MAJOR TOLMAN

Original Copy

UNITED STATES SUPREME COURT

ADVISORY RULES COMMITTEE

FIRST MEETING

CHICAGO, ILLINOIS.

JUNE 20, 1935

REPORT OF PROCEEDINGS

OF THE FIRST MEETING OF THE

ADVISORY COMMITTEE

TO THE

SUPREME COURT OF THE UNITED STATES

HELD IN
THE FEDERAL BUILDING,
CHICAGO, ILLINOIS

THURSDAY, JUNE 20, 1935,
At ten o'clock A. M.

* * * *

THERE WERE PRESENT AT THIS MEETING:

Mr. WILLIAM D. MITCHELL, Chairman.
Mr. CHARLES E. CLARK, Reporter.
Mr. EDGAR B. TOLMAN, Secretary.
Mr. SCOTT M. LOFTIN.
Mr. GEORGE W. WICKERSHAM.
Mr. WILBUR H. CHERRY.
Mr. ARMISTEAD M. DOBIE.
Mr. ROBERT G. DODGE.
Mr. GEORGE DONWORTH.
Mr. JOSEPH G. GAMBLE.
Mr. MONTE M. LEMANN.
Mr. WARREN OLNEY, JR.

Also present, upon the invitation of the Committee:

Mr. EDWARD H. HAMMOND, Attorney in the Department of Justice.

* * * *

I N D E X

PAGE

THE CHAIRMAN: Gentlemen, suppose we get going? Let's check the attendance here:

William D. Mitchell, present.

Scott M. Loftin, present.

George W. Wickersham, present.

Wilbur H. Cherry, present.

Charles E. Clark, present.

Armistead M. Dobie, present.

Robert G. Dodge, present.

Joseph G. Gamble, present.

George Donworth, present.

Monte M. Lemann, present.

Edmund M. Morgan, absent.

Warren Olney, Jr., present.

Edson R. Sunderland, absent.

Edgar B. Tolman, present.

That completes the list.

Most of you gentlemen know as much about this situation as I do, but for the benefit of some that have been farther away, I will state in a general way what has been preliminary to this meeting.

I think you are all familiar with the statute; the one section that authorized the Court to draw common law rules, and the second section,

which authorized it to combine the two.

After that act was passed, a movement was started to get the work going. I understand the Chief Justice and the Attorney-General conferred, and under the suggestion of the Attorney-General the local Federal Judges appointed local committees around, and started them to work on the subject. At that time, the general assumption was that the work would be confined to drawing rules applicable only to common law actions. I am not sure how far the Court had considered that subject.

At any rate, after these local committees had been formed and were proceeding on the assumption that the work would be confined to common law rules, the court took the matter up, and reached the conclusion that they would have a unified system. I think you have all read the Chief Justice's statement at the American Law Institute; and then the Court concluded that there ought to be a Central Advisory Committee, acting under its direction and supervision, who would centralize their work, and prepare a draft for the consideration of the Court. That is how this Committee originated.

We have the problem of co-ordination of the work of this Committee with these various local

committees that have been appointed.

I think they started, each of them, drawing a set of rules of their own; they were all common law rules, they were not combined, and I think the Court has felt we would make better progress with less confusion if there was a Central Committee to draft a set of rules, and then used the local committees to criticize and suggest, and deal with the subject in that way.

At any rate, it is the idea of the Court, I am told, that these local committees should be continued, and all the enthusiasm and interest that they have shown should be preserved; and they will be used to advantage when this draft, made by this Committee and turned loose by the Court, goes to the Bar.

MR. WICKERSHAM: Mr. Chairman, I don't know about other committees, but I have talked with Mr. Kellogg, who was appointed by Judge Knox as Chairman of the committee in New York, and he had had no intimation whatever that those committees were to be continued. On the contrary, he got the impression that their work was done; so that, if they are to be continued, I think it would be well to suggest to the Chief

Justice, perhaps, that notice to that effect be given.

I have a lot of material that Mr. Kellogg gave me, and his impression was that they were functus officio.

THE CHAIRMAN: Well, he called me on the phone, and I told him just the opposite; that the Court didn't want to abolish this valuable local set-up. And the Chief Justice -- we were at one time on the point of suggesting that some letter be sent out to those committees at once, and the Chief Justice suggested we had better wait until this Committee met, and get your views as to just how we would co-ordinate with those local committees.

After you have made your minds up as to how it ought to be arranged, and what you want to do with these other committees, a letter will be sent out telling them just what the plan is, but he thought it was inadvisable to send them out until this Committee had considered the subject.

Now, these are all merely suggestions, to get your minds working on some of our problems here.

The general assumption has been, I think, in my chats with the Chief and with other members of

the Court, that this Committee would proceed somewhat along the lines that the American Law Institute has followed: That a sub-commitee, headed by the Reporter, would have the actual job of sitting down and drafting something, and the Court appointed Dean Clark as the Reporter to take charge of that work.

One of our tasks today will be to take up with him his suggestions as to what sort of a set-up he wants, what staff assistants and other help and financial expenditures his work entails; and everything we do will go back to the Chief Justice before we consider it finally authorized, particularly in the matter of expenditures.

Now, we have a good many separate problems that I will bring up later, but just at present, I think we would like to hear from Major Tolman, who has been on the Attorney General's advisory committee, and who has had a great deal to do with the work of having these local committees appointed. Mr. Tolman has been put on this Committee, and the general lines of the informal discussions that have been had about the situation indicate or suggest that Mr. Tolman be the liaison officer between this Committee and the various local committees that have been appointed. We don't want to bother with a secretarial office.

There will be masses of correspondence coming in to this Committee, suggestions from the Bar, and letters to be answered -- you can see the size of my file, accumulated in a day or two -- and I don't want to be loaded down with a secretarial office; and we don't want the expense of it. The Attorney General has this set-up of his own, and it has been suggested that Mr. Tolman be given charge of our secretariat, and that he be the funnel through which all communications to and from the Bar and judges pass; that he maintain that office, and be the target at which all correspondence directed to this Committee should go. In that way, he can act as a liaison officer between this Committee and the other local committees; whatever material comes in that is useful for the Reporter in his set-up will go to him, and so on. That is the general idea that we have to consider.

MR. DOBIE: That has been done, hasn't it, Mr. President? I understood all material had been sent in to Major Tolman -- I mean, from these various committees, and all.

THE CHAIRMAN: Up to date, yes; but now, we have been set up, and people are commencing to fire letters at me, as the only way that they know how to reach us,

and we have got to have a secretarial office; we have got to have a set-up to handle our clerical work. I am not speakingof the Reporter's staff, that is a separate thing, but I mean the general secretarial work of the Committee.

If it meets with your approval, may be we had better hear from Mr. Tolman, telling about what has been done in the Department of Justice, and what this set-up is, over there.

MR. TOLMAN: Mr. Chairman and gentlemen:

I thought that it would save time if I would write in a rather condensed form a report of what has been done in the Department of Justice; and, while it is not necessary to read all of this, I will read parts of it, and perhaps comment on the statute, and I think it will give you the picture better than a rambling report.

(Reading report:)

DRAFT OF REPORT TO SUPREME COURT ADVISORY COMMITTEE FOR ITS SESSION OF JUNE 20, 1935.

Gentlemen:

The act of June 19, 1934, was, as you know, the culmination of the long continued efforts of the American Bar Association and its Committee on Unifcrm Judicial Procedure headed by Thomas W Shelton, its chairman. The purpose of these efforts was to transfer from Congress to the Supreme Court power to regulate procedure in actions at law in the District Courts of the United States and in the Courts of the District of Columbia, and through the exercise of that power to improve procedure in those courts. The project, which lost momentum after the death of Mr. Shelton, was taken up by Attorney General Homer S Cummings, and its passage is universally conceded to have been due to his almost unaided efforts.

