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P R O C E E D I N G S

of

MEETING

of

ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE

of the

SUPREME COURT OF THE UNITED STATES.

Friday, February 21, 1936.

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Friday, February 21, 1936. 9:30 a. m.

Washington, D.C.

The Committee met at 9:30 o'clock a.m. in the Supreme Court of the United States Building, Hon. William D. Mitchell, Chairman, presiding.

Present:

William D. Mitchell, Chairman.
Scott M. Loftin.
Wilbur H. Cherry.
Charles E. Clark, Reporter.
Armistead M. Dobie.
Robert G. Dodge.
George Donworth
George Wharton Pepper
Monte M. Lemann.
Warren Olney, Jr.
Edson R. Sunderland.
Edgar V. Tolman, Secretary.
Edmund M. Morgan.

The Chairman. We adjourned last night having before us a motion, duly seconded, to amend Rule 11, striking out in subdivision (d) in substance everything after the words "circumstances permit", having in mind the previous motion that Rule 10 be consolidated with Rule 11. Some of us old fashioned lawyers could hardly reconcile ourselves to the idea of what was being discussed with regard to pleading facts without evidence. That is the point at which we stopped last night. Do the members of the committee desire to vote on that motion now, or do the members desire to have further discussion upon the question?

Mr. Donworth. I think Judge Olney expected to express further views on the question this morning. He indicated to me that he did expect to discuss further on the subject. Perhaps Mr. Morgan has some views which he could give us on this subject.

The Chairman. We adopted a motion yesterday, Mr. Morgan, to consolidate Rules 10 and 11. You made a suggestion that Rule 10 was not at all necessary.

Mr. Morgan. Yes.

The Chairman. The rule was chopped down, and then it was moved to consolidate it with Rule 11. Then in addition we adopted a general resolution to rearrange Rule 11 in a little more precise and orderly form, and then we also had a discussion as to these various subdivisions in paragraph (h) Pleading in Special Matters. We discussed how far that was advantageous, and the general impression was that they being all disputed matters, assuming they were, it might be well to clear them up.

Mr. Morgan. Yes, I agree with that.

The Chairman. Then we came down to this question of stating the facts, occurrences, or omissions, and the motion which was made was to eliminate that provision, and simply make a provision containing a short and simple statement of the claim, showing that the plaintiff was entitled to relief, and that nothing be said about stating the fact; that there be no provision about stating the evidence. That is the motion before us now. Have I stated that situation about as it is?

Mr. Tolman. Yes.

Mr. Clark. Going into the rule now, as I understand it, I think there is a possibility of two statements with regard to it. The rules may be consolidated into one, but Senator Pepper suggested a new form for the material that was to be contained in the statement, and the gist of this particular matter was, as stated by Mr. Mitchell, that a short and simple statement be made in regard to the claim. Was it also your idea that we say:

"Each averment of a pleading shall be set forth as simply, concisely and directly as the circumstances permit"?

The Chairman. The language suggested is "a short and simple statement of the claim shall entitle relief". That is the substance of it. As I understand we have not attempted to specify the language at all. The rule would have to be generally revised, and someone, I think it was Judge Olney, in connection with his motion, which we adopted, suggested that we rearrange it, and we have what the complaint would say, and the answer, and then another subdivision which is

applicable to all pleadings, and then special provisions about special facts that have to be pleaded. But we are down to that one point as to whether we want to state that you shall allege the facts without evidence, or just forget about facts.

Mr. Pepper. I might say very briefly for Mr. Morgan's information that the thought behind the motion was that every time you aver a fact you aver matter which is evidential. That is, it is an impossible discrimination to say that you can state facts and you cannot state evidence.

In the second place there is no real philosophical distinction between the proposition of facts and law which you can express in words of a rule, and if you cannot express a thought it has always seemed to me wise not to try. I thought this expression "each averment of the pleadings should be set forth as simply, concisely and directly as the circumstances permit" is about as close an approach as we can make to a direction to a pleader and a guidance to the court, and that we do not get into trouble until we go on and try and specify more particularly what is implicit in that general statement.

Mr. Morgan. That is true.

Mr. Pepper. That was, I think, what we were discussing last night when we adjourned.

Mr. Donworth. Mr. Chairman, while I appreciate the force of Senator Pepper's statement, and with due deference, it seems to me that the situation now made carries us back to commpn law pleading. That the progress made in the codes is to state the facts.By simply saying "averment" there is very much doubt as to whether you mean the facts or a combination

of facts and law, and so on.

I have had the view that the lawyers, especially those in the code States perhaps erroneously regard the codes as a very great step forward from the common law pleading. The modified procedure, the combined procedure of law and equity, came in with the appeal code, and in that same code was the requirement for pleading facts. True, the equity rule said "without evidence", but that is not, as I recall it, in all the codes, or at least not universally in the codes. But the codes do say you shall state the facts.

I understand that Dean Clark's idea is--- I do not desire to speak for him, but as the foundation of this rule I understand his view is that the word "facts" in the codes has given rise to very numerous decisions, which undoubtedly is correct. I am afraid that any substitute for it would give rise to an equal number in the future, without the aid of any of the precedents of the past.

So, without making myself a nuisance on the subject, I simply wish to state that in my view it would be a step backwards towards the common law pleading simply to say "averment" without indicating what kind of an averment you are talking about.

The Chairman. In a common law state, if you leave out all reference to allegations of fact, where they have common law pleading today, or something that resembles it, would not the lawyer be justified in continuing right along with the common law pleading?

Mr. Donworth. Yes.

Mr. Morgan. If you put in "facts" and you turn to

Chitty you will find that he tells you that that was the common law rule exactly--- that the pleading should state the facts. Take for example the case of Moore vs. Hobbs. In that case the plaintiff alleged that the defendant owed him money, and that was all. The court in that case, in holding that that was insufficient, said it was insufficient at common law. That at common law you had to state the facts and so on and so forth. So I do not believe you get away from the common law by using "facts". I think Mr. Clark has demonstrated that the codifiers thought they were going to draw a sharp line between facts, conclusions of law and evidence, and that it is an impossibility in practice.

In most of the States the common counts are permitted, and how anyone could say that that is a statement of fact in plain and concise language without unnecessary repetition gets me. That is what the field code said, and in most cases they permitted common counts. I do not think you would get anywhere by using the term "facts" except into the difficulty that we have all gotten into in the code States. I do not know whether Senator Pepper's paraphrase will get us out of any difficulty. I do not believe it will get us into any more difficulty.

Mr. Clark. I think this part of the code reform was recognized as a great failure. I do not believe there is any doubt that the improvement of code pleading came in by reason of doing away with the form of action, and the uniting of law and equity, and the general flexibility. This was an attempt to compromise with equity pleading, and it just has never worked. The way we make things get by is to get away

and get back substantially towards the common law forms.

For one I desire to say quite frankly that if there was a choice between the two--- if the issue gets as sharp as that, and I do not really think it does, as between common law precedents, as to stating the case--- and, understand, I limit what I say to that--- and some of these detailed statements that are given out under the code as middle forms, I will say that I am all for the common law. And I do not believe that anywhere in the code States should you hold that a form in Chitty, so far as the allegations are concerned--- I limit myself to this matter of stating--- can properly be held as insufficient. Of course that is a discussion we have as to the common counts.

On the point that the lawyers may be distressed not to see the word "facts", of course I cannot answer conclusively on that. I do not suppose any of us can. I suppose some of the lawyers may be a little surprised, but I cannot believe that that is a matter which is very close to the heart of the practicing lawyer. I do not think he really honestly feels that he does plead that way; that is that he does plead facts as distinguished from other things. I know that if we leave this in we will be subject to the criticism with respect to "brain trusters". People will say "Oh well, if you want brain trusters", and so on. It may be an advantage to have that criticism. Sometimes I think brain trusters prove themselves to be useful, in that people who want to make practical arguments grab hold of what the brain trusters say.

Back in the days when the equity rules were established Dean Pound pointed out specifically on this point that he

thought that was one of the weak points of the equity rules. My only point there is this, that I think we may be rather in doubt as to what the lawyers may feel about that, but there is no question as to what the scholars feel about it.

The Chairman. My feeling is this. I appreciate all the difficulties with respect to the matter and the utter impossibility of making an expression of this kind which is accurate and which means what we think it means. I merely had a vague feeling back in my head that this requirement to plead "facts" without any mere statement of the evidence, however unscientific it may be, does have a deterrent effect on the lawyersand a sort of a moral restraint in their wondering around and pleading with voluminous statements; if I may use the expression "mere evidence" rather than "ultimate facts". There is an effect it has on pleaders under the code system, and I was wondering whether those who are accustomed to that system, if they found all restraint on statements of evidence obliterated, which had been repeated in the equity rules and all that, it might have a result which would be bad. It is just an indefinite feeling of that kind rather than any closely reasoned argument about it which made me hesitate about it. But I am willing to go along and see what the men who know the subject best think about it, and if there is a chance here to do something that the scholars would all agree on ought to be done, let us try it. That is the way I feel about it.

Mr. Olney. May I ask the Reporter a question at this point, Mr. Chairman. I notice he referred to the expression of facts being used in the equity rules. The equity rules

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were adopted of course comparatively recently. Have you found any case arising under those rules where that expression gave rise to difficulty?

Mr. Clark. Oh yes. The same problems come up in the equity rules. I do not think they have had quite the serious issues, they have not had quite the long drawn out issues brought up in connection with them, but the question of what facts mean has been brought up in connection with the equity rules, yes.

Mr. Olney. Have they given rise to any decisions or any difficulties of any serious import?

Mr. Clark. Well I think it is serious.

Mr. Olney. What I mean by that is this. Has there not been after all a perfectly clear understanding evidenced by the decisions under the equity rules as to what was meant, so that no injustice has resulted from the use of the expression "facts"?

Mr. Clark. I do not know that this goes much into the question of injustice. I do not think that perhaps generally we get so many decisions nowadays which are unjust as they are time consuming and wasteful, in the sense that you start and you wonder if you are right, and the court does also. You have that sort of thing in the equity pleadings. Of course with the pretty free power of amendment that we have it is a little unusual for a case actually to go off on the pleadings alone.

Mr. Dodge. Here is the English rule:

"Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the

party pleading relies for his claim or defense, as the case may be, but not the evidence by which they are to be proved."

And there are a great many fine print references to cases under that rule, and I do not see any cases that indicate that there is any controversy as to what the "facts" means.

Mr. Pepper. Mr. Chairman, I confess that one of the reasons I am interested in this question is perhaps a little remote from the immediate question before us, but I hate to see further emphasis placed on what I think is an unreal distinction between facts and law, in view of the enormous confusion that we are trying to straighten out in equity jurisdiction respecting relief in places of mistake. The will-o-the-wisp that we have been chasing for years about giving relief to a man who made a mistake of fact and refusing it to a man who has made a mistake of law has filled the books with sophistries, and has led, I think, to about as much injustice as any line of equity decisions that I know.
If we now, at this stage of the development, indicate that we are still attempting to adhere to that distinction, although we are doing it in a procedural connection, it seems to me that we are just delaying the time when that will be frankly confessed to have been a mistake in scientific analysis.

Mr. Donworth. Do you think, Senator Pepper, that your suggestion in regard to the requirements of the pleadings would help any in the solution of a question or correction of a mistake, as between law and facts, I mean?

Mr. Pepper. I think, sir, that everything which tends to a scientific terminology in the law is really a help to clear thinking, and that it simplifies procedure in the end.

I would not be so foolish as to suppose it would have any immediate or striking effect, but I think it is the stream or tendency which one is interested in rather than the specific matter.

The Chairman. Of course we have a rule which requires you to state facts and not a rule of law. A ridiculous situation might arise in this way, that a statute might be considered unconstitutional, but unless you allege it is unconstitutional in your answer or your complaint you cannot get it considered by the Supreme Court. You have to raise it in the pleadings in the lower court.

Mr. Donworth. But in connection with those very rules you must state the facts bringing yourself within the protection of the Constitution.

Mr. Pepper. But when you do that you are stating the evidence.

Mr. Tolman. Mr. Chairman, may I complete for the record very briefly something which I have been saying orally to members which bears, I think, on this question. What is the cause of all these different demurrers and motions to strike that have been taking up and wasting so much time and causing so much reversal? It is because some statute lays a requirement on the pleader that he shall make a statement in a definite way containing definite things, and taking hold of his hand and writing, as the result of which the other side immediately raises the point, either in good faith or in bad faith--- it does not make any difference which--- that he has not done what the statute or what the directions call for. One of those requirements that has made trouble is that he must

state facts. Another is that he must not state law. The other is that he must make any evidence. I think if we would merely substitute acts, circumstances and occurrences in place of "facts" there would be still a requirement which would make just as much trouble as we have ever had before.

What is the remedy? In my mind it is two-fold. First relax the requirements on the pleader. Do not tell him too much. Make a more general direction of what he shall say. Senator Pepper's proposal is a relaxation of the requirements on what the pleader shall say.

Then what is the second thing? You have got to make a standard of minimum requirement for the pleader, and that rule does, because it says it shall be sufficient if he states his claim showing himself entitled to relief and press for the relief to which he think he is entitled.

It seems to me that we are on a hopeful path and that we can vote in the affirmative now as a matter of choice that we prefer to omit these dangerous words, even though we have become familiar with them. The fact that we have become familiar with them does not mean that the younger generation are all familiar with them. We can leave these dangerous requirements and relax the demands on the pleader.

Mr. Dobie. I should like to express one thought concerning a matter which the Major stated, which appeals to me, and that is with respect to the requirement about stating facts and not stating evidence and not stating conclusions of law. There seem to me to be certain cases in which you can set out this thing in narrative form, just like a Peter Rabbit story with old Mrs. Rabbit at home in the hutch, and

the three little rabbits, Moxie, Flopsie and Cottontail Peter. There are other situations in which you just cannot do that, as Senator Pepper said last night. You state that X and Y are married, or that Q and so on are the children. I believe that this phrasing of the Senator's, stopping it there with the words "as the circumstances may permit" is in the hands of competent judges in the Federal courts going to accomplish a very desirable result. I like the flexibility of that. I also agree absolutely with Major Tolman that if you put something in there that is hard and fast, in some instances it is easy to comply with it and in some instances it is absolutely impossible. I believe this will work.

Mr. Dodge. Mr. Chairman, this discussion indicates to me that there must be very great difficulties about pleadings in other States, which we do not have at all in Massachusetts. It is the rarest thing in the world for any case in Massachusetts to turn on any difficulty about pleadings. We do not have any trouble about demurrers, motions to strike and those things, because our directions to the pleader in our statutes and rules are very, very slight. I concur entirely with Major Tolman that it is a step forward to try to get to that simplicity of pleading which we have. It is the rarest think the the world for a long and involved pleading to be the subject of any litigation in Massachusetts. And I really think that these rules, with their minute directions to the pleader inject a great deal into the pleading in the Federal courts in my State which would be totally foreign to our State practice.

Mr. Clark. Mr. Dodge, I think, is quite correct about

Massachusetts. I think that they have an excellent system in Massachusetts, and I think it is aided by a very few--- and I repeat that--- a very few model forms in the statutes, and those model forms come directly out of Chitty, and they are fine.

The Chairman. Are you ready for the question? All in favor say aye. Opposed no. The ayes seem to have it. The ayes have it.

(g) ADMISSION BY FAILURE TO DENY.

Mr. Clark. Now Mr. Chairman, I bring up a little favorite of mine in (g).

The Chairman. A matter of substance.

Mr. Clark. Well I have been turning it around and therefore it is a matter of substance. It is this matter of pleading by infants.

The Chairman. Section (g) in line 76.

Mr. Clark. I make two suggestions. The first is the one that I support most strongly. The second is the alternative. The first is that both brackets be stricken. The second is that if that is not done, then as an alternative it be stated "except as against an infant or an insane person not under guardianship or conservatorship."

Now going back to the matter of striking. I think that the protection here accorded is unnecessary. It might do no harm, it could be argued, in the case itself, but what troubles me is the fear of the consequences on the judgment. The thing is stated most broadly, and the ultimate limits are not clear to me, and I do not see how they can be clear

until they have been decided by the Supreme Court.

Suppose a judgment is entered by default against an infant. What is the effect of that judgment? Or suppose that a judgment is entered on a pleading which does not set forth the facts that later the court may think it should. In other words, what is the effect of the judgment when this provision is inserted?

Now to go back and raise the point as to its usefulness generally. This provision for the protection of infants developed in the equity pleadings when the equity pleadings themselves were in the whole case, where you set forth the facts in detail, when they were a kind of a "discovery", and you are supposed to set forth the whole story, and no further evidence might be necessary. If it were necessary it would be taken by depositions. At that time a rule of this kind developed by the equity courts for the protection of infants was sound enough. It was one that any court looking out for the benefits of the infants would do. It was perfectly natural there. It was carried over when pleadings lost that effect. Now this rule is only a rule of convenience anyway to hurry the case along, and the meaning of the old equity provision is not what it was in the old days, and what it is is not clear.

As a matter of fact this provision (g) means very little as against a grown person. I say that because of the great flexibility of amendment. Suppose we have omitted something that is required. Why, at the trial we just take back what we have said. What penalty is there provided against anybody? In other words as a matter of protection of the

infant, the infant is well protected. Particularly with our further provisions under Rule 21. So I say it is not needed. And what it means on the judgment is very doubtful to me.

Coming to the cases under the old equity practice, of course you have a great many cases which assert the power and the desire to protect the infant. But when the case has gone to judgment there is a little doubt as to how far writ of error would lie. It is certainly clear that a writ of error will not lie for anything except fraud; if the infant was robbed by the attorney, for example, and it seems to be, as I look at the cases, the better rule which does not cover anything but fraud anyhow. That is under the old equity rule.

Now along comes this statement, and as I say, its effect is broad, and to my mind unlimited. It has broadened out from the equity rule of 1912, which has not been discussed, and the effect of the equity rule is not at all clear. We cannot tell what it was. That of course, as I say, goes back to the former equity procedure. So I say that the provision is of very doubtful extent in scope and is unnecessary.

Now if this is to be put in here, why in the world should we extend it beyond the equity rule? The equity rule I think raises doubt enough. It seems to me that in any event it should be limited to the equity rule, and my second alternative is the equity rule, leaving out the Latin non compos mentis, and so on.

Mr. Donworth. What is your suggestion?

Mr. Clark. My first suggestion is to strike out all in brackets in lines 78, 79 and 80. That is, after the word "denied" in line 78, to strike out the remainder, which appears

in the brackets.

The Chairman. Is it a question whether or not the allegations have to be proved against a person under disability even though he has his guardian ad litem.

Mr. Morgan. That is the point I tried to raise under it, and nothing that Dean Clark has said has moved me at all. I think you never ought to have judgment against an infant on pleadings or a person suffering under any disability. It should always be a matter of proof, approved by the judge.

Mr. Clark. Suppose you get it, is the judgment a nullity?

Mr. Morgan. I do not know about that, but as I said, if I have to choose between the two I would say it was a nullity certainly. I say that if a person is under disability and the court said the person did not have the capacity to appear by himself, the case would have to be proved against him, and not made by pleadings. I think our whole tendency is to get away from judgment on pleadings if we possibly can, and to make that just an introduction to get the matter before the court. And certainly I am strongly opposed to any judgment on pleadings against persons under disability.

The Chairman. Even though he is represented in the second bracket by a general guardian?

Mr. Morgan. I do not care how he is represented.

Mr. Lemann. Did I understand you to say that you were opposed to judgments generally?

Mr. Morgan. I think that judgments on pleadings generally are bad. I think they are bad enough.

Mr. Clark. What about the case where, as might often be, the minority or insanity is not known until later when attack is made on the judgment?

Mr. Morgan. I cannot help that.

Mr. Clark. It seems to me that you would make a great many Federal judgments then subject to question.

Mr. Morgan. That may be.

Mr. Olney. When an infant for example, a minor, is represented either by a general guardian or one appointed by the court, a guardian ad litem, and the whole matter is under the supervision of the court, the court should be particularly careful to see that the interests of the minor are protected, and I can see no reason why an admission, for example, in the answer which is filed on behalf of the general guardian or the guardian ad litem should not be taken to be true, unless the court has some reason to suppose that the guardian in that respect is not doing his duty or protecting the interest of his ward. The whole matter is merely a matter of protection to the ward. Now if a person is appointed to protect it and performs his duty and in the course of that finds that certain allegations in the complaint are true, why should he not admit it and be done with it, and why should it not be taken as sufficient?

I cannot agree with this view of Professor Morgan at all as to the special protection afforded a minor that goes clear beyond the recognition that a guardian may very properly make admissions of fact on behalf of his ward. If the allegations of fact are true why should he not admit them and be done with them?

Mr. Morgan. Why should not the court find it?

Mr. Olney. Because it simply imposes the burden of introducing evidence and going through a long, unnecessary procedure which the whole object of pleadings is to avoid.

Mr. Pepper. May I, Mr. Chairman, ask Professor Morgan through you whether he makes a distinction between the position of an infant represented by a guardian and a beneficiary who is an adult who is represented on the record by a trustee?

Mr. Morgan. Yes I do.

Mr. Pepper. Is there a solid reason for it?

Mr. Morgan. I do not know. I had not thought of that, but I would think there were certainly sound reasons for that, historically and otherwise.

Mr. Pepper. I think that very often beneficiaries of full age are just as apt as are infants to feel that the representative has failed in his representation, and I should suppose that if you were going to make any exception to admission by failure to deny that it ought to extend to all cases where the party on the record who files the pleading is a fiduciary, and I think that if you put it that way it carries the thing to the length criticised by Judge Olney.

Mr. Olney. Let us consider this from the practical point of view. As a practical matter is there any occasion for the extreme precaution which Professor Morgan would require? Is any injustice apt to be done to minors under the rule as Dean Clark would have it? I think not.

The Chairman. It comes down to a question of whether you would trust the guardian's judgment as to whether a thing is true or not, or whether you ought to have the court

establish the truth of it by proof. That is about all there is to it.

Mr. Dobie. I do not know what constitutes the practice in the various States, but I know that in Virginia in connection with suits to sell the lands of persons who died insane the requirements are very meticulous. I had occasion to act as counsel not long ago in a case to sell the land of a person who had been insane. The requirements in such a case are so meticulous that in certain aspects of it they are absolutely absurd. There are infinite details in connection with such a case, and it has been held by our court that you can not waive any of them.

The Chairman. In practice the guardian ad litem never admits anything. He never does. He always throws himself on the court with a general denial, and puts the other side on proof. The general guardian--- I am not so sure about the case of the general guardian. Under the practice with which I am familiar and accustomed to I think the general guardian can admit facts.

Mr. Dobie. The trouble about the general guardian is that his powers vary so much. As you know there are a great many cases in the Federal courts where the citizenship of the infant determines the citizenship in the case. It was pointed out in a very good Massachusetts case--- I have forgotten the case, Mr. Dodge--- that there was a very great distinction between powers of the general guardian under State laws. They draw a very keen distinction between the powers of the general guardian under State laws. In some instances he has very great powers and in others he has

practically none at all.

The Chairman. If we make provision that admission can be made by a guardian as against an infant, we may be giving him authority that he does not have under a State statute.

Mr. Morgan. We might very well be doing that.

The Chairman. There is that point about it.

Mr. Clark. I think you need to bear in mind also Rule 21. Do you all have that rule before you? Of course if necessary we can doctor that up a little bit more.

I call attention particularly to lines 13 to 17:

"A guardian ad litem shall be a competent person appointed by the court for the purpose of suing or defending, and shall, together with the next friend, be subject to such orders as the court may make for the protection of the person under disability."

I might say in passing that I dislike that word "disability". I would rather use the words "insane person" or "an infant".

Mr. Donworth. I think if the plaintiff has a competent lawyer he will request the guardian not to make admissions.

Mr. Morgan. Of course he will.

Mr. Donworth. And he will insist on proving his case.

The Chairman. The general guardian is under bond, is he not, and if he makes a misstatement he may be liable for it, but a guardian ad litem never is.

Mr. Loftin. I think that is true.

Mr. Tolman. Mr. Chairman, may I ask Judge Olney a question. Judge Olney, have you considered this question in its relationship to the necessity of binding persons under

disability by the final decree which of course is something that we do not want to impair? If this exception in this rule was out, and it simply was a rule that provided that everything should be admitted that was not denied, without more ado, would not the law take care of the ward and the person under disability, notwithstanding the rule?

Mr. Olney. No, not necessarily, by any manner of means. Do you mean to say that they would consider that the law would say that the admissions were void and the judgment was void?

Mr. Tolman. Will you repeat your question?

Mr. Olney. As I understood your question it was: What would the law do with a judgment which, we will say, had been rendered on admissions in the pleadings against an infant, against a minor? I say that it would be binding unless they could show in some way that there had been fraud or mistake which entered into the matter.

Mr. Dodge. Does this discussion relate to express admissions or only to the implied admissions from failure to deny?

Mr. Olney. The principle is the same.

The Chairman. Both, probably.

Mr. Dodge. Mr. Clark, you are referring here only to implied admissions from failure to deny.

Mr. Clark. Yes.

Mr. Dodge. If the guardian expressly admits, is there any question about it?

Mr. Clark. I should not suppose so. But if this situation occurs why should it not apply to express admissions?

The Chairman. I spoke of a matter a moment ago.

We cannot by these rules give a State appointed guardian any more authority than he has under State law. We cannot say whether an admission is good when the State law limits the power. We have to bear that in mind.

I just offer the suggestion, having in mind the provision in Rule 21 which requires the court to supervise the matter. Suppose we made a rule that provided in substance and effect that admissions made by a guardian if within his authority and if accepted by the court should bind. In other words we hold our hand on the question of what his authority may be under the law that appointed him, and then we check it further by giving the court, as Rule 21 seems to do, a discretion to say whether proof is required or not; discretion to say that no proof is required on it, or if he thinks that proof ought to be taken on it he can insist on it, even though the guardian does not do it. It might be a compromise that would affect the infant.

Mr. Clark. I have another suggestion which Senator Pepper passed to me, and I will read it. The Senator suggests that in place of the matter stricken out after the word "denied" this language be substituted: "subject to the right of the court to require proof when deemed by it to be desirable.

The Chairman. That covers part of my suggestion, but not the one about authority.

Mr. Morgan. I agree with the Chairman. What I am anxious to have done here is to have it provided that admission shall actually be called to the attention of the court and the court shall affirmatively approve them. I do

not object to an admission which is affirmatively approved by the court.

The Chairman. You do it in this way: "shall be deemed admitted when not denied, except as against a person under disability". And then say "Provided, that admissions by a guardian, if within his authority and accepted and approved by the court, may be taken."

Mr. Morgan. Yes, that is all right.

The Chairman. That answers you. It makes it unnecessary to prove facts that everybody knows are so, and the court knows are so, and yet leaves both the guardian and the court under duty of insisting on proof.

Mr. Olney. It seems to me that is a perfectly satisfactory arrangement, Mr. Chairman. The only suggestion I would make in connection with it is that this first statement here is a statement of a general rule. "Averments in a pleading, which must be pleaded to by these rules, other than those as to the amount of damage, shall be deemed admitted, when not denied." That is the general rule of pleading. I would not make any exception to the rule in that connection, but separately in connection with infants or with minors or people with disability state the rule that you have in mind there.

The Chairman. That is a matter of arrangement.

Mr. Olney. That is a matter of form, and I think it is better in that form.

The Chairman. That is a matter of arrangement, wherever it ought to be.

Mr. Morgan. I agree.

The Chairman. Would that suit you, Mr. Morgan?

Mr. Morgan. Oh yes, that is quite all right with me.

The Chairman. What is wrong with it if we limit it carefully to the authority that the guardian has to start with, and then require the court's approval of the admissions. Whether there should be failure to deny or affirmative admissions makes no difference. You have the admissions.

Mr. Clark. I will put something in Rule 21. That is the idea.

Mr. Morgan. That is alright with me.

Mr. Clark. In passing do any of you share my dislike of the word "disability"? I should rather throw it out as "infant" or "insane person" and guardian and so on.

Mr. Donworth. If he has a guardian how do you cover it?

Mr. Clark. We cover it by the word "guardian".

Mr. Morgan. That is in Rule 21.

Mr. Olney. How about a person confined in a penitentiary. They are considered under disability in some States.

Mr. Clark. I do not think we would want to touch him unless he had a definite guardian, would we? I do not like that word "disability" very much because I do not know how far it goes.

Mr. Dobie. You like to specify the persons as "insane persons" or "infants" or use some other expression?

Mr. Clark. That is what I wanted to do, yes.

Mr. Pepper. Mr. Chairman, if this is done, which sounds to me reasonable, I hope that we avoid the danger

which might arise in connection with it. If we discard "disability" and make our phrase dependent on describing the representative of the person in question, I hope we will carry that far enough to remove disputes as to whether the particular fiduciary is contemplated by the rule. For instance in Pennsylvania we have the committee rather than the guardian. We have the committee in lunacy; we have the committee of the confirmed alcoholic and habitual drunkard. And there are various situations like that which I think were infelicitously called disabilities, but I think it is important that they should be covered.

Mr. Clark. In Massachusetts they call the conservator of a lunatic a guardian.

Mr. Donworth. And so he is called in the State of Washington.

Mr. Dobie. We call it committee' in Virginia, not committee.

Mr. Lemann. And we call it "guardian" in California.

Mr. Cherry. Guardian?

Mr. Lemann. Yes. Does that strike you as curious?

Mr. Cherry. In a few States they call him a conservator.

Mr. Dobie. And in Virginia he is called the "committee'."

The Chairman. As I understand it it is proposed to drop the language contained in the bracketed portion out of paragraph (g) of Rule 11, and then you could put a clause somewhere else that if a person under disability is represented by a guardian or a guardian ad litem, that any

admissions that he makes within the limits of his authority, and approved by the court, will be accepted. Now you have left the case that is under disability and is not represented by a guardian. What do you do with that?

Mr. Donworth. As I understand it, paragraph (g) is to stand now generally without any exception?

The Chairman. That is right.

Mr. Donworth. So is that not the end of paragraph (g)? I mean is there any further question with reference to paragraph (g)?

Mr. Clark. Would not this be the way to cover it. Begin in Rule 21 something like this:

"The court shall require proof of all cases against infant and insane persons, excepting that the admissions of guardians, committees'" and so on.

The Chairman. If approved by the court.

Mr. Morgan. Yes. I think that is a fine way to do it.

The Chairman. Is there anything else you want to raise under Rule 11?

Mr. Olney. Yes. This matter of the capacity to sue I think requires a good deal of attention. I read the language in paragraph (h):

"(1) It shall not be necessary for a pleader to allege the legal existence or capacity of any party to sue or be sued. But if the adverse party desires to raise an issue of such matter he must plead the lack thereof affirmatively as provided in paragraph (d) above, and when such allegation is to the

effect that he has not legal existence or capacity he must also allege the proper party to be sued, if any and known to him. When legal existence or capacity has thus been put in issue, that party whose legal existence or capacity is in issue shall have the burden or proof."

Now that is not in many cases true. The rule makes no difference in between the defenses of lack of legal existence and lack of capacity to sue or be sued, or between the case where the legal existence or capacity to sue of the plaintiff is involved, and that where the legal existence or capacity to sue of the defendant is involved. If the defendant, for example, or the plaintiff is a natural person his existence cannot well be questioned, and his capacity to sue is presumed, and if it is questioned the other party must prove that he has not that capacity. For example suppose that I bring suit against somebody, or suit is brought in my name, and it is claimed that I am a minor or under disability, or, more probably, not of sound mind, and am able for that reason to bring the action, the burden of showing that rests on the defendant. It does not rest on me.

Mr. Morgan. There are many cases to that effect, but I thought Mr. Clark was not purporting to state the law but was trying to put them all in a lump. I do not see any objection to it.

Mr. Olney. The language is here: "When legal existence or capacity has thus been put in issue, that party whose legal existence or capacity is in issue shall have the burden of proof." That is what the draftsman says.

Mr. Morgan. That is what he says. No doubt he is

changing a lot of law.

Mr. Olney. If I am of sound mind and the other fellow says I am not, he has got to come in and show it.

Mr. Morgan. I do not object to that.

Mr. Olney. And if the plaintiff is not a natural person and the plaintiff's capacity to sue is questioned, then the burden should be on it to prove its capacity to sue. In other words there is a difference between the two. For example if an unincorporated association brings suit and the question is raised as to its capacity to sue, then it is incumbent on it to prove its capacity to sue in that case.

Mr. Morgan. I take it that Mr. Clark thought that in all these cases the capacity to sue or be sued would be peculiarly within the knowledge of the person or association involved, and that he was making a general rule. Of course the cases are various, as Judge Olney said, but here is a uniform rule proposed, and it does not seem to me that it is a rule which places any undue burden upon the party.

Mr. Clark. That is a correct statement. I might say that this was an endeavor to get away from something that, as I read the cases and study the question, is usually one of these things that Major Tolman speaks of. You rely on unsound objections generally. Once in a while they may be real, but generally not. Some States go so far as to provide that you must allege and prove corporate capacity always. That is true in New York. And really, as a practical matter, what a fool thing that is, to encumber your case with that when you are suing the subway or something of that kind. I thought it would eliminate one of the weapons that you

have for delay, and as Mr. Morgan says, it may not be essential to the rule, that is the rule would be somewhat helpful without it, but the burden of proof is put on the person who knows. It may cause the plaintiff a little difficulty, particularly in the case of a foreign corporation to decide whether all the "i's" have been dotted and the "t's" crossed.

The Chairman. The judge's point is more narrow than that. He thinks that when there is an artificial person it ought to have the burden of proving its own entity and capacity. But when you are dealing with a natural person the presumption is that he is of age and sane.

Mr. Morgan. That would be the presumption. The burden of going forward would certainly be on the defendant.

Mr. Olney. My real objection is this. I think the rule is all right myself. It is not necessary to allege capacity to sue. So I am inclined to think the whole section might just as well be omitted, and that would leave it within the general rules of pleadings which are sufficient. But we ought not to touch this matter of burden of proof, because that is a matter that depends upon the particular circumstances of the case, and it varies with the character of the case. We ought not to try to lay down a rule in connection with it. It is something that causes no difficulty in actual practice. It is solved by the court in connection with the particular case just in accordance with the good common sense of the particular situation. If it is a natural person they set on the presumption of sanity and capacity, and they say "If you claim this man is <u>non compos mentis</u> prove it." If it is an unincorporated association, and it is

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the plaintiff, and its right to bring the suit or its capacity to bring suit is questioned, they naturally turn around and say to the plaintiff under those circumstances "Well, you are only an unincorporated association. Now you prove your authority to sue." In other words we should not here endeavor to lay down rules as to the burden of proof.

The Chairman. Would not the same situation exist if you struck out the language "When legal existence or capacity has been put in issue, that party whose legal existence or capacity is in issue shall have the burden of proof, for this reason. Your prior rule compels the adverse party to raise the issue and plead it. Now without any consent about burden of proof, the necessary inference may be that the one who has to allege the thing is the one who has to prove it. So you have got the burden on the one who raises the point in all cases. Is that what you want to do?

Mr. Olney. I am inclined to think this rule should stop with this, or leave it out entirely:

"It shall not be necessary for a pleader to allege the legal existence or capacity of any party to sue or be sued."

Let it go at that.

Mr. Clark. I do not have any final views on that particular subject. Under the common law the natural person had to set up his capacity. He did it by plea in abatement, and he had to risk the decision there.

Mr. Morgan. Of course if it did not have to be alleged it could not be raised under general denial, could it?

Mr. Clark. No.

Mr. Dobie. There are a good many cases to that effect;

that a general denial does not raise it.

Mr. Clark. But the reason for putting it in is that there is a certain amount of litigation which has come up over it. The question is not clear. And furthermore, the lawyers certainly are in doubt. In my own State, for example, you do not have to do it but the lawyers do it. If the plaintiff is a corporation and the defendant is also, you then have two worthless paragraphs, one as to plaintiffs and one as to defendants.

Mr. Olney. When you say an artificial person you certainly ought to be required to state the character of that artificial person.

Mr. Clark. You have to do that in the caption and in the summons, which is all anyone needs I think. "Summon the John Jones Company, a corporation".

Mr. Olney. So long as the capacity in which the party is sued appears, it is all right.

Mr. Dobie. In diverse citizenship cases you have to have corporate capacity shown.

Mr. Clark. There is no question about that.

Mr. Dobie. The Supreme Court is very strict about that. They will not stand for the allegation simply that he is a citizen. You have to say that it is a corporation doing business and organized under the laws of such and such State.

Mr. Pepper. I am trying to think how this question would come up practically. I can not think of any case involving a suit by a natural person where any issuable fact could be set up by way of defense respecting his disability except in the case of an infant. I do not think it is open

to a defendant, is it, to challenge collaterally the mental capacity of a plaintiff?

Mr. Dobie. It certainly is in some States.

Mr. Pepper. I am glad to know that.

Mr. Dobie. Oh yes, in some States it is.

Mr. Olney. Yes, Senator Pepper, that is true.

Mr. Pepper. I have often had the opinion that the one who was bringing suit against my client was non compos mentis, but I did not know that my client could raise that issue.

The Chairman. If the plaintiff is insane the judgment does not bind the defendant, and the defendant is entitled to judgment.

Mr. Olney. Senator pepper, suppose you had this case. For example, out in California where we appoint a guardian for the estate of a lunatic; suppose a suit is brought against a man who is a lunatic, and the guardian has been appointed, and he has authority under the code to maintain, at least to protect the estate of his ward. Under those circumstances a suit is brought in the name of a lunatic by some attorney chosen by him and not by the guardian at all; why, the thing is just a nullity!

Mr. Pepper. I see.

Mr. Dodge. You might have a suit by an administrator, and the defense might be that he was not a legally appointed administrator.

Mr. Clark. Why should he not say that? He has his own records, and he can prove it without difficulty.

Mr. Olney. I think the burden is on him to do so.

Mr. Donworth. The suggestion of Judge Olney could be met--- I do not know whether this is desirable or not--- by taking lines 89 to 91, the language in which is:

"When legal existence or capacity has thus been put in issue, that party whose legal existence or capacity is in issue shall have the burden of proof".

And you could add something like this to that language: "except in cases where a presumption of law may impose such a burden on the adverse party."

Mr. Olney. Why do we say anything here about burden of proof? Why not leave it to the general principles of the law.

The Chairman. I do not object to that except I raised the point that if you require the adverse party to make the allegation in his pleading is there not an inference that he has to prove what he alleges?

Mr. Lemann. I understand the point to be that if you say nothing about it that at least in a number of States a lawyer whose client is a corporation and the plaintiff in the case, would have to prove that it was legally incorporated and offer a certified copy of the charter in evidence. On the other hand if the lawyer's client were a defendant he would have to make similar proof, that is if the defendant were a corporation. That is the rule in some States. It used to be the rule in our State. We changed it however by statute. If this provision were taken out you would have to do what the local practice previously required you to do or what the State practice required you to do. At least it would be uncertain what you would have to do or not do.

I imagine the argument in favor of putting this in is to arise at the desired uniformity of rule we are hopeful of reaching if we can. Therefore I would suggest it is desirable to leave it in, and that, with respect to the case that Judge Olney puts, while thoroughly proper to make, is quite unlikely to happen, and it will not make much trouble. Practically there is hardly anything that we can provide that you cannot think of some situation arising in connection with, even though it had not been foreseen, or even if we do think of it the situation is going to develop where the rule as framed is not going to work. If we discarded the rules on that possibility I am afraid we would cut down a good deal here that we ought to put in.

The Chairman. If you strike out that provision about burden of proof it would probably mean that the issue was not there unless it was specially raised. Then that would leave it to the court to say whether under the particular circumstances the facts are within the knowledge of one party and the burden is on him, and so on, and leave it open as to where the burden is. Is that the result of striking that out?

Mr. Lemann. There is a provision here, as I understand it, for general denial. You can come in and say "I generally deny the allegation". We used to be permitted to do that, and we thought we made a great advance in my State when we stopped that practice. You cannot do that any more. You have got to take each paragraph and answer it.

The Chairman. I was only talking about the burden of proof. If we leave the rest in he would not have to prove it unless it was specially raised.

Mr. Lemann. I was addressing myself to what would happen if we took it out in the consideration of the permission of a general denial. If we took out this clause about burden of proof could the defendant again put in a general denial?

Mr. Morgan. He can not put in a general denial. He will have to plead it specially, as provided in lines 86 to 89:

"But if the adverse party desires to raise an issue of such matter he must plead the lack thereof affirmatively as provided in paragraph (d) above, and when such allegation is to the effect that he has not legal existence or capacity he must also allege the proper party to be sued, if any and known to him."

And the burden of proof is provided for in the last sentence. Then the court would have to determine whether or not on that plea the plaintiff would have to prove it or the defendant.

Mr. Lemann. This is a limitation on general denial, is it?

Mr. Morgan. Yes, quite so.

The Chairman. Do you raise the point, or make the motion rather to strike out the last sentence beginning "when legal existence" and ending with "burden of proof", in lines 89 to 91?

Mr. Olney. Yes, I make the motion to strike out that language.

Mr. Dodge. I second the motion.

The Chairman. Is there any further discussion of the motion to strike? If not I will put the question.

Mr. Lemann. I vote to keep it in.

Mr. Dobie. I also vote to keep it in.

The Chairman. Let us put the question and vote by a show of hands. All in favor of striking out that last sentence in the paragraph raise their hands.

Mr. Morgan. Do you mean the last sentence only?

The Chairman. Yes. The sentence is: "When legal existence or capacity has not been put in issue, that party whose legal existence or capacity is in issue shall have the burden of proof".

Those in favor of the motion raise their hands. There are six who voted in favor of striking out the sentence.

Those against the motion raise their hands. There are also six against striking the sentence.

I vote for striking it out.

Mr. Morgan. That makes it unnecessary for me to object to burden of proof, because I was going to do that.

Mr. Donworth. I want to ask Dean Clark in reference to line 88, the language which begins "or capacity he must also allege the proper party to be sued, if any and known to him." After the word "party" was it intentional to leave out the expression "to sue or"?

