and not venue.

Dean Clark. Yes.

Mr. Olney. Now, we have an important thing to do. It is important to put it so that he shall know where he is sued, and that he should not have to go out of his home State to defend the suit. But when it comes to service of process, you ought to be able to serve him where you can find him within the State.

Mr. Dobie. I agree with you.

Mr. Mitchell. Without any further motion, I think the principle has been well stated in the record, and unless there is some difference, we will consider the idea adopted. The details will have to be worked out by the drafting committee. Is there anything else in Rule 13, Mr. Clark?

Mr. Dobie. Have we decided whether we will adopt the first one and not the alternative rule?

Mr. Mitchell. We have not. We are just talking and making suggestions.

Mr. Dobie. You can just have absolute uniformity and nothing else, or provide that you can follow the practice in the State rule, or adopt the rule we have here. Now, I think Maj. Tolman's suggestion is that he does not want to put into the rules anything so that we will adopt a State practice that will violate our rule; but if you follow our rule it is all right or if you follow the State method that is all right,

Mr. Mitchell. Well, will you make a motion?

Mr. Dobie. All right, I will make one.

Mr. Cherry. I am wondering about the other effect?

Mr. Olney. Do I understand that if we lay down the rule as to service, manner of service, and also provide as an alternative that service may be made in the manner provided by State law--

Mr. Dobie (Interposing). That is it.

Mr. Morgan. That is it--the first alternative of Dean Clark's draft.

Mr. Olney. It seems to me that is quite right.

Mr. Lemann. Did any one else get the idea from subparagraph 3 that a corporation might be sued in a State in which it was not doing business, by serving the lawyers there? If there is such a contention I think it should be overruled. But does the language leave ground for such an argument?

Dean Clark. Do you mean the expression "authorized to receive process"?

Mr. Lemann. Yes, managing agent or officer.

Mr. Morgan. Well, if you look at the heading of the rule, this is dealing only with manner of service and not jurisdiction.

Mr. Lemann. I do not think the contention would be well taken, but I was wondering if somebody might make it.

Dean Clark. You will notice in the beginning of that

same sentence, subsection 3, at the top of the page, we put in the words, "which is subject to suit as such"--that is, as words of caution.

Mr. Mitchell. Why would it not be wise to put in an express provision to satisfy Congress that nothing in the rules shall change the venue or district in which the suit may be brought?

Mr. Dobie. I think that is wise.

Mr. Mitchell. Then you remove the argument about it.

Dean Clark. Of course, the kind of case you had in mind is some of these automobile cases.

Mr. Dodge. How does that leave service on a partnership, where a partnership cannot be sued in the firm name, and where ordinarily service must be made?

Mr. Morgan. It says, "Which is subject to suit as such."

Mr. Dodge. Does that mean in the firm name?

Mr. Morgan. I suppose so.

Dean Clark. Yes; of course, the law here is a little uncertain. I take it that where, by local law, service could be made in the firm name, this would provide that the Federal court may do likewise.

Mr. Dodge. Why should not we provide that a partnership may be sued in the firm name in the Federal courts, changing the law of Massachusetts and other States?

Mr. Wickersham. Well, the trend of decisions on that

I think is quite in favor of that. Take the Coronado case that has been mentioned.

Mr. Dodge. Yes.

Mr. Wickersham. The Supreme Court held that you could sue an unincorporated labor organization; and there are a number of other cases where there is a recognition of a dual capacity in an association of men who are carrying on business.

Mr. Dodge. Yes; I should like very much to see the law of Massachusetts changed in that respect.

Prof. Sunderland. Would an organization sued in its name extend the jurisdiction of the court over all the individual partners?

Mr. Wickersham. Well, of course, the law has not been thoroughly developed there.

Mr. Mitchell. Now, if that idea is followed, I think it should come up in connection with Rule 39 on the question of suing capacity. You will notice in the footnote, I threw out a suggestion that we might take up the whole question of capacity, as provided by our own rules or the law of the State. Up to date we have avoided definitions further than you see here. It is quite a technical subject, although it is important, of course.

Mr. Dodge. Well, we can take that up under the later rule.

Dean Clark. Yes, I think that is where it comes.

Mr. Wickersham. Yes, that is the place where you really deal with the subject.

Dean Clark. Yes, Rule 39.

Mr. Mitchell. Now, we are discussing the details of Rule 13, to prescribe the method of service, and in view of that discussion, it will not take long to make a rule of our own.

I would like to bring the Committee back to the question whether they want to follow Maj. Tolman's suggestion, and take original Rule 13, with subdivision 4, which gives an alternative method according to the State law. Is that the sense of theCommittee?

Mr. Loftin. Did not Mr. Dobie make a motion on that?

Mr. Mitchell. Well, let us have a vote on that. All in favor of the suggestion laid down in Rule 13 here, with an alternative method of service according to the State law will say "Aye"; those opposed, "No."

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

Mr. Mitchell. That seems to be settled. That leaves us to the details as to methods prescribed in Section 13.

Mr. Morgan. Well, in Section 4, I understood you were going to provide, "In actions at law."

Dean Clark. Yes.

Mr. Wickersham. May I suggest you used several times

the word "method." It seems to me better to use some other expression.

Mr. Olney. As to the suggestion made by Mr. Morgan, that the alternative method of service be confinedto actions at la w?

Mr. Morgan. No; the methods used in actions at law in the particular States; because Maj. Tolman has pointed out that there are some States that make a difference between actions at law and suits in equity.

Mr. Dobie. We are following the law practice, under the alternative.

Maj. Tolman. I understand that the Chairman suggested a motion for a rule that it would be better to have it appear at the end of the rules--"Nothing herein contained shall be construed to supersede or alter the action of Congress governing venue and the place of service of defendants." I am not satisfied with that last part.

Mr. Dobie. No, not the last; stop with "venue."

Maj. Tolman. Yes.

Mr. Mitchell. Yes.

Dean Clark. Yes.

Mr. Mitchell. Do you want to vote on that, or just make it as a suggestion to the Reporter.

Dean Clark. I take it that that would be sufficient.

Mr. Mitchell. You can hand it to the Reporter, Maj. Tolman.

Maj. Tolman. Yes.

Dean Clark. I just want to clear up some points in subdivision 2-- questions as to an adult person, etc. I have just quoted the equity provision. Do you prefer the expression there, "adequate age and discretion?" That is the first question.

The second question is, Is the matter in brackets necessary? My own idea is that, with all the provisions as to State practice and service, we do not need a separate provision; we do not need the infant provision.

Those are the two questions on that.

Mr. Mitchell. Your first question is-- Equity Rule 13 uses the same phrase that you do, "adult person who is a member of or resident in the family." Had we better not follow the Equity rule?

Dean Clark. Yes, that is what I am doing.

Mr. Dobie. Are you talking about an insane person or an infant?

Dean Clark. Yes. I do not think it is quite necessary.

Mr. Morgan. May I ask if there is any definition of "adult person", because I think "suitable age and discretion" is better.

Mr. Dobie. I think "adult" would mean not a minor.

Mr. Morgan. I do not know. That would ra ise the question whether is 20 years and 6 months old or 21 years.

Mr. Cherry. No one knows in Minnesota at what age a person is an adult.

Mr. Lemann. "Suitable discretion." What does that mean? Some persons do not have sufficient discretion at an advanced age. (Laughter.)

Mr. Dobie. How about 18 years old, or something like that?

Mr. Lemann. We specify the age--16 or something like that.

Dean Clark. Judge Thacher in New York says the rule has been in effect for 100 years, and no question has arisen under it.

Mr. Mitchell. What rule?

Dean Clark. Rule 13, in slightly varying form. He says this expression has been in effect since 1842--"member of or resident in the family."

Mr. Morgan. Maybe they know what it means, then. (Laughter.)

Mr. Mitchell. Evidently it means some oerson of matur- ity, not necessarily one who has reached his majority.

Mr. Morgan. I always used to think of a Scandinavian servant girl who was not of"suitable discretion", although

of"suitable age." (Laughter.) We had a number of cases where they either threw the paper in the waste-basket or threw it in the fire, and we got a default judgment against them.

Mr. Dobie. There is something in what Prof. Cherry suggests. In Virginia, for instance, if a person is 18 years old he can make a valid will.

Prof. Sunderland. I think that with that language "suitable age and discretion", you would never get into trouble, because nobldy would ever have service made upon a person who could hardly be shown to have suitable age and discretion. I do not think there is any question. If you have a definite age, it might cause trouble.

Dean Clark. I have been told to use the words "apparently of suitable age and discretion." In New Jersey there is a rule--have you got the New Jersey rules, Mr. Wickersham?

Mr. Wickersham. No; I was just looking at the language of the New York rules--

Mr. Lemann (Interposing). We have the language of the Equity rule, and we have an alternative method of using the State practice. Is it necessary for us to stop very long on this? I make a motion that we go on and leave it as it is.

Mr. Mitchell. You make a motion that we confirm the adoption of the Equity rule?

Mr. Loftin. I second the motion.

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

Dean Clark. Now, what about the provision as to infancy? Is it necessa ry?

Mr. Mitchell. I think it is; because otherwise you could serve a summons on a baby two years old.

Mr. Dobie. I think it is; because some of the States are very technical about that. I had a case about selling the estate of an insane person; and the insane person would get out of it $30--and I spent $400 worth of time on it. In our State there is a very rigid requirement, and selling real estate of an infant in Virginia is even more hideous, and I am inclined to think that is a good thing to put in.

Mr. Mitchell. Is it not true that if you do not put it in, it mea ns that you can leave it with any person, which would authorize on its face service on a baby?

Dean Clark. Yes; but it amounts to that anyway. Suppose service is made on an insane person, and there is nothing to show that he is insane; is the service really invalid? If he appears to contest the service, he knows that he has got a suit, and you can have a guardian appointed. Whenever the case is going to arise, this will take care of it, and whenever the case is not shown, this will not take care of it; there is not any way to take care of it, because the plaintiff knows the facts, and if he does not appear he is not disclosing them.

Mr. Mitchell. Do you not think it is necessary to specify that service cannot be made on an infant?

Dean Clark. I do not think it is necessary.

Mr. Loftin. In order to bring the matter to a head, I move that it be included in the motion.

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

Dean Clark. I might ask Maj. Tolman this question: Do you want to bring up your suggestion of service by registered mail?

Mr. Tolman. Well, I suppose I ought to, because it is made by some of the committees, and that was probably my special function, to call attention to those suggestions. A suggestion has been made, coming from Wyoming or Idaho, that there might also be authorized service of process by registered mail. Now, of course, that can be worked out, so that you attempt to get personal service, and if you do not get it, you can send your summons by registered mail. There was a letter, I think, from New Mexico--

(Interposing).

Dean Clark. Mississippi, was it not?

Mr. Tolman. Yes, Mississippi, and also from the Far West, in which they say there are a very large number of defendants, and the distances are great, and the cost of service is enormous, and that it would be well to authorize service by registered mail.

Mr. Wickersham. That is Utah?

Mr. Tolman. Yes.

Mr. Mitchell. I do not know.

Mr. Tolman. Now, it seems to me that if I could make a suggestion that, perhaps, would take cognizance of all the subject, there might be an alternative provision that the District court might make a rule concerning the circumstances under which an alternative method of service by registered mail might be made.

Mr. Mitchell. Make an order permitting it, do you mean?

Mr. Wickersham. I do not think you ought to have that in original process. It is too uncertain. Mail goes astray.

Mr. Mitchell. The mail man brings the mail and takes a receipt, and any bellboy can sign the receipt.

Mr. Wickersham. Yes.

Prof. Sunderland. I think the Post Office Department has a rule by which you can direct delivery to the addressee only.

Mr. Dobie. But in apartment houses and places of that kind they do not do it at all. And I have an idea that Judge Parker and Judge Chestnutt and a number of them are against this. They say original service of summons must be by the marshal, and I am inclined to think that it would be dangerous to extend it any further.

Mr. Lemann. There is only one difficulty about it. If there is any question about whether the requirement of personal service by mail raises any trouble, I think we ought to avoid

it.

Mr. Olney. In those States, such as New Mexico, Utah and Nevada, they are very apt to have local statutes that provide for that particular contingency, by reason of their objection to that, and that being so, in every case wherever that exists, they can serve in the manner provided by the State law. I doubt the necessity here of any provision.

Mr. Dobie. That is a good suggestion.

Dean Clark. I am not sure about the rational thing to do about this. But there is a good deal to be said in favor of it.

Mr. Olney. I think that is true; but we are going to have so much difficulty, and are going to propose so many novel things, so that I think we can leave that out, leave that to be developed further.

Dean Clark. I think there is a good deal in what you say.

Mr. Mitchell. Now, we are down to Rule 14.

Dean Clark. Rule 14 will have to be rewritten, and it is going to be greatly changed, because of the differences we made.

Mr. Mitchell. Suppose we pass it then?

Dean Clark. I think so. I think I got the general idea.

Mr. Olney. Now, is there any necessity for Rule 14,

in view of what has been done in the previous section, in regard to the commencement of an action.

Dean Clark. That is the point Mr. Olney made. Everything will appear in Rule 10; but if we decide that it needs to be separate, Rule 14 will be quite different from what it is now. This feature has to be quite changed.

In Rule 15, I am not sure. We have discussed it. Is there anything more?

Mr. Donworth. Yes, I have a suggestion about Rule 15. What is meant by "exact time of service"? Does that mean the exact day, or the hour? Do you mean the exact day? I think that is all that should be required. I think the word "time" should be "day."

Dean Clark. Well, we thought the hour should go in. But maybe you are right about that; maybe "day" should go in. In cases involving the question of liens, it might be important.

Mr. Dobie. I ~~think~~ think so, and in lis pendens. That old rule about the law recognizing no part of a day has gone to pieces. It might also mean the hour.

Mr. Mitchell. It also might arise in connection with disputed cases.

Mr. Donworth. Is there any necessity for showing the hour of the day? If it becomes material, the court may inquire into it; but I do not think--we propose to empower the

court to proceed in the ordinary case--I do not think we should trouble every man to put in the exact time of service.

Mr. Wickersham. We have in New York no definite return. When the service is made there is an affidavit attached by the process server, and in due time, if anything should be done, and there is any dispute as to service, an affidavit is useful to show that the action is commenced by the service of summons on a certain defendant by a certain person. It is called a return, in the sense of a return writ.

Mr. Morgan. Well, you do have the sheriff serve the summons, and he can make an affidavit.

Mr. Lemann. This is where the summons is served by somebody else.

Mr. Morgan. Yes.

Mr. Lemann. Now, this says you must make return as promptly as possible, and within seven days. But as I recall the provision, his papers may not be filed for 20 days. Suppose I bring suit against you, and my boy makes service; so that you will get a copy of the summons; but I will have 20 days to file the complaint. But under this, I have to file my return within seven days, or as promptly as possible.

Mr. Donworth. I move that we substitute the word "day" for "time".

Mr. Mitchell. Where it says "exact time"?

Mr. Donworth. Yes; "the exact day of service."

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

Mr. Lemann. There is another point in connection with that. I think it is the custom to show the place of service with some degree of particularity. In our State we usually name the county. But this is to show that he served it. You want to show, of course, that it was served within the location where the law permits service. And I have suggested, to cover that, the inclusion after the words "set forth in a specific manner the exact day of service," these words--subject to change--"a designation of the city or county and the State wherein the service was made." I think there should be some idea of where it was. Of course if it is his place of abode that might be more definite; but if it is served on the person himself, it seems to me that the return should show at least the city or county and the State where service is made.

Mr. Wickersham. Would not the word "place" cover it?

Mr. Mitchell. "Place."

Mr. Wickersham. Would not that cover that--"place and manner of service"?

Mr. Lemann. It depends on what you mean by service. This language ~~will~~ should be clearer.

Dean Clark. Well, it might be city, town or township.

Mr. Wickersham. Why not have some specific place?

Mr. Donworth. It might require you to name the store or office.

Mr. Wickersham. Yes--serve it at No. 100 Canal St., in the City of New Orleans, La.; that is a specific place.

Mr. Demann. Then you would require him to specify the exact spot, as it were?

Mr. Wickersham. I think the place where it is served should be specified.

Mr. Donworth. Having in mind the rural counties.

Mr. Dobie. Suppose you meet him in his automobile?

Mr. Wickersham. You could say, "In the village of Couhaven, County of Rumford, State of Maine."

Mr. Donworth. That is what I say--the city, the county and the State.

Mr. Lemann. If you say "place", you give room for some argument about the question--if you specify Couhaven, and does not say 15 Canal St. Somebody will raise a question; in other words, some people will take a broad view, and others a narrow view. And I think it should be made plain.

Mr. Olney. Is it necessary to say anything except the city and county?

Mr. Dodge. Yes, in some cases.

Mr. Donworth. Yes, but according to this you would not have to name the county.

Mr. Dodge. I move that the word "place" be included

after the word "manner."

Mr. Lemann. I do not think that is necessary.

Mr. Mitchell. Well, under these rules, we never had any trouble. It seems to me that those are common practices that must be read into the rules. All lawyers know what return of service is; and as long as the Equity rule does not specify what the return calls for, it seems to me that a very general statement as to the manner is sufficient.

Mr. Dobie. The lawyers use mature process servers.

Mr. Mitchell. I suggest the use of the word "date" instead of "day", because date includes month and year; it is better than "day."

Mr. Olney. "Date" is better. "Manner, place and date." I make the motion that it be left that way.

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

Mr. Wickersham. Does that include the word "place"?

Mr. Olney. "Manner, place and date."

Mr. Wickersham. Yes.

Dean Clark. What do you want to do with sub-day?

Mr. Cherry. May I ask about the whole matter of return, the number of days, and further and other summonses, and so on. It seems to me that those are appropriate to the old existing practice, and not to the one provided in these rules, where service may be made by any disinterested person.

I do not quite see the need of a return by such person. That is appropriate to theofficial. He makes proof of service, not a return. Is it not sufficient for this limited purpose? He is doing something for the attorney for theplaintiff; and since the complaint must be filed within 20 days, I do not see the purpose of filing the summons and I do not see any reason for the further and other summons. And it is appropriate to the idea of the writ or summons, and the alias writ. I thought we would get away from that.

Prof. Sunderland. I think that is inconsistent with what we did yesterday, in providing a 60-day limit.

Mr. Cherry. Yes, it is inconsistent with that.

Mr. Wickersham. Well, unless you limit this to the requirement of a return in cases where the summons is served by the marshal.

Mr. Cherry. Yes, that is what I had in mind--a return by the marshal and proof by the other person; and any rule as to time of return I would suppose would be with reference to service by the marshal, and that would mean not having any further summons.

Mr. Donworth. Well, I think that is erroneous, be-cause you often have a large number of defendants. You want to make your return for some particular defendant against whom ~~whom~~ you are asking for an injunction, and so you return it, even though it is signed by a lawyer and served by private individuals

you serve that and you make out a return in your office and try to serve the other defendants.

Mr. Cherry. Why should you make another summons?

Mr. Donworth. Because you want to return the summons.

Mr. Wickersham. Then you are making an affidavit as to service of summons against a defendant against whom you are asking for relief; and the summons you are serving on all sorts of defendants.

Mr. Donworth. It is not the custom in my State; where you are serving a part of the defendants, you do return that summons and make out a return, and then you make out another summons later on.

Mr. Wickersham. Your summons is issued out of the court and served on the defendant?

Mr. Donworth. No.

Mr. Wickersham. You are speaking of the Federal court?

Mr. Donworth. No, the State practice in Washington.

Mr. Wickersham. Well, it is served by the marshal.

Mr. Mitchell. In Minnesota you do not have to make out another summons.

Mr. Wickersham. What Mr. Donworth is talking about is that the summons is issued by the court and served by the marshal, and of course, the marshal makes his return.

Mr. Cherry. It is <u>functus officio</u> as to the one made out

by the lawyer, and I do not see the reason for another return.

Mr. Donworth. Well, it is done under our State law. ~~As I said, if you want to cut out the State law say "in our State."~~ As I said, if you want to get special relief against some defendants, you file a return against those defendants, and then at your convenience you get out a new summons in your office and send it to the other defendants.

Mr. Cherry. We do not get out another summons. You have as many copies as you please.

Mr. Olney. We do that in California; but it is dependent on the fact that the summons is issued by the court, under the seal of the court.

Mr. Donworth. Well, that is what I am talking about. The lawyer does the whole thing; he issues a succession of summonses when necessary.

Mr. Olney. Is not your summons issued under the seal of the court?

Mr. Donworth. Not necessarily.

Dean Clark. It was on account of that that I thought it should be done. Your whole point comes to this--whether the paper that constitutes the summons needs to be returned. That is your whole criticism--the requirement of the return of the paper to the lawyer who signs.

Mr. Cherry. Unless it is signed by the marshal--I do

not see why you cannot make a number of returns as to the one paper.

Dean Clark. There is a little point there about the use of the word "return"." I suppose you could use "affidavit of service."

Mr. Cherry. "Proof of service;" proof would be by the marshal where he serves it.

Dean Clark. Well, you do not want to have any summons go back and forth. That is the main thing, I take it.

Mr. Cherry. Well, if it is served by the marshal, I do not see any need for it.

Mr. Mitchell. Well, let us see if I am clear about it. Now, under this practice it would permit a summons to be issued by the lawyers, and the complaint attached and served. Suppose there are several defendants and you have service on one or two of them. Now, if you have a rule that requires the summons, or affidavit or proof of service, to be filed within 7 days in the clerk's office, and then you find that you can serve one of the other defendants in 10 days, and the marshal or somebody wants to make service on the defendant, he has to get hold of the original document, to take it along and make service. He always carries the original with him.

Mr. Cherry. Does he have to do so?

Mr. Mitchell. Under the State law, he has to exhibit it to them.

Mr. Cherry. No, he just gives him a copy.

Mr. Mitchell. Then the requirement of a copy would give service?

Mr. Cherry. Yes.

Mr. Donworth. Should this not go out as of no consequence? Without making any argument ex nomini, you require a specified place where summons has to be indicated. Now, passing that, I think that the four lines here serve no purpose at all:

"The original summons, together with such return endorsed upon it or attached it, shall be returned to the court as promptly as possible, and not less than 7 days after the service."

I think those words should be left out, and leave it to the old Equity rule.

Mr. Lemann. I should think the summons ought to be in the court. It is the fondation, after all, of your jurisdiction, to show that this fellow is served; but would it be all right to say that it should come back at the same time the complaint is filed? If you file the complaint and say that should be done in 20 days, the return should be in then.

Dean Clark. What do you do in cases where you only give notice to the defendants?

Mr. Morgan. You file them, but do not put in proof of service on them.

Mr. Mitchell. Under your rules that you are providing here, you are going to require the summons or proof of service of the summons with complaint attached, to be filed, promptly in court. Now, I do not know of any purpose in having it filed, until some action by the court would be required. And under our practice in our State, and every other State that I know about, the difficulty is that when you go and file papers in a lawsuit you have to make a deposit of $10 or $15 or $20 for costs; and the advantage is, that, after having proof filed with the court and got nothing done by the court about it, the lawyer has to dig up $10 or $15 for deposit. Now, it is quite common in the Code States, where the complaint has been signed by the lawyer and served, he gets back proof of service, and he holds the papers in his files. He does not have to dig up any other money until the time arrives when he has to make a deposit in court; he does not have any expenses. So I do not see any practical reason for requiring that the summons and proof have to be promptly filed, and compelling the party to place their case on the court record and pay the costs. It seems to me that there is some idea about proof, where it should be promptly required--and I do think you find that lawyers in all the Code States will object very seriously to having to file their papers right away and subject themselves to costs. In many States, you do not ever get into court and do not pay any costs. The suit is dismissed.

Gentlemen, I think the Chief Justice is ready to receive us now.

(Thereupon, at 11:15 o'clock a.m., the Advisory Committee took a recess until 11:30 o'clock a.m., to call upon the Chief Justice of the United States.)

AFTER RECESS.

(The Advisory Committee met after the recess at 11:30 o'clock a.m.)

Mr. Mitchell. Judge Olney is interested again in this question that has arisen under Rule15, as to specifying the place of service.

Mr. Olney. Yes, Judge Donworth was talking to me about it, and he suggests this, and I think there is a good deal of force in it: If you simply say "the place", then your ~~attor-~~ return ~~ney~~ may become very important in matters of title, such as foreclosure, where you ta ke judgment by default, or possibly in suits to quiet title. Now, unless there is something fairly definite about it, those titles will be pass ed on by searchers of records employed by the title insurance companies, and people of that sort, and they may possibly reject a title, or question it, or possibly the thing may be questioned later, if it gives an opportunity for question. It seems to me that the whole thing can be settled, if, instead of saying "place", you simply say "county." Now, the county will indicate at once the district in which it is served. And that is all that is required. If you say "county", it removes any possibility of anything more exact being required, and nothing more exact should be necessary.

Mr. Mitchell. Well, I am curious about this: I find

that the Equity rules do not specify what manner or place of service shall obtain; under the Equity system all that is required is an affidavit of service; it does not say "place", county or date," or anything; and why is it necessary for us then to go into particulars and state the county or place?

Mr. Olney. I am sure that has not given rise to any trouble; because in the affidavit of service the lawyers have been careful to show that the service, as a matter of fact, is within the district.

Mr. Mitchell. Well, here we have Equity rules that have caused no trouble, and we have Code rules. I know this, that the Minnesota requirement is simply that service may be made by any other person, and he shall make affidavit of service, without specifying what it shall contain.

Mr. Donworth. I will be very glad to have that language adopted. The trouble is that you have here now this terrible provision, never prescribed before, prescribing the specific place.

Mr. Mitchell. Then your motion would be to strike that out and just say "proof of service"?

Mr. Donworth. You see, where you have a matter of title and defaulted judgment, it is going to be back on the table years later; and years later your title depends upon the jurisdiction, and the jurisdiction depends upon the return;

that is, proof of jurisdiction depends upon the return; and if you have a specific place in there you are going to find that many titles will be upset collaterally.

Mr. Olney. They may not be upset, but there mere question of them will be a very serious matter.

Dean Clark. Well, the way the discussion is going, I am inclined to think we ought to leave Rule 15 out altogether and go back to Rule 12, simply inserting the Equity rule provision.

Mr. Olney. I think the matter isa matter that can be left--that is, will have to be redrafted, and I think the draftsman can take care of it.

Mr. Donworth. I think so.

Dean Clark. All right. But my present impression is that there is not enough in the rule we have just been considering, Rule 15; and at the end of Rule 12 I will put the ~~service~~ sentence from Equity Rule 15, but change that in the latter case--that is, service by a person not the marshal--"that the person serving the process shall make affidavit thereof."

Mr. Morgan. Yes.

Mr. Wickersham. Yes.

Dean Clark. I wanted to ask Mr. Cherry if in Minnesota they attach it to the summons?

Mr. Cherry. Well, I think that is often done. I do

not think they meant to suggest it as a requisite.

Mr. Mitchell. Well, it is always done in an affidavit of service--that it was served by so-and-so, by delivering a copy thereof.

Mr. Morgan. We cannot very well do that.

Dean Clark. What do you want? You would have to serve the summons over again.

Mr. Morgan. Make an affidavit when it is not attached.

Mr. Olney. In regard to the return of summons, the return of summons is important or is material only in a case of default.

Mr. Morgan. Yes.

Mr. Olney. In 99 cases out of 100, it is not material at all, and there is no necessity for returning it. It is only when you want to take a default that it is necessary to return the summons. Why, then, require that any return be made except where there is a default?

Mr. Cherry. My understanding from the Reporter is that he proposes to leave out Rule 15, and simply add to Rule 12 a provision for proof of service.

Mr. Olney. All right.

Dean Clark. Yes; proof of service for a person not a marshal; proof of service by affidavit.

Mr. Mitchell. That raises the question of my object-

ion that I discussed before; it raises the question about any rule requiring you to file papers in court and incur costs before there is some occasion to take court action.

Mr. Wickersham. Yes.

Mr. Olney. I thought we had passed on that.

Mr. Morgan. Yes, I thought we had passed on that, and you acquiesced on the 20-day rule.

Mr. Mitchell. Well, I object to that. I think a rule that requires the papers to be filed before the trial term, or before the court is asked to take any action, is all that is needed; it can be kept off the files as long as the lawyer wants it, and he can save money and postage, and a lot of trouble.

Mr. Wickersham. Well, that would modify Rule 16.

Dean Clark. That is correct; and then you do go ahead.

Mr. Wickersham. Yes.

Dean Clark. I will say this: Of course, there is less reason for the rules now. My original plan was that all things should go through the clerk's office. And for that reason, now I have no feeling either way. I think it will be strange to many jurisdictions, because, you see, there are quite a good many, even of the Code States, that require the summons to issue out of the court after the filing of a claim.

Mr. Wickersham. But it will be a simpler practice for them, and there will be less objection than if you made it

more complicated.

Dean Clark. Well, what is simple to one man does not seem so to another. My problem is that they will think it very strange, and therefore be against it.

Mr. Wickersham. That is true. We have to look at the different views of it.

Dean Clark. How about this suggestion, Mr. Olney? Would it suit you, Judge Olney, if you wanted to make some mention of the other fellow's complaint, if you introduced the other fellow's complaint?

Mr. Lemann. You will have to do that. I think it will strike some lawyers as very extraordinary to suppose that you can take them out and that is all. I was just wondering, if you are going to redraft this, Dean Clark--you said you were going to follow Equity Rule 15, so as to provide, as I understand it, that if the paper cannot be served by the marshal, in the place of serving process you make an affidavit. Suppose they are served by the marshal?

Dean Clark. You would not say anything about it.

Mr. Lemann. You would not say anything about it. The Marshal always makes the return, I am sure, but there must be something that says that he will make it.

Mr. Donworth. Is not that his duty anywhow?

Mr. Mitchell. There is a Federal statute, and we will

say nothing about it, because the statute still stands.

Mr. Donworth. On this question the Chairman has raised about the filing of the complaint, I sympathize entirely with the Chairman's view that the papers need not be filed until there is occasion for it. I do not have before me the exact statutory provisions of the State of Washington; but in practice we do not file them until there is occasion for it. Under rule of court, the judge may order any pleadings that are not filed, or other papers in the case that are not filed, to be filed instanter, and if both parties are before the court they do it; if only one party is before the court, the clerk will communicate to him and enter the court order that the papers are to be filed immediately. And that works very well. But I thought as a compromise between this--but I did not like the idea at all--and our idea, that perhaps this 20 days was all right.

Mr. Mitchell. Can we not leave that to the drafting committee, without tying their hands on it, and let them look into it further and see if they can find any special reason for insisting on 20 days.

Mr. Donworth. I move that the action taken approving Rule 16 be subject to the understanding that the Chairman has just mentioned.

Mr. Mitchell. Is there any second to that motion?

Mr. Tolman. I second it.

Mr. Mitchell. The motion is that the action taken approving Rule 16, requiring papers to be filed within 20 days after the service of complaint, be open for reconsideration by the drafting committee, with a view to substituting some less restrictive provision.

Mr. Loftin. Some less time?

Mr. Mitchell. No.

Mr. Loftin. Some greater time?

Mr. Mitchell. No; abolish it entirely, except when papers are filed with the court.

Mr. Lemann. If parties do not settle a case in 20 days, I think they ought to go into court.

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

Mr. Mitchell. There were three Noes.

Mr. Olney. Let us have a understanding as to what that vote was on.