Soon after the passage of the bill there were conferences between the Attorney General and the Chief Justice

and in view of the fact that the Supreme Court had no appropriation or personnel to take care of the work it was decided by the Chief Justice and the Attorney General to form a small organization within the office of the Attorney General to cooperate with the Supreme Court in carrying on the work involved, and to provide for the expense thereof.

The Conference of Senior Circuit Judges in September last, as its report shows, "at the suggestion of the Chief Justice, considered appropriate methods for assisting the Supreme Court in the discharge of this highly important and difficult task, through the cooperation of the members of the Bench and Bar throughout the country, to the end that the views of the federal judges and of the bar may find adequate and helpful expression."

After this conference, in order to secure the cooperation of the members of the bench and bar, the Chief Justice requested the Attorney General to write a letter to

each of the Senior Circuit Judges inviting each to, in turn, invite the District Judge in each District to appoint a committee of leading members of the bar to cooperate with him in a consideration of the matter or, at his option, himself to appoint a committee for his whole Circuit.

The Chief Justice not only wanted the matter considered generally but also wanted certain specific subjects considered and mentioned certain of these subjects, and asked the Attorney General to prepare a more complete list of them.

The Attorney General prepared such a letter and list of subjects to be considered, and submitted them to the Chief Justice for his approval, which was given. A copy of this letter and the subjects to be considered are attached hereto. Additional copies are available for the members of this Committee.

The Circuit Judges promptly transmitted to

the District Judges a request to appoint committees or themselves appointed committees for their whole Circuits. The District Judges also proceeded promptly to appoint committees in their Districts. We have the names of the members of about fifty of these committees ranging in number from three to forty members. Undoubtedly committees have been appointed whose names have not been reported to us. There is abundant evidence of the fact that these committees promptly and willingly took up the work, gave it serious consideration and have formulated either rules or suggestions for rules,- some of which have been reported to the Attorney General's office but more of which have been reported to the district and circuit judges and are being held by them for consideration and may be expected to come in from time to time.

It will be borne in mind that the letter of the Attorney General above referred to, in accordance with the

instructions of the Chief Justice, invited consideration of the question of rules of procedure in civil actions at law. That letter contained no reference to rules of procedure for cases in equity. The question was immedi tely brought up as to whether or not the court should proceed at once to the final objective, the one authorized by Section 2 of the act, to-wit, the union of "the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both:" When this question arose the Attorney General's office was directed not to extend its work until this question had been considered by the Court and decided.

At this time the Attorney General had formed an organization within the Department, had appointed a Special Assistant to the Attorney General, in charge of the work and an advisory committee consisting of three members of his

staff, The Assistant to the Attorney General, Mr. William Stanley, Assistant Attorney General, Harold M. Stephens, and Edward H Hammond, attorney in the Department of Justice; three members of the teaching branch of the profession, Dean Roscoe Pound of Harvard, Dean Charles E Clark of Yale and Professor Edson R Sunderland of Michigan; also three practicing lawyers, George W Whiteside of New York, Frank A Thompson of St. Louis and Donald DeFrees of Chicago. An extensive correspondence had been carried on with the circuit and district judges and their committees. Material had been accumulated for use in the task. A plan had been formulated for necessary preliminary research. Offices had been equipped and the appointment of four additional men to carry on the research work was under advisement, but in view of the matters above referred to there have been no further appointments to this work.

The plan of work for the department in addition to the collection of material for the use of the judges, the committees, and the Attorney General and his staff, the correspondence with them and the collection and organization of the matter suggested by the committees, proceeded along the lines of the statute. Section 1 of the Statute authorized the court to prescribe law rules. Section 2 of the Statute authorized the Court to unite the equity rules with such law rules. The Department planned that if and when it became its duty to draft law rules to be submitted to the court, the law rules must be so drawn that they would be harmonious with and suitable for union with the equity rules whenever the court decided to take the second step. All of the work of research done and the material gathered by the Department were necessary parts of the larger task of promulgating rules for a single form of action and they are available to this Committee.

It is of interest to observe that so far as can be ascertained from the correspondence with the committees, personal conferences with some of the members and an examination of the reports and recommendations which have been made available, the committees have acted on much the same theory.

They have evidently contemplated that the rules should be a composite of

(1) The State Practice act or Code of Civil Procedure.

(2) The Federal Equity Rules.

(3) Selected provisions of the procedural system in other states where the subject had not been dealt with in the committee's own state, such as

(a) pre-trial practice
(b) discovery and examination before trial
(c) joinder of parties and of causes of action
(d) provisional remedies, and
(e) summary judgments.

What has been said above does not apply to the so-called common law states, meaning the states in which there have been retained separate procedural provisions in regard to actions at law and cases in equity, but even in these cases the strong tendency was to favor rules at law which should to a considerable extent be a paraphrase of the corresponding equity rules.

While every state which has a satisfactory code would naturally favor the largest possible conformity between the new rules and the State code, there seemed to be a recogni[tion] of the necessity of uniformity and a willingness to make con-cessions for the accomplishment of that end.

Your attention is called to the time element in-volved in the enlargement of the field. While rules under Section 1 of the act do not have to be reported to Congress and take effect six months after their promulgation, if the rules for law and equity are united under Section 2 they

have to be submitted by the Attorney General to Congress at the beginning of a regular session thereof and do not take effect until after the close of such session. This clearly means that the united rules should lie with Congress throughout an entire regular session. If the rules are therefore not submitted to Congress at the beginning of its next regular session in January, 1936, their submission will have to wait until January, 1937, and they cannot go into effect until the end of that session at the earliest.

Edgar B Tolman

Special Assistant to the
Attorney General

Chicago, Illinois
June 20, 1935

MR. LOFTIN: Major Tolman, may I ask whether the Attorney General's advisory committee is to be continued?

MR. TOLMAN: Nothing has been done about that matter. After this meeting arranges its organization, then we will know what to do.

THE CHAIRMAN: I might supplement Major Tolman's statement by making some mention of the financial situation.

This, of course, will cost some money.

The Attorney General, I am told by officials of the Department, has an appropriation of $40,000. I have also been told by his assistants down there that they estimate that until the next session of Congress, after the first of January next year, they will need about $15,000 of that 40,000 for their own set-up, for the salaries of the Attorney General's staff on this work, and for the incidental expenses of these local committees.

That leaves $25,000 out of the Attorney General's appropriation, that the Department has suggested might approximately be made available for the use of this Committee, because the appropria-

tion act is so worded that the Attorney General can authorize expenditures out of it for a committee appointed by the Supreme Court.

Now, it is doubtful about the sufficiency of that fund; so the Chief Justice, through Mr. Hammond here, has applied to the Appropriations Committee of the House for an additional $25,000 to be expended under the direction and control of the Court itself. Mr. Hammond reports this morning that that suggestion has been received in a friendly spirit, and we have no reason to doubt but that the Congress will make that appropriation at this session. That would leave possibly $50,000, all told, that might be available for the use of this Committee in the drafting work; up to, say, June 1936.

I have had some talk with the Chief Justice about outlay. The order specifies that the members of this Committee, as such, will serve without compensation; but it is understood that the Court wants to compensate the members for their expenses in attending all meetings. At present, we have no appropriation, and the costs of this meeting will have to be paid out of the Attorney General's appropriation, which is subject to legal limitation

as to expenditures and so on; and Mr. Tolman has kindly arranged to have the necessary authority given down there to pay the expenses of members in attendance at this meeting, within the limitations prescribed by law.