Mr. Clark. Yes. I think I am not very strong about that. I think that came up in our discussion last night. The idea was that the defendant did not need to say anything about the plaintiff. But he talked about himself. That was the idea. I am not insisting about it. As I say, my recollection is that somebody thought that we ought not to say that the defendant should say who should be the man to

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sue.

Mr. Donworth. All right.

Mr. Pepper. This is just a transcript of the old common law rule that the plea in abatement must give the plaintiff a better writ.

Mr. Clark. Yes.

The Chairman. Is there anything else now in Rule 11 as to substance?

Mr. Dodge. Yes. I should like to move that the words "truthfully and" be stricken out in line 65.

Mr. Clark. I do not think I object to that. You understand that what I am after is not so much the affirmative as to get away from the negative. I was in effect trying to show that all the law requires is "truthfully and unambiguously", and we do not want the other things. Perhaps if you think it protests too much, I do not know that I care. Do you think theyshould not be truthfully stated?

Mr. Dodge. I think it sounds rather naive.

The Chairman. Is there a second to the motion?

Mr. Olney. I second the motion.

(The question being put, the motion was carried.)

Mr. Pepper. I voted no because that refers to the old common law rule that pleadings must be true, and it is a very useful injunction to certain classes of petitioners that pleading is not simply a tennis game where you bat the ball backward and forward, but that you are responsible for each averment you put on the record. I think it is a very wholesome thing.

Mr. Dodge. Quite commonly the allegations in the two sets of pleadings are diamet rically opposed to each other.

Both cannot be truthful.

Mr. Pepper. That is true with respect to prayers for victory.

Mr. Donworth. Is there any precedent for this, I wonder?

Mr. Clark. As Senator Pepper said, that was clearly the common law rule. You will find a whole section in Stephan on Pleading devoted to that. He has a list of maxims of pleadings, and this is one. As to the others, the chief thing that I am after is the doing away with prohibitions against alternative or hypothetical pleadings, and of consistency, and so on. As to all those things there are rules and rules going either way. For example in New York they have the beautiful situation--- for the moment I forget which way it goes--- but I think that allegations in the complaint must be consistent and in the answer they need not be, or perhaps it is the other way around.

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Mr. Morgan. I guess it is the other way around. I guess in the answer you can join as many consistent defenses as you have. That is what you have in Minnesota, at any rate-- consistent defenses -- but they do not know what "consistent" means, actually.

The Chairman. These words "truthfully and" have been stricken out by majority vote. I think the real question comes up under Rule 12, and that is whether we shall abolish all verification . I do not think there is much use -- I agree with Mr. Dodge that it is pretty naive to put in "truthfully". If you are going to have verification, you do not need to say it here. Is there anything else?

Mr. Olney. I have quite a number of things here.

The Chairman. Are they matters of substance?

Mr. Olney. Some of them are. I might call attention to them as I run along, quickly.

In (b) the statement is made that --

"All allegations of claim and defense shall be made by means of a series of numbered paragraphs, each of which shall contain a single statement."

That would mean that every sentence would have to constitute a separate paragraph. It should be "a single statement" or "single factor" or "set of related facts". That is a mere matter of form.

In the third sentence of (b), the statement is not suitable as to a defense. The separate defenses are not stated by counts.

Mr. Clark. I think you are right. We should put in "a separate count or defense".

Mr. Olney. It would also, as this language is put, include separate statements of separate defenses by way of traverse or denial. That is not necessary. The only case where the defenses should be stated separately is in connection with affirmative defenses.

Mr. Clark. I think you are right about that. Goodness knows, I did not want to call for more separation. I was trying to give less chance to fight over it. I think probably the defense matter ought to be taken out and put in a separate sentence.

Mr. Olney. I am just calling attention to these things as I go along.

There is one thing that is perhaps of some importance in (d). It is provided that denial may be made for want of knowledge. If that expression is used, and if it goes no farther than that, it is going to permit a defendant to claim that he has not knowledge in a great many instances where he knows perfectly well what the facts are.

The Chairman. What you want is "knowledge or information sufficient to form a belief".

Mr. Olney. I do, indeed.

The Chairman. That is a stock phrase.

Mr. Olney. That is a stock phrase, and I think it prevents evasive statements.

Mr. Morgan. I made a suggestion about denials here which did not meet with Mr. Clark's approval. I am not insistent upon it, but I do think it would help if we put here:

"Denials must fairly meet the substance of the allegation

denied, and where an allegation is made with a qualification, the truth of some of which the pleader desires to controvert,"--

That ought to be "with qualifications" --

"the truth of some of which the pleader desires to controvert, it shall not be sufficient to deny the allegation generally or as alleged, but so much of it as is true and material shall be stated and only the remainder shall be denied."

That is practically the rule they have in Connecticut, and I must say I think it is valuable if what you want to do is to avoid over-broad denials, because I know our practice in Minnesota was to put in a general denial if there was some adjective or adverb in the case that was not strictly true as stated.

Mr. Lemann. Would this be another limitation on the right of general denial?

Mr. Morgan. Yes.

Mr. Lemann. In other words, the provision now made for general denial would have to be construed by the profession to mean that it was equivalent to a denial of each separate allegation?

Mr. Morgan. Yes.

Mr. Lemann. Is that the general understanding of a general denial in the profession?

Mr. Morgan. What it really does is to put the plaintiff to his proof.

Mr. Lemann. My judgment would be that the profession would interpret leave to put in a general denial as giving you leave to deny it if it was not all so, even though part of it

was so. Perhaps I am wrong about it, but I think the profession will take some education about that phrase if we leave general denial as it is now in.

The Chairman. Have you any suggestions, Mr. Clark?

Mr. Clark. Yes. The reason we did not jump at it, so to speak, was merely that it is a matter of taste, and we did not think there was much added there. There are a good many words added.

The Chairman. I think myself it is pretty important if you have not covered it.

Mr. Clark. I thought we had.

Mr. Morgan. All you say is "must fairly meet the substance of the allegation denied." That is all you say. It does not seem to me that that does it. I could put in a general denial with a perfectly clear conscience under this rule, here, in Connecticut.

The Chairman. If there was an allegation of fact in the paragraph which you knew was not so?

Mr. Morgan. Exactly.

Mr. Dodge. Why do we not strike out the permission to use a general denial?

Mr. Donworth. Then you get into negative pregnants very seriously. I think the greatest deterrent against excessive general denials is the comment that the opposing attorney will make before the court and jury that you have been unfair in your denials. For instance, if the allegation is that on a certain day a man came to the city of New York riding on a white horse, and as a matter of fact you know the horse was black, somebody might say, "I deny that whole allegation." The practice with us is to deny each and every

allegation contained in the third paragraph of the complaint except the defendant admits that Smith came to New York on a certain date.

The Chairman. That is what Mr. Morgan wants.

Mr. Morgan. That is what I want. That was not our practice at all, Judge. Our practice was a general denial.

Mr. Lemann. Would not the abolition of a general denial tend in favor of what you say? Would it not be helpful to abolish general denial to accomplish what you desire?

Mr. Donworth. Our code permits general denials; but the great deterrent is, if you deny too much, you lose in the argument.

Mr. Olney. The difficulty is that frequently the defendant expects to lose his case if you finally get him on trial. He is just going to make it as difficult for you as he can, and he indulges in these general and evasive denials; and in order to be ready, in order to be prepared to go on and get the judgment to which you may be overwhelmingly entitled on the facts, you have to make a lot of preparation and go to a lot of expense and bother in order to prove allegations which you know the defendant really is in no position to contest, and which he will have to admit when he comes to the trial, provided he knows that you are ready to prove them.

Mr. Morgan. If you have the proof.

Mr. Olney. That is the reason I am opposed to these general denials. I have been annoyed beyond words by denials of that character when I knew they were not made in good faith. The defendants had no idea of really contesting the point at all. They just wanted to bother the plaintiff and put him to

expense.

Mr. Clark. You simply cannot stop them in reality, and it seems to me it is really not honest and straightforward to go through some hocus-pocus of trying to prevent it. I think generally what we are trying to do is to state what can be done directly. Now, as a matter of fact, if you took out the words "general denial" I do not believe you would have changed it a bit. As a matter of fact, in our first draft we did not put them in. We put in "denial of each and every allegation not expressly admitted or qualified." That obviously means that you can also deny each and every allegation of the complaint. You cannot stop a defendant from doing that, and to cover it up with some pious admonitions is something that I just do not like, and I know the lawyers do not like it.

I spoke in Oregon some time ago, and some of the lawyers came up and said, "Do not put in any foolishness abolishing the general denial." It seems to me it is foolish. It is unfortunate for a pleader not to be honest, but there are certain cases where he really can make you prove your whole case.

Mr. Dobie. Will not this certificate thing, later, discourage a great deal of that?

Mr. Clark. That is my hope. Mr. Mitchell apparently thinks oaths would be better. I must say I think that is a desecration of the oath; but we will come to that in the next paragraph. The intent, however, as you say, is to do something in the next rule.

Mr. Morgan. I do not think that is going to help you

much. I think Sunderland's stuff, calling for admissions --

Mr. Clark. That helps a good deal. You are right about that.

The Chairman. Is there anything else of substance in Rule 11?

Mr. Olney. I do not know whether this is a matter of substance or not. I think perhaps it is in a way.

In (d), on page 2, it is provided that any defense which will take the other party by surprise should be affirmatively pleaded. I do not think that is the test of affirmative defenses. All affirmative defenses should be affirmatively pleaded in the answer, and the test of an affirmative defense is whether or not it comes within a denial or traverse of the allegations of the complaint. If it does not, then it should be affirmatively pleaded. The element of surprise I think really has nothing to do with it.

Mr. Dobie. Is not that what would surprise a party? The trouble about that, too, Judge, is that there are so many exceptions like payment, etc.

Mr. Olney. A man ought to allege payment if he has paid.

Mr. Dobie. I know it; but you cannot prove, under the general issue, lack of payment unless you plead it specially. That is the general rule of the codes. Even though non-payment is alleged by the plaintiff, a general denial does not raise that issue in most code States. You have to plead payment as an affirmative defense, and prove it.

Mr. Olney. I know; but that, of course, is just a nonsensical ruling by some particular court or in some

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particular jurisdiction.

Mr. Morgan. No, no; that is the general rule, Judge, and it is followed.

Mr. Olney. I have wrestled with it, and I know what the rule is, and we have the rule out in California, for example -- the perfectly absurd rule -- that you have to allege, in your complaint, non-payment.

Mr. Dobie. To be sure.

Mr. Morgan. In almost every State, payment has to be specially pleaded. They took it from the Hilary Rules, if you want to know where they got it, in England.

Mr. Olney. I do not know where they got it, but of course it is no part of a statement of claim at all. It is a negativing of the defense.

Mr. Morgan. Of course; I agree. Mr. Mitchell's father tried to get them to change it in Minnesota after they had slipped it over on him, but he could not do it.

Mr. Olney. But the point I am making is that here we are dealing with general principles. The general principle is that if a matter is not covered, if a defense does not come within a traverse or denial of the allegations of the complaint, it should be affirmatively pleaded and set up. That is the defense.

Mr. Dobie. The only trouble, Judge, is that in applying that test the courts have reached every conclusion it is possible for the human mind to reach. Take assumption of risk, fellow service, and things of that kind, and you will find that the courts have said everything they could possibly say; and I think this enumeration here is not very valuable.

Mr. Olney. I am not objecting to the enumeration, but I am objecting to the principle which is laid down.

Mr. Clark. It is because of the hopeless morass of the present situation that the rule is suggested at all. It comes from England and Connecticut and New York, and this is the New York form.

I am not particularly taken with surprise as such; but I certainly want to get away from the rule Judge Olney suggests, because it is so hopeless. It is perfectly meaningless, and it has caused more trouble than anything else.

The real gist of this rule, of course, is the enumeration. The other things are to state a general formula that the court can apply in cases not covered -- assumption of risk, contributory negligence, and all those things. In Connecticut and New York you do not need to allege anything about contributory negligence, but the burden is on the plaintiff, because it is considered a question of proximate cause. In other places, applying that same general test, you have to allege it specially, or in some places you can prove it under general denial, etc.

Mr. Olney. If you want to cover those special cases, all right. I have no objection to their enumeration; but so far as the principle which covers the matter is concerned, it is not a matter of surprise at all. It is a matter of whether or not it is covered by a denial of the allegations of the complaint.

Mr. Clark. It is because I think that principle is no principle, but a hopeless illusion, that I want to do something to take that away. That is not a principle. It is just a

hopeless set of words. It misleads more than it guides.

As I say, I am not very insistent on surprise as such. I think the real benefit of surprise is that it tries to get away from the rule you have stated.

Mr. Morgan. You have the latter part of it there --

"Would raise issues of fact not arising out of the preceding pleadings"--

Which is the part of the rule which the Judge is insisting upon, the principle. This matter of taking by surprise was used in the Hilary Rules and I suppose in almost every attempt to restate it since. Is not that right, Mr. Sunderland?

Mr. Sunderland. Yes; I think so.

Mr. Olney. If you adopt this principle here, which is new to the law and new to the profession, you are just going to raise up a multitude of other questions.

Mr. Sunderland. This same rule is used in Michigan. It is the rule in Illinois. It seems to me it is a sound principle. Pleadings are really to give information, and not to demonstrate logical dialectics. I think the principle of the defense of confession and avoidance, when applied strictly, results in nothing but a logical game; and the real point is that we want to draw the pleadings in such a way as to give the information to the other party. It seems to me surprise is really the principle upon which this ought to go, rather than conformity to a strict rule of logic.

Mr. Olney. Well, Mr. Sunderland, if you should take this rule as worded here, for example, and some man came in with a defense which was absolutely affirmative in character -- confession and avoidance, for example -- and the plaintiff

objected to it, and he said, "Well, you are not taken by surprise; you knew all along that this was our defense", he would try to avoid the necessity of pleading it, yet it should be pleaded in the very nature of things.

Mr. Morgan. You would get him under the second alternative then; would you not, Judge? --

"Which, if not so pleaded, would be likely to take the adverse party by surprise or would raise issues of fact not arising out of the preceding pleadings."

Mr. Olney. The point I am making, Mr. Morgan, is that the surprise is not the determinating factor.

Mr. Morgan. It is new matter.

Mr. Olney. And it is new matter.

Mr. Dobie. Is it not new matter that surprises?

Mr. Dodge. Not necessarily. Suppose a man is assaulted on a dark night, and thinks he recognizes the defendant, and sues the wrong man, who was not even there. The man pleads the general denial. He knows the plaintiff will be very much surprised when he can prove that he was not there at all. Does he have to plead something affirmatively there?

Mr. Morgan. No; I do not think so.

The Chairman. Do you want to crystalize your positions by any motion?

Mr. Pepper. To bring the matter before the committee, I move that the language in line 41 and following lines be amended so that it will read:

"All matters which show the right of action not to be maintainable which, if not so pleaded, would raise issues of fact not arising out of the preceding pleadings."

That brings up the question, and you can dispose of it one way or the other.

Mr. Clark. May I say that I hope the motion will not prevail, because we are making some change in the law here, and I think it is desirable to tie this up to the new rules that we are getting in the various States; and when we change these formulas that they are trying to develop, we are going off on our own entirely.

The Chairman. You said you were not wedded to the use of the word "surprise". How would you change it to meet Judge Olney's suggestion?

Mr. Clark. Frankly, I would not change it, because this is the formula which is now being developed.

Mr. Dodge. There are a great many cases where, under a general denial, the plaintiff is very much surprised by the defendant's evidence. Is the defendant's evidence going to be ruled against him as not admissible under the pleadings merely because it surprises the plaintiff?

Mr. Clark. You will note that these fears, I think, really ought not to worry us so much. The privilege of amendment is so flexible that he can change at the trial. What this does is an admonition in advance. It gets the fellow to stating more than he otherwise would, and that is what you want.

The Chairman. Change at the trial, and surprise matter, means continuance and costs and all that. I do not think that helps us any.

Mr. Dobie. I think the whole trend along this line has been, like the Hilary Rules, in the way of narrowing the

general denial. I think Mr. Dodge's example is a superb one. In some States, as you of course know, in connection with a plea of not guilty in a criminal case, where you intend to prove an alibi, you have to serve notice on the commonwealth's attorney to that effect.

I think what Mr. Dodge said in his example is very logical; but I think if we keep the words in there with this enumeration, they will have a good effect, and at least will minimize the evil. In all doubtful cases, I think the good pleader pleads it affirmatively, which I think he ought to do.

Mr. Morgan. He does that in Connecticut.

Mr. Sunderland. In case of doubt, you set up the matter. That is the way it actually works.

Mr. Dobie. That is what I tell my students.

Mr. Morgan. That is the way it works in Connecticut; and then, if you do that, they are likely to stick the burden of proof on you. If you plead affirmatively what you do not have to plead, they put the burden of persuasion on you.

Mr. Clark. Yes; but that is only a temporary aberration.

Mr. Morgan. I hope so. In Washington, the judge said that was not inviting error; it was only giving them a chance. (Laughter.)

Mr. Dodge. I second Senator Pepper's motion.

The Chairman. I am not sure it is worded just the way he meant it. Will you state it again?

Mr. Pepper. The motion is to amend lines 41 and subsequent lines so that the rule would read:

"All matters which show the right of action not to be maintainable which, if not so pleaded, would raise issues of

fact not arising out of the preceding pleadings."

The Chairman. How can they raise issues of fact which are not pleaded, which, if pleaded, would raise issues of fact? I do not understand that. I may be confused about it.

Mr. Pepper. As it is now, the language is:

"all matters which show the right of action not to be maintainable which, if not so pleaded, would be likely to take the adverse party by surprise or would raise issues of fact" --

Another way of putting my motion would be simply to strike out:

"would be likely to take the adverse party by surprise or".

The Chairman. Is there a second to that motion?

Mr. Tolman. I second it.

(On a division, there were six affirmative votes.)

The Chairman. Thirteen is an unlucky number.

(The Chairman then called for the negative votes.)

Mr. Donworth. I am voting "no" for the present. I want more light.

The Chairman. I vote "aye." I do not think amendment would help us. If the thing is a matter of surprise, the court will not allow an amendment at the trial. That is one of the conditions.

Mr. Donworth. What bothers me is whether all of these, with possibly some very slight exceptions, are not affirmative matters that require to be pleaded anyway.

Mr. Morgan. Yes; but they are practically all new, I think.

Mr.Donworth. Accord and satisfaction, arbitration and award -- every one of these is affirmative. Assumption of risk -- of course there are two kinds of assumptions of risk. Some do have to be affirmatively pleaded, and some do not; but they give rise to no trouble.

Contributory negligence: Most courts hold that that is an affirmative defense. Discharge in bankruptcy certainly is. Duress is. Estoppel is. Failure of consideration -- well, that might or might not be.

Mr. Morgan. Failure of consideration is.

Mr. Dobie. Lack of consideration may be proved, but under general denial failure of consideration may not be.

Mr.Donworth. It seems to me it is objectionable to use the general expression and then give these examples, because the examples would take care of themselves; but I do not like the idea of requiring a defendant, as Mr. Dodge says, to notify the plaintiff of the denial of fact that is going to defeat his case.

Mr. Olney. Will you repeat that last statement?

Mr. Donworth. I say, I do not like to require a defendant to put in his pleading merely a denial of fact which will defeat the plaintiff's case, purely as a denial, as in the case instanced by Mr. Dodge -- the dark night, etc. If the plaintiff sues the wrong man, he certainly is in hard luck; but I do not think you have to tell the plaintiff's attorney, who is very ingenius, and is suing you for damages-- I do not think you need tell him in advance of the trial that you have ten witnesses to prove that you were somewhere else at that time.

Mr. Olney. That is just the point.

Mr. Dobie. Do you not think, ordinarily, he would go around and say, "It is perfectly foolish to bring this suit. I have ten witnesses who will prove", as some man said, when he was charged with murder, that he was walking his baby up and down, singing to it, and said he was going to prove a "lullaby."? (Laughter.)

Mr. Lemann. I think that is a quite unreal case. The argument which led me to vote to retain this language is the emphasis which may be placed upon removing it. I think you have to have a pretty far-fetched case to justify the argument made by Mr. Dodge. I think it is quite far-fetched; and if I had such a case where I was not even there, was not anywhere around, I should not have any objection, and probably would put in my answer not merely a denial, but say I was not even in town, and I never heard of this plaintiff, and never knew him, because I do not want to fight the case just to get that fellow at a particular disadvantage.

Mr. Morgan. They then will move to strike that out as surplusage.

Mr. Pepper. It is a very real problem in "strike" damage suits, automobile suits, and things like that. If I knew that my client was being sued by a professional negligence lawyer, and I knew that my client was 100 miles away from the place, and was able to prove it, it never would occur to me to tell him in advance of the trial.

The Chairman. He might change the date of the alleged accident.

Mr. Pepper. He might change the date of the alleged accident, or he would have a tail of witnesses there as long as

the East Side of New York.

Mr. Donworth. My thought, on the whole, is -- I do not remember how I voted (laughter) -- that what is an affirmative defense, new matter, is pretty well known, and that so far as giving advance information of what you are going to do under a denial is concerned, it is not necessary, and therefore that these lines might go out.

Mr. Clark. I should be very much distressed, because I must disagree; it is not well known, and it is one of the most fruitful sources of dispute that there are. I felt that this was one of the necessary things to put in.

Mr. Morgan. I certainly agree with the Reporter on that point, because the cases are every which way on contributory negligence, and notwithstanding the Judge's statement they are that way on assumption of risk also, and they do give trouble like the dev il on assumptionof risk.

Mr. Dobie. Judge, I wish you would read some of the cases about fellow service. You talk about logical subtleties! I think Mr. Sunderland will bear me out there. Some of those cases are terribly interesting, but absolute nonsense from a practical standpoint.

Mr. Sunderland. There are hundreds of cases in the books where the sole question is whether the thing was confession and avoidance or not, and you can twist the thing around logically and make it work either way, and you never know what the result is going to be.

Mr. Olney. I agree thoroughly with what has been said here about the difficulties in the past in connection with a number of these defenses; and I think it is wise to mention

them specifically in the rule, and say that they shall be considered affirmative defenses. My objection goes to laying down the principle of taking a man by surprise.

The Chairman. That has been stricken out by vote.

Mr. Pepper. We really have not any motion before us.

Mr. Olney. I thought we were still discussing the question.

Mr. Morgan. The Judge wants to mutilate it still further.

Mr. Donworth. What words have gone out?

The Chairman. The words "would be likely to take the adverse party by surprise, or".

Mr. Lemann. I do not think we took any vote on Mr. Morgan's suggested limitation of denials. I think we sort of got by it. I should like to be recorded as favoring that limitation, and as opposing the permission of general denials.

The Chairman. I thought Mr. Morgan made a suggestion as to form which would include a provision preventing a man from denying a whole paragraph because there was a sentence or two that was wrong. The reporter noted that, and I understood that was acceptable. Did I correctly understand that that was acceptable, or do you want a vote on it?

Mr. Clark. I do not want a vote. My assistant, Mr. Moore, says we have said everything you have; but, if we have not, all right.

The Chairman. I think this rule is going to be so generally recast that --

Mr. Clark. He says we say it shall not be evasive, and what does "evasive" mean?

The Chairman. I thought Mr. Morgan's suggestion was a very good one.

Mr. Clark. All right.

The Chairman. It does not abolish general denials, but it goes a long way toward preventing subterfuge by general denial.

Mr. Pepper. It gets away from the evil of the old traverse, modo et forma. That is really what it does. I think that is pretty important.

Mr. Olney. If you are going on, I should like to call attention to this matter. I do not know whether it is a matter of language or a matter of substance in the reporter's mind; but in Rule (e) -- and I refer to the paragraph which begins at the top of page 3 -- it provides that where a party--

"makes default of appearance, the judgment entered shall not exceed the amount claimed in the demand for judgment, or be different in kind from that prayed for therein."

Now, every judgment by default, whether it is a judgment for want of appearance or not, should be so limited. It should not be confined to judgments for default for want of appearance. A man, for example, may come in and make an appearance to move to dismiss, or something of that sort. He is there in court. His motion is overruled. He is required to answer within a certain length of time, and he defaults. The same rule ought to apply.

Mr. Clark. I want to say that this was chosen with care, and I think it ought to stand.

Let me say, first, that the usual code rule is for lack of answer; and that has caused a multitude of trouble, by

putting it forward to the point of answer. The question has been threshed over a great deal, perhaps more in New York than elsewhere, as to whether you can go ahead and give a good judgment when the defendant has entered, demurred, and fought over the case in that way; and the claim has been made -- it comes up, as it happens, in New York in the cases dealing with law and equity -- that if, as they now put it in a state where distinctions were supposed to be abolished 85 years ago, you claim an equitable remedy on a statement of a legal cause, and you demur, the case has to be thrown out because of this rule.

I want to put it back so that you do not get into that problem. Now, would it be sufficient if you made it on any default? How is that going to hit the case of the demurrer where they are just going to fight on demurrer and then back out? Where a party is in court, and has submitted himself to its jurisdiction, why should he not take the proper judgment to settle the dispute? Why should he be able to come in and trifle with the court, go a little way and then back out?

Mr. Olney. Put it the other way, Dean Clark. Suppose a suit is brought against a man, and certain relief is asked, and he comes in and says, "Upon the facts stated there is no cause of action against me." By his demurrer he admits that those facts are true. Then the court overrules the demurrer; and he says, "Very well"; that is the end of it. Why should the plaintiff, under those circumstances, be entitled to have against him relief that he does not seek in his complaint?

Mr. Clark. Because the theory is that a plaintiff has a

just claim against him. The judgment should not be entered if he has not; and why should he be thrown out and have to bring another suit for it? It is the general theory of trying to get matters in issue between the parties disposed of as quickly as you can without the formality of throwing a man out to start over again.

Mr. Olney. If the man wants any further relief than that which he asks for under those circumstances, he certainly ought to plead it and ask for it.

Mr. Morgan. May I ask, Mr. Chairman, whether Dean Clark intends to give him whatever relief he is entitled to without any notice of an amendment in the prayer for relief to the other party?

Mr. Clark. Yes.

Mr. Morgan. Your defendant has appeared, now; and if you are going to change your prayer for relief, should you not give him notice by amendment?

Mr. Olney. That is exactly the point I have in mind.

Mr. Clark. How important are you going to make the prayer for relief? You do not make it so important. The usual code theory is, now --

Mr. Morgan. Of course that is very true, as to whether or not it states a cause of action. Most of the codes say the prayer for relief is no part of the complaint when it is attacked by demurrer for insufficient facts; but what about Judge Olney's notion that the defendant ought to be allowed to rest with the assurance that the plaintiff is not going to try to get any more unless he has notice of it? He has made an appearance, so ordinarily he would be entitled to

notice of further proceedings in the case; would he not?

Mr. Olney. You are running directly up against the question of due process of law. I should question very seriously whether a judgment rendered in that way would be due process of law.

Mr. Clark. Why not?

Mr. Olney. Because the party has not been notified of the relief which is sought against him.

The Chairman. I do not quite understand why you want to grant judgment by default for more than the relief asked.

Mr. Morgan. It might be different, Mr. Mitchell. That is what Mr. Clark is saying. He might ask for equitable relief and not be entitled to it. The defendant has defaulted, and the plaintiff is entitled to legal relief in the particular case.

Mr. Clark. The difficulty in these cases is that this is usually a perfectly theoretical, technical defense. It is one way of attempting to hang the plaintiff because he has not gone on the correct theory of the action. I do not think there is much possibility of any harm to the defendant, but there is a good deal of opportunity for the defendant to catch the plaintiff by the hip because the plaintiff's lawyer has not stated the case quite the way the judge thinks it should be stated. That is the way the cases will all come on.

Mr. Dobie. Would you consent to a limitation which is in a number of the codes, that where money is asked for it shall not exceed that? The reason for that is this: There are a great many of these cases in the Federal courts where a man has a $5,000 life insurance policy. The question comes up

whether or not he is going into the Federal courts. He sues for $2,990. If he can recover the $5,000 it is going to give the courts a lot of trouble. A lot of codes have that provision, that when you ask for money you cannot get more than you ask for.

Mr. Clark. I am willing to put in such a provision. I do not think it is necessary myself, but if there is fear about it I will put it in. Of course under these rules any one having a general appearance is entitled to notice. Even the entry of a default can usually be reopened. Even that is not a terribly serious thing.

The Chairman. If a man has a complaint, and asks for certain relief, and the other man is satisfied to let it go, and does not want to fight that relief, and then there is a default, if a man wants to switch and ask for something more, why should he not be required, as Mr. Morgan suggests, to amend his complaint? And that will require notice to a man who has appeared.

Mr. Dodge. Why should this paragraph be in here in this section on pleading? It is all dealt with again, is it not, in Rule A-18 on judgments by default?

Mr. Clark. This question usually comes up in connection with the matter which is stated with reference to complaints. As to the question of place, I do not know. We put it in here because we put in material needed with the complaint.

Mr. Dodge. You deal with the same matter over again in Rule A-18, where I think it seems properly to belong.

The Chairman. I do not see any logical difference between a man who defaulted and one who made a temporary

appearance and then withdrew -- not a particle. There is just as much reason for saying he should have defaulted entirely and have the relief amended without notice as there is after you come in. The essential thing underlying it all is notice to the defendant; and if you are going to say you can get an amended relief or a different relief from who you ask for in any default, what difference does it make whether the man has pleaded or whether he has not? I do not see any logical distinction. I think there is the same element of lack of notice in it where the man has not appeared at all as where he has appeared, or vice versa.

Mr. Dobie. I think the idea is that a man rather makes that decision at the start. Morgan brings suit against me for $500 in connection with the old Dobie estate, Black Acre. I am perfectly willing to let him have $500. I am going to Europe, and he can have his $500; and I go to Europe on that idea, and do not come into the suit at all. Then he turns around and wants me to make specific conveyance. I think there is an obvious injustice there. I will not say the distinction is absolutely sound, but I think that is the idea. The man makes up his mind whether he is going to fight the case at all. If he does not fight it at all, he is limited to what he asks for.

The Chairman. Suppose he goes in on some defense he thinks he has, and is beaten on it, and then withdraws, and there is a complete default for want of answer, demurrer overruled and time granted to answer, and he does not come in, and then he goes to Europe on that notice that all the plaintiff wants is a $500 judgment: Ought he to be in any different position?

Mr. Dobie. I am not sure it is sound, but I think that places it under this rule. I should not object to changing it.

Mr. Olney. I think it has to be changed. You cannot recover judgment against a man without a trial upon a mere notice to him. The recovery of any judgment by default is a recovery of a judgment upon notice to him of what you want. You cannot recover a judgment different from what you have notified him you are seeking. That is not due process of law, in my judgment.

Mr. Clark. Of course some States have this, and the question has not come up. I do not think that contention is sound as to due process. The general theory of codes is, of course, that you state the facts... that has been the beautiful ideal -- and not the law, and therefore you are bound by your statement of facts, and you are not bound by your theories of the law. That was the theory of not requiring your prayer for relief to be amended. There are a few jurisdictions, of which Connecticut is one, in which you always have to amend your prayer for relief, too; but that is not the usual code theory.

Mr. Olney. My recollection is -- I would not be certain of it, because I have not looked it up for a great many years -- that some of the courts have held that you cannot have relief against a man on a default for something that you do not ask for in the complaint, because it would not constitute due process of law. He has had no notice of what is sought. If that is true -- and that is my recollection of it -- it would apply whether the default was for want of appearance or a

default subsequently. The same principle applies right down the line.

Mr. Dobie. The idea is, though, I think, as the Reporter said, that when you have had notice of this suit, and the facts are stated, and all like that, you are charged with notice that he may have against you any relief that is justified by those facts. I do not agree with you on the "due process" part at all; but I do think there is something in what you say, and I am perfectly willing to accept an amendment that the relief shall be limited to that asked for in any kind of default.

Mr. Olney. I make that motion.

Mr. Loftin. I second the motion.

Mr. Donworth. I should like to ask Dean Clark if he has retained in these rules -- I do not remember -- the common provision that you may ask general relief; or is that prohibited? I mean, for "such other and further relief as may be just and proper in the premises".

Mr. Clark. There is nothing specifically stated, but it was assumed that you could. I do not know anything that would stop you. We have not stated it affirmatively.

Mr. Morgan. I do not think that suggestion would help this at all, because, as I remember, the courts have said that that prayer for general and other relief did not make any difference in this connection.

The Chairman. If there is no further discussion, I will put the question on Mr. Olney's motion.

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

Mr. Olney. I am not through yet, Mr. Chairman, I am sorry to say.

In subdivision (f) it is stated that the party may plead inconsistent claims. Now, I am not certain that I know what the Reporter had in mind there. Of course it is perfectly proper for a defendant to plead inconsistent defenses. He may plead them even though they are inconsistent in the facts stated; but when it comes to pleading, this expression, as the rule is worded, would cover complaints as well.

Now, a man should be permitted, as the Reporter has in mind here, to plead facts in the alternative when he does not know what the facts are; but he should not be permitted in his complaint to allege any inconsistent facts, to make a claim that is inconsistent in that respect. He should either state the facts, which must be consistent, or, if he does not know what the facts are, he may state them in the alternative; but the rule that applies in regard to pleading inconsistent defenses is different from the rule that applies, or should apply, to the pleading in a complaint.

Mr. Clark. This is another hopeless morass; and I must say that I think it would be very unfortunate indeed to continue this thing which appears in a few of the code States -- only a few. It has been read in in some others.

If the only requirement is the one that you should state the facts truly, that is in the way of admonition. The trouble with going beyond, and saying they shall not be inconsistent, is that you cannot tell what inconsistent allegations are; and that is literally true. You cannot. It is a difference in your legal interpretation of the

inferences you draw, and it has just been, really, a hopeless morass. This is one of the most troublesome small points there are. Of course at common law you could do it. You could plead inconsistent counts. There was not anything to prevent you. There is not any reason here why you should not, so long as you are not misstating -- so long, in other words, as you are pleading truthfully -- why you should not make your inconsistent claims, or why the court should stop and try to work out what are consistent and what are not.

Mr. Olney. Dean Clark, I quite agree with that. What I was objecting to -- I did not know how far you intended to go, but if that is what you have in mind I have no objection to it, provided the rule is clearly stated so that it does not permit the pleading of inconsistent facts as true.

Mr. Clark. That, of course, is why I put in the provision that the facts must be stated truthfully. I think that is the real requirement, and not any requirement of consistency.

Mr. Morgan. I object to both those things. I do not think it is possible to talk about pleading truthfully. Nobody knows what the truth is with reference to these matters in advance. The reason why the common law allowed inconsistent pleadings, the reason why most of the codes allow inconsistent pleadings, is because you cannot put on the pleader or on the party the burden of showing in advance what the particular facts are with reference to certain matters. The investigation is such, the body of facts, the evidence, is such that the jury, the body to determine the facts, or the trier -- whether it is court or jury -- might draw an inference one way or the other with reference to the matter;

and I think it is nonsense to talk about pleading truthfully. I think it is too great a limitation to talk about consistent pleadings. Of course the common law allows pleadings as inconsistent as you might want in the declaration with several counts, because the theory of that was that each count was an absolutely separate and independent lawsuit; and then after the Statute of Anne, when they allowed several defenses to come in to each count, they gradually came to allow those to be inconsistent.

It seems to me if you had a case where the question arose such as in that Minnesota case, where it might have occurred in the complaint, I suppose, as well as in an answer, where the defendant's first defense was that the assured committed suicide, and the second offense was that the beneficiary murdered him -- there are cases where the facts are absolutely inconsistent; there is no question about that; but the body of evidence was such that either one or any one of three conclusions might have been drawn; namely, that he committed suicide, that the beneficiary murdered him, or that somebody shot him from outside the basement window.

It seems to me it is nonsense to have a system of pleading that does not allow you to state those things so that the trier of fact at the end can find out what the facts were from your evidence. I do not think you can put on the pleader the burden of determining these questions in advance.

The Chairman. The burden of determining in advance what the jury is going to find at the trial.

Mr. Morgan. Exactly.

Mr. Dobie. Some of the cases say that you cannot prove justification in a libel suit unless you admit that you published the libel. To my mind, it is perfectly nonsensical.

Suppose I allege that Judge Olney has published a libel on me, charging that I have been in Leavenworth Penitentiary three times. As a matter of fact, the judge has not published any such thing as that, and there is some question about mistaken identity. There is no reason in the world why he should not be able to set up that he did not publish the libel, and that I was in Leavenworth Penitentiary three times.

Mr. Olney. There is no question for a minute about inconsistent defenses.

The Chairman. Then why do you draw a distinction? If you allow inconsistency in an answer, I cannot for the life of me see why you should not allow it in a complaint.

Mr. Olney. It sets the claim up in the first instance in connection with the defense of payment. I allege that I did not make the note, but, if I did, that I paid it.

Mr. Morgan. That is not inconsistent.

Mr. Dobie. Both of those may be true, Judge.

Mr. Clark. There has been a recent sad history in New York in connection with this very thing. In 1925, in a case much discussed and much criticized, which came up under the new joinder of parties provision, the New York Court of Appeals held that the claim of death of a child due to the negligence of a property owner in maintaining an iron fence was inconsistent with claim for such death as due to mal-practice of the attending physician. The result of it was to

take the teeth out of the new joinder provision. That is what it really did; and that went on until they had to correct it by the recent statute of 1935 in New York.

The Chairman. Do you want to raise this question by a motion to forbid inconsistencies in the complaint, and get a vote on it?

Mr. Olney. It is pretty hard to frame a rule of that kind. I have not endeavored to do so.

The Chairman. I do not mean the words of it, but the substance of it. Your point is that you want to permit inconsistencies in the answer but not in the complaint. If you make a motion that will raise that broad question, we can vote on that.

Mr. Olney. I will put the motion merely in this way -- that it should not be permitted in a complaint to allege matters that are essentially inconsistent as a matter of fact.

Mr. Dodge. Suppose you (1) allege intentional injury; can you (2) allege negligent injury? Are not those inconsistent?

Mr. Morgan. It has been held both ways. In Missouri they held first that they were inconsistent, and therefore they could not be joined. Then they saw what a mess they got into, and they held they were not inconsistent. Wisconsin holds that they are inconsistent but may be joined.

The Chairman. Do I hear any second?

(The motion was not seconded.)

Mr. Olney. That is the answer. (Laughter.)

The Chairman. Is there anything more?

Mr. Donworth. On Rule 11?

The Chairman. We are still on Rule 11. Is there anything more of substance?

Mr. Clark. Let me say, while the members of the Committee are looking over their notes generally, that what I think I had better do, in the line of the direction, is to split up this rule. Of course I suppose I should split it any_way, in view of the vote already passed; but I think perhaps it would be more acceptable if it were split still more.

I visualize, now, at least four rules, and perhaps more. That is, I think there is a little feeling that there is too much in one rule, and you would like it better if I made some separations. So that is the general feeling I have now, trying to follow out your general directions.

Mr. Olney. I have some other matters, Mr. Chairman.

In (g) there is something that I do not understand. It says:

"Averments in a pleading, which must be pleaded to by these rules, other than those as to the amount of damage, shall be deemed admitted when not denied."

I do not see why the amount of damage should not be admitted if it is not denied. This is entirely different from not taking the amount of damages in a personal injury suit, for example, which would be admitted in case of a default, and requiring the plaintiff to prove the amount of damage to satisfy the court in a case of default as to the amount of damages claimed; but where it comes to a pleading between parties, and the parties are taking issue, I do not

see why the amount of damages should not be deemed admitted if it is not denied.

The Chairman. What is the reason for that?

Mr. Clark. I do not know. I am pretty sure this is not mine. I was trying to think where it comes from.

Mr. Lemann. The English rule says damages are always denied. I just happened to run across that.

Mr. Morgan. That is the ordinary rule, just as on default.

Mr. Clark. I think I should be rather with Judge Olney on that; but somebody wanted it in, and here it is.

Mr. Olney. I do not see why it should be the rule. I cannot make out at all.

Mr. Pepper. I move that we strike it out.

Mr. Donworth. That motion would mean that if there were a damage suit for $50,000, and the defendant made default, the plaintiff would recover $50,000.

Mr. Morgan. Why not?

Mr. Olney. No; that is just it -- if they are pleaded. This refers to pleadings.

The Chairman. The plaintiff has to go to proof under our rules; does he not?

Mr. Donworth. Not if this is stricken out.

Mr. Olney. I am not referring to the case of taking judgment by default at all.

Mr. Pepper. This is a question of what the defendant must deny in pleading; and Judge Olney points out that there ought to be a denial of the act dammum; and as the Reporter says he thinks so, too, I move to strike out the provision

in the rule.

Mr. Morgan. May I ask what is the theory of allowing a judgment by default for want of answer except that it is an admission of the allegations of the complaint?

Mr. Olney. The theory is the same, but it is so subject to abuse in that respect that they make rather an exception to the rule; but when it comes to a pleading, suppose it is a matter of pleading special damages. Special damages are pleaded, and the amount is pleaded. The defendant ought to be required to deny it or admit it, one or the other.

The Chairman. The equity rule was even broader than this -- Rule 30:

"Averments other than those of value or amount or damage are not deemed confessed."

The drafting committee took the back trail on value, and struck that out. In an allegation of value it is admitted if not denied; but they kept in the equity rule that the amount of damage is deemed denied.

Mr. Clark. In the original draft, in T.D. I, we had the equity rule copied exactly; and there was discussion last time, and we took out "value" at the meeting in November.

The Chairman. There is a motion and a second.

Mr. Donworth. Mr. Lemann requests me to read this from the English Rules of Practice:

"No denial or defense shall be necessary as to damages claimed, or their amount; but they shall be deemed to be put in issue in all cases unless expressly admitted."

The Chairman. They have equity in England.

Mr. Lemann. If you change this rule as proposed, you are departing from the equity rules and doing something different fromthe English rules.

The Chairman. All in favor of the motion to strike out the exception of damage say "aye". (A pause:) Those opposed say "no". (A pause.)

