions, whether or not triable of right by jury, the court may".

Mr. Mitchell. Then had you not better mention waiver,

too?

Mr. Lemann. Would that be correct? If you said "whether or not triable of right by jury", the court might hold that part of the issues were triable by jury.

Mr. Donworth. It says "all or a part".

Mr. Lemann. He would be bound to order them all tried by jury, would he not, if triable of right?

Mr. Olney. Is there any objection to Judge Donworth's idea? If not, it is a matter for the Reporter in drafting it.

Mr. Donworth. I should like to have the language beyond question.

Mr. Mitchell. Is it not now?

Mr. Donworth. Not as it read before. I did not think it was very clear.

Mr. Mitchell. You want to give the court discretion, in a case triable of right, to order part of the issues to a jury. That is Mr. Lemann's point.

Mr. Donworth. I thought as it read before it intimated that there were some actions not classified. It says "in actions not triable of right to the jury or when jury trial has been waived", implying that there are some others.

Mr. Clark. I did not mean that. How do you like my expression "in all actions and at any time"?

Mr. Donworth. All right.

Mr. Mitchell. "The court may" -- what?

Mr. Clark. "The court may, in its discretion".

Mr. Sunderland. That will not do, because if it is triable of right he cannot take part of the issues only and have them tried by jury.

Mr. Lemann. Let us leave it to the Reporter with the admonition to make it perfectly plain.

Mr. Donworth. The reference to a part of the issues may be treated in a subordinate clause.

Mr. Clark. All right. A while ago one of my students went down to New York, and was much shocked because a judge was trying a jury case, and spent all his time working a cross-word puzzle. (Laughter.)

Mr. Loftin. I should like to ask the Reporter about the query at the bottom of the page.

Mr. Clark. Oh, yes; I think that should be taken up:

"Query. Should there be a provision that non-jury issues (which often may be decisive of the case) shall ordinarily be tried first?"

The Connecticut committee has recommended such a rule. I do not know that it is really necessary. They recommend a rule something like this:

"The equitable issues shall be tried first, unless the court shall otherwise order."

It is not made absolute. It is a sort of a preference.

10

Mr. Dobie. That was the practice when they had the equitable defense; was it not?

Mr. Clark. Yes.

Mr. Sunderland. Is not that a matter of conduct of the business of the court?

Mr. Dobie. I think so, too. The judge says, "This defense may dispose of the whole thing, and there will not be anything to go to a jury". He will certainly take that up first.

Mr. Clark. My rule says he may determine the sequence.

Mr. Dobie. That would take care of it. I would rather have that than an absolute rule.

Mr. Clark. All right.

Mr. Dobie. There is one other question I wanted to ask there. That is whether you deliberately left out the last part of the rule about the finding of fact having the same effect as the verdict of a jury.

Mr. Clark. I have that in Rule 104, and I expect there will be some debate when we get to that.

Mr. Dobie. What I really had in mind -- and all I am going to say is just this one sentence -- is that, as you gentlemen all know, there is a tremendous lot of law about what is the effect of these special findings and exceptions to findings, and what is reviewable on appeal in these jury-waived cases. If we can do anything to get rid of that mess

I think we will have done a great service to the bar.

Mr. Clark. I think Mr. Loftin has already approved of Rule 104.

Mr. Loftin. I have not said that. (Laughter.)

Mr. Dobie. We will leave it until we get to 104.

RULE 81. CASE TO BE PLACED ON TRIAL CALENDAR, WHEN -- CONTINUANCES -- CALL OF DOCKET.

Mr. Mitchell. Now we will pass to Rule 81.

Mr. Clark. Rule 81 is the one we discussed a little bit before. This, as drawn, automatically puts the action on the trial calendar.

Mr. Olney. I want to say again that I think that is a futile proceeding, and it would be very much better to require the parties to give notice that they want a case tried.

Mr. Mitchell. This forces a case on the trial calendar, and shoves it under the judge's nose on all his calendars ten days after answer, no matter when the case can be reached, or whether the parties are ready, or talking about settlement, or what not.

Mr. Clark. What do you think about that, Judge Donworth? You were not here when it was discussed a little in passing before. This is modeled on the equity rule which is on the left there. According to this, the case automatically goes on the trial calendar. The question was raised whether it

should not stay in privio legis until somebody hauls it out.

Mr. Donworth. The practice in our district has always been this: Of course, we have, in the Seattle district, two terms -- I think in all the divisions of the State two terms, beginning respectively the first Tuesday of May and the first Tuesday of November. The clerk makes up a calendar a certain number of days before the beginning of the term, and he puts upon the calendar all cases then at issue; and either on the first day of the term or on an early day in the term the clerk sends out postal card notice that on a certain day Judge So and So will call his calendar for the November term; and all the lawyers are supposed to be there who have cases on the calendar. By consent a case may be stricken, simply dropped from the calendar. Of course it stays in court. The judge tries to assign every case on the calendar. He is not always able to do that, especially if there are lengthy criminal cases, of course, consuming time; but that is the way it is done.

Mr. Mitchell. In that case the clerk serves notice of trial on the lawyers. He sends them a postal card and states that their case is on the calendar. Is not that the way it is done?

Mr. Donworth. I am not sure about that. No; I do not think the clerk sends notice that the case is on the calendar. You mean that it has been assigned for trial?

Mr. Mitchell. No; that it is on the calendar. He simply sends notice that it is on the calendar.

Mr. Donworth. No; you have to go up to the clerk's office and look at the calendar. He mails a postal card stating that on a certain day Judge So and So will assign cases for trial for the term, and you have to go up and see if your case is on.

Mr. Wickersham. Of course a method which would work well in a jurisdiction where there is not a vast number of cases would not work at all in New York or Chicago, for example, where there is an enormous raft of cases.

Mr. Mitchell. How is it done in the Federal District Court in New York City?

Mr. Wickersham. Nothing goes on the calendar until notice of trial is given by one lawyer to the other. There is a raft of cases that are at issue and ought to go on the calendar that never go on the calendar. I do not see why the time of the judge should be taken up in disposing of those cases when neither party is ready to move them.

Mr. Mitchell. Both in equity and in law, in the western districts, the United States courts have always had this general practice of forcing cases automatically on the calendar without any notice of desire from the lawyers. Then when they get up to the calendar day, and they are confronted with all these things, they get out of patience and angry because they are not disposed of under their noses. Then they

make rules that you have got to be there, or if the case is not tried it is going to be stricken, and you cannot get it back. I think it is all due to their annoyance as a result of seeing cases on the calendar that the lawyers are not ready to try.

Mr. Wickersham. After all, this is a matter of routine of the Calendar. Ought not the district courts to have the right to make rules with respect to their own calendars without making a general rule applicable to all, where the conditions are so different in different districts?

Mr. Donworth. I think that is excellent.

Mr. Sunderland. It seems to me if there is anything that ought to be left to the local district court rule, it is the calendar.

Mr. Clark. That can be done very easily. Then do you not think it is wise to put in here a statement that the judges may, by lawful rules, provide, etc.?

Mr. Sunderland. Yes.

Mr. Wickersham. Yes; put it in that the local judges may make their own rules for the calendar.

Mr. Olney. I would provide that they <u>shall</u> make them.

Mr. Clark. Yes; I should think so. They ought to have some rule on the subject.

Mr. Olney. Yes.

Mr. Clark. I had some idea of going down and talking to

Judge Knox, and then I thought this whole subject was too delicate anyway, and I had better not; but down there they have been trying to speed up things, you know. They have some new rules, and I had the impression that cases did go on the Calendar now.

Mr. Wickersham. There may have been some late change. I will go and talk to Judge Knox when I go back if you like.

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

Mr. Mitchell. I think it would be a good thing to do to find out what they are doing down there.

Mr. Clark. If you talk to him, Mr. Wickersham, will you talk to him about his experience about getting pleadings filed in the court?

Mr. Wickersham. Yes.

Mr. Tolman. Dean Clark, ought not this to go into Rule 3? You remember that in Rule 3 you had the question of local rules. It seems to me that if you got local rules together in Rule 3, it would be better than putting them here and there in the body of the rules.

Mr. Clark. I am not quite sure. I suppose that is all right, although, there being an equity rule here -- do you want to suggest anything about clearing the dockets? My last sentence might have some bearing on that.

Mr. Wickersham. I think that is a good thing. As a general rule, in every court, make them clear the docket.

Mr. Lemann. He has a rule here to drop them all after one year; have you not?

Mr. Clark. Cases in which no action has been had.

Mr. Lemann. I suppose you mean where they should have acted, and have not. Had you not better leave that to the local judges -- local rules?

Mr. Mitchell. I think that is a good thing, too.

Mr. Lemann. I think probably, because the conditions are so dissimilar. In New York, for example, you could not drop where there is no action in one year without the party's fault.

Mr. Mitchell. He might be waiting for a jury.

Mr. Sunderland. That would not apply to a case that was at issue.

Mr. Clark. No; it does not apply to a case if it is at issue awaiting trial, and perhaps that ought to be specified if the rule were made. That is not clear; but if you will look back at the suggestion of the judge, apparently it is a new thing in Federal procedure to clean house.

Mr. Wickersham. Oh, yes; very.

Mr. Lemann. That is because some of them do and some do not. We have a similar practice in western districts. The clerk sends a notice to every lawyer to be on hand the first week in November, and the court room is crowded, and the judge goes down the list and says, "How about it?"

Mr. Wickersham. Of course in New York or Chicago the judge never goes down to see what cases were filed and not on the trial calendar. We have a trial calendar a mile long. That calendar ought to be called annually; but I do not believe in calling up every case that is at issue where there are pleadings on file. Who knows whether it is at issue or not? There is a bill and answer, or a complaint and answer. Nobody is going through that to see whether there ought to be a reply, or is going to be a reply, or anything of that kind. Until one party or the other moves the case, why should you bother the court about it?