Mr. Mitchell. Maybe we had better settle it ourselves, then.

Dean Clark. I would be very pleased. I think it is is very important.

Mr. Mitchell. My idea is that the rule be so drawn that there be a rule that requires the party to file the papers if there is any occasion for the court to act on them, and that

there be no requirement for filing them in advance of that. There may be situations, of course, where they have to be filed, to get out substituted service, attachments, or whatnot--that they have to file them. And you can make a motion to file the pleadings. Then they would require you to file them a few days before the term or trial, but beyond that it is not necessary.

Mr. Donworth. But the motion is not that. The motion is that our approval of this rule be open to reconsideration, and that the Reporter give consideration to the thought that you suggested.

Mr. Mitchell. That is the way it stands. It is open to the Committee to take it up again at the next meeting, after the drafting committee has reconsidered it.

Mr. Lemann. Will the effect of the vote on this be that it may be extended beyond the 20 days? Will the effect be that there is no special limitation?

Mr. Mitchell. That is right.

Dean Clark. Do you not want to express you opinion, provisionally, anyway? I am not sure that I can do much more.

Mr. Cherry. I would like to have Mr. Donworth suggest a rule that he is familiar with, about the court issuing an order for filing instanter any and all needed papers. That occurs to me as taking care of the thing without any definite

number of days. There is a suggestion of a requirement in here that they need not be filed until the court needs to take action on them; and there is Judge Donworth's suggestion that the Reporter carry out his own suggestion, for a rule providing that the judge may order the filing instanter. It seems to me that that takes care of the situation.

Dean Clark. It seems to me that there are two different views here, and I do not see how I can reconcile them by thinking about them further. And I wonder if you will indicate just what your desire is?

Mr. Wickersham. I move that it is the sense of the meeting in line with what the Chairman has suggested. That is, that the rule shall not require the filing of pleadings, or the return of the summons, where the summons has been served by a person not the marshal, except when it is necessary for the court to take some action in regard to it.

Mr. Donworth. Mr. Chairman, I did not know that we were taking specific action at this time. What I thought the motion meant was that the Reporter would look up the statutes and the code rules of the different States, and after examining make an extract, or a rule of what he thinks will be the better practice along that line; and then we would have this rule and his view exegesis before us, and then we could take final action.

Dean Clark. Well, on that may I say that I have already

to a considerable extent digested the statutes, and as I suggested before, there is a considerable variation. Now, I shall if you wish, draw up two rules, an alternative form, one like this with a few alterations, and one substantially with the New York provision; because that is the thing you have in mind.

Mr. Wickersham. Yes.

Dean Clark. Very likely, if New York has a rule which Judge Donworth speaks of, we will put that in. But there are two different points of view--whether you want to draw a rule like this, or whether you want only to express an opinion now. I will do whatever you say.

Mr. Dodge. In how many States is it possible to hold the suit for a year?

Mr. Mitchell. In the code States, I do not believe there is a statute requiring them to be filed, except where you take some procedure. And the matter is handled, in my experience, by a local rule of the court.

Mr. Olney. In California, they require every paper to be filed.

Dean Clark. That would do, Mr. Olney, because there are quite a number of States where it is required by law.

Mr. Mitchell. That is where the summons is not issued by the clerk.

Mr. Morgan. And in some of the States that is absolutely disregarded--that is, that the pleadings shall be filed,

and nothing happens for failure to file, and then pleading takes place. So that it seems to me that there is one consideration that we ought to have in mind, besides Mr. Dodge's notion about carrying the papers in your hip-pocket, and that is whether it is good policy to encumber our public record with lawsuits that are brought and settled. Now, I know that in Code States there is a large proportion of actions that do not get any further than the pleadings. They are settled and dismissed; and if those were added to your judicial sta tistics, and you had that additional number of papers to file, you would have a still greater question of what we are going to do with all the papers.

Mr. Dodge. Well, is there not a right of third parties often to know whether there is any litigation pending with regard to a particular piece of property, and with regard to the solvency of the defendant?

Mr. Morgan. I do not know whether there is or not with regard to solvency of the defendant.

Mr. Wickersham. With regard to the title of property, there is almost always a lis pendens.

Mr. Lemann. Of course, you allow 20 days to settle, and if they do not settle within 20 days it may be pending for a year or two years.

Mr. Morgan. Lots of times in our practice we did not settle until the case was approaching for trial.

Mr. Lemann. That is still true; but you would have to file the papers very often in your practice. You get the papers in the court, do you not?

Mr. Morgan. We get the papers in the court when we get a notice of a trial; that would be the time for filing the papers.

Mr. Lemann. And that would be the time that you would settle?

Mr. Morgan. Yes.

Mr. Lemann. So that you get thepapers into court when you settle?

Mr. Morgan. No, we never get the papers into court when we settle; the only time we put the papers in the court was when the defendant was not competent. We get the approval of the court. We get a release or dismissal, and the lease would knock out the lawsuit, and we get no papers at all.

Mr. Lemann. I suppose Dean Clark would like to have a number of statistics. Would you prefer the filing of cases?

Mr. Wickersham. Mr. Chairman, are we going into court? If so, I think we ought to take a recess now.

Mr. Mitchell. Yes--probably something might happen that will solve this question.

(Thereupon, at 11:55 o'clock, the Advisory Committee took a recess, in order to be present at the opening of Court.)

AFTER RECESS.

(The Advisory Committee reassembled at 12:17 o'clock p.m.)

Mr. Lemann. Mr. Chairman, as I understand it, the present motion is merely to request the Committee to present the alternative rules and exegesis; and it seems to me that we would all welcome further light on thesubject, no matter what our views are. So that I suggest, if we have the same view, we might adopt that resolution without further discussion and pass on.

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

Mr. Mitchell. The next is Rule 17, Dean Clark.

Mr. Loftin. I did want to ask Dean Clark the purpose of that last clause.

Mr. Wickersham. In Rule 17?

Mr. Loftin. In Rule 16. Not being familiar with the equity practice, let me ask just what is the purpose of that, if the appearance of the defendant is by filing an appearance?

Dean Clark. It was mainly to allow a person to come in and get papers or notice of action in the case. Of course, if we do not have--the rule needs to be changed somewhat, if there are not going to be papers filed at once. Now, Judge Donworth has just given a rule to come in a little later, which illustrates the purpose of this. I will just read this suggestion. He says:

"After a party has appeared in an action, he shall be entitled to written notice of the time and place of the hearing in the case. Notice shall be served on the attorney or otherwise."

That is the form of notice. Now, this is the way of allowing other people, including change of attorneys, to get it without any particular formality.

That is the form of notice. Now, this is the way of allowing people, including change of attorneys, to know it, without any particular terminology.

Mr. Morgan. It lets the party in who does not want to defend the main action.

Mr. Loftin. That answers my question.

Mr. Dodge. How about appearing specially?

Dean Clark. It appears definitely that he does not want to appear specially. That is under Rule 26, at the very end, where it says, "No special appearance is necessary to raise such a defense; but all such defenses shall be deemed waived if not raised in or prior to the filing of the answer."

Mr. Lemann. Of course, that goes beyond what you would ordinarily call a special appearance; because your preceding language there provides as to a defense which may abate the action or avoid a decision; and Mr. Donworth's question is about challenging the jurisdiction, and there may be some doubt about that. When I read this, I made a memorandum,

"How about the special appearance?" I suppose the answer to that is this:Rule 16 means a general appearance.

Mr. Wickersham. Well, would that quite cover the question? A special appearance which will enable some one to come in without submitting himself to the jurisdiction, and move to dismiss the case for some jurisdictional defect. Now, if he cannot appear specially--you say it is not necessary?

Dean Clark. Maybe our language is not sufficient, because what was intended was to say that if you did not want to appear generally and submit to the jurisdiction, you could appear specially.

Mr. Wickersham. What I was going to add is that it is not necessary to raise such a defense. But on the other hand, in order to be held in case the motion is denied, and on appeal, and still appear specially, it is quite important that you appear specially.

Mr. Donworth. You take the case of the Qaulity Mining News, where the Mining News was not present there. Now, they moved to set aside the service, and they could not appear specially.

Dean Clark. I think the language is not quite as well chosen as it should be. The idea was, in order to enable the defendant to appear specially in order to move in abatement as to the jurisdiction.

Mr. Lemann. That may be the purpose of it, but your

language would include a lot of things.

Mr. Morgan. It would include everything except exception to the jurisdiction.

Mr. Lemann. Yes; that is not the kind of appearance that would save those rights.

Dean Clark. Then my language does not cover it. My idea was to get away from appearance in general terms. I wanted to get away from the question of general or special appearance, because he would raise debatable questions at once.

Mr. Wickersham. But that is one side of it. The other side is, whether, by making a motion the man submits himself to the jurisdiction. It is important that he should be able to make a motion without submitting himself to the jurisdiction.

Mr. Lemann. You take an attachment case. You can appear specially and make a motion. But if you do, you can come in or stay out.

Mr. Olney. A man cannot change the character of his appearance by calling it general or special. It depends upon the character is.

Mr. Dobie. That is not a general appearance, to move to set aside an attachment.

Mr. Lemann. It is in my State. You either ask the court to come in and help you, or relieve you, or stay out of court.

Mr. Dobie. There are a number of cases that hold--

Mr. Lemann (Interposing). There are a lot of cases.

where, if you appear and question what has been done, that is a general appearance.

Mr. Morgan. The question is, do you want to avoid that?

Dean Clark. All I wanted to do was to do away with the useless terminology as to general or special appearance. I was not attempting to change the question of jurisdiction.

Mr. Morgan. You do not pass on the question of whether the proceeding, after there is a submission to jurisdiction, is a general appearance, as to which the cases are in conflict, the Federal cases holding it is not. Of course, Texas has a statute, which the Supreme Court has upheld, that all appearances are general.

Mr. Lemann. So did Mississippi.

Dean Clark. I was trying to do away with useless formalities. Generally speaking, appearance is to be entered by the defendant filing his answer. In his anser he has to raise all his objections. Of course, I suppose a different question of jurisdiction he can probably raise at any time, but in general he must provide all the objections in his answer.

Mr. Lemann. Well, he could not raise the question of jurisdiction in a special answer.

Dean Clark. Yes, he could. At the same time, I want to find another way, and everybody please take note.

Mr. Donworth. How do you distinguish between the jurisdiction of the subject matter and jurisdiction over the

person, like in the Mining News case? It seems to me that the Mining News case, in which the Federal court held that the service was invalid because the president was simply casually there, is in point. Have you not got to have special appearance in a case of that kind?

Mr. Wickersham. Of course, it does not say that there shall be no special appearance. It says, "No special appearance is necessary to raise such a defense, but all such defenses shall be deemed waived if not raised in or prior to the filing of the answer." That would still leave it open to the defendant to appear specially and move to dismiss, on the ground--take the Mining News case--on the ground that the Mining News was not doing business within the State or district, and service upon its president casually there was not binding on the corporation, and therefore they asked that the case be dismissed. And therefore, under this we can take it that the objection is answered that it is necessary for him to do so.

Dean Clark. Of course, I have in mind the purpose to be solved. It may be defective language.

Mr. Morgan. I think it is.

Dean Clark. I just want to get away from this provision of appearing specially, and so on, when the paper shows it. Further on in Rule 26 I provide that, for purposes of a motion, I think it can be done in the answer, and I do not see why it cannot.

Mr. Morgan. Yes, I think it can, and I think you ought to take care of it. Suppose, for a first defense in his answer, he attacks the service of the summons. That would be a good defense in abatement.

Dean Clark. Yes.

Mr. Olney. He attacks the service of the summons?

Mr. Morgan. He attacks the service of the summons.

Mr. Olney. That would be a good defense in abatement.

Mr. Morgan. Oh, yes, it would be a good defense in abatement as to the jurisdiction. Not at common law. He appears specially and pleads in abatement under the common law. As I understand it, in Illinois, he had to do it under the last Practice Act if the defect did not appear on the face of the return; the only way to attack it was by answer, and in a good many of the Code States, you can plead to the jurisdiction and to the merits at the same time, and you can plead to jurisdiction and get that taken care of and ~~act,~~ and you do not have to go on and defend. You do not waive anything. In some States, if you do go on and defend you do waive. Now, as I understand Dean Clark's provision provides for but one answer, and in that answer you can attack jurisdiction over the person, as well as over the subject matter.

Dean Clark. That is it.

Mr. Morgan. If you did that for a first defense, and

for a second defense, and for a second defens go to the merits, you certainly are not providing that it is a waiver.

Dean Clark. That is true. I think that is permitted rather generally under codes. Your answer is partly in abatement and partly on the merits.

Mr. Morgan. Surely.

Dean Clark. Now, the embarrassment is to avoid separate grounds of filing defenses. You get all the issues at once, and the whole purpose of Rule 26 is to bring up all the points at once.

Mr. Wickersham. Yes; but that is just what the defendant does not want to do, in cases such as the Mining News case. Now, you assert jurisdiction over a corporation, serving an individual director or officer. The corporation does not want to come in with its defense. It wants to escape the jurisdiction.

Dean Clark. Now, I was not quite consistent with my own philosophy. I would still in that case like to have him put in everything at once.

Mr. Wickersham. That is what I wanted to ask you.

Dean Clark. And in that case, I put in an alternative.

Mr. Lemann. He could bring it in separately.

Dean Clark. Yes.

Mr. Lemann. But you have really given him another op-

Dean Clark. Yes;

portunity, but I was afraid people would get a little excited about it. The whole idea of Rule 26 is just a momentary weakness. (Laughter.)

Mr. Wickersham. It is a very real question, you know, in a great many cases; unless the defendant can appear specially and move, he gets drawn into litigation in a foreign jurisdiction against his will, and against the law.

Dean Clark. What I intended in this last sentence of Rule 26 was to provide nothing that would waive the question; he has not waived anything by putting in a document that says, "I appear specially and object to the jurisdiction."

Mr. Wickersham. He also may move and appear specially, all right.

Dean Clark. I have put it that way in Rule 26.

Mr. Morgan. I am afraid they will do it both ways, then.

Dean Clark. That is what I am afraid of.

Mr. Dodge. You mean he does not submit himself to the jurisdiction of the court, provided he does not make a complete answer, but appears to contest that?

Dean Clark. That is the idea.

Mr. Dodge. But if a man appears, he should be permitted to move to quash the service of the summons.

Dean Clark. He can, generally, do that. He certainly

can do it in New York.

Mr. Wickersham. What?

Dean Clark. File your abatement motion and your answer.

Mr. Olney. I take issue with Mr. Morgan. When you move the action is not abated. An abatement applies to another action pending, or a plea in bar, under the statute. It goes to the action itself; while a motion to quash the service of summons simply goes to the question of jurisdiction for the time being over the defendant.

Mr. Morgan. You are undoubtedly right in the most active use of the plea in abatement; but most of the common law pleading States, and most of the commentators, class pleas to the jurisdiction, as well as the pleas that you call pleas in abatement, as pleas in abatement. They are all dilatory pleas.

Mr. Olney. Now, a plea to the jurisdiction of the subject matter might well be considered as a plea in abatement.

Mr. Morgan. I am not talking about that.

Mr. Olney. But a plea is made to the effect that there has not been sufficient service on the man, and that does not abate the action.

Mr. Morgan. If it succeeds, it is a plea in abatement to the writ.

Mr. Dobie. But he can get another service, though, can

he not?

Mr. Morgan. Yes, he can bring another action.

Mr. Olney. He might bring another action.

Mr. Dobie. Suppose, in the case of the Mining News, they serve the president in New York, and the corporation not being there, later on it is quashed. Now, later on they decided to do business there and they did begin to do business there.

Mr. Olney. You can go on and sue him.

Mr. Morgan. The writ would make the plea functus officio, and the plea would, of course, be the writ.

Mr. Dobie. Yes.

Mr. Olney. If you mean by abating the writ that it is quashed, that is all right. The action itself is not abated.

Mr. Morgan. What do you mean by abatement of the action?

Mr. Olney. That it is at an end.

Mr. Morgan. Certainly, at common law.

Mr. Donworth. Under the statute, the complaint may be filed as a first step beginning the setion. If the action is begun that way, there is 90 days allowed for service. He may may make a service in ten days on John Smith, who is the janitor. The company comes in by special appearance and says that John Smith is not the janitor, and move to quash the service. It does not abate the suit.

Mr. Morgan. It abates the writ.

Mr. Donworth. We do not use that expression.

Mr. Morgan. I know you do not, because you are under a code.

Mr. Donworth. We can do it at any time within 90 days.

Mr. Morgan. Yes.

Mr. Mitchell. How does this question of terminology in plea in abatement arise?

Mr. Morgan. I suppose because the pleas are all regarded as dilatory pleas, and any dilatory plea is a plea in abatement. Now, as a matter of fact, a plea to the jurisdiction is not a dilatory plea.

Prof. Sunderland. There is no ambiguity?

Mr. Lemann. The only ambiguity, from the standpoint of the average lawyer is that what has been talked about in that connection most lawyers would not call a special appearance. I think we could restrict that to motions to questions or challenge the jurisdiction of the court.

Mr. Mitchell. Over the person?

Mr. Lemann. Yes, over the person, and therefore all we need to do now is to ask the court for further consideration of that question, or thephrasing on this point in the light of that.

Dean Clark. I think I would make my own purpose a little clearer if, I said, instead, "No special appearance is necessary" to raise a defense--"the defendant does not waive

such defenses by not noting a special appearance."

Mr. Mitchell. Without following it up, because it is all in the papers?

Dean Clark. Yes, because it is all in the papers, that have to come in very promptly.

Mr. Wickersham. The practical point is this; A man files an answer and takes objection to the jurisdiction over the person. In the first place, that question does not come up for decision until the case comes on for trial, and if when it comes on for trial he is defeated in that, he has got to go right through the file and authorize a judgment, and he appeals from the judgment, and that is one of the errors assigned. On the other hand, if he appears specially and moves to dismiss, and the motion is denied, he has got to appeal right away from that order and get a review.

Mr. Lemann. Not everywhere. It is an interlocutory order.

Mr. Cherry. It is not a final judgment?

Mr. Wickersham. If he appears specially and moves to dismiss and it is denied, he had a right to appeal.

Mr. Morgan. That is by statute in New York.

Dean Clark. In New York they have appeals on all sorts of things like that.

Mr. Wickersham. Well, a preliminary question like that is settled before we are drawn into the thing, and it is

of great value.

Dean Clark. I must say that I think it is not an advantage. In some cases it may be. In many cases, where the defendant never ~~did~~ ought to win, it is just a loss of time. Now, you just have to try to make some judgment as to how many cases there are of that kind.

Mr. Wickersham. Well, if he does not win, he ought to win.

Dean Clark. Well, unfortunately for him, that does not happen. They never win in New York. (Laughter.)

Mr. Wickersham. If an officer is sued who happens to be in New York, and the corporation is the party, I do not think the corporation is drawn into it.

Dean Clark. I do not think he should have to come in unless he wants to waive it.

Mr. Wickersham. Well, he does not waive it.

Mr. Olney. The trouble is that you put in the category the matter of what we call special appearance--that is, the mere matter of jurisdiction over the defendant personally, personal jurisdiction over him, with such matters as a plea in bar, or a plea of another action pending. Now, so far as such as pleas as that are concerned, which are strictly pleas in abatement, the defendant ought to be permitted to put them in his answer, and try them along with all the rest of the

case. But so far as a motion to quash the service of summons is concerned, and that is practically what it amounts to--he ought to be compelled to make that before he pleads. He ought not to have the privilege of making a plea of that sort, and also of putting in an answer and waiting until the time of trial before it is determinable--if there is going to be any trial at all now.

Mr. Morgan. He get that now under the Federal decisions.

Mr. Olney. He ought not to.

Mr. Morgan. He gets that now, and then he can go in and make his motion on the merits, and it is on appeal--

Mr. Olney (Interposing). But he should make his motion and have the thing determined, and have it determined once for all.

Mr. Morgan. Why not let him plead, and have it decided at the same time?

Dean Clark. Judge Olney suggests that this is an apparent/disadvantage to the defendant. It seems to me it is the other way. It seems to me that the matter of compulsion to the defendant is giving him a chance to delay the case on something that probably does not count. The whole philosophy of making the defendant speak up promptly and at once is to hamper the defendant--to cut down his chances of delay through these motions and proceedings, which Mr. Morgan very properly called, as they are often called, "dilatory motions."

Mr. Lemann. I have always drawn a distinction between these and dilatory pleas. We call these jurisdictional pleas "correctory." And I think the average plaintiff would want to know--pleas in abatement and those things are dilatory--but I think the average plaintiff wants to know whether he has the defendant in or not, and he likes to feel, if the defendant does not raise that point at the jump, that he is out of the picture; whereas the effect of the other method is to keep him in the picture; and many of the defendants take advantage of that, because they do not raise the point whenever it would be helpful to the plaintiff.

Mr. Morgan. Yes.

Mr. Olney. There is this thought about the matter, that perhaps Dean Clark overlooked. I think these motions to quash the service of summons act very rarely as delaying the action, unless there is genuine merit in the motion. It does not come in the class of dilatory tactics at all. It is rarely used for that purpose.

Dean Clark. Have you thoroughly in mind the procedure under Rule 26? Under Rule 26 the defendant normally is supposed to file his answer telling everything, and then any one of the opposing side, or the defendant, can ask the court for a hearing at once, or the court may order it, and they may settle the whole question; that is, you have got the defend-

ant on record; and then if it looked as the matter will end the case, then you may have your preliminary hearing; but you are not supposed to have your preliminary hearing unless it looks that way. That is in the body of Rule 26: "The court may, on such motion or of its own motion, or on motion of the opposing party, if it finds that a decision on such defense may finally dispose of the whole or a material part of the action, order the action set down for hearing on such defenses. On such hearing, the court may take such action, including entry of final judgment, as may be appropriate."

Mr. Olney. Well, so far as the average of what we lawyers would call a strict defense by way of abatement is concerned, this rule requiring the court to consider it in advan ce is a very valuable one. When I found it in the rules, it got my approval, as the result of experiences that I have had. In one case I interposed my plea in bar, and asked the court to consider it, and we spent three weeks on the merits, and then the court decided it on a plea in bar. But those pleas are entirely different from this matter of quashing service of summons.

Mr. Donworth. I think that would be shown by giving consideration to what actually happens. Take the case of the Quality Mining News. The Mining News was sued in its own right. But assuming that Quality was executor of his father's

estate, and he was alive--assuming it was legal. Now, Quality the executor, serves the Mining News, and makes this effective service. If the elder Quality is dead, and therefore the plaintiff has no capacity to sue, that is a plea in abatement, which under Dean Clark's suggestion becomes one of the defenses to be tried, like the others; and under the Constitution of the United States, that issue, whether Quality Senior is living or dead, must be tried by a jury if a jury is demanded, although it is a matter of abatement. But your motion to quash the service in never gets to the jury.

Mr. Morgan. That is right.

Mr. Donworth. And that should be recognized as a very different thing from what we have been discussing. The motion to quash service, if coupled with the justification that this article is true that was published against deceased Quality, where are you going to get? Then you get a jury trial, and you have to prepare your case and go in and try it before the jury, as to whether this company was really doing business here, and all of that. And, gentlemen, this is a very distinct matter--the question of whether you have appeared--the day in court has nothing to do with these matters, really, as to abatement under the modern practice.

Dean Clark. I am sorry to say that I must believe myself that that is more of a dilatory motion than almost anything else, because it is not getting anywhere, really.

Mr. Lemann. I think there you beg the question. I think the average lawyer--you take the practicing lawyers, and I rather think the majority will agree that that motion is rarely made, unless there is real occasion to make it, and that the abuses of delay come a hundred times under the other ~~court~~ Course where they would come one time under this ~~court~~ Course.

Mr. Morgan. Granting that, do you get anything worse if you put that in your answer, and if it is really to be supported by evidence in your answer, you will want to get it out of the way.

Mr. Lemann. Well, I feel that if I ought not to be brought into that court I ought not to be put under the necessity of putting in an answer. As I understand, Dean Clark goes to the other extreme. He says you can in advance of your answer, by motion, present all the dilatory arguments. But certainly, if you are going to do that--

Mr. Morgan (Interposing). But my argument is for cutting out the motion and requiring them to put in an answer, and then there is no reason why it has to be tried by jury. Why can it not have the same effect as a motion?

Mr. Lemann. I think it would be well to say challenge to the jurisdiction must be in 10 days; cut it down to 10 days; say "Come in with your motion to quash the service in ten days." I think that ought to be in a class by itself.

Mr. Morgan. At common law, if the sheriff made the

return, and they answered setting up that the sheriff's retu was false, the charge that it was false would be demurrable, because you could not impeach the sheriff's return. Now, tal it in Illinois, which is has the common law practice. If the exception appeared on the face of the return, then you could attack it, but if it did not appear on the face, the only way you could attack it was by a plea in abatement, or a dilatory pl to the jurisdiction. That was the only way of attacking it in Illiois, and I take it that would be the only way in Illi nois to handle it. You could not bring the thing in your dilatory plea; you could bring in only things that appeared on the face of the record.

Mr. Wickersham. Yes, but we have a different notior in this country.

Mr. Morgan. Certainly, we have a different notion.

Mr. Wickersham. We have a problem of a mobile peop moving from one jurisdiction to another. You have a requir ment that proceedings may be brought in certain places. Y have this question of representation. A man comes to New and works, not having a place there, and not doing all of h business there, but it is sought to extend jurisdiction of New York court over him by service of process in the city o New York.

Now, why should not that question be tried out speedily in the simplest possible way, without subjecting

the defendant to the possibility of being involved in the jurisdiction by being required to prepare his defense, and go into all the rigamarole that is necessary to get ready for trial. It seems to me, in the interest of the business of the court that there is no reason why you should burden the court with all the details of work in a lawsuit which does not belong in the court, and which would not enable the judge to decide promptly--because it did not belong in the court and would be removed from all other business in the court.

Dean Clark. Of course, that is provided for in the rule.

Mr. Wickersham. It is provided in the rule that it is requisite to file the answer.

Dean Clark. No. I was not wholly true to my own convictions, and I put in the motion--

Mr. Donworth (Interposing). Well, you have to file the answer.

Dean Clark. No.

Mr. Lemann. Of course, there is a lot to talk about in addition to this.

Dean Clark. Of course, in New York you can put in your answer.

Mr. Wickersham. Yes.

Dean Clark. But I give him the option.

Mr. Mitchell. And then when you put in the answer,

you give either party the privilege of deciding it in advance.

Mr. Lemann. I am afraid, Dean Clark has not given us a chance to make any motion at all. At the bottom of Rule 26 it says, "When the defense is such that it may abate the action or otherwise avoid a decision on the merits, the defendant may, in lieu of the above, file his motion, in advance of his answer, wherein he may present such defense." Now, a motion of that kind has nothing to do with any defense, either in abatement or otherwise.

Mr. Mitchell. You object to the term "defense"?

Mr. Lemann. Well, I think that language ought to be changed.

Mr. Dodge. Did you intend to raise the point that the defendant could make a motion in which he was trying to raise the question of jurisdiction of the court?

Dean Clark. No, I thought he should not.

Mr. Dodge. Well, I think that should be made plain.

Dean Clark. Now, I am at once at the point that, of course if a motion is not a defense, I should make it clearer.

Mr. Cherry. Your rule suggests that it is.

Mr. Wickersham. What I object to is making a defendant who is sought to be brought in, and it is questionable whether he is brought in--I would like to know whether he

is brought in when he appears to defend the action and instantly raises the objection which goes to the roots of the whole thing.

Mr. Mitchell. He does not have to do it under this rule.

Mr. Wickersham. That is what I would like to know, because sometimes Dean Clark says he does, and sometimes he says he does not.

Dean Clark. No, there is not any question but what I did not. And in the rule I put in theoriginal motion. I suppose the rule would cover the summons matter. But again I say this is a question of words to carry out the idea, and if these words do not do that we want to put in different words.

Mr. Lemann. But suppose I am in court, and I have some dilatory plea.

Dean Clark. He can put them all in his answer.

Mr. Lemann. That is what I am after.

Dean Clark. Well, he does not have to put them all in his answer.

Mr. Lemann. But he would have to put his jurisdictional objections, and his other abatement objection in the one pleading.

Dean Clark. Or in his answer.

Mr. Lemann. Therefore, if that is true, he cannot do what Mr. Wickersham and some of us think ought to be done,

that is, settle the question of whether he has got to defend this suit, before he raises any other issues.

Dean Clark. Why not? He makes his answer in advance.

Mr. Lemann. Yes, but if he has his abatement matter, he must throw them all into that motion.

Dean Clark. No.

Mr. Mitchell. You mean he has to put them all in?

Mr. Lemann. That is what I understood, and that is what I would personally object to.

Mr. Dodge. Most of them cannot be ~~cases~~ raised on motion, because they involve questions of fact--on this question of doing business in the State, it involves a jury trial, if it is a jury case.

Dean Clark. I suppose that comes in where Rule 26 says, "The defendant may, in lieu of the above, file his motion." I suppose you want to put in, "In lieu of," or "in addition to."

Mr. Mitchell. As a matter of practice, is a man entitled to a trial on the question whether he may be sued in that district?

Mr. Dodge. On the question of domicile?

Mr. Mitchell. Yes.

Mr. Dodge. I do not see why not.

Mr. Mitchell. I am talking about the statute.

Mr. Donworth. Well, the provisions of the statute re-

garding the time in which a man must be served are local matters. A man sued in a wrong district may stay there, unless he makes a special appearance; as I interpret this rule, a man sued in a wrong district must file his answer on the merits, in which he must say, "I am sued in the wrong district and I want to get out." It seems to me that a question should not be raised about that.

Mr. Mitchell. He does not have to. He can raise it in advance. But the defense is one that may "abate the action, or otherwise avoid a decision upon the merits." The rule itself states that.

Mr. Olney. I would not agree with Judge Donworth that under this rule as it reads now, a man would be required to make amotion to quash the summons. I think this has no application to it at all, because it deals with the defense to the action; and in these days a motion to quash the summons is not looked upon as an answer as to the merits.

Mr. Mitchell. He said the defense.

Mr. Lemann. How about the constitutional question?

Mr. Mitchell. I never considered the matter as a jury trial, as to whether it is a suit in the right district.

Mr. Dodge. Suppose he pleads in abatement, that he is not sued in the right district, and I think he is entitled to a jury on that.

Mr. Lemann. How about a corporation? That is a mixed

question of law and fact there.

Mr. Mitchell. I never heard of that kind of case.

Mr. Lemann. I have. I know one case that was referred to a master by the district court in New York.

Mr. Dodge. In Massachusetts, a plea in abatement would be the regular method of proceeding, and it would be tried by jury.

Prof. Sunderland. That is true in Illinois; but the Federal court refuses to follow it. They allow the filing of an affidavit.

Mr. Morgan. And of course, if it can be tried on motion, it must mean that it must be possible also in court to put in a plea. You can get out of a trial by the device of a motion, instead of an issue for trial.

Prof. Sunderland. The requirement of the Illinois court is that they must be tried by a jury, but the Federal court refuses to take a plea in abatement, and in taking a motion on affidavit they get somewhere without it.

Mr. Wickersham. I agree with Dean Clark in this, that those things ought to be included in the answer. It seems to me that those things go to the root of the question whether that case belongs in that court or not, and that they ought to be tried out and disposed before you go into the merits of the case. I think it is the business of the lawyers to save the court from being called upon to devote its attention

to a lot of things that it has nothing to do with.

