PROCEEDINGS OF

ADVISORY COMMITTEE ON UNIFORM RULES OF CIVIL PROCEDURE

FOR THE DISTRICT COURTS OF THE UNITED STATES

AND THE

SUPREME COURT OF THE DISTRICT OF COLUMBIA.

(Appointed by the United States Supreme Court.)

Washington, D.C.,

Sunday, November 17, 1935.

The Advisory Committee on Uniform Rules of Civil Procedure appointed by the United States Supreme Court met at 2 o'clock p.m., pursuant to adjournment on the preceding day, Hon. William D. Mitchell (chairman), presiding.

PRESENT: All the members attending the preceding sessions, except Prof. Morgan.

Mr. Mitchell. Well, we are down to the last sentence of Rule 39, beginning, "When an infant or a person incompetent," and so on.

Dean Clark. As I recall, last night some one raised the question whether there should not be a guardain appointed for both plaintiff and defendant. Well, I took this from the Equity rule, and I only gave my interpretation, but I suppose it is a matter of convenience. You start by next friend, without an appointment, and I suppose in most cases

you will have a regular guardian appointed by the probate or other court; yet I take it that the starting of a suit by next frined is very simple, without appointment; then when the case comes into court, the next friend could be appointed as the guardian ad litem, or some one else could be appointed. as Mr. Mitchell. You cannot appoint a guardian ad litem until you get jurisdiction; and you could do it by service of process on the defendant; and in order to have the infant get a guardian ad litem appointed, the next friend must start proceedings and get process served, so that it gives the court jurisdiction. So that I think this is all right.

Mr. Dobie. In some States, they allow a guardian ad litem to be appointed.

Mr. Mitchell. Who applies for the appointment of a guardian ad litem? You get the next friend to start it?

Mr. Dobie. Yes, it is the same procedure. I like this terminology, and I think it is the accurate one.

Mr. Dodge. Would it not be better to use the words "next friend"?

Mr. Mitchell. I am in favor of it.

Dean Clark. You would not criticize the Supreme Court, would you, for the language in the Equity rule?

Mr. Dodge. I noticed that they made that mistake. (Laughter.)

Mr. Mitchell. Well, is there anything else in

that sentence that you want to discuss? That gives the court ample power to require a bond, etc.

Mr. Cherry. Is there any objection to permitting a guardian ad litem for the plaintiff? If we said "may be brought by the next friend, or brought or defended by a guardian ad litem," there might be circumstances under which they wanted that. It would not prohibit the next friend from proceeding.

Dean Clark. I do not see any objection.

Mr. Mitchell. Is it often done?

Mr. Cherry. It is in Minnesota.

Mr. Dobie. Does the court always appoint a guardian?

Mr. Cherry. Yes.

Mr. Mitchell. There is some proceeding by statute for a guardian ad litem. How would we provide for that?

Mr. Cherry. I am not urging it. I did not mean that it was done in the Federal, but in the State court.

Mr. Mitchell. To prosecute or defend. Well, I do not see why we should not permit it, as long as some of the States allow it. There is no reason for abolishing it where it is common practice--as you say, in Minnesota. I think as long as it is the practice, we ought not to change the order permitting defending by guardian ad litem.

Mr. Dobie. Just insert ~~xxfxxx~~ "brogght" before "defend-ed."

Mr. Wickersham. There is in New York a provision that where an infant is a party where there is no guardian a guardian ad litem can be appointed by the court.

Mr. Dobie. In the light of all of that, I move that those two words be inserted.

Mr. Cherry. I second the motion.

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

Dean Clark. Now, have we finished with this rule?

Mr. Mitchell. I think so.

Dean Clark. You will notice my second footnote there. Is it the opinion of the Advisory Committee that further rules on parties should be drawn?

Mr. Wickersham. They generally are not so regarded.

Dean Clark. I suppose there could be argument that we would be getting into substantive law; that is a question that needs consideration as to whether we should do it or not. I am willing to attempt it--referring to the footnote.

Mr. Wickersham. It does not seem to me necessary to do it.

Mr. Tolman. I do not think we ought to have a complete code to revise the practice as to these matters.

Mr. Wickersham. As experience develops, the court itself can then make rules modifying or supplementing these rules.

Mr. Mitchell. Not under this statute. We wouldhave

to get the statute amended. The statute says nothing about that, but talks about the first set of rules, and does not say anything about amending them from time to time by the Supreme Court; and I think there is great danger in expecting to modify these rules after they are adopted, without submitting the modifications to Congress. The probabilities are that the rules we submit to Congress will be accepted, and take away that supervisory power.

Mr. Wickersham. Yes.

Dean Clark. Of course, I am not urging it. Perhaps this would not be a suitable occasion; but there are points of debate in any such rule. But I call your attention to the fact that there is a good deal of uncertainty about the law.

Mr. Mitchell. If we do not say anything about it, would it leave it in bad shape?

Dean Clark. I think if we do not say anything about it, there is a considerable amount of uncertainty. Of course, there is the Coronado Coal Co. against a labor union, opinion by Chief Justice Taft. There was a certain amount of uncertainty but probably no more than there is in a great many States.

Mr. Mitchell. There would be somelaw on the subject; there would not be any hiatus.

Dean Clark. It would not touch any law that exists.

Mr. Dobie. I am afraid you would be intruding on the jurisdictional field. I move that that be omitted.

Prof. Sunderland. I second the motion.

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

Mr. Donworth. Have we considered the suggestion made from one State about a rule limiting the right of payment of the judgment to the next friend or guardian ad litem? What would be thought of anaddition to this rule that would say something along this line: "That the court may, in its discretion, after the entry of judgment, make such orders as it deems fit and proper regarding payment of the judgment."

Mr. Dobie. Do you not think that is included in that general sentence "orders as the court may direct for the protection of such infants or incompetents"?

Mr. Dobie. We are talking about the concluding clause of this rule.

Mr. Donworth. I did not know that related to the payment, but perhaps it does.

Mr. Mitchell. If it does not it ought to be made clear; but I assume it does.

Mr. Cherry. It is pretty broad inits present wording.

Mr. Donworth. "may be brought or defended", it reads, and then it says, "subject, however, to such orders as the

court may direct", and so on, quoting Rule 39.

Mr. Lemann. That is in the Equity rule.

Mr. Cherry. We have been using the word "make", have we not?

Mr. Lemann. Yes, I think "make" is a better word.

Mr. Mitchell. Do you not think that is broad enough?

Mr. Donworth. Yes.

Mr. Mitchell. We will now pass to Rule 40, "Stockholders actions." In New York, if a plaintiff buys a share of stock after a certain event, he is held liable.

Dean Clark. Of course, this Rule 40 is Equity Rule 27. I changed the word "bill" to "action," etc. I had some doubt as to the necessity of this, but we gathered that the Supreme Court seemed to like it, and announced it in cases before it was promulgated as a rule.

Mr. Dobie. It was held that it was not a jurisdictional rule, in that case against Hall for $57,000,000, and in that case they said it just put into concrete form what had previously been a decision of the Supreme Court. I think we can leave that out.

Dean Clark. You will notice that I carry the Equity rule to the point of requiring verification by oath. I left its simple perfection.

Mr. Cherry. Would it mar that perfection to make

it "shareholders" throughout? That is the modern Equity rule, and here it is reached only in the last line of Rule 40; but since it is used--

Dean Clark (Interposing). Does the American Law Institute not use it?

Mr. Cherry. Yes.

Mr. Dobie. I move that the word "stockholders" in the second line of Rule 40 be changed to "shareholders."

Mr. Mitchell. That will be accepted, unless there is objection.

Mr. Olney. The rule seems to me to be, to a certain extent, a rule that announces a principle of substantive law--whether a man has a cause of action or not; that is what it really amounts to. And while it is in the Equity rules, I doubt very much the advisability of including a rule of this character.

Mr. Dobie. Will you please talk louder, I cannot hear you.

Mr. Olney. There is just this one reason for this rule, so far as I can see, and that is the number of blackmail suits brought by minority stockholders, and they have endeavored to discourage them. But after all, this rule really announces the cases in which there is no cause of action.

Mr. Mitchell. Well, you have got the Equity rules,

and you have got to do one of two things; we have a single proposal now, and we will have to make a back track in the case of a contract to allow a stockholder to bring a suit of equity cognizance after the event, unless we and take a step forward and make that uniform in both classes, we are up against it there.

Mr. Olney. If you wish to announce a rule of substantive law as to when a man has a cause of action, all right.

Mr. Mitchell. Is it any more than saying that an action may be brought by a guardian ad litem? The cause of action belongs to the company, and you are just facing a rule of who may bring an action on behalf of the corporation.

Mr. Wickersham. It does not even say that. It says that in every action brought by one or more stockholders in a corporation, and so on, you may assume such a thing. But it does not confer a substantive right upon him. I think this is a good regulation, and where it is proper to have such an action, this applies to what may be done.

Mr. Olney. I am not objecting the rule, but what is announced here to be the law. I simply say that, in effect, this is saying to the stockholder that "You cannot sue except under certain circumstances, "

Mr. Mitchell. How would you meet my point that the present Equity rule says that? Now, we have to have one

rule for both law and equity. Now, are you going back to the equity suit?

Mr. Olney. My point applies to the original equity rule.

Mr. Dobie. Would you mind stating your point again. I did not hear you.

Mr. Olney. The whole object, if I understand this rule correctly, is that it would put a stop to what has been going on, particularly in New York, as I understand, where a man would buy a share of stock, largely at the instance of some lawyer; he would buy a few shares of stock, and then he would bring a minority stockholder suit because of something that might have occurred before the ostensible plaintiff got the stock. I just wanted to cut that out.

Mr. Dobie. Have you any objection to the rule as drawn?

Mr. Olney. I have no objection to the principle.

Mr. Dobie. What is your objection?

Mr. Olney. My objection is that they are saying here, under the guise of laying down a rule of procedure--they are saying to a man, " You cannot get any relief," as a substantive rule.

Mr. Cherry. We do it with excellent precedents.

Mr. Dobie. And that was exactly was decided in the case of Hall vs. Oakland, in 1881, and this states precisely

what was held in that case. And there are a number of cases holding that it is not a question of jurisdiction.

Mr. Mitchell. This is one that would govern Federal courts in law actions, as well as equity.

Mr. Dobie. I think all of these actions have to be brought in equity; you cannot sue at law.

Mr. Mitchell. That is right.

Mr. Dobie. I move that we adopt the rule.

Mr. Mitchell. We are not changing the substantive law in the Federal court.

Mr. Cherry. I second the motion that it be approved.

Mr. Dodge. There is one point I suggest: It should be "the complaint in the action," not that the action should contain he allegations mentioned there.