(The motion was rejected.)

The Chairman. Is there anything else on Rule 11?

Mr. Olney. There are certain suggestions here which I should like to make to the Reporter.

As the rule is now worded, when the performance of a condition precedent is alleged, it would be sufficient to deny generally that performance of that condition precedent had been had. I think the rule should go so far as to require the person who is pleading non-performance of the condition precedent to specify the particulars in which it has not been performed.

The Chairman. It says:

"A denial of the allegation shall distinctly specify the condition precedent, the performance or occurrence of which is contested."

Your point is that he distinctly specifies the condition, but he does not distinctly specify the particulars in which it has not been performed?

Mr. Olney. Yes. It is just a suggestion.

The Chairman. That is a matter of form. Note that.

Mr. Olney. The same thing in regard to pleading a judgment or order. It is provided simply that it shall be pleaded that it has been given or made. Now, usually the

code requires, for example, that it be pleaded that it has been duly given or made; and the difference is, in some respects, quite important, because frequently the order is made; there is no possibility of denying that. The whole dispute is over whether it has been duly made; and there, also, the defendant should be required to state the particulars, the reasons or the particulars in which he objects to the judgment or order being effective.

The Chairman. Are you referring to subdivision (4)? That relates to the man pleading the judgment. It does not relate to the man who is assailing it.

Mr. Olney. It is for that very reason that I am suggesting that the rule be a little amplified to provide that the allegation should be that it has been duly made and given, and a party denying that allegation should be required to state the particulars. My only point is that as it is worded now, this will give an opportunity for evasive denials.

Mr. Clark. Is there any general judgment on that point? I think that is a little new. I do not know but that it is all right. I think we have put in the more usual provision, but I am indifferent. Are there any suggestions from others?

The Chairman. It seems to me rather unnecessary. If a man pleads in his complaint that a judgment was rendered, and you come to answer, you do not deny that the judgment was rendered, perhaps, but you admit that there was such a judgment rendered, but claim that it was defective for this reason or another. That is the natural way it would work out. It seems to me your suggestion may not be necessary.

Mr. Olney. He may admit that the judgment has been

rendered, and then he may come to the trial and contest it on the ground that while it was rendered and given, there was no jurisdiction, for example, or authority to make it.

Mr. Morgan. Does he not have to plead that specially everywhere, Judge?

Mr. Olney. What I want to do is to make this rule so clear that there can be no question but that he will be compelled to plead that.

Mr. Morgan. I supposed he was compelled to do it unless the judgment was void on its face.

Mr. Olney. Yes; exactly. He would be compelled to plead it.

That is the suggestion on that line.

In Rule 11, on page 4, in item (5), the language is:

"In pleading the balance due upon an account or upon an instrument for the payment of money, it is not necessary that the pleader set forth the items of account."

Why is it limited to an instrument for the payment of money? Why should it not be any obligation for the payment of money?

Mr. Morgan. You mean any written obligation?

Mr. Olney. Whether written or not. What difference does it make whether the obligation is written or not?

Mr. Morgan. He is talking about the last part of it, I suppose. You have to furnish a copy of the instrument. I suppose that is the reason; is it not?

Mr. Olney. If it depends upon a copy of the instrument, he should furnish it; but in any case it is a good rule of pleading, it seems to me, that he ought not to be

called upon to furnish the items of an account unless the other party demands them.

Mr. Morgan. I should think that is true.

Mr. Clark. I do not believe that is objectionable. Why not have it read:

"In pleading the balance due upon an account or upon an instrument for the payment of money, it is not necessary that the pleader set forth the items of account; but he must furnish such items or copy of the written instrument, if any"?

Mr. Morgan. That is O.K.

Mr. Donworth. The code provision goes farther than this in liberality, and it seems to me it is good. It refers to an instrument in writing, whether it was for the payment of money, or conveyance of land, or what it is. It says:

"It shall not be necessary for a party to set forth in a pleading a copy of the instrument of writing, or the items of an account therein alleged; but unless he file a verified copy thereof with such pleadings, and serve the same on the adverse party, he shall, within ten days after a demand thereof in writing, deliver to the adverse party a copy of such instrument of writing, or the items of an account, verified by his own oath, or that of his agent or attorney, to the effect that he believes it to be true."

That is section 284, "Pleading Written Instruments and Accounts -- Bill of Particulars."

It seems to me we should excuse the plaintiff, where he pleads an agreement by legal effect, from setting forth in Haec verba. So I think that is too narrow in limiting it

to instruments for the payment of money.

Mr. Clark. Again, I have not any great feeling that way. I will say that as to pleading written contracts generally there has been some difference of opinion in the courts. Some think you ought to state it according to legal effect, and some according to exact words. I have been a little in favor of leaving that more or less to the option of the pleader, and then, of course, on Mr. Sunderland's provision, you can show him up whenever you want to. I did not feel that it was very necessary to go further here.

Mr. Morgan. You can frequently save a lot by just pleading according to legal effect.

Mr. Clark. When it is very long.

Mr. Morgan. Yes.

Mr. Clark. Suppose it is one of these bonds that the New York lawyers draw now -- debentures, etc.

Mr. Donworth. Or an insurance policy.

Mr. Morgan. Yes; the way they did at common law.

Mr. Olney. To bring this matter to a head, I move that the word "written" be inserted before "instrument", and that the words be added "or upon an obligation for the payment of money", so that it will read:

"Or upon a written instrument for the payment of money, or upon an obligation for the payment of money."

Mr. Donworth. Is there any difference?

Mr. Olney. Yes. You may have an obligation which does not depend on a written instrument at all. I am amplifying the rule.

The Chairman. An oral promise would be an obligation;

would it not?

Mr. Olney. Yes.

Mr. Clark. He wants the items of account on that, too. I should think that is all right.

Mr. Cherry. Suppose you strike out "upon an instrument", Judge -- those three words?

Mr. Donworth. I think this general provision of the code, dispensing with the necessity of setting up a copy of an instrument in writing, is a good one. Then the code provision I have read gives to the plaintiff the option either to set it out in full, which he may do by exhibit attached, or in the body, or he may state what he conceives to be the legal effect. If the adverse party wants a full copy, he may demand it.

The Chairman. That is a broad rule. It is not limited to actions for account.

Mr. Donworth. That is true.

The Chairman. Why is not that the way to handle that, instead of limiting it to the paragraph which relates to balances due on an account? Why do you not have a general provision about the matter of written instruments, like the one Mr. Donworth has just read?

Mr. Clark. I have no feeling either way.

The Chairman. Have you any provision elsewhere about the manner of pleading written instruments, or is this the only one?

Mr. Clark. This is the only one.

The Chairman. And this is limited to cases where you are suing for a balance, pleading a balance due upon account

or upon an instrument for the payment of money. It is limited to a special class of cases, and you have made no provision for pleading instruments or pleading generally in contracts.

Mr. Clark. Of course what we have done is to leave that open generally. The pleader may plead it as he sees fit. We just have not limited the pleading either way.

The Chairman. I see. Well, if you have left it open generally, then Mr. Cherry's motion would be all right, to make no reference here to written instruments.

Mr. Donworth. Or to items of account, if the whole thing is open. In other words, I do not see the advantage of picking out items of account and giving them special freedom of action, if freedom of action is implied in all these points.

Mr. Morgan. Mr. Chairman, did the Reporter want to make a special provision for requiring the furnishing of copy of an instrument?

Mr. Clark. I should just as soon leave it out.

Mr. Morgan. The whole business?

Mr. Clark. Either leave out the whole business, or out leave anything except account.

Mr. Olney. I think the rule, as a matter of fact, is a pretty salutary one. Wherever a man is suing for an amount of money which is really a balance, he ought to be permitted to allege the balance; and if the other party wants to know how that balance is made up he ought to ask for the statement, without requiring the pleader to plead all the items which make up that balance.

The Chairman. Mr. Cherry suggested -- to make a formal motion -- that paragraph (5) of Rule 11, page 4, be amended by striking out the reference to an instrument, and limiting it to the balances on account, making it read:

"it is not necessary that the pleader set forth the items of account; but he must furnish such items within five days after written demand upon him."

What do you think about that? Do you want a vote on that?

Mr. Dodge. It does not read right:

"In pleading the balance due upon an account or for the payment of money" --

A balance due for payment of money:

The Chairman. No; I did not attempt to state the verbiage. I just tried to state Mr. Cherry's suggestion that we limit paragraph (5) to suits for balance due upon account, and make the necessary changes.

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

Mr. Donworth. Then, as I understand, the Reporter is opposed to giving the defendant the right to demand a copy of a written instrument where it is alleged only by legal effect.

The Chairman. That is covered by discovery; is it not?

Mr. Clark. I cannot say that I am so much opposed to it. I think it is unnecessary. Do you not cover it sufficiently?

Mr. Morgan. Yes; if he does not demand a copy.

Mr. Sunderland. In a way, it is covered through discovery, of course.

Mr. Morgan. Have you not a provision for a demand for

instruments?

Mr. Lemann. Would a bill of particulars cover it?

Mr. Sunderland. Yes; it would come in there.

Mr. Donworth. I think we are proceeding outside the line of pleadings.

Mr. Morgan. Quite true. This is, too, because it is a notice.

Mr. Pepper. Mr. Chairman, I have no disposition to question what has been done; but is it not practical experience that wherever a written instrument of any sort is the basis of the plaintiff's claim, or essential to it, unless copy is annexed there will be a motion for a bill of particulars? In other words, are we not simply inviting dilatory motions by failure to make a general provision for the inclusion of such documents without much limitation as to the character of the case?

The Chairman. In New York you do not have to set out a document. You simply allege generally what it is, and say you will supply the document at the trial; and it is common practice.

Mr. Clark. Of course I think, Senator Pepper, that by putting in a rule you are going to invite the motion. You say you will not put it in unless there is a motion. It may be impliedly invited, but it is not directly invited.

Mr. Pepper. Quite true.

Mr. Donworth. This code provision which I read is not a motion at all. There is no motion at all. You do not go to the court. It is a demand. He may serve a demand, and then within ten days he must be furnished with what he demands

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unless the court extends the time, as it sometimes does.
It does not go to the court unless somebody wants more time.

Carlson
file
12 noon

Mr. Clark. I think that that is not the usual code provision. In fact most codes do not contain any provision such as that. Quite a number of codes--- not the majority--- contain a provision that where the action is founded upon an instrument for the payment of money you may plead by simply filing a copy. All these things can be covered. It is a question [illegible] in view of the differences in the codes now and the real feeling that I have that it is not very necessary, whether we want to try to reconcile differences in the provisions.

Mr. Pepper. I was merely asking for information. I do not make any motion. I did not mean to do that.

The Chairman. Is there anything else?

Mr. Tolman. Yes, Mr. Chairman. I should like to have the Reporter explain to me lines 112 and 113.

Mr. Clark. On that the general rule coming from the common law is that allegations of time and place must be laid, but need not be proved as laid. Therefore it is impossible--- or it was as common law--- to test the sufficiency of a pleading, notably when the statute was involved in any way on the face of the pleading, because you could allege one time and prove an entirely different time. This is just an attempt to clear up that little point--- perhaps not very important, but to get it so that you can raise the question of the statute of limitations on the pleadings.

Mr. Dobie. Some of it came about by reason of that nonsensical mess with reference to venue; that you could allege that a certain thing took place on a ship in the Atlantic Ocean, namely in the middle of Soho Square in London.

Mr. Clark. Yes.

Mr. Tolman. The question is whether your allegation is "on or about" or "to wit". This does not require you to allege with certainty the particular days in every case, does it?

Mr. Clark. I think you are right so far as that goes, that is that if the plaintiff is unwilling to be tied down you can not tie him down.

Mr. Morgan. In some States courts will, upon demurrer, take judicial notice for example of the fact that a contract was made on Sunday and is void. Under some codes if you demur by reason of insufficient facts, the court will take judicial notice that the contract is made on a Sunday, if that be the fact, and holds the contract bad. That is done under the Iowa code, for example. Other courts will not take judicial notice of such a fact and hold the contract bad. They will take judicial notice, but they say that the date does not have to be proved as alleged, just as at common law. So I suppose this language will clear up a dispute on that matter .

Mr. Clark. Mr. Tolman went further and said: Suppose the plaintiff is unwilling to tie himself down; that he alleges that it was made "on or about". I said I did not see how we can tie a plaintiff down when he is unwilling to be tied under the rules.

The Chairman. We will pass on to Rule 12.

Mr. Donworth. Before we leave Rule 11 I wish to make an observation, not in any flippant sense at all, but in all seriousness. I notice throughout Rule 11 in various places

requirements for "facts" to be stated. For instance under (f) there is the provision: "A party in doubt as to which of two or more statements of facts is true" and so forth. And then in paragraph (2) on page 4 we have the language: "In all allegations of fraud or mistake, the facts must be stated" and so forth.

The observation I wish to make is that when we come to the ultimate preparation of the rules we may conclude that the word "facts" or its equivalent is absolutely necessary. If there are numerous decisions that throw the meaning of the word "facts" into vague doubt so that it means nothing, then these minutiae here must fall as insufficient equally with the main case. So I hope that this practical experience we are having here will lead, at a later date perhaps, to a reconsideration of the fact on "facts", but I do not wish to delay any longer on the rule.

Mr. Clark. I ought to say this much as a fact. The "facts" might easily be taken out by circumlocution here, but it did not seem to me important enough. These are more admonitory statements. I do not think that the two do go together.

The Chairman. You do not think that the tail goes with the hide, do you?

Mr. Clark. No I do not.

The Chairman. I do not either.

Mr. Morgan. I thought it was a good common law principle.

RULE 12. SIGNING OF PLEADINGS.

The Chairman. We will now take up Rule 12.

Mr. Clark. Let me say that that deals generally with verification, which is the chief point.

The Chairman. I have not raised any serious point about verification. I just mentioned it in my notes. What I heard here this morning made me think that most of the experts on the subject do not have anything on verification. I do not want to take up much time with that.

Mr. Morgan. Did you ever try to cross examine in Minnesota on verification, Mr. Mitchell?

The Chairman. I have won many lawsuits before a jury by flaunting a man's answer in his face with a verification. "You have not got a verification." "Well," he would say, "I did not tell my lawyer that. He wrote it down in his own way". From a practical trial standpoint before a jury a verification is a very useful thing. They always are in a strike suit and so on where a man will back away from a perjury prosecution if he is forced to it. As a practical matter I have seen many advantages in verification in that kind of a case where there is perjury in strike suits and things of that kind. As a matter of philosophical rules under pleadings I concede all you say about it. I am looking at it from simply the point of view of roustabout work in a trial court.

Mr. Morgan. My experience is just the other way. The question will be put "Is that your signature"? "Yes". "Well, what did you mean by it". The witness would say "My lawyer told me to sign it, that is all." That is as far

as I ever got.

The Chairman. Unless somebody else wants to raise a point on it I am willing to let it go.

Mr. Pepper. May I inquire, Mr. Chairman, concerning the language in line 10 of Rule 12. What is it for which the attorney may be held in contempt of court? Is it wilful violation? Does that mean wilful violation of the requirement that he must sign the pleading? That is the ultimate duty that is enjoined.

Mr. Clark. Of course it is supposed to be more than that.

Mr. Pepper. That is what I thought. I donot think it says more really.

Mr. Clark. I think you are right about that. Of course Mr. Mitchell raised the same question about the meaning of the words "thus certified".

The Chairman. I asked what was meant by the phrase "If the pleading is not as thus certified".

Mr. Clark. I think we ought to specify a little more there.

Mr. Pepper. I think so. May I suggest that the Reporter be requested to consider that point?

The Chairman. Yes. There is an equity rule about verifications limited to special relief. It says "If special relief pending the suit is desired the bill should be verified by the oath of the plaintiff or someone having knowledge of the facts." That is a question of converting it into an affidavit, I suppose.

Mr. Morgan. Yes.

Mr. Clark. I thought not. Because in connection with

injunctions, all that is covered. I really hated to put anything in here which I did not know how far it went.

Mr. Dodge. Is this the only place where the clause "except where otherwise specified" is in the rules here? Is it required unless otherwise specified?

Mr. Clark. No, absolutely not. It is not required very much, but it is required in cases of default too.

Mr. Lemann. What do you mean by cases in default? How do you know when you file a bill that there is going to be a default. I do not know that I understand the explanation.

Mr. Clark. The case of the shareholder's action in the T. V. A. case.

The Chairman. Do you mean that the rule provides that in a shareholder's action the bill of complaint, and demands on directors, and so on, have to be verified? Is there a special rule on that?

Mr. Clark. Yes. We did not dare touch that.

The Chairman. Have you a rule to that effect?

Mr. Clark. Rule 18. That is one we did not dare touch.

Mr. Lemann. Take the case of an application for a receivership pendente lite. I have always understood that such application had to be verified under the equity rules.

Mr. Clark. We did not touch that rule. The question raised by some of you is as to whether we should not have some rule on receiverships, but we are just blank on that.

Mr. Donworth. I suppose in a case involving a receivership the court would insist on an affidavit--- not a verification of a complaint, but a positive affidavit stating facts,

not on belief, but facts based on knowledge.

Mr. Clark. I suppose so. There is another case too, Mr. Lemann. That is the suit under the Tucker act. We just took that out. That statute says the petition must be verified.

Mr. Lemann. That is the suit against the United States that may be brought in district courts.

Mr. Dobie. Suits involving up to $10,000. They require a removal petition to be verified now in such suits.

Mr. Lemann. Is that $10,000 limit still in effect in connection with internal revenue matters?

Mr. Dobie. I do not think it is. I think you can sue for more.

The Chairman. Is there anything more on Rule 12? If not, we will pass to Rule 13.

RULE 13. DEFENSES--- HOW PRESENTED (a).

DEFENSES AS TO SERVICE OF PROCESS, VENUE, AND LACK OF THE COURT'S JURISDICTION.

Mr. Donworth. One point that I think deserves consideration in the first part of Rule 13 is joining the objections on the ground of the lack of the court's jurisdiction over the subject matter with objections to the sufficiency of the service. Of course we can change the existing law by rule. It has been my understanding that if a man comes into court and objects to the lack of jurisdiction of the court over the subject matter it is too late for him to make a special appearance as to the service on him. In other words if he asks any relief except for the court to rule that he has not

been served, then he has waived the objection of service on him. This would bind him too.

Further, this would limit the time when the objection to the court's jurisdiction may be raised.

There is a statute of the United States now that if a Federal court at any time during the progress of the case shall come to the conclusion that the court has not really and truly jurisdiction of the case it shall dismiss it. I do not think that we want to change that. I doubt if we could change it. This matter requires careful consideration. Some of those points are discussed by Mr. Morgan and by others.

Mr. Morgan. Did you say there was a statute to such effect in existence now? That there was such a provision in the rules?

Mr. Donworth. Yes; unless it has been repealed.

Mr. Dobie. It is still in there.

Mr. Sunderland. That is a duty laid on the court; not a privilege accorded to the parties.

Mr. Dobie. That is right.

Mr. Donworth. It would not do, it seems to me, for the court to get jurisdiction of a case involving, say, $1500 simply because nobody objects.

Mr. Lemann. Or a suit between citizens of the same State. I understand they have got to throw it out.

Mr. Dobie. In the Moffett case, which was a case involving the giving of a pass to a man and his wife, in an injury case this situation arose. The Interstate Commerce Commission forbade giving those passes. The railroad company

was anxious to settle the case. It went to court about the matter, the case being tried in the district court, and finally it went to the Supreme Court, and Justice Moody in a very crisp opinion said that the court could go into none of these cases; that the question is one to be taken up at the end of the plaintiff's case, that it was an action for specific performance, and dismissed the case.

Mr. Olney. As I understand it, the only thing which a defendant can waive is whether or not the court acquires jurisdiction over him.

Mr. Morgan. That is my understanding.

Mr. Olney. That is the question that the court has not jurisdiction of the subject matter. We are dealing here with limited jurisdiction in a certain sense. If it does not come within that jurisdiction, that is the end of it.

Mr. Clark. Of course this does not take away the court's power to act timely. This of course is an attempt to make the defendant show his hand on matters that he can bring up at the beginning. That is all it attempts to do, but it does try to do that.

Mr. Morgan. It tries to prevent the party from raising it later.

Mr. Clark. Yes.

The Chairman. You have the proviso that the court may raise the objection of lack of jurisdiction over the subject matter of the action. I think it is a good thing for the litigant, of course, to raise the point as soon as he sees it, so far as he is concerned, at the risk that if he does not, that the only recourse he will then have is that the court

might do it on its own motion. Why not require him to raise the point at a certain time, even though it is one that the court on its own motion could deal with at any time?

Mr. Dodge. He cannot waive it.

Mr. Olney. It is sort of useless to do that in one sense, Mr. Chairman.

The Chairman. He can waive it in one sense. He can do it so far as any error or any right of review on any action that he is taking is concerned.

Mr. Dobie. He can either waive it or he can consent.

Mr. Dodge. I do not see how he can waive it.

The Chairman. Suppose the court required him to prove it?

Mr. Morgan. There is the point. The court might require proof, and there is no way to get it on the record.

Mr. Lemann. You have to be careful to provide against fraud on the court. You open the door to fraud on the court. I hold no brief for the defendant, but if you undertake to do what is suggested you just open the door to a consent proceeding to give the court jurisdiction, something which the court, if it knew all the facts, would not do, that is take jurisdiction, and it could not take jurisdiction. I do not think we ought to do that. The lesser of the evils I think is to say that the subject matter can be brought up at any time, but provision must be made to prevent fraud on the court.

Mr. Olney. The rule is a perfectly proper rule when confined to objections by the defendant that the court has not jurisdiction over him. It cannot go any farther than that.

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The Chairman. Yes you can. You can say that he can not raise it after a certain date, but you can and should provide that the court can raise it if it wants to raise it.

Mr. Olney. Mr. Chairman, that will have no practical effect whatever. The counsel for the defendant will simply say to the court sometime "You have no jurisdiction here for such an such a reason", or something of that sort, and then the court has got to look into it. It does not want to go ahead in a case where it does not have jurisdiction.

The Chairman. Are there not cases in the Federal courts where jurisdiction over a subject matter may depend on proof?

Mr. Donworth. Yes, on petition for removal which alleges diverse citizenship that may be denied, and in that case the court holds a preliminary trial on that issue.

The Chairman. Suppose you wipe out any requirement that a man shall make that point of lack of jurisdiction by reason of diversity of citizenship at a certain stage, are you going to allow him at any stage of the proceeding to have the right to come in and say "I want to take proof on this question of diversity of citizenship"? It is not a matter apparent on the face of the record.

Mr. Dobie. It has got to be in the record. If it is alleged by the plaintiff and not denied, that is enough. If it is alleged by the plaintiff and denied, then you have got to have proof in any number of those cases.

Mr. Morgan. Yes; that is done many times.

12 The Chairman. Suppose it is admitted?

Mr. Dobie. If it is alleged and it is admitted then it

is all right. Then it is in the record. But the record must affirmatively disclose the jurisdictional facts. If it does not, any court at any time can take action. Unless the case is valid it is the duty of the court under express Federal statute to throw it out. And I do not believe the Supreme Court is going to stand for anything that in any way tries to diminish that.

Mr. Dodge. Is the judgment of the Federal court valid where the parties have agreed that they are citizens of different States but in fact are not?

Mr. Dobie. Yes.

Mr. Dodge. The judgment is valid in such case?

Mr. Dobie. Yes, if it is in the record. If it is alleged in the complaint and either admitted or denied, that is enough.

Mr. Lemann. Suppose the American Bar Association intervened in the Supreme Court of the United States and said "Here, we want to show that two unethical members of the bar have perpetrated a fraud on the lower court", and suppose that is ethically called to the court's attention, the court would not permit it to be precluded just because it happens that I make the allegation and the defendant admits it.

Mr. Dodge. The parties have conferred jurisdiction on the court by consent, have they, where the court really has no jurisdiction?

Mr. Morgan. I doubt that myself.

Mr. Dobie. Not unless the jurisdictional facts appear there. But if I bring suit against you, and I allege that you are a citizen of West Virginia, which you are not, and I

am a citizen of New Jersey, which I am not, if you admit that in your complaint, that is all right. Then the record discloses it.

Mr. Sunderland. But you cannot attack the record collaterally.

Mr. Dobie. That matter is settled in the case of McCormick vs. Sullivan.

Mr. Sunderland. Then there is the possibility of a waiver of the lack of jurisdiction.

Mr. Dobie. If the court never notices it, and the time goes by it is all right. But so long as the case is before any Federal court it can throw it out because of lack of jurisdiction. But, as decided by the Supreme Court in the case of McCormack vs. Sullivan, when the time has ended for hearing you cannot do it. But so long as it is before any Federal court any judge can smack it out.

Mr. Morgan. The case of McCormack vs. Sullivan was a case in which the parties by consent gave jurisdiction to a court over the subject matter.

Mr. Dobie. Where the court never noticed it.

Mr. Lemann. I think we are talking about what happens in the lawsuit itself; not what happens after that lawsuit is ended.

Mr. Pepper. Mr. Chairman, what is the precise question before us?

The Chairman. The rule as drawn does this, even on those matters of want of jurisdiction which are not subject to waiver, which can be raised before the court at any time: The rule provides that the litigants can raise those points,

so far as they are concerned, within a limited time. Then it goes on and has a proviso at the end which says that the court however may always on its own motion raise the objection of lack of jurisdiction over the subject matter. So it does not attempt to interfere with the court's power to refuse the case any time. That is preserved. All it does is to ask the parties, if they want to raise the point as a basis for error to do so within a stated time, in a certain way. It provides that they must do it that way.

Mr. Pepper. That seems to me to be reasonable, but I could not quite grasp whether there was a motion made to change that, and if so, in what particular.

Mr. Dodge. I was going to make a motion. It would be foolish to say, as we seem to do here, that a party may during the trial by not acting very promptly, waive this question of jurisdiction over the subject matter--- I doubted whether he could--- I thought perhaps we were misstating the law here.

The Chairman. Well, he waives it in one sense. He does not confer jurisdiction on the court by not denying it, if that is what you mean. That is true. But so far as he is concerned in the matter of his right to assert the point and claim error if the case is decided against him--- he waives his right to assert it. That is really what he does. I do not see that that is inconsistent.

Mr. Dodge. If he suggests to the court at some later day that the court has no jurisdiction, the court can throw the case out. It cannot say "You have waived it".

The Chairman. The rule on its face does not attempt to tie the court's hands.

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Mr. Clark. This is merely an attempt to smoke the defendant out; make him tell his case, and not to hold back and shoot in the dark or delay the action.

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The Chairman. That is it. The litigant, we will say appears in court, and the case is tried, and if he loses, then he comes in and says, "Well, there is no jurisdiction at all here". If he wants to he can keep quiet and let the judgment stand. This provision is intended to make him show his hand and assert his point at once or he is out, unless the court takes it up of its own motion. It does not prevent him from walking up and whispering in the judge's ear, of course.

Mr. Dobie. There is an express Federal statute which says it shall be the positive duty of the court at any time to throw the case out, and the court will do that as soon as it becomes apparent, as it did in the Moffett case after it had been in the three courts. You say that this man can not tell the judge what he ought to know. Suppose he writes him a letter, or something of that kind?

Mr. Sunderland. The statute says "if it shall appear" and so forth.

Mr. Dobie. Yes.

Mr. Sunderland. It does not require the judge to go on an expedition to bring in a lot of evidence to try and determine whether the facts exist which are not before him.

Mr. Pepper. I move that the rule be approved as reported, in order to bring the matter before the committee.

Mr. Cherry. I second the motion.

Mr. Tolman. Before you do that there is a matter which

I wanted to bring out. It is a matter of verbiage. In lines 4 and 5 of Rule 13 appear the words "jurisdiction over the subject matter of the action". The equity rule which seems to accomplish the same purpose says "the court's jurisdiction". There are cases where a witness raises by plea of abatement or by motion his objection to the jurisdiction of the court over him. I remember one quite important case where a person brought a suit in the Federal court, and was in attendance outside of his place of residence as a witness, and he was sued in another court in a case, and his plea in abatement was sustained on the ground of lack of jurisdiction. I think we can not confine that purely to the matter of the jurisdiction over the subject matter. I think it must be jurisdiction just as the equity rule provides, and not limited by the words "over the subject matter of the action".

Mr. Olney. Not only that, but when you use the expression "the subject matter of the litigation" you do not cover such cases as where the court lacks jurisdiction because of non-diversity of citizenship. Non-diversity of citizenship does not go to the subject matter of the action. And the parties cannot waive their non-diversity of citizenship. It should be either where the court lacks jurisdiction of the action or simply lack of jurisdiction.

The Chairman. Yes, I think that is right.

Mr. Pepper. Will it be agreeable to the Reporter if the motion be taken to be for the approval of the rule as reported, leaving out the limiting words to which Major Tolman has called attention?

Mr. Clark. I have no great objection. Let me state why we put it in, and why we do not immediately adopt the Major's suggestion. It is a point of fairness. We have got the other jurisdiction sufficiently, and we wanted to make people know definitely what we meant here.

The Chairman. What becomes of the jurisdiction on the diversity of citizenship which is not touched here?

Mr. Clark. I think it is, Mr. Chairman.

The Chairman. Where?

Mr. Clark. That goes to the subject matter of the action.

Mr. Olney. As I stated, when you use the expression "subject matter of the litigation" you do not cover cases of the court's lack of jurisdiction because of non-diversity of citizenship.

Mr. Dobie. The Supreme Court has used that phrase. I despise it.

Mr. Olney. Controversy between citizens of the different States.

Mr. Dobie. I think it is a hideous phrase. But the Supreme Court use it.

Mr. Lemann. Controversy between citizens of different States.

Mr. Clark. The two alternatives are jurisdiction over the person and jurisdiction over the subject matter. Those are the ones we use. What we want to make everybody know is that we are hitting both.

Mr. Sunderland. Why not say "controversy". Would that be better?

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Mr. Tolman. If you leave some of them out you try to enumerate the jurisdiction over persons.

Mr. Denworth. I think we would get in bad with the court and with the profession and ultimately with ourselves if we try to run counter to the well established principles of all the Federal courts that they do not want their time taken up with cases that are not within their jurisdiction, and that it is really unprofessional to allow a case to go on through the courts, as between lawyers in the case, if the court has not jurisdiction. That is my personal view, and I think it is the view of the profession and the view of this committee.

Now the trouble here is that subject matter of the action, or the action itself, the court's jurisdiction over the subject matter, should be treated separately from this matter of the service on the defendants. It is a very different thing and should not be lumped with it. As it is here there is no distinction made with regard to jurisdiction between a case where the lack of jurisdiction appears on the face of the papers and where it does not. According to this, if I am sued in the Federal courts for $1900 I can keep still about it, and if I do not object timely I must let it go on. That I consider is unprofessional.

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Some of the discussion which has taken place on this subject has brought out that there may be allegations sufficient to give the court jurisdiction, and they may be undenied. Then there is some ground--- ample ground--- for requiring the defendant to deny those allegations. But as it is written here you cannot object at any stage, even if the allegations

do not show sufficient jurisdiction.

For instance, some lawyers have thought that a case arises under the Constitution and laws of the United States where the defendant claims some immunity, and so forth. But the decisions are that in order for a case to arise under the Constitution of the United States and laws the plaintiff must have this advantage. And suppose he alleges the wrong kind of Federal question, then it really appears upon the face. I think we should separate those altogether. It is well settled, for instance, that if a case is removed to the Federal court by defective petition--- not defective because its allegations are untrue, which we should meet by a proper provision--- but defective because there is not really an allegation there of diversity of citizenship--- it will be dismissed. I knew a case brought in the Federal court, which went to the circuit court of appeals, and which was dismissed there because there was no allegation of diversity of citizenship. So I think it needs careful consideration and attention, and should not be drawn in with this question of whether the marshal served the right man or served him within the jurisdiction.

Mr. Morgan. I was merely raising this point. I think what we are trying to accomplish here is entirely desirable. I did not mean to be in the position of making an attack. I think in the case of the man that was referred to in a case involving $1900, that he ought to suggest it right at the start before the court goes into the case, and not wait.

Mr. Donworth. Suppose he does not?

Mr. Morgan. Well, that is what I was speaking of.

I do not think the Supreme Court is willing to stand for this rule, but I am willing to draw it.

Mr. Clark. One point on the matter of the defendant failing to raise the point. That matter has already been ruled on in the C. C. A. under the Michigan practice where they follow it. That was in the case of city of Detroit, Michigan, against Blanchfield, 13 Fed. (2d), C. C. A. 626. The Michigan State practice I think tried to force the defendant to raise this point, and this is a case where he has not done it. The plaintiff made the allegation of diversity of citizenship, and it was a question, it is true, as to requiring the defendant to raise it and prove it. He had not done it on the trial, and they said they would not hear it.

Mr. Donworth. That is where the allegations were sufficient?

Mr. Clark. Yes.

Mr. Donworth. But this provision would reach a case where the allegations were not sufficient.

Mr. Morgan. The court would have to take notice of that under the general statute where the allegation is not sufficient.

Mr. Clark. It seems to me it would complicate the rule to elaborate it and draw the distinction between cases where the allegation appeared on the face of the record and cases where they require proof in addition to the record.
It is better to take a short rule that covers the whole thing, and then just preserve the thing that we could not take away by the express provision.

Mr. Olney. Mr. Chairman, we are concerned here with framing rules that would guide the profession properly.

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It is all right in that connection to provide that where the record is sufficient on its face to give the court jurisdiction that the defendant, or the plaintiff either, for that matter, should not be permitted to show facts that disprove the record, unless he does so at the very outset. But I do not think he can go any farther than that.

Mr. Donworth. That is correct.

Mr. Olney. That is the point we have in mind. We can not go any farther than requiring in the case of diversity of citizenship, for example, where if it appears on the record that that diversity of citizenship exists, that that be disproved at once. You can prevent any of the parties from thereafter coming in and endeavoring to disprove it unless they take up that feature of the case right at the outset. But we can not go any farther than that. And if the diversity of citizenship does not appear on the face of the record, why it is almost useless to provide that a party shall be deemed to have waived it. And it is misleading, in a way, to the profession.

Mr. Morgan. I was going to suggest right in line with what Judge Olney has said, whether we could not redraft it so as to avoid the use of the expression "to be deemed a waiver by the party" because I think that always carries with it the notion that the court does get jurisdiction by consent of the party. And I think that is quite impossible here. It is only that the party can not raise the question, as Judge Olney suggested, and it seems to me we could make that clear, and then we would not appear to be attempting to upset a perfectly well established rule.

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Mr. Olney. The party ought not to be permitted to come in and say "Well I admitted the diversity of citizenship when we started this case, but the fact was just the contrary". He ought not to be permitted to come in and do anything of that kind.

Mr. Cherry. May I make this suggestion, Judge. Would it meet your point if in lines 9 to 11, containing the proviso clause there should appear words which limited that action of the court to what appeared on the face of the record?

"Provided that a court may always on its own motion raise the objection of lack of jurisdiction over the subject matter of the action appearing on the record".

It was to take care of the suggestion that what is foreclosed to the party is what has to come in outside by issues and evidence.

Mr. Olney. It seems to me that that is stating it in a negative way, so to speak. It is a mere matter of draftsmanship here, however. It would be better that it should be stated affirmatively that the party must present any questions that go to the jurisdiction of the court at the outset, so far as he can, and, in particular, if that jurisdiction depends upon facts which are outside, or which are to be made to appear, he can not, when the jurisdiction is once made to appear by the pleadings thereafter endeavor to controvert those statements of fact--- those facts which give the court jurisdiction. They are to be taken as true. He has admitted them. And that should be stated affirmatively.

Mr. Donworth. I concur in that view absolutely.

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Mr. Olney. Farther than that I do not think we can go.

Mr. Cherry. I still think, Mr. Chairman, that it is pretty salutary to put upon the party who wants to object to the jurisdiction, whether he does so by raising an issue of fact or by calling the attention of the court to the record, the duty of doing it as early as he has the opportunity to do so, without attempting to take it from the court--- or it should not be taken from the court. That is why I suggest a limitation perhaps if there is to be any change in the statement of the court's duty.

The Chairman. The trouble with that, Mr. Cherry is, that if the court finds out during the trial of the case that, although the record is right on its face, there has been a double crossing in some way, it takes away from the court the right to inquire into it. I would not do that.

7 Mr. Dodge. I seconded Mr. Pepper's motion. My preference is for the rule here as stated. Is the rule broad enough to entitle the party to a trial by jury? Is it broad enough to include a preliminary jury trial? There are cases where the defendant is entitled to a jury trial.

Mr. Clark. What language do you refer to in the rule?

Mr. Dodge. Lines 7 and 8, "be decided on preliminary hearing".

Mr. Clark. Do you mean that that forecloses jury trial?

Mr. Dodge. I wondered if the word "hearing" was broad enough to include a preliminary jury trial?

Mr. Clark. That is the point we discussed, and we reached the conclusion that the jury trial could be had.

The Chairman. The point is whether the word "hearing" is broad enough to include jury trial.

Mr. Clark. I did not suppose there was much question about that.

The Chairman. Make a note of that.

Mr. Clark. We could put in the words "preliminary hearing or trial".

Mr. Dodge. Yes.

The Chairman. Would this rule be in a little better shape if you strike out the clause "and all such defenses shall be deemed waived" and so forth? You could not strike out the matter of process and all that. I do not think anybody can say we are not doing something we have got the power to do when we do not attempt to confer jurisdiction on the court. A proviso could be put in there that even though the parties do not raise it when they should, it is always open to the court to raise the question. We are not conferring jurisdiction thereby. Of course we cannot do that when it does not exist. We are requiring the parties to speak up. That does not prevent the court from doing it if it wants to.

Mr. Pepper. In order to get the matter before the committee, Mr. Chairman, I made a motion that the rule be approved as reported, and then I accepted an amendment offered by Major Tolman striking out the limiting words in connection with the jurisdiction. As I understand it that is the matter now before us. Could the sense of the meeting be tested on that question?

The Chairman. On the acceptance of the amendment the

point was raised that the phrase "the subject matter of the action" was broad enough to include diversity of citizenship cases.

Mr. Pepper. Whether it is or not, clearly jurisdiction without limitation would be wide enough, so why not eliminate the controversy?

Mr. Clark. I do not care so much about that, but before you go ahead further let us see what you are going to do with the proviso clause then.

The Chairman. Let us settle this question step by step.

Mr. Clark. I am sorry, but I think this is an important question as to whether we should strike it out or not.

The Chairman. Strike out what?

Mr. Clark. If we strike out "jurisdiction over the subject matter" up here, are you also going to strike it out in line 10? It is tied up with line 10.

Mr. Tolman. No; I think it belongs in line 10, and it does not belong in the other place. Perhaps I have not made my point clear, but my point is you want to get a number of jurisdictional points raised, and you really ought to get them all raised, and you have not raised them all because you limit your enumeration. Now I suggest this redraft: "All objections that a defendant may raise as to the lack of the court's jurkidction shall be raised at one time by motion" and then go on the way you are.

Mr. Clark. And leave in line 10?

Mr. Tolman. Leave it in, yes, because that is a different category.

Mr. Lemann. Did you make the motion to take out

"service of process" and everything?

Mr. Tolman. I say that will cover everything.

Mr. Lemann. Do you think that is covered by the word "jurisdiction"?

Mr. Tolman. I do.

Mr. Lemann. That would not be entirely clear to the profession, perhaps.

Mr. Dobie. I think the general word "jurisdiction" would not include "venue".

Mr. Tolman. I say "all objections". I could make it broader by putting in some unnecessary words. The language is "All objections that a defendant may raise as to the lack of the court's jurisdiction, whether over the person or the subject matter". Do you want to put that in?

Mr. Clark. All right.

Mr. Tolman. It illustrates the comprehensive character of it.

Mr. Clark. You have got to put in "venue" too.

Mr. Tolman. If you commence to enumerate then you are excluding something.

Mr. Sunderland. But "jurisdiction" does not include "venue".

Mr. Lemann. Would Major Tolman object to this language:

"All objections the defendant may raise concerning the sufficiency of the service of process upon him, venue, and lack of jurisdiction, whether of the person or the subject matter"?

Mr. Pepper. That is what my motion intended to cover.

The Chairman. Let us put that motion then.

(The motion was put to a vote by the Chairman and was adopted.)

Mr. Donworth. I should like to put this on the record, Mr. Chairman. My view of this is that as lawyers it is our duty to retain open for objection at any stage of the proceeding the fact that the court has not jurisdiction on the face of the record. I think a rule would be proper that would require the party objecting to the jurisdiction, where his objection depends upon a fact, to raise that in accordance with the suggestions of this rule, but I am firmly convinced that it is our duty as lawyers to retain the right to object at any time to the jurisdiction of the court which appears upon the face of the record.

Mr. Morgan. I want to second that suggestion. That is the way I feel about it exactly.

Mr. Olney. That is the way I feel about it.

Mr. Morgan. And I think this rule would accomplish it if it is redrafted. I think the substance of it is right, but I quite agree with what Mr. Donworth says.

The Chairman. Without being too technical about parliamentary procedure and reconsideration, I am willing to entertain a motion to raise that issue as to whether this rule shall be redrafted so as to draw a distinction between cases where matters appear on the face of the record and those where it does not require extraneous proof. Do you want to vote on that question? I realize it is an upsetting, in part, of our practice. Do you object, Senator?

Mr. Pepper. No.

Mr. Morgan. I think that ought to be submitted as an

alternative rule. I voted for the first one, but I am confident that the Supreme Court of the United States will not stand for it. I think they will rule with Judge Donworth.

The Chairman. Suppose we make an alternative rule then.

Mr. Morgan. I think they will clearly stand for the rule proposed by Mr. Donworth and Mr. Olney.

The Chairman. All in favor of an alternative rule along those lines say aye. Opposed no. The ayes have it.