Mr. Mitchell. Why should the court worry over it?

Mr. Wickersham. Why should the court bother with it at all?

Mr. Mitchell. It makes me think of the last interview I ever had with Calvin Coolidge. I went to the White House to say good-bye to him on March 4, 1929; and he was not very busy, and he drew out a cigar and put his heels upon the table and began to give me some political philosophy. He knew I was going into the next Cabinet; and one of the things he said was, "The Attorney General of the United States should never go out to meet trouble. It will get to him fast enough; and if it does not, maybe somebody will intercept it before it does." (Laughter.) I think these judges are just fighting that principle when they insist that a case shall be put on the

calendar and stuck under their noses automatically, and then wrestling around to get it off.

Mr. Donworth. There is a rule in our district, and I presume in others, for the court to get rid of stale cases. I forget what it is; but there is a local rule whereby, after a certain period, if nothing has been done in a case, then on the call of the calendar the court may dismiss it.

Mr. Wickersham. That is when it is on the calendar.

Mr. Donworth. Yes.

Mr. Wickersham. I do not think that rule applies to a case that has not been put on the calendar.

Mr. Donworth. No.

Mr. Mitchell. The only thing I think about in that connection is that if the case goes stale in that sense, you will find a lot of statistics at the judicial conference in which such cases are included. All that Congress are interested in is the disposition of business in the Federal courts, the number of cases disposed of and that remain pending; and when you are dealing with pending cases in connection with the volume of business to be done by a Federal judge in a certain district, as to whether or not you need a new judge, it is very important to know whether they are dead cases or live ones. So there is a reason for getting out of the records stale cases that have been practically abandoned.

Mr. Lemann. We have a rule that if the plaintiff has

taken no action for five years, the defendant may have the case dismissed. We have used it now and then. You might ordinarily say, "Why does not the defendant try his case if the plaintiff does not want to try it?" The defendant will say, "There is no reason for me to agitate it. It is getting older all the time"; but at the end of five years he can get rid of that thing hanging over him.

Mr. Wickersham. We have a rule in New York that after issues of like date have been tried, and a similar case has not been put on the calendar, it may be dismissed for want of prosecution.

Mr. Mitchell. That is analogous to the statute of limitations.

Mr. Wickersham. Yes.

Mr. Clark. You see what Judge Raymond said, first. Judge Miller, district judge of North Dakota, recommends law rule 28 of his court, as follows:

"This rule is a copy of rule 28 of the Southern and Eastern Districts of New York."

And then he goes on to state his reasons.

"28. DISMISSAL OF CASES FOR WANT OF PROSECUTION. Cases which have been pending in this court for more than one year without any proceedings having been taken therein during such year may be dismissed as of course, for want of prosecution, by the court on its own motion, at a general

20

call of the calendar. Such cases may also be dismissed for want of prosecution at any time on motion by any party upon notice to the other parties."

Mr. Lemann. Could we not provide that the several district courts shall, by their rules, provide for the fixing of cases and for the dismissal of cases which are not prosecuted?

Mr. Mitchell. Can we not do it in that way? I think it would be preferable, instead of saying they may make rules, to put in a provision that "nothing herein contained shall be construed to prevent district judges from making their own local rules with respect to the manner of placing cases on the calendar and dealing with them and dismissing cases for want of prosecution", etc. That will dump the whole thing on each judge according to his own requirements.

Mr. Lemann. Had we not better make it affirmative? Instead of saying nothing herein contained shall be construed to prevent them from doing it, had we not better say they shall make such rules?

Mr. Mitchell. You will find that each judge will have his own notion about how he wants to dispose of his own business, and will be pleased at not being interfered with in all those details.

Mr. Donworth. We might make the rule that the district courts shall have the right to make their local rules in all matters not affected by these rules, such as -- and

enumerating the "such as" without limiting the generality.

Mr. Mitchell. Do you not think that would cover it?

Mr. Clark. Yes; that is all right. I have a suggestion of that kind in the foot note here.

Mr. Wickersham, you might be interested in this: I have been looking back, and I have this:

In a memorandum prepared by Mr. Goggins, who is a New York lawyer, he states that the recent Federal calendar practice in the southern district of New York has eliminated the necessity of the filing of a note of issue or a notice of trial, as required in State court practice; that within 20 days after the filing of the last pleading a case is regarded at issue. The law court sends a notice to the calendar commissioner, who, in turn, assigns a trial number to the case, which is published in the Law Journal.

Mr. Wickersham. That is a new rule. I am not familiar with it. Probably my managing clerk would be far better than I on these questions. I know he would.

Mr. Mitchell. If Rule 81 is to be dumped on the trial judge, we can go to Rule 82.

Mr. Donworth. Then the whole of Rule 81 is referred to the trial judges?

Mr. Mitchell. Everything in it is going to be left to adjustment by local rule.

Mr. Donworth. All right.

RULE 82. VOLUNTARY DISMISSAL.

Mr. Clark. Rule 82, as you will notice, is the dismissal of an action. As you see/ in a foot note, we tried to work out a reasonable compromise between various views, from free dismissal to no dismissal except by legal cause. This provides for dismissal by stipulation -- that is, by agreement -- at any time, and the plaintiff may dismiss of his own motion at any time before the introduction of proof at the trial of the case.

"Provided, however, that in the latter event the court may assess against him any costs incurred by the defendant, and, when the defendant has filed a counter claim prior to the date of such dismissal, may decline to permit such dismissal or may order the counter claim continued for trial and adjudication. An action may be dismissed at any other time by the court upon motion and such terms and conditions as it may deem just and proper."

If you want to look back here to the local committees' suggestions, you will see a good many suggestions for a rule, and some difference of view as to just what it should be.

Mr. Donworth. This is not free from difficulty in the matter of arriving at a just result. The Code provision in our State, which applies in the district court in law actions, is that at any time before the submission of the case to the jury, in a jury case, the plaintiff may take a

voluntary nonsuit.

Mr. Dobie. That is the Virginia statute, and they held they had to follow that under the conformity act before the jury retires.

Mr. Donworth. In a case tried by the judge, the rule is not so specific; but we try to make it substantially the same as in a jury case. That is, before you wind up, you can dismiss.

Sometimes a voluntary nonsuit is very important. You find you are surprised; a witness you relied upon is dead, or something of the kind. You do not feel like taking a continuance. You have to study your case again; and it does seem as if a voluntary nonsuit, you being liable for the costs, is the only remedy; and yet too many voluntary nonsuits, of course, subject the defendant to annoyance and difficulty.

I do not know just where to draw the line. I am in favor of having the right of voluntary nonsuit, or what amounts to that, subsist for a longer time, it seems to me, than the beginning of the introduction of evidence. I am not quite clear on the subject.

Mr. Dobie. You mean as a matter of right? Of course he makes provision here that the judge may, on motion --

Mr. Donworth. Yes; as a matter of right.

Mr. Sunderland. I wonder what that word "costs" would mean. If it is just taxable costs, it does not amount to

much. If it is expenses incurred in preparing for the trial, it is a very different thing.

Mr. Donworth. It only means taxable costs in practice.

Mr. Sunderland. That is no compensation for the defendant, the other party, who has gone to all the trouble of getting his witnesses there and preparing to try the case, and then finding it blow up on him because the other party, for some reason or no reason, decides he will quit for the time being.

Mr. Wickersham. As the practice at present stands, can he not suffer a voluntary nonsuit at any time before the case is submitted to the jury or court for a decision?

Mr. Mitchell. The general rule is that he may dismiss the suit voluntarily before the trial commences, or during the trial with leave of the court. Is not that the general practice?

Mr. Olney. He may dismiss at any time under our practice.

Mr. Donworth. Until the jury is ready to retire.

Mr. Sunderland. The State practice differs quite widely on that point; but, generally speaking, I think it lasts up until the introduction of proof, as an average. It seems to me that is unfair unless there is compensation, because the plaintiff can do that capriciously and put the other party to enormous expense; and it seems to me that at that time he

ought to make some showing.

Mr. Olney. Dean Sunderland, in ninety-nine cases out of a hundred when a suit is dismissed in that way it is never brought again.

Mr. Sunderland. Well, of course it may be brought again.

Mr. Dobie. I do not think that is true with us in Virginia.

Mr. Olney. It is true out our way.

Mr. Dobie. I am rather inclined to think that some of the older lawyers there who are used to this right of taking a nonsuit at any time before the jury retires might not like this rule. I think there is great force in what a lot of you gentlemen say. It rather hurts me to think of the plaintiff in any case just rocking along, and one minute before the jury retires, when all the evidence is in and all the trouble has been taken, just saying, "Your Honor, I take a nonsuit."

Mr. Lemann. We have the right to do it, but it is extremely rarely that it is done. Have you the right to do it, Mr. Dodge?

Mr. Dodge. Substantially, I think, as it says here, before the introduction of proof. Is there a right on the part of the plaintiff to discontinue after motion for summary judgment has been filed?

Mr. Sunderland. I do not think there is any provision

of that kind there.

Mr. Wickersham. If that were there I should think it would be welcome, because, after all, the summary judgment leaves the matter free to be litigated over again; and if the plaintiff voluntarily withdraws, that is as much as the defendant could get on motion for a summary judgment.

Mr. Dobie. No; he might get a judgment on the merits.

Mr. Sunderland. He might get a judgment which would be a bar to another suit; but I think there is nothing on a summary judgment to prevent a voluntary dismissal.

Mr. Wickersham. I do not know. I doubt that.

Mr. Mitchell. Let me read the Minnesota rule about that. It gives you a pretty good picture of the practice in six or eight States of the Northwest:

"DISMISSAL OF ACTION.