Mr. Dobie. Yes; the word was "bill" in the old Equity rule, that is, substitute "complaint" for action. The old rule was "bill", but of course we had to strike that out.

Mr. Mitchell. The "complaint in" is good.

Mr. Wickersham. Yes.

Mr. Mitchell. It has been moved and seconded that we adopt Rule 40 as so changed.

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

Mr. Mitchell. Rule 41.

Mr. Lemann. In the language at the end of the second

paragraph, I note that that is copied from the Revised Statutes and seems rather inexact. It says "The action shall proceed at the suit of the surviving plaintiff against the surviving defendant;" and the word "surviving"seems to apply to both. But it is the language of the statute.

Dean Clark. Could we not say, "and/or". (Laughter.)

Mr. Wickersham. It is the first time.

Mr. Lemann. Instead of saying that, we could say "surviving plaintiff or plaintiffs" or "surviving defendants or defendant," as the case may be.

Dean Clark. That is all right. There is no objection to that.

Mr. Olney. In connection with Rule 41, may I ask the reporter just what is the necessity for the exception that occurs at the end of the parentheds?

Dean Clark. Yes, I wanted to make a statement about that, because it is a little troublesome. That deals with the question of how far a State may be sued without its consent. And it came up a little in connection with this very recent case, "Ex parte Gray. I am not wholly sure that it is necessary. Of course, these suits to enjoin a State statute are normally against some official of the State, and not officially against the State; so that I suppose the technical rule of not suing a State does not apply.

Mr. Dobie. That has been held in at least 50 cases,

ever since the case of Ex parte Young.

Dean Clark. Well, I had some doubt about this and I wanted to raise the question. Do you think the exception is necessary?

Mr. Dobie. No, and I object to it; and my objection was to consent to such substitution; and I think it would be unfortunate to put that up to the State, and I hink the Supreme Court would object to allowing this State officer say whether he should be substituted.

Mr. Mitchell. That is not covered by the statute.

Mr. Lemann. What do you say about the case of Ex parte La Prade, in 289 U.S., 444/ And I wonder whether that was required?

Mr. Moore. In an action to enjoin a State statute because unconstitutional, an official of the State may defend it, and in the Supreme Court, when he has gone out of office, the question is whether his successor may be substituted for him. And it has been held that he cannot, if the complaint made no further allegations to the effect that the successor is attempting to enforce the alleged unconstitutional statute. Now, if it has done that--

Mr. Mitchell (Interposing). The theory of that decision undoubtedly is that you are not suing the State at all, but an individual, and a certain individual is assuming the

right to commit some act under an unconstitutional statute. Now, if he dies, he is through; he is not threatening; and the theory of the decision that if some other individual comes along and holds the same office and makes the same threat, you cannot properly substitute him; there is not a succession in right or interest; is that correct?

Mr. Dobie. Yes; you remember the Young case?

Mr. Mitchell. Yes, my firm argued that.

Mr. Dobie. You will remember that they said there, in a decision by Mr. Justice Harlan, that when a suit is brought against an individual of a State on the ground that a statute is unconstitutional, it is not a suit against the State.

Mr. Wickersham. That is the only way you can get jurisdiction over him, is to sue the State.

Mr. Donworth. That situation would seem to require that you would have to start again.

Mr. Mitchell. That is right.

Mr. Wickersham. Yes.

Mr. Olney. In that connection, to start again might mean an awful waste, and there is nothing accomplished. Would it not be sufficient to provie that, in the case of an officer under these circumstances, the plaintiff could file a

supplemental bill, setting out his death, and that demand or some such other proceeding had been taken, so that it appeared that he took the same attitude about enforcing the statute of which complaint was made, and providing that under those circumstances the original suit should not abate but might be carried on against the successor. That ought to be the law, and I do not see why it cannot be provided for by rule.

Dean Clark. Well, is that different from the first part of it?

Mr. Mitchell. Well, as you have it, if a man did not consent to the substitution--

Dean Clark (Interposing). I mean if you could add the matter in brackets? I put it in brackets because there is some question about it. If you can add that, then if you not got practically Mr. Olney's idea, which now makes it essentially the stautory provision?

Mr. Mitchell. The court says you cannot do that.

Mr. Olney. The court says you cannot substitute, and substitution would mean that the new officer was substitued, and as a matter of fact he might not take the same view of the statute at all But if it appears that he took the same view of the statute and proposes to enforce it and complaint is made that it is in doubt, then you have the same cause of action as to him as you had against the first officer. Here you are to go on with the suit without starting all

over again.

Mr. Mitchell. Well, the theory is that the original suit is still alive and you bring in the new officer without a supplemental bill. The technical objection is that if the first officer is dead, there is no suit, and then you bring in the new man to defend in the old suit, instead of bringing a new suit. That is the technical objection.

Mr. Wickersham. It is not like the officer of a corpration; but here you have got to avoid the position of trying to sue the State. You cannot sue the State.

Mr. Lemann. Does this decision practically wipe paragraph B of the Judicial Code, Section 780, or should it not be left to the determination under that paragraph, hiwhc might be broad enough to cover every case?

Mr. Mitchell. You might sue the tax official of the State.

Mr. Lemann. But the United States gives its consent that. That is covered by paragraph(A).

Mr. Mitchell. What is that--

Dean Clark. It is at the top of 89.

Mr. Mitchell. I am in favor of that clause, because the statute seems to make it necessary, and then if it goes to the court they can strike itout.

Mr. Lemann. That would not go as far as kkxxxxxxxkx Mr. Olney's suggestion.

Dean Clark. Mr. Olney's suggestion, as I got it, was to change the effect of Ex parte La Prade.

Mr. Olney. No, my real objection is to this: Such substitution and continuance of action can be had only if the successor consents to such substitution, or the law of the State of which he is an officer authorizes it." Now, requiring that consent, you are not going to get it, and you might just as well leave it out. In ine cases out of ten you will not have it, and it will mean a lot of additional expense and work.

Mr. Mitchell. You think if you cannot bring him in by subtitution, you can do it by supplemental bill?

Mr. Olney. You can do it by supplemental bill, showing that the new officer takes exactly the same position in regard to the statute as that of which you complained in connection with the first officer.

Mr. Mitchell. I doubt if it would be possible, if you cannot bring him by sub titution, and the court would consent to bringing him by supplemental bill because of the death of the defendant--which would be beating the devil around the stump.

Mr. Olney. I think it would be within our power to provide that the statute should not apply under such circumstances.

Prof. Sunderland. Would it not be true that you would be equally unable to get the State to consent, and that you may go under the same circumstances?

Mr. Lemann. You could provide that if he did not come in within a ce tain time he could be brought in.

Prof. Sunderland. Yes.

Mr. Mitchell. When the Supreme Court handed down the decision saying that you could not substitute a successor in that kind of suit, it was based on the statute and the Court gave court authorities. There is no exception in 780 U.S. Code, Title 28, and they must have held that notwithstanding the statute it could not be done.

Mr. Lemann. Would it not be better to accept the substitution, subject to an examination of the cases?

Dean Clark. I might say that that case was overruled by the Yale Law Journal, if that is sufficient. (Laughter.)

Mr. Dodge. Did the Court hold the statute unconstitutional in regard to that?

Mr. Mitchell. I suppose they must have done so in effect. I do not suppose they said so.

Dean Clark. I do not remember that they discussed it.

Mr. Mitchell. They have got to be so careful about treating the action in any way as ~~kkkk~~ if it were a continuation of interest, and there is no continuation of interest unless it is a suit against the State, and that will do; so they have to take the position that there is no continuation of interest between the officer and his successor.

Mr. Olney. There is a continuation of interest where

the successor takes the same position as his predecessor.

Mr. Mitchell. Suppose you bring an action against him for some act which he had a right to do, and you bring an action against him to enjoin, and he dies, and the next day John Smith, who has no real succession in interest and is an independent person, comes along and makes the same threat, can you join John Smith, by substituting him, or do you not have to bring another suit against him?

Mr. Olney. Why should you be compelled under those circumstances to bring a new suit, and possibly it has gone to trial and judgment may be even now in the power of the court? Why should you be compelled to go through all of that, with all of the dleay and expense, when, after all, the question is identical and the position of the parties is identical, and in reality it is nothing but a State officer trying to enforce a State statute and insisting upon its validity.

Mr. Wickersham. Take the case that Mr. Mitchell suggested awhile ago, about the 26 individuals--and that must be the theory, because it is because he is an officer of the State. Now, suppose you have two totally different individuals, and one is sued and he dies, and the other is a trespasser who comes along and starts a similar trespass and threatens the same. You could not bring him in by a supplemental bill. It may be inconvenient, but is that not where you are left?

Mr. Mitchell. You cannot bind the second man by a

judgment already rendered on the other man.

Mr. Wickersham. "Res inter alios acto."

Dean Clark. I suppose there is a case where the State officer served, is, in effect, a wrongdoer, and when the new man comes in he may not be a wrongdoer. It is not, according to the question he put. It is not like suing a governmental officer.

Mr. Cherry. May I suggest a little more ingenuity, since we are getting ingenuous. A plaintiff in this kind of action could lessen his risk by suing more than one person, and then if one of them dies the action is still going, and I think you could bring in somebody else.

Mr. Mitchell. By supplemental bill.

Mr. Cherry. Yes. Your difficulty seems to me very vital--that if you have only one person and that person dies, then there is nothing to go on, and there is no succession of interest. If several people were involved and any one of them is alive, the case would continue; and then I think under our rule on parties and supplemental pleadings you might get him in.

Mr. Lemann. Suppose A and B were sued and A dies, and after the case had been tried--

Mr. Cherry(Interposing). On a common question of law and facts.

Mr. Lemann(Continuing). And C takes up A's part,

can you bring in C?

Mr. Cherry. On the common question of laws and facts.

Mr. Wickersham. He was a stranger to the act.

Mr. Lemann. When it is in that stage--it is rather extraordinary if you can do it.

Mr. Cherry. I think it is more nearly, possible, than the other.

Mr. Lemann. I agree with you as to that, that the case is kept alive, but it is sometimes hard to bring a third person in a suit at any stage, to which he cannot be tied up.

Mr. Cherry. When there is a common question of laws and facts.

Mr. Mitchell. May I suggest that Mr. Clark prepared a new provision about substitution and put it in brackets and put it up to the court. It is a mere question of law. If they say that the substitution cannot be made--and I do not see how they can avoid it--why, then, they will stick to our exception. If they think we are overestimating that decision, they will adopt our alternative. We cannot decide that. The only thing we can go on is that opinion.

Mr. Donworth. May I make a suggestion that has not been brought up?

Mr. Dobie. Will you gentlemen talk louder?

Mr. Donworth. I want to bring in a suggested thought that I do not think has been brought into the discussion yet.