Mr. Mitchell. Well, when this rule expressly provides that--the last sentence of Section 16 gives a man the alternative; instead of setting this up in his answer, he may make preliminary motions.

Mr. Lemann. Well, he has got to put all the other things in the motion.

Mr. Mitchell. Well, you are getting down to details.

Mr. Wickersham. Well, take that line that says, "No special appearance is necessary to raise such a defense, but all such defenses shall be deemed waived if not raised in, or prior to the filing of, the answer." It may not be necessary to raise a defense; but the question is, if the special appearance is not necessary to raise the defense, on the other hand, is the special appearance admissible in order to avoid the consequences of a decision, if it is adverse to the defense?

Mr. Mitchell. What about this language: "When the defense is such"--let us suppose that the word "defense" is broad enough to include service--"when the defense is such that it may abate the action or otherwise avoid a decision upon the merits, the defendant may, in lieu of the above"--now "the above" is to put these things in his answer--"or file his motion, in advance of the answer, wherein he may present such defense and ask immediate hearing thereof."

Mr. Wickersham. I should not have thought that the failure to raise the question of jurisdiction was a defense to the action.

Mr. Mitchell. You are objecting to the terminology?

Mr. Wickersham. Yes.

Mr. Mitchell. But the practice is that he can get those things decided before he puts in his answer.

Mr. Wickersham. But I think the question of whether or not you have got proper service on the defendant was not a defense to the action.

Dean Clark. Well, if it is not a defense I do not know what it is.

Mr. Wickersham. That is not a defense to the action. That is an objection to the jurisdiction.

Mr. Morgan. Well, lack of jurisdiction is a defense.

Mr. Mitchell. It is now 5 minutes after 1. Suppose we take a recess until 20 minutes of 2?

(Thereupon, at ~~12:45~~ 1:05 o'clock p.m., the Advisory Committee took a recess until 20 minutes of 2.)

AFTER RECESS.

(Friday, November 15, 1935.)

The Committee reassembled at 15 minutes of 2 o'clock.)

Mr. Mitchell. Gentlemen, let us proceed. Do you want to consider any question with reference to Rule 16, and take that up now, or do you want to take up again Rule 26? Would it not get a more orderly treatment if we went back to Rule 16 and reserved action as to Rule 26. If that is satisfactory, I will start in that way. Now, is there anything more you want to say about Rule 16? I think not. We passed a resolution about that.

Dean Clark. That is the one that is called for under the statute.

Mr. Mitchell. Yes. That brings us to Rule 17.

Mr. Morgan. Are you going to put anything in Rule 16 about the special appearance; because this is the only rule that has to do with appearances as such, is it not?

Mr. Lemann. As I understood, we will pass that part of Rule 16 until we fight the battle of Rule 26; because it is somewhat tied up with that; and I suggest that we keep that open.

Mr. Morgan. All right.

Mr. Mitchell. All right. We will consider all of those questions when we get to Rule 26.

The next is Rule 17, "Time to defend; default."

Mr. Wickersham. The first question there is reducing the time for service of the summons from 20 days to 5 days, under the conditions specified there. Is that a desirable or possible thing to do?

Mr. Lemann. We discussed that to some extent last night, did we not?

Dean Clark. Yes.

Mr. Morgan. Yes, we omitted that.

Mr. Mitchell. We took action about reducing the time to five days.

Mr. Dodge. That is upon ex parte proceedings, but did that contain notice? I think it is disadvantageous to eliminate it if there is a hearing.

Dean Clark. I might say, carrying out Mr. Dodge's suggestion somewhat, that there are cases where the parties really both want quick action, and later on, in connection with the entry of judgments, the courts are very anxious indeed that it be provided that they be speeded up. But suppose, for example, the parties wanted to get a declaration of rights, of something pending.

Mr. Morgan. Well, the defendant can answer the same day he gets it. There is nothing to prevent his answering earlier.

Mr. Dodge. I had in mind the case mentioned yesterday, where there was an injunction sought, and a short order,

and obviously there should be a preliminary hearing on the merits. Should not the judge be able to order the defendant to come into court promptly?

Mr. Donworth. We have another rule onmotions, and a shorter time. I think in an injunction suit the plaintiff, in addition to his complaint, usually files a motion for a temporary injunction, which the judge sets down for hearing in a very limited time. But the requirement for the answer I think is general in stating what it does.

Mr. Mitchell. Mr. Dodge, do you not think that the time of the defendant to answer, when there is a motion for an injunction, should be fixed at a reasonable time, as a matter of course? Otherwise you would be left rather helpless on the motion.

Mr. Dodge. Suppose there is a short order notice, of three days, and order or notice in three days, and the defendant comes into court, and he has not filed any pleading, and asks to be heard on the preliminary injunction; and the court is functioning, and wants the action tried on its merits very promptly; and the judge says, "I will not issue the temporary injunction, but I want this case tried at once on the merits, so that the issue may be determined with respect to a permanent injunction." I think he ought to have a right to have the order issued at once.

Mr. Mitchell. Do you mean that the other side desire

to go to trial and needed proof.

Mr. Dodge. Well, he may prevent the injunction, and still feel that the matter ought to be tried very promptly, so as to know his real rights.

Mr. Lemann. Now, you can do it in a Federal equity court, but this order that you speak of is in the State practice.

Mr. Donworth. It is a restraining order.

Mr. Lemann. I thought he was speaking of a case where there is no application for temporary injunction, and you wanted to get the case decided, and the judge did not want to issue a temporary injunction, and he said, "I want to speed up this case." Is there any way in Massachusetts of making it snappy? I should not imagine you could do that in Massachusetts.

Mr. Mitchell. My idea was that he wouldissue the injunction until it went to trial, and if the party did not do it, he would still have an injunction; so that I think the rule should give him power to compel the defendant to file his answer. If he wanted to file it, he would be in rather good shape, on a motion for injunction.

Mr. Dobie. Is there any fear of arbitrary abuse of this power? It seems to me that giving the judge power to enlarge the time is going rather far. Should we not also give him the power to shorten it? I should rather favor

that myself.

Mr. Lemann. Do you mean after hearing, or ex parte? Mr. Dodge suggests after hearing. Then, you have another hearing, of course.

Mr. Mitchell. Do you not want to leave in Rule 17 the clause, "Unless the time shall be enlarged by the court for cause shown."

Mr. Dobie. I think we ought to leave that to the judge.

Mr. Lemann. As I understand it, ~~there~~ that is res judicata in this Committee, as we voted really not to give him that power at all. Now, Mr. Dodge wants to go back and give him power after the hearing.

Mr. Dodge. Yes.

Mr. Lemann. And you want to go back the whole way?

Mr. Dodge. Yes; it is a very good way for speeding up that matter. I remember a case where the case could be reached finally in three weeks, but in the meantime we had an injunction trial before the court.

Mr. Wickersham. Did both parties want to expedite it?

Mr. Dodge. I do not recall.

Mr. Wickersham. If both parties want to expedite it they can do it.

Mr. Dodge. But where one of the parties desires it, I think you can trust the judge to exercise the power reasonably.

Mr. Wickersham. But the judge has power, on a motion for a temporary restraining order, to practically make the defendant answer; without technically shortening the time he constrains him to file an answer, because he grants a restraining order, unless he brings in proof of a good defense.

Mr. Mitchell. I would like to ask Dean Clark a question. The first occurs in brackets in Rule 17 and says, "Unless the time shall be enlarged by the court for cause shown." Do you understand that to be an ex parte order?

Dean Clark. I think it can be.

Mr. Mitchell. Now, in the next paragraph, you use substantially the same language, and you want the time shortened without a hearing.

Dean Clark. Well, I supposed the next one also would be ex parte, because I suppose it would be rather difficult to get a hearing without getting a 20-day delay, and I thought there would not be very much harm done. Suppose the court, on the ex parte application, has ordered an answer in 5 days. Then the defendant appears and says it cannot be done. Then the judge says, "If it cannot be done , I will give you ten or fifteen days.

Mr. Mitchell. Well, his being in the court, he can show the defense.

Dean Clark. That is true, but after all, the fault is not very serious.

Mr. Bonworth. We have prescribed the form of summons, and I do not see how this can work in very well with the form of summons.

Dean Clark. I think that can be taken care of very well. Back in the form of summons I had a provision covering this. The plaintiff would go to the judge before using a summons. The summons is issued and the motion is made, and if the court has granted the motion, you must serve the answer within whatever time is specified.

Mr. Mitchell. I am afraid of this reduction. I think there would be a good deal of opposition to five days, ex parte, and all of that. There may be exceptional cases where it would be a good thing.

Mr. Dodge. Do you think there would still be objection if it was not ex parte?

Mr. Mitchell. I do not think there would be so much. Say if the plaintiff should go to court and get an order returnable the next day, and if the defendant should then come in and show that he should have more time--

Mr. Dodge (Interposing). That is what I had in mind.

Mr. Mitchell. It would take the objectionable feature away a little, if you should put in an express provision that it was to be after notice of hearing.

Mr. Cherry. But he would have to have that hearing before he had been served with a complaint or it had been filed.

Mr. Mitchell. The court would take care of that, I suppose, when it granted the application.

Mr. Donworth. Bear in mind that the plaintiff's lawyer will not always be a highminded gentleman.(Laughter).

Mr. Wickersham. Are there any lawyers who are not high-minded gentlemen? (Laughter.)

Mr. Donworth. I think for one case where Mr. Dodge's situation might apply, there would be 100 where there was danger it being abused, and that the bar would object to this shortening before they were heard at all.

Mr. Mitchell. I think they would.

Prof. Sunderland. One of the objections is in regard to summary judgments; one of the objections of the district committees was in regard to the shortening of the time, and they were finally opposed to it.

Mr. Mitchell. Will somebody make a motion to either reject or adopt that clause of Rule 17 that is in brackets?

Mr. Morgan. We have already rejected it once. We would have to reconsider it.

Mr. Mitchell. We have? Well, if that is so, I think a motion would be in order to that effect. This rule requires the defendant to make answer within twenty days after the service of the summons. Remember that under the system we have adopted, the plaintiff has the option to attach a copy of thecomplaint to the summons and serve it with the

summons, in which case the defendant has a copy immediately on service of the summons. And he has the option that the plaintiff had as to the filing of his complaint, or filing the summons without any complaint at all. Now, if the time for answer runs from the date of the service of the summons, bear in mind that the defendant's time is running when he has not had a copy of the complaint that has been filed. Now, the way that is handled in the Code States, where that system is used, is that if the complaint is served with the summons, you get 20 days. If you file your complaint, or serve a copy of the summons without the complaint, then the defendant may make a demand for a copy of the complaint, and he has 20 days from the date the complaint is handed him within which to serve his answer. That ought to be provided in this rule, I think.

Mr. Lemann. We discussed that yesterday fully, and I wonder what advantage there is in giving the plaintiff the option to file his complaint only in court? Now, we require a copy always to be served with the summons. Ordinarily, if a man gets a summons--we have discussed that--and we said that he would get a copy of it; if it is in court he has to go to his lawyer to get it, and of course, he can call on the other man to furnish it; but why should it not always be given to him by the other side.

Mr. Wickersham. [illegible] Rules 22 and 23 also

Mr. Mitchell. I do not know why he should not.

Mr. Olney. I think you have confused the rule on commencement of an action by filing with the Clerk and the rule in regard to service, which is found in Rule 13, which reads, "The service of the summons upon the defendant, when a natural person, shall be by delivering a copy thereof and of the complaint to him personally," and so on.

Mr. Lemann. That is right.

Dean Clark. Then we provide, in the case where the defendant could not be reached, you file your complaint in court, and then it is left to the marshal. But there are two alternatives, that is, if you are required to serve after filing the summons in the court--did we not vote on that?

Mr. Loftin. Yes.

Mr. Mitchell. Well, I was wrong. I overlooked subdivision 2 of Rule 13. I withdraw my objection.

Mr. Wickersham. Well, it says twenty days after service of the summons he is required to serve his answer. Ought that not to be twenty days after the service of the complaint?

Mr. Lemann. The complaint is to accompany it.

Mr. Wickersham. Well, what complaint? The time is so many days after the complaint.

Mr. Lemann. Well, if you serve the summons with the complaint, he has the same time to answer.

Mr. Wickersham. Now, if you serve the summons and start

the action--and I think you have the right to serve the summons without the complaint; but the time to answer ought not to run until the man has a complaint.

Mr. Mitchell. But the rules we have now adopted require that the summons and the copy of the complaint should go with it.

Mr. Wickersham. Is that in there? You worked that in over me. (Laughter.)

Dean Clark. I understand that you did oppose it. I think you remain true to your convictions.

Mr. Wickersham. I think so. I may be overruled but I will adhere to my opinion.

Mr. Mitchell. Is there anything more on that subject, Dean Clark? Then we will pass to Rule 18.

Mr. Wickersham. I do not like that phrase "all technical forms of pleading are abolished." Forms of action are abolished. But what is it to abolish technical forms of pleading? Every pleading must have a certain technical form if it is going to state a cause of action as known to the law. Of course, if it is an "old wife's tale," that is a different thing.

Mr. Morgan. Are we abolishing the common counts here?

Dean Clark. Then we had better put it the other way--"no technical formsof pleading are required."

Mr. Morgan. That is probably much better.

Mr. Wickersham. That would be better--"no technical words of pleading are required."

Mr. Dodge. Equity Rule 20, on the left hand side, does not have much application.

Rule 18 is, "unless otherwise prescribed by statute or these rules, the technical forms of pleading in equity are abolished."

Mr. Donworth. Where is that?

Mr. Lemann. Equity Rule 18. But he referred to Equity Rule 20, and placed that on the opposite page, instead of Equity Rule 18.

Mr. Donworth. Equity Rule 18 is not properly in there?

Mr. Lemann. No, there (indicating) it is very short.

Well, Equity Rule 18 says, "Unless otherwise prescribed by statute, or these rules, technical forms of pleading in equity are abolished." That is a different thing.

Dean Clark. Now, the latter sentence of Rule 18 compares to the latter sentence of Rule 19.

Mr. Wickersham. I would like to suggest an amendment to Rule 18: Instead of the present form, add to it something like the clause in both Illinois practice and the New York Civil Practice: "But every pleading shall contain a plain and precise statement of the facts constituting a cause of action or defense."

Dean Clark. Now, I was going to say that the object-

ion of many to this rule that it may be covered later, but perhaps if we protest several times it will do no harm.

Mr. Wickersham. Yes.

Dean Clark. But we do cover this thing later on.

Mr. Wickersham. Yes; you have "Form of pleadings" in Rule 20.

Dean Clark. Yes.

Mr. Wickersham. And you have Rules 22 and 23 also stating the same subject?

Dean Clark. That is true.

Mr. Wickersham. Yes, because all of those rules more or less refer to the point that I made the suggestion about. It brings up that question of what the pleader shall state. You have got three or four different phrases to choose from. The rule in Section--

Dean Clark (Interposing). Well, I presume there is no inconsistency, and I cannot see any inconsistency; it may be that you "protest too much." The condition that you are complaining of now always comes in the complaint, and I have got in there Rule 23.

Mr. Wickersham. Yes, but Rule 22 is "amendment to pleadings", and then there is Rule 23, "Complaint--contempts." For the moment waiving the form, I will ask generally whether that Rule 18 is necessary or important enough to have. Before you get the amendment of the pleadings, etc., ought you not to deal with the subject of what are the pleadings that may be amended? the complaint, the answer and reply, etc.? Ought they not to precede the provision regarding amendment of the pleadings? That is a mere matter of order, of course.

Mr. Olney. Are you discussing the last sentence of Rule 18?

Mr. Wickersham. Yes.

Dean Clark. I do not know that Rule 18 is specially

necessary. It is probably along the line a little of the Equity rules. If you want to save space, you could leave out Rule 18, or I could add another sentence in Rule 22 from Rule 18.

Mr. Mitchell. That would be better.

Mr. Wickersham. That would be better.

Mr. Olney. Well, it seems to me, Mr. Chairman, that if there is a change in the last sentence of Rule 18, the rule is of value, because most motions that are mostly used for purposes of delay are motions in connection with pleadings--to strike out this or that, or to require fuller proof, or something of that sort. Now, that is where motions of that character, that are used for purposes of delay, take the time of the court and all the rest of it. It seems to me that at this point a statement that has the idea of the last sentence of Rule 18 is worth while. I do not like the wording of that last sentence of Rule 18, because it fails to distinguish between the effect of an error or defect in the pleadings before trial, and at the trial, and the effect is quite different. Here is the suggestion that I have drafted: "Prior to trial, errors or defects in the pleadings or procedure that do not substantially affect the just dtermination of the cause upon its merits are to be disregarded, and after trial no rehearing or new trial shall be allowed, nor any judgment or order set aside or vacated by reason by reason of any

error or defect, unless it affirmatively appears that the same has substantially prejudiced the party in the presentation of his case, or has caused an erroneous termination of the cause upon its merits."

I think something of that sort, that lays it down as a principle that the judges might follow might be of value.

Mr. Morgan. I think the suggestion of requiring the prejudice affirmatively to appear is important, because this language here (indicating) is used in a good many codes and a good many courts construing this language are going to assume that it did appear affirmatively when it did not appear affirmatively, and I think that is important.

Mr. Mitchell. You said "before trial". You mean before the conclusion of the trial?

Mr. Morgan. No.

Mr. Olney. I simply said "prior to the trial."

Mr. Mitchell. Well, if you meant trial, or the commencement of trial, the same condition would not exist during the trial; so that I thought you meant really--

Mr. Olney. Prior to the decision.

Mr. Mitchell. Prior to thedecision. You did not mean prior to the trial?

Mr. Olney." Errors or defects in the pleadings or procedure that do not substantially affect the just determination of the cause upon its merits are to be disregarded."

And then he comes in and says some "i" is not dotted, or some "t" is not crossed, and then the same thing happens again, where it says, "unless it affirmatively appears that the same has substantially prejudiced either party."

Mr. Mitchell. I thought you meant during the trial.

Mr. Olney. Yes.

Mr. Mitchell. You meant upon completion of the trial?

Mr. Olney. Yes, that is true.

Mr. Mitchell. What is your pleasure about Rule 18?

Mr. Cherry. That would be a general rule that would not take its place among pleadings. I think putting it in some place where it has general application to the whole procedure would be wise.

Mr. Olney. That is true, but the point made is that a reiteration of the point would not do any harm; and I thought it was of value here in connection with pleadings, because the dilatory motions on the different points, and all that sort of thing, are costly to the client.

Mr. Cherry. Might there be some danger under this subheading of 4 of its being narrowly construed to affect only pleading?

Dean Clark. Possibly it should be put right after Section 3.

Mr. Cherry. Yes, I had some suchthing in mind of putting it somewhere to make its application general; the earlier

the better.

Mr. Mitchell. Do you like Judge Olney's substitute for the last paragraph of Rule 18?

Mr. Dobie. I like that. I think Judge Olney's suggestion that it must be made affirmatively to appear is a good one. This report here a stock report on Rule 19, which is rather a general provision or statute, and I think it is a good suggestion.

Mr. Mitchell. Could we not refer it to the Committee for revision?

Mr. Morgan. I move that that be done.

(The motion was unanimously adopted.)

Mr. Dobie. I agree with the suggestion that Mr. Cherry made that we put this thing further back, and if we did that it would be better.

Dean Clark. It seems to me it might come in under Rule 2. We can insert this as Rule 3.

Mr. Lemann. Is there a general Federal statute as to the record on appeal? In that connection, will you have your staff give a general reference to the statute, and we would see where the provisions of these statutes would be found here. Then we would find the corresponding Equity rule under the statute. Now, I would like to know which of these rules correspond to the Equity rules, and which of

them correspond to the Federal statutes; that is the advantage of showing that you have not overlooked anything.

Dean Clark. Do you mean the next time we meet? (Laughter.

Mr. Lemann. Yes; I am just asking about the Federal statutes.

Dean Clark. Yes, there are several Federal statutes. The amendment statutes are referred to in Rule 22 and are copied here, "Sections 767 and 777 United States Code."

Mr. Dobie. 777 is a general one, 28 U.S. Code, 777.

Dean Clark. Now, there is one on appeals that I refer to later.

Mr. Donworth. Where is Section 767 to be found?

Dean Clark. Opposite Rule 22. Now, Mr. Lemann you asked about the appeal one; that would be 103 or 104.

Mr. Lemann. That has some language resembling this language we are now discussing, about prejudicing or affecting substantial rights; is that right?

Mr. Morgan. Yes, that is common Code language.

Dean Clark. Yes, I am pretty sure I have got that in there.

Mr. Dobie. What is you are after?

Dean Clark. The appeal section. Well, here it is, opposite Rule 100; it is 28 U.S.C., 391. It says, "The court shall give judgment after an examination of the entire record before the court, without regard to technical errors,

defects, or exceptions which do not affect the substantial rights of the parties." And I put that in at the end of Rule 100. You see now we have this in as a warning to the court.

Mr. Wickersham. Yes.

Mr. Mitchell. I wonder how about affecting the action before the court where the practice says they may make rules of practice for the district court. I have proceeded on the assumption that they could deal with anything the district court had to do, in the form of settling bills of exception, and whatnot. But when you come to telling the appellate court what it could or could not do, it is outside the statute, because there is no reference to that in it. It is all a question of practice and procedure in the district courts. And that is one of the questions that I wrote out and handed to the court, and they confirmed the impression I had that we had to limit ourselves to District Court practice, including such practice in the District Court which forms the basis for appeal. This matter of settling bills of exception is a matter of practice in the District Courts, and included all of that ~~stock~~ and the statute. But to say that the Circuit Court of Appeals cannot do this-and-so, that reaches out beyond the statute. I think that ought to be stricken out. However, we are not on that rule yet.

Mr. Wickersham. The statute requires that.

Mr. Tolman. That occurs in one of these rules now. That is to say, there is a provision that says that these defects shall not be the cause for a rehearing or a new trial. Now, that rule as originally drafted provided for no person. Now, Judge Clark changed that language only so far as it refers to the trial court.

Mr. Mitchell. You mean on a motion in the trial court?

Mr. Tolman. On a motion in the trial court. But in addition, I find a situation such as arose in the case of Barbour Asphalt Paving Co. vs. Standard Asphalt & Rubber Co., reported in 275 U.S., page 372. That went up from Chicago, and the opinion was written by Mr. Justice Van Devanter, and it dealt with the rule made for District Courts, and it held that that rule was to be considered by the court on appeal, and it was arule which provided that the narrative form of statement should be employed, and prohibited the filing of questions and answers. A full shorthand report in nine volumes was filed, and went up to the Court of Appeals, notwithstanding this District Court rule. The Circuit Court of Appeals declined to look at it, reversed the case, and it went to the Supreme Court, which said that under the circumstances, because they always have allowed it to be done--that that was an abuse of judicial discretion and you should have reversed the case, with instructions to file, instead of the full record, a narrative statement. And the case reiterates

that this rule, which was a ~~difficult~~ District Court rule, be reflected in the other courts. Therefore, I think if we take the form of providing for a rule that it shall not be cause for motion for new trial or rehearing, we use all the force within our disposition. And it was on this very rule that the first change was made.

Mr. Mitchell. Yes. But there is that case that I talked about a few moments ago, that under the rule making power of the trial court, rules may be made in the trial court which will form a basis for appeal. That is a liberal view of the statute that you ought to take. I am not referring to the fact that the Circuit Court of Appeals may do thus-and-so after it reaches them. And I do not think they ought to have this in there.

Mr. Wickersham. It does this: It necessarily applies to appeal, and would it not be a technical rule for the District Court? "No rehearing or new trial shall be allowed or any order or judgment set aside or vacated by reason thereof."

Dean Clark. Yes.

Mr. Wickersham. Do you have an application for a new trial in the District Court?

Mr. Mitchell. I am talking about the end of Rule 100.

Mr. Wickersham. I did not know that.

Mr. Mitchell. It says, "On hearing of any appeal or

motion for a new trial,"

Mr. Wickersham. Well, I was referring to Rule 18.

Mr. Mitchell. I was speaking of Rule 100.

Mr. Dobie. Ithink that is applicable to both the appellate and trial courts, that 28 U.S. Code 391; it refers to an appeal, etc., "in any case, civil or criminal" and also refers to all U.S. courts. So we cannot legislate for the appeallate courts, but I think this will be takenas applying to the District Court, and on theother hand it will have a good effect in the appellate court. I do not think we need--

Dean Clark (Interposing). I do not think we need to consider Rule 100 yet.

Mr. Dobie. I am talking about Rule 18.

Mr. Mitchell. We have not settled the matter of the first two sentences in Rule 18. You have taken the last paragraph and you have accepted Judge Olney's provision. But the first two sentences here, "all technical forms of pleadings are abolished. For the purpose of determing the effect of the pleading, it shall be liberally construed, with a view to substantial justice between the parties." What is your action on that?

Mr. Cherry. Was that what the Reporter meant to include in Rule 20?

Mr. Morgan. Yes, that would be added to Rule 20.

Mr. Cherry. The substance of the first two sentences?

Dean Clark. No; when I made that suggestion I was thinking of leaving out the first two sentences, and adding the last setence to Rule 22, "Amendment."

Mr. Dobie. How about Rule 20, which has to do with the form of pleadings? I u derstand that the first two sentences were thought possibly appropriate there rather than in a separate rule.

Dean Clark. The first two sentences can be brought in there.

Mr. Wickersham. Do not Rule 18 and Rule 20 deal with the same subject, form of pleadings, and should we not combine those two and make one rule of them?

Dean Clark. It can be done. I take it that Judge Olney's suggestion goes to Rule 3, and this goes to Rule 20.

Mr. Cherry. Yes.

Mr. Mitchell. That settles that. I wanted to ask about Rule 17. The last paragraph says a default may be taken against him. There is nothing said there about procedure, or entering judgment assessing the damages; and I was wondering if there is any place where that is dealt with?

Dean Clark. We do deal with that. We had expected that the case would proceed ex parte, but yesterday it was voted that there should be an affidavit, and it has got to be rewritten on that basis.

Mr. Mitchell. You have that in mind?

Dean Clark. Yes, I have that in mind. I shall not have to say anything about covering that default, other than a default by non-appearance; but I understood the judgment was that all such defaults went to the court.

Mr. Mitchell. That is right.

Dean Clark. Well, I have that in mind.

Mr. Mitchell. Now, Rule 19.

Mr. Wickersham. I do not understand the last paragraph of Rule 19, where it says, "Any application to the court for its order prior to the trial shall be by way of motion, which, unless otherwise specified, shall be in writing and shall set forth the relief or order sought, and shall be considered as a plea and be subject to the ~~rule that~~ rules applicable to pleadings."

Dean Clark. Well, I may say that what I wanted to do--although I hesitate to say it, but this is the practice that I am familiar with--I wanted to have all these papers, following the orderly procedure, of answers and so on--which would mean that under the suggested system they would have to be filed with the court, and copies furnished; and now they would have to be served, and if the signing by counsel would carry the effects stated here, that signing by counsel, and with the allegations there contained, should be simple. In other words, these are general formal rules.

Mr. Wickersham. What do you mean? Do you mean sup-

pose I make a motion to obtain a more definite complaint, and the court makes the order; the complaint then amended in accordance with that order is a pleading, but the motion is not a pleading, and the order is not a pleading?

Dean Clark. I treat the motion as a pleading, and of course what I assume is that it is to be called a pleading.

Mr. Wickersham. Well, I do not understand how you can call it a pleading. It is not a pleading. The pleading is an orderly statement of the facts constituting a cause of action or a defense. You may call it anything you like, but the question is, is it correct?

Mr. Dobie. Is not a demurrer a pleading?

Mr. Wickersham. A demurrer is a pleading, because it is well recognized as such.

Mr. Morgan. Well, the English court said it was so far from being a pleading that it was an excuse for not pleading.

Mr. Wickersham. Well, that is true, but technically it is regarded as a pleading.

Mr. Olney. When I read this, the thought that occurred to me was exactly the same as Mr. Wickersham's suggestion; but I think Dean Clark had in mind, so far as the motion itself was concerned, and so far as pleadings were concerned, the rules with regard to pleadings should cover it. Now, I have written out this as a suggestion: "Any

application to the court for an order other than an ex parte order shall, unless otherwise specified, be on written petition or notice of motion, which shall, as to the order sought, be considered as a pleading and be subject as to its contents to the rules applicable to pleadings.

Mr. Wickersham. Now, my first question is, what is it that is considered as a pleading? Is it the application to the court for its order?

Mr. Olney. Yes.

Mr. Wickersham. That certainly is not a pleading.

Dean Clark. If you get out of Westchester and get over to ~~Milwaukee~~ Greenwich you have a motion as a pleading.

Mr. Wickersham. I never heard of it.

Mr. Olney. This was limited in this way, "Which shall, as to the order sought, be considered as a pleading and be subject as to its contents to the rules applicable to pleadings.

Mr. Wickersham. Now, it is a motion. It says, "Any application to the court for its order prior to the trial shall be by way of motion, shall be in writing, and shall set forth the relief or order sought, and shall be considered as a pleading." That is a motion to the court.

Mr. Lemann. Why should we not call it that? In the part of the country that I come from, and possibly some other parts of the country that is what they would call it. Now we call everything of this sort--every document that is signed

by counsel and goes into the record is a pleading.

Dean Clark. So do we.

Mr. Lemann. And it is a bad idea. I looked at "Clark on Pleading," and I saw that it is mostly considered as a pleading.

Mr. Olney. All that Clark had in mind in this provision was that the moving papers on motions should be subject to the same rules as pleadings; was not that all, Dean Clark?

Dean Clark. That is all.

Mr. Mitchell. Why not say that?

Dean Clark. I want to know what Mr. Wickersham has in mind, because I can see the advantage of having one immediately applicable. But if we want to call it a pleading, why should we not do so?

Mr. Wickersham. Because it is not. What is a pleading? A pleading is a statement of the facts constituting the cause of action or defense. It has been so recognized by officials and courts.

Mr. Dobie. The line between one of these motions and demurrer is very thin. And Judge Clark in his book has a reference to 20 cases. The complaint may fail to state a cause of action, and some courts say, "This is a rule of law subject to a demurrer," and others say, "No, it is not a rule of law, but the fact, but it is a cause of action, and therefore the motion to make more definite and certain." It seems

to me that you can go on with a demurrer and get at this.

Mr. Wickersham. Then the amended order is a pleading but the motion is not a pleading.

Mr. Lemann. Is the motion to dismiss the bill in equity a pleading?

Mr. Wickersham. No, it is not.

Mr. Lemann. ~~No,~~ It is not?

Mr. Wickersham. No. It takes the place of the old demurrer, and the demurrer became a pleading. A motion to dismiss takes the place of a demurrer, but how can you say that the motion papers on an application respecting pleading is part of the pleading? I cannot imagine that.

Mr. Lemann. Are we not directed to abrogate all technical rules here?

Mr. Wickersham. I know, but there is a limit to that. One man will come in and tell a story, and somebody will come in and tell another story, and the judge will do something for him. That is one thing. But I am opposed to abolishing every form of judicial procedure.