Then, I think it has been the expectation of the Court that when it came down to the actual drafting work done by the Reporter and those under his direction, and his staff, that there will be an expenditure for a moderate compensation for those men who give up their time to that work, on lines similar to those followed by the American Law Institute.

Dean Clark has presented, or suggested a budget here. I asked him to do it, because I thought he ought to know what his staff requires.

When it comes to the time limit, he says that he should hope to get a preliminary draft ready for the consideration of this Committee in the fall, and the idea will be then that this Committee should meet and chew the draft up and do what we can with it, and whip it into shape so that we could then submit it to the Court; and we should hope to be able to do that before the Court adjourns in June,

1936, so that the Court will have a chance to look over the draft and feel that it is a sufficiently respectable document to warrant them in handing out the draft to the Bench and Bar of the country. Then, of course, it would have to go through the mill there.

It would be exceedingly dangerous business for the Court to enact a set of rules without having everybody take a whack at it, to see whether there are any holes in it; and I think it would be their idea that, at that stage of the game, this draft would go to these local committees and to the Bench and Bar generally, and we would be flooded then with suggestions, and one thing and another. We would have to take those up again, go over our draft, and then again submit it to the Court.

However, so far as I have been able to sound out those who have ideas on the subject, including the Reporter, the indications are that to get a report ready to submit, to disseminate among the Bar, to disseminate among the local committees, to get their views, and revise it and have the Court consider it and all that, and have it ready by January 1st, at the opening of the next session of Congress, is a physical impossibility. It would also mean a haste about this work which wouldn't be justified;

so that, apparently, if we follow that program, and get our Reporter to present a draft to us next fall, and we can deal with it so as to be willing to hand it to the Court before they adjourn in June 1936, so they can chew it over before the adjourn, and make up their minds whether they are willing to hand it out for general discussion and criticism, we will have done a good job. It is a tremendous undertaking. I have some correspondence with the Chief Justice about some phases of this thing, but I will leave that for the present.

I started to call your attention to this budget.

First, it is estimated that the expenses of four conferences of this Committee, that is, traveling and subsistence, on the assumption that we have four general Committee meetings before June, 1936, at $3000 apiece, and a reservation for contingent expenses and expenses of smaller group meetings of $1000, a total of $13,000.

He has got a suggestion here for the Reporter's regular staff. He suggests that he be allowed to employ Mr. James William Moore at a salary -- he is now on a salary of $2300 at Yale; that this Committee pay him at the rate of $1800 a

year for his work in the drafting, Yale continuing to pay him $500.

He also suggests the employment as one of his aids of Mr. Frederick F. Stone at a salary at the rate of $2000 a year; stenographer, part time, he estimates that 700, and travel and incidentals at 500; which would make the Reporter's staff, the narrow staff, $5000 for total expenses up to the time we submit a draft to the Court in the spring or summer of 1936.

Then he has a suggestion for an expanded staff here, on the theory that if he finds he is able to make faster progress with the larger staff, it would pay to expedite the work that way, and would cost no more in the end.

For his expanded staff, he suggests as assistants during the summer of 1935, Professor Harry Shulman, two and a half months at $500 per month, $1250; Professor Fleming James, Jr., on the same basis, $1250; and then he has got an item here, an estimate of "Special Work of members of the Committee," five of them for two months each, at $500. He puts that down as a possible expenditure of $5000; contingent reserve for special work of assistants, $2500; making $10,000. So that, with

his expanded staff, his outside limit for the period from now until June 1936, would be $15,000.

He has an estimate of mimeographing and printing,$2000; secretarial staff in the Department of Justice and expenses of the Department with respect to the local district committees, he has put in at $20.000; the Attorney General's office estimated it at $15,000.

That would leave, out of the total of $65,000 in the two appropriations, one made and one contemplated, a surplus of $15,000; so that his general outline here calls for an expenditure between now and June 1936, both in this Committee and in the Attorney General's Department, and their work, according to their estimate, a total of $50,000 out of the $65,000 available.

Now, I have done all of the talking so far, mostly, just to sort of start the action going. You have thechoice of taking up particular suggestions one by one, or possibly you prefer to open the discussion generally for a while.

What is your pleasure about that?

MR. LOFTIN: Mr. Chairman, wouldn't be well at this time to hear from Dean Clark? I think he has un-

doubtedly given considerable consideration to the work of this Committee.

THE CHAIRMAN: You mean, with respect to his staff and set-up and organization?

MR. LOFTIN: Not so much as to the mechanics, but as to the outline of the work of the Reporter, and matters connected therewith.

THE CHAIRMAN: What is your pleasure about that?

If there is no objection, we will hear from Dean Clark.

MR. CLARK: Well, Mr. Chairman, and gentlemen of the Committee, may I say I would like mainly to get instructions, and I would like to have the opinion of the gentlemen on sone of the various activities we should follow.

I think perhaps I can indicate two or three matters in a preliminary way, before indicating some of the problems that come up.

First, I think it would be very helpful indeed to the Committee to have the assistance of the Department of Justice and Major Tolman. It is quite important that we get these suggestions from the various parts of the country; and I think that we must work out a rather detailed documentation of what we do -- I think it will be more persuadive.

That will mean, in a way, not only documentation from the books; that is, what we can find from studying the statutes and rules and general authorities; but also, what we can get in the way of practical suggestions; and I think it is going to be very helpful indeed to have Major Tolman able to get all these things together.

I must say that I was a little overwhelmed myself at the thought of even the correspondence that would develop; and, while I do not think I have had

as much as Major Tolman, I have already had a great deal, and that needs to be sifted over very carefully.

Now, again, as to the time, I want to concur in what Mr. Mitchell has said. I have worked in this subject quite a little, and of course, have some ideas. If the Committee wish to push ahead for the date of January 1, 1936, I am quite prepared to do it; but on the whole, I think it would be unwise. I am afraid that we would have to complete the work ourselves, with such a short time remaining for its submission generally to the Bar, that that would not give a good impression.

My own view is that it will be quite possible; quite desirable, in fact, to aim at the date of submission to Congress as January 1, 1937; that we should complete our report to the Court before the end of the next term of Court; that is, before the Court adjourns next June; and that the remaining period would then be available for consideration by the Court and for submission to the Bar generally, and then for revision by ourselves.

I think that our work probably would meet with more approval from the Bar as a whole, if it is seen that we gave that much time and attention to the matter.

MR. OLNEY: Mr. Clark, leaving out the matter of the approval of the Bar, can the work be done satisfactorily between now and such time as would enable us to report it to the Court in such time for them to consider it before January 1, 1936?

MR. CLARK: Well, I should rather doubt it. I think that I could probably get a draft that would be satisfactory to myself; but of course, that isn't the problem, by any means.

What I expect, having had some knowledge of discussions in the American Law Institute, and from what should be the nature of the work of the Committee, is that any preliminary draft which is laid before you will call for a great deal of revision; and I don't believe that we could both prepare a draft and have it revised by the Committee in that time.

MR. OLNEY: Well then, the time is not sufficient to do the work itself, between now and January 1, 1936?

MR. CLARK: Yes, I think that is correct.

MR. WICKERSHAM: May I ask the Chairman whether he thinks the Court understands that, or does the Court expect us to do the work with greater celerity?

THE CHAIRMAN: The general understanding in my conversations, purely informal, has been that this job --doing a good job, the kind of job that ought to be done, and taking all the precautions that are required to get it circulated among the Judges and the Bar -- means that, if we get these rules in effect inside of two or three years, we are doing a creditable work.

MR. WICKERSHAM: All right. I wanted to be sure the Court wasn't expecting us to give them something they could send to Congress next January.

THE CHAIRMAN: They are not. It is quite evident, if we should try to dump in on them a set of rules that they would have to consult the senior Circuit Judges and the Bar about, and pass on them before January 1, it couldn't be done.