Mr. Pepper. May I ask the Reporter, through you, Mr. Chairman, whether he gave consideration to the desirability of including among the questions that ought to be raised at the outset, non-joinder of indispensable parties? I had this case the other day. A bill in equity in the Federal court against a corporation was filed by a stockholder alleging misconduct on the part of officers and directors. The corporation alone was sued. The plaintiff failed to aver, as he would have been compelled to by the letter of the equity rule, that he was the owner of the stock at the time of the injuries complained of. He sued the corporation only because in point of fact he bought his stock in order to bring his suit. It was a strike suit. If he had joined those against whom the cause of action in favor of the corporation arose under Dodge and Woolsey and Hawes and all those old cases, it would have been necessary for him to allege and prove that he was the owner of the stock at the time the injuries complained of occurred. As he could not do that he tried the dodge of suing the corporation alone, and instead of

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praying for relief against the third persons, asked for a receivership in order that the receiver might bring suit against the third person in the name of the corporation.

I raised the point in a Federal court--- it was in the Middle District of Pennsylvania--- that this was a subterfuge and attempt to get around the provisions of the equity rule. That the persons against whom the cause of action ran were indispensable parties, and that the court could not entertain a bill in the form of a receivership measure where the real purpose was to get relief against the third persons. The court so held on preliminary motion, and dismissed the bill.

It does seem to me that questions of that sort, arising under old equity rule 94, and, I think it is equity rule 27, now are the sort of questions which are very often short-cuts to a just result, and saves the time and trouble of the court. I realize that in a later provision of this rule such a matter is one which on special application to the court could be raised, and if the court thought proper should be made the subject of preliminary disposition, but I wonder if it is not a right in the defendant to raise that question just as much as if it were a question of jurisdiction.

Mr. Donworth. I do not know whether Senator Pepper referred to Rule 24 of the Equity Rules, but it seems to be in point. The rule is as follows:

"Defect of Parties--- Tardy Objections. If a defendant shall at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and therein specified by name or

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description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties."

Is that in point?

Mr. Pepper. I think it would be in point, sir. The substantive rule that I had in mind was, I think, Rule 27. I am not sure.

Mr. Donworth. The stockholder's rule?

Mr. Pepper. Yes. It was a stockholder's bill.

Mr. Dobie. You cannot make any decree saving the rights of an indispensable party. If he was indispensable there can be no decree there.

Mr. Lemann. Do you not really mean to present the question of whether failure to comply with rule 27 by the plaintiff should not be susceptible of being raised in advance of the filing of answer? Does not your question involve that broad inquiry?

Mr. Pepper. It does. The question is whether a defendant who has what under Rule 27 would be a perfect defense, ought not to have the privilege of raising that in limine without having first to go to court under the later provision of this rule and satisfy the court that it was a point that was worth raising, and then getting permission to raise it, and have a motion day fixed, and all that sort of thing.

The Chairman. I thought your point was that there ought to be a rule similar to this requiring him to raise it within a limited time.

Mr. Pepper. I am not sure but that it goes that far, because as Mr. Dobie points out, if the party is really indispensable the decree might not be a valid decree, and

therefore there would be a duty to make the point. But whether there is a duty or not, I am not entirely clear, but it certainly seems to me that there ought to be a right on the part of the defendant, without getting a special leave of the court to do so, to raise the defense of non-joinder of indispensable parties in the same way that he raises this question of jurisdiction.

Mr. Clark. Let me say this. I am in a little bit of doubt myself about it. I talked with my assistant, Mr. Moore, and he feels that this is the kind of question that a good deal of the time you are not going to be able to settle thoroughly until you get to the trial, and that the court can not go ahead and enter a decree if it finds that they are indispensable really. Rule 23 does limit indispensable parties very greatly. Rule 23 does cover that subject generally. We hope that there are not so many cases of indispensable parties. But when you cut that out, why the
11 court cannot go ahead. That is all there is to it.

The line between necessary and indispensable parties being a little vague it is a question whether you can cut that out profitably in defense and separate it from the rest. His feeling is that you can not. I must say that I am a little bit in doubt about it. Our feeling was that we ought to separate the jurisdictional matters from the rest.

The Chairman. This obviously would not come in under this rule anyway, would it?

Mr. Pepper. Why not?

The Chairman. Unless your objective is to put in a rule that requires the party to specify it in a certain time

or waiveit; that is what we are doing here.

Mr. Pepper. That would be the effect of its inclusion here, and I am wondering why the defense of the lack of joinder of a party alleged to be indispensable is not a point which the defendant has a right to raise in limine.

Mr. Lemann. Does your question involve only this point of lack of parties? Suppose he sued the corporation and other parties who were properly parties; that he made the parties all right, but he did not make an allegation as required by Equity Rule 27; that he only stopped at the time of these transactions. Now in that case there would be no objection on the point of parties. But he omitted the allegation that is essential under Rule 27. Do you mean to inquire whether he could raise the absence of that allegation in defense of his answer, or should be permitted to do so?

Mr. Pepper. No. The provisions of the equity rule are such that when you come to trial and the plaintiff fails to prove affirmatively that he was the owner of the stock at the time the controversy arose, he loses.

Mr. Lemann. Suppose his bill has no allegation to that effect?

Mr. Pepper. Even if it has no allegation the defendant can ask the court for what in a lawsuit would be binding instructions, or in the case of an equity proceeding, for a finding of fact and law.

Mr. Lemann. I thought you meant to ask whether if the bill contains no allegation the defendant should not have an opportunity to call the absence of that allegation to the court's attention before he filed his answer. I do not know

whether you could raise it.

Mr. Dobie. That is not a jurisdictional question.

Mr. Lemann. No.

Mr. Dobie. The Dunner case held that, as the Senator knows.

Mr. Pepper. It was in order to consider jurisdictional questions and analogous questions growing out of non-joinder that I ventured to raise the point.

Mr. Lemann. I wonder where we could stop. That is what I meant to inquire.

The Chairman. You can stop right now. The committee will be in recess until 1:45 p.m.

(Thereupon, at 1 o'clock p.m., Friday, February 21, 1936, the Advisory Committee took a recess until 1:45 p.m. the same day.)

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AFTERNOON SESSION

The Committee resumed at 1:45 p.m. on the expiration of the recess.

HOURS OF SITTING SUNDAY

The Chairman. The guards are interested in knowing about our possible Sunday session, and it would be an accommodation to them if we could make up our minds about sitting on Sunday, and what hours, and let them know today. It is a little disturbing to their arrangements unless they know in advance.

Mr. Olney. I move we sit from 10 to 2 on Sunday.

Mr. Dodge. We sat from 2 to 7 the last time.

Mr. Donworth. I thought that was better. It gave us the forenoon free, and we could do our work in the afternoon.

Mr. Olney. It makes no difference to me particularly, but I thought it would be more desirable to have the afternoon and evening free.

The Chairman. It is a question whether men like us can stand the gaff, and whether we will do better work if we get half a day off Sunday. I have not been accustomed, in recent years, to working on Saturday afternoon.

Mr. Dodge. What did you say about the afternoon?

The Chairman. I said I have not been accustomed in recent years to working on Saturday afternoon, so running through all day Sunday leaves me rather limp at the end of the day, if I have not an opportunity to get out in the fresh air.

Mr. Dodge. From 2 until 7 gives us an extra hour over sitting from 10 to 2.

The Chairman. If you are going to have it in the morning, why not make it from 9:30 until 2, then? You can have the

afternoon to walk around and visit your friends. If you want to go to church, we had better have it in the afternoon. There have been a variety of suggestions.

Mr. Dodge. I move that it be from 2 until 7, just to bring the question up.

Mr. Donworth. I second the motion.

The Chairman. All in favor of the motion say Aye; contrary, No. The motion is carried.

RULE 13. DEFENSES--HOW PRESENTED.

(a) DEFENSES AS TO SERVICE OF PROCESS, VENUE, AND LACK OF THE COURT'S JURISDICTION

The Chairman. Shall we go on with the matter Senator Pepper was discussing?

Mr. Pepper. I will withdraw that suggestion, Mr. Chairman, in the interest of progress. I think the Reporter has explained his reasons for not including it in the first part of the rule, and I take it it can be the subject of a motion for an advanced hearing under the second subdivision, and I think that sufficiently covers it, so I apologize for the waste of time.

Mr. Lemann. May I ask the Reporter, in rule 13, to consider this point. As I read the rule as it now stands, if a defendant appears in Federal court to controvert the citizenship of the plaintiff, or the amount involved, that is only a special appearance. I would have thought the law would be otherwise, apart from the rule. I am not sure that I correctly construe the rule. I merely wish to direct the Reporter's attention to the point, both as to what the rule now says, and

as to what the law now is.

Mr. Morgan. I have not the point in mind that Judge Donworth stated. Does this rule make the appearance for the purpose of attacking the jurisdiction over the subject matter a waiver of any claim that there is not proper service of process?

Mr. Clark. No. They can all be included at one time. It would be a waiver if it were not included at the same time.

Mr. Morgan. As Judge Donworth says, a good many States hold that if you attack the jurisdiction over the subject matter, you waive service of process, and that is the only question left.

Mr. Lemann. That is the point I meant to raise. I would have thought that if I attacked the citizenship or the jurisdictional amount, I waived questions of process or venue.

The Chairman. Where have you a provision here that makes it clear that it is not a waiver?

Mr. Clark. In the first sentence it says:

--"shall be raised at one time by motion"

or shall be waived.

The Chairman. That is a mere inference, though, that you are not waiving it.

Mr. Dobie. It is waived if not raised prior to a general appearance.

Mr. Lemann. The language of line 7 says any of these things shall constitute a special appearance. I would not have thought that an appearance to contest citizenship or the jurisdictional amount would constitute a special appearance.

Mr. Donworth. My first suggestion was that the two were

entirely distinct -- the question of the sufficiency of the service of process and the objection to the jurisdiction over the subject matter -- and that they should be treated in subdivisions of the same rule, or in separate rules. But the committee did not favor that idea.

Mr. Clark. What we are trying to do is not to give the defendant too many successive bites at the same cherry. We want to make him make one gulp. The difficulty with some of these other ideas is that you may be getting back to the situation which is possible under some codes now. At first you start attacking the process. Then you start attacking the jurisdiction. Then you start attacking the pleadings, first by motion, and so forth. The whole attempt is to shorten the process, and combine them. What we have done is to try to lump the jurisdictional matters together and the other matters.

I think we have stated as clearly as we can that you must put all the jurisdictional matters at one time in one motion.

The Chairman. You have done that, but the point, as I get it -- at last, the one that is in my mind -- is this: You have made them all special appearances. If somebody raises the point of an attack on the court's jurisdiction, or citizenship, it ought not to be the basis for a special appearance. It is not essentially a special appearance, and never has been considered so. Why should we make it so? You have said here that they may be joined, and all constitute a special appearance. Why?

Mr. Clark. The first point is that they must be joined.

The Chairman. That is right.

Mr. Clark. The next is as to why we term them a special appearance. That is simply a device to tie it up with the waiver. We want to force them to speak at once, and if they do not speak, they waive.

I suppose we could do it without calling it a special appearance as such. In our first draft of the rules we did not provide for appearances as such at all. We simply took it as a question of the substance of whatever action was taken, without reference to appearance. Then the question was raised as to whether you should not hear especially such matters as service of process and so forth. If you are going to have it as to service of process, we want to put these other questions in at the same time, and this is the device for doing it.

The Chairman. Your rule requires a man, if he has two different points, on one of which he could normally make a special appearance, and on one of which he could not, to make them all together or not at all.

Mr. Clark. That is it.

The Chairman. Your rule, therefore, compels him to join two appearances, one of which would normally be special and the other general. You have to call them allspecial, otherwise you prevent him from appearing specially on one ground. That is, the right of special appearance would disappear.

Mr. Clark. That is the idea, yes.

The Chairman. So I can see a reason for making them all special, so long as you compel him to unite them. But suppose he makes only one, that is not united with an ordinary special appearance. He has but one point, and it is not a motion to

set aside a process. It is one which would ordinarily be a general appearance. Why do you make that a special appearance? The rule ought to be that if he joins with the thing that is a matter of special appearance something that is not, nevertheless the whole thing should be considered a special appearance. But it ought to be limited to cases where he is compelled to take that action. I do not know whether I make myself clear or not.

Mr. Clark. I think I get the point. I suppose it is feasible. I am a little afraid of complications. You have the same thing one time as special appearance and the other time as general. I do not know whether it is worth it or not. What is the advantage of getting him a general appearance?

Mr. Lemann. It can be left to the style committee.

Mr. Dobie. I think we had better make it as it is, and not try to make a distinction. I do not think it would work any hardship.

The Chairman. If we allow a man to make a special appearance to attack the jurisdiction of the court on the ground that there is no diversity of citizenship --

Mr. Clark. On the other hand, you are pushing him a good deal. If he does not do it, he is out. People have spoken of this as a grant to the defendant, as a sort of right. In a way, it is something of a right, but there is a penalty attached, and the chief advantage of the rule is the penalty on the defendant.

Mr. Olney. I think Dean Clark is hitting the nail on the head there. The disadvantage to the defendant is very slight. What difference does it make, in effect, that his appearance

to object to the jurisdiction of the court on the subject matter is merely a special appearance, when he has to make it at the very outset or not at all? It does not make any difference one way or the other. You can have a complicated rule which will cover the situation the Chairman has in mind, but I think it is an unnecessary complication.

The Chairman. We are enlarging the right of special appearance.

Mr. Olney. In that connection it seems to me that it may be a mere matter of form, but I think perhaps it is more than that. The rule reads:

--"and which shall without more constitute a special appearance."

It should read this way, it seems to me:

--"and which shall not, without more, constitute a general appearance."

We are trying to prevent it from being a general appearance. Of course, it is a special appearance. In the very nature of things, he appears for this purpose. What we wish to provide in this connection is that it shall not be taken to be a general appearance, and it should be so worded.

The Chairman. I am reluctant about enlarging the right of special appearance. I can see, where you are forced to join together two motions, one of which would ordinarily entitle him to a special appearance, and the other not, the whole thing ought to be special, of course. But where you have only one motion to make, and not two things joined together, and that one thing is a thing that has never been the basis for a special appearance, I do not like to make it so.

Mr. Morgan. Of course, venue is never a special appearance.

Mr. Donworth. I assume the Court will enforce this rule as stated. It is my recollection, as stated before, that any attack upon anything besides the question of whether the defendant individually has been brought into court -- anything beyond that is a general appearance; and if you come in and say to the court, "You have no jurisdiction in this case because the statutes do not give it", and later you attempt to question the service of process, the court says, "You are in court. That is all gone by."

Whether the court will enforce this, and say that combining the two does not waive the question of personal service, I do not know. I hope it would be enforced as written, but I do not feel absolutely sure of it.

Mr. Pepper. Would it not be true, Mr. Chairman, that even if you left out this language

> "which shall without more constitute a special appearance"

the very fact that the defendant was required by the rule to raise the question by motion would make it impossible for the court to say, "It is true the rule enjoins upon you the necessity of moving, but by moving you have made it impossible to take advantage of your motion."

That is what would happen, and it seems to me we may be doing a wise thing in putting in a provision on the subject. But I cannot imagine the court saying, "You have come in here in obedience to a rule. You are raising an objection to service, but by coming in here and raising the objection, as

the rule requires you to do, you have put yourself out of court, or, conversely, you are in court and cannot raise the question."

The Chairman. My mind may be muddy on the thing, but ordinarily we have a special appearance which is permissible only where, as Judge Donworth says, you are objecting to the sufficiency of the service of process, and have not got the defendant in court.

Mr. Pepper. Yes.

The Chairman. There are various other motions, to the jurisdiction, and so forth, which, if made, constitute a general appearance. We have made a rule here that all objections of that kind must be united, and therefore it would be very unfair to a defendant to compel him to unite one that normally constituted a special appearance with one which normally constituted a general appearance, without treating them all as special appearances. That is inevitable. My point is a narrower one. Suppose you do not have two grounds, but only have one, and that one happens to be one which does not go to the jurisdiction over the defendant. It is not a matter that normally is a special appearance at all. By virtue of this rule, even if you have only one, and you have not been compelled to unite because you have only one, a motion of that kind is made a special appearance even though the thing you are raising is one that normally is a general appearance, and therefore you are enlarging the rule of special appearance. I am willing to enlarge it where you have a special appearance and a general one united. Then I think they ought to be both specials, but I am unwilling to enlarge it when you want to

raise only one point, that ordinarily constitutes a general appearance.

Mr. Pepper. If a man comes in and makes a special appearance and the question involved is something other than service or venue, then he makes the point and it is decided in his favor. The difference between general and special does not arise. If he makes the point and it is decided against him, he either has to appear generally then or the proceeding will go on and a judgment will be rendered against him for default.

The Chairman. It is a general appearance.

Mr. Pepper. I mean, the only case in which the special appearance is worth anything is the case where, if he appeared generally, he would waive the objection he was going to make. Is not that so?

Mr. Clark. I think Senator Pepper is correct, but I would add to it that special appearance means so little to me that I would be glad to forget it.

As a matter of fact, we were directed to put this in. This is not so much our idea.

What difference would it make if we said this:

--"which shall be made in advance of the answer, and which shall be decided on preliminary hearing or trial, and such defense shall be deemed waived if not raised prior to the filing of the answer."

Mr. Olney. As a matter of practical experience, where a defendant questions the service of process upon him, he has to be exceedingly careful not to make any general appearance or take any action in the matter that amounts to a general appear-

ance. Frequently the hearing upon his motion to quash service of summons, for example, is so delayed that if his motion is overruled he is in default. We have to provide in the rules a practical method of protecting a defendant under those circumstances, if that is what you had reference to, Mr. Clark. That comes up time and again in these cases.

The Chairman. What I have talked about is something that can be considered. I did not mean to ask any action on it.

Mr. Pepper. May it be understood that the Reporter may take into consideration the making of the change that he last suggested? It seemed to me that covered all the ground, and, so far as I can think of, it covers the points that have been raised around the table.

The Chairman. Does it? Let us see just what it was.

Mr. Clark. Leaving out the designation of anything as special.

The Chairman. What do you do then? You compel a man to put all his motions together. Some of them are those that constitute, ordinarily, special appearance, and some of them constitute general appearance according to established law, and you do not prescribe expressly that the whole thing is a special appearance. He is out of court on the process point right there.

Mr. Pepper. But, Mr. Chairman, no court, when a defendant comes in in obedience to a rule which requires him to do that thing, would penalize him for having obeyed the rule.

The Chairman. I would like to have it said that he is not penalized.

Mr. Dobie. I agree with that. I believe, for simplicity,

we ought to keep the special appearance, and not make the split you suggested, Mr. Chairman.

Mr. Sunderland. The codes provide for the combination in the answer of these various matters now, and it has been held that where a matter is put in which would be a special appearance if it stood alone, if it is along with other matters which constitute general appearances, you do not waive the benefit of a special appearance by adding it to the others, without any express provision in the code to that effect. I agree with the Chairman that we ought to specify it so as to eliminate any point.

Mr. Dobie. I cannot see any harm it does by staying in there, and I think it would make it a little more complex if we split it up the way General Mitchell suggested, and make venue or process a special appearance, but jurisdiction alone a general appearance. I think we had better leave it the way it is. I think that is fair and workable.

Mr. Sunderland. You can say that objection to service of summons shall not be waived thereby.

Mr. Donworth. Or to venue.

Mr. Sunderland. Venue is a general appearance.

Mr. Donworth. Not when you sue in the wrong district.

Mr. Sunderland. That is always a general appearance.

Mr. Morgan. If there is diversity of citizenship, and you sue in the wrong district, you just come in as to venue. That is only venue. That is not jurisdiction.

Mr. Sunderland. But you have to object in limine.

Mr. Morgan. Yes, sir.

Mr. Dobie. You cannot object to venue and demur at the

same time.

Mr. Morgan. No; you cannot do that. It is like a plea in abatement at common law.

Mr. Loftin. What are we doing about the matter in brackets?

The Chairman. I was just going to raise that question. I have a note on that myself. That is where a man makes a special appearance and the point is ruled against him, and then he enters a general appearance. That is an effort to make him drop that point unless he takes an appeal to the Circuit Court of Appeals in the way of an application for writ of prohibition.

I may be entirely wrong about it, but this is what I said:

"I think the bracketed portion should be stricken out. It assumes that the Circuit Court of Appeals can and will entertain a petition for writ of prohibition in all such cases. Will a writ of prohibition lie to review a trial court's decision as to adequate service of summons? Is it not the law that a writ of prohibition is like a writ of mandamus, only to be granted when the right is clear and beyond serious dispute? Are we not trying to substitute writs of prohibition for review on appeal in the cases specified? Furthermore, this rule offers to a defendant an opportunity to delay trial pending what is at most an interlocutory appeal to the Circuit Court of Appeals. It seems to me the cure is as bad as the disease. I prefer the unfortunate alternative which now prevails, that if the point is seasonably raised below and over-

ruled, a general appearance will not waive the right to review the point on appeal."

Perhaps I have misunderstood the situation.

Mr. Denworth. I think the Chairman is right. Most courts refuse to review, by extraordinary writ, the sufficiency of service. They say your remedy is to go through the trial and appeal later.

Mr. Clark. I think you have correctly stated the situation as to the thing we are after. So far as restrictions on the writ of prohibition are concerned, it seems to me that if we provide that method in the rule, that is valid. The rule would then govern. Of course, whether it is done by writ of prohibition or otherwise, what it really calls for is an interlocutory appeal, however it is named, and that is the question we wanted to raise. Mr. Dodge, I thought, brought out the question as to whether more interlocutory appeals might not be desirable. I felt that they are undesirable generally, but on these points of jurisdictional matters there is something to be said for them. In New York appeals on interlocutory matters are very usual. There are stated rules as to how to do it. You cannot say that you can do it in every case, but the cases in which you can do it are so numerous that you can do it pretty generally.

The Chairman. Assuming that the writ of prohibition will not now lie to review the action of the lower court in refusing to set aside service of process, what power has the court, or this committee, under this law, to enlarge the right of appeal? We have been talking about procedure on appeal, and how far we could go with that. We are in doubt about that.

Now we come to the point of possibly or probably granting the right of appeal, or regulating the right of appeal, which is not a mere matter of procedure, but is something broader than that.

Mr. Pepper. Are we not doing more than that? Are we not adding to the jurisdiction of the Circuit Court of Appeals? I do not understand that an appellate court can issue the extraordinary writ of prohibition except to prevent the lower court from entering upon jurisdiction which is forbidden to it. Here we are, in effect, saying that a procedural error in the court below will justify the appellate court in issuing a writ of prohibition.

Mr. Sunderland. Here it is entering upon a jurisdiction that is forbidden. It is a jurisdictional objection, and the court threatens to go ahead and deal with the case in spite of the fact that it has no proper jurisdiction over the defendant and the defendant wants to prevent the exercise of that jurisdiction.

Mr. Pepper. I realize that, sir, but I was wondering whether, within the decisions on the subject of writ of prohibition, it could be found that the sense in which the writ was allowed at common law or under statute is sufficiently broad to cover a mere question of whether the service has been validly effected.

Mr. Sunderland. It has been so held, for example, in Wisconsin. Where you cannot save an exception, they allow a writ of prohibition. In New York, where you can save an exception, they do not allow a writ of prohibition.

The Chairman. You have to test this, not by what the law

is in any State, but by what the Federal statutes prescribe as to the appellate jurisdiction of the Court of Appeals. Of course, if this enlarges that in any way, it is outside of our problem.

Mr. Lemann. They have some authority to issue writs of prohibition. I had one tried against me a year ago. I had never heard of it being done in a Federal court, but it was tried, not in this case, but in a more extreme case. They have some jurisdiction to issue writs of prohibition. I do not know whether this would come within it. If it does not, I agree with you that it would be ultra vires for us to attempt this. If we have the power to do it, I think there is an argument on both sides, so far as delay, and so forth, are concerned. If you could get a summary hearing in the appellate court on such an application it might save a lot of wasted time in trying a case where it develops that the lower court had no jurisdiction and should never have tried it. On the other hand, if the upper court takes two years to decide that the lower court had jurisdiction, then you have just lost two years out of the plaintiff's life. So, if you are going to do this, I think there ought to be a summary proceeding in the appellate court. If the statute does not provide for that now, I do not think we can do it here.

Mr. Dodge. What I suggested was not an interlocutory appeal, but that power of reporting the question which our local committee in Massachusetts recommended to this committee, and which has proved a very valuable power. That is, the trial judge always has the right, if he thinks an interlocutory decision so goes to the merits that it should be determined before

a complete trial, of sending that case up on report.

Mr. Lemann. By certificate.

Mr. Dodge. By certificate. It has not been abused at all in the State practice. Its absence has been commented on to me by judges of the district court, as the absence of a power which they wished they had. Recently, within a year, I have had the exact case we are dealing with in this rule -- the question whether a foreign corporation is suable in Massachusetts. I brought the suit. My opponent appeared specially. We tried out the question of fact, as to whether it was doing business there. The judge, sitting without a jury, found the facts in my favor, and made certain rulings of law, and then reported that question to the supreme court. We went up there, and the supreme court decided it, and the whole thing is now in shape for trial. The case would not have been reached any earlier if all those interlocutory proceedings had not taken place, so there is no delay. It is a very convenient remedy, because it is a long case to try, and if the supreme court had reversed the trial court, it would have saved all of us a lot of time.

The Chairman. That involves a certificate, and, of course, that cannot be done except by act of Congress. We have not any power to enlarge the appellate jurisdiction of the Court of Appeals. We have not any power at all to put this rule in here with any effect unless, under the existing rule, statutes, and decisions, the Court of Appeals now has jurisdiction to entertain a writ of prohibition to prohibit the trial court from proceeding with a cause for want of service of process. I doubt very much if you will find any decision in the Circuit

Court of Appeals where they entertain a writ of prohibition for that purpose.

I had the thought also, which I tried to express here, that it is not a precise review, in a way. It is a very limited review, in any event, because a writ of prohibition or mandamus is a special remedy, and they will not grant it unless the right is clear. That is not what you want reviewed. It may not be so clear an example as the question of adequate remedy by appeal. I do not think it is safe to proceed unless somebody can produce some decisions of the Circuit Court of Appeals, under our law, to show that it has that power. I do not think it is safe to assume that it has, notwithstanding what may be the law in some States where the statutory condition is quite different.

Mr. Lemann. Mr. Dobie says the Supreme Court apparently has power to issue writs of prohibition. There is room for argument. He says the later cases seem to indicate they can do it.

The Chairman. It is in aid of their own jurisdiction, is it not?

Mr. Sunderland. In the Federal courts you can save an exception, can you not?

Mr. Morgan. Oh, yes.

Mr. Sunderland. If you can save your exception, it follows that you cannot have a writ of prohibition, because, if there is any other adequate remedy, prohibition will not lie.

Mr. Morgan. They would have to overrule the previous line of cases.

Mr. Lemann. He says:

"Section 262 of the Judicial Code gives the Supreme Court, also the Circuit Courts of Appeals and the District Courts, power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. There seems to be no special provision in these statutes for prohibition."

Mr. Pepper. May I ask whether he is right in that, because section 342 of the Judicial Code provides that the Supreme Court shall have power to issue writs of prohibition to District Courts when proceeding as courts of admiralty, or with maritime jurisdiction.

Mr. Lemann. He discusses that, and he says the later cases do not limit it to admiralty and maritime jurisdiction. He discusses the section I just read in a preceding page I did not refer to.

Mr. Pepper. Is not that a specific provision on the subject of prohibition?

I do not find anything which, by name, gives the jurisdiction in prohibition to any court except the Supreme Court. I was wondering whether that was an exclusion of the implication that the Circuit Court of Appeals might have it.

Mr. Lemann. He concludes not, after reviewing that statute and the other statutes, but you would have to examine the cases to check up.

Mr. Pepper. We have such a proceeding pending in the Third Circuit at the present moment, in a 77b proceeding, where a party deems himself aggrieved by a decision made by the

District judge. He has applied to the District judge for leave to apply to the Circuit Court of Appeals for a writ of prohibition to prevent the District judge from doing the thing which he has just done, and that question is going to be discussed next week in the Circuit Court of Appeals.

The Chairman. As the rule is drawn, if the motion to set aside the service of the process is denied, and then the party who has made it applies for a writ of prohibition, and the Circuit Court of Appeals throws him out on the ground that they have not any jurisdiction, or that they would not grant it if there was an adequate remedy by appeal, then he can go back to the trial court and go on with the general appearance without waiving his right, as it is worded. You make a futile application to the court that has not any jurisdiction to grant you a writ, to save your rights.

Mr. Lemann. I suppose it is on the theory that the upper court might say that your remedy is sufficient by appeal, and they would not interfere. If they took that view, you ought to be penalized, because they will not prohibit. I suppose that is the theory of this.

Mr. Loftin. In order to get the matter before the committee, I move that the language in brackets be left out.

The Chairman. I would like to ask Dean Dobie if I am right in the general impression that in United States Circuit Courts of Appeals they will not grant writs of prohibition to the lower courts where there is a right to review by appeal.

Mr. Dobie. That is my understanding. I was just going to read an extract from --

Mr. Clark. This takes away the possibility of an excep-

tion.

Mr. Dobie. I think we could extend it if the Court was willing to do it, which I frankly doubt. In the case of In re Rice, 155 U. S., 396, Mr. Chief Justice Fuller said:

> "Where it appears that the Court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset, and has no other remedy, is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the Court is doubtful or depends upon facts which are not made a matter of record, or where the application is made by a stranger, the granting or refusing of the right is discretionary."

Mr. Clark. This is to take away that other right of appeal.

The Chairman. What right have we to take away the right of appeal, or enlarge it?

Mr. Tolman. May I second Mr. Loftin's motion to strike out the matter in brackets?

The Chairman. Is there any further discussion?

Mr. Morgan. General Mitchell, do you think there is any hope that the Supreme Court would overrule that long line of decisions which says you may save an exception and try it out?

The Chairman. No.

Mr. Morgan. Then it would be futile for us to put this in.

I think, if there is no hope of that.

Mr. Olney. It may be possible, by the rules, to take away that right.

Mr. Morgan. But they would have to overrule their whole line of decisions, because they have said that if you do save an exception, then you do not waive your jurisdictional point by going on and trying the case.

Mr. Clark. This is not the first thing we are asking them to change. We are asking them to make a new rule on several things, including narrative records, and so forth.

The Chairman. They could, in effect, supersede their decisions by making a different rule here. That is not my point.

It takes six or eight months to get a decision in the Circuit Court of Appeals --

Mr. Dobie. How do they handle supervisory appeals in bankruptcy? Do they not do this pretty rapidly in New York?

The Chairman. Yes. That is because there is a special procedure by statute to shorten the time of petitions for review and things of that kind. They are all specially provided by statutes, which regulate the method of appeal and the time for appeal. We are not going into that field under our statute.

Mr. Morgan. If we are going to try anything on the Supreme Court, I think we had better try ending this at the word "action" in line 15.

The Chairman. The motion was to strike out the bracketed portion. If there is no further discussion, I will put that motion. All in favor say Aye; contrary, No; the motion is carried.

Mr. Dobie. I would like to know whether the committee thinks there is any use putting in the provision:

"If the motion is ruled adversely to the defendant, either in whole or in part, he shall be deemed to have consented thereto if he subsequently appears generally in the action."

That is, if he goes on and tries the action, he waives the question of jurisdiction. That is contrary to the holdings of the Supreme Court now, and the holdings of about half the States. About half of them are the other way.

Mr. Olney. It is a very severe penalty.

Mr. Morgan. It seems to work all right in about half the States.

Mr. Lemann. Under the last motion it would go out of the rule. You are asking whether that much of it should be put back.

Mr. Morgan. Yes.

Mr. Lemann. I think it is pretty tough on a man to say to him, "You don't know, and your lawyer doesn't know, whether there is jurisdiction or not. He thinks probably there is not. He is not sure of it. It is hard to be sure of anything in trying a lawsuit." He is acting in good faith about it. If you put this back, you say to him, "You have to back my judgment. I am very sure the court has no jurisdiction. If I am wrong about it, you are hooked badly, if you have to go ahead and try this case, and give up your jurisdictional question."

Mr. Morgan. That is the point.

Mr. Lemann. That is pretty tough.

Mr. Dobie. In connection with Mr. Morgan's suggestion, we must remember that rulings on the jurisdictional questions in Federal courts are pretty difficult. In the interpretation of a lot of these statutes having to do with the amount in controversy, and things like that, the Circuit Courts have shifted about, and a lot of them are in the dark. I think it would be unfair to the litigant.

Mr. Morgan. If they shift about, why not take the guess of the trial judge?

The Chairman. The trial judge would always guess against setting aside service as insufficient, if the man were standing in the courtroom, and he knew his denial of the motion to set aside the service could not be reviewed. He would say, "We are here. I guess we will go on."

Mr. Morgan. Isn't that right? That is just the point. "You are here and you are going to get a fair trial, so come on and play ball."

Mr. Lemann. His saying that he is going to get a fair trial does not always make it so.

Mr. Sunderland. That might be right in a State court where it would not be right in a Federal court.

Mr. Morgan. I am not so sure about that. I would rather bet the other way.

The Chairman. If there is no motion to restore that --

Mr. Morgan. I did not think I would get it by these diehards.

The Chairman. Is there anything else of substance in subdivision (a) of rule 15?

(No response.)

The Chairman. How about subdivision (b) of rule 13?

Mr. Dobie. General Wickersham wanted to put something in there. I do not know whether we want to fight that over again.

The Chairman. I have some verbal suggestions, but I am submitting those in writing. I am not taking the time of the committee on those.

If we are through with rule 13, let us pass to rule 14.

RULE 14. MOTION FOR FURTHER STATEMENT OR BILL OF PARTICULARS; MOTION TO STRIKE OUT.

Mr. Clark. I think I said this about Mr. Morgan's suggestions. He makes various suggestions on that matter. I said:

> "All of Mr. Morgan's suggestions are accepted. It is felt, however, that the rule now does not sufficiently limit the granting of the motion and makes it available as an instrument of delay."

This is another one of those things that you can stick in just to hold things up.

> "The following is suggested as a third sentence, after 'promptly' in Mr. Morgan's rephrased first paragraph:
>
> "'The movant shall have the burden of showing that the information called for by the motion is needed for the proper preparation of his defense.'"

Do you want to consider that form, and let it go to the drafting committee?

The Chairman. Is that a matter of substance? I do not

catch the thread of it, so I am not able to say myself.

Mr. Clark. It is an attempt to make the motion not freely grantable. It is to discourage the defendant from indulging in these motions unless he really has something to get out of it.

What was it Judge Donworth said about discouraging the demurrer? This is a discouragement of the motion.

Mr. Dodge. It states the attitude the Court would take, anyway, does it not?

Mr. Clark. I am not so sure.

Mr. Dodge. I think that is the law. Get specifications if you need them to state your defense.

Mr. Clark. I think it depends a good deal on the judge. In our lines 8 and 9 we say:

> --"and grant it when there are further facts which should be stated in order to enable the defendant properly to prepare his defense."

What I meant by that was that it should not be granted otherwise. Mr. Morgan improved the language. We are willing to admit that he polished it a little, but he did not put in much of a cog. I wanted to do something to make it a little less likely that you can stick these motions in to delay the case.

Mr. Dodge. As a matter of fact, Mr. Reporter, motions of this sort, in jurisdictions with which I am familiar, do not have the slightest bearing on any delay of the case. You can not reach a case for trial for two or three years. These motions come up early and they are disposed of months and years before there is any possibility of a trial. I have never known a case to be delayed in trial on its merits by means of

that sort.

Mr. Morgan. Is that because the courts of Massachusetts are so far behind in their calendar?

Mr. Dodge. I think that is perhaps it, but in most States there is considerable delay.

Mr. Clark. In the metropolitan area, where there is a long delay anyway, it cannot make much difference, but in places where that is not the case, this is one of the favorite implements of the defendant's lawyer -- for example, in my State, you stick in a motion, and just let it stand. The plaintiff usually, if he is well advised, will put in a reply as quickly as he can. If he does not, it has to be called up for hearing. It depends on the judge. Some judges will decide them promptly, and some of them will not. I have seen long arguments and briefs on this very subject.

Mr. Donworth. What particular feature is that?

Mr. Clark. The motion for bill of particulars or more specific statement. Mr. Morgan suggested rephrasing it, and I wanted to put in a little after it, to make it a little harder for the movant to act.

The Chairman. What was the proposal you wanted to add?

Mr. Clark (reading). "The following is suggested as a third sentence after 'promptly' in Mr. Morgan's rephrased first paragraph:

"'The movant shall have the burden of showing that the information called for by the motion is needed for the proper preparation of his defense.'"

That follows right after the statement:

"The court shall proceed to determine the motion

promptly."

The Chairman. That is the law anyway. Does not the movant have to show that the thing is reasonably needed for his defense?

Mr. Clark. The way some courts react, you certainly do not have to.

The Chairman. I thought that was the law.

Mr. Morgan. That is what they say the law is.

The Chairman. If we say it, it will not add anything to it.

Mr. Dobie. Some of them say there is practically no difference between a motion to make more definite and certain and a motion for a bill of particulars. I think there is.

Mr. Morgan. You have taken care of that in another place.

Mr. Donworth. We usually move in the alternative. I think most lawyers do that.

Mr. Pepper. Is there anything in the word "movant" that is not contained in the English word "mover"?

The Chairman. I will rule that that is a matter of style.

Mr. Donworth. I wish to move that we strike out lines 10 to 13. This reads:

> "Upon being served with an amended pleading, or bill of particulars, or if such is not served and the motion therefor is denied, the defendant shall have the same time for filing his defenses to which he was entitled at the time of filing his motion."

That is very unfortunate for the defendant, particularly if he is in the right, as he will be 50 percent of the time. I think there is a general rule -- I suggested one to Dean Clark,

and I think it is incorporated somewhere -- that the party losing on a motion shall proceed with the next step within five days, or within such further time as the court shall allow. If a defendant does not move for his bill of particulars until the 18th day -- and he certainly is within his rights -- then even if he wins on the motion, and gets the bill of particulars or amended complaint, he has two days left to answer it. I do not think that is at all right.

Mr. Sunderland. I thought this meant that he had 20 days at that time.

Mr. Donworth. No; -- "to which he was entitled at the time of filing his motion."

Mr. Morgan. He has only two days.

Mr. Dobie. The idea was to make him move promptly. If he wants to wait until the 18th day, that is his lookout. If he wants a bill of particulars, he ought to decide before the 18th or 19th day.

Mr. Donworth. This is entirely upon the wrong theory. When a man is sued for $5,000, or $100,000, or there is a bill in equity under the Sherman act -- and all this litigation is important -- don't think you are going to subserve the ends of justice by driving that man to get the case to issue within a month, or any other particular time. We find no abuses in our district with these preliminary motions. They are in the interest of justice. The court grants them fully as often as it denies them. I should say oftener than it denies them. Under a rule such as I have suggested, the party losing a motion, or the party served with a new pleading shall have five days, and as much more time as the court shall grant. That

saves the interests of everyone. But assume that this defendant -- and I am afraid that this idea runs through a lot of the rules -- is acting in bad faith, trying to stave off a just judgment. We who have had important litigation in recent years know that very often it is just the reverse. The defendant is being pursued by the United States, or by some plaintiff, and it is very unfair to say that if he takes 18 days to decide what kind of a motion to put in, he must file his answer after he gets the amended complaint, within two days.

Mr. Morgan. He can get more time from the court.

Mr. Donworth. But he should not in any case be held to less than five days.

Mr. Morgan. He has his original time, and if he needs more time he will ask for it. I have never known defendants to be backward about asking for more time.

Mr. Donworth. You have to give three days' notice of your motion.

Mr. Morgan. No; you can argue it on the motion for bill of particulars.

Mr. Donworth. It is a wrong theory to assume that the defendant is acting in bad faith.

Mr. Morgan. I am not assuming he is acting in bad faith.

Mr. Donworth. He needs time to defend against these very important cases on which he is going to be haled into Federal court.

The Chairman. That may be a general argument in favor of enlarging the practice of trying to answer generally. A man makes a motion. Suppose he has 20 days to answer. He lets 10 go by, and then he makes a motion, and when the motion is de-

cided he has what is left, 10 more days.

Mr. Dodge. Perhaps it is not decided until after the 20 days.

The Chairman. You do not count in his time for answering the time consumed in presenting the motion and getting it decided.

Mr. Donworth. It is a premium on the plaintiff putting in his vague averments.

The Chairman. I thought this was an advantage to the defendant, because one of the things I have always been troubled with, under the practice I am accustomed to, is the fact that if you let the time for answering go by without answering, even though you have made a motion, you are at the mercy of the court.

Mr. Donworth. The court always grants you time.

Mr. Morgan. But you have to ask for it.

The Chairman. The court does not have to. This makes it a matter of right. You will have some time anyway, and such additional time as the court wants to grant you. One of the things that has always worried lawyers in my jurisdiction is the fact that when they made a motion of this kind and they let the time for answering go by, they were helpless in the discretion of the court, as to how much time they did have. This gives him at least as much time as he had left when he made the motion, and leaves the court the power to enlarge it. There are other provisions with regard to that.

Mr. Donworth. I do not think much of the suggestion that in arguing your motion you can say to the court, "Now, your Honor, if you deny this motion I will have two days left. I

wish you would say I will have 10." Of course, that is a confession of weakness. I think there should be a definite rule that gives a man five days, at least, which is surely as little as one needs to turn around. I do not think there would be anything unreasonable about that.

The Chairman. Suppose you put in at the end "not less than five days".

Mr. Donworth. That would be satisfactory.

Mr. Lemann. Then he can wait 20 days, ask for a bill of particulars, and have five days more.

The Chairman. That is right.

Mr. Lemann. A man can wait 15 days and ask for his bill of particulars, and still have five days left. Is not that enough? It all depends on where you start from.

The Chairman. Let us settle it by a vote. Will you make a motion to carry out your suggestion?

Mr. Donworth. I would be entirely satisfied with the Chairman's suggestion, adding at the end of line 13 "but not less than five days in any event." I think that might cover it.

The Chairman. Let us take a vote on it. All in favor of the amendment, say Aye; contrary, No. The Ayes seem to have it.