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

"1. By the plaintiff at any time before the trial begins, if a provisional remedy has not been allowed, or a counter claim made or other affirmative relief demanded in the answer: Provided, that an action on the same cause of action against any defendant shall not be dismissed more than once without the written consent of the defendant or an order of the court on notice and cause shown;

"2. By either party, with the written consent of the

other, or by the court upon the application of either party after notice to the other and sufficient cause shown, at any time before trial;

"3. By the court where, upon the trial and before the final submission of the case, the plaintiff abandons it, or fails to substantiate or establish his cause of action or right to recover;

"4. By the court when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal;

"5. By the court on the application of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence. All other modes of dismissing an action are abolished. The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register and notice to the adverse party. In all cases other than those mentioned in this rule, the judgment shall be rendered on the merits."

You see, the plaintiff is given the right to do it before trial commences, once. He cannot repeat without consent of the court. During the trial he has to get the court's consent. If the court thinks justice requires that he go through to the end and take his medicine, he cannot get out.

Mr. Wickersham. I think that is a pretty good rule; but, after all, in a summary judgment all the court decides is

28

that the plaintiff has not presented a good cause of action or the defendant has not presented a good defense, and there is no trial of any issues, and there is nothing on which a plea of former adjudication could run against an allegation on a similar state of facts that did set up a good cause of action.

Mr. Sunderland. But on a summary judgment, if a defendant puts up a perfectly good defense, like the statute of limitations, and there is nothing to meet it at all, then, before judgment is rendered, the plaintiff says he dismisses.

Mr. Mitchell. You ought not to be allowed to dismiss during the trial without the consent of the court, after you once get going. The court can let you do it, and normally he will; but if he thinks you are playing with the other fellow, and your whole case is such that you ought to go through to a finish and not harass the defendant any more, he can refuse a voluntary dismissal; and it works very well. It gives protection to the defendant against harassment, and allows the plaintiff to dismiss if he has a good reason for it. He may get caught without a witness, or by some surprise, or something, and want to dismiss, and justly ought to be allowed to, after the trial commences.

Mr. Cherry. In a case tried in our Federal court under that statute just a little bit ago, the plaintiff dismissed the second time, and the C. C. A. just held he could not do it.

The way he tried to do it was just simply not to appear when the case came on. Then he argued that under the other subdivision, all the court could do was to enter a dismissal without prejudice, and had Judge Nordby badly worried. He finally decided the man was entitled to a trial. He got worried about it. He impaneled a jury, the defendant presented his evidence, and then he directed a verdict for the defendant. The C. C.A. said he need not have done all that; that he could have dismissed.

Mr. Mitchell. Failure to appear was equivalent to a voluntary dismissal before trial.

Mr. Cherry. This was the second time. They said he could not do that, and they gave judgment on the merits for the defendant.

Mr. Lemann. But it should be plain that failure to appear would not force the court to dismiss the suit, if we are going to adopt this other view.

Mr. Cherry. I am not suggesting the language there, because the language did lead to that confusion.

Mr. Donworth. Of course the court can always grant a man a continuance in case of hardship. That is the proper remedy for a real hardship.

This Minnesota rule seems to me pretty good. It does abridge the plaintiff's right as existing, I think, at common law. That is recognized by the rule itself. It says at the

bottom:

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

Mr. Sunderland. At common law you could dismiss after the jury went out. If you got word that they were staying out too long, you could dismiss.

Mr. Cherry. In England, of course, when they had that rule at common law, all the expenses of the adverse party were included in the costs. Is there any necessity of worrying about ordinary costs if the right of the plaintiff to dismiss as of right ends with the beginning of the trial? There is some hardship on the defendant, it is true; but at such an early stage as that, I wonder. You are making the suggestion.

Mr. Sunderland. Yes, because at the beginning of the trial the witnesses are all there; the expense has all been incurred; the work has all been done.

Mr. Cherry. Granted.

Mr. Mitchell. You do not need to say anything in the rule about costs in case of voluntary dismissal. On judgment of dismissal, they just tax the costs as a matter of course.

Mr. Olney. That is one thing I want to bring up here. As this rule reads, it does not make it clear that the costs go as a matter of course on dismissal. They could go as a matter of course.

Mr. Mitchell. Yes.

Mr. Loftin. I move that there be incorporated in this

rule a provision that nonsuit may be taken at any time before submission to the jury, in the discretion of the court.

Mr. Mitchell. You mean during the trial?

Mr. Loftin. During the trial, at any time before submission to the jury, in the discretion of the court.

Mr. Wickersham. You do not mean to limit his right to dismiss before the trial begins?

Mr. Loftin. No; he already has that.

Mr. Clark. I do not see how that is different than this, if you add "in the discretion of the court". I have it that the court may do it at any time, in the last sentence.

Mr. Dobie. He could do it while the jury is delibarating.

Mr. Clark. Yes.

Mr. Lemann. The idea is that he shall have a right to dismiss without permission of the court at any time before the trial begins, and after that at any time with the permission of the court.

Mr. Mitchell. Your rule does not prevent him from dismissing twice without trial. I think the Minnesota provision is a good one, that he cannot try that more than once.

Mr. Dodge. The last sentence of the rule means, does it not, that the plaintiff may discontinue at any time by leave of the court? It looks like an extraordinary power you have conferred on the court.

Mr. Loftin. It may mean that, but it does not say

that. It says it may be dismissed by the court.

Mr. Olney. I would put in there "after motion", "upon motion of the plaintiff".

Mr. Clark. Yes; "upon motion of the plaintiff". I have got it just noted.

Mr. Dodge. What you mean is that the plaintiff's right of continuance may continue if the court approves it.

Mr. Clark. Yes.

Mr. Dobie. Even after the jury has gone out.

Mr. Dodge. At any time.

Mr. Dobie. If they have not come in with a verdict.

Mr. Dodge. The action may be dismissed by the plaintiff at any other time.

Mr. Sunderland. But by the defendant in the case of counter claim. It would be under the same rule.

Mr. Mitchell. What is the sense of the meeting, first, as to dismissal before the introduction of proof? As I understand, that can be done once by the plaintiff, but not twice without consent of the court. Is that right?

The second situation is a dismissal during trial, but before final submission. That is in the discretion of the court.

Are there any other cases we could provide for?

Mr. Sunderland. I think we ought to cover the summary judgment case after hearing. That ought to be subject to

dismissal on the order of the court.

Mr. Mitchell. You could say in this rule, "except as otherwise provided in the summary judgment rule."

Mr. Sunderland. That really ought to be taken care of here, I should think.

Mr. Clark. Yes; I should think so, because the summary judgment rule does not provide anything on the subject.

Mr. Mitchell. That is right.

Mr. Clark. We could add here a phrase to cover summary judgments.

Mr. Sunderland. Yes.

Mr. Wickersham. In what way would you take the summary judgment?

Mr. Sunderland. Where it is up for hearing.

Mr. Wickersham. Limit the right to dismiss to the time before the motion is submitted to the court for decision?

Mr. Sunderland. Yes, and thereafter only on order of the court.

Mr. Wickersham. And thereafter only by leave of the court, yes; but at any time before submission?

Mr. Sunderland. At any time before submission.

Mr. Lemann. Would you let him do it as of course at any time before submission, or at any time before you filed the motion?

Mr. Mitchell. Before the motion was brought on for

hearing.

Mr. Lemann. That seems to me like letting him dismiss after trial.

Mr. Clark. There are no witnesses there.

Mr. Olney. Before we leave this particular rule, I would suggest that a distinction might well be made between what amounts to a dismissal, or what is to take effect as a dismissal -- a distinction between those cases where the plaintiff is entitled to it as of course, as of right, and those cases where an order of the court is required. It is merely to save labor of the clerk of the court; so that, for example, if before the trial the plaintiff files a dismissal of the suit, that ought to be sufficient without anything further, without any order or anything of that sort; but where an order is required, then the dismissal takes effect only when the order is entered.

Mr. Donworth. Just what do you mean by that, Judge Olney -- "when it is entered"?

Mr. Olney. It is something that comes over from our code, and has worked pretty well there. The mere filing of the notice of dismissal in and of itself constitutes the dismissal. The action is at an end right then and there, without anything further, without any entry or anything else. It is through.

Mr. Dodge. Is not that the effect of the rule as it

stands?

Mr. Mitchell. It says here, "the plaintiff may dismiss". That indicates that an order has been required.

Mr. Donworth. "Or of his own motion at any time before the introduction of proof". That would mean that when he does that, that is the end of it; would it not?

Mr. Mitchell. Yes. It ought to be made clear, though, that there is no order required on the notice of dismissal.

Mr. Olney. I will take that up with the draftsman when I get back.

Mr. Mitchell. May I suggest that the words "the plaintiff may dismiss" ought to be qualified by "without prejudice", or "without determination of the merits", because the word "dismiss" is sometimes used to mean a dismissal on the merits.

Mr. Lemann. Yes.

Mr. Mitchell. That ought to be provided for.

Now, if I may go back a minute, I think the committee has solved, without knowing it, my controversy about the necessity of filing papers. The moment you leave to the local judges, according to their own practice, the method of getting cases on the calendar, and all that, you automatically leave to them, or should leave to them, the matter of requiring when papers shall be filed. Some of them will want the papers filed and have the cases automatically put on the calendar; and you could not work the New York system, for instance,

without having them filed.

So, if Mr. Wickersham will take the chair for a moment, I move that the matter of requirement as to the filing of papers go along with Rule 81 as a matter that is left to the local machinery, and that all our rules therefore will deal with service, and not be based on filing, because that may vary in different districts.

Mr. Clark. May I make a plea a little bit further than that -- that the matter of serving pleadings or otherwise be subject to local rule?

Mr. Donworth. The method of serving them?

Mr. Clark. Yes, instead of what I suggested originally. Just as Mr. Loftin is afraid to go back to Florida, I am a little afraid to go back to Connecticut with a rule that you gentlemen all think is simpler, but all the lawyers with whom I have been brought up will think is horrible.

Mr. Mitchell. That is a different matter. You can make a separate motion on that. This matter of filing I think we have forced ourselves to leave to the trial judges.