MR. DOBIE: I think we will all agree that is utterly impracticable, to present it for approval by the session in 1936. I think, if that can be done in 1937, we can certainly not be charged with

neglecting our job.

I was interested in what General Wickersham said about when the Court expected us to present our final report to it. I wondered if they would rather have it done during the summer, or when the Court is in session, or what that situation would be. I think, on questions like that, if we can work them out here, it would be extremely helpful. I don't imagine that, at this meeting, we can go into much of the details of the rules.

THE CHAIRMAN: I don't think they have thought about that. Of course, they are looking to you. gentlemen to plan this work in the most efficient way; that is what they appointed you for. They want your judgment and your help in going at it in an orderly way; they are busy with other things, and they have delegated to you the job looking this field over, making your mind up as to what proper organization you should have, and how you should go about it. They want your opinion about it. They haven't expressed any to me.

MR. WICKERSHAM: Of course in their order, they say nothing about communicating with the Bar; they asked us to advise them.

My personal concern was whether they had in their minds that they were going to get before them, next November or December, a finished product that they could do as they liked with, or whether they really understood it would take a year or more to do this.

THE CHAIRMAN: My impression is, from what I know of the situation, that if we got a report that was satisfactory to this Committee, that we could hand to the Court in a year from now --

MR. WICKERSHAM: And they could send to the Bar --

THE CHAIRMAN: --that they could then consider, and with a view to sending it to the Bar, they would be completely satisfied that we had proceeded in an orderly way; and they wouldn't feel worried if you took longer, if you found it necessary; they want to leave it to the Committee.

MR. DOBIE: Do you contemplate the possibility after we make our report and it is referred to the Bar, that the Court will call on us again to go over our tentative completed report in the light of the suggestions of the Bar?

THE CHAIRMAN: Undoubtedly. It will go out to

these local committees and all the Judges, and the Judges will hear and talk about it. They may have an infinite variety of suggestions to make, and I have no doubt the Court will dump back on to us our report, with this multitude of suggestions from Committees, lawyers and Judges, and ask us to go down the line again and see what is good and what is bad in them; and then make a second report to them, which they can look at as nearly a final product.

MR. DOBIE: That would seem to be the only sensible thing to do.

MR. WICKERSHAM: It would seem to me, under that aspect, we ought to look to the point of giving the Court our draft, if possible, before their final adjournment next year; and they could look it over during the summer months, and perhaps, during vacation, direct that copies be distributed and so on, and be ready to take it up when they met in the fall.

But it seems to me we ought to work to that date, say June 1, 1936, to get it in the hands of the Court; that is, our suggestions; but not later than that day. I mean, that would be my general idea.

THE CHAIRMAN: Do you want to take any formal action on that? Is it the sense of the meeting --

MR. LOFTIN: Do you want to make that motion?

MR. WICKERSHAM: I will simply make the motion that it is the view of the Committee that it should endeavor to complete, and to furnish the Court with its suggested rules, not later than June 1, 1936.

MR. LOFTIN: I second the motion.

THE CHAIRMAN: All in favor of that say aye.

Opposed?

(The motion was carried by unanimous vote.)

MR. LOFTIN: Mr. Chairman, I don't think Dean Clark had finished, and I suggest that we hear further from him.

THE CHAIRMAN: We will call on you again, Dean, to go on with your statement.

MR. CLARK: I wanted to find out how much of the actual work of research the Committee was willing to do; that is, individual members.

It is my guess that not all of you will have the time, but that some of you might work on specific topics; it would be quite easy, I think, to work out a little assignment. Such-and-such a person, for instance, might take the rules as to original process, including Arrest, and --

MR. WICKERSHAM: That brings up a question -- "including Arrest" brings up a question that I have had in mind which we should consider and determine; and that is, how far we should attempt to prepare rules for provisional remedies, or whether provisional remedies should be left,under the Conformity Act, to the different States.

My own impression is that if we undertake to establish a uniform rule for provisional remedies in

the Federal Courts, it will do more to stir up opposition to these unified rules than by any other process, but it is a subject that I think -- I am only throwing this out for consideration.

There are three or four fundamental subjects which I think we ought to decide before we undertake the division of the work. First, the general scope and plan; then, I think we should take those three or four other fundamental questions which I think we ought to consider.

THE CHAIRMAN: We have a large number of those. Of course, I think we ought to, so far as we can, dispose of the big problems of organization first; then take up the various matters that the Reporter wants instruction on.

His question raises this one:

Is it the idea of the Committee that those of us who are in the active practice will find the time to do any actual drafting work, or some of us may and some of us may not, or whether that sort of work will have to be relegated to the Reporter and to those members of the Committee who are law school men?

MR. WICKERSHAM: There we have the precedent in the

American Law Institute, the Reporter of the subject will communicate with members of the Council, for instance, as to whether A, B, or C is willing to undertake the work of being Adviser on such a subject. In that way, we are drawn into actual original work, those members of the Council who have had the time and interest and who have been able to do it, by leaving the initiative to the director of the work.

The Reporter here stands rather in the relation that the Director of the American Law Institute does to its work, and he can from time to time communicate and find out what particular subject each member of the Committee is interested in, and what he would be willing to work on.

MR. CLARK: Well, I rather expected that I would do that, particularly with the professorial members whom I know; and I had thought of certain things I might ask them to do. I don't know the practicing members of the Bar so well, and I was wondering if I could find out if they had a specialty in which they were interested, or how much it would be possible to call upon the other members.

MR. DOBIE: I would like to make one observation

there, Dean Clark, if I may.

Being a law school man myself, and not imposing too much confidence in the law school men, I think it would be extremely unfortunate if in any way it gets out to the Bar of the United States that this is a law school project, rather than that of the whole Committee. I really feel very strongly on that.

I think we may have some more "Brain Trust" stuff, if the lawyers generally get it that this is the idea of a group of theoretical people who have written a great deal on the subject.

Of course, there is also the matter that these men who are engaged in practice can't give the time to it that we can. I don't begrudge every available moment that I have. Some of us, like Mr. Lemann there, are combined law school men and practitioners, who do the work of two people, practice and teach, too.

But this work, in whatever way it is done, we ought to guard very carefully, and certainly see that it doesn't go out to the public that the spade work is a law school project, with these able and experienced practicing lawyers rather sitting on the poop deck and looking on at what we do.

I really have that feeling very strongly. I would like to hear from other members of the Committee, particularly General Wickersham.

MR. WICKERSHAM: They are both indispensable.

MR. CLARK: I quite agree with what Dean Dobie said. It was partly with that in mind that I was making the suggestion.

I do not know that this really needs to be decided, or taken up right at the moment, if you would rather think it over, and perhaps make suggestions to me privately, those of you who can spend a little time on some particular field.

MR. WICKERSHAM: Mr. Chairman, how would it do to adopt a motion that the Chairman be authorized, in consultation with the Reporter, from time to time to appoint such members of the Committee as are willing to accept appointment to act as Advisors in the work, on particular subjects dealt with?

MR. OLNEY: May I make a suggestion, before we consider that particular motion?

MR. WICKERSHAM: Surely.

MR. OLNEY: We have not merely ourselves to con-

sider as to the part we will take in the work; we have also got to bear in mind, as has been said, the Circuit Judges and the local committees; they are of decided importance.

According as they are taken into consultation and are in accord with the final result of our own labors, the work of adoption of our work on the rules by the Court, and its adoption by the Bar, and without objection in Congress, will be simplified.

Also, looking at it from our own point of view, the point of view of myself as a member of the Bar, I would make this suggestion:

There are very few of us, outside of the law school men, who have anything of a broad, comprehensive idea of the task that we are given to undertake. We have, all of us, particular subjects, particular ideas that we have met with along in the line of our experience.