Mr. Cherry. In Rule 19, I think the only words that will cause difficulty are the first words in the next to the last line, to-wit: "be considered as a pleading and subject to the rules applicable to pleadings." If that was left out, that setence would simply say, "be considered as a pleading" and not "shall be subject to the rules applicable

to pleading."

Mr. Wickersham. Now, what are the rules?

Mr. Cherry. They are the rules in subdivision 4 on pleadings.

Mr. Wickersham. Well, you say as to the form. That is one thing. But there are a lot of rules as to pleadings--when the pleadings shall be served, he shall answer; and so the rule applicable to the motions will not do.

Mr. Cherry. But they are not in this group, are they, as to service?

Mr. Wickersham. No, but they are part of the rules applicable to thepleadings.

Mr. Olney. Can you not say, "as to their form and contents?

Mr. Wickersham. That would be all right.

Mr. Donworth. I never heard of anything but three things, the complaint, the answer, or the reply, being called a pleading. But when I read this thing I thought I must have been asleep. I think in some of the rules we have passed, the question has been raised, and on that same question we have passed on it hypothetically. Now, if this rule stands different when you are served with a complaint and you make a complaint and you make a motion to make definite and certain--you have pleaded to that complaint for the time being, and then the court disposes of your motion one way or another and it will be another pleading.

Mr. Wickersham. Well, as a general rule, but in many cases when you make that motion you get an extension of your time to plead until the decision of the motion. This motion is not a pleading.

Mr. Donworth. Yes.

Mr. Wickersham. You delay the time for the service of your answer until the time for a motion to make more definite and certain.

Mr. Mitchell. It seems to me that on the question of the use of the word, there are some people here who think that the pleading includes such things, and others who do not. Now, there are other in use, and it does not make any difference what use we apply it to; if you want to avoid the issue, why not adopt Mr. Cherry's suggestion and strike out "as a pleading" and add "special applicable to the form and the contents;" thereby you would avoid the issue. Is there any reason later on in the rule for calling a motion a pleading?

Dean Clark. I will have to check that, because there are some other things that will have to be covered. Now, here is the point--I hesitate to throw this out: The rules as to the answer provide that the defendant must file his answer or other defense within 20 days. I think that amotion to make more definite is a defense.

Mr. Donworth. In order to bring about action by a

rule--

Mr. Olney (Interposing). You are going to open the whole matter to delay. When I read that I did not understand what was meant, but I suppose you had in mind requiring the defendant to answer, and if you wanted to facilitate that and avoid delay that is the thing to do.

Dean Clark. Of course, I think there is a danger, but I have covered that in my 5 and 6 in here. If that goes by the board, I think that had better be stopped.

Mr. Donworth. Well, you would have a rule substantially to this effect, that a man has a pleading and extends the time for the next pleading, subject to such terms as the court may impose. That is usually done by a motion to make more definite and certain, but it does extend the time, subject to the discretion of the court, and I think it ought to, because the complaint then is defective, and that should be the case for that reason.

Dean Clark. I have answered your question, Mr. Chairman. This will have to go back and be worked over, particularly on those questions of time, because this interpretation of time would automatically be taken care of, if this is a pleading, and it would not be if this was not a pleading.

Mr. Wickersham. Suppose the judge says, "Yes, I grant the motion to make more definite and certain, and I require that to be done in five days." Any judge that regards

himself as bound by the 20-days rule regards a motion to make more definite or strike out as being redundant.

Mr. Dobie. He may extend the time.

Mr. Wickersham. He may extend it or shorten it. He is not bound by the rules as to the time within which pleadings may be filed. This is as to the time in which pleadings may be filed, and I think you would run into difficulties there, and you would take away from the court plenary power, and I do not think it tends to make the proceedings simpler. I think the reverse.

Mr. Mitchell. I am not clear as to what you are driving at. Is there any discretion as to whether a motion to make more definite and certain is a pleading? Now, there is not any objection to taking either way out of that if you find there is any advantage in it. And the question I meant to ask you, Dean Clark, is whether the rule that his statement be considered as a pleading would upset some of the other rules. If it does, you can strike it out. If it does not, it would seem easier to take the statement, that it should be considered a pleading, in order to prevent the redrafting of other rules.

Dean Clark. I think it does upset some of the others, but that is not an incurable matter.

Mr. Lemann. As I understand it now, a motion is not a pleading, and I would not have to do that under the rule.

Mr. Dodge. The question is whether it is subject to the rule.

Dean Clark. My suggestion was that we put in that as to the rule and the content of pleadings.

Mr. Dodge. Why not leave those words out?

Dean Clark. I prefer that.

Mr. Wickersham. Pardon me there. How can you make a motion to strike, or to move to amend a pleading, subject to the rule regarding the form and content of the pleading? It does not conform. There is no reason why you should attempt to make it conform or not make it conform. I attack that because I say it is redundant, or it does not clearly set forth what the gide is as to that, and I ask that it be made more specific, or that certain things be removed. If that application is to conform to the rule of pleading, why should you attempt to use it?

Dean Clark. Well, it will not do anything more than it should do. We would start off with the heading as suggested, and have the pleading give the name of the case, the name of the court, the name of the docket on which this case would be a notion, and allegations divided into paragraphs, ending with signing by counsel, whi h signing shall be significant.

Mr. Wickersham. It would be significant that it is brought in good faith, but you overlook the fact that then

you must set forth a statement of facts, whereas the motion to make the complaint more definite and certain does not state that at all.

Dean Clark. That is a premise that we cannot accept, from the history of my own State. You accept the premise that that is necessary to a pleading. I cannot accept that premise, because I have lived for years where it is not necessary.

Mr. Wickersham. In Connecticut you are require to set forth in your statement the facts upon which you depend.

Dean Clark. Not in your pleading.

Mr. Wickersham. I find in Section 30 that the complaint must state a cause of action. I find in Section 33 that there may be separate causes of action. I find in Section 36 where there are separate causes of action; and so I find all through that they practically take a statement of requirement for those which are causes of action or defense.

Mr. Morgan. For specific papers, that was not called a pleading; that was called a complaint.

Mr. Wickersham. Well, is that not a pleading?

Mr. Morgan. Well, you admit that a demurrer is a pleading. What does a demurrer say?

Mr. Wickersham. The demurrer says that the complaint does not state facts constituting a cause of action. We have

abolished demurrers, and we have now a motion to dismiss.

Mr. Morgan. Well, if a demurrer is a pleading, a demurrer does not state the facts. It does do other things, like the motion to make more definite and certain.

Mr. Wickersham. From time out of mind a demurrer has been called a pleading, it is not, but it has been called such.

Mr. Mitchell. I would like to take a vote on the question whether the words "be considered as a pleading" be allowed to stand in Rule 19?

Mr. Loftin. I thought there was a motion to strike that out.

Mr. Cherry. I make that motion.

Mr. Mitchell. It is seconded.

Mr. Morgan. I will second it.

Mr. Lemann. Tell us how much more resistante there is. All we want to do is to make a motion to dismiss in the same category as a demurrer.

Mr. Mitchell. I am in favor of leaving the words in, on the statement of Dean Clark that he will leave them out where they interfere with some other rule. Is there any further discussion?

Mr. Dodge. It does not involve the amendment of other rules, if you just leave out the words "considered as a pleading."

Mr. Cherry. I think that is the motion.

Mr. Olney. In many Code States they have no notion of a motion as a pleading. They draw a sharp distinction between them. We had better avoid that question if we can.

Mr. Mitchell. I know. In my part of the country if the judge asks for the pleadings, everybody knows that he means the complaint, the answer, the reply, and nothing else.

Mr. Olney. Yes; and in view of the fact that there is a difference in the ideas on the subject of the provision let us avoid raising the question here.

Mr. Donworth. I am inclined to agree with Judge Olney, as a result of this argument, that being an innovation it is better to avoid it; but if you do strike out a reference to a motion as a pleading, you should have something like the following, which is the rule in many districts:

"A motion addressed to a pleading, or a demand for a bill of particulars or the items of an account, shall extend the time for the making of the pleadings next required on the part of theparty moving, until the decision of the motion, and for five days thereafter, unless the court shall fix a different time, and the court in granting or denying such motion may in its discretion impose such terms as it may deem proper."

That is what is actually done, as I understand, and I think it should be adopted.

Mr. Mitchell. Let us take the sense of theCommittee on the motion to strike out the words "be considered as a

pleading and."

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

Mr. Mitchell. That is carried. Now, the next question is whether the words "and shall be subject to the rules applicable to pleadings," ought to be limited to some particular kind of pleadings. Is there some ~~discretion~~ discussion about that?

Prof. Sunderland. How about having that say something like this, "the rules of pleading which are applicable thereto"; some are applicable to motions and some are not.

Mr. Donworth. How would you know?

Prof. Sunderland. It is easy to find out. There are the rules by which you can attack a pleading by a motion to make more definite and certain--

Mr. Wickersham (Interposing). Why is that necessary?

Prof. Sunderland. It seems to me it is very easy.

Mr. Lemann. It seems to me to make good sense.

Mr. Mitchell. It excludes the idea of a rule as to the time it shall be served.

Prof. Sunderland. Yes.

Mr. Mitchell. The rules relating to the time you are interposing an answer.

Mr. Wickersham. Why should you try to make any rules as applied to these motions? unless applicable to the pleading/

The office of a motion is to point out some defect in the pleading. Now, if it is not pointed clearly and fairly it will not be granted. It is unlike pleadings that tends to the formation of an issue which is going to be tried by the court or jury.

Mr. Mitchell. Perhaps Dean Clark can tell us what he had in mind in telling us it should be subject to the rules applicable to pleadings.

Dean Clark. The rules as to the time, the rules as to the form, the rules as to the signature, and the rules as to filing ~~pleadings~~.

Mr. Mitchell. What do you mean by the rules as to time? The answer has to be served in 20 days.

Dean Clark. The answer or other defense, including the motion.

Mr. Mitchell. Then a motion to make more definite and certain would have to be made in 20 days.

Dean Clark. Yes.

Mr. Lemann. I think the language leaves it doubtful as to whether it relates to this. You see, a large number of lawyers throughout the country will have to go to school over again over the rules. We have a small structure. If we had 48, we might have a different reaction. As I say, we must get by, because it is new; many of these rules will be new to a lot of people. We have to get them used to

these new rules. And we have to be guided by new considerations--first, getting simplicity in this thing so that it will accomplish the whole purpose intended. That is what we are here to do; and if we cannot do that we had better not go on with the job. Second, subject to that paramount first consideration, the second consideration, is that of confusing the bar; therefore the members of the bar would feel that if I were one, or two or three, or if we were ten, and everybody else was used to the other way, of course it is ~~easy~~ easier to take ten than forty. But we have got those difficulties to consider no matter what we do; and the first consideration will always be what is really going to make for simplicity and clearness.

Mr. Wickersham. That certainly would leave a great ambiguity.

Dean Clark. I suggest that this ought to be considered: Practically all the steps we have taken to date have been by the adoption of the New York rules. Now, as I sense Senator Walsh's objection, which stood for 25 years, it was that the code in New York was unsuccessful, and he did not want foisted on the country the procedure of the New York rules. And it seems to me that we run into a very great danger in Congress, when the objection can be made that the Committee is pushing along the line of the New York system. Now, we have many things that will be strange to the bar in

my own State. I am sorry that Mr. Loftin thought I had thrown him no sop--because I will be glad to throw him some; because the more we can get language that will meet the different points of view in the different parts of the country the better. But to date it seems I am very much troubled about following the New York procedure.

Mr. Wickersham. The New York procedure became very burdensome, and the recent forms of procedure were brought about by the infinite number of details in the procedure. It is true they were legislative regulations but the rules became a monstrosity by putting in all sorts of petty requirements that became necessarily exasperating to the bar. Now, we have a very great modification about the practice and the rules of practice. I will not enthuse about that, but they are a great improvement over the old code. Why should we try to impose infinite restrictions and try to make the motion papers part of the pleadings, or subject to the rules as to pleadings? Now, if you are going to bring an action in a Federal court under those, the question will be raised, "What does that mean?

Dean Clark. This is not a restriction. This is an enlargement.

Mr. Wickersham. I think it is a very great restriction. A man knows what a motion is to make more definite and certain, or to strike out certain things; but if that is

applicable to pleadings, the question will arise, "What does that mean?" That would bring up troublesome regulations. I do not se why you should ~~strike~~ surround a motion of that kind with all the regulations governing pleadings. It seems to me that is a matter of ordinary judicial procedure.

Mr. Mitchell. That clause is ambiguous to me, because I had asked the question as to whether you meant in that clause that the time within which a motion should be made is governed by the same rule as the time within which an answer should be made. I do not know by reading it; it is ambiguous and you cannot get away from that. It is so much that I object to having that same system applied to all of these documents as the complaint and answer, but the question is just what we mean by it.

Mr. Lemann. I was wondering if you could get away from the word "pleadings" and spell out what you must do with the other papers, and use some other expression. It could be spelled out by taking up each one of the things separately.

Dean Clark. I suppose that could be done. Of course, I attempted to make general rules applicable. There are several exceptions here which are not subject to these general rules. One thing is that this Rule 35--that may not be the exact one. I thought it provided for brevity and directness in stating the general principles. But of course, any other system might do that.

Mr. Wickersham. Well, Dean Clark, these motions with respect to pleadings are not very formal. When a man makes a motion for making more definite and certain, he says, "Here is a complaint that contains certain allegations, but it is not clear whether he is trying to do this or that, and I want it to be made clear." That is a very simple form of motion. I remember hearing a man asking in the United States District Court for such a motion, and the judge said the motion was for a bill of particulars, instead of a motion for making more definite and certain; and the judge said, "Would you rather have a motion for a bill of particulars, and if so I will consider that," and the man said, "I have not made that motion." And the judge said, "Yes, you have, because you are entitled to some further explanation of what the plaintiff desires and I will give it to you in whatever form you like, by making the complaint more definite and certain, or by bill of particulars." But those are separate forms of application. They are not pleadings, but sometimes a motion is a pleading, and I do not see why we should surround them with technical difficulties.

Mr. Lemann. Well, on this general subject, how about the statute of limitations? A man sues me, and I have a number of defenses to put in. Am I right that under Rule 26 that could be brought up separately by motion, or by pleading? I do not have to wait for my answer if I want to do that under the last paragraph of Rule 26. I bring that up now, for

general light on the subject of how this thing will work.

Dean Clark. That could not come up under Rule 26, because that goes to the merits of the action.

Mr. Lemann. Well, is that on the merits? I wondered what that meant.

Dean Clark. I take it that Prof. Sunderland has provided for taking up the question of that kind on motion. But that is a summary proceeding.

Mr. Morgan. That is 112 and 113 in New York now.

Dean Clark. Yes.

Mr. Mitchell. Mr. Morgan, are there any special actions that you want us to take up?

Mr. Morgan. No.

Mr. Wickersham. Just to bring up the subject, I move to strike out the words "and be subject to the rules applicable to pleadings," at the end of Rule 19.

Mr. Lemann. We voted on the other one.

Mr. Wickersham. Yes, we voted on the other one.

Mr. Olney. Your motion is to strike all out after the first sentence of Rule 19 "any application to the court for its order prior to trial shall be by way of motion."

Mr. Loftin. Prof. Sunderland, what was the language you suggested in lieu of what Dean Clar had written out?

Prof. Sunderland. My suggestion?

Mr. Loftin. Yes.

Prof. Sunderland. There were some questions asked as to the validity of my suggestion, and one of the things Dean Clark said he thought was included I did not think was. (Laughter.) I withdraw my suggestion.

Mr. Donworth. I second the motion.

Mr. Mitchell. That clause is ambiguous. If you strike it out, it may be necessary to make some special rule regarding motions, or put in another clause here. But we will take a vote on it. All those in favor of striking out all after the word "sought" in Rule 19 will say "aye"; those opposed "no."

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

Mr. Donworth. I have no private opinion about this objection. I think in view of the fact that the pleadings has gone out, we must provide for the case where a defendant moves against the plaintiff, and the court rules against the plaintiff, and so on, and my understanding is that the actual practice is important in connection with what I hastilywrote--and I do not know whether it is a proper proceeding or not; I do not know whether it would be a proper proceeding to refer this to Dean Clark for further suggestion. But I will say it again. It is my idea of how to take care of the provision, (Reading) "That the defendant shall answer," and so on; I will read it again:

"A motion addressed to a ~~the~~ pleading or a demand for a bill of particulars, or for the items of an account, shall extend the time for the making of the pleading next required on the part of the party moving, until the decision of the motion, and for five days thereafter, unless the court shall fix a different time, and the court on granting or denying such a motion may, in its discretion, impose such terms as it may deem proper."

Those terms might be nothing or everything; if it was purely frivolous it might be of serious character, and I think that is essential, if we are going to know what to do with a complaint that ~~is destructive~~ we think is obstructive. What does Dean Clark think about it?

Dean Clark. I think it has got to be covered somehow, and I think very likely it is all right. I would just as soon have a chance to go over it and consider it and compare it with various rules, although so far as I know now it is all right.

Mr. Mitchell. If there is no objection, it will stand referred to the drafting committee for further consideration.

Dean Clark. Yes. We thank you very much.

Rule 20.

Mr. Mitchell. Rule 20. What do you mean by "the first adversary party on each side"?

Mr. Donworth. Well, John Brown et al sues Richard Jones et al. Is that the idea?

Dean Clark. Yes.

Mr. Morgan. Well, if the case is Jones against Smith, and everybody else in the action in the beginning, but should he not have the names of the parties who are brought in later?

Mr. Donworth. It seems to me that in the first pleading, the complaint, the full names of all the parties should be inserted in the title.

Mr. Morgan. That is the usual rule.

Mr. Donworth. And after that you can make use of the expression "et al."

Mr. Morgan. That is the general practice.

Mr. Wickersham. Yes, because the pleading has got to state who the parties are.

Mr. Donworth. That would come inserting ~~by answer, and~~ after the word "pleading" in the fourth line of Rule 20, substantially this language ~~would be used~~: "In the pleading the title shall contain the names of all parties."

Mr. Wickersham. Well, does not the paragraph on the complaint cover that?

Mr. Donworth. That is not covered there.

Dean Clark. That is Rule 23, I think.

Mr. Morgan. Rule 23.

Mr. Wickersham. No, that does not apply.

Mr. Dobie. It uses the word "caption."

Mr. Morgan. Rule 23.

Dean Clark. No, it is Rule 25; it is not Rule 23.

Mr. Wickersham. That is on joinder.

Mr. Morgan. It says, "Either the plaintiff or the defendant."

Dean Clark. It says, "The usual caption;" that is carried over under Rule 23.

Mr. Mitchell. The Equity rule requires the residence of the defendant.

Dean Clark. And I could not see why you need it in the caption.

Mr. Mitchell. What is your pleasure about Rule 20?

Mr. Wickersham. I want to ask Dean Clark whether he takes out those words in brackets. Did you mean to exclude those?

Dean Clark. I put those in in the alternative. The first two suggestions have been covered by Mr. Donworth's suggestion. I was raising the question whether you need all the names. As it is now, you will have the word in brackets, and then add the further time for the plaintiff that he is given. The next one is the word "transactions" or "occurences." I just gave you two nouns meaning substantially the same thing. The word "transactions" is used very often with a certain significance. That is familiar. I think

I prefer the word"occurences" because it has not the moss that is attached to the word "transactions." But I do not think it makes very much difference. here, except that the phrase will occur later, because you will note that the separate statement is only an admonition here, and there is no particular penalty for not doing it. I have definitely tried to do away with a fight over a simple statement. And so I put it in this way: "Each defense shall be separately stated and numbered where such separation is desirable or necessary for the clear presentation or adequate understanding of the matters set forth." That is, in other words, now, after the admonition, I do not believe there is much chance of having a fight over it, whether you have a separate statement or not, which I think is one of the several useless things that can occur in your pleading.

Mr. Mitchell. The word "transactions" is a common dxpression in joinder, and perhaps might be used instead of adopting a new terminology.

Prof. Sunderland. You might use both.

Mr. Mitchell. That is quite all right.

Prof. Sunderland. To get away from a technical definition.

Mr. Tolman. Something that occurs is something that happens. I think they both apply.

Mr. Wickersham. Is that not in effect, anticipating what I was

going to suggest by using in these cases the words ~~used were~~ "cause of action," which Dean Clark, in drafting here, has generally boycotted, and which I think is very essential. Suppose we pass Rule 20 until we come to discuss a little further on Rule 23, which is the content of the complaint, and so on.

Mr. Olney. I quite agree with Mr. Wickersham, in regard to that; but you want some such thing in as this, "Each defense shall be separately stated." Now, each affirmative ground of defense should be separately stated, but the denials of the allegations of the complaint--there may be several denials, any one of which is sufficient to end the action. They are all one and they need not be separately stated; but where one has affirmative defenses, those should be separately stated.

Mr. Morgan. Do you provide for a general denial, or do you abolish general denial?

Dean Clark. They may have abolished the general denial; that is for youto decide.

Mr. Dodge. It seems to me that Rule goes into unnecessary detail. They did not find it necessary in the Equity ~~Code~~ rule to provide that a copy of the documentshall be annexed to the pleading, or that the answer must refer to the paragraph of the bill by number. Cannot we assume some of those things, and rather follow the more simple form of the Equity rule?

Dean Clark. The important thing is that the more

important of these rules were thought over, and I was trying to avoid the possibility of a fight. I think you can do most of those things myself.

Mr. Dodge. You must insert a copy of the document sued on.

Dean Clark. I mean under the procedure in several States you cannot do it.

Mr. Morgan. The common law rule did not allow it. You could not plead it at common law and some of the States do not allow it.

Mr. Wickersham. Why not have the provision in the New York practice act, to the effect that if you should sue on a written instrument for payment of money you usually simply insert a copy of the instrument.

Dean Clark. That is covered, though not as completely, perhaps, as desirable, but later by a general rule. I think you should have ~~that~~ in mind several of the rules. Rule 35 is a series of things.

Mr. Wickersham. Rule 35, General Rules of Pleading.

Dean Clark. Yes.

Mr. Wickersham. That is true.

Dean Clark. And you want to look this over. Well, there are several of the rules here--Rule 23 on the complaint.

Mr. Mitchell. Then let us pass over Rule 20 and get back to it.

Mr. Wickersham. Yes.

Mr. Mitchell. Rule 21, Signing of Pleadings.

Dean Clark. Now, this is the Equity rule as to signature of counsel, and tries to make it even more exact, and the main object is very definite, to do away with the form of verification, which, unfortunately, tends to be I think just a formality.

Mr. Donworth. There is one thought in this connection; it is going to be hard on the lawyer, and I think on his conscience. When you find these things in your complaint and go over things you find certain things that are true and you find certain things that you can safely deny. Then there is a middle ground, where you say, "That is dangerous ground"; we do not know; we are not sure that is so. Let them prove that. Now, if you deny that, the lawyer must certify in effect that he believes the allegations false, and some of them may be true. Now, it is my practice to deny a lot of things that the other man ought to prove, but that are doubtful; but I thought this may be a small matter, and in the end of the sixth line it says, "In matters alleged or the denials made therein are true." I would strike out the words "or the denials made," and then following the next three words, and then add "which contains no denial of matters admitted to be true." I do not see how lawyers can

get along without denying things in the doubtful ground, although they may be true.

Mr. Lemann. The Equity rule is much more limited, "that upon the instructions laid before him regarding the case there is good ground for the same." Of course, that would not give you any breadth. Of course, you never can be sure. You might say theoretically. You might tell your client to deny--you may tell him "This may be true but you ought to deny it." But ought you professionally to take that stand? "I am afraid you are not telling the truth, and so far as my belief is concerned, I do not believe you." What will happen in practice is that they will go on as they have been doing. It is just a question of whether you want to make this a form of words or not. Because the practical result would be that the lawyer would not feel that he could tell his client.

Mr. Mitchell. Why is not the Equity rule all right to adopt?

Mr. Morgan. One of the things you are trying to get away from is the English practice, and what most people will look at ~~the ways of trial~~ as a waste of time. It is a matter of merely putting the plaintiff to his proof at common law, and the defendant always had ~~to be~~ right. He could not strike out the general issue as a sham. And it is considerably reduced. It was tremendously reduced in New York. If you will read the article by Earl Herron,

on the difficulties of proof, in the Yale Law Journal, you will find a case where one man in a case was compelled to spend two weeks proving delivery, and when the defendant's witnesses came in they said, "We will admit delivery" although he refused to admit delivery up to that time--I take this that this is just an attempt and means to cut that down, and certainly it is no advantage to make the lawyer state that to the best of his knowledge information and belief the denial is true.

Mr. Donworth. I do not understsnd that that is what it does.

Mr. Mitchell. Yes.

Mr. Morgan. Yes, that is what it says; it just requires that statement by the lawyer and verification by him.

Mr. Lemann. It puts too much on the lawyers.

Mr. Morgan. Most lawyers do not do it.

Mr. Lemann. I would not want it in my practice, because I have sometimes done wrong when I thought I was right. Of course, those cases like you put cause trouble. But those are not hard cases and this penalizes the honest lawyer.

Mr. Dodge. You have in mind cases in which there is grave doubt as to being able to prove it, and you are not in possession of all the facts, and do not know whether you can honestly say that you really believe that to be true. You think it may be, and you hope it will turn out to be.

Mr. Morgan. Will the English master allow you to put that in your pleading?

Mr. Dodge. I have no doubt he would.

Mr. Morgan. He is not giving evidence. The master determines what the issue shall be.

Prof. Sunderland. I do not think so. They do not try.

Mr. Morgan. They do not try, but do they not make ghe issue what the real question is?

Prof. Sunderland. No.

Mr. Lemann. Of course, this is the easiest practice; the more conscientious the attorney is the more hesitant he is as to the form of the words.

Mr. Dodge. The Equity Rules are as far as we ought to go on that, if there is good ground for filing the pleading.

Prof. Sunderland. I think the cure is through discovery.

Mr. Morgan. Yes, Mr. Dodge, I accept that--it is good ground for filing the pleading.

Mr. Mitchell. There is a motion to substitute the Equity rule on that.

Dean Clark. I could insert that, but the rest of the rules is worth saving, and it does not seem to me very severe. It seems to be required of counsel. And I would hate to lose the whole rule. And I can add this particular point.

Mr. Morgan. You have it in there, that there was good ground for filing the pleading.

Dean Clark. Yes.

Mr. Lemann. And where you have instructions regarding the case that is very important.

Mr. Morgan. Yes.

Mr. Mitcell. Have we settled this last point?

Mr. Donworth. Limit the change to the language criticized.

Mr. Dobie. That takes in the language "to the best of his knowledge it is true" and substitutes the language of the Equity rule.

Dean Clark. It is with particular reference to the denial.

Mr. Mitchell. "that upon the instructions laid before him regarding the case there is good ground for the same."

Mr. Tolman. In these actions do we want those words regarding instructions? That comes from the English practice of instructions and powers.

Mr. Mitchell. Yes.

Mr. Tolman. I think this rule covers it if you strike out the words "the matters alleged or the denials therein are true"; strike that out, and it will then read: "That to the best of his knowledge information and belief there is good ground for filing and supporting the pleadings." That

would be the modern language of the Equity rule.

Mr. Morgan. Right.

Mr. Mitchell. Yes. Is that seconded?

Mr. Morgan. I second that.

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

Mr. Mitchell. Now, Judge Olney, I would like to bring before the Committee for consideration at this point this-- Dean Clark has drafted this rule so that the signature of the attorney implies the various things that he is discussing, or his client in this is really making a certificate to that effect. It occurs to me that it would be really more effective if he were required to make the actual certificate at the time, so that instead of his signature merely implying it, he should sign such a certificate on a pleading. I have a feeling that it might have some salutary effect. I do not believe that putting this into the rule is going to have very much effect. You might take a practical view of that. But if it is in there as a certificate, many a lawyer will be a little more careful.

Mr. Dobie. Do they not have some such practice as that in a bill in equity in New Jersey?

Mr. Olney. I do not know.

Mr. Dobie. They do have chancery courts, and they have a rule in connection with a bill in equity along the

line you suggested.

Mr. Olney. We had to have one the other day, in connection with a pleading, and I really sat up and took notice when I signed the certificate.

Mr. Lemann. I think that is right. I think we should have a requirement that requires the certificate. And I think if you just put it in these rules it will not have much effect; but the chance of its having effect will be improved by making the man sign it.

Dean Clark. I have no particular objection to that. But I have a little feeling that suffers from anything in the way of a formula. That is the reason that I did not want to have an oath put in. It seems to me that if you verify it by an oath, it takes away from the pleading. I suppose that gets to be the form, not the law, and stationers will sell you blanks with that in it.

Mr. Morgan. Yes.

Dean Clark. Then suppose you have not got the certificate on; what are you going to do about it? What penalty is there? Anything that just savors of words, I am not sure means much, and makes the danger very real--

Mr. Morgan (Interposing). A penalty for lack of verification may be required.

Dean Clark. Well, I assume in that case you might treat the pleading as nothing, or might demand that it be

verified. That is one of the difficulties.

Mr. Morgan. Well, the practice I am familiar with is that the party receives it, and the other party receives his, and there would be no default in pleading.

Mr. Wickersham. That is only where the complaint is verified and the answer is not.

Mr. Morgan. Yes.

Mr. Dodge. I should be inclined to leave those words in the Equity rule rather than have it under the typewritten pleading as filed.

Mr. Dobie. They would have a rubber stamp to support this system unquestionably if you did that.

Mr. Lemann. I do not think it is important enough to take much note of.

Mr. Mitchell. Well, there is no motion made about it. We will now take up Rule 22

. Mr. Loftin. Before you do that, I wanted to ask Dean Clark about the words in the second line of Rule 21 in brackets "one or more of."

Dean Clark. I think we ought to settle that. Shall we leave it simply "The attorneys of record," or shall we say "one or more of"? If you say "attorneys of record", where you have many counsel all would have to sign.

Mr. Mitchell. "One or more" is the Equity rule. Why not leave it in?

Mr. Donworth. Some of the lawyers are in other States.

Mr. Lemann. Does this apply to motions? (Laughter.)

Mr. Loftin. I make a motion that it be "one or more".

Mr. Mitchell. All right, that will be accepted. The next is Rule 22.

Rule 22.

Dean Clark. You will note on this that the provision for amendment--I tried to make it very broad, and I have suggested in a footnote, "In view of the foregoing, the following, which is 28 U.S.C., 767, in substance, is thought to be unnecessary" and so Rule 22 as now drawn is supposed to cover the ground of those two sections, 767 and 777, and they are not repeated in the rules. They appear on the left hand page.

Mr. Morgan. You do not think it is advisable to allow ~~the other side to~~ an amendment as of course after the opposing party has pleaded? There are a good many codes that allow amended pleadings to be served as a matter of course within the time specified for a responding pleading.

Dean Clark. Well, of course, there is some argument for doing that. I chose the other course on that. In the first place, the judge would always allow it when there was any real question, and second, that making it as of course might give a chance for delay, and this speeds up a little more.

Mr. Morgan. Well, as I understand, you do allow amendments after pleading where the action has not been assigned for

trial.

Mr. Loftin. Only by leave of court.

Mr. Morgan. Only by leave of court.

Mr. Loftin. Yes, of course.

Mr. Mitchell. Yes.

Mr. Lemann. Suppose you leave out "by leave of court." Suppose there is an amended complaint after an answer has been filed. Is there any provision for an answer to the amended complaint, or do you think that could just be left to the judge's order when he gave authority to amend? There ought to be some provision.