Mr. Donworth. I second that motion.

Mr. Wickersham. I will make the motion for the Chairman, so that he can put it.

Mr. Olney. I think it is a peculiarly satisfactory solution, because it shocks a great many of us, and it is going to shock the bar in a good many States -- at any rate,

out west -- that any action shall be pending without a paper on file in court.

Mr. Mitchell. You will find most of the Federal judges require them to file them.

Mr. Olney. This permits them, in the districts that are accustomed to that practice, to go ahead on that basis; and in the other districts, where they have the other practice and are accustomed to it, or think it advisable, they can adopt it.

Mr. Mitchell. Are you ready for the question?

Mr. Dodge. It requires a careful consideration of our rules, however, many of which I think obviously contemplate a case in court. How is a party who is interested in the subject matter going to intervene if he does not know anything about the case? I think there are time limits in various cases and perhaps others involving the acts of third parties which contemplate their knowing what is going on.

Mr. Olney. How do they know it now? They have to find it out in some way.

Mr. Dodge. Yes, but if the papers are on file they have no difficulty.

Mr. Olney. No; they can look it up.

Mr. Dobie. I understand the motion now is just as to the filing of the papers.

Mr. Mitchell. As to the time when papers have to be filed -- whether 20 days after answer, or three weeks before

the term, or what not.

Mr. Sunderland. Will it be at all embarrassing for lawyers who have cases in other districts, not knowing what the local rules are, to be sure that they get their papers filed, if necessary, in the right time?

Mr. Donworth. They ought to employ local lawyers.

Mr. Dobie. The clerk would know.

Mr. Lemann. Yes; that is a very salutary rule.

Mr. Mitchell. They would not be familiar with the practice in other districts except as a matter of courtesy. It is an almost universal custom, is it not, to have local lawyers?

Mr. Lemann. The only question I have is as to how fundamental a thing this is. We have diversity and a system of uniform rules. The other, the trial calendar and the matter of disposing of cases on the trial calendar, notice of trial, etc., seem to me to be matters of detail that ought to be left to the judge in running his court. This seems to me to be different in character. I do not know that I would urge any very strong objection to it. It has the great merit of letting the lawyers everywhere do what they are accustomed to. Of course if we went on that theory we would not do a great deal of what we are doing here, because there are some of them that are going to make lawyers everywhere do things that they have not been accustomed to doing; and having

stepped on toes as much as we have, the question is whether we ought to make a reluctance to step on toes here lead us to commit a matter of importance like this to local rules. That is the only doubt I have on the proposition.

Mr. Mitchell. Our alternative is to require filing, because if we do not the judge in New York cannot apply this rule about calendars, etc. Unless the papers are filed they have not a way of putting them on the calendar without notice of trial.

Mr. Lemann. If we require them to be filed --

Mr. Mitchell. That will fit any case.

Mr. Lemann. The only alternative, as you say, would be to adhere to the rule we had previously tentatively adopted, and require them all to be filed in a certain length of time. It is going to create great confusion through the Federal judges as to whether or not your papers are on file. In Minnesota they do not file them until they are ready to act on the case.

Mr. Mitchell. In the Federal court?

Mr. Lemann. Yes.

Mr. Mitchell. I will not say that.

Mr. Lemann. Unless it is Minnesota, the only other place I have heard that suggested is New York, where, according to the Reporter's information, the Federal judges are trying very hard to make them file them. They want to make them

file them.

Mr. Mitchell. I think in Minnesota, in a law case, you have to go to a court and get a summons issued. That means filing right there.

Mr. Lemann. So that would be introducing into the Federal courts a not great disparity of practice which would tend against conformity rather than conformity on a rather fundamental matter. I do not think it is convincing to say we are permitting this divergence of calendar.

Mr. Mitchell. I will withdraw the motion, and let it stand as it is, that you have to file your answer in twenty days. When do we have to file a complaint?

Mr. Clark. A complaint has to be filed in twenty days.

Mr. Mitchell. I will forget it.

Mr. Olney. It does not seem to me a very fundamental matter. When you get down to it, it is not a particularly fundamental matter whether it is done as the New York practice has developed, or whether it is required to be filed at the time, as with us. It is not particularly fundamental. The fundamental thing, as it seemed to me, was that you had to serve a copy of the complaint on the defendant, so he would know what you were trying to do.

Mr. Lemann. I think we are all agreed on that.

Mr. Dodge. How about class suits, where there is a great question as to whether a sufficient number of defendants

have been included, and there are countless numbers that might come in?

Mr. Donworth. I think these objections are more apparent than real, for the reason that under the practice of not requiring the papers to be filed either party may file, whenever he wants to, his side of the case; and, secondly, the judge always has the right to make an order that the papers be filed. Consequently, this rule that you would make would be like a general order that would govern the matter, just as special orders might on his own motion.

Mr. Wickersham. At the present time you start your suit by filing a bill in equity and getting out a subpoena. At common law, under the conformity act, you proceed exactly as you do in a State court. You get your summons, and you serve your summons and complaint, and the defendant answers, and there it stands unless the plaintiff wants to move the cause ahead, and serves notice of trial, and there is no opposition. Here we are blending the two systems, and the question is whether the equity system is better to adopt for all cases, law and equity, than the local practice at common law. Before forming a definite opinion myself I would really rather talk to Judge Knox and talk to the managing clerk of my office, who is dealing in those things all the time, and get their views. I confess it is not a subject with which I have been brought in close contact for a long time.

Mr. Lemann. I may be affected by the great novelty of the whole scheme to me. If I were more used to it I would not be bothered so much. Would it be well to pass it until we can think it over and perhaps talk it over with some of the judges?

Mr. Olney. Mr. Dodge has brought up the matter of class suits. I think the point he makes there might have a very decided bearing in some cases. In that connection I wanted to suggest to the Reporter, when he comes to redraft that section in regard to class suits, the advisability of saying in the rule that in class suits -- and I am speaking now of genuine class suits, where the parties on one side represent a large number of people who are not actually parties to it -- it shall be the duty of the court in those cases to see to it that such number of defendants are represented and the proceedings are so conducted that the final result or the final presentation of the case shall be entirely adequate to protect the rights of those outside. I say that because I do not think in many cases the judge really appreciates that those suits go on the theory of representation, and that it is all-important that that representation be adequate.

I am just making that as a suggestion. I think you catch the idea; do you not?

Mr. Clark. Yes; I get it.

Mr. Donworth. My investigation of the authorities --

which I made very carefully, as I said, about a year ago -- disclosed that they stated that to make an adequate judgment the court must find as a fact what Judge Olney stated; but if there is the slightest doubt about it I thoroughly agree with the idea.

Mr. Olney. I suggested that it be in there, not because it is not the law now or anything of that sort, but because I think it is advisable for the direction of the judges themselves. The burden is really thrown on the judge independently of the parties that are before him.

Mr. Mitchell. Did we not adopt the principle that in addition to that rule we should say something about fair representation?

Mr. Donworth. We left it all to be redrafted, but I think that was in it.

Mr. Mitchell. I thought it was.

Mr. Dobie. We agreed not to make any provision as to the binding effect of the judgment, though; to leave that to the courts.

Mr. Donworth. To come back to Rule 82, I have one or two suggestions. Let us read beginning at the beginning, to get the connection:

"The plaintiff may dismiss all or any part of his action upon a written stipulation to that effect signed by all the parties" --

I suggest inserting there "who have appeared therein". We often have a lot of men that we have published notice to, and have never heard from; they have imaginary liens, or something of the kind, perhaps.

Mr. Olney. Which rule is that?

Mr. Donworth. Rule 82. In the third line, after the word "parties", insert the words "who have appeared therein".

Mr. Dobie. And in the first line we have "without prejudice", have we not, just to get it all together?

Mr. Mitchell. Yes; "without a final determination on the merits" is the usual expression.

Mr. Donworth. Then, in the proviso --

"Provided, however, that in the latter event the court may assess against him any costs incurred by the defendant" --

Professor Sunderland raised the question as to whether that meant the imposition of something outside of the taxable costs. I think that doubt ought to be removed, and my own idea is that it should be left to the usual procedure. I think Judge Olney suggested that we either expressly say "with costs", or leave it to the general rule, which I suppose is statutory, that the defeated party is taxed with the costs. I do not think, however, that this should mean an indemnity allowance; and if we do mean that I think we ought to say so. We ought not to leave this something for the lawyers to struggle over as to whether they simply pay the taxable costs, or $250 attorneys' fees,

or something of that kind.

Mr. Mitchell. It usually means terms; that is, if the plaintiff wants to dismiss because he has found he is lacking a witness or something during the course of the trial, the court may, in granting him leave, impose terms, which means the imposition of something more than taxable costs. I have seen them allowed $50 or $100.

Mr. Donworth. Should we not make it rather more definite than it is now?

Mr. Dobie. How about adding "and expenses" -- "costs and expenses incurred by the defendant"?

Mr. Wickersham. Consider one moment: We have been talking about a voluntary dismissal, in the first place, at any time before trial began; but we have now, in this rule, not a voluntary dismissal at all, but a dismissal by consent. That is not a voluntary dismissal.

Mr. Mitchell. We have agreed that a dismissal before trial may be made voluntarily without any terms, once. The second time, it cannot be. Now we are dealing with dismissal during trial.

Mr. Donworth. No; not at this point.

Mr. Cherry. This is voluntary dismissal.

Mr. Donworth. And it is wrong to put in any terms on that feature.

Mr. Wickersham. Then this should be changed so that the

first part should not be on written stipulation.

Mr. Clark. The first sentence is a waiver. The second part of that sentence is "or of his own motion at any time before the introduction of proof". Even then, though, there is a further provision that taxable costs go against him. Do you want to change that?

Mr. Wickersham. No, but I think you would have to change the order. What I mean is this: As it reads, you can dismiss on written stipulation signed by all the parties at any time before the entry of final judgment.