Mr. Morgan. I do not think it is vital. I do not think we ought to waste much time on it.

The Chairman. Is there any other matter of substance now?

Mr. Dobie. What was the idea of this language:

"A bill of particulars when filed shall become a part of the pleading which it supplements"?

Mr. Morgan. It will be a part of the pleading, and that makes the pleading demurrable. He could demur to it.

Mr. Dobie. That changes the old rule.

Mr. Morgan. Yes, it changes the old rule, absolutely.

Mr. Sunderland. I could not see the distinction between the three different items, "amended pleading, further statement, or bill of particulars". Are those three different kinds of things, or two kinds of things?

Mr. Clark. Where are you?

Mr. Sunderland. Line 20 -- "by serving an amended pleading, further statement, or bill of particulars."

Mr. Morgan. I thought the "further statement" might be the form of an amendment for the amended pleading.

Mr. Sunderland. Amended pleading, or amendment to a pleading, or a bill of particulars -- is that what is meant?

Mr. Clark. I do not care particularly about it. I do not think it is very important, but that is what we are after.

Mr. Dobie. It does not supersede the old pleading. It is just in addition to it.

Mr. Clark. It can be either way. Do you want to change it?

Mr. Dobie. No; I just wanted to know.

Mr. Dodge. Let us make the rule uniform about that. In some places you have left out reference to "further statement".

Mr. Donworth. The usual practice is, where the statement is amended, the plaintiff must amend his complaint, so that you have one complete narrative statement.

Mr. Pepper. Mr. Chairman, is there any matter before the house?

The Chairman. No. We are just looking for substance on rule 14.

Mr. Pepper. Before we leave rule 14, I want to ask the Reporter whether I correctly understand the point. I am accustomed to a practice in which, upon the coming in of plaintiff's declaration or statement, the defendant, in all cases except tort cases, is required to file what, in our practice, is called an affidavit of defense. It is substantially an answer, verified. Our common practice is this: If, in the judgment of the plaintiff, the affidavit does not disclose, assuming all its facts to be true, a defense to the claim, he may move for judgment for want of a sufficient affidavit of defense. That is set down on motion and comes up on the next current list and is argued, and in a very large number of cases the matter is disposed of by what is, in substance, a demurrer to the answer. It has been found in practice to be such an expeditious and satisfactory way to separate real cases from cases that have some organic defect in them, that we think a lot of it. If I understand it, the general policy of our rules system is to discourage a proceeding of that sort. Under rule 40 a provision is made which makes it possible to do that thing, but it is relegated, in the distribution of subject matter, to places where you are dealing with depositions and summary judgments, and things like that. If it has the importance that I had supposed it had, it ought to have its place in the same category as the things that we now are discussing under rule 14. But no doubt that has been decided by the committee heretofore and the general policy approved. If so, I do not want to raise the question.

The Chairman. We thought we had covered that subject pretty fully in Summary Judgment Procedure.

Mr. Pepper. Very good.

Mr. Sunderland. But that is not based on pleadings.

Mr. Pepper. Yes; it is altogether based on pleadings.

Mr. Sunderland. I mean the summary judgment is not based on the pleadings. Your point is that you want some way to raise the point on the pleadings.

Mr. Pepper. I do not want to press the matter, if it has been maturely considered, but I just wanted to point out that in an important jurisdiction, over a long period of time, it has been found to be a very great aid to expedition and justice to have a procedure by which you can get judgment against the defendant for his failure to disclose in his answer an adequate defense to the case made by the declaration.

The Chairman. Mr. Sunderland, I am a little disturbed about your statement about the motion for summary judgment not enabling a man to get summary judgment on the pleadings. Of course, you can add affidavits, and so forth, if you want to, or questions of fact, to sift things out and see whether they are substantial or not, but, as I read that rule when we had it up before, are not the pleadings, depositions, and so forth, on file?

Mr. Sunderland. That is true, but that is not taken in limine. It is taken after you have gone a great deal further and taken depositions and gotten admissions.

Mr. Clark. If it is so limited, I would be a little worried about it. I thought this was practically the New York motion. It is the converse of a summary judgment. It is a

motion made by the defendant.

The Chairman. Suppose there are not any depositions or admissions on file, but the pleadings are there?

Mr. Pepper. I recognize that it comes within the rule. I was merely asking the Reporter with respect to this matter of emphasis on the theory of the lawsuit, which is really what we are considering --

Mr. Clark. I would like to speak about that a minute. I talked to Senator Pepper a little about this before. I think that there may be a little different emphasis as between him and me.

So far as Senator Pepper's practice is practically a demurrer, I do not like it. I am frank to say I do not, and that is what I have expressed right along here. We have tried to get at that in the matter of defense, as a part of the answer. In other words, I should not want to go any further than this summary procedure. I am a little interested that Senator Pepper feels that in his State it has proven effective. I have not seen, in demurrers generally, anything except a waste of time, unless both parties are willing, and where both parties are willing, you can get your case on very readily. We went through the trial court statistics. In one of these instances we had some 9,000 cases. A great many of them were settled anyway, but there were about 20 demurrers, and in those cases they almost never settled the case.

Mr. Pepper. But you probably did not include in those statistics what I speak of as judgment for want of sufficient affidavit of defense. That would not be disclosed in the statistics.

Mr. Lemann. I think your point is right, because we have had a provision in the last 10 years that when the answer comes in the plaintiff may ask for judgment on the answer because it does not really state any defense. That has been used repeatedly with us, with great advantage to the plaintiffs, in preventing delay. Otherwise you just put in an answer and state your defense. You may get a year's delay before the case is called.

Mr. Pepper. It is like putting a case down for hearing on a bill and answer in an equity proceeding.

Mr. Lemann. In rule 13(b) of our own rules, you have the right to set up other defenses.

Mr. Clark. This can come under 13(b).

Mr. Lemann. That is the point I wanted to raise. Make it perfectly plain that it can be done under 13(b).

Mr. Clark. I think it is perfectly plain now.

Mr. Lemann. That settles it.

Mr. Pepper. Is that the answer?

Mr. Clark. Yes. It comes under 13(b), and can be called up separately. But you cannot call it up separately as a matter of course. You have to make the court think it is a vital matter. Notice the difference between the summary-judgment procedure and this. The summary-judgment procedure is a good deal the same, but you have to show that you are acting in good faith, too. You have to show in your affidavit that you are not holding back and simply saying, "He has forgotten to state something, and I am not going to disclose anything of my own."

Mr. Pepper. It is clear, is it, that such a thing as Mr.

Lemann and I have in mind could be raised?

Mr. Clark. Yes. In line 27 it says:

"Every other defense or objection in point of law or fact, whether in abatement or bar, to the right of action or defense set forth in the last pleading on file, shall, except as stated in rule 14 (Motion for Further Statement or to Strike Out) * * * be made as a defense in the answer."

Then it can be called up.

Mr. Pepper. Then the court, on the motion, discloses it.

The Chairman. But it is discretionary with the court as to whether he will have a preliminary hearing.

Mr. Clark. Yes.

Mr. Donworth. Let me state what I understand to be the point in these rules, as bearing on the question raised by Senator Pepper. I understand the Pennsylvania practice to which he refers enables the plaintiff to obtain judgment if there is a defect in the answer, if it does not set up sufficient facts. These rules discourage anything of that kind.

Mr. Pepper. Yes.

Mr. Donworth. The idea is that a case should not be decided on the pleadings, in the ordinary course. There may be certain exceptions. As I understand it, if you want the summary judgment, you must put in some affidavits, too, because the pleader is dealt with very indulgently, and it is not assumed that he has not a better case than he sets up. He may have. Isn't that so?

Mr. Clark. You are correct.

Mr. Pepper. We had a very fine old equity lawyer in

Philadelphia a generation ago, Mr. McMurtry, who was better before the court than he was before the jury. On one occasion he attempted a rather labored witticism before the jury, in trying a case against a very clever trial lawyer who, on rising to address the court, said that he had noticed with great satisfaction that Mr. McMurtry had made a real joke; that up to this time he had always supposed that his idea of a joke was a demurrer. (Laughter)

Mr. Olney. Mr. Chairman, this matter of motion for judgment on the pleadings is important. It frequently is a very effective shortcut, without the necessity of trial or any preparation for trial. We have had an experience of that sort in our office recently, a most striking experience. Suit was brought against the Public Utilities Commission to set aside certain rates as not due process of law. The Public Utilities Commission put in a pleading, and we moved for judgment on the pleadings and got it, because there was no defense stated in the answer, in effect. If it had not been filed, and we had had to get ready for trial, it would have cost us thousands of dollars to try that case.

The matter is of extreme importance. It is used constantly, and it ought to be here, and there ought not to be any question about its being permitted. I have read rule 15(b), and it is exceedingly doubtful if that is intended to cover this case. There ought to be no doubt about it at all. It reads, for example:

> "When a defense is such that a decision thereon may finally dispose of the whole or a material part of the issues, the party may at the time of filing his

pleading file also his motion"--

The only pleading that is being filed is the answer.

--"stating the grounds therefor and ask that a hearing be had upon it in advance of the trial of the other issues and the court may, on such motion, or of its own motion or on motion of the opposing party, if it find that a decision on such defense may finally dispose of the whole or a material part of the issues, order the case set down for a hearing on such motion."

That rule -- and it is a perfectly proper rule -- is designed to take care of the situation where an answer sets up a matter in abatement, and the trial of that issue presented by the abatement, prior to the main trial, will dispose of the whole case. In such a case as that it is perfectly proper for the court to set it down and hear it, and hear evidence upon that particular plea. But it does not refer to this motion for judgment on the pleadings.

The Chairman. It allows the defendant to make a motion for judgment on the pleadings, but not the plaintiff.

Mr. Lemann. Look at line 40. Doesn't it say "on motion of the opposing party" in line 40?

Mr. Olney. It ought to be made perfectly clear.

Mr. Lemann. Rule 13, page 2, line 40, contains the words "on motion of the opposing party". Do not those words give the plaintiff the right to make the motion?

Mr. Clark. That is, the motion to bring it up in advance for hearing.

Mr. Lemann. It certainly ought to be clear. I agree with

Mr. Olney. I had a case recently in which I was representing the defendant, and we had just a question of law under a lease, as to whether we were required to pay certain taxes. The plaintiff sued us. He was the owner of the property, and he sued claiming that the tenant should pay the taxes. We filed an answer, denied it, and referred to the language of the lease. Our opponent, the plaintiff, took a rule on us for judgment. On the face of the papers it was plain that we were obligated to pay. The court disposed of it in 10 days. We took it to the Supreme Court and in a few months it was settled. Why should that case have had to stay on the trial calendar for a year or two before the parties could be heard, when it presented a question of law clearly on the pleadings?

Mr. Clark. You have a principle in those cases that can be taken care of under your summary procedure.

Mr. Sunderland. I do not believe so.

Mr. Clark. Yes, you have.

Mr. Sunderland. I think it is technically within the wording of that rule, but I do not believe any lawyer will ever suppose he can use that, and I do not believe the rule is primarily designed for that.

Mr. Olney. Much of this is a matter of form, but I move, so as to get the thing clear, that it is the sense of the committee that provision be made somewhere or other clearly and unmistakably for a motion for judgment on the pleadings.

Mr. Lemann. I second the motion.

Mr. Clark. I must say that I regret that very greatly. That is the thing we are trying to get away from, the chance of making the pleadings mean as much as that.

The Chairman. Let us try to narrow this down before we argue that. As I understand the situation, it has been the intent of the drafting committee to provide for motions for judgment on the pleadings in subdivision (b).

Mr. Clark. Included with the other defenses. That is the point. You have to bring them all up at once.

The Chairman. The details of it are secondary. The rule does do this. It may be obscure in its wording, and it may raise the question that arose in my mind, as to whether the plaintiff can do it or only the defendant, when he files his plea; but the essential thing about this rule, outside of those questions of clarity, is the discretion of the court. This rule, to whatever extent it grants the right to judgment on the pleadings, leaves it to the discretion of the court as to whether then he will entertain it or leave it to the trial. As I understand it, we are all agreed that some provision should be made clearly for motion for judgment on the pleadings, but the real issue before us is whether that should be discretionary with the court, as this rule has it, or absolute. Is not that about it?

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Mr. Donworth. Are you speaking of Rule 13?

Mr. Clark. Subdivision (b).

Mr. Pepper. Isn't there anything that leaves it discretionary with the court?

The Chairman. Yes, not only that but you have to have a motion to determine whether the court thinks so after the preliminary motion. Then he sets down the motion for further pleadings on a further date, which is a very awkward way of doing it.

Mr. Olney. As a result of many a struggle with this sort of thing, there are two things which our rules should provide for, and they should be entirely distinct.

One is a motion for judgment on the pleadings, either by the defendant -- a motion for judgment by the -- I mean by the plaintiff; a motion for judgment by the defendant is equivalent to a motion to dismiss the action. But when the plaintiff wants judgment on the answer as insufficient, he moves for judgment on the pleadings, or bill and answer, if you please. That should be clearly provided for and unmistakably provided for.

The other thing, and the very advisable thing, is the thing really covered by this rule. An answer is interposed, we will say, by way of abatement -- a suit on a note -- something easily proved -- just to settle the whole business right then and there. Under those circumstances it is allowed the court in its discretion to set that for special hearing in advance of the general trial. That also is very applicable, but it is entirely different from the motion for judgment on the pleading.

The Chairman. Your motion is to provide for a judgment on the pleadings and not to leave it to the discretion of the court as to whether he shall entertain it?

Mr. Olney. Exactly.

The Chairman. I think that is just the difference between your motion and the rule, or your view of the rule. This intends to grant the right but expressly leaves it discretionary with the court.

Mr. Clark. That is correct, and on the plaintiff's motion, that is given by 49 to 52, except in cases where the plaintiff is required to file reply, in each case the plaintiff's reply, under the first sentence of the rule, requires him to put all his objections in at one time. The attempt is made to get away from another stage of hearing when it so rarely settles anything. There isn't much on which you can catch a person on the pleadings that really counts. To provide that in any case the party may make objections on the face of the pleadings is not going to get you very far, because the pleadings do not have to be very specific, nor do they have to be very binding.

The Chairman. Why do you think it ought to be discretionary with the court whether he will entertain a motion for amendment of the pleadings?

Mr. Clark. I do not think most of the time you will get anywhere with that.

Mr. Olney. I disagree positively with that.

Mr. Donworth. Mr. Chairman, I think Judge Olney's motion cuts right into the heart of what these rules have on the subject of pleading. As I understand these rules, they

studiously avoid the possibility of having the merits of the party's case decided by his pleadings. They studiously avoid that. You can't demur to a complaint. You can't demur to an answer. The purpose of the pleadings under these rules is to inform the court in a general way -- enough to satisfy him generally so that he understands what the claim is and what the defense is; but you can never get a judgment based upon a party's allegations or denials. You can't get a judgment under these rules unless on affidavit, unless you show the court not as a matter of pleading but as a matter of fact that the plaintiff has not got a case.

The motion cuts right into the very heart of the spirit of these pleadings.

Mr. Clark. You are quite right.

Mr. Pepper. That may be so, and maybe after I have had the advantage of sitting in long enough, I will come to that way of thinking; but at the moment it seems to me that is at war with common sense.

With us the plaintiff holds this promissory note for $10,000, and it is overdue and unpaid. He makes demand, and it is refused, and he brings suit. The defendant is required to file an affidavit of defense setting up whatever defense he has. He files an affidavit of defense which tells a cloudy story of a substance which is negatived by all the law of negotiable instruments. It sets up some defense which is not
2 available in the suit on that note. It is clearly so. We immediately order that affidavit of defense set down for argument on a motion for judgment for want of sufficient affidavit. In 15 days the man gets his judgment, he issues an execution,

and gets his money. Why in the world ought he wait for a year, during which time the defendant may become insolvent or skip, or do whatever else he pleases?

The Chairman. You have to bear with the reporter in this respect. He has not eliminated that entirely. Where the pleadings show clearly that one party or the other is entitled to judgment, he has provided that such a motion may be made, or intended to, although we are not satisfied with his method; but he has coupled it with this condition: that when the matter is brought before the court it is a matter for the court to say whether it ought to go to trial on the merits or not.

In the case you speak about, I should assume that the court would say, "Yes, here is a point clear on the matter of record and law, and it can be disposed of now; therefore, I will hear it"; so he has not deprived the parties of their rights. He has left it with the court to say whether it is clear in advance.

Mr. Pepper. That could be disposed of at the time of motion.

Mr. Clark. If that is not clear, we will clear that up.

Mr. Lemann. I am not sure whether the reporter did intend to permit this. First I did think he intended to permit what Senator Pepper, Judge Olney, and I have been talking about. I thought it was covered by Professor Sunderland's provisions, but when it was pointed out he disavowed that. Then I said it was in 13 (b), and I made the suggestion of 13 (b); but as I listened to those statements and have thought

a little further, I don't think the reporter intended it to be in 13 (b); I think he intended it with his statute of limitations and other defenses.

Under 13 (b) the defendant could come into court and say, "Here is one defense. I have pleaded the statute of limitations, which involves some proof, but ought to be taken up and disposed of separately. It may dispose of the case."

Then the judgment of this preliminary argument as to whether it would dispose of the case. If he said it would, then he would set it down for a day on which you would bring the witnesses. As I listened to the discussion, I thought that is what the reporter intended to cover.

Mr. Clark. I am sorry, but you are wrong. Notice the first sentence:

"Every other defense or objection in point of law or fact."

Mr. Lemann. If you thought you would cover it by 13 (b), why the statement that covers Professor Sunderland's part? It seems to me the important thing is Judge Olney's motion.

Mr. Clark. Between the two, it does not seem to me that you want any further opportunity to raise the question. I think the cases suggested by Senator Pepper are amply covered as it is now. The reason I am disturbed by the further suggestion is that on top of what seems to be very complete coverage now, you put in another motion that runs around and is at large.

Mr. Pepper. The only motion which Judge Olney made, as I understood it, was not to superimpose anything but to make sure that Rule 13 in some way or other provides for an

opportunity for either party to make an objection that the case against him is not valid in law as disclosed on the face of the pleading.

Mr. Clark. It does now, and the point involved is the discretion.

The Chairman. Now, analyze that. Senator Pepper calls attention to the fact, of course, that if the point is not clear on the pleadings, the court probably will not grant the motion, but you have accomplished practically the same thing by leaving it to the discretion of the court whether he will hear it. I think it is Tweedledum and Tweedledee really. As long as you have mixed up here or combined in this rule not only means of judgment on the pleadings but special discretion, on which you are going to hear evidence, it is all right to have a blanket clause unless the preliminary hearing is going to be ordered. That gives the court discretion to have a preliminary trial on an issue of fact, which he ought to have. What harm does it do in the same breath to say that he shall have discretion as to preliminary hearing on motion for judgment on the pleadings, because he has it anyway, as Senator Pepper points out. He won't grant it if it is in doubt. So, I think, in favor of the principle of the rule, it will have to be revised and clarified.

Mr. Morgan. It seems to me that the first sentence of 13 (b) does everything that a demurrer did under the code system and the common law system. If you rephrase this portion beginning in 35 to show that the court may on its own motion or motion of either party order a hearing or a trial in advance of the trial of issue, and then combine that with 49

to 52, I do not see any case that is not covered in that rule.

The Chairman. I do not either.

Mr. Morgan. Senator Pepper's rule calls for an affidavit of some kind or other except that he is calling for an affidavit of defense by the defendant, taking it for granted that the plaintiff's is going to be supported. It seems to me the plaintiff's can be overstated, just as the defendant's. I don't care what Mr. Sunderland intended by that thing; the language there is certainly strong enough.

Mr. Olney. It was intended, I understood, by the reporter that there should be no right to obtain a judgment either in favor of the plaintiff or in favor of the defendant simply on the pleadings. The pleadings were not intended for any such purpose.

Mr. Clark. That is an overstatement. You have stated it in terms of absolutes. May I clarify it this much?

I do not think you are very often going to get it on the pleadings, but I don't intend to say that you shall not when you have a proper case. As the pleadings are going generally in this country, you can't get it very often, but I am not putting it in terms of absolutes. When you have it, here it is.

The Chairman. Judge Olney has made a motion that whatever Rule 13 does or does not do, it is the sense of the committee that it should provide a means for a motion for judgment on the pleadings. Let us lay aside for a moment the question of whether the hearing on that motion in advance of trial ought to be discretionary with the court. Now we have the particular motion without reference to the question of

whether the preliminary matter should be discretionary with the court. Rule 13 provides a motion -- if it does not do it now -- for judgment on the pleadings by either party. Are we ready to vote on that?

Mr. Clark. I am not quite sure. As a matter of instruction, I think that I agree with what you have in mind, but a motion -- May I put this in a motion for judgment either by itself or as a part of some other pleadings?

The Chairman. I do not care how you do it.

Mr. Clark. We are trying to make them come together. I did not want them mixed up. I want that understood.

The Chairman. Is not that a question for an arrangement?

Mr. Dodge. He has got to have the right to file that motion independent of any pleadings.

Mr. Lemann. 49 to 52 cover that.

Mr. Clark. The plaintiff has to do the same thing that the defendant has to do. If the plaintiff files his reply, it has got to contain his objection. In the cases under the rule where he does not file a reply, he can file separate motion under 49 to 52.

Mr. Dodge. Yes, I overlooked those last few lines.

The Chairman. The particular question is whether the motion for judgment on the pleadings, or its equivalent, shall be permitted by Rule 13.

All in favor will say aye; those opposed, no.

(The motion was carried.)

The Chairman. The next question is whether or not we shall preserve with respect to motions on the pleadings the discretionary power of the court to hear them before the trial,

just as you have to have discretion to hear special trials on special issues of fact before the main trial.

Mr. Pepper. As to that I hope we will not interpose that barrier. I venture to believe that in jurisdictions such as my own, where we are accustomed to a motion for judgment for want of sufficient affidavit of defense, or in Massachusetts, or in Mr. Lemann's jurisdiction, Louisiana, they will adapt the practice under such a provision to what they are accustomed to, and it will be treated as a motion, of course. It will be put on the list and disposed of as heretofore.

In jurisdictions where such motions are not offered, it would not be much used or resorted to, but if we insist that before the motion can gain the hearing of the court you first have to educate the court to the proposition that it is something worth his while to listen to, we are making two demands upon the attention of the busy court, and I think we are doing something that is unnecessary.

Mr. Clark. Mr. Chairman, I think the task of the court on this preliminary matter is a very simple one indeed. It is just a question of inspection of the documents, really, as to whether this is a matter that really goes to the essence or not. This is the general direction in which pleading reform has gone. This is the thing that has caused difficulty. The equity rule has even abolished the demurrer. In New York they have tried to lessen the possibility of this preliminary hearing. This is most closely modeled upon the English procedure. As a matter of fact, already on the law side in the federal court the court has asserted that whether a hearing

should be had is a matter of the discretion of the court. That goes back to a case in 7 Howard.

The Chairman. You do not want two hearings anyway, do you?

Mr. Clark. Oh, no.

The Chairman. Your provisions have two hearings.

Mr. Clark. No, there is no question about that. I did not think it so provided, but if it does, we can clear that up. All that happens is that when the objection comes in, and the party who makes it asks for a preliminary hearing, and the judge looks at the papers and sees on the papers whether it is going to need additions or not, he orders a hearing.

The Chairman. He goes on with the hearing; he does not order it.

Mr. Pepper. No, the reporter evidently has in mind that there is to be an interview between counsel and the court.

The Chairman. He has agreed that he will wipe that out.

Mr. Pepper. Suppose you do. Then why put in anything having to do with the discretion of the court whether to grant the motion or not? That would not be any more discretionary than any other matter would be.

The Chairman. He can deny it without prejudice anyway.

Mr. Pepper. Certainly.

The Chairman. The only reason I thought it might be well to leave it is that you have got to have a discretionary clause like that with respect to preliminary trials on matters of fact -- special issues.

Mr. Clark. The two ought not be combined in one. That is the one mistake of 13 (b). They ought to be separately

stated. They apply to different situations.

Mr. Pepper. The question of discretion where it appears as discretion, not whether you will give a party his legal rights, but whether the court will or will not mold the machinery in certain fashion -- the question that is raised on motion for judgment based on a pleading is a matter of legal right. It is not discretionary. You are either right or wrong. If you are wrong, you lose; if you are right, you win. The court can't say, "You are right, but in my discretion I won't give you the judgment."

The Chairman. But he can say that without prejudice he will deny the motion.

Mr. Pepper. Certainly, but then he is not exercising discretion in the technical sense; he is deciding a question of law.

Mr. Clark. He already has this right on the law side now in federal court. It is a question of whether you will decide on this thing and give the parties absolute right to have an extra round of the battle. It gives the party the absolute right to say, "I put this thing in, and I am entitled to have it come out."

The Chairman. On the law side is there a statute?

Mr. Clark. No, the court has asserted the power without statute.

The Chairman. To do what?

Mr. Clark. The hearing of objections is a matter of some discretion ---

Mr. Donworth. (Interposing) The court always in deciding a motion for judgment on the pleadings, whether he says it

aloud or thinks it in his own mind, goes through this process:

"I am not going to decide this case as a matter of pleadings. If the defendant can amend his answer, as he also says he can, I will let him do it."

The court will not grant a judgment on the pleadings unless he thinks the pleadings sufficiently clear in their allegations and thinks that that is really the end of the story. So, he does have a discretion always to allow either party to amend.

Mr. Pepper. We have the liberal practice of amendment. Suppose I represent a plaintiff. In comes the affidavit of defense, and I order the case down for judgment on a motion for judgment for want of sufficient affidavit. The argument takes place when the case comes up on the motion list. Counsel for the defendant is finally driven by the court to the admission that on the case as it stands I am entitled to judgment, but he says "I can amend my affidavit." The court says it will allow judgment in so many days unless in the meantime the amended affidavit is filed. The affidavit comes in, and the affidavit meets the objection. The case stands over for trial.

Mr. Lemann. I do not understand why the reporter thinks this is another round of delay. Our unprejudiced judgment -- I think of all of us -- is that this certainly obviates delay and expedites the trial.

Mr. Clark. I should have to disagree.

Mr. Lemann. Then, it is a question of judgment.

Mr. Clark. You can see somewhat by the statistics as to how often it settles the case, and it does not very often.

Mr. Pepper. We can assure you, Mr. Reporter, that there isn't anything which conduces more to the collection of debts than the realization by defendants that they can't trade on the long delay before their case comes up on the trial list.

Mr. Clark. That is why the summary judgment procedure is a desirable one. How can you avoid putting it up to the judge after a hearing, because you have got to get him when he is going around to some of these different places where he sits. You can file briefs and arguments and make it a matter of extended delay.

The Chairman. Provided you can go to the court in preliminary hearing and ask him. He has got to decide whether he will entertain a motion or not. That involves delay. If you prohibited the motion absolutely, it would have some effect.

Mr. Clark. But it does not require separate hearing.

The Chairman. No, but you do give the man a right to go before the court on a separate motion and ask him to entertain a motion for judgment on the pleadings. That ties everything up until he decides that, so you don't gain much by it.

Mr. Olney. I have known of cases being delayed and being deliberately delayed by motions to dismiss. That is, the defendant would make a motion to dismiss and just sort of hang the whole case up to get time to plead, and all the rest of it, while his motion was being heard on judgment. I have never known of a trial of a cause to be delayed by a plaintiff on motion for judgment on the defendant's answer -- not a single case.

Mr. Dobie. Here is a tort case, and the only defense that is set up by the defendant is infancy, where it is perfectly clear there is nothing to it. Do you think that it ought to be discretionary with the judge whether he would give judgment there?

The Chairman. Well, let us see. Are we ready to vote on the question of entertaining a motion ---

Mr. Morgan. (Interposing) As I understand it, Mr. Clark's preliminary matter is just an ex parte application, just like an order to show cause why judgment on the pleadings should not be granted. I cannot see anything wrong with that at all. All you have to do is get an order to show cause why an order on the pleadings should not be granted.

The Chairman. In order to decide that ex parte, unless he is a rubber stamp, the judge will have to take the pleadings and see what the point is. Then he has to study the pleadings, hear what you have to say about it, sort of make up his mind ex parte whether you have a good point. That takes time. He is busy. Then, if he makes up his mind that it is a substantial point that ought to be heard, and you have the hearing, and the other side is represented, it seems to me it is loading down the judges with the merits of defense and pleadings.

Mr. Morgan. I venture to suggest that you will not have on the calendar, which will have to be heard, more than 10 percent of the cases you would have otherwise.

Mr. Olney. These motions for judgment on the pleadings by the plaintiff are comparatively rare, as a matter of fact.

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The Chairman. By either side they are quite rare.

Mr. Olney. Motions to dismiss are frequently used.

The Chairman. A motion by the defendant for a judgment on the pleading.

Mr. Olney. That is the same thing.

The Chairman. No, it is the decision on the merits.

Mr. Pepper. It is awfully hard to generalize what is rare and common because it is so different according to the custom of the jurisdiction. I should say that a very, very much larger percentage of cases than has been suggested is disposed of finally with us on motions for judgment for want of sufficient affidavit of defense. I think that if that is a rational procedure it would be a pity either to discourage it or to uproot it. I do not want to urge any such provision as would make it possible in the jurisdiction where that kind of thing is not common and has not become traditionally identified to compel resort to it. It does seem to me, though, for the sake of large sections of the bar that are accustomed to it, that it ought to be at least permissive. If you are going to permit it, I can assure you from practical experience that it is just wasting the time of court and of counsel to have an interview in chambers, or wherever else it may be held, to satisfy the court that you have got a real case and that he ought to order the thing down and fix a time for hearing. We just go to the clerk and file a praecipe for judgment for want of sufficient affidavit of defense. The following Monday is rule day. It is put on the list. We go into court, and the case comes up.

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The court says, "Smith versus Jones, rule for judgment for

want of sufficient affidavit of defense. Mr. Pepper?"

I go forward, make my argument, and submit my brief. The other party appears. The court takes the papers under advisement, and in a very short time I get a notice from the clerk either ruling absolute judgment for the plaintiff or ruling discharge and an order to put the case down for trial.

It is one of those things which is so understandable to the people who have grown up under it and possibly so strange and inexplicable to those who have not that I would not think of asking for a moment for anything but that it be permissive. Other than that, this element of discretion, as to whether or not the matter will be entertained by the court, subserves much of useful purpose.

The Chairman. Don't you think that if you did have it discretionary with the court and went to make an ex parte application for leave to get a motion before the court for judgement on the pleadings, as a matter of practice, in busy courts it would be granted? They would say, "Well, put it down, and you make your argument in court."

Mr. Pepper. We have three district judges in Philadelphia. Judge Kirkpatrick lives at Easton, Judge Dickinson lives at Media. Judge Welsh is occupied most of the time in bankruptcy and leaves these matters to the other judges.

If I want to get Judge Kirkpatrick or Judge Dickinson to pass on such a question as this, I have to go myself or send somebody 150 miles up-state to Easton or down to Delaware County to find the judge and say to him, "Judge, here is a real question. There is going to be a rule day next week. I very much hope you will put it down."

If he has confidence in me and knows that I do not make foolish motions, he is very apt to say, "Yes, I will allow it," and so on; but I would feel that I had wasted his time. Perhaps my time is best spent when I am wasting it, but I would think I had wasted his.

The Chairman. Are we ready for a vote on this question of whether it will be discretionary with the court to entertain a motion for judgment on the pleadings?

Mr. Tolman. Question.

The Chairman. All in favor of making it discretionary say aye; those opposed, no.

The noes have it.

(The motion was lost.)

Mr. Donworth. I should like to ask the reporter if he thinks it would help the situation if we added to the clause permitting the motion for judgment on the pleadings something that exists anyway on the hearing before determining such a motion. The judge may allow either party to amend his pleadings. I am thoroughly in sympathy with the reporter's idea that the justice of the case should not be on what is written down, and if on the hearing of such a matter it is merely a defect in the allegation I think it should be supplied.

The Chairman. Isn't there a general allegation that at any and all stages you may make amendments?

Mr. Clark. I think it should be permitted, but I think we have broad provisions anyway.

The Chairman. Is there anything else now in Rule 13? If not, we will pass to Rule 14.

Mr. Clark. That is what we just considered.

The Chairman. Oh, yes; Rule 15 is next. Is there any matter of substance you wish to discuss? I made suggestions as to phraseology, which we will pass over.

Mr. Olney. That presents a very serious question. It says:

> "The answer must state as a counterclaim any claim against a plaintiff arising out of the transaction which is the subject-matter of the action or else the claim is barred, * * * "

Does that mean it is a counterclaim in the strict sense of the word, one that acts in diminution of the relief sought by the plaintiff? It may be an entirely different cause of action, and yet it is barred unless the defendant raises it.

Mr. Dodge. It must arise out of the transaction.

The Chairman. What line are you talking about?

Mr. Clark. It is right at the beginning.

Mr. Dodge. Equity Rule 30.

Mr. Clark. It is line 1 to line 3. It comes from Equity Rule 30. It is a provision in many states.

Mr. Loftin. Will some one read the equity rule?

Mr. Dodge. (Reading:)

> "The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross bill, set up any set-off or counterclaim against the plaintiff which may be the subject of an independent suit in equity against him, and such set-off or counterclaim so set up shall have the same effect as a cross suit, so as to enable the court to pronounce a final

decree in the same suit on both the original and the cross claims."

Mr. Clark. The equity rule was passed on in the American Surety case, 260 United States 360.

The Chairman. This varies only in the equity rule, and you have stuck in that proviso that you can't put in things outside of federal court jurisdiction.

Mr. Olney. The difference is this, if I may call attention to it. The equity rule reads as follows:

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit."

Presumably if he does not raise it, it is granted, but it uses "counterclaim" there in the sense -- in the strict sense of counterclaim -- that is, something that goes by way of reduction of the relief sought by the plaintiff.

Mr. Morgan. That is recoupment, not counterclaim.

Mr. Olney. Well, suppose I have a counterclaim against a man for $500. He has sued me for a thousand dollars. It is not covered by such a matter as claimed. We use "claim" here in the sense of any cause of action arising out of the transaction. This extends it to any cause of action, something that might be raised as a pure action for equitable relief. That is the difference between the equity rule and this rule. We have had the same rule in the California Code, but there is all the distinction in the world between a counterclaim and a cross complaint. If a man sues, he has got to set up the counterclaim he may have; but if he has got some other cause of action which he may have a right to set up by

cross complaint, if he wishes he may set it up or not, as he pleases. There is a marked distinction between them.

This word "counterclaim" as used in the equity rule is not the equivalent of the word "claim" as used in our rule.

Mr. Morgan. I wonder if you are right about that. Does the federal practice make that distinction between counterclaim and cross claim that you are talking about? I suppose that any claim arising out of the transaction would be a counterclaim and that was a purely statutory creation. Recoupment was the only thing that was known at common law and then set up by the statute of frauds, and a counterclaim came much later.

The Chairman. What do you mean by the sentence in line 8:

> "A counterclaim need not diminish nor defeat the plaintiff's recovery."

If it is a money claim it can escape doing that.

Mr. Dobie. It may be injunction.

Mr. Olney. May I read the California Code to you? It illustrates what I have in mind. It provides for the setting up of the counterclaim.

> "The counterclaim mentioned in section 437 must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action; provided that the right to maintain a counterclaim shall not be affected by the fact that either plaintiff's or defendant's claim is secured by mortgage or otherwise, nor by the fact that the action is brought or the counter-

claim maintained for the foreclosure of such security; and provided further that the court may in its discretion order the counterclaim to be tried separately from the claim of the plaintiff."

Section 439 has to do with when the defendant omits to set up a counterclaim.

"If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterward maintain an action against the plaintiff therefor."

Mr. Morgan. All your counterclaims require that they shall defeat or diminish.

Mr. Olney. I will go on and read the provision with regard to cross-complaints.

"Section 442. Cross-complaint. Whenever the defendant seeks affirmative relief against any party relating to or depending upon the contract, transaction, matter, happening, or accident upon which the action is brought or affecting the property to which the action relates, he may in addition to his answer file at the same time or by permission of the court subsequently a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint. If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original

action."

If he does not file his cross-complaint, his action is not barred.

Mr. Morgan. I see.

Mr. Olney. A counterclaim is, and we want to understand that distinction very clearly in regard to this rule.

Mr. Morgan. Your counterclaim is a counterclaim which necessarily tends to diminish relief sought by the plaintiff.

Mr. Olney. Exactly.

Mr. Morgan. As Mr. Clark says in his memorandum, that is true in some states, and in other states it is by interpretation, but it is not universally true, as I understand it.

Mr. Olney. What I am getting at is that if you use this general expression here -- "claim" -- as used in these rules, it goes as far as any cause of action upon a cross-complaint -- what we would ordinarily call cross-complaint -- and if you do not set it up, your action is barred.

The Chairman. Line 8 makes that clear.

Mr. Clark. That is what I intend. That is the equity rule.

Mr. Olney. I do not think the equity rule intended that. I think it is going to result in a great many causes of action unjustly barred without the parties' having any idea of what has happened to them.

Mr. Dodge. Does line 8 read the same as if it read that a counterclaim need not be for a money judgment? Are there other cases besides that where it would diminish?

Mr. Morgan. That thing is all based on the old common law notion that you have only one judgment in an action. If

you are going to have a judgment, you can't have judgment for the plaintiff and judgment for the defendant in the same action. I take it it is the basis of that thing which requires it to defeat or diminish so that you would not have the spectacle of a plaintiff recovering a money judgment and the defendant recovering for specific performance.

As I take it, under my own procedure, there is no objection at all to that sort of thing. As Mr. Clark has drawn that thing, the object of the statute is to get as many of those set up in one proceeding as you conveniently can.

Personally I cannot see why counterclaim should not be interposed even though it does not tend to defeat.

The Chairman. Mr. Clark also calls my attention to the fact that in equity the counterclaim which must be set up is often not a demand for money. If you take Judge Olney's view, you would be narrowing the meaning of the equity rule.

Mr. Morgan. Suppose, Judge Olney, that the plaintiff sued for money with reference to the subject-matter of black acre and that then the defendant counterclaimed for specific performance.

Mr. Olney. Exactly.

Mr. Morgan. Would you say that that ought not to be barred?

Mr. Olney. I would, indeed.

Mr. Morgan. Let us take a particular case. Suppose a dispute arose between the parties concerning a contract and that the plaintiff brought suit against the defendant to recover an installment of the purchase price. The defendant claims he has paid it ---

Mr. Olney. (Interposing) And wants specific performance.

Mr. Morgan. No, he does not say anything about it at the time. He says he has paid it and makes his defense that he has paid it. We will say that he gets a judgment that he has paid it. Any cause of action against the plaintiff based on the plaintiff's denial of the contract for specific performance is gone. It ought not to be.

Mr. Dobie. I would set it all up there. Why bring another suit?

Mr. Olney. It is very well to have it set up there, but the conditions may not arise in issue, and they might very naturally not present the matter there. He might say it is not necessary. Perhaps he fails to see what the situation is.

The Chairman. Under the equity rule today, suppose the plaintiff brought suit for rescission of that contract and the defendant had a right to specific performance of it and did not assert it in his answer. Under the equity rule he would be barred. Why should we change that? Am I not right?

Mr. Dobie. That is my opinion.

Mr. Olney. Take that very case and let us get at the justice of the thing.

The Chairman. But we are asked to take the back trail on an equity rule already in force.

Mr. Olney. All right, but let us take that particular case. A man is sued. The owner of the property, who has sold it under contract, sues for rescission of the contract on the ground of fraud. The plaintiff comes in and denies that there was any fraud in connection with it at all. It may well not occur to him that if that action is decided against the

plaintiff, the plaintiff will then refuse to carry out the contract, or anything of that sort. He makes his defense and proves it, and then he wishes to obtain the property.

The plaintiff says, "Your action for specific performance against me is barred."

Not only that, but his action for damages against him is barred.

Mr. Dobie. It just says that we put this transaction in litigation. This whole transaction is litigable now and not later.

It says, "Come across with everything you have got; if you don't do it now, you can't do it at all."

Mr. Pepper. I have been wondering how it would work out as a matter of mechanics. It seems to me highly desirable to accomplish the reporter's result if it is possible, and I could understand how there is no difficulty in equity. I was wondering how the thing would work out practically if the plaintiff brought an action which, from the nature of cases triable by jury -- as, for instance, an action for money due under agreement of sale, and the defense involves the assertion of counterclaim in the way of specific performance not with respect to every matter covered by the contract but with respect to some other contract which the plaintiff -- so the defendant says -- is in default of. The counterclaim is set up. As a matter of practice, is the thing so molded that the cases come up for trials at different times?

The Chairman. We have rules to permit the court to separate the issues and to try part by the jury and part by the court. That is all flexible.

Mr. Pepper. That is all flexible, but I was wondering if it is flexible enough for such a severance -- whether you are really gaining much by insisting on the counterclaim. Doesn't it really mean two suits? It means two trials.

Mr. Morgan. It may and it may not.

The Chairman. Of course, you could have one trial to submit to the jury and let the court decide the other himself.

Mr. Dodge. If I am sued for merchandise and at the same time I discover that that merchandise violates a patent which I have acquired, I have got to bring a patent suit in the way of a cross-action.

The Chairman. That is not arising out of the same transaction.

Mr. Dodge. The infringement which I claim is the sale.

Mr. Morgan. He can give you one; there is no question about that.

Mr. Dodge. I don't know if there is any particular objection to that.

Mr. Dobie. The only thing that gives me any pause is the point Senator Pepper has made. The equity rule -- I may be wrong, as I frequently am -- but I understand the equity rule covers his case clearly. What we are doing is extending the equity rule to cover both law and equity.

We will just say to the defendant, "Everything you want under that transaction is before the court. It has gone into it, and one of those questions is pretty nearly likely to verge on the other. Let us bring it in here together. If you don't, you are sunk."

I think it is a good rule and ends litigation.

Mr. Morgan. Your lawyer has got to know his cases.