Now, my suggestion would be that Dean Clark make an outline of this subject, a skeleton of it, with perhaps in connection with each, a statement of the general idea, the general purpose, the general things to be accomplished in connection with that particular subject. Then that skeleton can be sent

to us, and can be sent to the senior Circuit Judges, and can be sent to all of these committees, with a request for suggestions anywhere down the line in connection with these various subjects. The mere enumeration of the subjects will bring the particular points to the attention of these gentlemen, and you will begin to get suggestions along a rational line, and with some co-ordination; and we ourselves then, so far as we lawyers are concerned, can give to the Dean the results of our own experience and our own ideas.

It seems to me, we may get the cooperation of these various committees, in getting them to work.

What I feel is -- one thing I am afraid of is that many of these committees have discussed something themselves, and they will be enthusiastic in having it imposed upon this Committee literally, and without any exceptions to it; there is the pride of authorship, you know, all that sort of thing; but if we can get them working along this other line, we will have them with us.

MR. WICKERSHAM: How many of these committees are there, Major?

MR. TOLMAN: We have had some interesting reflec-

tions on that subject, as a result of experience.

About the first demonstration that we had at Washington of the attitude of the Bar was telegrams for drafts of rules to be submitted to them. I greatly admire the psychology of the Chief Justice in giving the initiation of this thing to the Bar. It was very clever judgment of human nature.

Well, you see how many of them have originated anything. One State has done a wonderful piece of work; half a dozen other States have made beginnings on it; but the great part of them -- having been satisfied by the demonstration that the Chief Justice wants them to do something -- they are thoroughly placated now. What they really want is drafts.

I think the idea of keeping them in line is a perfectly sound one. I think the committees are a great asset; we ought never to lose them.

MR. WICKERSHAM: About how many of them are there?

MR. TOLMAN: Oh, we have the names of committees from, I think fifty districts. There are probably 500 men working on this.

MR. WICKERSHAM: What I meant was, the number of different committees.

THE CHAIRMAN: Fifty districts, I think he said.

MR. WICKERSHAM: They are committees appointed in the District Courts?

MR. TOLMAN: In the districts, yes; and some by the Circuit Courts.

MR. LEMANN: In my State, where we have two Districts, we have one committee; I think that is probably true in other States. I imagine we have a committee functioning with some degree of activity in almost every State.

MR. DOBIE: I remember the meeting in Asheville a short time ago. Of course, the Chief Justice always goes down there. I was invited to go, but it came right during our final examinations, and I couldn't.

I understood they went through it quite seriously, and will probably make a report to you, or a very large committee of all the States in the Circuit.

MR. TOLMAN: Well, it hasn't worked out quite that way. It has been rather informal; it is different everywhere.

For instance, in the Fourth Circuit, Judge Parker has a regular annual conference in his Circuit.

He didn't appoint anybody, but he held a meeting of that conference. And in the Sixth Circuit, the Judge had a judicial conference of his own, and a large one; from that, he picked a standing committee of five.

Well, let me finish this picture. I think what we do about these committees is a very important thing. In the first place, I think we will be most ungracious not to recognize what they have done; because, whether it has been worth anything or not, the spirit of it is magnificent.

Then, just as your Annual Meeting is the meeting that sells the Restatement to the Bar at large, so we have got to have a constituency to sell these rules; and our committees that are now in existence and have worked on this matter have demonstrated their interest and their loyalty; they are the men that are going to give us a working force behind this movement.

MR. WICKERSHAM: I had no intention of suggesting anything to the contrary. I only wanted to get some idea of the magnitude, the extent of the numbers who would have to be consulted, in line with Mr. Olney's suggestion, which struck me as a very good one, if we could do it: Send to each of these

committees a skeleton outline prepared by Dean Clark of about what we are contemplating, and let them criticize or suggest additions to that, before we get down to the actual formulation of anything.

Of course, after all -- aside from certain fundamental questions, as to whether you will include this, that or the other thing -- it is a work of great importance, but it isn't a novel work; a great deal of the spade work has been done.

You have got the Michigan rules, and a variety of rules in different places that have been threshed over; and we can take half a dozen of those, and the equity rules, and you get a pretty good idea of what the scope is of what you are going to do. Then come the details, which are different; but there are certain fundamental questions which I think perhaps we ought to put to these committees and get their opinion on them. For instance, the one I threw out a while ago, as to whether or not we should undertake to provide general rules covering provisional remedies, or whether to leave those to the general laws of each State. I mean, that is one of the things I just threw out.

MR. TOLMAN: Well, I see your point, and it is in

harmony with what I was trying to say. I don't think we ought to ask these committees to do any drafting.

MR. OLNEY: I had in mind to head them off from that very thing.

MR. WICKERSHAM: Judge Olney had that in mind. That is the reason --

MR. TOLMAN: I would give them a finished product, and at the same time not the whole of the finished product, but I would give them rules. If the Drafting Committee had rules on a subject and thought it was time to send them out, I wouldn't stop because we hadn't got all the rules; and there are certain vital and fundamental questions that I would send out. There are plenty of them to be decided.

For example, we have got a Judicial Code. Now, if that Judicial Code stays there except so far as we make rules, are we going to make a complete set of rules on every procedural subject that is in there, or are we going to let the Bar, when we get through, have to look in two books and make a careful search to find out what the law is ?

Although brevity and simplicity are the most vital necessities, I think we have got to cover

the ground so that when the Bar gets through, they only have to look in one book to find out what the procedural law is.

MR. WICKERSHAM: That brings up another question that I had in mind --

THE CHAIRMAN: This discussion is headed up right to Point I in my agenda. As long as you have led up to it, I am going to ask the Committee to consider it and take some action on it; and that is, the question of the relationship of this body with these committees.

MR. DOBIE: Mr. President:

I do not know if it is in order; if it is, I would like to raise this question:

Do you think it is desirable, in order to get the continued support of these local committees, that some form of resolution be taken by this Committee, thanking them for their work and expressing our interest in their work; that that be given to them either through the press or directly ?

THE CHAIRMAN: That is precisely what I was going to suggest.

MR. DOBIE: I think we all agree that we must work with those people, and we need their help, both in connection with suggestions, and particularly, as somebody has said -- to use a word I don't like -- to sell these rules to the United States.

I thought it might help get it across to these men that we are not high-hatting them; and I thought that was worth bringing up for the thought of the Committee.

THE CHAIRMAN: The first thing I had on the agenda here was a suggestion that the Committee consider the appointment of Major Tolman as its Secretary -- I don't mean by that a mere amanuensis; I mean a man in charge of the secretarial work; and with the idea that he will aid in the liaison between this Committee and the committees that he is in touch with.

MR. WICKERSHAM: I move the appointment of Major Tolman as Secretary of this Committee.

MR. DOBIE: I second it.

THE CHAIRMAN: All in favor say "Aye".

(The motion was carried by the unanimous vote of the Committee.)

THE CHAIRMAN: Now, the next thing on the agenda, along the line of what you have just been discussing, is a resolution of some kind to authorize the Secretary to send a communication to these local committees, which they are all waiting for now, telling them just what we expect of them, and what we hope to g n from them.

The Chief Justice thinks that ought to be done, but he thought it ought not to be done until this Committee thinks it a wise thing to do, and considers just what form it should take.

MR. GAMBLE: I was wondering, Mr. Chairman, if a communication directed from this Committee to these various committees would be appropriate, or whether or not it shouldn't come from the source of their origin ?

THE CHAIRMAN: You have him right here; he has just been made Secretary of this Committee, and also the Attorney General's right-hand man, in charge of the direction of the work of these local committees.