The statute on which the main portion of this section is grounded--Section b on the preceding page, over on the left, says, "By or against officer of State, city, and so forth---Similar proceedings may be had and taken,"etc. Now, it is only a suit against the State that would bother you, and this I think carries it further than necessary. Let us read what is in that issue: "Except when the action is to enjoin enforcement of a State statute or other legislative enactment". The courts hold that a city ordinance is a legislative enactment of the State.

Mr. Dobie. For some purposes.

Mr. Donworth. Yes; and in suing the mayor or corporation counsel of a city, there is no reason why their successor cannot be brought in, and if they try to beat the jurisdiction, they ought to be brought in. So that it seems to me that the clause in brackets goes too far, and we ought to hold it only in the case of the State, where there is any doubt about it. Is that not true?

Dean Clark. Well, under the decision in Exparte La Prade, the theory in that case was that the individual by evading the statute is acting as an individual.

Mr. Donworth. You can against the city, however, without any limitation.

Mr. Dobie. In the Young case, the Supreme Court said the officer in this case is stripped of his official or repre-

sentative character and is subject in his person to the consequences of his individual conduct. That is pretty strong. I am in favor of doing this by Mr. Olney's way, if we can do it. What I am opposed to is bringing him down there--or making the consent of the State officer to the substitution, or the law of the State, obligatory. I think that ought to go out. I think if we xan do this it ought to be done. It is hard on him to have to bring a new suit. We cannot fight that La Prade case; but we can put it up to the court whether this does not specify the substance of it.

Dean Clark. My idea was of saving something from the wreck.

Mr. Dobie. Yes.

Dean Clark. There was also Mr. Donworth's suggestion that if this rule applied to State officers, would it not also apply to the mayor of a city?

Mr. Dobie. Yes.

Mr. Loftin. Yes; but in that case you could sue the city.

Mr. Dobie. Yes, you could sue the city or could sue a county.

Mr. Donworth. If I had not heard this discussion I would not have thought that.

Mr. Loftin. Ordinarily you could sue both the city and the State officers too.

Mr. Mitchell. Ought not the word "city" be before the word "officers"? You could say "State officers or."

Dean Clark. I should think so.

Mr. Mitchell. I think that would be proper, because a city ordinance is a legislative enactment.

Dean Clark. Frankly, I was intending to include it.

Prof. Sunderland. What is the difference between State statute and State legislation?

Dean Clark. You do not need them both.

Mr. Mitchell. Suppose you put it "law" instead of "statute".

Mr. Donworth. Just leave in "State statute" and strike out the rest.

Mr. Dodge. Suppose a State statute is to correct a tax that is unconstitutionally laid?

Dean Clark. I was not sure that we had gone as far as Ex Parte La Prade put it. We were trying to limit Ex Parte La Prade all we could.

Mr. Lemann. Would not the same question come up in an income tax case? You pay an income tax to the State treasurer, and the State treasurer to whom you paid it has gone out of office; and you want to substitute a new person.

Mr. Dodge. I think the effect of the decision would be moral, rather than anything else.

Dean Clark. I suppose the essence of the decision

is that it would be applied to any case where the defendant may be considered a wrongdoer, when he was acting individually.

Mr. Lemann. If you are suing an internal collector of the United States, you cannot substitute; you cannot substitute him.

Dean Clark. This is like that case.

Mr. Lemann. Then Section 780 does not authorize it, even in the Federal cases. You cannot do it in any case then.

Dean Clark. It does not authorize it in any case, except that I suppose the Federal Government gives consent, as you have indicated.

Mr. Lemann. Section 780 says relating to the discharge of his official duties; it says, "Where, during the pendency of an action," and so on, "brought by or against an officer of the United States, or of a county, city, or other governmental agency, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise seeks to hold such office" that the action may be continued against his successor in office. That is to say, if you cannot substitute the new collector of internatl revenue for the old collector, and if you cannot do it in the Federal court, I think it is clear that you cannot in a State case.

It looks as if the statute were limited to junction cases as to the present or future discharge of official duties.

Mr. Donworth. This case cited was the case of a State statute.

Dean Clark. Yes.

Mr. Donworth. And what was the officer by the defendant?

Dean Clark. The Attorney General.

Mr. Donworth. As I understand it, there is a motion that the whole thought be reconsidered; but independently of that, as I am at present advised, I would strike out "legislative enactment" and save what we can from the wreck. (Laughter

Mr. Mitchell. Dean Clark, your statute does not allow substitution of one officer for another where the matter relates to present or future discharge of his official duties. That is very important; because take the case of the collector of internal revenue. The old collector has collected the money, and if you bring suit against him under the old notion --you cannot bring suit against the present collector. Under this statute, you could not sue his successor, because it is not a matter relating to the present or future discharge of his duties. He is being sued for some misappropriation of the money by his predecessor, and your exception does not cover that.

Dean Clark. Before the brackets, Rule 41 says "His successor in office may be subtituted as a party and the action continued in accordance with the provisionsof said

section."

Mr. Mitchell. That is right. Then I have a suggestion on that. I think that ought to be "State law," instead of "State statute," if we are going to cut out "legislative enactment"--"State law" such as the action of a State warehouse commission fixing rates; and there are a lot of State statutes where it would be a suit against the State; and an order of the commission fixing rates is a legislative act; and they have held that it is the act of theState, under the provisions of the amendment which says that no State shall be sued without its consent; but it is not a statute.

Mr. Donworth. Has not Federal jurisdiction been taken away in all those cases?

Mr. Mitchell. Well, I used that as an example.

Mr. Cherry. There are certain exceptions in that statute.

Mr. Mitchell. How have we left this exception, then, what is the motion?

Mr. Donworth. You wish, Mr. Chairman, to protect the situation that you refer to?

Mr. Olney. Is this not the situation in regard to the statute: That under this decision under Ex Parte La Prade, that we have to put this exception that is in brackets, unless we can find some way whereby, by further facts, on a showing of further facts, we can escape the complete abate-

ment of the action. Is that not the situation? I think we have got to have thisin, but it may be that, as I have suggested--I am trying to draw it up now--it may be that where there is a further showing of facts, which as I understood the statement made here, was not true in the case of Ex Parte La Prade, that you can provide a case where the action can go on.

Mr. Mitchell. My suggestion was that you prepare something and had it to the reporter, and he can work it out; and meanwhile we can pass on.

Mr. Only. Yes; because I think it is pretty clear that we have to accept this as it now reads, with the possibility of a difference.

Mr. Dobie. Yes, I would not object at all. I did not want it to depend entirely on the consent of the State officer; but I would not object but would favor the supplemental bill idea, to be drawn by you--"or the consent of the State officer," though I am not sure that even with the consent of the State officer, there---

Mr. Olney(Interposing). Here is the situation as I see it: Under the law as it stands at the present time, if I get the effect of this case correctly, they certainly cannot proceed without the consent--

Mr. Wickersham. Cannot what?

Mr. Olney. Cannot proceed with substitution without

the consent of the officer of the State.

Mr. Wickersham. I am wondering if you can proceed with his consent.

Mr. Olney. Well, you certainly cannot without it; so that putting it in here means that you can do it, and to that extent it is an amelioration of this case of Ex Parte La Prade. I am wondering if you cannot get a further amelioration.

Mr. Dobie. I think you can.

Mr. Donworth. What we really want to say is, "Provided that it is the intention that this exception shall go only so far as required by the case of Ex Parte La Prade."

Mr. Mitchell. Right.

Mr. Wickersham. I just want to note before you pass that an exception to the use of the words "lack of action." (Laughter.)

Mr. Mitchell. We will now take up Rule 42.

Dean Clark. We have passed that, Mr. Chairman.

Mr. Mitchell. Yes. We will take up Rule 44.

Dean Clark. Have you any objection to any of these Equity rules that are copied here? In Rule 44 I have a note about the Equity rules, which we thought were unnecessary. The only one not in words covered, I think, was this one; and I did not see why it should be here anyway.

That is Rule 41, which says, "In s it to e xecute the trusts of a will, it shall ~~xx~~ not be necessary t o make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

Mr. Dobie. That does not often come up in the Federal court.

Mr. Donworth. What rule is that?

Dean Clark. Rule 41. That I have not intended t o cover at all.

Mr. Wickersham. I suppose it had some useful purpose.

Dean Clark. We have been unable to discover any; and we wondered if it did not say things that, conceivably, might not be so. When are you going to establish a will in the Federal courts?

Mr. Wickersham. This is not to establish a will; it is to execute the trusts of a will.

Mr. Dobie. But after the semicolon it says, "But the plaintiff shall be at liberty to make the heir at law a party where he d esires t o have the will established against him."

Mr. Wickersham. I think that is bad phraseology. I think it means to have the trusts of the will e stablished.

Mr. Donworth. Where you desire to have the trusts

of the will made binding upon him.

Mr. Wickersham. I do not suppose the construction of a will would often come up in the Federal courts.

Mr. Dobie. I know of a number of Federal suits involving the construction of a will.

Mr. Wickersham. I say that does not arise very much in the Federal courts, but usually in the State courts, although it might arise in the Federal court.

Mr. Dobie. There are a large number of cases--I hate to talk about my own book, but in my case book I have a number of cases there, and that line of distinction between what the Federal courts do in probate matters and cannot do in probate matters is very difficult to decide. We have no probate procedure, but where the State procedure permits an independent bill to have the will set aside can be brought in the Federal court.

Mr. Wickersham. Yes, suits to construe the ~~provisions~~ directions /of a will might be brought in a Federal court.

Mr. Dobie. Yes.

Mr. Wickersham. Therefore, we might as well put it in.

Dean Clark. Well, in practice the only case where it has been construed--they did not try it in the case in 111 U.S. 170, which was a suit to enforce a personal trust.

This rule goes back to Rule 50 of the former Equity Rules, which was promulgated in 1842, and is very obviously taken from Order no. 31 of the Court of Chancery of England of 1841. This is the old English chancery rule. So that you can see that the origin of it is very clear. Now, it seems to me that that goes back to a procedure that, in practice, at least, we do not have in the Federal courts, and if there is any question about the construction of a will is joined, with all our rules about joinder of parties, we do not need to talk about getting words in.

Mr. Dobie. Why not leave them out?

Dean Clark. If there is something that is not covered, it is wrong.

Mr. Loftin. I second Mr. Dobie's motion.

Mr. Mitchell. It will be so understood, that this and Equity Rule 41 will be omitted.

We will now take up Rule 45.