Mr. Lemann. Under the equity rule would you have to set up claim for money damages?

Mr. Clark. No.

Mr. Lemann. I move that on this point the rule stand as it is.

Mr. Loftin. I second the motion.

The Chairman. The motion was to let the rule stand, so far as this point is concerned.

Mr. Tolman. May I say one word about that? I wonder if we have lost sight of the fact that this rule as drafted makes one very fundamental change from the equity rule. The equity rule says that the answer must state counterclaims arising out of the transaction and may state any other claim; whereas, our rule was compulsory both as to counterclaims arising out of the transaction and those arising elsewhere.

Mr. Morgan. No.

Mr. Dobie. Only when it arises out of the same transaction is it compulsory.

Mr. Tolman. What do these words mean: "or else the claim is barred"?

Mr. Pepper. Line 6 takes care of that.

Mr. Lemann. I think the words you quote emphasize the result that would be obtained.

Mr. Tolman. I misread it.

Mr. Dobie. If the court can't adjudicate the counterclaim, it would be silly to make the man bring it in, but if it can adjudicate it -- this is drastic, and I admit it is going to catch some of them.

Mr. Olney. You are requiring here that if the court can have jurisdiction, and it comes within your definition of a claim against the plaintiff and arises out of the same transaction, he must present it. Now, just as sure as can be, there are going to be questions as to whether the court can take jurisdiction of it, and you are going to have litigation to determine that fact.

Mr. Dodge. Must it involve three thousand dollars?

Mr. Lemann. No, it does not have to.

Mr. Pepper. Question.

The Chairman. All in favor of the motion say aye.

(The motion was carried.)

Mr. Lemann. I understand there is one more question on this rule, Mr. Tolman, as to whether you should be permitted to file a counterclaim that you asserted after the suit.

Mr. Tolman. I think I did have a memorandum on that.

The Chairman. Well, I objected to the phraseology. You state that you can't do it if it is for the purpose of harassing the plaintiff. I thought that that was too vague a term and ought to be stricken out. Any counterclaim would harass the plaintiff. I thought it was sufficiently covered in lines 28 to 32.

Mr. Lemann. What is the idea of allowing the defendant to go out and buy a claim?

The Chairman. If he honestly owes a claim, it has got to be bought from somebody, and this is the general idea of getting the things all settled at one time. He can go out and buy a claim, and if it has got to be adjudicated, the more you can get done at one time, the better. This is an attempt

to clear up matters.

Mr. Dodge. Under the old codes it was due in connection with contract claims and not due in connection with claims arising out of the same transaction. Then it could arise afterward.

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The Chairman. Suppose the plaintiff brings a suit and the plaintiff is execution-proof, and the defendant goes out and buys a claim against him for ten cents on the dollar, and sets it up as a counterclaim and wipes out the plaintiff's claim.

Mr. Lemann. Why not? I had a case, once, where I bought a judgment against a man who had brought suit against me, and so dismissed the suit.

Mr. Pepper. Mr. Chairman, I suppose that there is nothing in this that disturbs the conclusion reached in such decisions that are to the effect that certain claims cannot be set off against each other because they are not mutual--as, for instance, where the plaintiff is suing as a trustee, on a cause of action, and the defendant seeks to set off by claiming that he has a judgment against either the trustee or the plaintiff, personally. Whatever the law may be on that, I do not think it is disturbed.

The Chairman. No, I do not think it is disturbed.

Mr. Olney. This law needs revamping. As it reads, it might not bar a counterclaim that was set up and acquired after the action was begun.

Mr. Lemann. Yes; and if you buy it after the action has begun, you are certainly wasting your money.

Mr. Morgan. It might.

Mr. Olney. The only point I am making is that if you are going to bar them, you should bar only counter claims that were accrued to the defendant after the time the suit commenced.

Mr. Lemann. If you are going to give the defendant this right, why not give him the advantages as well as the disadvantages?

Mr. Morgan. But the claim against the plaintiff does not accrue.

Mr. Lemann. He did not buy it.

Mr. Morgan. And then the debt would become due at a later date.

Mr. Lemann. Well, then, I think that is right.

The Chairman. You think there ought to be some qualification put in there about barring it and limiting it to claims that mature before the commencement of the suit?

Mr. Olney. To a counterclaim that existed before the commencement of the action.

The Chairman. Did you get that, Mr. Reporter?

Mr. Clark. I got that. But I do not see why that should be barred, too.

Mr. Dodge. He might inherit a claim on the very last day of the trial.

Mr. Morgan. You are right.

Mr. Donworth. There is nothing here about barring these claims. It is optional with the defendant, as I understand it.

Mr. Morgan. But one arising out of the same transaction.

Mr. Donworth. I thought we had disposed of that.

Mr. Morgan. But this might arise out of the same transaction.

The Chairman. Is he not allowed to bring it in by a separate pleading?

Mr. Lemann. The last day of the trial, under those circumstances, might not be too late.

The Chairman. If he tries to bring it up, and the court will not let him, I do not think it would be barred, would it?

Mr. Clark. No.

Mr. Morgan. When Charley speaks of things being debarred, it reminds me of a law class where there were questions after questions asked. And finally the professor, in desperation, said, "I will answer that when the case comes up." And next morning, the boy brought around the reporter showing that it had happened.

The Chairman. Do you want to pass that?

Mr. Donworth. Is there any derivation of that?

The Chairman. You mean, about buying outside claims?

Mr. Donworth. Yes.

Mr. Clark. Yes, that is a matter that causes a lot of trouble under the codes.

Mr. Pepper. Mr. Chairman, it occurs to me that the difficulty we have last been discussing will probably take care of itself, without modification. Because I think the court would construe the words "any claim against the plaintiff" as meaning a claim that the defendant could at that time have asserted against the plaintiff. Because it is required that it be set up by answer.

No court would construe the defendant, I take it, as barred from asserting his counterclaim if he did not have an available counterclaim when he filed the answer, which was the only time that he could file it.

The Chairman. Yes; because it is limited to the answer.

Mr. Pepper. Yes.

The Chairman. I think that is reasonable.

Mr. Donworth. There is nothing here that bars an independent counterclaim, at all?

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Mr. Pepper. No; but there is the point made that something that arises out of a subsequent transaction might be acquired.

Mr. Donworth. I see.

Mr. Pepper. And I made the suggestion that the court would not rule that that was barred, though after-acquired.

The Chairman. It is barred if it occurs between the date when the complaint is filed and the answer is interposed?

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Mr. Pepper. Yes.

Mr. Tolman. I should like to take a real case that we had in our office within a year, and see what effect it has and how it would fit this rule: A bill was filed against trustees who had a very large sum of money. They were charged with breach of the trust and of their duty. The trust had a good many different layers of priority; there were some above and some below, and certificates had ranking differently. Nobody knew, until the matter was finally adjudicated, what the final stratification would be. These trustees went out and bought certificates that they thought would come rather high up in the line and, if they did, would exceed any they were held for. And the court held that they did not have any right to do that. And that is one of the things which led me, in my memorandum, on page 10, to say that I had known of unfortunate consequences of permitting the purchase of claims during the litigation.

Mr. Clark. Of course, that makes a division of the time when a purchaser can get a suit in. There would not be any question, I suppose, if the purchase were made the day before suit was brought.

Mr. Morgan. That comes under the trustee, I suppose.

Mr. Cherry. It might knock him out, on the ground that it was a violation of his duty as trustee, to acquire the claim. That might be procedural.

Mr. Tolman. I do not know whether that decision is going to be affirmative or not.

Mr. Cherry. We do not cut it off.

Mr. Olney. In connection with this rule, may I ask the reporter what is meant by the expression at the bottom of the first page, "The court may, in its discretion, order a severance of a counterclaim." What is meant by this expression "severance"?

Mr. Clark. That goes so far as to order it continued as a separate case. I do not know that it is necessary. Perhaps a separate trial is all that is needed. But we did go so far as to provide that the court can really order that it be conducted separately, and order it discontinued.

Mr. Olney. I think the expression ought to be amplified in order to make it absolutely clear, so that there will be no doubt as to what it means.

The Chairman. Well, we have something further on severance.

Mr. Olney. It may be covered further, Mr. Reporter; I was just curious to see what you had in mind.

The Chairman. I think the word "severance" is rather well defined.

Mr. Donworth. I understand that the law is confused in the different States, as to the assignability of tort claims. Do you understand it that way?

Mr. Clark. Well, there is some difference in the rule, I think. But in most States, now, I think that tort claims can be assigned, except perhaps some personal injury claims.

Mr. Donworth. Well, it would seem that this is all right. But it is entirely new to me, and I think that the fairer rule is that except as to counter claims arising out of some transaction, an assigned claim should be one owned by the defendant at the time of commencement of the action. That is the provision in my State. I do not know how common it is.

But just for the record, I will move that the provisions in line 14 to line 17 shall be modified so as to require that an assigned claim must have been owned by the defendant at the time of, or prior to, the commencement of the action.

The Chairman. Is there any second?

Mr. Clark. Let me say, as to that--

The Chairman. I do not have a second, yet.

Mr. Olney. Wait a moment, please. I am interested in that.

Mr. Tolman. Is that line 14 of Rule 15, Judge?

Mr. Dobie. Yes.

Mr. Tolman. I will second the motion.

The Chairman. All in favor--

Mr. Clark. I was going to say that that is the requirement of several of the codes--making a distinction between arising out of the transaction and not. It is not required, in others; for example, in Arkansas, Indiana, Kansas, Kentucky, and Ohio it is not required.

The Chairman. If it arises out of the same transaction, could it be assigned anyway? Is it not a matter that belonged

to the defendant, to begin with?

Mr. Clark. No; this is a contract claim which is not out of the same transaction. They want that so it cannot be acquired after action is brought. Some codes require specifically that it cannot be, and others say that it can.

Mr. Donworth. I have a double objection: One is that I think the defendant should not go out and buy a claim after the action is begun, and use it. I think it is something in the nature of champerty and injustice. I also think that it is a bar in the case of tort claims, which I think should not be brought in at all.

Mr. Dobie. Is it not a rule, generally, in the United States that tort claims are not assignable, unless they pertain to property and not to personal injuries?

Mr. Donworth. There is quite a difference in the rule, but I think you state the law generally.

Mr. Lemann. I should not think an assigned tort claim would be very valuable. I would not want to buy one.

Mr. Donworth. No, they would not be worth very much.

Mr. Pepper. Well, granted that we are trying to serve the interests of the Republic by doing away with unnecessary litigation, I think that the time should not be important, if it is a bona fide claim.

The Chairman. That is the trouble with it; a defendant goes out and buys a claim, and he may buy it from someone who might never bring suit, himself.

I agree with you, Senator Pepper.

Mr. Pepper. If we are going to do the latter, I do not see that there is a great deal of difference, excepting only

the bona fides of the transaction.

Mr. Cherry. After all, if the claim is good, why should you waste any fears on him? He owed that to somebody.

The Chairman. And you thereby make one suit out of what otherwise might have been two.

Mr. Cherry. I do not see why the plaintiff should kick.

The Chairman. Do you want to discuss it any further?

Mr. Morgan. No; I ask for the question.

The Chairman. All in favor of limiting these independent counterclaims to those owned at the time suit is commenced, say aye. (Several "ayes")

Raise your hands, please. (Several hands were raised.)

And those opposed? (A number of hands were raised.)

The motion is lost.

RULE 16

CLAIM AGAINST ONE NOT A PARTY TO THE ACTION - THIRD-PARTY COMPLAINT--COUNTERCLAIM AND CROSS-CLAIM BY THIRD-PARTY DEFENDANT.

The Chairman. Is there anything else on No. 15? If not, we shall pass to No. 16. Are there any new matters of substance there?

Mr. Pepper. Sometime a man might be mean enough to raise a question of a difference between form and substance.

The Chairman. It is bobbing up in my mind every second.

Mr. Dobie. I should like to raise one question: Are the words "third party defendant" here, generally used in the sense of somebody outside of the suit or inside the suit?

Mr. Clark. Well, this is practically a new word that is being coined. The law-writers are generally using the term "third party", and it seemed convenient. I think we are fast making it a word of law. It is a convenient way of making the

designation.

The Chairman. The "third party defendant" means where he sues the plaintiff?

Mr. Clark. Yes.

Mr. Cherry. And arises out of a different transaction.

The Chairman. Is there any matter of substance on Rule 16?

Mr. Clark. I do not have anything, I think.

The Chairman. There have been a good many proposals as to form, that you have before you, and that Mr. Morgan made.

Mr. Clark. Yes.

The Chairman. Well, if you do not have anything else, we shall pass on to No. 17.

Mr. Dodge. Mr. Wickersham had an objection to Rule 16. He thought that the intervention of this additional cause of action should only be permitted with the approval of the court. He cites a case there.

Mr. Clark. The case he cites is that recent Chandler & Price case (Chandler & Price Co. v. Brandtjen, 56 Sup. Ct. 6; American Bar Assn. Journal, Jan. 1936, pp.46), where an intervenor came in and tried to bring in a claim on an independent right of action. And it does not seem that the Chandler case fits this action. This is where the defendant is in, and he wants the loss all covered at the same time. This is along the English, New York, and Wisconsin procedure; and I think that they have something comparable or perhaps more extensive in Pennsylvania.

Mr. Dodge. They have that rule in admiralty, do they not?

Mr. Clark. Yes, they do.

RULE 17. WHEN ACTION AT ISSUE--REPLY, WHEN REQUIRED.

The Chairman. Now we are down to Rule 17. That is where a case is at issue, and eliminates a reply unless ordered by the court.

Is there any matter of substance there?

We have so much for demands of admission, under our discovery, that it takes the place of that. And I withdraw the suggestion. I do not want to go over it too fast for you; but if you do not have something on that, perhaps we can proceed.

Do you have something, Mr.Morgan?

4 Mr. Morgan. Yes, I have a question about that: It was with reference to judgments by default, on matters in reply, as I remember. I do not know whether he called that to your attention for me, Charley. Are you going, under this rule, to treat matter which is properly recoupment, but which is labeled a counterclaim?

Mr. Clark. Did you see our answer to you?

Mr. Morgan. Yes; I saw it, but it does not give me any light.

Mr. Dodge. In line 20, who is the co-plaintiff?

Mr. Morgan. He is not the plaintiff except when making the claim. You and I are plaintiffs in a suit, and I can make a claim against you.

Mr. Clark. That is it.

Mr. Dodge. But there is no reference to more than one plaintiff.

Mr. Clark. Well, all that would mean that we should put in against a co-plaintiff, if any. But I should think that "if any" is understood; you cannot make a claim against a co-plaintiff, if there is not one. I should not think you would

need to state that this is applicable to cases only where you have more than one plaintiff.

Mr. Morgan. Do you have your own reply here, Charley? You say this:

"Our rule making a reply turn upon whether the answer asserts a counterclaim or cross-claim denominated as such offers a convenient rule of thumb in determining when a reply is needed."

Mr. Clark. Yes.

Mr. Morgan. Well, now, take a recoupment, for example: Suppose a recoupment is denominated a counterclaim: Do you have to have a reply to it? And if it is not denominated a counterclaim, you do not have to have a reply? And if it is denominated a counterclaim and you do not have to reply, are you going to have a defendant under the recoupment, before you file the counterclaim?

Mr. Clark. We make that point.

Mr. Morgan. Yes, but it is a question of sense. That is what I want to know.

Mr. Clark. That maybe a matter of choice. If it is bad sense, it is worse to leave it up in the air.

Mr. Morgan. But my question is whether you are trying to do too much in too short a space. Shouldn't you make a different provision for the place where a default judgment would be proper, for lack of reply, and for the place where a default judgment would not be proper, for lack of reply?

I should think a default judgment, if it were called a counterclaim, would be just foolish.

Mr. Clark. Well, we want to get away from the long

argument you have, that there is something different between counterclaims and defenses.

Mr. Morgan. But can you do that? An attempted over-simplification very frequently results in complexity.

Mr. Clark. Well, I do not know the complete law.

Mr. Morgan. Neither do I. That is why I put it in a query.

Mr. Clark. What did you say?

Mr. Morgan. This is not a case where I have a "hunch." I have a "hunch" that something is wrong, but I do not know how to cure it, exactly.

The Chairman. Well, we shall refer that to the reporter and to Mr. Morgan.

Mr. Morgan. That is too bad.

Mr. Clark. You are certain of a rule, here.

Mr. Lemann. You again say, in your revision, as such, on page 29, line 2, "like conditions to those." That rather freezes my blood, as to a matter of English.

The Chairman. Well, that is a matter of form.

Mr. Morgan. Yes; I do not like that, myself.

RULE 18. SHAREHOLDER'S ACTION.

The Chairman. Rule 18, Shareholders Action: I think that is practically a copy of the equity rule.

Mr. Clark. Yes, that is. We changed "stockholders" to "shareholders." We forgot to change it in the second line, but we shall do that. That is the T.V.A. decision, which has come to life again, recently.

The Chairman. I suppose there is no criticism about that. That takes us to Rule 19.

Mr. Pepper. I think the old equity rule specifically

requires the proof, in that case.

Mr. Clark. I think we copied it.

Mr. Pepper. Probably I am wrong.

Mr. Clark. Of course, it obviously does require proof.

Mr. Pepper. Of course, it must mean that.

Mr. Clark. No; this is just the pleading end.

Mr. Dobie. You just substitute a complaint for the bill, here?

Mr. Clark. Yes; that is it.

RULE 19. AMENDED AND SUPPLEMENTAL PLEADINGS

The Chairman. Rule 19.

Mr. Clark. In the first place, here, someone wanted this to be more flexible than we suggest, I think. They wanted more pleadings. Somebody suggested--

(a) Amendment of Pleadings.

Mr. Morgan. I did--any time within ten days after the responsive pleading has been served.

Mr.Clark. Well, once was enough, and it might hurry it up not to permit so many. Of course, I do not care very much about it, either way.

Mr. Morgan. No, neither do I. But I think it is very rarely that a motion to amend, made before trial, is not allowed.

Mr. Clark. I think you are right about that. But the question is whether we should put on a limitation as to amending.

Mr. Dobie. I think that if you give them one bite, and then leave the rest to the court, that is enough. It is not vital.

The Chairman. What are we doing with the bracketed part of the section? Are we leaving it or striking it?

Mr. Dobie. I am in favor of it. The Carroll case, as I read it, was limited to death by wrongful act.

Mr. Morgan. Well, it happened to be. I think the Supreme Court of the United States took a backward step in not holding that that was the same transaction. But it does seem to me that it does fall within a different version of the transaction set up, or attempted to be set up.

Mr. Lemann. Will you state that again, please?

Mr. Morgan. In the case of Baltimore & Ohio Railroad v. Carroll, an injured workman brought an action, claiming injury in intrastate commerce. He got a verdict, and it went to the Supreme Court of the State, and was appealed and went to the Supreme Court of the United States. And on the way up, the plaintiff died, and his estate was substituted. And the Supreme Court of the United States held that it was an interstate matter, and sent it to the trial court. And at the trial court, the plaintiff amended by alleging the death, as of course he had to do. Of course, that was necessary because of the record. Because he was an administrator, now. He also alleged the survival of persons who lost in a pecuniary way by the death of the decedent. And the court allowed that. And you know that under the Employers' Liability Act there is a provision for liability by survival, and also under the regular Lord Campbell's Act. The judgment was obtained again, and it went to the Supreme Court of the United States. And they set it aside on the ground that the damages under the Lord Campbell's Act were barred by the statute of limitations, although the Employers' Liability Act says that the plaintiff may recover,in case of death, both damages that the survivors have suffered, and also pain and suffering. It specifically provides that they must both be sued for in one suit. So they

sent the suit back, again. Of course, they got analytical; they did not use Mr. Justice Holmes' decision in the Kinney case.

Mr. Lemann. In other words, they held that the statute of limitations had run,under the Federal Employers' Liability Act.

Mr. Morgan. Not on all of it.

Mr. Lemann. Well, on part; but had not been interrupted by the fact that the suit had originally been brought under the State act, at a time when it might have been brought to protect the defendant under the Federal act.

Mr. Morgan. That is it.

Mr. Lemann. I am asking whether that case is inconsistent with this bracketed language.

6 Mr. Morgan. I think so.

Mr. Lemann. A case based on the same right, with a different version.

Mr. Morgan. It is a different version of the same transaction.

Mr. Lemann. What do the words "different version" mean? Those are not words in the legal art, as yet.

Mr. Morgan. No. I think that analytically you can say that undoubtedly there were two causes of action combined, here. Practically, you can see that there is only one cause of action, with two items of damage.

Mr. Lemann. Did the reporter mean, by your bracketed language forms, to overrule the Carroll case?

Mr. Morgan. He says it is not contrary to the Carroll case.

Mr. Lemann. And he thinks the Carroll case does not provide a different version of the same thing? Well, I shall go that far, myself.

Mr. Dobie. I should like to go as far as we can in this case, and put it up to the court. As you know, there was a case where a brakeman was bringing a suit, and in his suit he claimed that the Leamann coupler was an unsatisfactory type. And then, later, he amended and said that the Leamann coupler was a satisfactory type, but that this one was defective. Now, to my mind it is hideous to hold that that is barred.

Mr. Morgan. Was that in a Federal case?

Mr. Dobie. No; an Illinois case.

Mr. Morgan. Well, the Illinois rule is crazy, anyhow.

Mr. Clark. How about the Wulf case?

Mr. Morgan. You start with the Wilder case, where Chief Justice White always got "balled up"; he used the test of departure, in pleading as to scope of amendment. He said that you depart from law to law, or from fact to fact.

Of course in the Wulf case they went to the other extreme and changed from the Kansas State Act to the Federal Employers' Liability Act, and they changed from intrastate commerce to interstate commerce, and also changed from the woman's suing in her own right, to a representative capacity, administratrix. That looked as if they were going to limit it.

Then, in the Kinney case Mr. Justice Holmes said that when you are talking about the statute of limitations, you ought not handle this in any analytical fashion, but you ought to consider whether the purpose of the act is going to be defeated by this changed version, and that it ought to be very

liberally construed.

Then we come to the Carroll case, which seems to put a limit to it; and then there is the case in 280 U. S., where Mr. Justice Cardozo got hold of it, and where Professor Arnold said he thought the Supreme Court adopted Dean Clark's theory of a cause of action.

Mr. Clark. He cited me about seven times.

Mr. Morgan. Yes, but he always did it cautiously.

Of course, when you use language like this, you can say that the Carroll case is not contrary to it. And yet I can interpret the Carroll case as being contrary to this. I can say that certainly, in the Carroll case, they were only adding items of damage to an otherwise frank story.

Mr. Clark. Well, there is no question but I am trying to go the other way.

Mr. Morgan. Of course you are, and I am not blaming you.

Mr. Clark. And all these cases of the Supreme Court hold that they think they go side by side. The only case against that is this one of Missouri Railroad against Wulf, and the plaintiff sueing under the Federal Employers' Liability Act. And they held that after the Federal Employers' Liability Act had run, you could amend.

Mr. Morgan. And there the defendant put in the answer that it was interstate commerce, and the plaintiff amended to that. Then they distinguished the Wilder case by saying that in the Wilder case the action was originally brought to the Missouri State court and removed to the Federal court, whereas in the Wulf case it was brought later to the State court. Now, I do not see why they did not say that the distinction was

that the plaintiff's name in one place was Wilder, and in the other place was Wulf.

Mr. Cherry. What was the Wulf case?

Mr. Morgan. That was a case of application for a tax refund. And Justice Cardozo said that the precedents were not altogether in point, but they were helpful, and that the court had not adopted any definite definition of cause of action, and that this definition might depend upon the circumstances of the particular case--which, of course, is what we all think.

The Chairman. Is there any proposal to be made about that part of the bracket?

Mr. Morgan. I do not know whether you are handling procedure, here, or substantive law. That is my only question.

Mr. Olney. I should like to say that I am afraid of the matter that is here in parentheses, for the reason that we could not be certain that it correctly expresses the rule, and I do not think it goes far enough in certain respects. We are dealing, here, with a subject that--as these cases will show--has been a subject of a good deal of discussion in the courts, and which has given rise to many difficulties. I am afraid to lay down, in a case of that sort, something which, after all, when it is laid down, becomes an inflexible rule. And I think we had better leave this whole matter to the court to work out, as they have been doing, without any particular statute on the subject. I think they can work it out ultimately, and accomplish justice far better than we can by endeavoring now to crystallize the rule.

For example, this case occurs to me; I think it would not

come within this language, and yet it should: Suppose a man brings suit to rescind a contract, on the ground of fraud. And
7 he states his cause of action, and then finds, as a matter of fact--or is advised by his counsel, perhaps--that he has lost his right of rescission--which he may lose, and may lose very quickly. And then he changes to an action of damages for the fraud. Now, that amendment should relate back; but I do not think it would, under this language here. And I am afraid to touch the thing.

Mr. Dobie. Isn't that the same story, but asking practically for different relief? It may be that you would have to lay it to scienter or something else; but it is the same thing, and you are just telling it again.

Mr. Morgan. That very case that you quote was cited in the last decision of the Supreme Court.

Mr. Lemann. Is this in our jurisdiction? Isn't this merely impinging on a wider field?

Mr. Clark. Well, in the case of N. & G. Taylor Co. v. Anderson, 48 Supreme Ct. 144, they followed the Illinois rule.

In Heron v. Southern Pacific, they seemed to have a good deal of doubt, there. And Chief Justice Hughes went into the rules of the Rescission Act and the Conformity Act; and he held it did not cover either. They held in that case that the Federal courts would not be bound by a provision of the Arizona Constitution that required contributory negligence always to be submitted to the jury. And in that case, Chief Justice Hughes went into the Conformity Act and also went into the rules of the Rescission Act. And I think that he rather seemed to think that it was a matter of substantive law.

Mr. Olney. We ought to leave this matter for the Court to work out.

The Chairman. There are two Conformity Acts.

Mr. Morgan. I like to think that the rules of rescission apply only to substantive law. But some hold that it is the other way around.

Now, I should like this to be treated as liberally as it can be treated, in order to obviate the running of the statute of limitations in these cases.

Mr. Olney. It should be so.

Mr. Morgan. If it is better to leave it entirely to the Supreme Court, I am in favor of saying nothing. If the Supreme Court is willing to adopt a liberal rule which will help here, then I am in favor of the rule.

Mr. Olney. But if the Supreme Court is not in favor of a liberal rule in such cases, it is something that ought to be passed by an act of Congress. We ought not to try it. We are entering upon a field of definition of rights, and without sufficient information.

Mr. Donworth. Where it is a State statute of limitations, of course Congress could not help it, but the rule might. I

8 agree with what the gentlemen have said: That we should go just as far as we can in this matter, because the introduction of the statute of limitations does serious wrong in these instances. And I do think that a rule which could be printed and submitted to all the courts of the country, if adopted by the Supreme Court, would help wonderfully.

I share the sentiments expressed by some, that perhaps we might even go farther than this language. I had thought of

this: After the word "pleading" in line 21, and reading down to that:

> "Whenever it appears that the right of action asserted in an amended pleading is based on the same right or is but a different version of the transaction or occurrence set up or attempted or intended to be set up in the original pleading" --

I thought of adding:

> "or asserts other elements of damage arising from the same transaction or occurrence."

I thought that that might carry over and reach some of the cases, along the line discussed by Mr. Morgan.

I do not make any motion, but I would suggest that for consideration:

> "or asserts other elements of damage arising from the same transaction or occurrence."

Mr. Clark. I think that is good.

The Chairman. Are you ready to move with respect to the bracketed clause in 19A?

Mr. Dobie. I move that it be amended as suggested by Judge Donworth.

Mr. Olney. I think you should consider that. It says that the action is based on the same transaction or original occurrence. So you have to get down to that--not based on the same right, but on the transaction, itself. There may be an entirely different right growing out of that transaction and, if so, the man ought to be permitted to amend his complaint and go after it. You are trying to define something

here in a hurry, and something which is going to require the utmost care.

Mr. Morgan. I think that is what Mr. Justice Holmes had in mind in the Kinney case.

Mr. Olney. Exactly. It is a difficult matter, and we ought not to do it without the utmost care. I think that we really should not do it at all. I think we should leave it to the courts. They will handle it all right, in final analysis.

The Chairman. I understand that the motion for retention of the paragraph, necessarily binds the committee or the reporter in that connection.

In that connection, Judge Olney's suggestion could be considered. So I should not construe the motion as excluding things like that. I thought that the expression "different version" was a rather helpful one.

But on the motion, gentlemen, do you wish to say something?

Mr. Lemann. If we should adopt this, with amended verbiage, it would only apply to the Federal courts, and would not prevent a State court from applying a different rule, or the Supreme Court of the United States from applying the same rule in a case which went up from the State court.

The Chairman. That is clear.

Mr. Morgan. Our decision is that the Federal court will not follow the Illinois version. You remember that the Illinois court held that the omission of just one essential allegation in a suit based on wrongful death, was binding: They omitted the allegation that they were survivors who

suffered pecuniary damage, and all the rest was good. And the Illinois court held that that was not amendable, after the cause of action had begun.

Mr. Lemann. I understood the reporter to say that the Illinois court did apply the rule in a case that went to the Federal court.

The Chairman. Of course, if a case goes to the Supreme Court of the United States from a State court, then the Federal court is bound by the State court, on a local question of pleading and practice in the local State courts. There is no question about that.

Mr. Lemann. Suppose a case under the Federal Employers' Liability Act is brought in the Federal court, but the second case is brought in the State court: I would have to suppose that there is just one case which can be brought in the Federal court.

Mr. Morgan. Suppose you remove it to the Federal court, for diversity of citizenship--

Mr. Dobie. You cannot do that.

Mr. Morgan. I am talking about diversity of citizenship in the Illinois case.

Mr. Lemann. Suppose the suit is brought in the Illinois State court, under the State statute.

Mr. Morgan. And suppose it is then removed, for diversity of citizenship.

Mr. Lemann. Let us forget that, for a moment. Suppose it is then held that the case should have been brought under the Federal act, and suppose that the plaintiff amends, and after the statute of limitations has run: Would the Illinois

court be controlled by our rule?

The Chairman. No; our rule would have nothing to do with the pleading in the State court.

Mr. Lemann. I should think so. And that is why I think that what we are trying to accomplish here would be bound to have a limited effect.

Mr. Morgan. Oh, yes; it would be bound to.

Mr. Dodge. Would not the Illinois court's construction of its own statute of limitations be binding?

Mr. Morgan. I do not believe so.. I think that the Federal courts have held the other way on this.

Mr. Dobie. I think it rather goes the other way: That the statute of limitations of a State would be followed in the Federal court. But if it is a State interpretation of a Federal statute, of course the Federal court is not bound.

Mr. Morgan. Then it is an interpretation of an amendment of a pleading, and I do not think the Federal court would follow the Illinois court at all.

Mr. Cherry. Do I understand that the motion is to strike out the matter in brackets?

The Chairman. That motion is to retain the matter in brackets, with such amendments as have been suggested.

9 Mr. Cherry. May I suggest that rule to be redrafted, but that either there or somewhere it will appear as an admonition. There is a very general one, but a very good statement on that question of amendment and liberality of amendment. And I am wondering whether that does not state, in general terms, as much as we can safely hope to put in these rules. Anything stated here might have the effect of narrowing what is there.

That is rather broad:

"changing the grounds of action or defense or adding new grounds or rights of action and claims for relief or new defenses, and by making any changes in any other matter of form or substance necessary for the adequate presentation of all matters in dispute between the parties."

Mr. Clark. Of course, that is a matter of amendment, generally. This is a matter of the statute of limitations.

Mr. Cherry. Of course.

Mr. Clark. We cannot expect this to cover the statute of limitations.

The Chairman. Rule 2 gives the effect of the amendment.

Mr. Cherry. But I am wondering if that is not more effective than any attempt to cover it now.

Mr. Clark. I do not think so; because I think that it does not cover the point where the statute of limitations is not involved. And I think that the rule, as it is now, does not affect the question of the statute of limitations.

Mr. Morgan. Except that all amendments are held to relate back, if you do not have any other provision; the court, as I understand it, always construes them to relate back.

Mr. Clark. Of course, at one time we put this in Rule 2. But we thought that would be too abrupt.

Mr. Cherry. I think that that accomplishes all you could hope to accomplish in this.

Mr. Donworth. Well, you are moving to retain this, are you not?

Mr. Cherry. No.

The Chairman. Is there any statement in Rule 2, that

that amendment shall relate back?

Mr. Morgan. No; but isn't that a universal rule?

Mr. Clark. I take it that it relates back, except where it relates to the statute of limitations.

Mr. Morgan. But some of the States say they will not allow the amendment; and others say that it is allowed except where it relates to the statute of limitations. But I think that you cannot dodge the question.

Mr. Olney. This will illustrate the question: In Draft No. 1, the provision reads as follows:

> "Amendments shall be held to relate back to the date of the original pleading so amended whenever it appears that the right of action or defenses asserted in the amended pleading arose out of the conduct specified or the transaction or occurrence set up or attempted or intended to be set up in the original pleading."

Now, as a matter of fact, that is any amount of a better statement than this one.

Mr. Morgan. Absolutely.

Mr. Dobie. I agree with you.

Mr. Clark. Of course, we think it is better, too.

The Chairman. Are you ready for the question? The motion is to retain, in substance, the bracketed paragraph. All in favor say aye.

(Chorus of ayes.)

The Chairman. And those opposed?

(Several noes.)

The Chairman. I shall have to ask you to raise your hands. Will those voting "aye" raise their hands, please.

Mr. Lemann. I think it is a rather close question.

Mr. Morgan. Terribly close.

Mr. Dobie. It is.

(A number of the committee members raised their hands.)

The Chairman. The "ayes" have it.

Mr. Clark. I like, there, going back to the TD1 statement.

Mr. Morgan. I think that is much better.

The Chairman. That is a matter of form, and we did not settle that.

Mr. Lemann. What took you away from it? What someone said, last time?

Mr. Clark. Yes; someone brought out a whole case, which I am not going to state, if I do not have to.

RULE 19
AMENDED AND SUPPLEMENTAL PLEADINGS
PARAGRAH (b) PLEADINGS DEEMED AMENDED TO CONFORM TO PROOF

The Chairman. Turning to Paragraph (b), Rule 19, I made a suggestion there.

Mr. Dodge. Mr. Wickersham expressed a very strong view about that.

The Chairman. My objection is this: As you have it worded here, if there is a motion, during the trial, for amendment of the pleadings, the court is compelled to grant it.

Mr. Morgan. Yes. I object to that.

The Chairman. And he can continue the case, if he thinks it is necessary. My point is that he ought to have the

discretion to deny it. He ought not be compelled to grant an amendment during the trial and then continue the case, if it is prejudicial. He ought to have a discretion to amend it. Do you see my note on page 5?

Mr. Morgan. I certainly agree with the chairman on that.

The Chairman. I have it here: "The court is required to allow the amendment and to adjourn the trial."

He ought to have power to deny it.

I suggested inserting, at the beginning of line 29, "Deny leave to amend or".

Mr. Olney. I think you have to consider the case where the proof is offered and not objected to, and it goes in.

Now, in the other case it should be within the discretion of the court to refuse the amendment. But where the proof is in, the pleading should be deemed automatically amended.

Mr. Morgan. I agree.

Mr. Olney. And there should not be any question about it, whatsoever.

Mr. Dobie. Without objection?

Mr. Olney. Without objection.

The Chairman. Isn't that another point?

Mr. Olney. They are both here, in this same thing.

The Chairman. I know.

Mr. Olney. But they should be combined.

The Chairman. Do you want the rule to be that when a motion for amendment is made during the trial, the court is bound to grant it?

Mr. Olney. No; I mean that if objection is made to proof, or if a motion is made to amend the pleadings, so as to permit

proof to go in during the trial, that should be submitted to the discretion of the court. The court should have the power to deny it, if it is unfair to the plaintiff to ask that that amendment be made and the case tried with that proof.

On the other hand, if the proof has gone in without objection, and they are both cases covered by this rule,then the pleadings should be deemed amended.

Mr. Lemann. I move that the reporter be requested to redraft the rule, to make that distinction: In other words, evidence without objection, enlarges the pleadings; but if objection is made, then application must be made to the court for leave to amend.

The Chairman. And the court can deny the amendment, at his discretion.

Mr. Lemann. Right.

The Chairman. All right.

Mr. Morgan. Certainly. Otherwise you are going to have great injustice done, I think.

The Chairman. Is there anything else under Rule 19? I take it that that is the sense of the meeting.

Mr. Tolman. I might say to the reporter that I submitted a redraft for this line,on page 19, which I take it is in harmony with that.

Mr. Pepper. May I ask if Mr. Morgan is going to be with us all during the session?

Mr. Morgan. Yes; I shall be here all the time, now.

Mr. Pepper. I only ask that because of the important matter in Rule 1.

The Chairman. Is there any other substantive matter on

the rule?

Mr. Morgan. What did you do, Mr. Tolman?

Mr. Clark. He suggested a redraft.

Mr. Tolman. It is a matter of form.

Mr. Clark. That raised the question of, How could it be relative, if it did not correspond to the pleadings?

Mr. Morgan. So you are getting technical again?

Mr. Tolman. But how could it be relative, if it does not correspond to the pleadings?

Mr. Clark. I think this is a matter we can iron out.

The Chairman. Very well.

RULE 20
ORDER FORMULATING ISSUES TO BE TRIED

The Chairman. Now let us pass to Rule 20. I have a serious objection to make to that. As I understand it, it is an experimental provision, to try to get the parties into court and to knock the parties' heads together before the trial, and get them to narrow the issues.

I object to it because, in the first place, it ought to be discretionary with the court as to whether he will undertake a job of that kind. We ought not to force it on judges in busy districts; we shall get no sympathetic treatment from them.

And the next point, as I understand it, is that the court, after hearing the parties, can decide the issues, after a protest by one of them. In other words, at a preliminary hearing, with no record and no right of appeal, the judge can strike out one of them. And I have said it in this way:

"This is experimental. It is to allow those judges who have the time and inclination to bring in the lawyers

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and 'knock their heads together' and endeavor to get rid of the chaff, and narrow the issues of fact and law to matters really in dispute, and eliminate unnecessary proof. Many of our Federal judges are too busy to do this. It should be a matter of discretion whether they entertain such proceedings. Furthermore, the limitation of issues should be the result of agreement by the parties, induced by pressure from the judge. The judge should not be given power to exclude an issue from trial, against the protest of either party, merely because the judge thinks the evidence is too flimsy. This would produce an outcry from the bar, and might operate to impair the right to a jury trial. The rule as drawn may be construed to require the judges to entertain such proceedings. It also is vague in not showing clearly that an issue cannot be excluded against the protest of either party. It should be remembered that there is no appeal from such an order, and no way provided to keep a record of the proceeding to review an order excluding an issue. Therefore, consent of both parties to the result arrived at is a necessity."

And then I made a few suggestions to carry that out.

Mr. Morgan. Mr. Chairman, this is one place where I desert the chairman from Minnesota, because I think this is one

11 of the most helpful rules in the whole outfit. It is in substance what the Commonwealth text on evidence recommended with reference to rules of evidence, as you remember, eight or nine years ago.

The Chairman. Do you disagree with my position that this

gives the court power?

Mr. Morgan. Not at all; I think you ought to have it. I think you have here a rule that a person cannot take an issue to trial merely by putting in a pleading.

The Chairman. But that summary judgment case has a judgment which is reviewable.

Mr. Morgan. When you say that there is no opportunity to review it, don't you suppose that you would have this put into the record, and take an exception to the judge's statement that this is the only issue? And I think you have there exactly the same situation as you have in the summary judgment question--putting a party to proof, as to whether matter is admitted, and raising false issues. And it seems to me that a preliminary hearing is exactly the thing for it.

The Chairman. Of course, I read the English law, and they give the power to overrule protests of both parties, about what the issues are. But they do not have any seventh amendment.

Mr. Morgan. But the Supreme Court of New York said so. And the question is whether or not there is a real issue to try. And that may be a preliminary matter for a court to determine on a proper hearing.

Mr. Lemann. The question may become a question of law, just like a motion for a directed verdict. And the court says, "As a matter of law, you are not entitled to it."

Mr. Morgan. Exactly so.

Mr. Sunderland. As a matter of fact, that is frequently done.

Mr. Dobie. If my memory does not fail me, as it frequent-

ly does, because I am not an Addison Simms of Seattle, you said before that that worked extremely well in practice, there.

Mr. Sunderland. I do not believe that the court in Detroit goes so far as actually to determine that things shall not be tried.

Mr. Pepper. I shall be for this if you can put in a provision that it will be subject to impeachment of the court, if the court uses this opportunity to suggest a settlement, and tries to make the parties settle. The thing that bothers me about these powers is that the modern judges, not wanting to try difficult cases, simply call counsel in and talk settlement to them, even when the judge does not know much about it. I was recently put into a very difficult situation by one of the judges in our Court of Appeals of the Third Circuit, who was hearing a case involving a great deal of money. After the case had been argued, we were brought in and an effort was made by the judge to compel settlement. This sort of thing invites more or less of a three-cornerd discussion between counsel and court. And I should like to know whether it actually works in other states. It seems to me that there ought to be some background of experience for it, if it is justifiable.

The Chairman. If I am not mistaken, when a motion for summary judgment is made and the case is threshed out in that way, he may, however, do exactly what is provided here.

Mr. Pepper. Does that work out fairly well?

The Chairman. I think it does. I do not know whether he exercises that authority in New York; I think he either grants or denies it, and lets it go with that.

Mr. Sunderland. I do not think there is any summary judgment rule that operates with that provision. We put it into ours, but it has not been actually interpreted anywhere. In Detroit this provision has no connection with summary judgment procedure. But it is a procedure which the circuit court has developed at its own instance, and having a judge sitting as a pre-trial judge to whom every case goes. It never gets on the docket without going to the pre-trial judge. And he has the parties before him, and tries to determine what the real issues are, and notes them on a sheet of paper and does, in fact, try to get some sort of settlement if it seems that some settlement can be made. In other words, it is an element of conciliation. And we do accomplish a great deal, in eliminating issues over which there is no dispute.