Mr. Clark. Now go on to the next part.

Mr. Wickersham. Now you say:

"Or of his own motion at any time before the introduction of proof at the trial of the case."

I think it would be clearer if you began by saying:

"May dismiss of his own motion at any time before the introduction of proof at the trial of the case, or at any time until final judgment upon written stipulation."

Mr. Clark. Yes; I think that could be arranged. The reason I did it this way was that I was adding a clause on taxable costs to the second one, and if you put that first it operates on both.

Mr. Wickersham. Yes, but as it is now I do think it is rather ambiguous.

Mr. Mitchell. Judge Donworth is right; it should be

taxable costs, because it relates to dismissal before trial.

Mr. Lemann. May I ask why you say "the court may"? Why should he not always be necessarily condemned to pay the costs?

Mr. Mitchell. Let us strike that out, because on dismissal the costs are taxed by the clerk as a matter of course.

Mr. Lemann. It seems so. That would take care of the whole thing; would it not?

Mr. Mitchell. Except dismissal during trial, which may be upon terms.

Mr. Lemann. That can only be by consent. He has got to get the consent of the others. They will take care of that before they give the consent. Do you not think they would take care of it when they signed the stipulation?

Mr. Mitchell. That is only one way of doing it. The plaintiff may ask, during the trial, to dismiss; the defendant may oppose it, and the court may grant it in his discretion. If he does, he ought to be allowed to grant the application on terms.

Mr. Lemann. I do not wish to be hypercritical about the language, but the court action is in the last sentence, and it says it may be dismissed at any other time. I just wondered whether that covered the two sets of time above; whether the courts would be free to act in the first contingency, because it is not another time.

Mr. Mitchell. The whole rule is in the discard as far as phraseology is concerned. We adopted the principle as to what could be done before trial or during trial. We gave instructions to him. The only thing we did not say was that if it is dismissed during trial, in the discretion of the court the court may impose terms.

Mr. Dodge. Do we have to consider at all the right to get rid of a case by agreement? Is not that an obvious, natural right? Why do we have to consider the question of what the parties may do by agreement? Of course they can get rid of a suit.

Mr. Wickersham. That is the point I raised. There is an absolute right to dismiss at the will of the plaintiff up to the beginning of the trial.

Mr. Dobie. The plaintiff alone?

Mr. Wickersham. The plaintiff alone.

Mr. Mitchell. I am not sure you are right, Mr. Dodge. If you specify the ways in which dismissal may be made, and eliminate stipulation, you are omitting it by implication; and it is always customary to put it in when you are listing the ways of dismissal.

Mr. Dodge. We have provided for a good many things here which the court may order which the parties doubtless may do by agreement, all through these rules.

Mr. Mitchell. I think we have given the Reporter general

instructions on Rule 82 that will make it unnecessary for us to consider the arrangement of the verbiage there.

RULE 83. CONSOLIDATION AND SEVERANCE.

Mr. Mitchell. Rule 83.

Mr. Clark. This, you will see, is the broad rule of consolidation and severance.

Mr. Wickersham. I am glad you did not say "summons and severance".

Mr. Clark. I tried to abolish that later. I do not know whether it will survive or not. Do you want it to come back in?

Mr. Mitchell. Let us stick to Rule 83 for the time being.

Mr. Wickersham. Sufficient unto the moment is the evil thereof.

Mr. Dobie. I once heard Chief Justice Taft say that that "summons and severance" thing was quite new to him in his early days at the Ohio bar.

Mr. Wickersham. He caught some of the New York lawyers on it.

Mr. Olney. The word "any" at the end of the fifth line ought to come out.

Mr. Wickersham. I think that is a good rule.

Mr. Clark. Of course it is like the statute on the

other page, only this provides for severance. This only speaks of consolidation. It is the same idea.

Mr. Wickersham. Yes; it gives the court control over the way the case is to be tried.

Mr. Dodge. What does this mean:

"For ~~them~~ purposes of any ruling, * * * the court may consolidate such actions"?

Mr. Clark. That means any interlocutory ruling, or the decision of any motion, or anything like that.

Mr. Dodge. He may consolidate the actions?

Mr. Clark. Yes.

Mr. Dodge. I simply suggest for the Reporter's consideration that there is a very elaborate opinion -- I do not know exactly where it is -- by Chief Justice Rye on the difference between consolidation and an order that cases be tried together, within the last ten years, which may represent not merely the law of Massachusetts but the general law.

Mr. Sunderland. Consolidation results in one judgment. Trying together results in several judgments.

Mr. Dodge. I thought trying together was really what is contemplated here.

Mr. Clark. No, it does not. I suppose they can always try cases together when it is done by agreement, at least.

Mr. Dodge. You are speaking about what the court may

order here; are you not?

Mr. Clark. Yes.

Mr. Sunderland. Does not consolidation result in one judgment?

Mr. Clark. Yes. Of course we have further provided for the so-called split judgment. Consolidation may result in one judgment; but in Rule 98, I think, we provide for a series of judgments in cases even when they are not consolidated.

Mr. Mitchell. What do you call it when a judge orders two cases set down for trial together as one case, but does not technically consolidate them? What is the expression with regard to that?

Mr. Clark. I do not know that there is any technical expression. It is just trying cases together -- joint trial.

Mr. Olney. They usually consider them consolidated for purposes of trial.

Mr. Dodge. Yes; a complete consolidation has far-reaching effects technically.

Mr. Wickersham. Consolidation in effect makes one cause pending instead of the number consolidated; but the hearing of a number of cases together is simply a matter of convenience. It would not be done except in equity, and is just to facilitate the work of the court.

Mr. Donworth. Do you say the consolidation under our practice now would only be in what used to be equity causes?

52 Mr. Wickersham. No, no; I said the consolidation would make it in effect one case.

Mr. Donworth. Yes; absolutely -- just as if it had been brought in one originally.

Mr. Wickersham. Just as if it had been originally brought by XYZ against A, B, C, and K, etc.; but trying together simply means, for the convenience of the court, and the circumstances of all the cases are heard at the same time. The latter would only be done in an equity case, however, because at common law, if you had a lot of cases tried together, all had to go to a jury, and it would not be feasible.

Mr. Donworth. I presume that is so.

Mr. Clark. I have here the lesser work I have cited once before, which cites the statute here -- this one, on this side:

"It is provided that 'When causes of a like nature or relative to the same question are pending before a court of the United States, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so.' A similar result has been suggested, unnecessarily, under the conformity act. It is entirely within the discretionary power of the court, but when consolidated they remain separate as to parties, pleadings,

and judgment."

Citing Adler v. Seaman, Shooters Island Shipyard Company v. Standard Shipbuilding Corporation, Johnson v. Manhattan Railroad Company, and Mutual Life Insurance Company v. Hillman.

Mr. Sunderland. Those are Federal cases.

Mr. Clark. Yes.

Mr. Sunderland. That is under this statute.

Mr. Donworth. I have sometimes been bothered on an appeal as to whether you could treat it as one case or not, and I think the courts have not always maintained the distinction that Judge Wickersham has pointed out. The order of consolidation should always specify whether it is a real consolidation or just a joint trial.

Mr. Wickersham. Just a grouping.

Mr. Donworth. Just a grouping.

Mr. Cherry. Would it not be better to use different language when it is not a true consolidation? Would it answer the purpose to say, instead of "consolidate", "consider together such actions or rights of action", etc.?

Mr. Clark. I think we were wanting something more than this.

Mr. Cherry. You do not want true consolidation; do you?

Mr. Wickersham. I thought that did mean true consolidation. Does it not?

Mr. Cherry. I wonder if you want that.

Mr. Sunderland. Do we want that?

Mr. Cherry. I do not think so. You do not want just one judgment.

Mr. Mitchell. If the parties were the same, you would not mind it.

Mr. Sunderland. You have a whole group of cases with nothing to tie them together except a common state of law and fact.

Mr. Wickersham. Not in that case; but suppose I have a whole lot of suits growing out of the same transaction and against the same defendant, for example: It is a great convenience to consolidate them all in one case and try them in one case and then let the judgment dispose of all the issues.

Mr. Sunderland. This rule provides for a common question of law or fact.

Mr. Dobie. That is an equity rule, though. The equity rule says "in causes of a like nature or relative to the same question". No; that is 28 U.S.C.

Mr. Wickersham. That is a statute.

Mr. Donworth. The first part of that statute -- all but the last line and a half there -- really means a trial together. It avoids consolidation until it gets down to the last line and a half.

Mr. Clark. It would seem to me a little unfortunate if you go into detail and specify here very much, for the

reason that you would then have a consolidated case much more limited than your ordinary case, because you want to bear in mind where your ordinary case is -- I mean, the case we have now provided for earlier in the rules.

Take a case, for example, where the parties are joined under Rule 42. They are joined on the common question of law or fact. We have provided generally that there may be separate trials, etc. Rule 99 provides for judgments in favor of or against various parties at various stages of the case; so that under that rule you can have your various judgments on top of your various trials. Now, if we provide either way here under consolidation we are going to have it limited over what the ordinary unconsolidated case is, because the ordinary unconsolidated case, under the way we worked it out, ends in a single judgment or in various judgments.

Mr. Sunderland. You think, as a matter of fact, our rules have destroyed the notion of consolidated judgments?

Mr. Clark. Yes; essentially. We have in the ordinary case the possibility of all sorts of splits.

Mr. Sunderland. The idea of a single judgment is gone?

Mr. Clark. Yes.

Mr. Sunderland. And that is the basis of this notion of consolidation?

Mr. Clark. Yes.

Mr. Wickersham. Is not this statute adequate itself? It is very broad. While the headline is "Orders to Save Costs; Consolidation of Causes of Like Nature", the enactment is:

"When causes of a like nature or relative to the same question are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

That is a pretty broad grant of power, and I do not think you can add anything to it by the rules. You can qualify it or regulate it, but is it necessary to do it?