Dean Clark. Let me explain about this Rule 45. This suit as a representative of a class is something we always talk about, but as to what it really means, that is almost unknown. That is, in certain cases where you have a class suit, that is all right, but the extent to which it goes, and how far representatives can go has not been clearly defined. Now, we have done, as the footnote to that rule points out,

is to try to differentiate three different types of class suits. In other words, we try to spell what we think is as near the law as we can state it. Of course, can just take the other course--take this very vague and unistructive language of the Equity rule; but we tried to do is to state the limits of the various class suits. If you will down through Rule 45, you will see that we have three instances. The first one might be called the two-class suit; the second, purely a class suit, and the third a bybrid class suit. And there is quite a difference in the conclusiveness of the judgment in the different cases. In the first case, the judgment is conclusive. In the second, it is not conclusive, but is mainly a good precedent. In the third case it is good against persons having a several interest where the object of the action is the adjudication of claims as to specific property.

Mr. Mitchell. Have we got any authority to prescribe the amount involved?

Mr. Dobie. No, I had a question about that. I think that is jurisdictional and ought to go out.

Mr. Olney. I would like to make another objection to this rule. It goes on to prescribe what the effect of the judgment is in various classes of class suits. That is a matter of substantive law. That is not a matter of procedure. The courts have been busy with it, and they are in confusion on the subject; the effect of the judgment is, after all,

not a matter for us and it seems to me we should leave the procedure by which the class suitscan be brought with the effect of the judgment that is recovered on them--it seems to me we will have to leave that to the court.

Mr. Donworth. I had occasion during past years to bring a class suit of considerable importance, and I made a pretty careful investigation of the law, and I found it not so difficult as one would imagine who has not had the responbility of acting under it. It was a case of two mortgages securing bond issues, and there was a doubtful question between the first mortgage bondholders and the second mortgage bondholders. Two banks were acting respectively as trustees. Of course, they could not decide the question, and the question was how could they make an adjustment that would be binding upon the bondholders? The property was worth something over$2,000,000, and a number of bondholders under each class--there were about 750 under the first and about 900 under the second mortgage, and we fortunately had their names and addresses of over three-fourths of them. Well, I will say this, that we did not have to take the responsibility of judgment, because before we got to that point Congress enacted Section 77b, to our great joy and satisfaction.

Mr. Wickersham. That is one of the good things that Congress has done.

Mr. Donworth. Yes, but I find that the Federal court, including the Supreme Court of the United States, in recent decisions, that is within ten years--the Supreme Court of the United States held in one case that where the partiesselected out of a very numerous class were such that Federal jurisdiction existed--for instance, you take a lot of plaintiffs whom are citizens of the State of Washington, or vice versa, or take a lot of citizens who are citizens of California, Louisiana and other States, and there are a lot of defendants who are citizens of Washington. You could bring that suit in the District of Washington, and omit any individual members of the class who would defeat jurisdiction; an adjudicaion entered in that suit was binding on all concerned. The courts, however, scrutinized this principle with great care: You must have enough representatives of both plaintiffs and defendants to make it fairly representative. That was the expression--"fairly representative." You must not handpick your parties. I happened to select 23. I picked out those who were most likely to litigate, and those of opposing views, and I found 23 who had indicated opposing views on one side, and so I thought I would make the number on the other side the same, and that was done. Now, there seemed to be a situation where there was no other way of settling a controverted proposition in that suit; and it may be, as Judge Olney says, that the

ultimate effect of the judgemtn is a matter of substantive law; yet when you are dealin with a way of settling a lawsuit, and parties, it seems proper to bring this in. I think the rule has a real function there, Now, the Equity rule says, "When the question is one of common or general interest to many persons constituting a class," and so on, one or more may sue or defend for the whole. I did not think of this point coming up and did not bring my memorandum of authorities that I prepared in the litigation that I referred to. I have not any particular suggestion to make about this at the present time. I might have later, at the next session, when I have had time to look the matter up.

Mr. Dobie. I would like to say one thing that Dean Clark probably knows--but everybody cannot keep the Equity rules at the end of their finger-tips. But this present Equity Rule 38 supplanted the former Rule 48. Under the old rule there was an express provision that in such cases the judgment shall be without prejudice with the rights and claims of the opposing parties.

In drafting the new rule, they left that out, with the idea that in certain cases it would be binding on the class. There are a number of decisions as to the extent to which it is binding. The leading case is "The Supreme Tribe of Ben Hur vs. G. Caldwell, It is a big thing,

and I think if we can phrase something that is fairly definite-- if we can make a classification that the Supreme Court will accept and that will bring light out of darkness, it would be be very desirable.

Mr. Donworth. But the Supreme Tribe of Ben Hur case to which you referred was against a corporation.

Mr. Dobie. They held in that suit that the decree was binding.

Dean Clark. May I say that I was intending to state anything more than existing law. I think we do state existing law accurately. We have spent a good deal of time and thought on it. Now, here is a case where, if a lawyer gets into it, he is going to be at sea as to what the effect of the Equity rule is. It seems to me that it would be bad to leave something perfectly in the dark, which is meaningless, or mean even suggest the wrong thing. If you read the Equity rule, as it stands, you may have a case"where the question is one of common or general interest" the matter is <u>res adjudicata</u>, which is not so under the Federal decision. We are not trying to enact new law or substantive law, but we are just trying to tell the bar what it is all about.

Mr. Donworth. Do you mean the Federal decisions are in favor of binding the class by the judgment entered?

Dean Clark. Except what we have covered by the first

sentence. The case of The Supreme Tribe of Ben Hur vs. Caldwell was the case of the ownership of the Supreme Lodge of a fund, and that is the true class suit case, where, having adequate representation within the State you can adjudicate the rights.

Mr. Wickersham. Take the Cornett case. You have the same thing there.

Dea Clark. Yes. Now, take a case of a taxpayer. That is not a class suit, and that would not be res judicata. Suppose a taxpayer brings suit and says, "The whole assessment is illegal, and I am doing it for the benefit of all other taxpayers." He gets a decision that it is illegal. That is not binding on others.

Mr. Dobie. They have held also that they cannot join those together for the purpose of making up the jurisdictional amount-- those in category that the Supreme Court had there is not the classic common law category. I think if you can bring light here, you ought to do it.

Mr. Olney. The principle involved here/from the fundamental point of view of numerous parties, which is, perhaps, more important than any other case. The principle involved is the securing of a judgment that is good against a man when he is not actually in the suit, and it all depends on the question of whether or not he was fairly represented in the suit. It is a question of obtaining a judgment

which is good against the man by obtaining a judgment against a representative. Now, the illustrations of that which come up are exceedingly numerous. They apply to judgments against public officers as representing a taxing district and the taxpayers in the district, and the property owners, and the variations and difficulties in it are great. The one rule which certainly is the rule--the one case which is within the rule is the case to which Dean Clark has referred, of where the interest is a joint interest and a sufficient number of people are made defendants, so that that number can fairly be taken to represent the class, and do represent the class, so that when the thing is brought out to a conclusion the judgment would be held binding as to all members of the class. But as I see it, this rule is going to be extended as time goes on into matters that are not matters of joint interest merely, but matters of common interest. I can see no reason, for example, why, when the question is simply one as to the validity of a tax and a suit is brought for the enforcement of that tax against such a number of taxpayers as to make it certain that the matter is contested fairly and fought out--that that judgment ~~ix~~ should not be binding on every taxpayer in that district, and sooner or later the courts are going to come to some such concousion as that; and we do not want ot be here in a position of legislating upon a matter of that sort--and that is what we are doing. We want

to provide that these actions can be brought and judgments obtained in these cases, but just what the effect of those judgments may be, in the way of res judicata, we ought not to determine. We ought to leave that to the court, and leave it flexible, so that they can apply the reasons--apply a reasonable rule and apply it, perhaps, progressive rules as time goes on in connection with it. We ought not to endeavor to legislate upon a subject of that character.

Mr. Dobie. Would you leave all that stuff out, then, that affects the force of the judgment?

Mr. Lemann. Have we got the power to pass on that?

Mr. Olney. I do not think we have, and it also strikes me that there would be difficulty in stating rules that have been followed by the courts too completely. I note in the discussion one of the qualifications claimed is that there should be fair representation. That is not the law.

Dean Clark. Mr. Donworth has just passed up a suggested on that which I will read.

(Dean Clark read a paper prepared by Mr. Donworth.)

Mr. Mitchell. That tests the difficulty and I doubt if we have authority to do it anyway.

Mr. Donworth. Is it not a very important feature of the Federal jurisdiction? Not only the The Supreme Tribe of Ben Hur case, but others?

Mr. Mitchell. Of course, it is important, but we are not dealing with jurisdiction. We have got in this rule another sentence that supports to add together these claims for the purpose of giving jurisdiction under the statute as to the amount involved. That certainly is outside of our province and changing the jurisdiction of the Federal court. If we say, "Well, they have got jurisdiction in that kind of a kind of a case, when, except for our rule they would not have it--" I do not think we could do that.

Mr. Donworth. How far does your objection go? Would you leave out the whole rule?

Mr. Mitchell. No, I would leave out the first paragraph, where it says, "Where a sum is a requisite to founding a Federal jurisdiction, the claim of or against the class shall control," and so on. I would leave out that sentence.

Mr. Dobie. I would like to make that motion. I think we can cut that off pretty quickly. I make the motion that that sentence be expunged.

Mr. Tolman. Beginning where?

Mr. Dobie. Dealing with the jurisdictional amount, the sentence, "Where a sum is a requisite to founding Federal jurisdiction." I do not think we have any power to legislate, and that is a jurisdictional question.

Mr. Dodge. That is two sentences.

Mr. Mitchell. Let us take them one by one. The first point is "Where a sum is a requisite to founding Federal jurisdiction, the claim of or against the class shall control in the first instance, and the claim of the individual in the other two instances." Now, that is a question of jurisdiction.

Mr. Loftin. That was your motion, Mr. Dobie?

Mr. Dobie. Yes.

Mr. Tolman. I second the motion.

Mr. Mitchell. Do you want to discuss that?

Mr. Cherry. Is that new, or is that the result of the cases?

Dean Clark. That just states the present law. It is a question again of whether we want to give information at all. It involves no change.

Mr. Mitchell. Welll, we are purporting to deal with a jurisdictional question there.

Dean Clark. I have no wish to restrict any court from going to places where they ought to go; but this provision in essence has been in equity practice since the beginning, 90 years, and we have no tendency to go anywhere except to avoid confusion.

Mr. Olney. I will have to take issue with you on that.

Dean Clark. Take the taxpayers' suit, for example.

Mr. Mitchell. There is a good deal in it that we

will, no doubt, adopt; but there are four or five different sentences, and we will have to deal with them separately, and it is better to take each one and have them separately, and we have clean-cut question here.

Mr. Dobie. I do not dispute that that is accurate. I think it is. But I think it would be a great mistake for us to provide as to the amount of jurisdiction.

Mr. Donworth. We can leave that to the statute.