MR. WICKERSHAM: I wonder whether that suggestion hasn't some merit: That we request the Attorney General to communicate with these various committees ?

MR. LEMANN: If we want to establish our relations, General, with the committees, don't you think it should really come from us, to show our anxiety to have their continued support and cooperation ?

I should think the kind of communication addressed to them should be something like this:

That the Committee had been organized, and Major Tolman had become the Secretary of this Committee; that we proposed that he would put at the service of the Committee all the material sent to him; that we were very appreciative of the work they had done, and hoped they might continue to send Major Tolman any suggestions they might have; that the Committee intended to take into account all suggestions that might be made to it, and would in due course, after it reached some tentative conclusions of its own, then submit these tentative conclusions to the local committees and ask for their suggestions.

MR. DOBIE: That was my idea. Of course, if the Attorney General wants to add anything to it, that is optional; but I do think it would be an awfully good idea for this Committee to get that across to the local committees.

MR. LEMANN: I don't think we want any drafting from them.

THE CHAIRMAN: Does that statement of Mr. Lemann's embody the sense of this Committee ?

MR. LOFTIN: If you will make that as a motion, I would like to second it.

MR. LEMANN: I will make it as a motion.

MR. CLARK: I think that is very fine, Mr. Chairman. I just want to add a bit to Judge Olney's observation.

I should a little hate to go back and ask for direct gestures on these things from the committees. We would be overwhelmed.

Furthermore, we can't do it very quickly. I wouldn't have enough information to go to them now; we certainly can't do anything of that kind until we meet in the fall, I think. Of course, we could then reconsider the matter, but I should a little prefer not to go to the committees too rapidly. We want their good will, but until we reach conclusions ourselves, I am not sure --

MR. OLNEY: Perhaps I didn't make myself clear.

I haven't in mind asking them for any vote,

or anything of the sort.

I myself, for example, would like to see a skeleton outline prepared by an expert on this subject who will cover the thing, in order to enable me to consider the matter intelligently from my own point of view. I am sure these committees are in exactly the same situation, most of them. They are made up of lawyers, for the most part, and they are in the same situation.

All I had in mind was that such an outline should be prepared and sent out by the members of this Committee; and that those committees themselves be asked for any suggestions that they might have to make, not in the way of drafts, but in the way of the points to be covered and the objects to be attained.

MR. CLARK: If I might comment further, I have felt that would be a fine thing for the Committee, and I shall be glad -- if you wish me to do that, I shall do so.

Again, I am a little hesitant about submitting that yet to the district committees, because I do not see how that can be prepared without suggesting certain tentative approaches, and you gentlemen

very likely may say, "We won't consider that at all; we won't put that in our scheme of things."

In other words, I feel we may raise questions in the district committees that never will be considered, that we will settle and adjust in our own inner circle here.

MR. OLNEY: I think very likely that is the case. If that is what it would mean, anything that was sent out, we ought to pass on it ourselves.

MR. DODGE: As to the district committees' relations with us, shouldn't the district committees receive their directions from the power that appointed them, rather than direct communication in the first instance from us ?

In my District, for example, I learned that the District Judge had appointed a committee of three. Do they know the Attorney General in the matter ? Do they know Major Tolman ? Aren't they looking merely to the District Judge who appointed them ? If so, shouldn't he tell them what their duties are, before we address direct communications to them ?

THE CHAIRMAN: Well, there is this about that, Mr. Dodge: This Advisory Committee is appointed by the

Supreme Court, and at first, many of these committees got the impression at once that the Court had stepped in with a new set-up; and that these local committees, appointed at the suggestion of the Attorney General by the Federal Judges, were all going to be in the discard.

Now, it is the Court that is going to decide what this Committee's relations with those other committees are, and all that this motion of Mr. Lemann's is, it is simply to advise these local committees that so far as this Committee appointed by the Supreme Court is concerned, we hope they will continue in existence, we expect their cooperation and assistance along the lines as indicated, and that we understand that the Court has no different idea about it.

Now, then, if the Attorney General wants to send them a letter himself, saying that in view of that he is going to maintain this organization of local committees, he can do it; but it does seem to me that these local committees are waiting for some word from us as the Advisory Committee of the Court. In fact, I have been telephoned by half a dozen of them, wanting me to tell them what their functions are and what we want them to do, so there is an element that they have got to have from us about it.

MR. DODGE: I question whether, in my part of the country, the local committee even knew of the existence of this Committee, because this Committee has had very little publicity in Boston. I did read a little squib about it in the paper before I heard of it from any other source, but it has been given no publicity there, as yet.

MR. DOBIE: I don't think the Associated Press, Mr. Dodge, did carry that. Of course, it was in the United States Law Weekly, and things of that kind. I dare say that in New Orleans they probably gave out that Mr. Lemann was appointed; but I find that there has been very, very little publicity about this in the papers. How desirable publicity is, is a question.

MR. GAMBLE: I don't think it is desirable at all until we get something done.

MR. OLNEY: I might state my own experience: There is practically no publicity in California on the subject, but the senior Circuit Judge had seen mention of the appointment of the Committee, and he was at once very much upset. I saw him. He felt a certain responsibility, in a way, for the committee which he

himself had appointed, really.

I think it would help relations in my section if I could go back, for example, and report to the Circuit Judge that it was the idea of this Committee to utilize those committees to help in the work.

MR. DODGE: Would he then communicate with his committee ?

MR. GAMBLE: May I not inquire, if Major Tolman wouldn't communicate with these committees, to whom would your communications be addressed ?

MR. TOLMAN: Well, there have been a good many different kinds of communication. The genesis of the thing was a letter signed by the Attorney General, prepared in his office.

MR. GAMBLE: Yes, I have that. I also have a copy of a letter from the senior Circuit Judge to the District Judges.

MR. TOLMAN: Yes. Then the senior Circuit Judge wrote the District Judges. After that, then the correspondence came in, from the Circuit Judges, the District Judges and the committees, to the Attorney General.

MR. GAMBLE: Wouldn't it meet your suggestion, Mr. Dodge, if a communication were sent back through the same channels that the original communication was ?

MR. DODGE: Yes, that is what I had in mind.

MR. WICKERSHAM: It went first to the Circuit Judges?

MR. TOLMAN: Yes.

MR. WICKERSHAM: And they communicated with the District Judges; and the District Judges then appointed their committees ?

MR. TOLMAN: Yes.

MR. WICKERSHAM: I think we had better keep to that line, or we will get in an awful mess.

THE CHAIRMAN: Mr. Hammond ?

MR. HAMMOND: Oh, I think so, yes. We have made the senior Circuit Judge responsible for the District Judges. All communications from the District Judges were supposed to go through the senior Circuit Judge.

MR. DONWORTH: It strikes me that there is a little mixture here of a question of expediency and one of delicacy. Of course, they must both be met.

We remember the clause in the order appointing us, that we are responsible only to the Court; and, of course, that was put in for a reason, because of the other line of work that has been going on. We should certainly avoid the slightest suggestion of cross-purposes or of ignoring, as Judge Olney has said, and the other gentlemen -- I think our contact with these committees is going to be along two lines.

We will hear indirectly from them in an official way, either through the Attorney General's office or through Major Tolman, their suggestions.

Further than that, individually, we are going to be approached very often -- probably most of us have already been consulted by the Judges' committees and others; and if they happen to live in our general neighborhood or happen to know us individually, they are going to write to us with their various suggestions; and I think the correspondence that each of us would have would be more or less multitudinous.

I think, by all means, we should invite the cooperation of those committees, and not let the idea get out that they are superseded or to be ignored.