Mr. Clark. I do not think the thing should be limited. Our rule, I do not think, does limit it. There are two changes that we made. One of them is to get in the idea of severance; and of course that can be done by either a different rule or a different sentence in the same rule. But I do think we want in the idea of severing also. We have spoken of it earlier.

Mr. Wickersham. Yes; as to severance, I agree.

Mr. Mitchell. Laying aside severance, in what respect have we changed the statute?

Mr. Clark. We have made different language for the

test of like nature, and we are trying to tie it up with our joinder rule. Then we are trying to get some conformity with what we have done already. I do not think, practically speaking, it makes much difference in result, but I should think it would make our rules a little more symmetrical. The test we used for joinder before was "such actions, etc., which present a common question of law or fact."

Mr. Mitchell. Let us look at the statute. Is not that covered by the statute?

Mr. Clark. Yes. I do not think there is much difference there.

Mr. Mitchell. I wonder if there is any.

Mr. Clark. I am not at all sure there is. The reason I put it in, as I say, was not to change the actual power of the court, but --

Mr. Sunderland. You want uniform terminology throughout your rules.

Mr. Clark. That is what I was trying to do; yes.

Mr. Donworth. It is a very serious matter, when you have several cases tried together, to know whether there is one consolidated judgment or arrangement of costs between the different parties, and all that; or the simpler thing happens that you try three cases together because they grow out of the same fire, say, and each plaintiff gets his own judgment against his own insurance company, which is a very much

simpler thing. It causes a good many sleepless nights when you have got to know, which you do not know, whether it is one case or three cases, when you come to the appeal and the record. It is very unsatisfactory.

I would favor either leaving the old provision in, or, if we have to be more specific, I would add in this proposed Rule 83, in line 4, after the semicolon following the words "law or fact", these words:

"Or, without consolidation, may, in such cases, order several cases to be tried together."

Then you would know by the order made, in the language of the Georgian, "where you were at."

Mr. Dodge. Then you have given the court an extraordinary power to consolidate, and have given to "consolidate" a meaning of something different than ordering the cases to be tried together; and that opens up a great, big question as to the effect of technical consolidation.

Mr. Donworth. Yes, sir.

Mr. Dodge. I want to know more about the law. I am afraid of this word "consolidate".

Mr. Wickersham. But the statute uses it.

Mr. Dodge. I know it does, but it says the court may consolidate if it is reasonable. That leaves it to an appropriate case for consolidation. Where A sues B, and B brings a cross action against A, arising out of the same thing,

those may be consolidated and made one case.

Mr. Wickersham. Do you not think whatever power is given in this rule is contained in the statute?

Mr. Dodge. No; I think the statute would plainly be construed as authorizing consolidation only when, according to law, it was proper to do it.

Mr. Wickersham. "When it appears reasonable to do so."

Mr. Lemann. This work of Clark on Code Pleading says:

"The term 'consolidation' is often used in three senses: (1) where several actions are combined into a single one wherein a single judgment is rendered -- the situation here considered; (2) where several actions are tried together, each remaining a separate action; (3) where all but one of several actions are stayed until one is tried. Where there is a true consolidation, the allegations of the various complaints may be taken together and treated as one pleading, so that the allegations in one complaint will remedy the defects or omissions in another."

Evidently they are all shuffled together in the case of true consolidations. (Laughter.)

Mr. Donworth. A very good lawyer wrote that.

Mr. Dodge. Have we not covered severance before?

Mr. Clark. Yes; we have had severance under the joinder of parties rule. Of course it is a little hard to be sure what action was taken on each point; but we did restrict joinder of parties, I think, to the English rule, which is

somewhat narrower than our rule, and tacked on a series of transactions. I remember a battle raging on that, which would be a somewhat narrower provision than this as it stands. Of course the statute seems to use "consolidation" in a very free and easy sense.

Mr. Donworth. As an alternative only.

Mr. Clark. But it still puts it in.

Mr. Olney. We have to provide for two classes of cases, and we have to have a separate provision for each, it strikes me, unless this is just thrown out. One is where you can effect a genuine consolidation of the actions. The two actions are the same. They can be consolidated, and one judgment given. Then, in addition to that, there should be the provision which the draftsman evidently had in mind, that where there are one or more issues that are common, you can have a single hearing upon that issue or issues, or a series of hearings, if you please; but the result is separately entered up on the clerk's docket in each action.

Mr. Wickersham. Yes. That is not a technical consolidation.

Mr. Olney. That is not a technical consolidation. In other words, we must distinguish there. I think the court should have the right, and it has the right undoubtedly at the present time, to say, "Well, now, this series of facts here is common to all of these actions. We are going to have a

trial of them. Notify the parties. Bring them all in, and try them all at once."

In fact, that very thing was done out in San Francisco after the earthquake, where a great number of suits were brought on insurance policies, and the defense in a great number of the cases was the same. That is to say, the fires that arose after the earthquake in a certain district all arose from a certain cause; and the question was whether those fires really came within the insurance policies or not. They just consolidated a great mass of them; they just tried them all at once and got through with them. We never would have gotten through otherwise out there.

Mr. Sunderland. Is not that the sense in which consolidation is practically useful? Technical consolidation amounts to very little. We do not need to bother with it very much.

Mr. Olney. It was not consolidation of the actions, because in each case there had to be a separate judgment.

Mr. Donworth. A separate verdict of the jury.

Mr. Olney. No; the verdict of the jury went to the defense of the insurance company, and one verdict settled the whole business for all that particular class of cases.

Mr. Dobie. I remember a case exactly like that in the western district of Virginia. It was not comparable to the earthquake, however. You are the only San Franciscan I ever

heard use that term. (Laughter.) I thought it was a fire, Judge.

Mr. Mitchell. That is because the juries soaked the insurance companies. They called it a fire.

Mr. Sunderland. I should think the thing to do is to take out "consolidate", and put in "try together", because that is really the thing we are driving at.

Mr. Wickersham. Is not that a pretty good rule that the statute gives? --

"When causes of a like nature or relative to the same question are pending before a court of the United States, or of any territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

Mr. Lemann. What does the last clause mean? If you are going to criticize this rule, I think you must criticize the corresponding language in the statute, because that seems to imply that the last thing is something more than consolidation for hearing.

Mr. Wickersham. Yes; that is technical consolidation. That is where you take a certain number of suits and make them one.

Mr. Mitchell. Why can you not do this -- take the

statute and say:

"When causes of a like nature or relative to the same question are pending before a court of the United States or of any Territory, the court may order such causes tried together, or make such ordehs and rules concerning proceeding therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, or may consolidate said causes and continue them as a single cause."

There you have expressed the thought.

Mr. Dodge. That is too broad a power, I think, Mr. Chairman -- the last part. I would rather say, "and may consolidate them in proper cases." The cases of real consolidation are rare.

Mr. Lemann. You think "consolidate them and treat them as a single cause" means something different from "may consolidate them"? I wonder what the second thing means if it does not mean the first.

Mr. Donworth. I once had a real consolidation case in which I represented one of the parties. It was this: A lot of mechanics' liens were filed, and they ranked differently under the special provisions of the statute, and it was really necessary to quiet the title and give everybody his rights. The court made it a consolidated action, where each man -- it was equity, of course -- tried out his lien, proved that he

furnished the goods, that they went into the building, filed his lien, the nature of the goods, and then the laboring men also, and the court ranked them. That was the only remedy there, it seemed to me. It was a real consolidation.

Mr. Olney. The only point I make is that the court should have very ample powers in this respect, and that the distinction should be drawn between consolidating actions in such a case as indicated here and merely having a trial or hearing that is common to all the actions.

Mr. Wickersham. Oh, yes; there is a distinct difference.

Mr. Clark. I am inclined to think, as a result of this discussion, we had better take the statute. Some of you feel nervous about going somewhere else, and I should hate to go less than the statute.

Mr. Olney. I think the statute is pretty blind, myself. I would just as soon have the rule as the statute.

Mr. Cherry. Does the statute make ample provision for the things you do here -- severing rights of action, ordering separate trials, and determining the order of distinct issues?

Mr. Clark. It is so general that a good judge could read that into it.

Mr. Cherry. That is what I am inclined to think.

Mr. Clark. On the other hand, it is so blind that a not-so-good judge might not. That is why I put it in the rule.

Mr. Sunderland. I think there is something to be said for uniform terminology throughout. He has used that term, "common question of law or fact", in two or three other rules, and I think there is something to be gained by following that same language.

Mr. Donworth. One objection to that is that the only thing the court can do under the rule here is to consolidate, whereas we think, or I think -- I mean, the expression has been made around here -- that the court should have the authority to try cases together without consolidation. So I think the rule that requires consolidation if he does anything is too restrictive.

The last half of the rule -- "may sever rights of action", etc. -- does not treat of consolidation. I do not think it is right to say that the only thing the court can do under the very commonly arising situation of fire, liens, etc., is to consolidate them. I think it should have the privilege of going only part-way in that direction.

Mr. Lemann. I think it would be desirable for the rule to be more explicit, and cover some of these difficulties we are talking about, without going short of the statute -- make it plain.

Mr. Dodge. I think you can improve the statute.

Mr. Mitchell. I am looking at the decisions under this statute. There are four or five pages of notes; and the

general trend of them is that there cannot be consolidation in one case unless there are the same parties. They also treat a joinder together for the purposes of single trial as not a consolidation. That seems to be recognized here. It says here, for instance, where cross suits between the same parties, etc., by agreement are tried together, on the same evidence, but separate judgments were rendered, a subsequent order of the trial judge finding that the causes were consolidated nunc pro tunc was not sufficient to effect a nunc pro tunc consolidation. They recognize the fact that a trial together is not a real consolidation, and they also seem to indicate that a real consolidation should not be effected unless the parties are the same. That is the general drift of the matter.