Mr. Mitchell. All in favor of striking out that one sentence will say "Aye"; those opposed "no."

(The motion was unanimously adopted.)

Mr. Mitchell. It is carried. Now the next sentence relates to the effect of a judgment in class cases.

Mr. Donworth. We can leave that to the Supreme Court decisions, which are satisfactory, and the C.C.A. decisions are satisfactory also.

Mr. Lemann. In any event I do not think we have any power to say what the effect of the judgment is.

Mr. Cherry. Well, Mr. Dobie pointed out that in the rule which preceded the present Equity rule, that was attempted.

Mr. Lemann. It is not in the present Equity rules, however,--not in Rule 38.

Mr. Cherry. No, but in the preceding Equity rules.

Mr. Mitchell. Well, if we adopted Judge Olney's

rule, and preferred to leave it flexible--

Mr. Cherry(Interposing). I was only going to the question of our competency to make the recommendations.

Mr. Lemann. It might be a good thing.

Mr. Cherry. It might on the merits, but the question is whether it is within our province.

Mr. Lemann. Is it in order to make a motion to leave out the next sentence, or has that been acted on?

Mr. Mitchell. It has not been acted on.

Mr. Dobie. May I ask a question about the last sentence.

Mr. Olney. I make a motion to strike out the last sentence of Rule 45.

Mr. Mitchell. That last sentence relates to the effect of the judgment in class cases. Is there any further discussion of that?

Mr. Dobie. I would like to make that the basis of the objection that has been made--that the law stated here is not helpful or correct, and that we ought not to go into it at all.

Mr. Olney. I would not say it is not correct, though I am not sure about it by any means. What I do say, is that in the first place, it is not our function--that is more important than anything else. And in the second place, I think a matter of this sort should be left to the courts to develop. I do not agree with Dean Clark at all

that there has been no development in the decisions of the coutt uponnthe subject. I think quite the contrary is true.

Mr. Dobie. I think we have consistenyly broadened the effect of the judgment and decree in every case.

Mr. Olney. Yes. We want to leave here in our procedure a provision by which such suits can be brought, and then let the court determine what the effect of those judgments is, and I am certain that as time goes on they are going to apply the fundamental principle that wherever a man has been genuinely represented in a piece of litigation, and there has been something or some party to it than can be said to have genuinely represented him, and there have been a determination by the court of the real issues that are involved, both of law and fact, that judgment is going to be binding on him. I think they are going in that direction, and that is the direction they ought to go.

Mr. Dobie. You are afraid that we will stop them?

Mr. Olney. Let it develop.

Mr. Tolman. A declaration as to the legal effect of a statute is not procedure.

Mr. Olney. Exactly.

Mr. Lemann. It is the legal effect of judgment.

Mr. Tolman. Yes.

Mr. Lemann. I like the idea of an expression, but that would carry us too far. I like to see people informed.

I had to look this up, and I would have been glad to have somebody tell me, but still I do not think we can undertake to go beyond that.

Mr. Dobie. You do not think that is a question of procedure--the binding effect of judgment?

Prof. Sunderland. I do not see how that could possibly be considered procedure--the effect of the judgment. It absolutely settles the ultimate rights of the party. And that is the very essence of substantive law.

Mr. Dobie. Are you in favor striking that sentence out, Prof. Sunderland?

Prof. Sunderland. I think we have got to. We are clearly outside of our province.

Mr. Dodge. How do you feel, Mr. Dobie?

Mr. Dobie. I am dubious about it, but I think if a reasonable number of us think that it is questionable it ought to go out.

Mr. Mitchell. There is a distinction between our determining the effect of a judgment upon the parties to the suit, and the effect on people who are not. Is there anything in that?

Mr. Dobie. I think there is. If a reasonable number of these gentlemen think that is beyond our purview, I would rather it go out.

Mr. Cherry. Question.

Mr. Mitchell. All in favor of striking out the last sentence of Rule 45 dealing with the effect of the judgment, will say "Aye"; those opposed "no."

(The motion was unanimously adopted.)

Mr. Donworth. The last sentence still remains in.

Mr. Mitchell. No, we just struck it out.

Mr. Donworth. The last remaining sentence I wish to speak of.

Mr. Dobie. Do you mean the first three?

Mr. Donworth. The last sentence that remains.

Mr. Olney. "When persons having a several interest are so numerous as to make it impracticable them all before the court," and so on one or more may institute action for the whole.

Mr. Dobie. Are you going to move to strike that out?

Mr. Donworth. No. That third sentence says, "When persons having a several interest are so numerous as to make it impracticable to bring them all before the court, and the object of the action is the adjudication of claims in or to specific property, one or more may institute action for the whole." Now, there is the hiatus there, you see; it does not say anything about the defendants. To get what I am satisfied is the true rule of law, I would add this provision as to defendants, after the word "whole," put a comma and say

"and a reasonable number of those may be made defendants as

representatives of the whole." When the complaint alleges that the following 23 defendants are interested, the correct pleader, that is, the man who tells his story in a good way will say, "This is a reasonable number to be made defendants in this case." Now, when the court tries the case, in order to give it the effect of a class suit, the court must make a finding that a reasonable of those interested have been made defendants, and that is a question of facts in the case which must be passed on. Do you oppose this, Dean Dean Clark?

Dean Clark. No, that is quite all right.

Mr. Mitchell. Is not the requirement of a reasonable number for fair representation--does it not run all through this?

Mr. Donworth. No, we have not said anything as to defendants, but only plaintiffs.

Mr. Dodge. Can you have a class suit where there a lot of people all claiming an interest? I did not suppose a class suit was possible where a man has a specific interest which he claims in specific property.

Mr. Dobie. There are some of those cases, and I think there have been a number of them. And I wouldlike to ask Prof. Sunderland about that--take, for example, the grain elevator cases. There the deposits are not supposed to be kept separa te. I think there have been those cases

in which they sought to make the interest separate. I think Prof. Sunderland can instruct us on that.

Prof. Sunderland. I do not think much instruction can be given. I think there is great confusion. I think the confusion is due to the term "common or general interest." Nobody seesm to know what those terms mean.

Mr. Olney. Would it be due process of law to render a judgment in a case of that sort which would be binding upon any one unless he was actually before the court?

Mr. Donworth. There have been cases where a piece of real property has been acquired by The Supreme Tribe of this, or that, and the members of the tribeare numerous and scattered all over the country.

Mr. Olney. Well, but they have a joint interest there.

Mr. Mitchell. Is that a several interest or a joint interest?

Mr. Donworth. It is a several interest of each one; some one makes a deed to the supreme tribe. I think you can rely upon the Federal courts not to say when 25 people own a piece of real estate, 3 people can sue to determine the title of the 25. The Federal courts would never say that. But this rule will be considered literally.

Mr. Olney. Suppose there are 500 of them, and each one has a several interest of his own in that one piece of

property; is it due process of law to adjudicate John Jones, who is one of them, who has a certain interest, is bound when he is not before the court?

Mr. Donworth. If the court finds as a fact that it is impracticable to bring them all before the court, and their interest is the same--I mean if they all depend upon the exact state of facts and law, and if you brought a reasonable number in, and a reasonable opportunity has been accorded all of them to come in and assert their rights, it is the only way to do it.

Mr. Olney. But when you add on these other things that you have spoken of, you come back to what is the fundamental principle upon which these cases must go, and that, that you can render a judgment which is binding on a man not before the court, when he has been fairly represented there.

Mr. Donworth. That is right.

Mr. Olney. But in the case of a several interest, where it cannot be said that he was fairly represented in the proceeding, and it is brought in such a way that he was not fairly represented, you cannot get judgment against him without his being a party.

Mr. Mitchell. We have stricken out the provision about the effect of the judgment being binding, anyway.

Dean Clark. In the provision stricken out, it was provided that judgment would not be binding except with the claims

that the judgment passed upon.

Mr. Olney. If that means one or more will do for the whole where there is a several interest it will cause trouble.

Mr. Dobie. I would like to ask one question about those three sentences. In a number of the code provisions they are very much broader than this. They say that where there is a wuestion of common or general interest, or the parties are so numerous that they cannot all be brought before the court; so that in a number instances under the code, even though they are not so very numerous, they still term these "class" suits.

Prof. Sunderland. They are divided into two classes of cases--first, where there are many persons, or where the number of persons is so numerous as to make it impracticable to bring them all before the court. The question comes in, is what kind of cases as a rule is it, to which many persons apply, and what kind where the number of persons is so numerous as to make it impracticable to bring them before the court; and the cases are in utter confusion.

Mr. Dobie. I know that, but I want to ask, was that done deliberately? You want to rule out those other, and limit it only to those cases where the parties are so numerous as to make it impracticable to bring them all before the court.

Prof. Sunderland. It seems to me that where there is a joint interest a few persons ought to be sufficient; wher

it is joint the number ought to be immaterial; where it is not strictly joint--

Mr. Dodge(Interposing). Suppose I am threatened by a suit by a hundred different people, all based on the same question of law, but varying in amount. May I join 5, or 100, and get an injunction bidding on all of them?

Mr. Donworth. Do you mean in a suit to quiet title?

Mr. Dodge. No, a bill to prevent multiplicity of suits.

Mr. Donworth. It has never been applied in that kind ofcase.

Mr. Olney. In the Circuit Court of Appeals I think you can.

Mr. Wickersham. If the litigants claim an interest in a suit of real estate--if there were several and each one claimed an interest; suppose you had a thousand acres of land involved in a Federal suit, by a whole lot of xxentrymen who claimed different entries on that land.

Mr. Lemann. Do you mean on different pieces of land?

Mr. Wickersham. No, I mean on the same tract of land. But they were all based on some common claim.

Mr. Mitchell. Common instrument in the chain of title.

Mr. Wickersham. Yes, common interest in the chain of title.

Mr. Lemann. Would that not be under the second sentence?

Mr. Wickersham. Perhaps so.

Mr. Lemann. I am wondering what cases would be covered by the third.

Dean Clark. The first one would cover the creditor suits; the second would cover taxpayers suits, and the third interest in the fund.

Mr. Dobie. The reporter has made it clear that the second one is spurious and the third one is a hybrid.

Mr. Donworth. He has also made it clear that you can not do it here unless it is impracticable to bring them all in.

Mr. Dobie. That is the point I raise. We are limiting the old Equity rule.

Mr. Wickersham. When the facts have been heard in that case as to the number of litigants who are held bound--whose representation was held to bind those outside, they subsequently tried to avoid the effect of the action. That was that case that has been referred to.

Mr. Donworth. That was mentioned in the suit? I do not remember.

Mr. Wickersham. The Tribe was sued by name in the Ben Hur case.

Mr. Donworth. And certain individuals were joined with it.