The Chairman. Rule 42 gives the court precisely the same power as we do here, but it is after motion for hearing of the pleadings and evidence. Perhaps I was wrong in assuming that this was rather a formal proceeding; but I know well enough that I would never go into one of these proceedings without having a court reporter with me.

Mr. Lemann. I assumed that. I wrote at the bottom of your memorandum "It should be remembered that there is no appeal from such an order," "Why not?"

Mr. Clark. I certainly think that they are subject to review.

Senator Pepper was going to say that we had in here, last time, a provision for conciliation, which was stricken. The committee voted to strike it out. But the provision for conciliation in the original rule we had was stricken out.

The Chairman. Is this a substitute for it?

Mr. Clark. This is the remainder of the rule. We voted to continue the rule. Mr. Morgan and Mr. Tolman suggested alternatives, both of which we have accepted.

The Chairman. Then, suppose I limit my objection to this rule to the point that it forces the court to entertain a proceeding. You force him to entertain a motion for summary judgment, to sift the issues out there.

Now, should we try a thing of this kind and force every federal judge to entertain these proceedings? My thought was that some judges would want it and some would balk at it; and if we make it discretionary with them, that would probably let those judges who like it, experiment with it.

Mr. Lemann. Is it not permissive? It says "may."

The Chairman. Oh, he may grant the order. But he must hear the proceedings. He has to sit there and hear it all, and then he may or may not grant the order. And I doubt if it is wise to force all this on all federal judges. I think it ought to be discretionary with them, as to whether they entertain it or not.

Mr. Lemann. But if a judge should say, "I do not believe in this. I am not going to do it; I do not care to do it," then I do not believe he would violate anything here. Suppose he says, "I am not compelled to do it." Your point is that he is compelled to hear them preliminarily?

The Chairman. Yes, he is compelled to hear the whole argument.

Mr. Lemann. Is he compelled?

The Chairman. I think he would be subject to impeachment

if he did not.

Mr. Lemann. Under this rule?

The Chairman. Yes.

Mr. Lemann. I should not think so.

The Chairman. "After the pleadings in an action have been completed, the court may, upon motion of any party showing grounds therefor or of its own initiative, and after hearing the parties, enter an order."

Mr. Lemann. Yes; but it says "may."

The Chairman. Yes; but that means he has to grant the hearing and he cannot refuse to grant it, any more than he can refuse to let a man file a lawsuit. He can deny it, after he has heard it. But this thing makes him sit there and hear a wrangle, and then decide whether he will or will not grant it.

I only suggest that since this is experimental and has not been tried very much, and since many of the judges are against it, therefore it should be more or less discretionary with the judges in the different districts, depending upon the volume of work they have to do, as to whether they are going to entertain proceedings of this kind.

And after all, you have the summary judgment, which gives them the same chance as this motion that we are talking about.

Mr. Lemann. I should agree with you as to what ought to be his right. My only doubt would be that I thought this rule gave him that right. If it does not, I agree with you. That should not force him.

The Chairman. Well, you would not say that because the

statute gives the judge the right to deny a right, after hearing, therefore the judge can refuse to hear the matter?

Mr. Lemann. Well, I think that he could say, "I am not going to interfere." But if that is not plain, I agree that it ought to be made plain.

The Chairman. When it provided that he "may" make an order, after hearing, I thought that he would not have any business in making an order before hearing.

Mr. Olney. I move that the rule be so worded that there can be no question that it is discretionary with the judge whether to entertain the motion or not.

Mr. Loftin. I second that motion.

The Chairman. All in favor of that, say aye--that it will not come into effect unless he is willing.

(A chorus of ayes.)

The Chairman. Very well; that is passed.

Mr. Tolman. In line 10 I had a suggestion to strike out the last seven words. I think they are superfluous.

The Chairman. Don't you think that the court ought to have a right to take the back trail, if something develops during the trial which makes him feel that he has narrowed the issues too much?

Mr. Tolman. My point is that that is inherent with any trial.

Mr. Olney. In connection with this rule, I should like to say that if it is adopted, there should be very careful safeguards drawn around it. It is capable of great abuses by an arbitrary or unscrupulous judge, and such have been known. There should be provisions, for example, that he

should state his reasons why he cuts out pleadings and why he deems that it is not worth while to try it--and other provisions. After the order is once made, of course every presumption is in favor of the order; and unless it is properly safeguarded, it is subject to abuse.

The Chairman. Well, the man can have a court reporter to report all the proceedings. And that is where the element of safety comes in.

Mr. Olney. However, it ought to be provided that such a matter be determined in open court, and not in chambers. I think you are going to have all sorts of trouble.

Mr. Dobie. My guess would be that the attitude of the average federal judge in a more or less experimental thing of this kind, will be one of cautious conservatism.

Mr. Olney. Yes; but you cannot deal with this on any question of averages. You have to assume the other kind, and safeguard against its abuse.

Mr. Morgan. Yes; every once in a while you will find one of them.

Mr. Donworth. Mr. Chairman, I think this is a good experiment and is worth trying. I notice that it does not call for any affidavits. It seems to call for the pleadings and the oral statements of the lawyers.

Now, any lawyer invoking this would have to be very careful that the judge is not arbitrary and does not exclude anything that has been raised, that has anything in it beyond the flimsy. Because if the judge simply takes the bit in his teeth and says, "Oh, I don't believe there is much in that," and so on, then there will be many reversals because the party

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has not had his trial on the issues. In other words, the trial judge may bluff the parties, for the time being; but the circuit court of appeals is not going to be bluffed. If there is an issue there, they are going to decide that it has to be tried, regardless of what the judge may have said.

However, I think that is a routine matter that will be cured in the course of experience as we pass along.

The Chairman. Then, let us pass to Rule 21.

IV. PARTIES
RULE 21
REAL PARTY IN INTEREST; CAPACITY TO SUE OR BE SUED

Mr. Clark. That brings up several questions. The whole question of capacity is one of some difficulty.

But first, we understand that Mr. Morgan and some of the others wish to do something more with real party in interest, which would make us happy. If Mr. Morgan wants to change that, we shall accept that.

Mr. Morgan. I notice that you were not very willing to accept anything you had from me before.

As I said, I am perfectly willing to get away from "real party in interest" by using Mr. Clark's system that we had before, to the effect that a"person who, by the substantive law, has the right sought to be enforced."

But he thinks that would be inconsistent with retaining all the remainder of it, concerning executor, administrator, guardian, and so forth.

Now, I am anxious to keep that.

Mr. Clark. Don't you think that they are entitled to sue, by substantive law?

Mr. Morgan. I do not know whether they are the persons who, by substantive law, hold the interest.

Mr. Lemann. Isn't this derivation wrong--Rule 25, TD1?

Mr. Morgan. The first paragraph is Equity Rule 37, and Rule 39, TD1.

Mr. Lemann. Yes; I was looking at the next page. Excuse me.

Mr. Dobie. I should like to hear from some of you gentlemen about this matter of the conflict of laws. I am a little dubious about that.

The Chairman. What is the precise point?

Mr. Dobie. "The capacity of a natural or incorporated person to sue or be sued shall be determined by the domiciliary law of such person."

Mr. Morgan. Yes; the first sentence in the second paragraph.

The Chairman. It would not be any different if we left that out, would it? We could not change it.

Mr. Morgan. But Mr. Clark's view is that this is a conflict of laws, which has to do entirely with procedure, and the matter of who has the right to sue in this particular court. Isn't that right?

Mr. Clark. Yes.

The Chairman. Is that right? Is that a matter of procedure?

Mr. Morgan. It is a procedural rule of conflict of laws, without any question. But which one of these representative parties has a right to sue in this particular jurisdiction? In some cases that you see, the Supreme Court of the United

States has said that the matter of determination of the party who shall sue, is a question of procedure. For example, in Minnesota this "real party in interest" statute has been interpreted to the effect that only the administrator can sue under the wrongful death statute, because he is the real party in interest.

As I understand it, the Supreme Court of the United States has said that in these wrongful death statutes, the question of who shall bring the action is a procedural matter. Am I right, there?

Mr. Sunderland. I think so.

Mr. Morgan. And the real parties in interest are the beneficiaries who are named in the statute.

Mr. Sunderland. I think so.

Mr. Morgan. So that the party who is suing on a Minnesota wrongful death statute, for example, in Maryland might be the proper representative of the person, under the Maryland statute, while the Minnesota court would have said that that was all wrong, because the real party in interest was the administrator, and had to sue.

Mr. Donworth. That means that you favor the language, as written here?

Mr. Morgan. I do not know, Judge Donworth, whether it is proper for us to try to decide a question of conflict of laws, here.

The Chairman. Are you not just one step removed from saying, "Who owns the claim?"

Mr. Morgan. It may be.

The Chairman. Is that a matter of procedure?

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Mr. Dobie. That is the capacity to sue and be sued.

Mr. Lemann. Suppose that in Spain, a man is of age when he is 18, and he brings a suit in Massachusetts. Is that a question of procedure, as to whether he is of age to bring that suit? My original notion would have been that that question of capacity would have been settled by the domiciliary law. You might state it in terms of the Massachusetts law, saying, "We do not let anybody in court in Massachusetts unless he is 21 years of age." But your Massachusetts law is that a man can come into court when he is of age, and then you go back to his domicile, to see if he is of age. That is really the interpretation that this would give to the federal matters.

Mr. Morgan. Well, as the memorandum showed, this matter is in dispute in the federal courts and other courts. It might be well to clear this up.

Mr. Dodge. In Massachusetts our remedial law is that a man has capacity if he has capacity by substantive law.

The Chairman. For instance, are we dealing, perhaps, with the procedure, if we say that nobody under 25 years of age can bring a suit?

Mr. Clark. In the case of New York Evening Post Company v. Chaloner, 265 Fed. 204, you have that:

> "Every unincorporated association, whether partnership, joint stock company, club, union, business trust, or other association, shall have capacity to sue or be sued when it has such capacity by the law of the State in which the district court is sitting."

Mr. Lemann. In this article in the Yale Law Journal, I see that you say that on the whole, the courts have followed

the statute rule as to the capacity to sue or to be sued. Do you mean the rule of the state in which the suit is brought, or the rule in the state of domicile? You mean the former, do you not? You mean the state in which the suit is brought? And that, I say, is the majority rule. That would not be inconsistent with this rule, would it?

Mr. Olney. It seems to me, Mr. Chairman, that we have to differentiate here between the case where the capacity to sue is called in question and the case where the capacity to be sued is called in question, so far as any artificial organization is concerned. We are speaking, now, of artificial persons. If an artificial person is not permitted to sue, by the law of the state in which it exists, it should not be permitted to sue in the federal courts. It simply does not have the right to bring suit, under the laws of the Government. Its liability to be sued in the federal courts, however, should not depend upon the state law at all. If it is acting as an entity and is subject to suit under the principles that were laid down by the case of United Mine Workers of America v. Coronado Coal Company, 259 U. S. 344, it should be subject to suit.

The Chairman. In other words, the state law should not be allowed to grant immunity.

Mr. Dobie. The Lupton case merely held that the state law should not be allowed to hold that if you do not file a copy of your charter, you cannot sue in the federal courts. I do not think that case is very much in point.

Mr. Olney. But the capacity to be sued should rest on the law of the State where it is organized. If it does not

have the capacity to sue, it simply cannot sue.

Mr. Morgan. That is the domiciliary notion, is it not?

Mr. Dobie. Do you think that we should state this here? I must confess that I am "up in the air" about it.

Mr. Olney. It might be well; I had not thought about it particularly. I just ran across the rule, and it seemed to me that this was a distinction that should necessarily be made. I am quite in favor of laying down, in these rules, so far as artificial persons are concerned and organizations of one character or another, a principle upon which they can be sued, whether they are suable in the state courts or not, so that there is given a right for redress. If it is a proper case for the federal courts for redress, the federal courts will not be hindered by some state law, in giving that redress. They should not be hindered by some state law that does not permit such things to be sued, as an entity.

Mr. Dobie. You probably know of the North Carolina case that held that a railroad company that filed its charter there should become a domestic corporation. The railroad company wanted to remove to Virginia, for the purpose of defending suit. But the North Carolina courts did not allow that.

But those are all questions on the diversity of citizenship.

Mr. Olney. We are speaking here of the capacity to sue.

Now, when it comes to the power of the federal courts to go after something that is operating as an entity and is accused of having done wrongs for which redress should be given, the federal courts should not be restrained in granting that redress. Certainly they should not be restrained by the

law of the domicile in the state where the action is brought. It should depend upon general principles.

Mr. Clark. Isn't that covered by lines 18 to 23? Were you suggesting a change in that?

Mr. Olney. Well, as I read it here, you have this:

> "Every unincorporated association, whether partnership, joint stock company, club, union, business trust, or other association, shall have capacity to sue or be sued when it has such capacity by the law of the state in which the district court is sitting, or when lacking such capacity by such state law it is necessary to accord to it the capacity to sue or be sued for the purpose of enforcing for or against it a federal substantive right."

Now, it should go clear beyond enforcing a federal substantive right. It does not make any difference what the right is, which is sought to be enforced, provided it is enforceable in the federal court. That is my point.

On the other hand, the right to sue or the capacity to sue should be determined by the domicile of the organization.

Mr. Clark. On this matter we were attempting to state the federal law. And the Coronado case was at first thought to go further, but it has been definitely limited to this particular point.

Mr. Morgan. That is as to capacity to sue; but how about the capacity to be sued? Do you agree with the Judge on that, Charley?

Mr. Clark. Well, I cannot say whether that works out, or not. I should think that capacity to sue or to be sued would be much the same.

Mr. Pepper. Will you state once more the case of the capacity to sue?

Mr. Olney. It seems to me that the capacity to sue should depend entirely on whether under the law of the State where it is organized--the law that governs it--it has that capacity, or not. If the law provides that it does not have the capacity to sue, then it should not have the capacity to sue in the federal courts. On the other hand, when it comes to enforcing against it, redress for wrongs done by it, then no limitation imposed by the state statutes should prevent the federal courts from granting the redress.

The Chairman. He agrees as to the rule so far as capacity to sue is concerned, but objects so far as being sued is concerned.

Mr. Clark. Well, there may be some difficulties here, especially if we get the American Federation of Labor against our rules. This point is not very clear. We have gone as far as the federal authority definitely permits.

Mr. Dodge. Have you not gone beyond the authority? As I read the article, you have been dealing with natural questions. But you propose to apply the domiciliary law, and that is something different from what I understand the cases say. It may be that this is right, as opposed to what the cases say, but it is not the present law.

But I just wonder whether we should change it.

The Chairman. The Coronado case was a substantive case, was it not?

Mr. Dodge. Yes.

The Chairman. And under the federal rule, you can

enforce a substantive right in a federal court, even though under a state law there is an attempted prevention of suit.

Mr. Clark. You are discussing a different point; you are up to line 23.

Mr. Dodge. That is right.

Mr. Olney. Aren't the principles that I have been stating, sound?

4 The Chairman. Well, the rule as drawn, as I understand it, applies to the state law of the domicile, both as to the capacity to sue and as to the capacity to be sued, except where there is a federal substantive right involved, and a right arising under the laws of the Constitution of the United States. Then you can maintain a suit against such an organization, in the federal court, to maintain that right, even though an immunity to suit was attempted under state law. Now it seems to me that that is going far enough; because if it is not a federal right, or arising under the federal laws or Federal Constitution, why should there be a greater right to bring a suit against it in the federal court than in the state court?

Mr. Olney. Because it may be the only method by which you can obtain practical relief.

The Chairman. Well, a diversity case would be the only case you would be interested in.

Mr. Olney. But that may be of extreme importance.

The Chairman. But under Rule BA23, any right pending in federal court can be brought up.

Mr. Olney. But this rule gives a limitation of the right to sue. Suppose a federal right is involved: An organization

should not have the right to sue to enforce that right, unless it has the capacity to sue in the state in which it is organized.

The Chairman. That is all right; but I thought your question related to the capacity to be sued. You are not in disagreement with the rule, so far as the capacity to sue is concerned.

Mr. Olney. Well, I am in disagreement with the rule, so far as it say "or when lacking such capacity by such state law it is necessary to accord to it the capacity to sue or be sued for the purpose of enforcing for or against it a federal substantive right."

I do not think that is correct.

The Chairman. I think that I do not agree with you about that.

Mr. Clark. What does he say? I did not understand.

The Chairman. He says that if you have an organization or association that, under state law, does not have any capacity to sue, nevertheless it will have a capacity to sue in a federal court.

Mr. Olney. No; that is not it.

The Chairman. The only case where you should have a right to sue under a federal court is where there is a statute which prevents the defendant from coming into court. But why should a person who is denied the capacity to sue by a State, be allowed to be a plaintiff in a federal court?

Mr. Olney. Exactly.

Mr. Clark. Well, this may have some political dynamite in it. And it is a matter that has come up in connection with

labor unions and with relation to how far the Coronado case goes, and whether they should be allowed the opportunity to sue.

Of course it goes as far one way as the other.

Now, did you make a provision that they cannot sue but they can be sued? And you had the further suggestion that it shall not be limited to a federal substantive right. Then you have them limited as to suing. But if you have them liable to suit--

The Chairman. He wants it restricted.

Mr. Olney. No; I agree with the reporter; I would "go the whole hog."

The Chairman. But he thinks that a plaintiff ought to be allowed to go into court to maintain a federal right.

Mr. Olney. That is right.

Mr. Pepper. The capacity to sue does not raise the question of whether a foreign corporation has a right to sue, despite its failure to register under the laws of the State. That is a question of capacity.

Mr. Olney. I do not know.

Mr. Donworth. As I understand it, a corporation may sue without having complied with the rules of registration.

Mr. Cherry. That is the Lupton case.

Mr. Pepper. I was thinking of the Scranton Correspondence Schools case, where suit was brought by a Pennsylvania correspondence school corporation, in a court in Kansas. And the objection was made by the person in default to the plaintiff on a tuition fee contract, that the correspondence school had not registered and complied with the law in the matter of

registration. My recollection is that Mr. Justice Harlan Stone's opinion enabled the court to escape from the consequences of the defendant's contention, by holding that the transaction was in interstate commerce and, that being an interstate commerce contract and the parties being engaged in that, it could sue notwithstanding non-compliance with the local law.

Mr. Lemann. I think that if the Penn Mutual Life Insurance Company did not qualify in Louisiana, they could bring suit in a federal court, without regard to interstate commerce.

Mr. Donworth. I think that Senator Pepper's point goes rather to the validity of a contract.

The Chairman. I move that we strike out, in lines 18 and 19, the words "whether partnership, joint stock company, club, union, business trust, or other association," and just leave the rest of it in there.

Mr. Donworth. Will you please repeat that?

The Chairman. I suggest that we strike out, in lines 18 and 19, the words beginning with "whether parthership, joint stock company," down to the words "other association".

Mr. Donworth. And then it would read: "Every unincorporated association shall have capacity to sue or be sued"?

The Chairman. Yes; instead of stirring up all those unions and business trusts and joint stock companies, by tying a tin can on them. I suggest that.

Mr. Olney. I make a motion, in order to bring it up, that that should be done.

The Chairman. There is no special reason that that should be in, except we thought it was open to interpretation as to

what should include an unincorporated association.

Mr. Dodge. Would that include a partnership?

Mr. Olney. Yes, it would.

Mr. Dodge. I had some question of whether it would include a partnership.

Mr. Dobie. I think so. In the American case books they always include partnerships.

Mr. Dodge. You mean, shall have capacity to be sued or to sue in its own name?

The Chairman. All I meant was to strike out any particular reference to any particular kind of unincorporated association. If the phrase "unincorporated association" is not sufficiently broad, we shall have to leave it in.

Mr. Morgan. You could say "partnership or other unincorporated association."

Mr. Tolman. We could at least strike out "club, union," and so forth.

The Chairman. That word "whether" is just the same as "such as." And I thought it was the same as "such as, for example," which we have here three or four times.

I just suggest that for the revision committee.

Mr. Olney. Mr. Chairman, there is one thing that should be changed here, beyond any question. It is in place of the words "by the law of the State in which the district court is sitting." It should be "when it shall have capacity to sue or be sued, and when it has such capacity by the law of the State in which it exists." That is the law that should govern. If it has capacity to sue under the law of that State, then suit should be permitted in the federal court, anywhere.

Mr. Lemann. That would fit this thing with lines 8 and 9, would it not?

Mr. Olney. In other words, it is not the law of the state of the foreigner; it is the law of the state of the domicile.

Mr. Morgan. That is what lines 8 and 9 say. Are you going to keep them in?

The Chairman. Yes, they are all right.

Mr. Olney. I am down to lines 20 and 21.

Mr. Lemann. I do not know whether lines 8 and 9 are right, but I see that it is quarter of 6.

Mr. Morgan. But lines 8 and 9 and 6 are tied up together, are they not, Judge? Domicile is what you want to govern, and not the foreigner.

Mr. Olney. Yes.

Mr. Morgan. And Mr. Lemann says he thinks it applies to the foreigner.

Mr. Lemann. That is what I meant to say.

Mr. Donworth. You take a foreigner--one living in Maryland and another in Illinois--

Mr. Olney. Mr. Chairman, it is quarter of 6.

The Chairman. Very well; we shall recess until 8 o'clock.

(Thereupon, at 5:40 o'clock p.m., a recess was taken until 8 o'clock p.m. of the same day.)

NIGHT SESSION.

The committee resumed at 8 p.m. on the expiration of the recess.

RULE 21. REAL PARTY IN INTEREST; CAPACITY TO SUE OR BE SUED.

The Chairman. The committee will come to order. We have a very hard nut to crack in rule 21.

Mr. Donworth. Mr. Chairman, if there is nothing pending, I would like to ask the Reporter a question. I want to say that I think the rule is very well drawn, and I have no suggestion to make except this:

In the second paragraph, after "the capacity of a natural or incorporated person to sue or be sued", should there be inserted right there

"in his or its own right"?

We know the difficulties that are met with in the case of a foreign executor. He is still a natural person. His capacity to sue in another State could hardly be determined by the domiciliary law. In fact, I think it is the other way. What do you think about that?

Mr. Clark. I suppose you are right about it. You are quite right on the law. It is a question of his appointment.

Mr. Morgan. Is that a question of capacity to sue, or stating a cause of action?

Mr. Clark. I am not quite sure on that.

Mr. Morgan. The courts are certainly in conflict on that, don't you think so, Judge?

Mr. Donworth. I think so.

Mr. Morgan. As to whether or not that goes to the existence of a cause of action, if he does not properly allege that he is properly appointed.

Mr. Donworth. I remember when the point was up in the discussions in the American Law Institute. I think the restatement states the law in this way, that it is perfectly proper to pay voluntarily to a foreign executor, and that exonerates, but only voluntarily. If the executor tries to sue, he must show capacity in the jurisdiction.

Mr. Morgan. He must allege a proper appointment, because they say the cause of action is in the foreign executor, and anybody who does not allege a proper appointment has not alleged a cause of action. I did not suppose it was capacity to sue, Judge.

Mr. Donworth. I think you are right, perhaps.

Mr. Sunderland. It is the ownership of the claim, is it not?

Mr. Donworth. Do you think it is worth taking into consideration to consider the advisability of inserting "in his or its own right"?

Mr. Morgan. It may be.

Mr. Lemann. Does this undertake to say anything about whether an executor appointed in Massachusetts could sue in Mississippi?

Mr. Morgan. No; I do not think it undertakes to say that, does it?

Mr. Lemann. I do not suppose it does.

The Chairman. With the definition of the term "capacity to sue" I do not think it does. I did have a notation myself:

"Does this mean that a guardian appointed in one State may sue in another State?"

Mr. Morgan seems to have established that that is not capacity to sue, but that it is ownership of the claim.

Mr. Morgan. I think there is some confusion in the cases, as I remember, but, as I understood it, briefly, the rule was that it went to cause of action, and not capacity to sue.

Mr. Lemann. I sat in the Conflicts group and dealt with these cases years ago myself. I do not know that they state the problem in terms of whether it is capacity or not.

Mr. Morgan. I do not know that they do, either.

Mr. Lemann. They do not use the word. I think the rule is very well settled that an executor appointed in one State cannot sue in another without qualifying, and I think the reason they give for it is that there is no privity between the executor and the deceased. I do not think there is any language of capacity in the cases at all.

Mr. Pepper. Yet it is pretty hard to take it out of capacity, if you once admit that the title to the chose in action is in the executor, or guardian or administrator, so that the debtor in another State gets acquittance if he pays voluntarily at the domicile, on the theory that the situs of the debt is there.

It then follows that if the administrator goes into the State of the debtor to sue, he cannot lose title to the chose in action. The only reason he cannot maintain his suit is because his commission has no extraterritorial effect. Is not that capacity?

Mr. Lemann. Of course, the rules as to payment to foreign

representatives are pretty complex themselves. There is some new law made in the restatements, in an effort to smooth out inconsistencies. When we come to deal with those other things, without going into that very broad, difficult thing of conflicts, if we deal with the kind of problems suggested here in connection with guardians, for example -- we do deal with guardians, apparently, in the second paragraph -- we should not say anything about executors, if your idea is right, and this rule does not cover them. We are saying something about guardians, and we are not saying anything about other persons in a representative capacity.

Mr. Donworth. I thought if we excluded the idea of representative capacity here, and said nothing about it, it might be well. However, I think the Reporter can be trusted on that.

The Chairman. What shall we do with the matter we were discussing? There was some discussion about that provision in lines 18 to 23. There were some minor points made, about the district in which the court was sitting, instead of the place of domicile, and so forth, but the substantive point was whether we should attempt to give the right to sue as a plaintiff in the Federal court to an unincorporated association which had no right to sue under the law of the domicile, no right to maintain a suit in the case of a Federal substantive right.

Dean Clark has called attention to the fact that we say that they can be sued if they commit a wrong, but cannot maintain a suit where somebody else has wronged them. But we may run into political or practical difficulty. That is the only argument I can see in favor of maintaining it. I do not know that it does any harm to maintain it.

Mr. Pepper. I move that it remain as reported.

Mr. Donworth. We had already stricken out, at the suggestion of the Chairman, something in lines 18 and 19, had we not?

The Chairman. No; I made a suggestion in which I asked no formal action. The drafting committee can consider whether they could not leave out "whether partnership, joint-stock company, club, union, business trust, or other association" without doing any harm to the meat of it, without mentioning any particular kindof organization.

Mr. Donworth. I would second Senator Pepper's motion, to get it before the meeting. I am not sure whether it runs counter to some of the suggestions made by Judge Olney.

Mr. Olney. It is directly counter. My point was simply that if an organization had not the right to sue in its domicile, under the law of its domicile, the Federal courts ought not to give it the right to sue.

The Chairman. The theory of allowing it to be sued is that if they commit a wrong they ought not to be immune to suit in a Federal court to maintain a Federal right. There really is not the same argument in favor of giving them the right to sue if somebody else has wronged them. That is a different aspect of it.

Mr. Olney. The State of their domicile either gives them the right to sue, or else, in the nature of things, it provides that any wrong done them must be redressed in some other way than in the name of the association, and that should be the method of redress in the Federal courts as well.

Mr. Pepper. The reason I made the motion was because I understood this applied only to groups associated in other form

than corporate form.

The Chairman. That is right.

Mr. Pepper. It does not mean corporations organized under the law of the State, but it means an unincorporated group; and if it be true, as I understood the Reporter to say, that the question of the capacity to sue under those circumstances was governed by the law of the forum, it seems to me that we had stated it correctly when we said it could be tested by the law of the State in which the Federal court is sitting, unless that law fails to deal with the proposition, in which case the rule gives him the right, and it has the advantage of creating a reciprocal situation over against the liability to be sued, which we do not want to accord unless we also give the right to sue.

Mr. Dodge. Should not the words "to sue or to be sued as an entity or in its name" be put in there? Every course, every partnership has a capacity to sue or be sued.

The Chairman. I think perhaps that would help.

Mr. Lemann. There was some question, I think, at one time -- the decisions are referred to there -- as to whether a partnership may sue as an entity in a common-law jurisdiction, or whether the partners would have to sue as individuals.

Mr. Dodge. They would have to.

Mr. Morgan. They always have to sue as individuals, except in the Coronado case they said they could be sued, unless you have a statute. The statutes in a great many States allow suit by a partnership in the partnership name. Aside from that, of course, it has no standing in court.

Mr. Dodge. That is what we are dealing with there, capacity to sue or be sued as an entity.

Mr. Morgan. Yes.

Mr. Lemann. You say that depends upon statutes?

Mr. Morgan. Generally, yes.

Mr. Lemann. Does this imply that it does not depend on statutes?

The Chairman. It does not.

Mr. Lemann. I was just wondering how far this was procedural and particularly this last part, and even the former part -- whether this is part of our job. We cannot settle all problems that border on procedure, and I just wondered whether this is ordinarily the sort of thing you expect to find in a code of practice.

Mr. Morgan. I do.

Mr. Cherry. I do not. I have very grave doubts about it.

Mr. Lemann. I want to do a progressive job. I do not want to try to conquer the world right now. I want to leave something for the next generation to do. I do not want to get too far into controversial matter, which might produce a lot of attacks on the job as a whole. I was just raising the question. I am not sure in my own mind.

Mr. Pepper. Except for the sort of quasi-political question that was raised by the Reporter, are not all the considerations of justice in favor of suing and being sued in the common name? I think the Coronado case had its origin back in the decision of the House of Lords in the Path-Vaile(?) case, as I recall it. In my State, for instance, it is just too bad that if you want to sue a partnership doing business as the Excelsior Plumbing Company, you have to sue A and B, trading as the Excelsior Plumbing Company. I should not think it was very revo-

lutionary to assume that it is a procedural question, and give the right both to sue and the liability to be sued in the common name.

Mr. Dodge. That is, if, under the law of New York, a partnership located there is an entity, it should be suable as such in the District Court in Massachusetts, in spite of the fact that in Massachusetts we have to sue partners in their individual names?

Mr. Lemann. Would this say that?

Mr. Dodge. Does not this say that?

Mr. Lemann. First it says the law of the State where the suit is brought, and not the law of the domicile, in the paragraph we are talking about now.

Mr. Dodge. That was changed, was it not?

Mr. Lemann. I do not think so.

The Chairman. Not yet.

Mr. Lemann. There is one inconsistency between the second paragraph and the cases it dealt with, which take the law of the domicile, and the third paragraph, which take the law of the State where the suit is brought. Then there is an exception in that third paragraph of Federal rights, so that you can sue a partnership to enforce a Federal right, even though by the law of the State of the partnership's creation and the law of the State where the suit was brought, you could not do so. I do not know enough about it to sit here and vote how it ought to be. I have not heard the arguments on both sides, nor read the cases.

Mr. Morgan. Suppose a Massachusetts man, a Rhode Island man, and a Connecticut man are in a partnership that runs a

business in all three States. What is the domicile of the partnership?

The Chairman. Let me ask a question. I would like to ask two or three people this question. In connection with this whole question of capacity to sue, the second and third paragraphs, Mr. Cherry, do you think that is a matter of procedure, within the scope of our rule?

Mr. Cherry. I do not, Mr. Chairman.

The Chairman. What do you think, Mr. Morgan?

Mr. Morgan. I suppose the capacity to sue is within the scope of our rule, but the matter of conflict of laws with reference to it I thought was on the borderline.

The Chairman. We are settling those, are we not?

Mr. Cherry. I should modify my answer, Mr. Chairman. I think, in the second paragraph, all but the first two lines is properly within our scope.

I would like to see lines 8 and 9, except for the word "when" in line 9, and the third paragraph, omitted.

The Chairman. You would strike out

"and when by such law"

and simply say

"when a natural person is under disability"

and so forth?

Mr. Cherry. Yes.

The Chairman. --"and has a duly appointed guardian or other legal representative"

and so on.

Mr. Cherry. I think that belongs there.

The Chairman. From there down to the end of that paragraph.

Then you would strike the third paragraph?

Mr. Cherry. Yes.

Mr. Dodge. Does that mean a guardian can sue in a district outside the State?

Mr. Morgan. He was going to leave that to the present Federal law, which is in a mess, according to Dean Clark's article.

The Chairman. We ought not to try to deal with that.

Mr. Cherry. Granted it is in a mess, I do not think that is our particular job.

Mr. Lemann. We have so much to do. We cannot straighten out all the messes.

Mr. Morgan. I think it is debatable. I agree with Dean Clark, however, that a portion of the conflict of laws has to do peculiarly with procedure.

Mr. Clark. In the main, there is this to be said. Of course, we can leave it out, but we leave another hiatus in the rules. Most of it I do not think is very controversial, and we just back away from something and leave it in the air. I am a little worried about several places where the Conformity Act does fill a gap now, and we take away the Conformity Act, and then throw up our hands and say, "We got you into the mess, but God help you to get out."

The Chairman. We do not repeal the Conformity Act, except to the extent the rules repeal it. We leave the hiatus, and provide that the District Court can supplement these rules with local rules. That still leaves the Conformity Act in effect, except to the extent that we have abolished it.

Mr. Dodge. Suppose there is a State statute that the

guardian must sue in the name of the ward. What would be the effect of this?

Mr. Olney. I think that is the proper way to bring suit.

Mr. Dodge. Is not this part of the law of guardianship, really, rather than the law of procedure?

Mr. Pepper. If the last suggestion were adopted, to strike out lines 8 and 9, and retain the balance of paragraph 2, and strike out paragraph 3, have we contributed anything whatever to a solution of existing difficulties?

Mr. Clark. You have added to them.

Mr. Pepper. Have we not made the situation just a little worse. It seems to me we ought either to leave the whole thing out, or else make some effort to clarify the existing situation, which, it seems to me, this rule does.

Mr. Clark. You cannot run away from the situation entirely. The fact that we are making these rules doing away with the Conformity Act presents a problem here, and in some other analogous cases.

Mr. Pepper. We are pretty nearly running away from it when we come up and look it over and say, "You look too big for us to tackle, so we are going home."

Mr. Clark. Yes.

Mr. Lemann. Let me ask you, Mr. Sunderland, if you would expect a code of practice act to tell you about suits by guardians, executors, and administrators?

Mr. Sunderland. No.

Mr. Lemann. I am intrepid, Mr. Chairman, in looking for further fields to conquer, if you give me time to make a reasonable attempt to deliberate about them, so that I will know what

I am conquering. But I am just a little cowardly, I think, about undertaking too much, or being too ambitious. That is not something we have a right to expect of a code of practice or procedural act. This can be changed. New articles can be added to this draft, can they not? We do not saw them off, do we, Mr. Chairman?

The Chairman. No. Under the statute I assume they can amend them from time to time, provided they lay the amendment before Congress in the same way the original rules were.

Mr. Donworth. All the State statutes governing procedure have something corresponding to that first paragraph.

Mr. Morgan. There is no doubt about that.

Mr. Donworth. Are we in doubt about that at all?

Mr. Morgan. No.

Mr. Lemann. I do not think any of us is at all.

The Chairman. In order to raise the question, Senator Pepper has moved to accept the provision as it is.

Mr. Cherry, do you want to move as a substitute to strike out the second and third paragraphs? Perhaps in that way we can get a vote on it and get some expression of opinion.

Mr. Cherry. I would not want to strike out the second paragraph, beyond the first two lines.

The Chairman. We can take that up later. You can move another substitute then.

Mr. Cherry. I was answering Mr. Lemann's question. That is what I mean.

Mr. Lemann. To test the question, I will offer, as a substitute, a motion to remove the second and third paragraphs, without prejudice to the right, by subsequent motion, to test

the point of whether a part of the second paragraph will be restored, so as to make that plain.

The Chairman. Let us have a vote on that.

Mr. Dobie. What is the motion?

The Chairman. The substitute is to strike out all of lines 8 to 23.

Mr. Dobie. I second that.

The Chairman. All in favor of that motion will raise their hands.

Mr. Olney. Mr. Chairman, before it is voted on I should like to make this observation, which has occurred to me since we adjourned. What we are really doing here is providing a method of bringing suit against the individuals who make up these associations. Take the case of a partnership. We are providing that because they do business as an entity, we may bring suit against them in the name of that entity, in the name in which they do business. What we are doing here is not so much dealing with the capacity of the real defendants in the case to sue or to be sued, but we are providing simply that where there is an association of persons, those persons may be sued in the name of that association, although it is not incorporated, or anything of that sort. Looking at it in that way, it seems to me that it is purely a matter for the Federal courts, without regard to the law of the States whatsoever.

Mr. Lemann. That observation would become very pertinent if we retained this, because it would lead us to the view that the substance of the third paragraph should be changed. There should be no reference to State law, but if we decide to take it out on the ground that we would not ordinarily undertake to

treat it in a code of practice, then we do not have to settle now all these difficult questions. I really would not know what was the right way to vote on it, if we kept it.

Mr. Olney. I might follow up my observation by this. It seems to me, just looking at the matter, that it would really be a distinct advance in the way of simplification if, when parties act together under a common name, it was permitted that they should both sue and be sued under that name, without any further ado about it. It would be a desirable simplification of the practice and result in obtaining justice, and having justice done more easily. The more I think about it, the more I favor that being done, just going the whole distance in that way.

The Chairman. You would enlarge paragraph 3, which is now limited to a suit of that kind to maintain a Federal substantive right.

Mr. Olney. Yes. It seems to me, when you really analyze it, that it comes down simply to this question of how you are going to bring suit against a lot of people who have associated themselves together. If they have associated themselves together under a common name, the sensible thing is to permit them to sue and be sued in that name.

Mr. Morgan. Every commentator who has ever written on it agrees with Judge Olney.

Mr. Dodge. Do you think that by a Federal rule we can permit a partnership in Massachusetts, which is not an entity, and which cannot sue in its partnership name in the State court, to bring suit in the Federal courts?

Mr. Morgan. Certainly. Why not?

Mr. Olney. Mr. Dodge, when you say it is not an entity, you mean it is simply an association of individuals who are acting together under a common name. Those individuals are required in Massachusetts to bring suit in their own names. There may be a dozen of them, or there may be 300 of them. Nevertheless, if they come down into New York, New York simply says, "We are not going to bother with 300 plaintiffs here, or 300 defendants. They are all acting under a common name. Let them bring suit in their common name."

The Chairman. In a suit brought against a partnership in its firm name, under those statutes that permit it, do not the statutes limit the judgment to the joint property? It is not a judgment against the individuals.

Mr. Morgan. Certainly not.

The Chairman. It is the name. So that there is something more to it than the mere matter of suing a group under a particular title. You are not getting a judgment that is good against the individual property of any partner.

Mr. Morgan. That is quite true. The due-process clause would come in there. But it would be good against the partnership property, and that is what the Judge has in mind.

Mr. Loftin. That is not true in my State. In my State each partner is liable individually on a partnership debt.

The Chairman. That is not the point.

Mr. Morgan. Suppose he is a non-resident partner?

The Chairman. If you have a statute down there that says you can sue the partnership under the firm name, and not name the individual partners defendants, does not that limit your writ of execution to the firm property?

Mr. Loftin. I do not know, because we do not have such a statute.

The Chairman. I think most of the statutes do that.

Mr. Lemann. I had a case in the Federal court years ago where they permitted suit against a partnership under the firm name because the Louisiana law permitted it, and, so far from standing for the rule that the Federal rule would control, they laid down the rule that the State law, in effect, would control, because they followed the State law. The suggestion here would be quite opposed to that, because it would amount to saying that we are going to have a Federal rule that is going to give you access, in Federal courts, to suits against a partnership, no matter what the State law is. These points simply illustrate to me the difficulties of the problem and the uncertainty of the ground on which we go if we undertake to deal with it.

The Chairman. I attempted to raise the idea that if we leave it as it is and say that a firm can be sued, we have not said anything about the effect of a judgment, whether the judgment runs against the individual property of the partners or whether it is limited to the firm property, and we are getting into a mess there, because you cannot tell from these rules, where we provide for suit against an unincorporated association, whether, if you sue it under its associated name, you are getting a judgment that is good against individual property or firm property. All these State statutes that grant the right to sue against the firm, in the firm name, are limited to recovery against firm property.

Mr. Lemann. That is true in this Daugherty case that

came up in Colorado in the Federal court. I think the point is absolutely correct.

Mr. Morgan. There is no doubt about that, Mr. Chairman. The judgment would be a judgment against the entity, and would bind only the entity's property.

Mr. Clark. That is quite clear under the Federal procedure. The Coronado case is quite clear, and the cases which have come up in the Federal courts on State statutes are quite clear. I do not think there is any question about that. In some other connections, when we wanted to put in the effect of judgment, we were asked not to. We could put it in here, but I do not think it is as necessary here as elsewhere.

May I add one thing further in response somewhat to what Mr. Lemann has said, that we did not have enough knowledge? I do not think that is the proper answer, and I think that unless we can find some better reason we ought to face it. I think it might not be a bad idea to ask Mr. Lemann to look further into this matter. Mr. Moore and I think we have worked on it somewhat, and we have reached very definite conclusions here. I do not think it is quite fair to say that you are going to reject what is done on the ground of lack of knowledge, because if that is the ground, it is up to you to look it up and form an independent judgment.

Mr. Lemann. In paragraph 2 you are stating a rule that is opposed to your own statement of your own result of examination of the cases.

Mr. Clark. That is true, in part.

Mr. Lemann. That naturally makes me uneasy. We cannot all take the time to study this. If it is our duty, we should

do it.

Mr. Clark. I think it is your duty.

Mr. Lemann. Therefore I asked Professor Sunderland if this was the sort of thing you would ordinarily expect to be covered in a code of practice, or articles of civil procedure. If the answer were unanimously Yes, then I think the point would be good, and I think it would be the duty not only of Mr. Lemann but of everybody else to go and dig into the books and get the answer. But first we must be sure that this is part of the job.

Mr. Clark. I do not think the question of what is in the codes necessarily follows. I think provisions as to capacity are fairly uniform. It depends on the question of how far you go.

The Chairman. In what respect is this rule not in accordance with the authorities as you have found them? I understood, in answer to a question from Mr. Lemann, that you thought there were some parts of this thing that went beyond the cases.