Mr. Dodge. A typical example would be, if my landlord sues me in four suits for four successive months' rent, those could undoubtedly be consolidated. The range of true consolidation is very narrow, I think.

Mr. Mitchell. Do you not think this matter ought to be referred to the Reporter, if he has not already done so, to examine the decisions under this statute? If he finds the statute has been definitely and satisfactorily construed in the Federal courts, he may adopt the statute. If it is still in the air, he may feel justified in changing the language.

Mr. Lemann. Bear in mind the language we finally adopted

on joinder of parties.

Mr. Mitchell. We shall have to pass Rule 83, then. We have made trouble for the Reporter.

RULE 84. TESTIMONY AND EVIDENCE.

Mr. Mitchell. Rule 84.

Mr. Clark. You will recall that when we discussed this matter once before, we looked forward to this rule. There was a desire to continue the words "in open court", and I think that is all right. I was trying to cover here hearings before masters. You see, we put in "at all hearings or trials." I think, however, that can be covered, if desirable, by saying:

"At all trials the mode of proof shall be by oral testimony and examination of witnesses in open court".

And then perhaps put in another sentence covering hearings before masters.

Mr. Mitchell. I think that is better, because we want to preserve this principle of the equity rule to have cases tried in court instead of on depositions.

Mr. Donworth. There is a point of phraseology that I raised some time ago that keeps bobbing up in my mind. I think the Reporter is going to cover it. It says, "except as otherwise provided by statute." It should be made clear that we mean statutes not superseded by these rules, because we are changing a lot of statutory things, and if we made our

rules apply only where there was not a statute we would not get very far. I think it would be well to have a final rule saying that wherever the expression "provided by statute" or "except as provided by statute" is used in these rules, we mean statutes not superseded by these rules.

Mr. Clark. Yes; I think that can be done. You recall that later on I have put in a special section where I thought it would be desirable to put in a schedule of statutes that we deemed superseded.

Mr. Loftin. Dean Clark, where is the provision about reference to masters?

Mr. Clark. That comes right along here a little later. There are several sections on reference generally. It begins with Rule 90. There are several sections running along through after Rule 90.

The second paragraph is an attempt to meet the problem of variance.

Mr. Mitchell. The one in brackets, you mean?

Mr. Clark. Yes. I put it in brackets because I was not quite sure whether, with our rather free power of amendment, and not dismissing the case except upon the merits, etc., we had not pretty well covered it.

Mr. Donworth. I think that is a wise provision, and should be there. I think it is well expressed, too.

Mr. Clark. Then I will strike out the brackets.

The third paragraph is abolition of exceptions. You will notice that that is called for by many suggestions here. It was done recently in New York in a statute I have cited here.

Mr. Dodge. How does that read?

Mr. Clark. The New York statute? I will see if we have it here. They do it the other way around. They say:

"An exception shall be deemed to have been taken by the party adversely affected to every ruling of the court or of the referee during the trial, unless the said party shall expressly indicate that he acquiesces in the ruling. Exception to the charge given to the jury by the court and to the granting of requests to charge made by the adversary, shall not be deemed to have been taken unless expressly noted before the jury have rendered their verdict."

That is, you still have to take exceptions to the charge.

Mr. Dodge. Any point arising under the evidence, although no objection was made, is open on appeal?

Mr. Mitchell. No; you have to make your objection, but you do not have to take an exception to the ruling.

(By request, Mr. Clark again read the section of the New York statute above set forth.)

Mr. Dodge. Nothing is said about objections there.

Mr. Wickersham. It is simply inference from the adverse ruling.

Mr. Lemann. Does it not refer to making known his objections? Read that again, please.

(Mr. Clark again read the matter referred to.)

Mr. Mitchell. That involves an objection, because there will not be a ruling unless there is one.

Mr. Lemann. This language, though, says:

"An objecting party shall make known his objection."

Mr. Wickersham. Dean Clark, is that which you read the rule of court, or is that in the Practice Act?

Mr. Clark. That is the Practice Act. That is a new amendment of 1934.

Mr. Wickersham. To the Practice Act?

Mr. Clark. Yes; amended by Laws of 1934, Chapter 566, in effect September 1. That section is Section 446, "Exceptions during the trial." Section 445 is "Exceptions after close of trial by court or referee":

"Where an issue of fact is tried by a referee, or by the court without a jury, an exception shall be deemed to have been taken by the party adversely affected, to every ruling upon a question of law made after the cause is finally submitted."

Mr. Donworth. I like that expression very much better than the abolition of exceptions. I think it is much better to say they are imported, because the appellate courts -- and of course we cannot change their procedure -- are so

thoroughly rock-ribbed in the idea that they will not review anything unless excepted to. Then, further, the matter of a charge to the jury is strictissimi juris in the appellate court. You cannot get around that. It is a dangerous thing to fool with.

You say "exceptions are abolished". You can make something else import the exception if that is the way to do it; but if we abolish exceptions, I think we are creating a lot of trouble, and the appellate courts will not honor this.

Mr. Wickersham. I think that originated with the procedure in criminal cases, where, in order to get rid of the deciding question affecting a man's liberty, gradually the rule was broadened until the statute said that the court was to search the record to see whether substantial justice had been done, and disregard all considerations of exception, etc. Now, it has been extended to the civil practice. I think it relieves a very haphazard condition, that when the appellate court gets a record, and there is an objection made, it was not drawn to the attention of the court below; at all events, it was not drawn to its attention in such a way as to really compel careful consideration, yet the fate of the case on appeal rests on a particular objection.

Mr. Olney. Do you think there are cases of that sort?

Mr. Dobie. Is not the objection generally made general, and insisted on, and nothing at all said until after the judge has ruled, and then the lawyer just says, "Exception"?

Do you think that adds anything to it?

Mr. Wickersham. It depends on the character of the objection. If there was really a fight over it, there is apt to be an argument, you know; and then, after hearing both sides, the court will rule. Under this practice, however, practically every objection would be noted, but no exception; and yet when you go up on appeal you can go through the record and pick out something on which you can convince the appellate court there ought to be a reversal, although that particular thing was not brought clearly to the attention of the trial judge as something of importance.

Mr. Sunderland. But the taking of an exception does not draw it to the attention of the trial judge. He simply says to the stenographer, "Exception", and he notes the exception. That is after it is all over.

Mr. Donworth. You say it to the judge.

Mr. Olney. We have had exceptions abolished in California for I do not know how long. The case you imagine there really does not occur. The man makes his objection, and the court pays attention to it, rules on it, and that is the end. You do not have to say "Exception". That is all it amounts to.

Mr. Lemann. It is the same with us.

Mr. Dobie. That is the point I make. The exception is after everything is over. Then there is that little

mystic formula or "open sesame."

Mr. Donworth. Are you sure that you mean just what I do? The thought I was expressing was something different. Our practice abolishes the use of the word "exception" during proceedings in court. You do not have to say "I except" when the judge rules against you. The exception is implied; but there must be a ruling there which implies the exception. When you get into the appellate court do you not have to treat that as excepted to? That is, there is a great difference between saying, on the one hand, "exceptions are abolished", and saying, on the other hand, "You do not have to use the word exception, but it is implied without your saying it."

Mr. Wickersham. Do you have to assign for error questions you are going to raise? Can your court consider anything but the matters assigned for error?

Mr. Donworth. In the appellate court?

Mr. Wickersham. Yes.

Mr. Donworth. In the appellate court you must point out every ruling on which you rely for reversal, but you do not have to show that you used the word "exception" at the time. You must show that you objected and the court ruled against you.

Mr. Wickersham. And you must assign for error the particular thing on which the court is asked to rule?

Mr. Donworth. Yes.

74

Mr. Sunderland. That is exactly what Mr. Clark has in the third paragraph.

Mr. Donworth. Except that I do not like the statement that they are "abolished", because I think the appellate court is going to insist upon them.

Mr. Mitchell. Why is not the statute you read satisfactory? It simply says that wherever there is an adverse ruling, there shall be deemed to be an exception. What was that --- New York?

Mr. Clark. Yes; that is New York. I think that is all right, only I put in something more than apparently is there. I said, "if an objecting party shall make known his objection, or the action of the court desired, and the reasons therefor." That apparently is not required under the New York statute. Do you think it should be or should not? The New York statute goes very far.

Mr. Donworth. You take exceptions to the judge's charge and refusal to charge; do you not, Judge Olney?

Mr. Olney. You have to take exceptions to the judge's charge before the jury retires.

Mr. Mitchell. That is covered by a separate rule later on.

Mr. Donworth. But regardless of whether or not the word "exception" is disregarded and stricken out in practice, in cases of instructions to the jury, for example, if exceptions

are abolished, they a re abolished not only in this rule but in all of them.

Mr. Clark. We brought them in in Rule 89. We called them objections.

Mr. Sunderland. But an exception is merely a statement that you do not acquiesce in the ruling on the objection. That is all there is to it.

Mr. Olney. When we had them out there, there might be any kind of a ruling, but you always took an exception. You simply said, on the judge's ruling, "Exception."

Mr. Sunderland. You just told the judge he was wrong after he made his ruling.

Mr. Olney. That he was wrong; that is all there was to it.

Mr. Cherry. The Federal judges in Minnesota simply provide for that in advance of trial by their suggestion that the parties stipulate that an exception be entered to every adverse ruling. They do that at the opening of the trial, to save time, and then you do not interrupt to say "Exception".

Mr. Wickersham. What I wanted to ask is this: The rule says:

"It shall suffice for all purposes for which an exception has heretofore been necessary if an objecting party shall make known his objection, or the action of the court desired, and the reason therefor."

Make known his objection when?

Mr. Donworth. It means at the time of the ruling.

Mr. Wickersham. I think it should say so, then -- "at the time of the ruling" -- because that is the time to call the attention of the trial court to the point objected to, and give him an opportunity if he chooses to reconsider, or act in the light of the objection.