Mr. Wickersham. Yes, and after the judgment some of the members of the class who were residents of other States claimed that they were not bound, because to make them parties would result in a loss of the Federal jurisdiction; and it was that they were bound, although jurisdiction was based solely on diversity of citizenship; but I have not got a statement showing the number or proportion of the whole.

Mr. Dodge. Was that an action at law or a bill in equity?

Mr. Wickersham. A bill in equity but the same principle would apply.

Mr. Mitchell. Prof. Sunderland, may I ask you whether, as I understand it, you are satisfied with the first sentence in Rule 45, except that you suggest that the requirement in the first sentence about the large number is an essential. Does that state your position?

Prof. Sunderland. Where it is strictly a joint interest, that is.

Dean Clark. I want to ask if it would be desirable to have a sentence something like this: "At the institution of the action, reasonable previous notice of the class interested shall be had and alleged, with a right to intervene, with a view to securing adequate representation of the remaining members of the class, and until or unless the court has ~~duti~~ expressly consented to the withdrawal or dismissal

of the suit."

I think the whole theory of this adequate representation in the court would do whatever was necessary anyhow. But that would be a little safer to put in a safeguard of that kind, and I do not see any reason for not doing it.

Mr. Dodge. That is interpolated in the law, is it not?

Dean Clark. There has not been any specific provision for notice, I take it. I take it, however, that the right of intervention has existed.

Mr. Dodge. Well, is the bill to restrain multiplicity of action under that second sentence?

Prof. Sunderland. There is no common interest there.

Mr. Dodge. There is a common interest in a question of law. All the claims are dependent upon the same question of law in a case of that kind. They were varying in amount. We had a suit against five or six of them, and we were trying to get others to come in, and the Federal court proceeded to deal with it and issued an injunction--I always assumed, probably wrongly, that it was binding on the class.

Dean Clark. I think that probably is the second, but probably is not absolutely binding, but simply is a very

important precedant.

Mr. Mitchell. I was wondering whether, if you brought a suit, and the rest of them stood around--I was eondering whether if you brought a suit you could leave the other fellows out.

Mr. Donworth. I do not think these suits are much abused. I do not recall a case of collusion. Do you think they have been abused, Mr. Dobie?

Mr. Dobie. I do not think so.

Mr. Wickersham. They are too cumbersome. Nobody wants to get into one if he can avoid it.

Mr. Tolman. I think there is an important distinction in those cases which deal with several interests not joined, between the permitting of the owners of several interests to join and binding a class of defendants who have several interests. It seems to me that the cases that we have been considering are not cases purely of several interests. This Ben Hur case is a case of members of a fraternal insurance company, and there are very many other cases of that class--while in one case technically they may have several interests in the whole insurance pilicy. But these cases go further than that. They refer to the rules and regulations and rates to be charged in a society possessing assets in which they all are interested. Now, a pure case of suit brought, for instance, by the majority

of a number of residents in a certain part of a city, to enjoin a nuisance, it seems to me perfectly proper that they might join as plaintiffs, but to permit less than the whole to defend on behalf of all who own one residence, and to combine those who are not parties by a representative defense by other defendants seem to me to be difficult.

Mr. Wickersham. Is that not what Dean Clark meant when he said in the second sentence, when he said it was not conclusive under the theory of stare decisis?

Dean Clark. Yes, I was trying to say not more than I intended, by saying some of them would be binding and some would not. But you about losed my mouth.

Mr. Wickersham. Well, that is it. If there is not a technical estoppal by res judicata, there at least a principle of law established which the court shall follow in other similar cases.

Dean Clark. Yes.

Mr. Mitchell. In the first place, we have stricken out everything with reference to the effect of the judgment, and in the second case we have referred it to the drafting commission.

Mr. Wickersham. Somebody moved to amend that by adding something.

Mr. Cherry. That was in the third sentence.

Mr. Loftin. The motion was never put.

Mr. Wickersham. Was not that put?

Mr. Mitchell. We have not adopted that the third provision or several interests be extended to defendants with several interests. It has been proposed but not seconded.

Mr. Loftin. Mr. Donworth made the motion and I seconded it.

Mr. Wickersham. A reasonable number of those interested of those interested might be made defendants.

Mr. Donworth. As representatives.

Mr. Dobie. Are you willing to have that, Dean Clark?

Dean Clark. Wait a minute.

Prof. Sunderland. I suggest, Mr. Chairman, that I think there is some advantage in a rule which is not specific. I think that these cases are so important that the court ought to have some scheme of action in dealing with them and dealing with the specific circumstances that come up, and it is very difficult to lay down any definite detailed rules on the subject. If we have some very general and vague rule, such as the Equity rule, the courts are able, in construing that rule, to deal with the cases as they come up as they should be dealt with; in other words, it gives a very free basis of decision, and I am inclined to think, in such a difficult field as this, there ought to be a good deal of flexibility in the decisions of the court.

Mr. Donworth. And here you go back to theEquity

rule

Prof. Sunderland. I believe, on the whole, that is as good a provision as you could have.

Mr. Donworth. It was as a result of that rule that the Supreme Tribe case went the way it did.

Mr. Dobie. Yes.

Dean Clark. May I speak of that. In the first place, the Equity rule is a very sharp limitation on the code rule. The Equity rule is not the code rule, and they point out that they have adopted it from the code rule. But you will notice that, instead of the alternative of the code rule, they run it together.

Now, going to the somewhat broader question whether we ought to do nothing to clarify vague generalities in pleading to date, I must say that I am a little worried at the tendency the Committee has more or less followed. Perhaps it is all right, but what we have done is right along to go back to the judicial language, even though it is a prolific source of litigation. There has been a suggestion that our rules ought to be models to be followed. And yet instead of trying to ~~draft~~ work out rules that ought to be models, we have accepted all the old mossy statements that have caused lots of litigation.

Now, here is another case where the rules are not

clear, and we just throw up our hands and do not try to do anything towards clarifying them. Now, if we are going to build models, I say a very serious question arises; I mean if we are going to accept traditional, mossy models, a very serious question arises which one of the mossy models we shall follow, the Equity rule or the code rule. So much for that.

I want to answer now the question which was asked me, if I would accept Judge Donworth's suggestion. Judge Donworth's suggestion goes further than we had in mind. I do not know that I would object to it; but we had not thought of including the defendants in that particular case. I think that would make that rule include also bills of peace under class suits, and with the doctrine of representation.

Mr. Mitchell. Is it the law now that persons having several interests, and where the defendants are numerous, you can group them or bring in a group representing a class? Is that the law?

Dean Clark. I do not know of any case that goes quite as far as that.

Mr. Dobie. It is a wuestion of genenal or common interest, whatever that means.

Mr. Mitchell. No, I am talking about the third sentence. The second sentence is a common question of law or fact." The third is "When persons having a several interest

arevery numerous. Now, when we come to the third, wh ere there is a several interest, we limit that to plaintiffs.

Mr. Dobie. There there is no common question of law or fact.

Dean Clark. That is correct.

Mr. Mitchell. It has been moved to add to it a provision that would make that apply to the defendant, so that you can bring in a group of defendants. The question I asked about that was whether it was the law to do so, or whether we are ~~xixixg~~ making an advance on it?

Mr. Wickersham. Under the New York practice it says that where the question is one of general or common interest and the parties are numerous, one or more may sue or defend, and so on.

Mr. Mitchell. That would seem to cover it.

Mr. Wickersham. That would cover it.

Mr. Lemann. That is practically the language of the code.

Mr. Wickersham. That is the language taken from the old code.

Prof. Sunderland. Yes; but get practical confusion in the decisions as to what are included in those two classes--as to common or general interest, or what is included where the parties are too numerous, and so on. You will find decisions both ways on every proposition you suggest.

Mr. Mitchell. Well, this proposal that we have before us, of three different classes as they are does not clear up those uncertainties and ambiguities.

Prof. Sunderland. I do not know whether it does or not.

Dean Clark. I am very much convinced that it does, and I think uless prohibited by the Committee I can write something that will accomplish something--if Prof. Dobie does not write that standard work first.

Mr. Donworth. I was not aware when I made that motion that the effect was restricted to the third sentence. I am aware of that now. The old Equity rule only permitted this thing to be done where there was a real class. Of course, the word "class" is subject to definition, but nevertheless there had to be a class. That means that they had to be just in the same boat. In the rule opposite this Rule 45--that is, old Equity Rule 38--it says:

"When the question is one of common or general interest to many persons constituting a class so numerous," etc.,"one or more may sue or defend for the whole."

That obviously excluded anything like several interests. They had to be exactly alike, and their interests had to be exactly alike--perhaps not in dollars and cents, but ofthe samenature.

Mr. Dobie. Do you mean using the word "several" in

its technical sense?

Mr. Donworth. No. The word "class" cannot be ignored. It is just as if they said, "Provided they constituted a class," and we know more about what it means. Now, the code, it seems, goes a little further than that, as quoted in this work on Code Pleading. It says that when the question may be one of common or general interest to many persons, or when the parties are so numerous as to make it impracticable to sue them all, one or more may sue or defend for the whole. The second clause ignores the class, and just makes impracticability and "numerosity" the test, and I am inclined, although I have great respect for the thought that has been put in on this draft of thisparticular section--I am inclined to think that the code provision, which goes a little beyond the old rules, is good enough.

Mr. Dodge. It has caused a tremendous amount of litigation, and we certainly do not want, as Dean Clark says, to adopt old fashioned language if we can improve it. I understand that these three sentences are well within the law.

Dean Clark. That is my profound conclusion of the law. (Laughter.)

Mr. Dodge. Do you object to that, Prof. Sunderland?

Prof. Sunderland. I think that is substantially within some law. (Laughter.) There are so many different kinds that I would not say what the law is.

Mr. Dodge. Is that likely to cause trouble with the old code provisions?

Prof. Sunderland. I think we ought not under circumstances to take State code language. I think that would be a calamity. I think either we ought to take this language that the reporter has suggested, or we ought to take a rule that is not the code rule.

Mr. Dobie. Even though you think the code is fine.

Prof. Sunderland. You will not know what the law is under that code provision. Is that not true, Prof. Dobie?

Mr. Dobie. In some sense. I think you might say, "hardly ever."

Mr. Lemann. I think if Mr. Clark can improve this language he will do it. I think you ought to look over your key language and see how much clearer you have made the situation. The first two sentences did not make it clearer. if you can do anything ~~you~~ we could not object. The three would come under Equity Rule 38, I think. But my feeling is unless there is some objection to that language, and you have a strong feeling that it marks some advance--which I am not convinced of--but if it does not do any harm, let us try this.

Dean Clark. I have not been trying to reframe the law; I have been trying to state it.

Mr. Lemann. Yes.