Mr. Morgan. Lines 8 and 9 are in the teeth of the authorities, but lines 19 to 23 are with the authorities.

Mr. Clark. That is correct. With respect to lines 8 and 9, there is authority, as we have stated in our article, for applying the law of the forum. There is some question in some of the cases as to the law of the domicile. I would say that if you think the argument we have made here is not sufficient, you had better put in the law of the forum. It would be better to put in something definite than to create a gap and then run away from it.

Mr. Olney. I have not examined the cases thoroughly, but

when you speak of the law of the forum governing the matter of these associations, is it not the law of the court that governs the court in which the action is pending?

Mr. Morgan. That is it.

Mr. Olney. It is not the State of the forum. In other words, if you bring suit in a State court, and the rules of that state specify how a suit may be brought for or against an unincorporated association, those rules, of course, govern that suit, because they are the rules that govern that court. But it has no application to a suit in the Federal court. That suit is governed by the rules of the Federal court.

Mr. Clark. That is, the Conformity Act. That is how the State law comes in now.

Mr. Olney. That is how it comes in now, but there is no reason for our paying any attention to the State law in that respect.

Mr. Clark. I think you are correct, Judge Olney, that we could start out with a separate Federal law if we wished. That, I think, is true, if we wanted to.

The Chairman. I do not want to crowd the discussion, but our first proposal is on the substitute motion to strike out all of paragraphs 2 and 3. Do you want to vote on that now, or do you want to discuss it further?

Mr. Donworth. I am trying to draw up a suggestion here, if you will excuse me just a moment. I do not know whether it amounts to anything or not. I am sort of writing out loud.

Mr. Dodge. There is just one thing in those two paragraphs which I would say is a natural part of a code of procedure, and it is the only part which the Federal equity rules

cover. If we substitute for paragraphs 2 and 3 a provision about guardians ad litem, which is found in rule 7 of the equity rules, I should think we would have covered everything that is a natural part of a procedural code. Guardians ad litem are naturally a part of procedure.

Mr. Morgan. Yes. You have to have that. That is in every code.

Mr. Sunderland. It seems to me there is argument for including this in a set of Federal rules that does not exist in the State rules. Federal courts are normally dealing with controversies arising between parties of diverse citizenship. State courts deal normally with controversies among people who are all subject to that jurisdiction. If they went into this sort of thing, that would be somewhat out of the normal course of litigation, whereas this thing is within the normal course of Federal litigation.

Mr. Sunderland. We have parties from one State suing in other States. Parties are crossing State lines all the time.

Mr. Lemann. In State courts. I think you would find as many of them are going into State courts.

Mr. Sunderland. Presumably the Federal courts handle that sort of thing normally.

Mr. Dodge. Suppose the State statute provided that guardians cannot sue in their own names, but must sue in the names of their wards. Do you think these rules would give the guardian the right to sue in the Federal court in that district?

Mr. Sunderland. I did not quite get the question.

Mr. Dodge. Suppose the State statute said that guardians

shall bring suits in the name of the ward. Could that be overcome, as to the Federal court in that State, by a rule of this sort?

Mr. Sunderland. I think so.

Mr. Morgan. That is just a matter of the style of the suit.

Mr. Sunderland. The Conformity Act might control, unless we made a rule that offset it.

Mr. Dodge. The State statute provides that the guardian shall bring suit in the name of the ward, whereas the Federal rule provides that somebody else might bring the suit.

Mr. Lemann. The citizenship of the guardian determines, I think, and not of the ward.

Mr. Dobie. It depends upon the powers of the guardian. If the guardian has title, as an executor has, it is his citizenship. If he has not, it is the citizenship of the ward.

Mr. Lemann. Is it conceivable that changing this rule with respect to the party in whose name suit can be brought might change your citizenship results?

Mr. Dobie. Not the slightest. I think the courts would go into the realities.

Mr. Lemann. Suppose the ordinary rule in Massachusetts is that suits be brought in the name of the guardian. The rule is that the citizenship of the guardian would determine the jurisdiction of the Federal court. Suppose you have a Federal rule that suit must always be brought in the name of the ward. Might that not change your jurisdiction?

Mr. Dobie. I should like to read an extract from the case of Ansaldi v. Kennedy in that connection.

"The powers and duties of a guardian are determined by the State law (Massachusetts General Laws) * * * It is well settled that under this statute a guardian has no title in his ward's estate. He cannot maintain a bill in equity in his own name to set aside a conveyance made by the ward."

There are a great many other cases cited in the notes here on that point. I do not think that would have any effect at all.

Mr. Morgan. Take the guardian ad litem. In many States action is brought in the name of the infant, or the person under disability, by the guardian ad litem.

Mr. Olney. You have the real party in interest named in the proceeding.

Mr. Morgan. The real party in interest named.

Mr. Olney. And the formal indication that he appears by a representative.

Mr. Morgan. Exactly.

Mr. Olney. That conforms to the actual fact.

The Chairman. Let us take a vote on the question pending, as to whether we will strike out the two paragraphs in toto.

Mr. Clark. May I say just one thing more with reference to Mr. Lemann's point as to lines 8 and 9? We are going away from our own statement of the Federal law. As a matter of fact, what we think we are doing is to apply the general principle of uniformity, which is what we are after. This is the situation now, that the Federal courts follow the State rule of capacity, as to suing or being sued. They have not been wholly consistent, but it is true that it is usually the State law of the place where the Court is sitting. Some courts -- notably the

Tenth Circuit -- have, in effect, recognized the rule of the domicile. After all, the question of what people shall sue in the Federal court is a Federal question, to be settled, and we suggested that the Federal courts would achieve more uniformity by following the State law of the domicile, because that means that when a person can sue in New York, he sues in the same way in every Federal court in the country. If you make it a matter of each Federal district, then you have a different problem, if there is a question of any doubt. That is why we selected the State law of the domicile rather than the State law of the forum.

I think Judge Olney is correct that if we wanted to we could adopt a separate Federal law unlike State law. That is attempting a good deal. I am not sure that it is necessary. It would not be necessary except in an occasional case like the Coronado case. What we have done is to try to get a general rule, fairly uniform, and that is lines 8 and 9. Then, in lines 18 to 23, we cover the Coronado case. We put that as definitely the law of the Federal forum, because, for one thing, that is the Coronado case, and, in the second place, it is pretty hard to think of these things which are not entities as having a domicile. That is why those two rules are as they are. Perhaps the reasoning I have given you is not sound. But that is how we did it. That is our rationalization. But if it is not sound, here is most of the material. You ought to puzzle it out and put something else in, and not leave a hole.

Mr. Donworth. Mr. Chairman, I have been trying to formulate something to meet the very thought the Reporter is now suggesting.

First, I would say my idea is that the capacity of a natural or incorporated person to sue or to be sued in his own right should not be governed by the local law. A man going into Illinois, when he lives in Pennsylvania, is going into the Federal court, perhaps because of some limitations. We know that is particularly true of corporations of another State. I think, in the case of a person, natural or artificial, suing in his own right, his capacity should be determined by the law of his domicile. I think in other cases -- in the case of executors, administrators, receivers, guardians, and so forth -- the law of the forum should prevail, except where necessary to go against that forum for enforcing some Federal rights. With that idea I have drawn this to take the place of paragraphs 2 and 3, not with any idea that it is perfect, or has final merit:

> "The capacity of a natural or incorporated person to sue or to be sued in its own right shall be determined by the domiciliary law of such person. In all other cases capacity to sue or to be sued shall be governed by the law of the State in which the District Court is sitting, provided that to enforce a Federal right a partnership or other unincorporated association may sue or be sued, though not having capacity to sue or be sued under State law, when it is necessary for the purpose of enforcing for or against it a Federal substantive right."

Whether that is ideal or not, that gives you a working rule. Natural persons or corporations, in their own right, would be governed by the law of their domicile; all others would be

governed by the law of the forum, except where necessary to enforce a Federal right. Then the capacity exists independent of State law.

The Chairman. What I would like to do first is to take a vote on the question of striking out all of paragraphs 2 and 3. If that is carried, that ends it. If it is lost, then we can take the original motion, to keep paragraphs 2 and 3 in, exactly as written. If that is carried, it ends it. If it is lost, then we will go down the line on the paragraph and see what particular provisions you want to change. I do not think it is really feasible, from a parliamentary standpoint, to make up an entirely new draft of the rule and discuss that. Your ideas may be quite sound.

Mr. Donworth. I understood Mr. Lemann's motion was to strike out these two paragraphs without prejudice to their being reinstated in some other form.

The Chairman. Let us take a vote on that.

Mr. Clark. I might say that I do not think Judge Donworth is very far from right.

The Chairman. It may be so, but his proposition will become material if both these other motions are lost, and we get down to the business of recasting paragraphs 2 and 3. We will at least know whether we are going to deal with anything.

All in favor of striking out all those two paragraphs, say Aye; raise your hands, please. (After counting:) There are seven. That is the end of it, so far as adopting them is concerned, so your motion falls by the wayside, Senator Pepper.

Mr. Pepper. As often happens. (Laughter)

The Chairman. Now the question is on the substitute.

Mr. Olney. I listened with great interest to the suggestion of Judge Donworth. The only difference between the view that is presented there and the one that I presented is merely in regard to unincorporated associations. He would make them suable or not suable, according to the law of the State where the court was sitting. That is not the law of the forum. It is the law of the State where the court is sitting.

Mr. Donworth. Is not that the forum? I thought that was the forum.

Mr. Olney. No. The law of the forum is the law that governs the court.

That is a very feasible working rule. The only suggestion that can be made is to go further and provide a much simpler, and, I think, better rule for the Federal courts, but it is going to require careful definition, and all that sort of thing.

The Chairman. We just cannot leave the thing up in the air now. We have to settle questions of substance at this meeting. I do not think that this committee, as a whole, will get together and deal with questions of substance in time to get to this thing before the Court on May first, so we have either got to take this draft as they have it and go down the line and say what things we like and what things we do not like, or we have to take up some specific proposal and make some definite instructions to the Reporter. I do not know just how to go at it myself.

Mr. Pepper. If Judge Donworth will offer his resolution I shall be happy to second it, and then, if it passes, it can be referred to the Reporter. It sounded to me as though it

were in perfect form, but he may want to have its form considered. I understood both Mr. Morgan and the Reporter to say that they did not think it really was very materially different, except in one or two details.

The Chairman. If it is agreeable, let us take it up now and see whether we agree with it.

Mr. Lemann. We are just voting on the same thing over again. I think it is substantially what is there. We voted to take out what is there. Now we are voting to put it back.

Mr. Donworth. They did not say that.

Mr. Morgan. I do not see any difference between what Judge Donworth said and what we have here now. Do you, Judge Olney?

Mr. Olney. Yes; a great deal of difference.

Mr. Lemann. My feeling generally is that we do not know enough about this difficult subject, and that we are not called upon to know enough about it to try to deal with it. On the whole, I interpreted the vote as saying that the majority felt that way. If we are going to put this thing back, we can reverse ourselves. There is no parliamentary obstruction to it. Let us at least know that that is what we are doing.

The Chairman. I thought the committee would vote against leaving this all out, and against putting it all in, and then we would start in on the particular features of it that we wanted to change. Instead of that, we voted it all out. It is still open to put something in. I would like to get something concrete, and either take this rule and go down the line on it and see what we like and what we do not like about it, or take Judge Donworth's draft and have that explained to us,

and see what we are doing there.

Mr. Lemann. May I clarify it, to see if we are all thinking alike? I offer the motion that it is the sense of the group that we do not undertake in these rules to determine these questions of capacity of foreign executors, and administrators, foreign infants, partnerships, and corporations.

Perhaps that will not even be seconded, but at least, if it is seconded, and a vote is taken, we will know whether we should go on with substitutes for what is here, or whether we want to deal with it. Would not that clarify the atmosphere?

The Chairman. It would show whether, in striking it all out, you meant to table the whole subject.

Mr. Tolman. Mr. Chairman, I voted for it because I thought it was useless to put it in. The Coronado case exists. We do not need to put that into the rules again, and there are rules with regard to how a person may sue in the Federal court. We do not need to enunciate them again. I voted as I did because I thought we did not need to enter the field.

Mr. Clark. What is the law that is going to govern now? I would like to ask Mr. Lemann that, too. It seems to me that if we make any comment on the rules, in all fairness, we ought to point out what we have done. It we wipe out the Conformity Act, what have we in place of it?

The Chairman. Who says we are wiping out the Conformity Act?

Mr. Clark. I do.

The Chairman. I have denied that two or three times. You wipe it out to the extent that your rules wipe it out, but when you are silent you do not wipe it out.

Mr. Lemann. I do not see how it would have any other result. It would take a pretty brave person to be sure that we are going to cover in these 80 or 90 rules every procedural matter. Unless you are sure you are covering every procedural matter that has ever vexed the courts, then what are you going to say as to what the court is to do when a problem comes up that we have not covered? I do not think you can say that will not happen, because it would take too much courage to say that. If it does happen, what are they going to do but follow the Conformity Act?

Mr. Clark. Under the rules as now drawn, the Conformity Act is wiped out.

Mr. Donworth. I did not think this differed from the draft except in this respect. In the case of a natural or incorporated person suing in his own right, we disregard domiciliary law altogether and adopt the law of the State where the action is brought as controlling capacity to sue, in all representative capacities.

Mr. Olney. Suppose you had an unincorporated association?

Mr. Donworth. I would not allow an unincorporated association to be sued under this unless the State law allows it, or unless there is a Federal right to be enforced for or against it.

Mr. Morgan. That is just what this says.

Mr. Donworth. But I differ in the middle.

Mr. Morgan. How do you differ in the middle?

Mr. Donworth. The capacity to sue is always governed by the law of the State where the action is brought, if the person is not suing in his own right.

Mr. Morgan. What is the domiciliary law?

Mr. Donworth. The domiciliary law only applies in the case of a person suing in his own right.

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Mr. Clark. He has gone into the question of fiduciaries, and we have not.

The Chairman. I call your attention to the fact that there is a motion that has been made and seconded that we don't put anything in. Can you vote on that? If you vote it down, can we take up a definite proposal? I would really like to know whether we are going to put anything in.

Mr. Clark. We have discussed trying to get a uniform rule.

The Chairman. I do not think you are getting anywhere with this.

Mr. Donworth. I think your idea on the next vote is correct -- whether anything should go in.

The Chairman. All in favor of not putting anything in say aye.

(There were several ayes.)

The Chairman. Raise your hands.

There are five. Well, the motion is lost, I suppose.

Will somebody take this old rule and go down the line and see what you do not like?

Mr. Morgan. I move, then, that we restore 18 to 23 -- that is, the substance of lines 18 to 23.

The Chairman. The substance of 18 to 23. Do you want to vote on that?

Mr. Pepper. I second it.

The Chairman. The question is as to restoring the substance of lines 18 to 23. There may be minor questions. Does that include "in which the district court is sitting"?

Mr. Donworth. I take it that that motion is without

prejudice to striking out ---

The Chairman. The substance. All in favor ---

Mr. Olney. Suppose you have an unincorporated association which was permitted by the State where it existed to bring suit. Could it not bring suit in any other state in the federal court?

The Chairman. Would you say this rule does not do it?

Mr. Morgan. No, this does not do it. This makes it the law of the State where the court is sitting.

Mr. Clark. You had better take some of the crumbs if you can't get the whole loaf.

Mr. Pepper. I can understand that where you are dealing with the case of a corporation which has its capacities determined by a law of the State under which it is organized, you refer to the law of that State, as has been suggested, in respect of the capacities sued; but here we are dealing with an unincorporated group.

The Chairman. It is not created by the State.

Mr. Pepper. It is simply a group of persons who happened to have associated themselves in a particular place. They are not suing or being sued in that place; they are being sued in federal court elsewhere. Why should we complicate our consideration of federal procedure in that court by reference to the condition of foreign law in a jurisdiction which has nothing to do either with the suit or with the rights of the parties elsewhere than in their own state?

Mr. Dodge. Shouldn't a New York partnership be entitled to sue in Philadelphia if it is incorporated under New York law?

Mr. Pepper. No. This question of suing people in common name is complicated in cases of partnership by the necessity of having as part of the act which authorizes the suit a provision that when the judgment is recovered against the partners in their common name, it shall be indexed on the judgment index also in the name of each partner, because it creates a limit upon the real estate of the partners, and unless it is a limited partnership or association with limited liability, that is always what happens. It does not seem to me that the fact that a group of people trading in New York as partners are there permitted under appropriate statute which is in force in Pennsylvania to exercise a certain right of suit or become subject to certain liabilities of suit, has anything to do with the question of what will happen to them when they get into federal court in the Eastern District of Pennsylvania. They are not organized in corporate form. They have brought no charter with them. It has simply been declared in New York that it is the policy in New York to let them sue and be sued in a certain way, and a certain procedural regulation is met by the statute.

If they come into Pennsylvania, they are a common-law group. It is up to the State either to say, "We have a policy similar to that of New York," or to be silent; but in either event it has nothing to do with what the federal court will say, because, as to the federal court, it is a matter of federal procedure with federal law.

We have the capacity -- whatever those fellows had -- to settle federal law on that subject, and it seems to me we are losing the chance to do it. I think this is one of the

most important contributions to uniform common sense that we can get, and we just shy off because it is difficult to analyze. We will never get more light on it than we have now -- at least, I don't think we will.

Mr. Clark. Of course, I endorse wholly what Senator Pepper has said. I think he has stated the whole thing. I wonder if we are in sufficient accord. Perhaps we ought to cork this overnight.

The Chairman. We have had this under discussion by the clock for a little over three hours. I think you had better go along on this.

Mr. Morgan. It seems to me that Senator Pepper has answered Mr. Dodge, because those statutes giving the partnership authority to sue in their own name do not even purport to make them an entity. It just gives that privilege in the particular court. So, the New York partnership does not get any capacity as an entity to appear in any other court. It does seem to me that what we have in 18 to 23 here, since it does not go beyond the federal cases, is something we ought to state positively.

Mr. Dodge. Isn't it perfectly clear that a New York partnership can sue in its own name in the New York federal court?

Mr. Morgan. Yes, but that is merely because they give an opportunity to sue in its own name and not because they make it an entity like a private corporation.

Mr. Dodge. Then, the rule as drawn here does not add anything at all. As Major Tolman pointed out, it just reaffirms by us the existing law.

Mr. Morgan. Practically, yes. It is just a clear statement of how the federal courts go as to that. Even though one of those associations is not permitted to sue by state law, if there is a federal right involved, they may be sued in the federal court.

Mr. Dodge. That is the decision of the Supreme Court we are reframing?

Mr. Morgan. Yes, I think so, and I think we had better say so in so many words.

Mr. Donworth. I ask that Mr. Morgan's motion to reinstate lines 18 to 23 be adopted.

Mr. Pepper. Mr. Dodge put this case: A partnership formed in New York and enjoying the privilege given by New York law, which is primarily intended to determine procedure in the New York courts ---

Mr. Dodge. (Interposing) And the federal courts in New York.

Mr. Pepper. Then they sue or are sued in federal court in New York, and under the conformity act the federal court in New York applies the New York law to that situation; but you have not put the case in which those same persons come into the Eastern District of Pennsylvania to sue in federal court.

Mr. Dodge. That is not covered by this last paragraph.

Mr. Clark. I do not think it is unless we adopt the suggestion Judge Olney has made. Your question turns on the phrase which we have, "in which the district court is sitting." This is another way of doing it. We could do this practically all in 8 and 9.

3

"The capacity of a natural or incorporated person

to sue or be sued shall be determined by the domiciliary law of such person."

Mr. Olney. Let me put before the committee the matter Dean Clark and I have been thinking of. The difficulty we are dealing with here lies largely in the distinction we are making between corporations and non-corporations.

Mr. Morgan. That is right.

Mr. Olney. And in the use of the word "incorporated." If we said at the opening that a natural person, a corporation, an association, or an organization of any character which is permitted to sue and be sued by the law of its domiciliary shall have the capacity to sue or be sued in the federal courts -- that is, if the law of the domicile permits an entity to sue and be sued -- it is in the same situation exactly as the ordinary corporation. Then when you come down here to the paragraph beginning at 18, so that every association which is not permitted by the law of its domiciliary to sue or be sued shall be subject to suit or shall have the right to sue or be sued in the federal court, according to the law of the State where the court is sitting, why, you have then got a workable rule.

Mr. Morgan. That goes beyond anything we have discussed.

Mr. Dodge. What is the domicile of a partnership with different states?

Mr. Donworth. These statutes which permit a partnership to be sued as an entity are the result of local creation. When you get into another state, you find that machinery provided. Whether the execution shall run against the individuals as well as the property, and all of that -- those things are governed

by the statute which permits them to be sued.

Mr. Morgan. If it is not an entity, how can it have a domicile?

Mr. Donworth. Question.

The Chairman. The question is on the adoption of lines 18 to 23 as they stand, including the phrase about which the real difficulty exists, "in which the district court is sitting."

Mr. Dodge. With that phrase in, it does not add anything or advance the law one bit.

Mr. Dobie. Except when it sues as plaintiff.

Mr. Donworth. Except that the law exists now, and you hunt it up in decisions. When we put it in here, it will be codified under rule.

Mr. Pepper. It seems to me we can learn from the decisions of the Supreme Court as well as from any other source.

Mr. Dobie. I voted not to go into this thing, but if you are going into it, I think the second paragraph -- the last one -- is the best one to put in.

The Chairman. Are you ready for the vote on that? All in favor of letting lines 18 to 23 stand in the draft as they are now, say aye.

(There were several ayes.)

The Chairman. No?

(There were several noes.)

The Chairman. Let us have a hand vote. All in favor of restoring it, raise their hands.

There are five. Those opposed, raise their hands.

The motion is lost.

Mr. Morgan. Now, I move to put something in there more drastic than that. I want to put in Judge Olney's provision and let the draftsman work out the phraseology.

The Chairman. Have you got that in concrete form, so that if the motion is adopted the draftsman will know what his instructions are?

Mr. Morgan. Yes, I think Judge Olney has explained that several times.

Mr. Dobie. We will have to work out the phraseology ---

Judge Olney. (Interposing) My suggestion has really nothing to do with domiciliary findings.

Mr. Morgan. No, where a partnership was treated as an entity in one state, it would be treated as an entity in federal court.

The Chairman. Would it be advisable to have a committee give us a draft on this by Sunday afternoon? I am aiming at getting something definite enough so that when this meeting adjourns ---

Mr. Olney. (Interposing) Mr. Chairman, I think the vote was five to six on this. We are spending too much time on it. I feel that pretty strongly, as a matter of fact, although I would like to see the rule go to the extent which I have indicated. I should like to change my vote so that we can get along with this. The substance of the idea that is here is all right. It is a workable rule. It will work. Let us get along, and we will in time, maybe in connection with the redraft, be able to make some suggestions which the reporter will be free to adopt and bring here which will be in much better shape.

The Chairman. That restores lines 18 to 23. What do you want to do with the matter we struck out between lines 8 and 17?

Mr. Clark. On that part I think we should take Judge Donworth's suggestion.

Mr. Donworth. My suggestion is that persons and corporations suing in their own right, the law of the domicile controls; as to other cases, the law of the State.

Mr. Olney. I changed my vote with the idea that we should be at liberty to make suggestions to the reporter.

Mr. Morgan. I ask for the adoption of Judge Donworth's motion.

The Chairman. Will you state it again?

Mr. Donworth. In the case of natural or incorporated persons suing or being sued in their own right, the capacity shall be determined by the domiciliary law of such persons. In all other cases except what I have just mentioned and except as otherwise provided in lines 18 to 23, which have been adopted, the capacity to sue and be sued shall be determined by the law of the State in which the court is sitting.

Mr. Clark. I think that that is the substitute for lines 8 to 13. Lines 13 to 17 are a different thing.

The Chairman. That is right.

Mr. Pepper. Question.

The Chairman. If you have covered the capacity of natural and incorporated persons, and you say "all other cases," do not lines 18 to 23 cover all the other cases?

Mr. Morgan. He said except those two.

The Chairman. Don't they cover all other cases?

Mr. Donworth. No.

The Chairman. All in favor of that motion say aye.

Mr. Lemann. I don't know what it means, in addition to all my other objections.

The Chairman. Well, it is carried anyway.

Now we have lines 14 to 17. You have some modification of that. Will you read it, please?

Mr. Clark. There has got to be a little modification in one sentence. We had suggestions to break this into two sentences, one for the guardian ad litem and one for the next friend. You recall that there is a matter we took up back in Rule 11 that goes in here too. I have not drawn that yet, so I can't give that.

The Chairman. The question is on the motion to restore the guardianship. All in favor will say aye; those opposed, no. The ayes have it, and it is carried.

Mr. Pepper. There is one thing we have learned. If there is a tendency toward a deadlock, all you have to do is suggest a special committee to work the thing out, and then we get a vote.

The Chairman. I have learned that, and I have learned that I can change votes.

On Rule 22 I should like to ask a question about the joinder. Have we in these rules anywhere provided for joining two different causes of action -- that they have to be separately stated?

Mr. Clark. Yes.

The Chairman. You stated something about separate paragraphs.

Mr. Olney. There is one for separate counts.

Mr. Clark. It is in Rule 11, lines 14 to 17.

The Chairman. All right; I am satisfied. Is there any other suggestion about Rule 22?

Mr. Olney. I should like to ask this question of the reporter. Has he considered this case: Suit is brought by the citizens of some state upon a cause of action which is properly in federal court, because the suit involves the federal Constitution or federal law. The federal court has properly the jurisdiction. Can they maintain at the same time, because they have properly brought that action -- can they join with it a suit for a promissory note or any other action of which the court would not have jurisdiction? You have got to bear in mind this: You can bring a cause of action on the ground that your rights in a certain respect have been violated under the federal Constitution, say, and if the facts also show that your rights have been violated under state law the court will go ahead under those circumstances and will, if it finds that your rights have been violated under the state law, base its decision on that ground. But that is entirely different from the case I am putting now, where a party has a cause of action of which the court takes jurisdiction, and he unites with it another and an entirely different cause of action based on entirely different circumstances, perhaps not related to them at all, over which the court would not have the jurisdiction.

The Chairman. Have you read the case of Hearn against Ouster?

Mr. Olney. No.

The Chairman. That is a recent decision of the Supreme Court in which the plaintiff brought suit in federal court involving a copyrighted play or book. One claim was that the defendant was infringing on the copyright. The other claim or another claim was that even if the copyright was not infringed, he was guilty of unfair competition with respect to a copyrighted document. The third claim was that even though it was not copyrighted at all, there was unfair competition. The point was raised that the unfair competition -- the third claim -- was not within the jurisdiction of the federal court and also that the second was not.

The court said, as I remember it, that the claim for infringement was within jurisdiction, and the claim for unfair competition on a copyrighted document, if it was copyrighted, was properly joined, but that the third claim, for unfair competition on the theory that it was not copyrighted at all, was outside the jurisdiction of the court.

Is that the gist of the case?

Mr. Clark. I think so.

Mr. Olney. That is what I thought must be the law.

Mr. Clark. Judge Olney, we sent around this article in the January Law Journal. They were discussed, and they were rather complicated. We had some material on jurisdiction in our present draft. I understood our present idea was that we were going to disabuse any attempt on jurisdiction at all. So the Court will have to wrestle with the question of jurisdiction, as it has in the past. These rules were not intended to extend to jurisdiction.

The Chairman. This point on its face, literally

construed, does. We know it can. Ought we appear to be doing something we know we can't do, and ought we put in a clause that nothing herein contained shall authorize a joinder of a claim outside the court's jurisdiction?

Mr. Clark. I think that if we are going to put in a provision, we ought to make it general. That is, that same problem arises not merely here but in counterclaims and third party practice, and so on. So, if we want to put in a general statement, I suppose we ought to. The equity rule did this sort of thing and did not say anything about it.

The Chairman. I think Judge Olney's point is taken care of by operation of the law. We cannot do it if we want to. Although our rule literally says so, it does not have that effect.

Mr. Dodge. Must a counterclaim be against all the plaintiffs if there are a number of plaintiffs?

Mr. Morgan. No, the sky is the limit on this. It is an English rule, and I want to make it go further than Mr. Clark does. I want to force counterclaim and reply. Mr. Clark objects to that.

It seems to me that that is only a matter of form, because under the amendment he could stick it in the complaint, and I do not see why he could not just as well have it in the reply.

The Chairman. If we had replies as a matter of right, that might be so, but it is only discretionary.

Mr. Morgan. There may be such joinder when there are multiple parties.

Mr. Clark. What rule are you referring to?

Mr. Morgan. Rule 22. Your comment on that is this, Mr. Clark:

"The rule on counterclaims requires a plaintiff to plead any counterclaim arising out of the subject-matter counterclaimed on by the defendant. That seems sound enough, but he should not have the right at the reply stage to join an independent claim as a second counterclaim against the defendant. In other words, our rule gives unlimited joinder to the plaintiff, defendant, and third party defendant in their first pleadings. Further extension seems undesirable. We, therefore, prefer our own rule."

I asked, "Why?"

Mr. Clark. Because he has had had the chance to do it at the beginning.

Mr. Morgan. Something in the answer may have been the very thing he wanted to put in this particular counterclaim.

The Chairman. What you say, Mr. Morgan, would appeal to me if we had a definite provision for replies in all cases, but where you are dealing with discretion as to whether a reply will be put in at all, is it not just as well to leave that amendment to the complaint?

6 Mr. Morgan. I don't have any particular objection, but I don't see just why the counterclaim should be cut off there when you have got a provision for putting in all kinds of counterclaims, whether they arise at any time after the commencement of the action or at any time before the end of the trial.

Mr. Clark. If you have a counterclaim and a plea, you

have got to have rejoinder.

Mr. Morgan. What difference does it make if you want to get all of this settled up at once?

Mr. Clark. I think you get them all in by putting them in your first pleading.

Mr. Morgan. Why go to the trouble of getting an amendment when you have a pleading there?

The Chairman. It is the difference between asking the court for leave to amend and asking for leave to reply.

Mr. Clark. I suppose the main reason is that we hate like the devil to provide in the rules for rejoinder, surrejoinder, and surrebuttal. I suppose it can be done.

Mr. Sunderland. It is too complicated to describe.

The Chairman. What is the sense of the committee about putting in a general provision in a general way that nothing in the rules about joinder, counterclaim, or what-not, is intended to bring into the case any claim not outside the jurisdiction of the federal court?

Mr. Lemann. You want to make a general protestation. Nothing in those rules is to be construed in any way as suggesting a change in jurisdiction.

The Chairman. I think we ought to do that, because our rules literally do it.

Mr. Clark. Couldn't we put in a trial by jury too, because I don't quite like the biased way we do it now?

The Chairman. Well, that is hardly fair. You write a rule, and you say specifically that you can put anything in you want to, and literally it enables you to put claims in there outside the jurisdiction. Lawyers come along and say

the rule allows them to do it. Then the court has to say that the rule does but that they haven't power to do it, and therefore it is not in. I think we ought to make it clear that we are not attempting to make it.

Mr. Olney. We make a statement in the rule that is not so.

The Chairman. It is so, but it can't be done.

Mr. Olney. Well, then, it is not so.

The Chairman. I hate to be in the position of apparently trying to do something that the lawyer knows he can't do.

Mr. Clark. They did it in the equity rule. In the joinder provision of the equity rule they do not make the protestation.

Mr. Lemann. There would be a great many lawyers interested in these rules.

The Chairman. There are many lawyers who would take our rule as gospel and walk into court with a claim like that and would not know that the rule could not be operated.

Do you want to change the substance of 22 in any way? If not, we will pass to 23.

Has anybody any substantive criticism?

Mr. Dodge. It just occurs to me to wonder whether one partner can force a suit and join the copartners as defendants. I wonder whether under your first sentence one partner could force his copartners into litigation and join his copartners as defendants because they would not join as plaintiffs.

Mr. Morgan. I should think so.

Mr. Clark. Yes.

Mr. Dodge. That is rather surprising to me.

Mr. Morgan. This is the usual code provision. I don't know whether it has been interpreted that way.

Mr. Dodge. I do not think one partner should have the right to force the partnership into litigation.

Mr. Clark. There are two questions: first, as to getting into court; then, what the partnership right is when you get there. This would not touch the question of partnership law.

Mr. Dodge. That is, the suit would not amount to anything of the majority rule governed as to partnership?

Mr. Clark. Yes.

The Chairman. Is it not required that there be a majority vote of partners as to whether they shall go into a suit?

Mr. Clark. I think so unless there is a clause to the contrary.

The Chairman. Is there any other substantive suggestion on Rule 23?

Mr. Dobie. I think the inclusion of those words "necessary but not indispensable" is quite important there.

The Chairman. Yes, I think so.

Mr. Olney. I should like to suggest a substitute for that description of those persons. Of a proper party. These persons who will be proper parties and whose joinder in the action is not indispensable to the granting of the relief therein. That is what the reporter has in mind. He has used the word "necessary" although he has said it does not mean "necessary."

Mr. Dobie. It does mean "necessary" if we use the federal terminology. I think the words "proper parties" would get you into a terrible mess.

Mr. Olney. But whose joinder in the action is not indispensable to the granting of relief. If their joinder is indispensable, you can't go on without them.

The Chairman. Did we not go all over that at the last meeting and say that although there was a paradox there, that word "necessary" was so necessary we should adopt it?

Mr. Dobie. It is very unfortunate, but I think that if you get away from it you are going to get into a terrible mess.

Mr. Dodge. Did the Supreme Court use it in the equity rules?

Mr. Dobie. They used it in any number of decisions.

Mr. Pepper. I always understood that the distinction is a complicated one. I think it goes back Mitford's Equity Pleading. A proper party is one who if joined will make it possible for the court to give the most ample relief that the case is susceptible of. The case of a necessary party is one who, from the plaintiff's point of view, is necessary to complete justice, but it may not be impossible for the court to go on without him. An indispensable party is a man who, if he is not joined -- there is no lawsuit. You can't do it. I think there is that three-fold classification.

Mr. Donworth. The term "indispensable party" is an outgrowth of the federal jurisdictional code. There never was an expression "indispensable party" until the question of jurisdiction of the district courts was involved.

Mr. Pepper. My impression is that it goes away back into English chancery titles.

Mr. Donworth. It became important when the court made the distinction for jurisdictional purposes.

Mr. Dobie. It allowed you to dispense with certain parties.

The Chairman. I think that we went over that so thoroughly before and concluded that there were very well-settled categories.

Mr. Olney. The only distinction necessary to be made here is in connection with those who are indispensable in the real sense -- that is, the distinction between so-called proper parties and so-called necessary parties cuts no figure here in connection with this rule. The thing is that there are certain parties whose presence is absolutely indispensable to the granting of relief. That is the case covered here, and that should be clearly expressed.

Mr. Clark. We were trying to make use of the statute here about bringing in persons, which goes pretty far. I think we have the full benefit of the statute about going ahead. This is tied up with the federal background.

The Chairman. Judge Olney, as I understand it, wants to strike out "necessary" and put in "proper."

Mr. Olney. No, no.

The Chairman. That is the way you said it -- "proper but not indispensable."

Mr. Olney. No, I was objecting to calling them necessary parties.

The Chairman. Well, you are objecting to the word

"necessary" and are wanting to substitute the word "proper." That is the way you read it.

Mr. Sunderland. (Reading:)

"In federal courts, however, owing to the limited jurisdiction, another distinction is drawn. Necessary parties are divided into those that are only conditionally necessary and those that are absolutely necessary. Those parties who are conditionally necessary must be brought in if, being within reach of the process of the court, they can be made parties without destroying the jurisdiction of the court. On the other hand, if they are beyond the reach of process, or being within the reach of processare such that their joinder would destroy the jurisdiction of the court, they may be omitted as parties, being only conditionally necessary. It is to this class of parties that the term 'necessary' appears to be most commonly applied.

"'Necessary' as used of parties in the federal courts, therefore, means 'conditionally necessary.' To those parties who are absolutely and unconditionally necessary the term 'indispensable' is applied."

The Chairman. Could we put the word "conditionally" in front of the word "necessary" to get rid of our trouble?

Mr. Dodge. Why not do that?

Mr. Morgan. I did not know that. This is the first time I ever heard that phraseology. Where is that from?

Mr. Sunderland. This is an equity rule in the United States Code, Annotated.

Mr. Pepper. I am responsible for it, but I did not

actually do it.

Mr. Morgan. Did you invent that phraseology, Senator -- "unconditionally and absolutely necessary"?

Mr. Pepper. I am just jesting.

The Chairman. Why not get rid of it by saying "a person who ought to be joined"---

Mr. Clark. (Interposing) Of course, it could be done. I want to get the benefit of all the necessary parties. This judicial code provision is that where there are several defendants and one or more is not an inhabitant, and so on, the court may entertain jurisdiction and proceed with the trial and adjudication of the suit between the parties who are properly before it. That does not use the definition but simply is in form broad enough so that you could apply it to all cases. This is where there are several defendants and you can't get them, but that has been limited not to include indispensable parties.

The Chairman. We are asking if you can put in a clause which will include all but will not make it too elaborate.

Mr. Dobie. I would rather stick to the Supreme Court's terminology. It has a perfectly definite meaning, I am satisfied, in the federal courts.

Mr. Olney. That terminology will be misleading not merely to the lawyers but to the district courts themselves -- the use of that expression "necessary." It is not necessary to use the expression "necessary."

If you use the definition of what he says constitutes parties that are proper there, you will get a rule that will clearly express to the courts the principle upon which they

are to go. As it is now, it is not expressed here. The principle is not expressed here.

For example, the rule that we are really striving for -- and it is the correct one -- is that if the parties are necessary for the purpose of complete relief -- settling the whole thing -- then the court should bring them in.

The Chairman. Why could you not say, "when persons who ought to be joined to do complete relief are not indispensable"?

9 Mr. Pepper. I move that the suggestion of the chair receive the approval of the committee and that it be referred to the reporter to be drafted.

Mr. Clark. "When persons who are necessary to do complete relief"?

The Chairman. No, "who ought to be joined in order to do complete relief are not indispensable."

We will take that as the sense of the committee, then, unless there is some objection.

Is there anything else in No. 23? If there is not, we will pass to Rule 24, Joinder of Parties.

Mr. Morgan, did you have anything in substance on that?

Mr. Morgan. No substance on that.

Mr. Dodge. We had that question about any common question of law. Didn't we deal with that before, Mr. Clark?

Mr. Clark. Yes, we discussed it, if I may say so, and we had nothing. Objections were made to it. We had a different provision. We tried to improve on the English rule, and we did. The committee directed us to put in the English rule, and this is the English rule exactly.

Mr. Morgan. With the phraseology improved?

Mr. Clark. No, no, it is not improved.

The Chairman. Rule 25, Interpleader.

Mr. Clark. The statute has been passed there. The statute was passed January 20.

Mr. Pepper. A new statute was?

Mr. Clark. Yes. It is the act that they have been pressing. It is the interpleader case.

Mr. Pepper. It enlarged it?

Mr. Lemann. Yes, it enlarged it. It applies to all classes of persons who are exposed to conflicting claims.

Mr. Pepper. I drafted that act originally, and it applied to insurance companies.

Mr. Lemann. This is the extension of that act.

Mr. Pepper. As I understand it, this does not impinge on the provisions of the act; this is cumulative?

The Chairman. This new act is going to be embodied in the provision of this rule.

Mr. Clark. Do you have the suggestions we sent around, pages 13 and 14, headed "Suggestions and Agenda"?

Mr. Morgan. Do you mean the reporter's comments?

Mr. Clark. Yes.

Mr. Dodge. Is it the custom to admit interpleader where the defendant does not admit his liability one way or the other?

Mr. Morgan. It is not customary.

The Chairman. In connection with Rule 25, Interpleader, it is understood that the reporter is going to weave into that the new statute and also a lot of other statutes embodied by Mr. Morgan.

Mr. Pepper. I want to make one suggestion which may already be covered by others that have been submitted.

It occurs to me that it tends to obscurity to make that introductory reference to the provisions of Rule 24. The rule would not be clear if it began with the affirmative proposition that persons may be joined as defendants, and so on, and then the relation to the preceding rule be made the subject of one of our footnotes.

Mr. Clark. That is possible. I will state why we did it. Of course, interpleader was a great advance. We tried to make it clear now that interpleader now is really a special subdivision of Rule 24. Some argument might be made that that is not necessary. I think it would be really bad to leave it out, because it is such an important topic, now that we have this federal statute.

Mr. Pepper. "Persons may be joined."

Mr. Clark. You see, we did not want to make an admission against interest.

Mr. Pepper. "Persons may be joined as defendants." Would that tell the whole story?

Mr. Clark. You see, they can already be joined under 24. There is some question why we need to say anything more here. In one draft we had, we put this right in 24, and then we thought it would be sunk, so that lawyers would not know where to look for it. It is a question now. This is built on top of 24, and it is a question of showing the connection, really.

Mr. Pepper. I just wanted it considered whether the connection could not be indicated adequately otherwise than by

that sort of preamble. It seems to be a little bit confusing.

Mr. Clark. It can be done. I am not sure which is less confusing.

Mr. Pepper. I am not sure either.

The Chairman. We will consider that in recasting.

Mr. Dodge. What do you say to this, Mr. Clark: "that the plaintiff is not liable"?

Mr. Clark. Those rules are quite extensive. We are trying to get it so that interpleader does not limit the ordinary rules of joinder.

Mr. Morgan. Does this new statute talk of interpleader where the party does not admit liability to either? Does the new statute cover that? I understood that was the English rule.

Mr. Pepper. What case was that?

Mr. Morgan. Where the new statute covers the case of interpleader.

Mr. Pepper. Is this the new one?

Mr. Morgan. Yes.

Mr. Clark. Whether it does or not, I don't know really; it should.

The Chairman. It is now 10 o'clock, gentlemen. We will adjourn until tomorrow, at 9:30 o'clock.

(Thereupon, at 10 o'clock p.m., an adjournment was taken until Saturday, February 22, 1936, at 9:30 o'clock a.m.)

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