I do not know just what the matter of the delicacy of the situation would call for. Perhaps

if we should adopt a resolution inviting them to forward all of their suggestions, either through the Attorney General or direct to Major Tolman, that might meet it.

That runs into the other suggestion that has been discussed here; that is, whether we should invite anything before we have an outline. I think we certainly should not.

I think that the orderly way would be for our Reporter to prepare, in any form he sees fit, an outline of the rules. It is so much easier for us to criticize -- constructive criticism, I mean -- and add to and amend something we have before us, rather than for each of us to start in de novo on something that would be at cross-purposes with everyone else.

I would think that this resolution, in some form in which the delicacy of the situation will be taken care of, should pass.

I also think that before we actually do any individual work of our own as members of the Committee, that Dean Clark's outline in some form, more or less inchoate, should be before us.

MR. DOBIE: My idea, Mr. President, was just a good will resolution, as you said.

THE CHAIRMAN: Well, the gist of it is, as I understand it, that these local committees are to be told that this committee appointed by the Supreme Court wants their continued cooperation. They want to hear from us, and nobody else; either from us or the Court itself, and as to what this organization means to them. Nobody else can do that for us, and the general thought is that a resolution be communicated, telling them we want their continued cooperation; and, in order to soft-pedal the idea that they should start in drafting complete sets of rules themselves, to simply invite them to send to the Committee now, to aid us in drafting, such suggestions as they have and the benefit of such work as they have done; and inform them also that when we make a draft, in due course, we hope to be able to get their consideration and suggestions on that.

That is about the gist of it, as I understand your statement, isn't it ?

MR. WICKERSHAM: I was going to make one suggestion: That we ask them to send their communications through the senior Circuit Judge. That would preserve --

THE CHAIRMAN: Well, have they been communicating with the senior Circuit Judge ? Can't they write a

letter to Mr. Tolman, or to you down there ?

MR. HAMMOND: The original letter went out to the senior Circuit Judges.

I don't know that it would be a bad idea to show the original set-up, how the original letter went out, and how the committees are supposed to function.

I will just read the report indicating that set-up:

(Reading.)

MR. WICKERSHAM: My suggestion is simply that you preserve that set-up. We might communicate directly with the Circuit Judges, or let the committees, and ask them to send through the senior Circuit Judges whatever suggestions they may have.

MR. LEMANN: Haven't many of them been writing direct to Major Tolman, and taking a short-cut ?

MR. HAMMOND: Yes.

MR. LEMANN: Have most of them communicated directly, or have they come back through the District Judge to the Circuit Judge and then to the Department ?

MR. HAMMOND: Well, it has worked both ways. Sometimes they have followed the method of sending through the senior Circuit Judge.

MR. LEMANN: I was wondering if we couldn't address this letter to the senior Circuit Judge, and then send a copy of it, in the cases where there has been direct communication, to the persons who had been in direct communication, saying:

"Dear Mr. So-and-so:

"For your information, I am inclosing a copy of the letter the Committee has written to the Senior Circuit Judge."

That might serve both ways: Preserve the direct communication without too much circumlocution, and not offend the senior Circuit Judge.

MR. HAMMOND: Yes, that is what we did when we sent out this letter. We had sufficient copies made, and inclosed in the letter to the senior Circuit Judge a letter for each District Judge, a printed copy of this; and I think we could inclose, probably, printed copies of this letter to the senior Circuit Judge and ask him to distribute them.

MR. WICKERSHAM: Mr. Hammond, has the Attorney General communicated with the senior Circuit Judges or these committees, and made the announcement of the appointment of this Committee ?

MR. HAMMOND: No, we had been requested to hold up any communication until this Committee has met.

MR. DODGE: Why isn't that the first step to take, have a letter from the Attorney General to these committees ?

MR. DOBIE: I think the Committee ought to speak for itself, on that point.

MR. DODGE: If you think the committee in New Hampshire knows anything about this Committee, you think something that surprises me. There has been so little publicity about this in New England, at least, I should think it would be much more advisable to have the appointing power of that committee inform them than for this Committee to tell them.

THE CHAIRMAN: Well, don't we decide what their relation will be as far as we are concerned ? That is what sticks in my crop.

What they want to know is, how we are going to proceed in our work, and whether our set-up, which the Court is responsible for, means their abolition or not. And the Court has asked us specifically to suggest what our relations will be, so that a communication can go out which will bear evidence of having the approval of the Court and its own Advisory Committee, suggesting to these committees how we should like to continue relations with them.

Now, of course, Major Tolman and Mr. Hammond here are the Attorney General's right-hand men on this thing. He doesn't sit down and handle all these things. They are Special Assistants to the Attorney Genefal, and they can write from the Department with

full authority; and they are also with us, Major Tolman being our Secretary; so he can speak for the Attorney General's office and for this office in one breath. That is the reason we wanted him in that position.

It does seem to me -- of course, whether the communications will go out to the senior Circuit Judges; that is a tactful suggestion.

MR. WICKERSHAM: That was my suggestion, that we use that medium of getting to the committees. That preserves the relation of the senior Circuit Judges.

MR. OLNEY: I am certain of this, Mr. Wickersham: If we do not communicate direct with the senior Circuit Judge of the Ninth Circuit, we will be making a mistake.

(Laughter.)

MR. LOFTIN: Mr. Chairman, I seconded Mr. Lemann's motion, as he has revised it, that the communication be sent to the Circuit Judges, with copies to the committees -- did you include the District Judges ?

MR. LEMANN: Well, I really don't think we ought to try to spell out the details. I should think we ought to leave that to the Chairman and Secretary. Generall

I should think it ought to go to the people who have been officially connected with the enterprise.

THE CHAIRMAN: I would like to suggest two things about that resolution.

One is, that the communication state that any communications the local committees want to make to us may be transmitted to the Department, to Major Tolman; so that they send everything in to him, just as they have heretofore.

And then I would like to add another suggestion, and that is: Before this communication from this Committee or from Major Tolman goes out to the local committees, we submit a draft of it to the Chief Justice and get his approval of it; because he is interested, and we are really nothing but his Advisory Committee, anyway.

MR. LEMANN: Those are the things I think the Chairman ought to be generally authorized to consider, even if there are some things that haven't been mentioned today.

MR. DOBIE: I think that is a very interesting problem, Mr. Chairman. I agree with Mr. Lemann that we ought to leave that largely to you; because I don't

know, and you do, how much the Chief Justice wants us to go to him. You can speak on that subject with authority. Problems of that kind, I would very gladly leave to you.

THE CHAIRMAN: Well, I should feel in a matter of this kind, where these two organizations have been set up, that he ought to be told what our conclusions are, and what we propose to do about it, before it goes out.

MR. DONWORTH: This letter will be from the Chairman of the Committee, and I suppose it would carry suggestions in the proper language that this is with the concurrence of the Attorney General who made the original appointment, or something like that; so that the two will dovetail together.

THE CHAIRMAN: Well, I am not sure I want to go on it as Chairman. I dislike to start writing letters as Chairman, because then I get the answers back.

(Laughter.)

I would like to see Major Tolman get those.

I want to bring out the fact in this letter that Major Tolman is our Secretary, and also the Attorney General's man; and that communications addressed to him will hit both targets; and I don't want to get them started writing me about it.

MR. LOFTIN: Mr. Chairman, I suggest, in view of the discussion, that Mr. Lemann restate his motion.

MR. LEMANN: I think it would be simpler if we agree to vote on the resolution, with the interpretations placed upon it by the course of the discussion; vesting the Chairman with the authority to construe those interpretations.

THE CHAIRMAN: I will undertake to summarize them in the report to the Chief Justice.

MR. LOFTIN: Well, I seconded the motion originally. I re-second it.

THE CHAIRMAN: Is there any discussion ?