Dean Clark. I suppose you are correct that an intelligent court, not being held up by all of the decisions, ought to do under the old Equity rule ahat you have said here. But I do not know of any lawyer that can be sure of wha t they are going to do. But it does seem to me that there is a little advantage if we can help out the bar.

Mr. Mitchell. Is the law in the Federal court consistent and clear? Is this, after all, a Federal proposition, and we do not care how much confusion there is in the State courts. The point is whether this rule states the law correctly in the Federal courts? Now, what can you say about that? Is there confusion?

Prof. Sunderland. I do not think there is much confusion.

Dean Clark. There is not much confusion, that is true, but I think there is some, and the difficulty is that the Equity rule looks a good deal like the code rule, and yet it is not, and the whole atmosphere or aroma of class suits adds to the confusion.

Mr. Olney. Of course, here is the principle that governs. The underlying thing that would be accomplished should be to permit, where there is a controversy that is common to a large number of people, of one suit that will settle that controversy, without bringing in the large number

or having them required to actually appear in the court to get a fair trial--if they have fair representation of their interests in that trial. One difficulty with the rule is in the insufficiency of language. When they speak of a joint interest, they may have in mind a joint interest in the controversy, and an identical interest in the controversy, yet the interest of each be different. We have numerous cases of that sort. For example, there are the cases affecting water rights that constantly arise in California. Under our law, the owner of any land whose underlying waters are supplied from the stream has an interest in the waters of that stream. The result is that, if anybody tries to take water out of that stream, he is promptly involved with perhaps a thousand land owners or more. They all have a common interest, and they all have a separate interest in the water, because each has his own land; but they have the same interest in that controversy, and it should be a controversy that could be settled in one piece of litigation, as to whether this man had the right to take the water out under those circumstances, and the law in the matter is in a state of flux, as it were. I believe in going as far as we can see our way clear to go in the way of providing a procedure by which these things can be presented to the court, and then leaving it to the court to determine just how far they shall go and just how they are affected. But I think we ought to go as far as we reasonably can in permitting

the class ~~as to~~ proceed, where there is a controversy that involves a large number of people.

Mr. Mitchell. Did we not all agree to that? The specific question we are down to is whether or not this rule as drafted covers all the cases ~~actively~~ accurately that we want to deal with. The first pargraph deals with joint interests. Does that mean joint interest in property? Dean Clark?

Mr. Wickersham. Does that not mean a common interest?

Mr. Mitchell. Well, is that a property matter--a joint interest in property, that first sentence?

Dean Clark. We intended it to be a joint interest in property, but I am not sure but what the words "common interest" might do here. I might say that I have been somewhat embarrassed by the suggestion that Prof. Sunderland made some time back, that in this situation we did not need to require the parties to be so numerous, and if it is thought desirable some modification of the language "so numerous as to make it impracticable" would be made.

Mr. Donworth. This discussion has made this impression upon me: I have landed where I started out. When I come to comparing the three things--the code rule and Rule 45, the Equity rule, I find they are all different. I do not find in Rule 45 the provision where the question involved is one of general or common interest, or where the parties are so numerous as to make it

impracticable to bring them all into the suit--I find that the word "class" is left out entirely.

Dean Clark. That is true, because we thought that was meningless.

Mr. Donworth. Well, it has produced many decrees that have been affirmed. And perhaps it is a weakness of mine, but I do not like to depart from the old landmarks which have been so often the subject of litigation, and which have been ruled upon and which can be looked up by the lawyer when he is going to act, and when he cites those cases under Rule 45, the court will say, "Yes, but this is a new rule and new language."

Mr. Mitchell. Well, I should say it made them classes. The first sentence is when they have a joint interest in property and are numerous.

Mr. Dobie. I do not like that word "joint" unless it means that.

Mr. Mitchell. Then the next is where they have a common question of law or fact and are numerous. There they are in a class, because they have a common question of law or fact. The third sentence says, when they have a several interest, but it is an interest in a specific property, and that makes them a class. So that I cannot see but what so far as the class is concerned, it has dealt with three different classes in any aspect.

Mr. Donworth. With all due respect, Mr. Chairman, I do not think persons having a common question of law between them are in a class.

Dean Clark. Are taxpayers in a class?

Mr. Donworth. We all have common questions of law. There is not a question of law at all that is not common to a vast number of people. Of course, we threshed that out and voted it out. The only difference between what we voted out and this middle sentence is that in this middle sentence the number must be so large as to make it impracticable to sue them all.

Mr. Mitchell. Could we cover your class point by a general provision that where there is a fair representation of the class--then you introduce the word "class" into it and make it appear that we are really dealing with a class.

Mr. Dodge. Our action today is not final.

Mr. Mitchell. No.

Mr. Dodge. To bring the question up, I would like to move that we adopt the three sentences provisionally, changing the word "joint" in the first line to "common." And we can be supplied with a little memorandum of the existing law in regard to these matters.

Dean Clark. All right.

Mr. Mitchell. Let me understand that motion. That takes the rule down to the words "institute action for the

whole"?

Mr. Dodge. Yes.

Mr. Mitchell. There are no differences up to there?

Mr. Dodge. There are no differences except to changing "joint" to "common" in the first line.

Mr. Lemann. How about leaving the "common interest" in there? The subject matter of the suit runs into the second sentence.

Dean Clark. It is common interest in property that is meant.

Mr. Mitchell. I think you ought to say so, because I do not see any distinction between it and the second one, where there is a common interest.

Mr. Lemann. A common interest in property--

Dean Clark(Interposing). Where you have a specific property.

Mr. Lemann. Where you have a common interest in property.

Dean Clark. Would that make you happier?

mr. Lemann. No, I have no objection to the phrase "common interest in property", as long as I knew that it is understood.

Mr. Wickersham. Joint tenants, or tenants in common, have a joint interest in property.

Dean Clark. It would go further than that. If you

really want to be technical about it I will talk about it.

Mr. Dodge. It means interest of the same nature, and not diverse.

Mr. Donworth. It shows where you are getting when you depart from a thing that has been the subject of so many adjudications, and try to get something better; you start a new line of decisions.

Mr. Mitchell. I asked whether by "common interest" you meant on a question of law, or whether you meant a common interest in property. I was not clear about that.

Dean Clark. I meant property. On the matter of there being various rules of the court, I would like to point out that the Equity rule was a new thing; so far as I know just this form was absolutely new. It was said in the Hopkins edition that it was a new rule adapted from the code procedure. It has been construed somewhat. In fact, it has promoted a good deal of litigation which is not yet ended. I think the Equity rule itself is greatly desirable to avoid; and I must say that I am like Prof. Sunderland--if we are going back to moss, I would rather take the code moss than the Equity moss; because I am afraid that the Equity rule is clearly restrictive . It might not be if the code later went that way. But in terms it is very restrictive.

Mr. Mitchell. I have not enough knowledge myself about

class cases to ask any intelligent questions myself. But the way I feel about it this afternoon, my own personal preference would be to pass over this rule, except insofar as we have stricken out some parts of it, and refer it back to the committee--but largely for the purpose of giving myself a chance to study this; I do not know anything about it.

Mr. Dodge. That would be just the same as to approve it provisionally, with the request for information.

Mr. Mitchell. Anyway you want to do it.

Mr. Wickersham. How about Mr. Donworth's amendment?

Mr. Donworth. I would withdraw that because I find it does not convey the idea.

Mr. Lemann. I second Mr. Donworth's motion. I think the reporter has his heart on this, and I do not think it would do any good.

Mr. Mitchell. All those in favor of adopting Rule 45 down to the words "institute action for the whole," with the substitution of the word "common" for "joint"--

Mr. Wickersham (Interposing). Well, add also "in property."

Mr. Mitchell. I was just going to add--and that the words "in property" were included.

Dean Clark. All right.

Mr. Dobie. If we vote on that, I am frank to say that

I am theoretical on these subjects, and I would like to hear Prof. Sunderland a little further on what he has to say in connection with whether we ought to take either the code moss or the other moss; in other words, whether it is not desirable to have rather a flexible rule here, rather than to try to pin it down to an analysis that, possibly, may be as broad or may not.

Prof. Sunderland. It seems to me that if you take the code rule, it will inject into the Federal system a great deal of litigation, with a large body of precedents, and arguments as to sustaining of various constructions which will be urged in the Federal courts, which will take considerable time and litigation in the Federal courts, to decide what interpretation to make of those provisions. I think that will be unfortunate. I think if we are going to project any possibility of litigation into the Federal courts, under the Equity rule, it will be better to take such a group of proposals as Dean Clark has made, which will very likely turn out to be a practicable set of rules. Now, it may cause some litigation, but I do not think that his rule is likely to cause as much litigation as the adoption of the old code rule.

Mr. Dobie. How about the Equity rule?

Prof. Sunderland. The Equity rule is very vague and does not give us a great deal of trouble, and there is something to be said in favor of the Equity rule, in dealing with

a big subject like this.

Mr. Mitchell. Are you ready for the question? The motion has been made to adopt Rule 45, down to the words "may institute action for the whole", and substitute the word "common" for "joint" in the first line and "interest in property" for more "interest" in the second line.

Mr. Loftin. I did not understand that was all the motion. I thought the motion was to provisionally adopt it as you have stated, and let the matter be referred back to the reporter for further consideration, in the light of the discussion that has taken place here.

Mr. Mitchell. That was implied.

Mr. Dodge. It was expressed.

Mr. Mitchell. But we can have it referred back to ourselves for further consideration and study.

Mr. Dodge. With a request a further memorandum.

(A vote was thereupon taken upon the motion, and it was adopted, all voting in favor of it except Mr. Donworth.)

Mr. Dobie. Mr. Chairman, I do not care much about a record vote. I am inclined to think what Prof. Sunderland says is right, but I am perfectly willing to refer it back to the reporter.

Mr. Mitchell. It will be open at the next meeting and there will be no difficulty about reconsideration.

Mr. Dobie. All right.

Mr. Mitchell. We will now take up Rule 46.

Dean Clark. Rule 46 presents a little the same proposition. I mean we have attempted to leave out the code practice also. But at any rate, I have put up three different suggestions. The first is an attempt to state with some degree of particularity what I think the law is. The second is an attempt to do the same thing, only more briefly. In the second, we throw up our hands and go back to the Equity rule.

Mr. Donworth. This thought occurs to me: This is a compulsory action in a matter; it says "an application to intervene in an action must be granted to the person who claims," etc. I suggest that after the word "application" there should be something meaning "seasonably made." In the code there is usually some provision to that effect, and I think if we are going to make it compulsory on the part of the court to let him in, there should be some discretionary language, so that the would be obliged to let him in during the trial. From the fact that it is mandatory, I think you should leave something to the court, and I suggest something like "seasonably made."