Mr. Cherry. You mean after the ruling, Judge?

Mr. Wickersham. There is no time fixed here. It says "shall make known" --

"If an objecting party shall make known his objection, or the action of the court desired, and the reason therefor."

Now, when ought that to be made known?

Mr. Cherry. That is your objection, I think.

Mr. Loftin. That is your objection itself.

Mr. Wickersham. I say, this should state "at the time the objection is raised," or "at the trial."

Mr. Dobie. If there was not any objection, ordinarily there would not be any ruling; would there?

Mr. Wickersham. There would not; but this goes farther than to make a mere objection. He is to make known his objection, or the action of the court desired, and the reason therefor. When is he to do that?

Mr. Dobie. At the time.

Mr. Wickersham. It should be at the time, and it

should so state.

Mr. Dobie. The normal way would be to object to the evidence as irrelevant, incompetent and immaterial.

Mr. Mitchell. This draft of course is open to criticism because it does not say you have to make it at the time, and all that; and I am wondering whether all that is not covered by this New York statute:

"Exceptions shall be deemed to have been taken by the party adversely affected to every ruling".

Mr. Clark. They have two statutes. You are reading the first one. The one relating to evidence is another one.

Mr. Mitchell. (reading:)

"Exceptions during the trial: An exception shall be deemed to have been taken by the party adversely affected to every ruling of the court or of the referee during the trial, unless said party shall expressly indicate that he acquiesces in the ruling."

That, of course, involves an issue or an objection on which a ruling is made, and it indicates an objection or an issue raised at the time; so all that is impliedly covered. That is a new statute in New York, passed in 1934.

Mr. Wickersham. In that connection I want to call the attention of Dean Clark to this rule which you have:

"It shall suffice for all purposes for which an exception has heretofore been necessary if an objecting party shall make known his objection, or the action of the

court desired, and the reason therefor."

When shall he make that known? At the time of the trial? I think it ought to state so.

Mr. Clark. Or at the time of the ruling.

Mr. Wickersham. Yes.

Mr. Mitchell. If you use the New York statute, you do not have to say anything about that.

Mr. Wickersham. No.

Mr. Clark. Of course this statute is narrower than the New York statute. I am surprised that you want to accept the New York statute so readily. I was a little afraid of it. You do not have to state any reasons.

Mr. Lemann. This requires you to state your objection and your reasons for it. The New York statute implies an objection, but it would not require you to state your reasons.

Mr. Dodge is a little worried about the requirement to state your reasons.

Mr. Dodge. I thought I could see a lot of litigation over the question whether you had saved your rights by a sufficient statement of reasons. Perhaps that is a foolish objection, but I should think you should add, anyway, "unless the same is obvious", or something like that, because plainly you do not have to cumber up the record with a statement where it is obvious; do you?

Mr. Olney. Yes; the only safe way to prevent the court

being misled is to require a statement of the grounds of the objection, whether they are obvious or not.

Mr. Sunderland. Is not that the court's business before he rules? He ought to get the reasons before he makes his ruling.

Mr. Olney. Of course.

Mr. Sunderland. So that will be taken care of. If you get your ruling, that must be on a basis that is satisfactory to the court so far as the reasons go.

Mr. Olney. I am speaking of the objection.

Mr. Cherry. Is not the only question here whether you have to except after the ruling?

Mr. Olney. Yes.

Mr. Cherry. Then, on motion for new trial or an appeal, the ruling would be considered just as it was before, only now you do not have to make an exception. If, to get that considered before, you had to state a specific objection, you would still have to have stated it. I may be thick about it, but I do not get the point. If you just do away with the necessity of entering the exception, if that is all that is aimed at here, why say anything about the objection or the grounds for the ruling? It just leaves it as though there now were an exception in it.

Mr. Wickersham. If you take out "and the reason therefor", you have got it.

Mr. Mitchell. We are talking about the fact that you

cannot make an objection unless you give your reasons for it, and that has nothing to do with exceptions.

Mr. Olney. It comes up in such things as this particularly in the way of the introduction of testimony. Testimony is offered, and it is objected to as immaterial. That is the only objection that is made. Then, subsequently, the man endeavors to claim error on the ground that the testimony is incompetent. The testimony is admitted over the objection, and then he makes the objection that it is incompetent evidence. He has to call the court's attention right at the time to the fact that it is incompetent. He cannot stand on the proposition that he objected to it merely; he has to state the grounds of the objection.

Mr. Mitchell. That is not Mr. Cherry's point. Suppose you make an objection, and you do or you do not state your reasons for it. The court makes a ruling. Under the old common law practice, on the ruling which was made, you said, "Exception noted", or you ask for an exception, and the exception is allowed. Now, in stating your exception, claiming your exception, you do not have to give any reason for anything.

Mr. Olney. No; no reason at all.

Mr. Mitchell. All that this rule deals with is abolishing the mere statement, after the ruling is made, that you claim an exception. It is not changing the way in which

your objection has to be made.

Mr. Olney. Not a bit.

Mr. Mitchell. It does not say that you need to say anything about reasons so far as the exception is concerned.

Mr. Lemann. Is the suggestion that we simply say "Exceptions are abolished"?

Mr. Donworth. No; I seriously object to anything like that.

Mr. Lemann. I just want to get Mr. Cherry's suggestion.

Mr. Cherry. My suggestion is that we leave out reference to the ground.

Mr. Lemann. What would your suggestion be -- what amendment to this paragraph?

Mr. Wickersham. Would it not be sufficient to say:

"Exceptions are abolished for all reasons which have heretofore been necessary" --

And so forth?

Mr. Donworth. I like the New York statement, that an exception is imported or implied whenever the court rules against you.

Mr. Dodge. I do not like that at all, because I live in a State where exceptions are in full force and are made to the last degree in every technical respect, and I want to see them abolished.

The difficulty with the New York statute is that it

preserves the necessity of a bill of exceptions. You have gained nothing by the form of words at the trial; that is all. We go on here and accomplish the great object of abolishing the bill of exceptions. We want to get rid of the word.

Mr. Mitchell. How are we abolishing exceptions when, under the rules of the appellate court, you have to have them, and we have not anything to do with the appellate court?

Mr. Dodge. That is a different question. You mean the rules of the court of appeals, which we are not dealing with?

Mr. Mitchell. We cannot deal with them.

Mr. Olney. Those are assignments of error.

Mr. Donworth. I should hate to take up the first case in the circuit court of appeals where no exception appeared on the record and see what they do to me. I wonder if any State has ever abolished exceptions.

Mr. Wickersham. How are you going to make a bill of exceptions under the statute?

Mr. Donworth. I should like to know. Dean Clark, do you know of any State that has abolished exceptions?

Mr. Lemann. I can name one, but I do not recall the State. (Laughter.)

Mr. Mitchell. We are clear that we cannot abolish exceptions if we are tied down to bills of exception under appellate court procedure; so why can we not adopt this

New York or Florida rule here, and then, without saying anything about abolishing exceptions, wait until we get this part about making up bills of exception and see what we can agree on?

Mr. Lemann. If we can abolish them, we will come back and put this in.

Mr. Mitchell. Yes; we will do something for Florida here. The Florida rule is this:

"The party aggrieved shall be deemed to have noted an exception to all instructions and adverse rulings without the necessity of expressly noting the same."

Mr. Loftin. That is not our present rule, but our committee suggests that.

Mr. Clark. The Ohio laws of 1935 omit exceptions, just as England did more than fifty years ago.

Mr. Donworth. What does that mean -- "omit exceptions"?

Mr. Clark. They no longer have them under the laws of 1935.

Mr. Dodge. Is there anything in the circuit court of appeals rules that requires a bill of exceptions?

Mr. Cherry. A bill of exceptions is a wholly different thing; is it not, Mr. Dodge? Is it not a different thing from the exception to a ruling at the trial?

Mr. Mitchell. I do not think they necessarily go together, although usually they have done so.

Mr. Cherry. They have; but if we abolish exceptions you can still have a bill of exceptions.

Mr. Sunderland. A bill of exceptions is really a bill of objections. It is wrong in name.

Mr. Dodge. So that there is nothing in the circuit court of appeals rules that would prevent this rule here. This section of the judicial code and Revised Statutes providing for bills of exception is in language directing the action of the trial court. I should think that to that extent would put it within our jurisdiction.

Mr. Donworth. In answer to Mr. Dodge, I think you will find in the circuit court of appeals act that no exception shall be taken to the judge's charge to the jury generally, but the exceptions must point out so and so. I think you will find that in the rules.

Mr. Clark. There is a Supreme Court rule on objections to the charge to the jury, on the matter of making objections or exceptions, if you will, to the charge to the jury before it retires. When we consider that, you will find that rule quoted.

Mr. Mitchell. Are we going to be able to dispose of this matter of what words we shall use to show that it is not necessary to note an exception after a ruling? Shall we adopt the New York rule in substance?

Mr. Donworth. I think we are all agreed that no

exception need be called to the court's attention; are we not? The discussion seems to indicate that.

Mr. Mitchell. Let us refer it to the Reporter. Well, I do not know that we ought to do that.

Mr. Clark. May I make this suggestion: I am pretty sure there is going to be a lot of discussion about the preparation of appeal records in the trial court. I must say I am a little worried about the statement made that we cannot touch bills of exception. If we cannot touch bills of exception there is a good share of the rules here that we cannot touch. We shall go home pretty soon, but I think we certainly shall have not done much to correct one of the worst parts of the practice. I do not know; I should think this is a little minor if the big things are going through. I do not know but that you might want to tackle the whole question of what you are going to do with the preparation of appeals in the trial court, and then you could come back and deal with this.

Mr. Mitchell. Let us pass this, then, until we reach that.

(Thereupon, at 10:20 o'clock p.m., an adjournment was taken until tomorrow, Tuesday, November 19, 1935, at 9:30 o'clock a.m.)