Dean Clark. I cannot say for the moment what we did about that. I have the feeling that I put that in, but I am not sure.

Mr. Olney. I think you did.

Dean Clark. It is Rule 32, I think.

Mr. Mitchell. What do you mean by "assigned for trial"?

Mr. Dodge. I am was going to ask that very question.

Mr. Mitchell. Yes, it is a phrase that does not mean anything special; perhaps it does mean something in some jurisdictions.

Dean Clark. Well, perhaps it does. But perhaps we had better change it.

Mr. Morgan. That is the Connecticut practice, "assigning it for trial." They have a special term or session

every week, and assign cases for the next week ahead.

Mr. Mitchell. Assigns them, not for a date certain, but for the week?

Mr. Morgan. For the week. That proves that it is not very general.

Dean Clark. I think Major Tolman's suggestion all right--"the action has not been set for trial."

Mr. Tolman. That would shorten it.

Mr. Dodge. What do you mean by "set for trial"?

Mr. Lemann. When you get on the calendar, are there weeks waiting for trial? I once waited in New York a long time.

Mr. Mitchell. I suggest that that phrase be referred back to the drafting committee, to have some phrase that would more universally understood.

Mr. Loftin. Getting back to my original inquiry about amending pleadings, as I read the first paragraph, it says, any party may amend as a matter of course by filing such amendment in the clerk's office, provided that the opposing party has not pleaded in response to the earlier pleadings, or where no later pleading is "provided for." Now, suppose there has been a complaint and answer filed, and issue is joined, and the plaintiff sees fit to amend his complaint. As I understand the rules, he can do that as a matter of course.

Dean Clark. No; he cannot do it then; the defendant could amend his answer, if it took all this time.

Mr. Morgan. You see it says, "or where the action has not been set for trial."

Dean Clark. Of course, he may by leave of court, or by consent of the parties at any time do it. That is, there is another method of amending, by leave of court, or by consent of the opposing party.

Mr. Donworth. In the last part of that first paragraph it says "before its filing, or by keave of the court." Would you insert before the words "or by leave of the court" "or by the consent of the parties at any time"?

Dean Clark. Well, I intended to cover it by another provision. Do you mean"at any time" is better?

Mr. Donworth. No. I mean where it says "may amend by consent of the opposing parties signified in writing." My idea is that before or after filing--in either case--you can do it by leave of court; and so I think it would be more plain if you said "by leave of court."

Mr. Cherry. If you put in "by leave of court" it would not be lost so much--"in all cases parties may amend by leave of court or by consent." "By leave of court" in this seems out of touch.

Dean Clark. I think you are right about that.

Mr. Lemann. Would you leave it by endorsement or

otherwise?

Dean Clark. Yes, but it is not necessary. The only thing then is to make it more clear. It is not necessary.

Mr. Mitchell. The words "or otherwise" do not make a very definite provision.

Mr. Lemann. Sometimes the local lawyer just wants to stick on a possible amendment.

Mr. Wickersham. Have you finished with the first paragraph? If so, I would like to ask what the difference in your mind is between the phrases used in the second and third paragraphs? In the second paragraph it says "to be amended" and so on, by "changing the ground of action or defense or adding new grounds or causes of action and claim for relief or new defenses."

The next paragraph, the third paragraph, says that, "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 defense asserted", and so on. Ought that not to be "cause of action" in each case?

Mr. Olney. As to that last paragraph, which provides that it shall relate back, it is hardly necessary for us to pass on that, because it affects the substantive right of the parties. The courts have passed again and again on the amendments, and when they take effect, if it is a new cause of action, it does not relate back, so far as the statute of

limitations is concerned.

Mr. Wickersham. I wanted to get from the reporter a statement of what he regards as the difference.

Dean Clark. I was talking of the language. Of course, you are talking of the substance. I have tried to get away from the term "cause of action," because it seems to me that that is one of the most misleading phrases that we can think of. It has caused trouble wherever it has been used, and I have myself been guilty of not knowing what it means, and ~~when~~ a good many people did not know what it meant; and when I tried to explain to them and found out what they meant, I could not understand what they meant. Therefore, I have tried to kill that phrase off. I have added here, and I think it is the only time I have added it, as a sort of catchall, a provision that you can amend anything, which is the theory I think in any litigation between these same parties. The only question is as to the effect of the statute of limitations which Judge Olney raised, which is covered in the last paragraph. But the reason I am putting in the last clause of the last paragraph was for fear that if I left it simply "ground" alone, some judge may turn out--Illinois, perhaps, where they are stricter, and may say, "I do not see any new ground", but a new cause of action." And it is on that ground that I added the objectionable phrase here.

Mr. Wickersham. What I meant particularly was that in the next paragraph you said, "amendment shall held to relate back to the date of the original pleading so amended whenever it appears that the right of action or defense is asserted," and so on. Do you mean that that is synonymous with "cause of action" as used in the previous paragraph?

Dean Clark. I intended something more than the cause of action in the second paragraph. Here there is something more than simply the right to raise a complaint or defense. In other words, I intended a new ground of action, or a new defense. That is, suppose A and B are suing in matters of Federal jurisdiction, and A has another affair entirely? Why should he not put it in the same suit with B? There are later on provisions for ordering a separate appearance; but the whole theory here is that you had better get your matter at issue between the parties settled as soon as possible.

Mr. Wickersham. Well, I think it wouldlead to ambiguity.

But the next question I shall address myself to is this "cause of action." Now, I know the objection that exists to "cause of action", but the substitute phrase was much more rigid. Cause of action is used in practically every code. Of course there is a lot of literature on the subject. The Dean has written about it and a great many other people.

Mr. Morgan. Did you read McKelsky's article?

Mr. Wickersham. Yes.

Mr. Morgan. Did you know what he was talking about?

Mr. Wickersham. No; but I believe that there is not a single code in which there is not some such provision as is found in the old Code of Civil Procedure adopted in New York 1848, that the complaint shall contain a statement of the facts constituting a cause of action in orderly and precise language, without repitition, in order to enable a person reading it to know what is intended. I do not think that has ever been improved. Dean Clark cited in his article written in 1933, in the Yale Law Journal, the definition of cause of action by Phillips as being "operative facts giving cause or ground for judicial interference." That struck me as a pretty good description. An there is another article in the Yale Law Journal, Vol. 88, which objected to discarding terms which have become so much a part of the rules as to make such discarding inconvenient. Well, you have got it in Connecticut. You have got it in their practice. You have it in practically every code, and I think you would venture into an unknown sea when you try/some other ~~maknexxxf~~ description. In general, it is as well understood as any other term, despite the controversy over it. "Facts constituting a cause of action or defense."

Mr. Mitchell. Do you think we should take that sort of problem up? It is a serious one. I realize there is

a controversy about "cause of action," and I know there are a diversity of views about it. And coming back to Mr. Morgan's suggestion, it seems to me that that is a thing that we might very well take up at another meeting, when we deal with matters of phraseology and expression.

Mr. Wickersham. Does it not go beyond mere phraseology?

Mr. Mitchell. I do not think it is anything but difference of opinion as to whether the words "cause of action" is a scientific and accurate way of describing a question of thought. That is what it really amounts to, and I think it is important to decide whether you will use such a phrase or not. You have considered only 22 rules so far and you have 86 more to consider. At that rate, it will take ten days to go through them. But I would like to see it more accurate as to the choice of words; but that is for some other occasion.

Mr. Wickersham. I am quite willing to note an exception and go on. (Laughter.)

Mr. Mitchell. We will allow the exception.

Mr. Donworth. Mr. Chairman, I would like to inquire, in connection with the division between Rule 22 and Rule 25. As I understand Rule 25, you can sue a defendant on a promissory note, and also for injuries growing out of an automobile accident.

Dean Clark. That is right.

Mr. Donworth. And so on. You can bring in any transaction that resulted in liability. I wanted to make that plain.

Dean Clark. That is quite correct. In the section on joinder of claims, you can do the same thing, subject, however, to rather free power in the court to order a new trial; or, in other words, it is better to get all the sores healed at one time.

Mr. Wickersham. Our courts go so far as holding that by amendment you can insert a cause of action that would have been barred by statute of limitations if in an original suit.

Dean Clark. Of course, you just had a statute passed.

Mr. Wickersham. But before the statute.

Dean Clark. New York took it as a half-way measure between the rule of England, and stuck to their own rules regarding joinder of classesin these six or seven classes, which seems to me horrible, which limited the joinder of parties provision by the joinder of actions section; but we did feel that the joinder of actions section is rather free.

Mr. Morgan. Would this allow the addition of a cause of action which arose after the original action had begun, or are you limiting it to a cause of action in existence at the time of the original action?

Dean Clark. No.

Mr. Wickersham. You can do that by supplemental complaint.

Dean Clark. There is a provision for supplemental pleadings later on.

Mr. Morgan. It would be a supplemental pleading rather than an amendment by addition.

Mr. Mitchell. What is the pur ose of speaking of the amendment that relates back?

Dean Clark. That is to answer the point as to the statute of limitations. That is the question that Judge Olney raised, and there is a lot of litigation about it, andif we can make it clear we want to do so.

Mr. Mitchell. It introduces a new cause of action.-- Excuse me. (Laughter). I was brought up in that feeling. I understand that you cannot by amendment introduce claims barred. That is clear enough.

Mr. Morgan. That is the whole question, whether it is a new cause of action; and in the Kinney case Mr. Justice Holmes said that you ought to be astute enough to say if it was a new cause of action, if it was based on the same occurrences.

Mr. Mitchell. I would understand that. Now, I would like to make a point about the second line. You only mention serving the amended pleading. How about filing it?

Dean Clark. This is another thing.

Mr. Mitchell. You will have to provide for service by serving the other side, because nothing can be filed.

Dean Clark. Is this a pleading?

Mr. Wickersham. Which rule are you speaking of?

Mr. Mitchell. Rule 22, which says a party may amend a pleading filed by him. Well, he may not have filed it.

Mr. Wickersham. For service.

Mr. Mitchell. Yes, for service; and then it says "by filing such amendment." There is no need of filing.

Mr. Morgan. May it "service."

Mr. Mitchell. That is clear enough. Now is there anything else in Rule 22?

Mr. Olney. Should not that last paragraph in Rule 22 go out?

Mr. Mitchell. Why not leave that matter to the court to decide in proper cases? We are trying to lay rules here of procedure, and then we say the effect of the statute of limitations can be so-and-so. Am I correct?

Mr. Morgan. Your question is when they allow an amendment whether the statute of limitations is barred?

Mr. Olney. Certainly.

Dean Clark. This follows the Federal case. Of course, there is something in what Judge Olney says; but if it appears by a few words you can save litigation--and we hesitated to put them in.

Mr. Olney. The trouble is that I do not know what the effect of these words will be and it may be that they will work badly.

Mr. Donworth. I had a concrete case. A young man worked in a factory. He lost a part of his hand. He sued the company, alleging that it was an unsafe place to work. He lost at the trial but got a new trial.

Now, at that stage of the case, he moves to amend his complaint, by alleging that the defendant failed to instruct him, a new employee, as to the method of operating the machine. The court refused to allow him to amend, because it was a new cause of action; that furnishing an unsafe place to work was a very different cause of action from neglecting to instruct the new employee. Now, this would say, "growing out of the same transaction" and you could proceed in this case.

Mr. Dobie. There are a number of those cases. In one case, the complaint alleged that the railroad coupling was unsafe by reason of its being an inferior type of coupling; and in another paragraph of the complaint they said it was a bad specimen of its type of coupling. And I think that was a good precedent, and if we can adopt that kind of a suggestion I am in favor of it.

Mr. Mitchell. In those cases where a railroad is sued for personal injuries, and it is not alleged that it was in interstate commerce, and you bring it under the liability act, and then if it is in interstate commerce, the court holds that the cause of action is different; and that is the point you are trying to cover, and it is a very good thing to do.

Mr. Morgan. In those cases the Supreme Court is going to decide according to the rule and according to the decisions.

Mr. Dodge. I suppose a party includes in a suit on two promissory notes; and on one he has not brought it until

after the statute of limitations has run. Can he bring that up in connection with his complaint on the other note?

Mr. Dobie. That is two causes of action, and you can certainly sue him in the one case but in this other case you cannot.

Mr. Dodge. Well, I do not think so.

Dean Clark. It is merely a matter of construction about what you mean by putting it in. That second clause is subject to the statute of limitations. If your defense is not filed, he can go ahead and recover on it.

Mr. Dodge. It is not provided by the statute that it relates back.

Dean Clark. Well, the only ones that ~~do not~~ relate back are in the final paragraph.

Mr. Dodge. That if two causes of action are set up in the original plrading.

Mr. Wickersham. Now, suppose two promissory notes were given at the same time, arising out of the same transaction, and suit is brought on one of them after the period of limitation has expired on the other. The plaintiff seeks to add the other on his complaint. I understand that under this paragraph that is/~~suggestable~~ just what he can do; because it arose out of "the transaction or occurrence set up or intended to be set up in the original pleading."

Dean Clark. Well, of course, on this point I recognize

that our language here will not be final on the courts.

Mr. Wickersham. Well, ought we not to proceed on the assumption that it is ?

Dean Clark. I do not think it is.

Mr. Morgan. Every proper amendment relates back, ordinarily.

Mr. Wickersham. Yes, it would by the terms of this statement. I do not know whether we ought to consider whether it is desirable to do that. That is what the New York Court of Appeals held could be done under the New York Practice Act. I think that the bar at the time thought that that was a strained thing and going too far, in avoiding by interpretation the effect of the statute of limitations. An argument could be made on both sides.

Mr. Olney. Is not the difficulty with such cases as have been referred to here by Judge Donworth and Mr. Dodge-- that the courts erroneously rule upon it? Now, it is within our province to provide ~~that~~ rules that will prevent incorrect rulings, so far as we can by the court in matters of procedure. But when we try to agree on a rule as to the effect of the statute of limitations, we are going outside of our province.

Mr. Mitchell. I think that is true.

Mr. Lemann. The procedure rules we have adopted are in the Federal courts. Suppose we take the united view on

this question on the local law. We are trying by united action in the Federal court to prevent them from doing it, and that is trying indirectly, it seems to me, to reach a matter over which we have no jurisdiction.

Mr. Mitchell. The only purpose here is to effectuate the statute. That is not a mere incident.

Dean Clark. That was the purpose. There was a case in Illinois, which was a case where, notwithstanding the rather broad rule of amendment allowed generally in the United States Supreme Court, it was held, as I understand, under the Conformity Act, that they must apply the narrow rule in that case.

Mr. Morgan. The last decision under the Employers' Liability Act was that where it was on the injury, and the injured employee died while it was on appeal, by the time the executor got back he was not allowed to amend by adding the wrongful death. He could recover for the pain and suffering of the decedent, etc., under that part of it; insofar as the Employers' Liability Act provided for survival he could recover on that. But what he did was to allege the death, and ask for damages under Lord Campbell's Act. The provisions of that act are just like Lord Campbell's Act, and he got a judgment, which was united, with no separate judgment on each one of those items; and the Supreme Court of the United States reversed that and sent it back, and said all he could recover for was the pain and suffering.

Mr. Olney. Was that because of the requirement of the local statute?

Mr. Morgan. No, it was under the Federal Employers' Liability Act.

Mr. Mitchell. What is your view about Judge Olney's point? Now, we have here a statute that authorizes us to make rules of practice and procedure, and not to change the substantive law.

Mr. Morgan. Yes.

Mr. Mitchell. And now we have a clause, that may be a nice rule, of effectuating the statute of limitations--but can that be done under the decisions of the Supreme Court?

Mr. Morgan. I think we have nothing to do with it.

Mr. Mitchell. You think this Committee states the law anyway?

Mr. Morgan. Yes, I do not think one suit could be brought on two separate promissory notes; it is where you are making another description of the same general occurrence that you can.

Mr. Wickersham. But here you have the phrase "arising out of."

Mr. Morgan. Yes.

Mr. Wickersham. Under this, you could do it.

Mr. Morgan. Yes.

Mr. Mitchell. The question is whether we shall put

in a clause whether we like it or not. It is a mere attempt to change the statute of limitations.

Mr. Morgan. I think it is outside our province, if you want my opinion about it.

Mr. Olney. I move that that last paragraph be left out.

Mr. Dodge. I second the motion.

Mr. Mitchell. The motion is made that this last paragraph in Rule 22 be stricken out, on the ground that it is outside the province of this Committee, and relates to the operation of the statute of limitations.

(A vote was thereupon taken.)

Mr. Mitchell. The vote was 8 in favor of it so that it stands. Is that all on Rule 22?

Mr. Loftin. What was the vote on?

Mr. Mitchell. The decision was that the paragraph remain in.

Mr. Cherry. I think we should count that again, Mr. Chairman.

Mr. Morgan. I think you counted Mr. Cherry and Mr. Loftin on the wrong side.

Mr. Mitchell. All right. Those in favor of striking the clause out as outside the province of this Committee will raise their hands.

(Seven members of the Committee raised their hands.)

Mr. Mitchell. There are 7 of those. Those in favor of leaving it in will now raise their hands.

(Six members of the Committee raised their hands.)

Mr. Mitchell. Six members have voted in favor of leaving it in. So that it will be stricken out.

Dean Clark. What shall I do? Shall I forget it, in view of the closeness of the vote? The Major has a memorandum on it.

Mr. Lemann. Where we divide so closely, perhaps the Court ought to know. If Mr. Gamble were here, he might vote the other way; and it seems to me that one vote is a very small majority.

Mr. Loftin. I suggest that you put it back.

Mr. Morgan. Just keep out those promissory notes.

Mr. Wickersham. Those are the ones that I think ought to go in.

Mr. Lemann. In any case, where we vote so closely, would it not be desirable to have a memorandum made for the Court as to the closeness of the vote.

Mr. Mitchell. I should think so.

Mr. Olney. And if they go out on a close vote, the Court ought to know that.

Mr. Donworth. This clause would be appropriate in a statute, or would be appropriate in a statute of limitations,

or be appropriate in an act regulating ~~the acts of~~ actions or proceedings, and if I am right we should try it from our point of view and see it carried out.

Mr. Mitchell. The Marshal wants to know if we are going to have a night session.

Mr. Wickersham. I think we ought to.

Dean Clark. I second the motion.

Mr. Mitchell. Is that the general sense of the meeting that we have an evening session tonight?

Mr. Wickersham. I so move.

Mr. Mitchell. Then it will be 8 o'clock.

Mr. Donworth. I suggest that we adjourn at 5:30 o'clock.

Mr. Mitchell. Tomorrow morning? (Laughter.) We can sit from 8 to 10 o'clock tonight. Well, I think Mr. Lemann's suggestion is a good one. I do not know how we can handle it otherwise than to have the reporter note some of these important things that are stricken out by a narrow margin vote; and if he thinks well of it and that it is important, he can state that it was a close vote, or something of that kind, and give us a chance to say whether we want the Court to look at it.

Dean Clark. All of those things that went out, I will say went out by a close vote.

Mr. Morgan. Unless Dean Clark departs from his usual consistency, that is what will happen. (Laughter.)

Dean Clark. That suspicion is unworthy of you.

Mr. Morgan. That is not a suspicion; that is a compliment.

Mr. Mitchell. I think we are through with Rule 22 for the time being. We will go to Rule 23.

Dean Clark. Without arguing the question, let me remind Mr. Wickersham that the Equity Rules did not contain the phrase "cause of action" here, although it is used in some other places.

Mr. Wickersham. That is a different thing; there is no cause of action.

Mr. Mitchell. Dean Clark, I read that over, and I thought you had done a good job.

Mr. Wickersham. I move that it be accepted. I do want to say, however, that here is the complaint, which must contain a short, etc., statement of the grounds upon which the court's jurisdiction depends, and a statement of the acts and occurrences upon which the plaintiff bases his claim for relief; a demand for judgment, etc. Now, "the grounds upon which the court's jurisdiction depends." Does that mention facts, or what?

Mr. Doble. Jurisdiction in the Federal court.

Mr. Wickersham. All right.

Mr. Morgan. The facts constituting the ground.

Mr. Wickersham. It was only a question whether we

should state that--this is brought to the attention of a certain section of Congress.

Mr. Mitchell. Ought you not to say "jurisdiction of the Federal court"?

Mr. Wickersham. Yes.

Mr. Mitchell. Of course, the District of Columbia does not come within that definition.

Dean Clark. Well, of course, we have taken the Equity Rules.

Mr. Olney. Why do you not follow the Equity Rule? Are there any substantial differences?

Dean Clark. Do you mean follow it throughout--in all of the different clauses?

Mr. Olney. Yes. I read the Equity Rule, and under the circumstances, I think it is better to take the Equity Rule.

Dean Clark. I thought the Equity Rule put in requirements that were unnecessary and really burdensome.

Mr. Olney. Leave out the first one; I think that is about the only one.

Mr. Morgan. In the third section of the Equity Rule, it says "the bill shall contain a statement of the ultimate facts", etc. If there is anything that gives more trouble than that, I do not know what it is.

Mr. Wickersham. Take the first one. After all,

ought not the complaint in an action at law in the Federal court to state the facts on which the jurisdiction depends? Of course, if it is a case of diversity of citizenship, if the plaintiff is a resident and citizen of one State and the defendant of another, that would be the grounds of Federal jurisdiction; you could say that the ground is diversity of citizenship. But the ~~fact~~ rule ought to be that the defendant may challenge the fact and proof be made.

Mr. Mitchell. It is a ground if it is a constitutional question.

Mr. Wickersham. That is a rgound, but that is not ~~if~~ it grows out of citizenship; if it is a fact that grows out interstate commerce, that ought to be stated as a fact. So that "ground", it seems to me is not adequate.

Mr. Dobie. That is the Equity Rule.

Mr. Olney. That is the Equity Rule.

Mr. Wickersham. Take the ordinary case, that is, the alleged ground for jurisdiction in an action at law in the Federal court.

Mr. Olney. This Equity Rule has never given trouble.

Mr. Lemann. That is the language of the Equity Rules--just exactly that, and I do not think it has ever given any trouble.

Mr. Mitchell. When you reject the language of the Equity Rule, you have to go back to the Supreme Court and say

that you have done a good job, and unless it is a clear case we do not want to do that.

Mr. Lemann. This language has been tried for at least 20 years.

Mr. Dobie. There are hundreds of cases on that; you cannot say that the plaintiff is a citizen of Virginia and the defendant is not a citizen of Virginia.

Mr. Wickersham. But you can state the first part in the Equity Rule, the residence and citizenship of the plaintiff, and of each of the parties, and if any party is under any disability that fact shall be stated. Now, that has been eliminated; and then you leave only a short statement of the ground upon which jurisdiction depends. But if jurisdiction de e nds upon diverse citizenship, as happens so often, it seems to me it should be alleged as other things required in the Equity Rule.

Mr. Donworth. In many cases you have to make allegations of pure law--for instance, that a certain State statute is opposed to a Federal statute.

Mr. Wickersham. That would be a matter of law.

Mr. Donworth. Is that ~~not~~ any more effective?

Mr. Wickersham. I mean we ought not to omit this first paragraph in the Equity Rule, which requires a statement of names, residence and citizenship, from the new rule.

Mr. Mitchell. That is material in every case where

there is a Federal question.

Mr. Dobie. Yes, it is material where there is a Federal question.

Mr. Mitchell. And it is material in the District of Columbia, it seems to me, that you state the ground of jurisdiction if it is diversity of citizenship.

Mr. Wickersham. Well, why did you wipe out that requirement? It seems to me that you might say where the grounds are diversity of citizenship the plaintiff shall state the names and residence and citizenship of the respective parties.

Mr. Morgan. Could not say "the facts and grounds"?

Mr. Wickersham. Yes, the facts and grounds.

Mr. Tolman. You could do that, and the facts supporting such grounds could be stated, or the facts upon which the grounds are based.

Mr. Wickersham. I do not care about the phraseology. But suppose a man brought suit--

Mr. Lemann (Interposing). Is that as important as the venue, and would it not be better, rather than spend a long time on that, just to strike that first section out?

Dean Clark. I think this will be covered by the ~~intro~~ caption, and if you put it back--~~you~~ we have had to make the matter of capacity a matter of defense.

Mr. Wickersham. No, if there is no defense, that is a matter of citizenship.

Dean Clark. No, I mean the matter of citizenship.

Mr. Wickersham. If jurisdiction of the court depends on diversity of citizenship now, and if on the face of the claim it appears that there is no such ground and you claim that ground, it seems to me that it is dismissible. It seems to me that the fact as to citizenship ought to be stated in the complaint.

Mr. Mitchell. That is very important, to show whether the suit is brought in the right district.

Mr. Donworth. This says in the usual ~~appears in a previous~~ caption; that would appear in the caption.

Mr. Wickersham. But the citizenship and residence does not appear in the caption.

Mr. Donworth. But I say if you follow the Equity Rule, you duplicate the names.

Mr. Wickersham. I do not care anything about that. It should require a statement of the residence and citizenship of each party. I think it is important, because the test may depend on those facts, rather than the theory.

Mr. Lemann. It would not be much trouble to repeat the names. If you repeat the names, you would have to state the residence.

Mr. Donworth. Of all the parties.

Mr. Lemann. Yes.

Mr. Wickersham. Then under the Federal statute, where

jurisdiction depends upon diversity of citizenship, and upon the amount in controversy, you must say that the amount in controversy is $3,000, or whatever the amount is, over and above interest and costs. Those are jurisdictional facts, not theories.

Mr. Mitchell. Yes; but the second paragraph of the Equity Rule has been considered broad enough to require a statement of the ground, and it is required to be alleged that the amount amounts to $3,000.

Mr. Wickersham. I think it is because of the jurisdictional statute. We always make the allegations as to the amount ~~now.~~ involved.

Dean Clark. I think it is a little unfortunate to have it in the first and second sections ~~of the Equity Rule.~~ and the caption too. I think that if the provision as to the statement of the grounds is not complete enough, let us put the provision in there. What we are going to have is something conformable to the old Equity pleading, and now, to actions at law, as to all the parties, giving the names of the parties, and that John Smith, the defendant, is a resident of so-and-so, and then state the ground of jurisdiction, that John Smith is a citizen of such and such a State and not some other State. And I think you might end by saying that of those the complaint will hereafter always treat.

Mr. Mitchell. Why not state the facts and grounds

upon which jurisdiction depends?

Mr. Wickersham. Yes, facts and grounds.

Mr. Olney. Somebody might object to the complaint under those circumstances, by alleging that the various defendants are citizens of different states, and in the present case the court has jurisdiction on account of diversity of citizenship. Would that not occur?

Mr. Mitchell. It would not last very long.

Mr. Olney. No, it would not last very long.

Mr. Wickersham. Now, why not put in the facts and occurrences upon which the claim is based for relief? There again, I think "the facts constituting the cause of action" are more important. I have no point to raise on the question, but I think that emphasizes what are facts.

Mr. Mitchell. The word "simple" is better than "direct." There is no great meaning in "direct."

Mr. Dobie. I am very thankful that you abandoned the word "ultimate."

Dean Clark. I do not know that I have. Mr. Wickersham, do you allow "ultimate" too?

Mr. Wickersham. As I say, I do not think you have ever improved upon what you know the "New York Civil Practice Act," as a precise statement of the material facts, without any unnecessary verbiage.

Dean Clark. But I ~~ponder if~~ feel that you have not improved

here any possibility of raising trouble, because you have started trouble in New York more than in any other place,-- because New York prefers trouble anyway.

Mr. Wickersham. That is the old Equity Rule.

Mr. Mitchell. Let us take it step by step. We have paragraph first, and our choice in this is between "simple" "direct" and "plain".

Mr. Morgan. Why not "plain"?

Dean Clark. In the Equity Rules, in the second section they have "plain" and in the third section "simple."

Mr. Wickersham. "Short and simple are the annals of the poor." (Laughter.)

Dean Clark. Yes-- why not begin "Short and simple"?

Mr. Morgan. Not in the last three years. (Laughter.)

Mr. Tolman. This "short statement of the grounds" should be a "short and plain statement of the grounds," and the "ultimate facts" are short and simple. (Laughter.)

Mr. Wickersham. Why should we not use a slang word?

Mr. Mitchell. "A short and simple statement of the facts and grounds upon which the jurisdiction depends." Is that right?

Mr. Wickersham. Yes.

Mr. Mitchell. Then we have in the second section "a short and simple statement of the acts or omissions", and so on.

Mr. Wickersham. I think there ought to be a short and plain statement of the facts.

Mr. Dodge. Why not say "facts", leaving out the word "ultimate"?

Dean Clark. We know what acts are.

Mr. Wickersham. What is an act?

Mr. Morgan. An act is a voluntary contraction of the muscles. (Laughter.)

Mr. Wickersham. "Acts or occurrences"--I do not know what that means.

Prof. Sunderland. When you allege that a certain person is the son of another, is that an act or an occurrence? (Laughter.)

Mr. Morgan. It is an occurrence.

Mr. Wickersham. Is not the old rule that they shall state facts and not conclusions?

Mr. Morgan. And nobody knows what they mean.

Mr. Lemann. I like "facts" better than "acts and occurrences."

Mr. Morgan. I do not think it is any worse than "omissions or occurrences."

Mr. Lemann. Is there any substitute that you can think of?

Mr. Morgan. No.

Mr. Wickersham. We are not required to plead to

theory, but we are required to plead to facts.

Mr. Lemann. I do not think this has any other meaning except facts.

Mr. Morgan. All of this that Mr. Wickersham is trying to get away from is not facts, but evidence on one hand and conclusions of law on the other.

Mr. Wickersham. Would it not be well to state "facts"?

Mr. Morgan. It might be, but he has lots of cases where he says it is conclusions of law and not statements of facts. I doubt whether you can find any form of words that will do it.

Mr. Donworth. A judge in a charge to a jury is not going to say, "Gentlemen, you are the exclusive judges of all acts that have taken place."

Mr. Morgan. Every time you put words like that in a code, the courts just turn loose upon it.

Mr. Wickersham. It is just new terminology and will mean new litigation.

Mr. Olney. The Equity rule has used the expression. Now, that may be very objectionable from Mr. Wickersham's point of view, but if we adopted any other wording, the question is immediately going to be raised, What is the difference. Now, the idea that is intended to be expressed in both is the same. We all have the same idea about it.

Mr. Lemann. If you exclude pleading and evidence, you

might say that these fellows do not object to pleading and evidence.

Mr. Mitchell. Omiy any statement of pleading and evidence.

Mr. Dobie. "Facts" is broader than "ultimate." I think that is a hideous word, and has not meaning.

Mr. Olney. What I mean is this. The practical side of it is that, unless we are going to ~~obtain the~~ obtain a positive advantage which, either directly or in the correction of some evil that we have had, let us take the rule that we have had and are accustomed to.

Mr. Lemann. I think the prima facie argument is in favor of that.

Mr. Morgan. I object to "ultimate", because nobody knows what it means.

Prof. Sunderland. Right there, you say nobody knows what it means. But in a practical sense, is there not very little difficulty about the matter?

Mr. Morgan. No; every new case causes trouble.

Prof. Sunderland. Not in using the word "ultimate."

Mr. Morgan. But you do gain this, that you are not going to run up against claims that you produce something besides evidence--you are not going to have the question

whether it is a question of afacts or an ultimate question of law.

Prof. Sunderland. Or of evidence.