Dean Clark. I thought of a case, if we allowed intervention rather late in the suit, even any time before final judgment--but it was pointed out to me that this is a case

dealing with specific property, and it may affect the rights of a person in property, or have some bearing upon it, when th re is no real reason for having him in at any time.

Mr. Donworth. Well, any person so long as the court has control of the action. It is too late when the court has made its decision.

Mr. Mitchell. What do you mean by granting an application to intervene to a person who is represented?

Dean Clark. That goes back to the class suit.

Mr. Dodbie. That is a person who is represented, but where the representation is inadequate, and he has a different type of claim, for some reason, a different question.

Dean Clark. There are one or two small mistakes in the second sentence. In the sixth line, it says, "an ~~action~~ application to intervene may be granted in the direction of the court," that should be "discretion" instead of "direction." And at the end of that same sentence, it says, "pursuant to Rules 42 and 39." Rule 39 is not the one I want there. It is Rule 29.

Mr. Wickersham. How about Rule 37?

Dean Clark. This is the third party practice.

Mr. Wickersham. Well, take Equity Rule 37 on the opposite page.

Dean Clark. No, I want my rule on bringing in third parties.

Mr. Hammond. That shoul be Rule30.

Dean Clark. Yes, Rule 30 that should be; "pursuant to Rules 42 and 30.

Mr. Dobie. Would it not be better to put it numerically?

Dean Clark. I do not suppose it makes much difference. The reason I put it this way is that Rule 42 is the main one which refers to joinder of plaintiff and defendant and to the third party defendant.

Mr. Dobie. I beg your pardon.

Mr. Lemann. Your jursidictional point is subject to the same comment. But I wondered whether your statement as to intervent on under the second sentence was correct--it does not say third party defendant. I looked into this quest on some time ago, and I looked yesterday at the Whichita case, which I remember having run across, a case of intervention, where it was held that a man might intervene, thou his citizenship was the same as the plaintiff's citizenship.

Mr. Wickersham. He could not destroy the jurisdiction of the court by intervention.

Mr. Lemann. He could not destroy jurisdiction by intervention, although his interest was the same as the defendant's.

Mr. Wickersham. That has been done over and over again.

Mr. Lemann. And I was wondering whether that should not go out, for the same reasons that we took it out in preceding rules; whetherthis might be a case where we state it wrong; because my idea is that you could intervene in a case where you could not be plaintiff or defendant, but you could stay in, because I have done that, where an intervenor's amount would not have got it. So that I am raising two points.

Dean Clark. Didd not that involve property?

Mr. Mitchell. No, it was a suit involving a Louisiana statute, where it did not involve $3,000. A party who had a great more involved than ~~five~~ that filed interventions for others who had much less involved.

Mr. Dobie. I think that ought to go out.

Mr. Lemann. And I think this second sentence would be too broad. But is not the other objection that we took before the real objection, that if it is a jurisdictional matter the court has to settle it and we cannot do so?

Dean Clark. I take it, Mr. Lemann, that your case comes under the first sentence.

Mr. Lemann. No, we did not claim any interest in property.

Dean Clark. Well, some one who was representing you.

Mr. Lemann. No, we did not bring it as a class bill--

at least I was not relying on the class bill provision. I brought it under Equity Rule 37--a bill which involved the validity of this statute.

Mr. Dobie. Did you consider that in subordination to the propriety of the main proceeding? I am just asking for information.

Mr. Loftin. I wanted to raise that question also.

Mr. Dobie. It is technical, and there are a number of decisions on what constitute that.

Mr. Wickersham. There are two decisions to the effect that the citizenship of an intervenor shall not deprive the court of jurisdiction.

Mr. Dobie. And you cannot att ck jurisdiction; an intervenor cannot attack jurisdiction. That has been held. I just wanted to know; that is all.

Dean Clark. Now, you will note this difficulty: If you have something of that kind--if you allow a person to intervene, particularly under my second sentence, he should not be in all respects like the parties who are originally joined, or like parties interested under the common question of law and fact provision; and you would not make any of them have to act in subordination to the main proceeding. As a matter of fact, the court can sever and proceed as to one. Now, it would seem rather unfortunate if you allow the person to intervene under that second sen-

tence--then the men who are already in the action can carry it on, subject to this general right to control the trial when the suit is on, and yet this poor fellow who was intervening, I take it, could not press any claim of his own; he just has to do whatever the plaintiff wants to do; to take whatever the plaintiff wants to take up in the case.

Mr. Wickersham. Sometimes it would make a lot of trouble.

Mr. Dobie. I am inclined to think it would. I am inclined to think you are right.

Mr. Loftin. Do you mean this language?

Mr. Dobie. No, I mean that language of the Equity rule, that the intervention "shall be in subordination to, and in recognition of, the propriety of the main proceeding."

Mr. Loftin. I do not know. I have in mind a case brought in my jurisdiction of a proceeding under a mortgage for foreclosure. A trustee representing a large number of bondholders was suing, and a small group of bondholders sought to intervene, and questioned the propriety of the main proceeding, and claimed that the trustee was improperly representing their interests, and the court under this Equity rule declined to permit them to intervene. Now, as I understand the new rule, that would no longer be a limitation of such an intervention. And the question arises in my mind as to whether you would want to permit a small group of

bondholders to intervene in a proceeding of that kind and have a controversy between the trustee under the mortgage and a small group of bondholders which would delay the litigation.

Mr. Dobie. Suppose the small group brought it and the large group intervened, and the large group owned more bonds and were more heavily interested. Suppose two people brought the suit for 10,000, and 15 intervened having an interest of $1,000,000?

Mr. Loftin. You still do not get to the question that was raised as to the propriety of the main proceeding.

Mr. Dobie. But why should not those 15 men, if the court was willing, be able to question the propriety of it?

Mr. Loftin. I do not think that is practical, because in most of these instruments creating trustees under mortgages, there is a provision about the number of bondholders that can require the proceeding to bring the foreclosure.

Mr. Dobie. Yes.

Mr. Wickersham. Yes, but suppose the requisite number has concurred, and suit has been brought by the trustee, and then a majority comes along and says, "That is all very well. We have no objection to the suit. But the way it is being run is wholly to the interest of the

minority and against the interest of the majority," and they ask an intervention. I have never known a denial of that. I have heard of a few individuals, but not of a large number, and they are allowed to come in in subordination of the main suit. They may not be allowed to challenge the jurisdiction of the suit, but they may challenge the conduct of the suit, and they ought to have that right.

Mr. Loftin. In the case I mentioned they challenged the propriety of the main suit.

Mr. Wickersham. I do not think they can do that.

Mr. Loftin. Now, the reporter has left out that limitation under the new rule, and under his rule the court could go into that question.

Dean Clark. There was some doubt of what is meant where a corporation was collusively put into bankruptcy and the creditors were allowed to intervene in the action.

Mr. Dobie. It is not in any of the code provisions.

Dean Clark. I know. Of course, if you applied the rule strictly in the case I have just put, I think the creditors ought to be allowed to intervene. It seems to me this whole question comes down to the administrative orders to be made in the running of the action. You will notice that we have carried further the idea of multiple parties to a single suit. That is something you did not have at all at common law. That has been the development under the codes. The

multiple tendency has been to carry it a long way under the codes. Mr. Morgan emphasized how much that had to do with his paper work in the office of the clerk of the court, when it did not run into the trial in court. It seems to me unfortunate if we do not provide, in the early part of the litigation, that the court may hear and adjust your claim. You are going to provide a provision at variance with that, in favor of the man who has intervened. The man who has intervened will not be like the other parties; he can, with the permission of the court, separate the issues out and have them separately tried, or the action set down and he is held down to the original action. So that it seemed to me that there was not very much chance of imposition here, because the court is supposed, under our rules, to make orders throughout the trial to prevent imposition on one party. There was not much danger if you did not have it in; but if you did have it in it was a provision that put the intervenor in a different position from all the other parties: whereas if he gets in here, he is not in a different position from the other parties.

Mr. Cherry. As between the first and second wordings of this rule, would you care to state your own preference, Dean Clark?

Dean Clark. I have a preference for the first, as I thought it told more. I have not very much choice. I

suppose the little part of it that covered the question of jurisdiction is going to be cast to the winds, is it? (Laughter).

Mr. Lemann. I think it would be extremely unfortunate.

Mr. Dobie. I think the Supreme Court is going to rule very generously on that point. If the motion is in order, I move the adoption of the rule as it is drawn by the reporter.

Mr. Cherry. Which one?

Mr. Dobie. The first one, including the language in brackets, "on such terms and conditions as the court may think proper to impose." And incidentally, Mr. Hammond has called my attention to the fact that the West Virginia Committee specifically recommended that this propriety suggestion be left out.

Mr. Wickersham. How about the words in brackets about "on such terms and conditions as the court may think proper to impose"? Do you leave those in in your motion?

Mr. Dobie. Yes. I did not mean to stop the discussion, but just to get something before the Conference.

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

Mr. Dodge. What is the motion?

Mr. Mitchell. It is for the adoption of Rule 46, including the words in brackets.

Mr. Dobie. Not the alternative; the first one.

Mr. Wickersham. Not the first alternative, but the

main rule?

Mr. Mitchell. That is right.

Mr. Wickersham. Taking the words in brackets as part of the context?

Mr. Dobie. Yes, and strike out the ~~two~~ Two sentences beginning with "intervention under the first sentence of this rule", down to the words "~~been joined as plaintiff or defendant.~~ supporting the action"

Mr. Wickersham. Do you mean where it says "Intervention under the first sentence of this rule need not be supported by grounds of jurisdiction independent of those supporting the action"?

Mr. Dobie. Yes.

Mr. Lemann. I object that the second sentence is not an accurate statement.

Mr. Wickersham. You mean you would leave that to the court?

Mr. Lemann. Yes.

Mr. Dodge. Yes, it ~~would~~ should be left under Equity Rule 37.

Mr. Mitchell. The motion was to adopt Rule 46, including the words in brackets, and omitting the two sentences connecting with "Intervention under the first sentence of this rule", down to the words "joined as plaintiff or defendant."

Mr. Tolman. Mr. Chairman, I still believe that under this provision in the Equity rule that "the intervention must be in subordination to and in recognition of the propriety of the main proceeding." ~~It~~ still leaves that out.

Mr. Dobie. Yes, that is my motion.

Dean Clark. Yes, as I was trying to argue, I believe that should be done.

Mr. Wickersham. Dean Clark, as I understand, we do not want to have that limitation now that is in the Equity rule?

Dean Clark. No, I do not.

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

(A vote was taken and the motion was adopted, all voting in favor of it, except Mr. Loftin.)

Mr. Loftin. I vote "No." I prefer the first alternative. That is why I vote "No" on this motion.

(P. 1000 down to end already delivered)