Mr. Morgan. There is no difficulty about evidence, unless you say that you have not stated facts from which the conclusion you want inevitably follows. That is another rule that equity has followed. That is, that you cannot plead evidence, unless the evidence inevitably leads to the conclusion you want. For instance, the court say "negligently done," is the ultimate fact, and it will not do for you to plead that from which negligence may well be inferred, and if you plead facts in any way except that the act was negligently done, you have to plead the circumstancesfrom which negligence inevitably follows.

Prof. Sunderland. Well, you could unless the forms of language in different States is exactly the same in all; you cannot if there is considerable change in the language.

Mr. Morgan. Well, in New York it was 72 years before the court decided that a valuabiton consideration was sufficient, and before that you had the one below going one way, and the others going the other way.

Mr. Donworth. Yes, but we have those decisions now for fact.

Mr. Morgan. Yes, but those decisions come under the rule/ ultimate

Mr. Cherry. Why could not we use the words "ultimate facts" and attempt to get away from the necessity of pleading evidence? Under this system there is not the same need for it.

Mr. Mitchell. Well, if you leave out "ultimate", would it not be well to add "omitting any statement of evidence"?

Mr. Cherry. I think so.

Mr. Mitchell. If you do not state that, they will state evidence, and there is no rule on that.

Mr. Cherry. I think so.

Mr. Mitchell. How would this do? "Separate and short statement of the facts upon which the plaintiff bases his claim or claims, omitting any mere statement of evidence"?

Mr. Olney. In other words, you leave out the word "ultimate"?

Mr. Mitchell. Yes; otherwise you leave in the word "evidence."

Mr. Donworth. I move that the Chairman's sugesstion be adopted.

Mr. Doble. I second the motion.

Dean Clark. I still think it would be bad to get back in any of those words that caused difficulty. I mean any word in combination with the word "facts."

Mr. Lemann. Will there be any more complications

than there are now?

Dean Clark. Yes; we had a new climate of opinion against which words must be construed, and we must get rid of this old moss. Sometimes, I agree, decisions are helpful, but here I do not think they are, because I think they are too conflicting.

Mr. Olney. Well, now, I think we are getting rid of this length of time; what happened to that was this: We had this old common law system of pleading to which the courts and lawyers were accustomed, and they contained the strictest provision as to what the pleading should contain, but we are gradually getting away from that I think until now there is very little difficulty, as a practical matter, with pleadings, on the ground that we do not plead ultimate facts, or something of that sort, unless there is a real essential fact left out and then the question comes up; and the difficulty of the ~~change~~ conflict in the decision ~~that they have~~ has resulted for the most part in favor of a sensible, liberal view of the matter. I am inclined to stand on the language that we were accustomed to and practiced under for years, and with which all the bar is familiar. And the trouble of which we have been speaking is largely confined to the State courts. It does not occur so very often in the Federal courts.

Mr. Morgan. You are right there. I am thinking of State court decisions.

Mr. Wickersham. Well, despite the criticism that I think the praseology which is used in all the codes and has been for years is the best for the facts constituting the cause of action--I think if you attempt some other statement, you ~~xxx~~ will open up a new lot of litigation.

Mr. Lemann. Well, you open up the facts upon which the plaintiff asks for relief.

Mr. Dobie. That is the equity rule.

Mr. Wickersham. I would say "The facts constituting a cause of action."

Mr. Lemann. Why not state the facts constituting the cause for relief"?

Mr. Wickersham. Well, I was thinking of the common law actions. We can put it in the alternative.

Mr. Mitchell. "Short and plain statement of the facts upon which the plaintiff bases his claim for relief, omitting any statement of evidence."

Mr. Olney. I move that we adopt that.

Mr. Dobie. I second the motion.

(A vote was thereupon taken, and all voted in favor of the motion except Mr. Wickersham.)

Mr. Mitchell. That seems to be the sense of the meeting.

Mr. Donworth. Now, does this preclude what we lawyers throw in for a safeguard--the prayer for general relief? It

seems to preclude the general prayer for relief, and that is very useful in an equity action.

Mr. Dodge. There is another rule that makes it evident.

Mr. Wickersham. And especially if you are going to set up facts and circumstances upon which you are asking for some relief, you ought to do that. The theory is that you come into court and you want some relief.

Dean Clark. In answer to Judge Donworth, I will say certainly it does not; and going further, Rule 24 draws the teeth entirely of demand for judgment, except on a default situation. This matter, too, has been a matter of litigation, yet it is covered.

Mr. Dobie. You do not want both of those phrases in brackets, do you?

Dean Clark. No, those are alternatives. Which rule are you referring to? There are alternatives in both rules?

Mr. Dobie. Rule 23. I would prefer the first one.

Dean Clark. Yes, the first one is the one I prefer.

Mr. Dobie. I think that is all right, particularly in the light of the next one; and I move that we adopt that and strike out the second clause.

Mr. Mitchell. That is the first clause in paragraph 3 of Rule 23, is it?

Mr. Dobie. Yes, Rule 23.

Mr. Lemann. Is there any doubt whether a cumulative alternative could be put in the first brackets?

Dean Clark. I should not think so.

Mr. Lemann. Well, you had the second alternative, and that is why I asked the question. You have different types. I thought it ought to be plain that you could add that for a cumulative alternative.

Dean Clark. Well, I thought it does not appear, and the second one was a little awkward.

Mr. Dobie. There are several different types of relief.

Mr. Mitchell. The motion is to adopt paragraph 3rd and the first bracketed clause thereof.

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

Mr. Mitchell. That is correct. Now, let us go to Rule 24.

Mr. Lemann. I would like to raise the question as to the language that relief shall not be "different in kind than that prayed for"; and I would like to ask Mr. Donworth about that.

Mr. Donworth. In the paper that I prepared, I have the expression "shall not differ from." Unconsciously, some writers have fallen into the idea that "different" shall be

followed by the word "than." I think the correct expression is "differ from."

Dean Clark. Well, I will change it to "differ from." Of course, this is one of the things that are easily changed.

Mr. Mitchell. Why is not the second alternative better than the first?

Dean Clark. I will speak about that. I says it is more in line with the ordinary expression, but I think it means nothing if it does not mean the first; the second is a blind way of saying the first. I have a little preference for the first, as being more direct; but if you think that is harsh and you ask for the ordinary practice of the bar, having it more direct, you can use the old form. But I do not know what it means if it does not mean that. As a matter of fact, the New York has always understood what it meant, and has said from time to time that it does not mean anything, and then it has said it means the first; so that not only are you not sure that it means the first, but you are not sure that it means anything.

Mr. Wickersham. Well, you have the limitation that means something, that is, that it shall not exceed the amount claimed in the demand for judgment of the complaint.

Dean Clark. Well, of course, it always means that in law cases; that is all we want it to mean, and that is all the demand for judgment does.

Mr. Mitchell. I like the second one better.

Mr. Olney. May I suggest that the provision in regard to relief in the case of an appearance is in the negative here, when it should be in the affirmative? In other words we wish to give the court power to give whatever relief is required by the merits, regardless of anything that may be in the prayer. And it seems to me that it should be put in the affirmative, that the court can give the relief that the merits require, irrespective of the form of the complaint, and not put it negatively as it is here.

Mr. Donworth. Should that not be true even if the defendant defaults where the relief is of a negative nature?

Mr. Mitchell. No.

Morgan. No; if he defaults he does not get hurt any worse than the demand for judgment states.

Mr. Dobie. In other words, there is a sort of estoppal there. You sue me and ask for $300 damages. Now, I will go to Europe on a vacation trip. Or in other words, you try to get me separated from the old ancestral home--with soft music. (Laughter.)

Mr. Donworth. Well, if you are good they would not foreclose the mortgage. (Laughter.)

Mr. Morgan. Mr. Chairman, if you take this clause, I object to "embraced within the issues." I agree with Judge Olney

in what he has suggested. I would take the second sentence and say something like this:

> "Except as to a party against whom judgment is rendered by default for want of appearance, the judgment shall accord the relief to which the party in whose favor it is asked is entitled on the merits of the case, regardless of whether or not the party has asked for such relief by his pleading."

That is what we generally have in mind.

Dean Clark. That is not a bad idea. I think that is rather good.

Mr. Olney. That is the old equity rule, and that is the right rule.

Mr. Mitchell. Will you give me that again?

Mr. Olney. "Except as a party against whom judgment is rendered by default for want of appearance, the judgment shall accord the relief to which the party in whose favor it is asked is entitled on the merits of the case, regardless of whether or not the party has asked for such relief by his pleading."

Dean Clark. Do you want to go ahead and say anything more affirmstively? Do you want to add to your rule an

affirmative statement as to default in appearance? You leave it now to implication.

Mr. Olney. No; this is the second sentence.

Dean Clark. Oh, I did not understand that.

Mr. Mitchell. Suppose a man does appear initially and puts in an answer and does not appear for trial, or anything of that kind?

Mr. Wickersham. He is in bad luck.

Mr. Mitchell. Yes.

Mr. Olney. The difficulty in the first instance is, if he does not appear he can fairly say that the court has not jurisdiction of me only to the extent to which that relief is asked; but when he appears he is responsible.

Mr. Mitchell. I understand that your motion is made with the understanding that the drafting committee can make any revision in form.

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

Mr. Mitchell. It is carried.

Mr. Donworth. I would like to ask some of these gentlemen whether there is any provision in any code limiting the plaintiff in a default case to the specific relief asked? Now, you may want to have a commissioner appointed because the defendant does not voluntarily make the conveyance that he should.

Now, as I understand the issue, the court can ask, in the event that the defendant does not make the conveyance, that a Commissioner be appointed. I understand that you have to think out very carefully the result--that instead of being governed by what situation will develop after a formal hearing, he must have a hearing in equity at the same time. Is it new that the plaintiff is foreclosed by this equitable relief that he asks for? It is new to me.

Mr. Mitchell. Do you mean that if you ask for specific peformance in the complaint, and do not say anything about it, a comissioner is appointed under (d)?

Mr. Dobie. I think that is just the mechanics of it.

Mr. Mitchell. That is he title; the rest is just the machinery of getting it.

Mr. Donworth. Is there any precedent for limiting the plaintiff in equity to the specific relief demanded?

Mr. Morgan. That is what most of the codes say; that first provision that Dean Clark has is theprovision of a number of codes, I am sure.

Dean Clark. Yes, it is very general.

Mr. Olney. I have not looked at it for a long time, but there are decisions, I think, to that effect. Is that not true?

Mr. Mitchell. Then we will pass to Rule 25.

Mr. Wickersham. Here again you have got that phrase that I object to, "claims for relief" and "rights of action." I do not know what is a claim for relief. I have some idea of what a cause of action is. But I have no idea what "claims for relief" or "rights of action" are.

Mr. Mitchell. Well, we will know that we have that in there when we come to it.

Mr. Wickersham. Yes. I am only emphasizing it now, but we will have it up again, but I think we will have difficulty with it.

Dean Clark. Of course, in this rule it makes little difference which you use, because it is so very obvious that there is no restriction either way.

Mr. Olney. As I read it, I gather that under this rule you can sue a man for damages because he hits you with his automobile, also because he gave you a promissory note.

Mr. Morgan. And also on a promise to convey theproperty known as "Blackacre", and also for alienating the affections of your wife.

Dean Clark. Yes, he could include everything.

Mr. Morgan. Do you remember what the judges in Wisconsin said, that you could start out with an action for alienation of your wife's affections, and could wind up with a suit in ejectment.

Mr. Wickersham. I am opposed to that. I think that is going too far.

Mr. Lemann. I think in New York you can do it. You could summons me for an automobile accident, and decide later on that you wanted also to have it include alienating your wife's affections.

Mr. Wickersham. That is not in one suit.

Mr. Lemann. I just said summons.

Mr. Wickersham. Oh, a summons is a different thing. Except in some cases where the statute requires the summons to have the endorsement of the cause of action, there is some statutory provision as to service where that is required.

Mr. Dobie. Have you any definite ideas to any limitation, or would you go back to the idea that Judge Olney was talking about a few moments ago? I think that is very bad.

Mr. Wickersham. Well, as I say, I believe in knowing what the cause of action is. That is, I want to know what I am sued for.

Mr. Dobie. That has nothing to do with this. This is just the story of--

Mr. Wickersham (Interposing). I want to know the cause of action.

Mr. Morgan. Well, you have to have a separate statement of the cause of action. This is joinder.

Mr. Dobie. This is joinder and counter claim.

Mr. Morgan. You can join in practice.

Mr. Wickersham. Rule 25 says that they may join as many different claims for relief founded upon as many different rights of action, whether based on legal or equitable grounds or both, or stated or claimed in the alternative or otherwise.

Dean Clark. I am not sure whether Mr. Wickersham is basing his objection on the wording.

Mr. Wickersham. No, it is the subject.

Mr. Mitchell. Let us not discuss this on the ground that it states cause of action.

Mr. Morgan. No.

~~Dean Clark. On the substantive matter.~~

Dean Clark. But on the substantive matter it contains a good deal which New York tried to put restrictions on, but in New York it is stronger; and in view of the history, at least of the recommendations of either your Judicial Council or Commission, an act was passed, Chapter 339 of the Session Order 1935, providing for clear joinder of actions and giving the court discretion to try them either with the joinder or have separate trials. Now, I am off of New York. (Laughter.)

Mr. Wickersham. I am not enthusiastic about New York either.

Mr. Dobie. I congratulate you on your non-provincialism.

Dean Clark. How about congratulating me?

Mr. Dobie. I congratulate both of you.

Mr. Tolman. How about adding/these two words in line 3?

Mr. Wickersham. "causes" of action."

Dean Clark. I do not object to that.

Mr. Mitchell. Is that all right?

Mr. Wickersham. Well, it emphasizes what I have been contending for right along.

Mr. Mitchell. The real question that is vital in here, it seems to me, is not the question of phraseology. We can settle that some other time. It is the question of joining different types of action in one suit.

Mr. Wickersham. Yes.

Mr. Mitchell. Of course, we allwagree about the action on that. I was looking at the recommendation of the different committees on that, to see what the consensus of opinion of the bar is on joinder of different causes of action. It is very important/I think. to know Perhaps some of these suggestions are enough to tabulate them in our minds.

Mr. Loftin. Judge Parker is against it.

Mr. Mitchell. Yes, he is against it.

Mr. Olney. Do you know what the practice is in England?

Mr. Morgan. This New York practice act adopted the English practice; is that right?

Prof. Sunderland. It is not quite the same.

Dean Clark. This limitation as to land. The suggestions of the local committee show that in Florida ~~in~~ ejectment suits for land would be excluded from joinder.

Mr. Donworth. I would like to inquire as to the last sentence of Rule 25; it says, "The court may, however, order separate trials of any distinct issues where they may be thus more conveniently disposed of." As long as you are going to have different parties in controversies in the same suit, and where the defendant's attorney or the plaintiff's attorney would try to prejudice the parties by mixing them up, it seems to me that the right of the court to join issues should not be restricted to where it is convenient. Now, the court should have a broader power where they could be thus conveniently disposed of, or for the vaoidance of prejudice to any party. I just throw that out as a suggestion.

Mr. Dobie. How about putting in "The court may in its discretion order a separate trial of separate and distinct issues."

Mr. Donworth. Yes.

Dean Clark. This is from the Equity rule. I do not know about the objection to it, but I am inclined to say that

I am not sure that it might not be better to put it as you suggest, rather than leave it in the court's discretion; because no one really know theground you should go on in order to get a separate trial.

Mr. Mitchell. There ought to be a basis for exercising the discretion of the court.

Mr. Donworth. You could add "or in order to avoid prejdice to any party" or "where necessary to avoid prejudice to any party."

Mr. Dobie. What about saying "where the ends of justice so require"?

Mr. Donworth. Yes, "where the ends of justice so require."

Mr. Mitchell. Dean Clark, may I ask whether, taking Rule 42, 43 and 44, it is possible in this system to put in one suit a number of causes of action, and a number of defendants, some interested in one, some in others, and some not at all?

Dean Clark. That is permitted in New York practice - when you getdown to joinder ofparties.

Mr. Mitchell. Yes, I refer to Rules 42, 43 and 44.

Mr. Lemann. It is where there is a question of law common to all.

Mr. Mitchell. Not always.

Mr. Lemann. I will read that part of 42; it says, "where any question of law or facts is common to all the rights of action."

Mr. Mitchell. Yes.

Dean Clark. May I say that I think this is one of the places where the profession has been completely in accord in opinion; it has been practically unanimous; and where in my judgment it would unfortunate if we went back to the unworkable and undesirable provisions, because I see no reason why we should not bring out in the complaint all sources of dispute. There is not any chance for prejudice, because of the provision for separate trial, and as I read it the whole trend has been just as was the experience in New York. Now, a question was raised as to the English provision. This is what I found in 1928 before some of these changes were made. In Kansas, Wisconsin, and Ontario the restrictions were removed entirely. In Iowa, and Michigan, they were removed except as to the division of actions legal and equitable. In England and New Jersey they are removed, with the exception of actions not relating to land. Now, there are other provisions which do not fall within the same sort of framework, but are practically as broad. As I read it, the Florida statutes practically allow free joinder. The Alabama code has very little in it. Massachusetts has joinder within three main divisions, and Texas joinder is based on discretion. In Louisiana aplaintiff may

accumulate separate causes ofdemand in the same action, with certain limited exceptions. In Illinois the new act provided free joinder.

Mr. Morgan. Mr. Chairman, may I say with reference to tha that I think it was pointed out in the Michigan Law Revie under Prof. Sunderland's direction, that in the past, particularly under the common law and under the codes to begin wit the matter of joinder in pleadings was always tied up up with the notion that anything that was joined in pleading had to be tried together, and everybody was looking to convenience of trial or prejudice in the trial, etc., without thinking at all of the convenience of getting these disputes down on paper, and the convenience you would have and the saving in time and paper work, and the time of the court, and all that sort of thing, by getting this whole bunch of controversies with reference to the particular parties in one suit. And the convenience of trial is taken care of on an entirely different basis. It is right up to the judge as to whether it is or is notprejudicial and what you are doing is to save paper work and separate lawsuits, and perhaps a lot of new trials.

Prof. Sunderland. You are saving a lot of argument about restrictions.

Mr. Morgan. Precisely, saving a lot of argument, by preventing questions on misjoinder, etc., and it strikes me

that this is one of the most important things you can do at the pleading stage game.

Mr. Wickersham. Then it is considering everybody's convenience except that of the defendant. Why should I be brought into a lawsuit with "A, with whom I have a controversy, and be obliged at the same time to attend to all the litigation between A, B, C, D, and E?

Mr. Morgan. You do not have to be if you do not want to.

Mr. Wickersham. Well, the court has, perhaps, a right to decide as to whether I should be compelled to come into court as to a controversy with A, to attend to a lawsuit as to B and C and D, with whom I have nothing to do, and being sued in a matter with which I have nothing to do so far as the rest of the controversy is concerned.

Mr. Mitchell. It is not quite ~~fair~~ clear that that is so. It says, "may join as plaintiffs or be joined as defendants in action where any question of law or facts is common to all the rights of action,"etc. There is somewhere in the case, as I understand it, a common question of law and facts that pertain to all of the defendants.

Prof. Sunderland. And that is the only part.

Mr. Morgan. That is the only thing you are interested in.

MR. Wickersham. Irrespective of law, that is my only obligation; but it may be against A, B, C, and D, and why should I be compelled, because there is a similar question of law, to litigate in an action with which I have nothing to do in the controversy.

Dean Clark. I must tell Mr. Wickersham that that is in another rule. I do not think that is this rule. But I do not think that is a fair statement.

Mr. Wickersham. Perhaps not; but my objection goes to that kind of a controversy that, as I understood from what Mr. Morgan said, would bring into one lawsuit any plaintiff, A as against B separately, and B, C, and D, jointly, and X and Y jointly and separately.

Mr. Lemann. I do not think that is so. The suit against you was based upon running over somebody with your automobile, and the suit against me was based on libel. That is what you are afraid of?

Mr. Wickersham. Well, I may have misread it, and if so I withdraw my objection.

Mr. Lemann. In the case I referred to, they all sued on the theory that false statements were made to the company and that the plaintiff was induced to invest his money on those false statements. Now, that is a clear case. I suppose they can be sued together. But those defendants have separate

defences--one of them has died, and some have not gone to the meeting and every one has a different factual situation; but I suppose in practice they could be joined as defendants even after such a rule as this. But that is the typical kind of case that I understand is required or permitted to be joined.

Dean Clark. Yes; but the only variation I make ia when you say "under any practice or system." I afraid under the old code system you could not do that.

Mr. Lemann. You wanted to permit that anyway.

Mr. Wickersham. How about this: "The plaintiff may join in a common complaint as many claims for relief, founded upon as many different rights, based upon legal or equitable grounds, or both, as he may have against theopposing party." That means any one of theoppositng parties.

Mr. Mitchell. That is a single party.

Dean Clark. Read the next sentence.

Mr. Wickersham. "Likewise, where there are multiple parties, either plaintiff or defendant or both, such joinder may be had, subject only to Rules 42, 43 and 44, governing joinder of parties." The court may, however, order separate trials of any distinct issues where they may thus be more conveniently disposed of ."

Mr. Mitchell. Now, that refers to Rule 42, 43 and 44.

Dean Clark. In those rules there must be a statement

of law and facts as to all.

Mr. Donworth. The United States could sue all the delinquent taxpayers in one suit. (Laughter.)

Mr. Morgan. They could under this.

Mr. Cherry. They could if they could get jurisdiction.

Dean Clark. How could they get jurisdiction?

Mr. Lemann. They could not sue you or me under the income tax ~~tax~~ laws.

Mr. Donworth. Unless you claim the invalidity of it.

Mr. Lemann. Unless I claimed invalidity.

Mr. Dodge. It turns on the same question of law.

Mr. Wickersham. "All persons may join as plaintiffs or be joined as defendants in one cause of action where any question of law or facts is common to all the causes of action sought to be enforced." Now, that may not be theonly question involved.

Dean Clark. That is correct; you need to have only one "tie that binds", but if you have one tie that binds you can do that.

Mr. Wickersham. There may be other questions that affect X and Y but do not affect P, Q and R.

Dean Clark. That is shown by the case where 196 plaintiffs received false stock prospectus, and each plaintiff recovered different amounts; but they had joinder there, even

before your amendment this spring in New York.

Mr. Wickersham. Well, if that is so, where there is no statute——

Mr. Dodge. That is a little different where is a different question of ~~loss~~ law. Suppose a man had bought from five different brokers in New York, and the transactions were entirely different; but under the law there was a question in all cases as to whether the buyer could recover without having tendered back his stock certificate. That was the only question common to all the cases, but that was a question of law. Could those five brokers be joined in one suit?

Dean Clark. It seems to me that this question is getting academic anyway. The question comes to this: Are you going to trust the Federal judge to handle the cases expeditiously, or are you going to prevent that by some blind rule that would tie his hands? Suppose the complaint has gone beyond the bounds anyhow, would they so far enjoin a lot of people that should not be enjoined? Unless the judge is awfully stupid, there will not be any particular harm. I think it is, generally speaking, a more or less academic question, except very occasionally--there are physical and practical limits anyway on joinder; but suppose a plaintiff either makes a mistake or attempts to act wrongfully. It is so easy there to have/~~control of the thing~~ ~~entire~~ another trial; and in most of your cases

you will have only a set of documents and go along. If you have an arbitrary rule, in most of those cases you have to have Separation from the beginning and you have to have argument and dispute as to when you have it. Under this way, suppose a mistake is made, it is so simple to have a separate trial order, because from now on they can proceed as in two or three separate cases.

Mr. Mitchell. When you says mistake, you do not mean a violation of the rule, but you mean a case where the court would have a right to step in?

Dean Clark. Yes.

Mr. Mitchell. Mr. Dodge's question is in the affirmative.

Mr. Dodge. And I am not worried about it, but I wondered if you meant the rule of law to that extent where there was only one question of law affecting all of them.

Mr. Lemann. Suppose that was not a decisive question? Would that take care of it?

Dean Clark. I do not think it would. I suppose it has to be decisive. The reason I take this question of law or fact is that it was first taken up in the English rule and then in New York, California and New Jersey.

Mr. Mitchell. Well, if you put the word "decisive" in there, you would be in hot water, because one of the defendants

might have a separate defense, and the court might say that would be decisive in his case, but it would not be in others.

Mr. Donworth. Well, would we not all agree on Rule 25 if the sentence beginning "likewise" were omitted. That is entirely unnecessary, because that is actually covered by Rules 42, 43 and 44. Where there is one set of plaintiffs and one set of defendants, can we not permit that as many different causes of actions in contract form between different parties be brought in? I think we can raise this general question when we come to Rule 42, which is the blanket rule covering the entire subject. Is that not so?

Dean Clark. Yes; but the only thing is that we always will expect to find something in this; we could say, if we want to warn them as to the multiple parties, "see later."

Mr. Lemann. Could we not pass this sentence until we reach a conclusion on Rule 42? Because if we are going to permit it, we have to say so.

Mr. Mitchell. Well, we have got to decide what to do in the light of Rules 42 and 43 and 44.

Mr. Donworth. I move that we pass Rule 25, but with the understanding that the middle sentence is not disposed of.

Mr. Morgan. Well, there is really no necessary connection between putting the statement in the pleading and going to trial together--no necessary connection between them at all

it is a question of the convenience of plesding, first, and that question of convenience of pleading is entirely separate from convenience of trial.

Mr. Wickersham. Yes, but you leave the defendant's rights entirely to the discretionary action of the judge.

Mr. Morgan. Yes.

Mr. Wickersham. Now, I think the defendant ought to be protected against being haled into a controversy with a whole lot of parties with whom he has no controversy whatever, because there is a claim of the plaintiff against the defendants interconnected with all the other parties--simply because there is an element of law which is a factor in both lawsuits. I think that is destroying theproper protection of a defendant being sued under the law.

Mr. Donworth. Do you oppose the essential principle of Rule 25, when all the questions are between the identical parties?

Mr. Wickersham. No, I do not disapprove of that.

Mr. Donworth. Then Rule 25 can be considered as approved, except as to the middle sentence.

Mr. Olney. With you change you suggested.

Mr. Mitchell. Are you entirely satisfied with the change? I think if therights of the defendant are going to be left to the court to protect, there should be a clause that

he may do that without any substantial prejudice. It says "If public justice so requires.

Mr. Donworth. I finally amended that so that it will read something like this: "The court may, however, order separate trials, in order to avoid prejudice to any party, or where necessary to avoid prejudice to any party,"

Mr. Mitchell. That is the idea.

Mr. Lemann. And then approve the rule otherwise; that is the idea?

Mr. Donworth. Yes, that is the idea.

Mr. Mitchell. All right.

Mr. Olney. In this matter as I have seen it, the difficulty with the old practice had not been that you were required to file separate suits so much. I do not see very much gain in the mere joinder of suits. The difficulty with the old practice was that it permitted a joinder of suits in certain classes of cases and refused it in others, with the result that there was any amount of litigation and any amount of decisions that did not go to the merits, but simply decided that there was error committed in refusing a joinder in thiscase or in permitting it in that case. Now, if you are going to escape from that situation,--and I think it should be escaped from, as far as the principle is concerned--I am right with the law school men on this matter: It seems to me that you can permit the thing very properly, provided you

accompany it with a provision that makes it very flexible, and the judge has power to so guide the proceedings that, although they sre joined, prejudice is not done to the individual defendant, leaving this matter of flexibility until afterwards, but permit them to be joined; because the moment you endeavor to establish a certain class of cases in which joinder is permitted, and another class in which it is not permitted, you are going to have the same experience that we had in California, and all the code States, where they have similar provisions, of any quantity of litigation to determine in what way you could join them.

Mr. Donworth. Well, those observations, in which I concur, are really addressed to Rule 25 and not Rule 42.

Mr. Olney. I think they apply to both, and as long as you have approved a flexible system, this ought to work.

Dean Clark. I agree with you. I think we have done it.

Mr. Olney. I rather think we have.

Dean Clark. Rule 83 is another rule that has a bearing on this, "Consolidation and Severence."

Mr. Hemann. Would it not be well to pass this narrow rule, so as to pass the issues? We are all in apparent agreement as to most of Rule 25.

Mr. Mitchell. All in favor of that motion will say

"aye"; those oppposed "no."

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

Mr. Mitchell. Now, some of the members want to adjourn at 5:30 o'clock and it is now 5:25. Shall we pass to another rule now?

Mr. Dodge. We should take up Rule 42 next.

Mr. Mitchell. Very well. We will take a recess now until 8 o'clock this evening and we will be in session from 8 until 10 o'clock tonight.

(Thereupon, at 5:20 o'clock p.m., the Advisory Committee took a recess until 8 o'clock p.m.)

EVENING SESSION.

Friday, November 15, 1935.

The Committee reassembled at 8 o'clock p.m.

Mr. Mitchell. We were dealing with Rule 25; we had referred to Rules 42, 43 and 44. And with the agreement of the Committee, I would suggest that, instead of proceeding straight along with the rules next in order, we pass to Rules 42 to 45, while the subject is fresh in our minds, and work out this subject of joinder of parties. What do you think of that? We have been discussing that, and I thought while we were on it we might just as well clean it up.

Mr. Wickersham. Yes.

Mr. Mitchell. If there is no objection, we will do it that way. That carries us over to Rule 42.

Dean Clark. May I say rather briefly what I think you will all appreciate here? What I have done is I have taken the English rule and those of California, New Jersey and New York as my models. I hoped that I have improved it. I have definitely tried to do so; because it has always seemed to me that he main purpose of the English rule was quite clear, or the main factor of it was this common question of law and fact; but I thought it was stated rather blindly, as I shall indicate in a moment. And furthermore, the English rule

contained in words absolutely no limit on the joinder of the defendants, and all theAmerican models which have copied it have contained no limit. Now, it would seem to me in practice that you would really have to apply the same limitation to defendants as to plaintiffs--you really did as a practical matter, but that it would be clearer to have the test stated also as to the defendant, so that this rule, if anything, is limited beyond the English rule. And as a matter of fact, it is limited beyond the construction of the New York rule by the Federal court in New York, in one of the aspects that Mr. Wickersham was mentioning. In the Federal court in New York they have held that if you had common questions tying some of the parties together, the single common question need not tie all together; that is, if you had a common question between A and B and another common question between B and C, that you would have the requirement fulfilled; whereas I have made it definitely that there must be one common question going all the way through. The case I have in mind is reported in 21 Fed. Rep. 67. In that case 23 plaintiffs joined under the National Banking Act against 20 defendants claiming that at various times during 20 years they had made false reports. They set up 57 causes of action and each cause did not affect all of the defendants. If you will turn to my footnote you will see the English rule. The English rule is really in

four rules. As stated in my footnote: "Under Rule 1, those persons may be joined as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions, is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions any common question of law or fact would arise; under Rule 4, 'all persons may be joined as defendants against whom the right of any relief is alleged to exist whether jointly, severally, or in the alternative'; under Rule 5, it is not necessary 'that other defendants shall be interested as to all the relief prayed for, or as to other cause of action included in any proceeding against him'; and Rule 7 provides for joinder in the alternative."

"It will be noted that the above rule eliminates the xxxx confusing reference to transactions and extends the common question of law or facts test to the joinder of defendants, a matter which is in some doubt under the English rule."

And so, turning back to the rule as we have it, it says, "All persons"--and I put in in brackets "subject to the jurisdiction of the court;" I put that in as a limitation, which I think may be implied. That is, we are not intending to extend jurisdiction, and I do not know that that is necessary. I think it would be so clearly implied if we did not

put it in here, but I thought I would have it in here so that you would have it before you:

"All persons may join as plaintiffs or be joined as defendants in one action where any question of law or facts is common to all the rights of action sought to be enforced."

What I have done is to build up and make definite that test, which is the foundation of the English rule, and is really covered up by lots of language concerning transactions or series of transactions.

"Such persons may be interested, or be liable, jointly, severally, or in the alternative, but need not be interested in obtaining or defending all the relief prayed for. The court may make such order as may be just to prevent a party from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest, and may order separate trials or make such order as may be expedient to prevent delay of the action. Judgment may be given to one or more of the plaintiffs for the relief to which he or they may be found entitled and against one or more defendants according to their respective liability."

With a provision that misjoinder of parties shall not be a ground for dismissal, but any right of action may be severed and proceed with separately.

Mr. Morgan. Are you not going to allow judgment as between plaintiffs? Why do you not say "the parties" in-

stead of plaintiff and defendant" in the first paragraph, last three lines?

Dean Clark. Yes, that could just as well be "parties". Then we have another provision providing for judgment, the so-called "split judgment".

Mr. Mitchell. Why do the English exclude actions for the recovery of land in this joinder rule of theirs? What is the theory back of that?

Dean Clark. I always thought that was because of the theory that land must be locally tried; that is, on questions of venue.

Mr. Morgan. That may be.

Dean Clark. And the theory that if you had land claims, those must be tried at the place where the land is.

Mr. Morgan. That is, jurisdictionally being equal, instead of venue?

Dean Clark. And it would not be possible to bring any personal action, subject to a different rule, and force ~~fourth~~ then to be tried with the land action.

Mr. Mitchell. I notice under the English rule, in addition to having the authority to order the cases tried separately, they have the authority for the judge to order the exclusion of some causes of action, that is, limiting it. Is there any advantage in that?

On the question of trying them, it is only a question of separate trial, but here the court or judge may

order any such cause of action to be excluded and the consequent amendments to be made.

Dean Clark. Under that provision for the severance of the action they may be proceeded with separately, and that amounts to the same thing.

Mr. Mitchell. That amounts to the same thing.

Mr. Donworth. A thought has occurred to me in connection with this, and I do not know how valuable it is; but I thought I would try to discuss it, but I do not know how to define the thought without spending too much time on it. We understand that in different parts of the country there is quite a lot of opposition to what we are doing here--the unifying, I mean, into one system of practice in the Federal court. A great many think that is a mistake, and I want to suggest a thought further that we should not at this stage--I mean by this stage, in the preparation of the rules we submit to the Court next May, or whenever it is--confine it to a minimum and hope to get by this opposition that exists to the fundamental thing that we are aiming at. I think there is a lot to be said in favor of the idea of unifying the system of law and equity according to what you might call the eclectic method, of sticking to the system that is most general in the country. If I were a dictator-- that expression has been used--and knew that I was dealing with a democracy, I would at first not try to propound an ideal system, but would

a workable ecletic system, based on what is now the going practice, and leave for another rule, after we have got by the opposition, the things of this nature. I do not know whether I am right or not. But I just pass that thought on.

Dean Clark. If I may comment on that a little, I think there is something to be said for it, of course, and it is a question somewhat of emphasis. We are not now, as it appears--we have already decided not to try wild sweeps of imagination, and I think it is quite proper; on the other hand, it does not seem to me that we can go too far into the past, because it does seem to me that we lose at least some strength, and I should think a great deal, if we put up a system which, frankly, to the authorities on the subject, must be amazing, and here is a case where the whole trend of thought is quite general. For example, how could the American Society try to support us if we take out the old common law rules, which are simply trouble breeders. How can I support my own works if it is a thing I have condemned for years? And if I may say so, I think any one who has really studied the subject will say, it seems to me, that it is a question of emphasis, and if we go back and take some old test, like "all persons interested in the subject of the action and in the relief demanded," which is the current code phrase, we just take away the talking point of people who really understand the subject.

Mr. Dobie. Was not that argument of Mr. Donworth--

I do not mean precisely, but I mean along the same lines--but several people have come to me since the appointment of this Committee, and have spoken to me; and of course they were familiar with the system in which we have a separation of law and equity; and they said, "Do not burden it too much at the start. Go ahead and combine the rules." It is going to create opposition. It seems to me that we are biting off a whole, big mouthful; and I believe we get along better if we bite off a good deal than if we say, "This is only a little thing that we are giving you, and the bite will come later." I think we had better give them a good deal. On the element of time, I would like to see our old friend tempus fugit catch up with us. I do not mean that you are reactionary. I know you are not; but that idea occurs to me.

Mr. Donworth. I am trying to be practical.

Mr. Dobie. I know you are.

Mr. Donworth. Rather than have an ideal report.d

Mr. Mitchell. Well, the opposition to this legislation for a great many years has been directed mainly at the law side; this idea of combining law and equity in a uniform system has always been in the background. It has not stood out as a proposal at all, a uniform system in all cases in the Federal courts; and that made it necessary for the lawyers in every State to learn the law system in his own State and

another law system in the Federal court, and to keep on learning, if h could, about the Federal equity system, and destroyed conformity. In that way, there was great objection to the proposal. I always thought it had a good deal of merit, and it had enough merit, so that Senator Walsh as long as he lived was able to block the legislation. And now the court has got it. I think at first the idea was to go along with changing the rules in law cases alone, and then they realized that this was a great chance for a big reform, to wipe out this distinction in theproceedings and pleadings between the two kinds of causes, and they took hold of that. And one of the main arcuments in favor of it, as far as the practical side and the bar are concerned, is that, while it does destroy conformity in the law cases and the lawyer would have to learn thlaw in the Federal court, which may be different from their State system, they are learning another system in the Federal court in equity cases. Now, of course, the lawyers are not widely interested. But the thing has been well recei ed, and I think the lawyers and judges a re t horoughly "sold"on this unification matter, and that is going a long way to help it through. And I think it would be a terrible pity if we did not take advantage of this situation and put up a proposal that is not antiquated, and does not perpetuate those old different notions, and one that has reason back

of it. We are not putting anything that has not been actually tried somewhere, in some of the States, and there is a great deal of appeal to them; and I think myself that the court, or a majority of the court, feel that there is an opportunity here to do a job that will stand out as a milestone of progress in the way of procedure in the courts. I think that is what they expected. They do not want us to go wild and get out a lot of work that nobody understands, but they do expect, as far as I can sense their attitude, to have a real job, one that has merit and takes advantage of every new development on this subject, that has turned out to be useful and meets old objections.

I think we ought to proceed along those lines. Of course, you have got one leaverage that you could not have if you were obliged to take the rules and go to Congress and say, "Will you please enact these?" They might chew them all to pieces. But they are to be effective unless Congress can get a bill through to change them. But the burden is on the other side--a very different practical situation than it would be if you were just simply trying to get them enacted into law. They are to be law unless there is a veto by Congress. I have a great deal of confidence that, if you do a good job, if it is worked out carefully and it is simple, clear and easily understood and apparently workable, that you can go out and "sell" it and get away with it. If there are any objections--and

there always are with lawyers, very substantial objections and numerous objections--I do not think we ought to be afraid to try something that we know is right.

Now, as far as this joinder business is concerned, that is all a new thought to me. I have been practicing in certain jurisdictions where an engine of this kind is never thought of. But when this Committee was constituted, one of the things that I know what the court tried to do was to get a group of men, law school men, not only students and scholars on the subject, but who had had practical experience and were outstanding men; and who had had experience in this line in the law school field; so that those of us who are practicing lawyers would have the wide knowledge and understanding of what had been tried in different places, and we could depend on these law school men, the very best of their kind, to at least labor with us, with the advice of scholars and students all over the world, and things that they had worked out. I do not think, if I could be given the job of drawing up a set of rules, that I would adhere very strictly to the old ideas that I had had and I was anxious to get away from that. The practicing lawyers here who are not law school men wish to apply their practical knowledge in the way of criticism and help, and all of that; but we think we have got to have a little vision differing from our old habits and lay them aside and

try to use something that is an improvement.

Mr. Loftin. Mr. Chairman, I understood you to say that it was your interpretation of the act that the only way Congress could prevent these rules going into effect would be to repeal the law under which they are made.

Mr. Mitchell. Yes; if they do not confirm them and pass a statute, with the approval of the President; they do not have to repeal the law. They can pass a statute changing some of the rules but what I meant was that the rules automatically go into effect unless the opposition has enough strength to pass the bill in one session of Congress, in both Houses. And I tell you they will have a heavy job on their hands, if you have the Supreme Court back of it, and the general sentiment of the progressive and thinking Members of the bench and bar.

Mr. Loftin. Well, it was your thought that they could either repeal the law or modify or change certain rules?

Mr. Mitchell. Yes.

Mr. Loftin. That seems to be borne out by the language which says that such unified rules shall not become effective until they shall have been reported to Congress by the Attorney General at the regular session thereof, and until after the close of such session. Unless they take some affirmative action they go into effect.

Mr. Mitchell. The Chief Justice spoke of this thing in his address, you remember?

Mr. Loftin. Yes.

Mr. Mitchell. He said it was up to Congress and if they did not like it they would make a real reform, and that it was their duty--well, I did not mean to talk about that.

Mr. Wickersham. Dean Clark, you say this same rule, 42, is in force in several States?

Dean Clark. Yes, in Illinois, California, New Jersey and New York.

Mr. Wickersham. What is the New York statute?

Dean Clark. The New York statute is the English rule, the one given in the footnote to the rule. As a matter of fact, all the other jurisdictions that I have studied--well, I am not sure; Illinois made some changes, but New York and California and New Jersey provisions I think are identical with the English provisions. I think they use thesame wording.

Prof. Sunderland. The Illinois provision uses also most of the English wording.

Dean Clark. Well, they are all modeled on the English model. I hoped I was making it a little clearer. But my impression is that in Illinois a little qualification of the English rule was attempted.

Prof. Sunderland. Well, I think it is just slight.

Dean Clark. Yes.

Mr. Dodge. Well, in England and these States there is one marked difference from our rule, and that is that the differ-

ent causes of action must arise out of the same transaction of series of transactions; and I am just wondering if A and B meet on the street and A happens to mention a certain claim he has got against C, and B says, "That is funny, I have a claim against D that turns on that same question of law; let us, you and I, join in one suit and save expenses and sue C and D." I wonder whether there is an advantage in that. That goes beyond anything that has been tried anywhere, does it not?

Dean Clark. Well, this, of course, does not contain that language. I think it does not go beyond, because I think that language does not have real significance. What does a common question of law or facts arising out of a transaction or series of transactions really men?

Mr. Lemann. This says "question of law or facts;" if you have to have the same series of transactions; it might be law only, which of corse, would take you to an entirely different situation.

Dean Clark. The English provision is "law or facts."

Mr. Lemann. Yes; but is it limited by the same state of facts? Apparently there are two limitations under the English rule. Is that right? The first limitation is things arising out of the same transaction or series of transactions; and the second is that there must be a common question of law or fact. Is that a correct statement of it? I am just trying to get his point.

Prof. Sunderland. There is that limitation on plaintiff, but not on defendant.

Mr. Lemann. No.

Dean Clark. I might say on this that I would like to have thelaw school men in particular, who have played around with it a good deal--and I think all of them here present have--I would like to get their reaction as to whether this is an improvement or not. But I might say before you go into textual details, that perhaps the main question of policy might be decided. That is, I think, more important than the question of the wording exactly. What I have been trying to do is to get in the main the English text, and then upon that see whether we as a committee might improve upon that. This was, as I hoped, an improvement upon the English wording. If it is not, certainly we are subjext to no criticism if we use the English wording.

Mr. Lemann. Well, unless there is some precedent for joining in one action all sorts of controversy that turn upon a common question of law, I hesitate to support theidea. Of course, where there is a common question of fact, I am ready to have that; but this open a very unlimited door, if there is simply a common question of law--"Are they all liable under the income tax English law?" If so, join them all." If there is a precedent for this, all right, but I do not know of any. I have not investigated.

Prof. Sunderland. Now, here are the English ~~Denmark~~ rules.

(Prof. Sunderland read the rules referred to.)

Mr. Wickersham. They are tied together by thesame trandaction?

Prof. Sunderland. Yes, in both instances we have them tied as to transactions or series of transactions.

Mr. Mitchell. That is the English rule.

Prof. Sunderland. In England they do not have it on the defendant's side.

Mr. Mitchell. Well, we are striking it out of both.

Prof. Sunderland. It carries the defendant's rule in England over to the plaintiff.

Mr. Lemann. You say in England they do not make a primary rule, because I understood Dean Clark to say that in England it may be a common question of either law or fact. So that there must be some cases arising.

Dean Clark. Yes. Well, as a matter of fact, as to the defendant, I do not think they do extend it in actual practice in England.

Mr. Lemann. Is this an old rule in England?

Dean Clark. It was adopted about 1886.

Mr. Lemann. About 40 years ago. Have there been many cases?

Dean Clark. Yes, there have been a lot of cases.

Mr. Mitchell. Prof. Sunderland, why do youfeel that it is desirable in the Illinois Practice Act to go back to the English rule having a more restricted application?

Prof. Sunderland. Well, on the question of making it the same and getting the same tie as to the defendants, it seemed a little easier for the bar to take it.

Mr. Wickersham. I wouldbe in favor ofthat Illinois rule.

Prof. Sunderland. So would I.

Mr. Wickersham. But I think a rule that enables a plaintiff to bring in the same cause of action against a man, and five others against whom he has a different cause of action, and ten others against whom he has a similar cause of action has worked out a great hardship against the individual defendant. He would be compelled to watch the proceedings against all the other defendants, because something might be done that would affect his particular interest. It would add greatly to the expenses, and it would add enormously to the duties of his attorney; andI cannot see any logical reasnn for carrying the rule that far, just because there is a common question of law involved. Now, I think as you have limited it in the Illinois practice-- you have got a practicable system. You have got provisions that justify, really, the various groups of people in a suit, but I cannot possibly see any justification in compelling a single

defendant to come into a lawsuit, with, perhaps, 20 others, and with as many different lawyers, and saddle him the additional expense and trouble of having his attorney watch all of those others to be sure that something is not done in the suit by which he would be injuriously affected. I do not think the way they are tried in any particular district I live in would be of any advantage, and I think it would lead to hardship on individual defendants in many cases.

Mr. Dobie. Might he not get an advantage sometimes?

Mr. Wickersham. No. I have been in lawsuits, and they are common enough, they thought they would be justified in having a town meeting of counsel. (Laughter.)

Mr. Lemann. It is everybody's business and nobody's business.

Mr. Wickersham. And I think it would very seriously jeopardize the interests of some defendants.

Mr. Lemann. There is no doubt about that.

Mr. Mitchell. It is indeed a question whether it is safe for us to go further here than the English rule.

Mr. Wickersham. I think that Illinois statute that took those questions into consideration and said, "This is going far enough" was correct, and if we went much further than that, by that very thing, we would stir up opposition undoubtedly. In 1915, I did part of the framing of the Constitution of the State of New York, which contained a

great many reforms, and was turned down by the people subsequently on a separate submission; subsequently it was adopted, just taken step by step, 85 per cent.

Mr. Mitchell. Prof. Sunderland, do you feel that, outside of selling it to the bar, as a matter of practice it is good practice to favor the English rule, instead of the more restricted Illinois practice?

Prof. Sunderland. ~~Yes.~~ It would not make much difference, because practically every combination will be in one under the several rules.

Mr. Wickersham. Whether it is a real one or not?

Prof. Sunderland. Yes, I think it is an extraordinary case that would not come under this rule, and I do not think for that reason that this broader rule that Dean Clark has indicated is necessary.

Dean Clark. I was going to say this; that I dislike such an expression; but I think this expression is, briefly, "arising out of the same transaction or series of transactions." I can see that it does no harm, and I think the whole question is academic. I cannot conceive of that language being in or out making any practical difference on the side of the plaintiff. I will raise the question about the defendant in a moment. I would like to have anybody tell me what that means, but that may be an academic question.

Mr. Morgan. Well, you can find out what a transaction means in New York, if you are ~~limited~~ interested.

Dean Clark(Interposing). What is a series of transactions?

Mr. Morgan. I do not know about that, but New York has held that if you have a fist fight and a slander at the same time--if a man soaks a fellow on the jaw--there are two separate actions, and they do not arise out of the same transaction.

Prof. Sunderland. It might be a"series of transactions." (Laughter.)

Mr. Morgan. That might be.

Mr. Lemann. In that case the court would say there is not a common question of law,

Dean Clark. Well, I think you cannot stop to talk about that.

Mr. Mitchell. Dean Clark, will you state to us the reason for liking the English system which does not place any such requirement on the defendants. What is the point on that?

Dean Clark. I am a little afraid to put a restriction on the defendants. One of the famous English cases, and it is a kind that certainly should be followed, is Payne vs. Bryan Time Recorder Co. I have it here:

"The plaintiff carried on a business as an office supply company, and had bought cars from the Bryan Time Recorder Co.--No; it sold the cars to the Bryan Time Recorder Co., and bought them from the Curtis Co., Ltd. The Bryan Time Recorder

Co. refused to pay for the cars supplied to them, on the ground as they alleged, that they did not conform to the specimens which which they had contracted that they should conform to."

That is, this was the middleman in between that was going to squeeze both sides. He brings a suit against both. Now, if the car is up to specifications, the purchaser must take it. If the cars are not up to specifications, he can recover over from the man or from the company from whom he has bought them. Now, are those two things"a transaction or series of transactions"?

Mr. Wickersham. Well, why were they not?

Dean Clark. Well, I hope so.

Mr. Wickersham. Well, has anybody doubted whether they are a transaction or series of transactions? If you have a man buying cars and selling to B, that is a series of transactions.

Dean Clark. Well, there is a restriction in the English rule, so that there was not any occasion for going into the matter.

Mr. Lemann. Did the middleman sue his purchaser and find out which one of these fellows owes him the money? One of them owes him.

Mr. Mitchell. He would have to get his ~~stuff~~ story effective.

Mr. Lemann. That is it. Did he take the judge

aside and say, "One of these fellows is right and one is wrong, and I do not know which one."

Mr. Wickersham. Have it in the alternative.

Mr. Lemann. Does he make any statement himself? Does he say, "I believe they are all right, but if they are not all right"--

Mr. Morgan (Interposing). He says "I believe they are all right, but if they are not right, this bird must pay for them." I do not want to lose both suits."

Mr. Mitchell. It is going to be a great advantage along this line if we are able to point to some jurisdiction, like the English, where the thing was tried and worked. I think that is more likely to get approval than if we tried to get something new; we might get into trouble. The question occurs to me whether we ought to shrink away from the English system, as they did in Illinois.

There is this thing also--that whatever you adopt, and the rule is adopted, and the Supreme Court goes along, and it has a standing committee and keeps an eye on it, and finds that there are cases that this rule does not plainly cover--I think they will just fix it and in the course of time they will get a rule that will cover all the cases.

Mr. Morgan. May I ask Dean Clark if the English court has worked out a"series of transactions"?

Dean Clark. I do not think they have. I think the

emphasis has always been on the question of law or facts test.

Mr. Wickersham. Prof. Sunderland, what has been the operation of that law in Illinois?

Prof. Sunderland. I think it has operated very well. I think Major Tolman will know better about that.

Mr. Tolman. I do not think there is much regard for it, but the lawyers use it.

Mr. Morgan. It is only a year since it went into effect.

Prof. Sunderland. Two years.

Mr. Lemann. California has a rule like this. What is the effect there, Mr. Olney?

Mr. Olney. It has not yet had any appreciable effect. I couldnot tell you.

Mr. Lemann. Would it not be better to figure this out and get the opinion on it?

Dean Clark. This has been written about a good deal. Prof. Sunderland has written about it, and Mr. Lowman, and all of us have tried a hand.

Prof. Sunderland's research man had an excellent article on series of articles on jt.

Mr. Lemann. Who was he?

Dean Clark. Col. Plumb.

Mr. Morgan. In the Michigan Law Review.

Mr. Wickersham. Of course, we know it has been written about, and certain persons think it is a good thing or is not a good thing, but to what extent has it been used in the court

and has the bar responded?

Prof. Sunderland. I am inclined to think that in England there has been very little litigation over it. I think that proves that in the course of years it has not caused trouble.

Mr. Wickersham. How about Illinois?

Prof. Sunderland. I understand it has not gotten into court yet.

Mr. Wickersham. Well, of course, that Illinois rule is not very different from the New York rule--because of the action as to the defendant must grow out of the same transaction or series of transactions.

Prof. Sunderland. Yes, I think this is very similar to the New York rule. Of course, in New York the rule against defendants was very much restricted; so that you could not use the rule, or restriction of the rule, in a series of causes of action.

Mr. Donworth. If there is a common question of fact, or a common question of law--take the negotiable instruments law. Can you sue anybody because an endorser is liable? And you take the income tax law and the Federal Government: If you eliminate the identification of the transaction or series of transactions, it seems to me that there is absolutely no limit.

Mr. Wickersham. What strikes me is that it puts an

enormous unnecessarily on the individual defendant, or the small group of defendants, where there are whole lot of other defendants with whom he has no relation whatever, except that there is some common principle of law that runs through as to all of them.

Mr. Lemann. Well, of course, it does have that. I have the suggestion that Louisiana is raising a point about the franchise law how "losses" is to be construed where there is an offset; and now they are sending bills to almost every corporation, and under this system they could sue one hunddred of them in one case, because there is a common question of law.

Mr. Morgan. Is not that the way it ought to be attended to? That is, in one lawsuit, or else make all of them dependent upon one. I do not see any sense in having one hundred lawsuits.

Mr. Lemann. What would happen is that ~~we have tried~~ they try one and the rest wait.

Mr. Morgan. All the rest is just mathematics, and the other fellows are not brought into court. Of course, that would not arise here. What you have said, Mr. Chairman, as to the fire cases in northern Minnesota right after the war, where there was a question of the cost of quite a number of actions.

Mr. Donworth. It was one transaction.

Mr. Morgan. Well, we had 300 or 400 cases, and it took three months to try one. It was a question of the cause

of the fire.

Mr. Mitchell. A fire was set out in the woods, and they contended that it was started by the railroad.

Mr. Lemann. And you got them together?

Mr. Morgan. I had to. The litigants had to get together, or you would have stricken down the system of courts. It would have taken 900 months to try all of those cases.

Dean Clark. There is a later rule for consolidation, but I wonder if the Committee has in mind how far the court can go now in trying cases? The present consolidation statute is found in 28 U.S. Code, 724. I put in a later rule regarding consolidation; but I do not think I can go further than this:

> "When causes of a like nature or relative to the same question are pending before a court of the United States, or of any territory, the court may make such orde orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate the causes when it appears reasonable to do so."

Mr. Donworth. When a motion to consolidate is up, everybody is heard, just as in a court of equity.

Dean Clark. Well, of course, either here in this way, or in a motion to sever, and in this way you can put them

together.

Mr. Wickersham. Here is the Practice Act of New Jersey of 1912:

> "The plaintiff may join separate causes of action against several defendants, if the causes have a common question of law and fact and arise out of the same transaction or series of transactions."

Mr. Mitchell. There is an interesting decision of the New York Court of Appeals, in which they considered the New York statute and required a common question of law and fact; and they held that there was a subtantial question of law and fact that was common to all. Then the next question was whether or not the cases arose out of the same transaction or series of transactions; and the series of transactions was this: Each of the plaintiffs had bought stock in a certain corporation from the defendant, and alleged false representation, and one after the other had made a separate purchase, and they all alleged this false representation; and it was held that series of purchases was an independent act by the purchasers, and it must be a series of transactions within the meaning of the statute, and it was going the wrong way.

Mr. Wickersham. That was joinder of theplaintiffs.

Mr. Mitchell. Yes, this was a New York statute.

Mr. Lemann. An entirely different thing has been

said by the New York Court of Appeals recently.

Dean Clark. Another case in New York was the case I have given you, where there were 23 plaintiffs against 21 defendants, and where attention was directed to the fact that they made these reports, and there were 57 causes of action set up in that case, and that each cause did not affect all of the defendants.

Mr. Dodge. In view of those circumstances, suppose, on the question that Mr. Mitchell just called attention to--suppose five plaintiffs buy the stock of five different defendants, and there was one question that was common to all that happened to be involved. Is there any advantage in allowing under such circumstances the suits to be consolidated into one?

Dean Clark. Well, the main advantage in all this is to avoid dispute. I think in a good many of these cases it is not important to get cases tried together as such. The most important thing is to avoid trouble from it, and it has been a source of trouble ever since--well, there was some trouble at common law, but it was worked under the codes. But if we can get a system whereby you remove the dispute--and here you shift the basis of it; instead of fighting over the bare bones of whether your paper documents should be together or should be separate--and Mr. Morgan is quite correct when he emphasizes the bearing of this question as being connected

with that end of the litigation; it shifts the emphasis as to the convenient way of trying the cases.

Mr. Wickersham. Yes, it shifts the emphasis so that the defendant is expected to bear a very much greater burden than he would otherwise.

Dean Clark. You have mentioned that several times. I do not think he bears a greater burden.

Mr. Wickersham. Well, you try a suit for a defendant where there are a whole lot of defendants represented by other attorneys, and you will find out where the difference is.

Mr. Mitchell. Take the case that Mr. Dodge mentioned, where you have a number of plaintiffs who have made a separate purchase of stock, and have not even made it from the same vendor; they have made it from a series of stock sellers, each one of whom has been selling stock in the same corporation. It may be that each one of them has been making representations of a similar nature as to the financial condition of the corporation, and that the only common question of fact there is whether the finances of the corporation are, as each one of those defendants represented it to be. Now, if you can join all of those defendants, and if you can join all of those plaintiffs in one suit, the only possible advantage of having them together was that the one question of the financial condition of the corporation could be litigated before one jury, with the one set of witnesses. I do not see

that anybody gains by that.

Mr. Lemann. Maybe the plaintiffs would lose because each fellow would be tied up with the other fellows; by the time you had all the lawyers, with their engagements and the witnesses--by the time they get through with their own case--well, I would not be mixed up with it.

Another question may be this: I was just wondering of how much practical importance this was. Prof. Sunderland gives the impression that the Illinois rule would care for most of the cases. But in the Federal cases, how far would the jurisdictional question come in if you lug in a lot of plaintiffs and defendants? And to what extent can you do this without breaking some of your Federal jurisdiction?

Mr. Dobie. That is a good point.

Mr. Lemann. If that is going to limit you--

Mr. Dobie (Interposing). It will limit you tremendously.

Mr. Lemann. I have an idea that the Illinois practice could be adopted; and that is why I think if we can agree on the Illinois rule, that we had very much better do it than adopt the Federal rule.

Mr. Mitchell. I think that is true.

Dean Clark. If we are going to the English system on that, we ought to go, and as I say, the English system contains some fine rules. But if the point of going to

a
~~the~~ Federal system is important--and it has some argument here, it certainly seems to me that we ought to go to it, and that we ought not to reject that for another system which, if anything, is limited, and is certainly untried, because, so far as I know, there are no Illinois cases which give us any light on the subject. But it seems to me it would be a great mistake to go back of the English system in that way.

Mr. Wickersham. Well, both of these States, Illinois and New Jersey--I do not know what the other statute is.

Dean Clark. Well, I am sorry, Mr. Wickersham, but you read the New Jersey provision as to plaintiffs.

Mr. Wickersham. No, I read the one as to defendants.

Mr. Lemann. Let us hear it again.

Mr. Wickersham. No, it was as to defendants, not as to plaintiffs. I think the same illustration was made by Mr. Olney a moment ago. Suppose, instead of buying from one corporation, the plaintiff had bought from three or four different corporations. They are totally different corporations and totally different transactions, and there is no connection whatever between them. Would you say then that the court would have a rightto bring all the defendants under those circumstances into one suit? I think that would be a hardship on the defendants. What I read was exactly this:

"Any person may be made defendant, whether jointly

severally, or in the alternative * * * *

(Mr. Wickersham read the New Jersey provision.)

Prof. Sunderland. That uses the word "contest,""the same contest."

Mr. Wickersham. Yes. Well, you have "transaction."

Prof. Sunderland. In Illinois we have a little broader language "series of transactions."

Mr. Wickersham. But you have some connecting links.

Prof. Sunderland. We have some connecting links?

Mr. Wickersham. And here your connecting links are thrown aside as immaterial. I think that is going too far.

Mr. Dobie. Could you not trust to the court in cases of that kind?

Mr. Wickersham. No, I would not trust to the court where you have a substantive right of the defendant.

Mr. Dobie. You are afraid of them?

Mr. Wickersham. I think the right of the defendant is to be sued under circumstances that protect him, and I think it would be an undue hardship to bring me as a sole connection with 25 or 30 other people with whom I have no connection whatever in a transaction to which I am not a party, because there is a common question of law involved.

Mr. Dobie. You do not think you could trust the court in a showing of that kind?

Mr. Wickersham. I might or might not.

Mr. Leman. There is one question about the practice ~~professionally~~, and that is disapproval of the courts.

Mr. Dobie. And yet we are drawing these ruleson a somewhat different basis, and making them rather flexible in many cases, and granting the court large powers in amendments and things of that kind. Is this not inconsistent with that?

Mr. Morgan. As long as you have no confidence in your trial judges, you will never get any procedural reform. You do not care what kind of fellows they are, because you will not give them any power. And then you say you cannot give them any power, because they cannot be trusted. And there you are , in a continuous circle. That strikes every reform for procedure, evidence and pleading--that you will not trust your trial judges. It was found that all the way through all the uncertainty in regard to the right of the court to comment on the evidence, that there were floods of telegrams, and they said, "If we had good judges we would be willing, but God help us, we do not have good judges;" and then you do not have good judges because they do not have any power. You must break that continuous circle in some place.

Mr. Olney. I can tell you what happened in California: We had a constitutional amendment which permitted judges to charge juries on questions of facts; but it specifically provided that the jury could overrule the judge on such questions. There came up a hanging case; and the judge, Judge Pratt, told

the jury they must go out and bring in a verdict for hanging.

Mr. Morgan. They did that in England, and the jury brought in a verdict of "not guilty."

Mr. Dobie. Was he hanged in that case?

Mr. Olney. I do not know.

Mr. Lemann. I was just teasing Mr. Dobie, because I have heard ~~xxxx~~ lawyers and others criticizing the court. I think as lawyers we can question their intelligent use of their powers, as a general proposition. I think I remember that Commonwealth case that you referred to a moment ago, Mr. Morgan.

Mr. Morgan. That indicated that there was much more confidence in the Federal judges than in the State judges.

Mr. Lemann. I think we all have confidence in the trial judges.

Mr. Dobie. Well, if you have, is not the question of evidence and of separate trial of certain issues being lost sight of in this discussion? Take the case that Mr. Dodge suggested: Would it not occur to the Federal trial judge that the only t ing there would be any advantage of having all of these people in court for, would be the one question that they had in common? That is the fact about that corporation's solvency. As to that, you would have a united front on the plaintiff's side and a united front on the defendant's side; and this town meeting and the difficulty of stepping on the judge's toes by defendant's lawyers would not occur; and

where you have separate questions as between the plaintiff and one defendant, in which other defendants were not interested, they would be determined separately. I think any intelligent administration of that sort of rule would enforce that. I do not suppose the trial judge likes one of those cases any better than any of the lawyers.

Mr. Lemann. I think we are chasing windmills in this discussion. I would like myself to see the cases in which this has come up, and how many cases would not be cared for by this Illinois rule. I think it quite unlikely --certainly, as I said to Mr. Dodge, I think it very unlikely it would come up, and I think that usually plaintiffs want to unit cases. If he had a case, I would rather try my own case. I do not think I would say, "Let us join in," because "Too many cooks spoil the broth," and he could try his case and I would try my own, and we could exchange views. So if I was trying to sue somebody I do not think I would be likely to want to bring in a lot of defendants. If I tried it before a jury, the more defendants I have, except in very large places, the more likely it would be that they would take men of their own class on that jury, that would be rather likely to take their point of view. I can see this English case, where a fellow that is in between, and he wants to get it settled, and each fellow will get it settled as to himself, and that is apt to be carried off. But I have a notion that we are fighting a theoretical point here, just

for the sake of a perfection viewpoint on one side, and overcoming the practical difficulties on the other; both sides overstate the picture, and I hardly think that it is worth using ourselves up on.

Mr. Dodge. The case is likely to arise where one lawyer had four parties who have a personal injury case, and he found that perhaps there was a combination of law, perhaps not vital, and he joined four different parties in this complaint.

Mr. Dobie. In the Federal court.

Mr. Lemann. That is not likely.

Mr. Dodge. It might happen.

Mr. Olney. It might happen. For instance, the Southern Pacific is a Federal corporation.

Mr. Morgan. They could if they wanted to.

Mr. Dobie. Would they want to go into the Federal court in the first place?

Mr. Olney. I do not think they would.

Mr. Morgan. But they would know that the case would be removed if they ask for more than $3,000.

Mr. Dodge. I think there should be some extension of the English rule. I think the English rule is very good, but I have not heard any argument for the extension of it.

Mr. Donworth. The whole purpose of it is that cases of similar nature may be brought together and tried together. I think all cases have many features of similarity. Now, you

are having in 25 cases one common point of law, and they may be so diverse in every other respect as to make unfair. In other words, you are sacrificing independence in these different cases there to the immaterial circumstance of ~~there~~ their having one common point of law.

Mr. Morgan. Well, do you think the trial judge would not order a separate trial under those circumstances?

Mr. Donworth. If you leave it to ~~its~~ his discretion, he will exercise his discretion, but he has to apply the rule.

Mr. Morgan. Well, do you think the judge would not ~~that he~~ order a separate trial, under those circumstances?

Mr. Donworth. Yes, that leaves it to his discretion; but we are making rules, and it seems to me that, unless there is some precedent of applying the identical point of law as a sufficient identification point to make one case, we should divide them.

Mr. Dodge. And if the judge is certain to separate the trial, why do it in the rule?

Dean Clark. To avoid the controversy that continually comes up as to that.

Mr. Tolman. I would like to make one suggestion as to what seems to me to be the real difficulty that confronts us. There have been omitted from this rule the words "arising out of the same transaction". Now, I would call your attention to the very radical difference there is between "comm question of law

or fact," and the expression "a common question of law or fact arising out of the same transaction."

Dean Clark. Or series of transactions.

Mr. Tolman. Or series of transactions. It is a very different thing.

Mr. Donworth. "A question of law arising out of"--

Mr. Tolman. "A question of law arising out of the same transaction." Now, the Massachusetts committee called our attention on this matter to the rule in admiralty. The admiralty rule uses this language, "growing out of the same matter."

Mr. Wickersham. The same what?

Mr. Tolman. "The same matter." Now, to a certain extent Equity Rule 37 joins together the subject matter of the litigation and the common interests.

Mr. Wickersham. I suppose in the admiralty rule the word "matter" means a ship, does it?

Mr. Tolman. The ship or the accident.

Mr. Wickersham. In other words, it is the same transaction; it is equivalent to the language "arising out of the same transaction or series of transactions"?

Mr. Lemann. It seems to me that the English rule would be all right. I do not like the Illinois rule.

Dean Clark. I would accept the English rule. I think that point is somewhat academic. But I must say that I would be very much disturbed by the Illinois rule. I would like somebody

to state what the Illinois rule is.

Mr. Tolman. I did not want to be understood as pleading here for that rule.

Mr. Dobie. Prof. Sunderland drew that.

Dean Clark. He did?

Mr. Dobie. And he is the man that has said the least about it at this table.

Prof. Sunderland. I do not think it is a fair rule. (Laughter.)

Mr. Mitchell. I would like to ask if there is anything about the Illinois rule, where you would not find the same thing in the English rule because not only in the Illinois rule but in the English rule when you say contesting the defendant it applies not only to the same question, but to the same transaction or series of transactions. Now, the English rule uses that same phrase in connection with the plaintiff. Now, I do not find anything in your rule, Prof. Sunderland, that differs greatly from that language of the English rule, except that you use that same expression when you are dealing with the defendant. Is that about it?

Prof. Sunderland. Yes, that is about it.

Mr. Morgan. Why not take the English rule, where you have had forty years experience by the court, and if you take the Illinois rule, God knows what the Supreme Court of Illinois is going to do about it.

Dean Clark. The English rule refers to parties whom it is necessary to make a party, to the complete determination or settlement of any question arising, or in the alternative, arising out of the same transaction, regardless of the cause of action contained therein. That phraseology "whom it is necessary to make a party for the complete determination and settlement of any question involved therein." If you put that in almost anything could happen.

Mr. Wickersham. In other words, there is some justification for bringing in a number of defendants here; and for this proposal I see no justification whatever, except the suggestion that it is more convenient to the plaintiff to bring in the defendant in one suit instead of three or four suits. But the defendants have some rights. And I see no justification for bringing the defendant into a suit because, although he has no concern in the transaction which gave rise to the claim against the other defendants, there is the same question of law that is common to them all. And it would be imposing on the defendant an intolerable burden.

Mr. Dobie. He might be very much interested in the separate transaction, but one in the same series, I say, it is a separate transaction from the other one litigated, but in the same series.

Mr. Wickersham. I do not know what a series means.

Mr. Dobie. Nobody does.

Mr. Wickersham. I do not understand what a series is.

Mr. Dobie. I congratulate you. I am advocating some logical justification for bringing a defendant into a lawsuit with a whole lot of other defendants with whom he has no common cause at all, or common interest, just because there is one question of law applicable to all of them. It may not be the determining question of law; it may that there is just one legal question that affects all of them, but it does not read that that is the determining question.

Mr. Mitchell. Now, some of us will want to study this subject further before the Committee makes a final decision for its report. I think we might make a tentative decision, if it is the sense of the meeting that the rule should stand, in the meantime, but the Committee should study it and look up the authorities. Now, as I understand, the question, first is whether we shall go the whole way, as the Committee has done. There are others of us that think we can compromise on the English rule, that has been tried and seems to work, and may be there are others who may still want to go back to the Illinois rule. Now, can we not take them both and settle first, whether the majority of us are in favor of the one stated by the subcommittee, and then pass on to the English rule, and test that, and if that fails, then we will try the Illinois rule, and that will bring it to a head.

Mr. Lemann. May I ask what the English courts have said as to the difference between the English rule and the

Illinois rule?

Mr. Morgan. Nobody knows what the Illinois rule is.

Mr. Lemann. What has the 40 years experience of the English rule produced in the case of circumstances that will bring defendant in on unrelated actions?

Mr. Morgan. I hesitate to vote for the English rule until I know what is meant.

Mr. Mitchell. Let us have your present impression tonight on the subject, with the understanding that it will be considered and the subcommittee will consider the question.

Dean Clark. Might I say on that that there have been some cases--there have not been so many, but there have

been some well known cases. In one case the plaintiff sued two insurance companies, each of which had insured a portion of the cargo. The matter has not been greatly fought over in England, because it has worked well, and nobody has apparently been harmed, and they are satisfied. But I must say that the effect of the Illinois rule is that you do not know what it is. It seems to me that it can well be "All things to all men."

Mr. Olney. If I understood the reporter correctly--and to find out whether I did I would like to ask him this question and to put this proposition: Your concern here today with what is practically a radical advance, taking the country over. Now, under those circumstances, is it not wiser for us to take the English rule than try to go further, and if I understood you correctly, the only advantage to be derived from taking the further step would be to avoid some questions as to misjoinder?

Dean Clark. Yes, well--

Mr. Olney(Interposing). Now, it is not better to face some little question that may come out under the English rule, which provides for "transactions;" in other words it puts that limitation--rather with this matter of ours, going still further into a field of whose effect we arenot certain, and where our action is certain to be questioned?

Dean Clark. I think that is a perfectly fair argument, and I cannot object greatly to the English rule. The main

thought I had in mind was that the English rule contains certain combined statements. I do not think I have gone beyond the English rule, really.

Mr. Wickersham. Is it not true that in the long run the Federal judges are likely to take a correct view of it and come out all right?

Dean Clark. I think that is true.

Mr. Dobie. And you have the Supreme Court on top of this. I have been talking to Mr. Cherry, and I do not know about the New York rule, but they would come up and block you all the time.

Mr. Cherry. I am quite satisfied with the ~~New York~~ English rule.

Mr. Olney. I move that we adopt the English rule. I might say, that in all our discussions here, we want to get through with this whole matter, or rather, we want to get through approving of all of these things; our primary purpose is to present a plan for the unification of the procedure in law and in equity, and that is the thing we can do and have got to get over if we can. That is the great refrom we have got to make, and that is the only refrom that has got to be submitted to Congress. And it is far better for us to prepare a plan that will go through and accomplish that, with as little opposition as possible, than to put in a lot of other things that are going to hazard that greatly, when these other things can be attended to afterwards by the Supreme Court itself, without the necessity of going to Congress with it. The result of all of that is

that when we get through we will have to go back and scan all of the things that we have done and see what is wise in connection with them. I have particular reference to something that was drawn by Prof. Sunderland, with whom I thoroughly agree, but which is going to strike most of the provisions rather badly I think. But for the time being, let us go on with this and get what we can and what is wise, and then take a survey at the end. So I make my motion.

Mr. Morgan. I second the motion.

Mr. Mitchell. Is there any further discussion? Those in favor of the motion will say "aye"; those opposed "no."

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

Mr. Donworth. Does that apply only to Rule 42, or does it take in Rules 43 and 44?

Dean Clark. I should say it only applies to Rule 42, and there are some questions on Rule 43 and 44 that ought to be considered.

Mr. Olney. By the way, in connection with Rule 42, I want to offer a few changes there.

Dean Clark. Well, I suppose Rule 42 will be very considerably changed anyway, in the mere language.

Mr. Olney. Well, this is further on. Well, this is in the third sentence, where it says, "The court may make such order;" it seems to me that it should read, "The court may make such orders," in the first place, because it ought not to

be confined to a single order; and then it goes on "as may be just to prevent a party from being embarrassed or delayed"--

Mr. Donworth (Interposing). "Or prejudiced;" I do not know "embarrassed or prejudiced" might be the same thing.

Mr. Olney. But the embarrassment is apt to come in the delay--"embarrass the party, by requiring him to attend proceedings in which he may have no interest." I would substitute for that, "against the party against whom the asserts no claim, and who asserts no claim against him."

Dean Clark. I think that is all right.

Mr. Olney. I am offering that for your consideration, because I myself have not considered it thoroughly.

Mr. Donworth. I suggest also, in the first line of Rule 42, where it says "All persons subject to the jurisdiction of the court may join as plaintiffs." As a general rule, anybody can join as a plaintiff, whether he is subject to the jurisdiction of the court or not. The expression is pertinent to the defendant and not the plaintiff. He can come in whether he is from Canada or Louisiana.

Mr. Cherry. You are out of the Union now.

Mr. Wickersham. Well, if you put that clause in parenthesis--

Dean Clark(Interposing). Yes, I think that would be implied anyway; that is, we would not use the joinder to sustain jurisdiction. I just wanted to have assurance in the

beginning that it will not.

Mr. Wickersham. It applies also to the defendant, does it not?

Dean Clark. "All persons subject to the jurisdiction may be joined as defendants"; so that it applies to the defendants.

Dean Clark. Well, it applies, but this is not the jurisdictional test, so that I do not think it is intended. But I certainly think it is intended to be implied.

Mr. Wickersham. Well, we do not need it as to theplaintiff.

Dean Clark. No.

Mr. Mitchell. How about Rule 43?

Dean Clark. Rule 43 presents another problem. I might say there has been coniderable agitation to have a Federal interpleader statute. I think the insurance people, among others, want it.

Mr. Mitchell. Yes, I drafted it for them years ago.

Dean Clark. They want a little more, and Prof. Chase, of Harvard, has, I think, prepared a brief, and wants a lot more done; and he says some of it must be done by statute, and of course, it would because he wants to have process run in different jurisdictions. But he states that there are certain things that very clearly can be treated by rule and he hopes we will treat them. I might say what I have done here is in

the main, hardly more than to delete things as they are. I wanted to bring in the idea that you could have interpleader, and this is not a rule that does very much as it now stands. Now, he makes certain suggestions that we could abolish some of the requirements--and I shall have to go over this thing myself.

I suppose interpleader might come in under our defense section anyway, but he wants to provide it so that it can be filed as a defense; that is, that the stakeholder or company, being sued, can, as a matter of defense, bring in an interpleader.

Mr. Mitchell. Do you mean interpleading the other claimants?

Mr. Donworth. He can bring them in.

Mr. Mitchell. That was the original statute as it was drawn, where you had different claimants to the same policy, sued by one--that they could interplead. That would take care of the question of diversity of citizenship.

Mr. Olney. I have never had any interpleader experience in the Federal court, as it happens. I have had in the State courts; but is there any question about the right of interpleading in the Federal court? Is any statute or rule required for it? It is a relief to which a man is entitled.

Mr. Lemann. The reason the insurance companies had to have it was because the venue required it where the question of citizenship was giving him trouble.

Mr. Mitchell. If you were sued on a policy by a claimant in one State, you could not interplead by a claimant in another State, because under the venue statute, that person must be sued in his own district.

Mr. Donworth. That is supposed to be covered by the statute, is it not?

Mr. Mitchell. Yes.

Mr. Olney. And when I read this rule--I hesitate to define in a rule the right of interpleading. Of course, the right is pretty well established, the cases uphold it, and you definition may be wrong.

Mr. Mitchell. Well, you mean to leave the statute alone and not deal with in the rule?

Mr. Olney. Yes.

Mr. Mitchell. It has to be treated in one place or the other. You cannot interplead unless a statute or the rule allows it.

Mr. Olney. Well, you can in equity give the right of interpleader without a special statute, I think.

Mr. Mitchell. Well, if you have a lot of statutes or rules which prescribe the procedure and do not say anything about it--do not say anything in the statute or the rules--you do not get it. That would be my impression.

Mr. Olney. Furthermore, I think your general rules in regard to making parties and bringing in other parties

would cover the matter. But the objection that I had is to endeavoring to define theright of interpleader. I am afraid of it. It may be a groundless fear, but I am afraid of it.

Mr. Morgan. You mae the suggestion, Mr. Clark, that that provision as to ~~party~~ parties would take care of all interpleading?

Dean Clark. Well, of course, that is really the thing I want to do. All I did in Rule 43 was to tie interpleader up with the rule as to parties, and that is all I tried to do. But, I think that is a place that we can clear up some of the difficulties without much trouble. I do not believe there will be any question under this rule, but here what is a matter of defense is taken over by the interpleader.

Mr. Morgan. It certainly is, with your party provision here.

Mr. Lemann. This rule is very awkwardly worded.

Mr. Morgan. Yes.

Mr. Lemann. It says, "In accordance with the provisions of Rule 42," and as I understand, down to the word "providing", it is an attempt to restate the provisions of Rule 42; and it makes it very confusing, when it is not adapted to the expression by way of rule. I would leave out those four lines, and say at the bottom "Compare with Rule 42, if you want to draw attention to it.

Dean Clark. All it does is to say that you may have interpleader under the rules we have provided herein for joinder of

parties.

Mr. Dodge. When they calim against the plaintiff, is the plaintiff who is subject to the possible doubly liability?

Dean Clark. It may be the plaintiff or the defendant. it might be the plaintiff, but the original suit of interpleade would be by a plaintiff.

Mr. Dodge. If he ~~held~~ were the plaintiff in interpleader, but I think this was a case where there was an existing suit and somebody else was possibly bringing a case against the defendant.

Mr. Lemann. What he was saying was that you should have interpleader so that we would have Rule 42 so we know that Rule 42 would govern it.

Dean Clark. Yes; and the last sentence covers the point.

Mr. Donworth. I would like to suggest, Mr. Chairman, without starting a discussion, that it seems to me that some of these things that we are doing here may go beyond our mandate, and it may be that Congress will affirmatively approve these rules, and I hope they will appeal to Congress so that it will. So that I am particularly tender about putting in things that may be legislation themselves. It seems to me that we might well consider putting in a section--if my point of view that I have stated is correct--whereby, when a citizen of Texas sues a corporation of New York in Texas--say for

insurance or anything else--that that claim constitutes a fund n the court, and that the Texas court, on the application of the defendant, could bring in other claimants to that money, and they could be notified, even though they are not amenable to suits directly. That ought to be the law.

Mr. Mitchell. Well, that would amend the Constitution in a good many cases, because you are always up against the question of diversity of citizenship in any of those interpleader cases.

Mr. Donworth. Well, how are you going to do when the Texas man brings a suit against a New York corporation in Texas, and the fund is brought into the court and ~~he~~ is subject to the jurisdiction. There is your jurisdiction, and the rest is only incidental.

Mr. Lemann. Auxiliary.

Mr. Mitchell. Well, if it is paid in, I suppose that is different; I do not know.

Mr. Olney. When you get right down to it it is a question of debating the provisions of the Constitution. The right of interpleader which exists in these two defendants--and in this case--~~the~~ the moment you have two defendants, why, there is not the diversity of citizenship which is required.

Mr. Mitchell. Judge Donworth's idea is, I think, that we ought to avoid putting anything into the mouth of the legislature, outside of the Committee's function and the statute.

The moment we do that we are lost, unless we can get Congress to pass the statute and approve it.

Mr. Donworth. I think that is right.

Mr. Mitchell. Yes, that is a risky thing to do.

Dean Clark. It seems to me that we ought to make at least a gesture toward interpleader. I suppose any person interested in rules of joinder might think of interpleader, and try to look to find it in these rules; and I tried to tell him that we had it in here.

Mr. Mitchell. You can say in Rule 42 joinder of plaintiffs or joinder by interpleader of defendants; make it clear.

Dean Clark. You could, although there is a good deal of weight in Rule 42 now. It could go in. Then Prof. Jevie would be interested in getting in the last sentence of Rule 43.

Mr. Olney. In order that we may get on, I suggest that this be a suggestion to the reporter in connection with the redraft which you are going to make.

Dean Clark. I would like to have your suggestion on this: Do you think we want to go into interpleader somewhat more? I do not think Prof. Jevie asked us to go quite as far as Mr. Donworth suggests. I think Prof. Jevie feels that a statute is necessary to go as far as we want. But he thinks that some of the details ~~that~~ we can cover by going into the matter more extensively.

Mr. Donworth. Suppose we put in something along this

line--"To the extent that the jurisdiction of the courtin any case goes, the court may make appropriate order on interpleader--to the extent of the jurisdiction of the court in any case it may make orders appropriate to giving the parties or either of them, the remedy of interpleader."

Mr. Tolman. As I read Prof. Levie's letter, the one thing that he must have in mind is the power to adjudicateclaims from different States.

Mr. Donworth. Well, that needs a statute.

Dean Clark. That is true, but he does not state that that must be done by ststute.

Mr. Tolman. I know.

Dean Clark. That is what he is really after.

Mr. Tolman. Well, he is going to get that jurisdiction or venue by Congress if he can. This question here of jurisdiction does not mean that we will not get interpleader when we are within the jurisdiction. I think it is desirable for that purpose.

Mr. Donworth. I wuld not limit it to Rule 42. I would make it subject to the jurisdiction of "in any case", or something like that.

Mr. Wickersham. Here is the statute which covers the subject. This, I believe, is the one you spoke of, Mr. Mitchell, that you drew up. It is the Act of May 8, 1926, Chapter 273. It extends the insurance interpleader

statute, providing that it shall include any person holding a fund against which there are conflicting claims, and conferring upon the United States District Court, jurisdiction in all cases where a general equity interpleader by bill of equity for that purpose would now lie, subject to the same conditions, as to venue, right to enjoin proceedings in the State court, and diversity of citizenship as are contained in the insurance interpleader statute." I will read it.

(Mr. Wickersham read the Act of May 8, 1926, Chapter 273.)

Mr. Mitchell. You see, that is limited to Rule 2, claim for diversity of citizenship.

Mr. Lemann. Yes, you see that was another reason. We have so much trouble with where the limit was $1,000, and they made the limit $500.

Dean Clark. Yes, that was an act of 1925.

Mr. Wickersham. This brings the fund into the court, and in a case where there is diversity of citizenship--and then requires anybody outside who claims an interest in the fund to appear and claim it.

Mr. Lemann. That would require a Louisiana insurance company to interplead and sue a Louisiana citizen.

Mr. Mitchell. That is true.

Mr. Donworth. When the interpleader attaches, you can bring in any ~~finance~~ person, regardless of residence.

Mr. Mitchell. Well, ~~does~~ it says the claimants have to have diversity?

Mr. Donworth. In the first instance.

Mr. Lemann. In your case, you bring in a class of cases that the statute would cover.

Mr. Dodge. Is it not true that a New York ~~court~~ claimant could come into Massachusetts ~~corporation~~ and compel two Massachusetts citizens to interplead?

Mr. Lemann. Yes.

Mr. Dodge. Well, how about a defendant in that? Suppose it was a Massachusetts defendant?

Mr. Lemann. That would be more doubtful. Suppose the Massachusetts corporation goes into New York.

Mr. Dodge. A New York corporation can go into Massachusetts and compel two Massachusetts citizens to interplead there without any difficulty, both claiming against the plaintiff.

Mr. Lemann. Yes.

Mr. Dodge. Now, suppose a plaintiff comes in in thesame way to Massachusetts, can you not bring in any other defendant of the same citizenship as the defendant?

Mr. Lemann. Yes

Mr. Dodge. Under that last sentence of Rule 44, can

that not be done now?

Dean Clark. Well, you cannot have them all on the same side. I think you get into trouble there. That is, if now the defendant must counter claim against somebody in Massachusetts, are you not going to have them on the same side--

Mr. Dodge. No.

Mr. Mitchell. On the adverse side.

Dean Clark. Yes, that is what I mean.

Mr. Lemann. They are sued as nominal defendants, but they are sued there in the same case.

Mr. Dodge. I was wondering, if there is not jurisidiction, if we are not trying to give jurisdiction there.

Dean Clark. In that sentence I did not intend jurisdiction; of course that would involve the words "diversity of citizenship." On the other hand, to put it in affirmatively was thought to be necessary, because, of course, your action of interpleader was a plaintiff stakeholder suing in equity, and not a suit brought by way of counter claim.

Mr. Lemann. Not a counter claim.

Dean Clark. That is correct.

Mr. Lemann. I suggest this motion: That the reporter be requested to draft a rule on interpleader, with the change in the language that we have now employed, with reference to the manner in which--to make it plain that we specifically

recognize the right of interpleader, and in thatredra ft that he submits for the Committee's consideration the point that Prof. Jevie wants to cover, indicating to just what extent it is not covered by existing law; and that he make it plain that this rule will not supersede the statute.

Mr. Mitchell. I think ought to expressly say so.

Mr. Lemann. Because, in other words, this might be construed as overriding it.

Mr. Mitchell. I was going to say that. Is there any second to that motion?

Mr. Tolman. I second the motion.

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

Dean Clark. Are you through with Rule 43 now? If so, I was going to say I think we will have to give some consideration to Rule 44.

Mr. Mitchell. Can you do it in five minutes?

Dean Clark. Perhaps I can state the point. This is a situation where at common law there had to be a joinder, the parties having a joint interest, but where there was a subsequent mistake, if you did not make it it could be corrected. The court generally used the expression "united in interest, and the equity rule does use that expression. When we came to work on it, we first started it with simply keeping the equity rule in effect. The equity rule, you will

see is practically just that ~~first~~ sentence of Equity Rule 37:

"Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join he may for such reason be made a defendant."

Now we have fairly extensive Federal statutes which I think must be included here. I think they are 28 U.S.C., 111. Those are given two pages back.

Mr. Tolman. That is page 3 of that note?

Mr. Wickersham. Yes.

Dean Clark. Yes. It goes pretty far I think in the right direction. That is, it goes against the old common law idea that you had to bring somebody in. There has been a general tendency to get away from that requirement anyway. Some of the provisions go so far as to provide that a joint obligation shall be treated as joint and several. The Federal statute takes a little different tack. It says:

"When there are several defendants in any suit at law or in equity and one or more of them are neither inhabitants of nor found with in the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly

served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants or nor found within the district, as aforesaid, shall not constitute a matter of abatement or objection to the suit."

Now, that pretty much, as I read it and have read it and tried to work on it, makes it so that you do not abate the Federal suit any more, but largely continue with those you have begun. That is the basis upon which we have now drawn the rule.

And in doing so we went back to the old phrase as used in the Federal Cases, of "joinder of necessary parties." "Persons having a joint interest must be joined on the same side as plaintiff;" "When persons who are necessary or proper parties."

And I may say right here that I think probably the words "or ~~appear~~ proper" should come out, because I think this power need be given only in the case of necessary parties--"parties have not been joined or been joined in the action and are inhabitants or to be found within the district in which action is brought," the court may order them to appear in the case. But when such persons are neither inhabitants of or found within the district in which the action is brought", and so on. That is the way we have it.

Now, from that point on the next section is the statute.

Mr. Lemann. Would you leave out "necessary"; that the court cannot entertain jurisdiction even though they are necessary parties.

Dean Clark. Yes, that is what the statute says.

Mr. Dobie. The next part is the only one that that can apply to; the indispensable party it is impossible to dispense with; and the "proper party" means nothing.

Mr. Donworth. The court divides "necessary parties" into two classes; first, that is merely necessary, not indispensable; and the other, indispensable; as to those the court would not hesitate to join them; if they are only necessary, it will.

Prof. Sunderland. For that reason, is not "necessary" a very bad expression, as it seemed to me; you do not know what it means.

Mr. Morgan. It means somewhat between "proper" and "indispensable."

Mr. Dobie. In that connection I want to ask you the difference between "indispensable" and "necessary."

Prof. Sunderland. Some courts use "indispensable" as "necessary."

Mr. Dobie. But not the Supreme Court. The Supreme Court, strictly speaking, does not use the word "proper." It uses the expressions "formal party" or "trustee" and naked titles, as a person who is in to satisfy some

technical rule but has not interest in the suit. A necessary party is one who has an interest in the suit, and who ought to be in it for the complete determination of all the issues; but he is not so essential to it but that an adjudication as to it can be had without an adjudication as to him. And indispensable party, one who is so indispensable to the suit that no essential decree can be handed down which does not ipso facto apply to him.

Prof. Sunderland. I think that is true, but the State cases are greatly confused.

Mr. Dobie. Yes.

Prof. Sunderland. Now, would it not be possible to eliminate any misunderstanding?

Mr. Dobie. Yes, I do not think "proper party" should be in at all.

Prof. Sunderland. Yes.

Mr. Dobie. And I want to bring up this point: It seems to me that there are two things here: One is a Federal statute that is applicable to both law and equity, and applies to dispensing with these parties, either if they are not inhabitants of or found within the district. The other is if the man lives next door he will defeat the jurisdiction, if he lives in the same State as the plaintiff.

Dean Clark. Yes. Let us go over it, because the

suggestion is troublesome. Now, I really need to go fully into the thing, because I am afraid you limit the matter of joinder. As a matter of fact, I do not believe there is very much left to indispensable parties; nor do I doubt that there should be anything left. I am rather afraid that if you start by taking out "necessary" or start defining it, you have cut down on the power of the court to go into the suit. I do not say that it is impossible. Maybe some of you can suggest language which will hot be. But I ~~might therefore~~ should rather go the other way, because it seems to me that it is a salutary tendency to go in and decide the case as to the parties who were in, because I do not see that you are going to do any real injury by doing that, and you will do much more injury by saying that you cannot decide a case because you cannot catch somebody who had some interest.

Mr. Mitchell. In this rule, are you taking care of the situation where a person is a necessary party and is within the jurisdiction, in the district, but the joinder of whom would oust jurisdiction?

Dean Clark. In that case, I take it that the present Equity rule is that you do not need to join him.

Mr. Mitchell. I know; but the point of the thing is whether this rule was dealing with the case where we have parties in the district, but because of lack of diversity

of citizenship, they are out of the jurisdiction of the court.

Dean Clark. What I have done is shown in the last sentence.

Mr. Mitchell. Yes, you have covered that; that is the last line.

Mr. Donworth. One thought I had in mind was that the court got along very well with Equity Rule 39, and with that rule in force, the courts have created a distinction between being necessary and indispensable parties, and whether substantially the same thing as in Equity Rule 39 would not be all right, without trying to provide specially for it, but merely leave it to the court.

Dean Clark. Of course, that is possible. After all, that Equity Rule 39 was in the Equity cases, and we are now trying to draft a rule as to common law cases. And I am very much afraid that with that "united in interest" rule which is used in the code proceedings,--that each one would be considered pretty restricted.

Prof. Sunderland. That is covered in all sorts of ways.

Mr. Olney. If I remember correctly, Mr. Reporter, there was a decision by Judge Taft, in which he elaborately considered the case where two parties were interested in a patent, and one of them desired to bring suit, and my recollection was that, if the other party would join with him as

a party plaintiff--and under the patent laws he was required to be joined--he would oust the jurisdiction of the court. And Judge Taft laid down and discussed the case quite extensively, and pointed out that the suit may be maintained nevertheless in the Federal court. Are you familiar with that case?

Dean Clark. I do not remember the exact case, but is not that a provision of the Equity rule that we are trying to cover in the last sentence?

Mr. Olney. As I remember it, I remember thinking it was rather an elaborate procedure, but something that had to bbe quite carefully observed; and as I remember it, they had to allege that they had asked theother person to come in, or something of that sort, and he had refused.

Mr. Donworth. Was not that the case that enforced the statutory provision of the patent law, that the holder of the legal title to the patentmust be entitled to sue?

Mr. Olney. Yes, it grew out of that.

Mr. Donworth. You see, thejurisdiction of the court in patent cases is along different lines. I do not think the case Judge Olney has in mind would throw much light on this. I think it is an interpretation of another statute.

Mr. Dobie. Shields vs. Barrow is the leading case on that, according to this book here--which I wrote myself.

Mr. Mitchell. Gentlemen, it is past 10 o'clock, and

we should adjourn. What time do you want to meet in the morning?

I suggest 9:30. Of course, I should not object if overnight the greatest living authority on Federal Procedure would write a statute or rule on the subject.

Mr. Dobie. I have no objection. (Laughter.)

(Thereupon, at 10:14 p.m., the Committee adjourned until Saturday, November 16, 1935, at 9:30 o'clock a.m.