MR. OLNEY: In that connection, should it not be as a part of the motion that the form of the letter to go out be a form that is approved by the Chairman of the Committee ?

MR. LEMANN: Yes, I was taking that for granted, by my last suggestion.

MR. DOBIE: I don't suppose the Chief Justice would be interested in that particularly.

THE CHAIRMAN: I think he would. I would hand it to him, and get his approval. At any rate, I think we should talk to him before we send it out, because there is somewhat of a delicate situation here, you know, between the two organizations, and he ought to know what is going on.

MR. DOBIE: Your motion would leave that to the Chairman, of course ?

MR. LEMANN: Yes, it would.

THE CHAIRMAN: Have you any further discussion ?

All in favor of that resolution, with interpretations, say "Aye."

Opposed ?

(The resolution was carried by unanimous vote of the Committee.)

MR. WICKERSHAM: With the Chairman having full power to interpret that resolution.

MR. LEMANN: Haven't we lost sight of the motion of Mr. Wickersham about the procedure of drafting ?

I think Mr. Olney is entirely right in saying that practicing lawyers would prefer, and find it really necessary to have something presented for their consideration; and Mr. Wickersham's motion, as I recall it, was that this be left to the Chairman and the Reporter to work out the procedure of allocation.

Mr. Clark originally asked whether he should allocate this work largely to the law school men. I think Mr. Wickersham meant to cover it; it seemed to me his resolution did cover it.

THE CHAIRMAN: Well, he made the motion, and we sort of wandered away from it. Do you want to state it again ?

MR. WICKERSHAM: Well, my motion was that the Chairman and the Reporter be authorized to request that members of this Committee who are willing to do so, act as Advisors in the preparation of any of the particular subjects which may be raised for consideration.

MR. LOFTIN: I will second the motion.

THE CHAIRMAN: Any discussion? All in favor --

(The motion was carried, by the unanimous vote of the Committee.)

MR. DOBIE: Mr. Chairman, wouldn't it be well -- I am not offering this as a formal motion -- it may be that some of these lawyers here are specialists in some particular field; and it might be very desirable for them to give that information to the Reporter.

MR. WICKERSHAM: Yes, I assumed that would be done before we left.

MR. DOBIE: It may be -- I don't know these practicing lawyers very well -- but without any false modesty he could say, "If I am to do anything here, I would prefer to work in this particular field."

I said I thought it would be well for the members of this Committee to tell you the fields in which they specialize.

MR. CHERRY: You set the example, and the rest of us will follow.

MR. DOBIE: Well, I don't know, for example, what particular field Mr. Olney has been a specialist in out there. It may be there is some one part of Federal procedure in which he is perfectly magnificent, and has had an enormous practice; and some other particular field in which, though his judgment is excellent, he doesn't feel competent to speak with the

same authority.

MR. OLNEY: I am like the old country doctor --

MR. DOBIE: I think it is very well for the Reporter to know that, Judge.

THE CHAIRMAN: How would it do to propose a resolution to invite every member of the Committee to communicate with the Reporter on his own motion, and advise him how he is situated, how much time he feels able to give to the work, and what particular subjects he is interested in and willing to help on ?

MR. DOBIE: That is my idea.

MR. WICKERSHAM: Mr. Chairman, we haven't found that that method of procedure was very appropriate in the American Law Institute. We have found it very much better to have the Reporter take the initiative. He says to the Director, "How about Judge So-and-so ? Can't he help in this ?" And then it is arranged.

You build up the Committee by suggestion, rather than by asking a man in advance what he will do.

I do think there are one or two fundamental things that we ought to decide, whether we decide them now or submit them to a committee for consideration and report.

Take this one I referred to a moment ago, about provisional remedies. That is a subject -- whether we are ready to express ourselves on it or not now, I don't know -- but I think we must give special consideration to that.

I think there are many subjects -- I don't know what Dean Clark's impression is about that --

MR. DODGE: What do you mean by provisional remedies?

MR. WICKERSHAM: Well, Attachment, Arrest, Injunction, and so on.

MR. CLARK: Mr. Chairman, there are two or three general questions that I thought we might discuss.

Might I say first that the suggestion was made that the Committee would like to have an outline from me. If that would be helpful, I should be glad to send an outline if it will be considered purely tentative; and I can do that very shortly -- I should say, by the middle of next week.

In that connection, another point: I have unfortunately gotten into the habit of professors, I fear, of talking too much; by which I mean that I have written articles, and I had prepared an article -- I have two articles with my assistant, Mr. Moore.

There was one article that Major Tolman referred to, in the January number of the Yale Law Journal, which stated the historical background and which may be helpful, but which is not now immediately necessary, the Court having acted. Another article appears in the June Yale Law Journal, which is not yet officially out. I have a few reprints here.

This last article, I don't think I should have written if I had known of the development of this Committee, because I made certain suggestions as to what might be done; but the article was already in press when the Committee was announced, and it does serve the purpose of something to shoot at, if you want. I want to again offer my apologies for having it in print, but there it is. As long as it is there, it may be that you can get some ideas.

Again I say, I am perfectly ready to accept your judgment. I only make this suggestion as an aid to you all in forming your judgments; and it may give you something definite to consider and to object to. I just picked up a handfull of these; I may not have enough to go around. I will see that you are all supplied, and draft a little outline of subjects to be considered, and then ask for your comments, if you can make them, as soon as you conveniently can.

MR. DODGE: Is there any other literature you can refer us to; for example, is there any model draft?

MR. CLARK: There is quite a good deal that has been done on that subject. For example --

MR. WICKERSHAM: The Michigan rules, the rules of the American Judicature Society, the Practice Act in New York --

MR. DODGE: Will you refer to some of those in your communication to us?

MR. CLARK: Yes. I might say further, I have committed myself in print even more extensively, in a book I wrote on Code Pleadings, published by the West Publishing Company a few years ago; and there, I discussed a good many of these things. I think probably in all of these things I have said too much for present purposes, but nevertheless, I have said them and they are out; and, if you gentlemen wish, you can get my impressions in that way, and perhaps that will give you some foothold to make suggestions.

So, if that is agreeable, I will see that you all get copies of this article, and an outline. I think I can send it out very shortly.

MR. DODGE: And a list of some of these periodicals?

MR. CLARK: Yes. On that, may I ask again for suggestions? A great deal has been written on the subject of pleadings and procedure. I could make a very extensive list, or a very brief one.

MR. LEMANN: Your Horn book footnotes has a rather staggering bibliography. I imagine he would like one rather carefully selected for the busy lawyer -- models to consider.

MR. DOBIE: Mr. Chairman, I don't want to toot my own horn, but I have just corrected a galley proof on a Case book on this subject. I can say for that Case book, it may be rotten in a great many ways, but I certainly went through 75 of the leading law journals in the United States, and I have got very acute references in there to the literature of the subject.

I should be very glad indeed to try to help Dean Clark, if he would like me to do it, to prepare something in the nature of a prospectus of the articles in the leading law journals on this subject. I do think I am familiar with that.

MR. OLNEY: A bibliography of that sort would be

very helpful to lawyers.

MR. DOBIE: Some of these journals have unified indexes; some very good, some rotten, some have none at all. Where they had none, I took the files and went through every article, and the law school notes.

THE CHAIRMAN: With the permission of the Committee I would like to have four or five different problems disposed of before we get to discussing generally the kind of rules we are going to make.

This is an endless subject, and there are some broad questions of the scope of the work that arise under the statute, which I have here in the list that the Committee has to consider.

Right at the outset, we ought to get back to this specific problem of recommending to the Court a certain financial set-up for the Reporter for the coming season. He is going to start to work right away. No expenditure can be made without the approval of the Chief Justice; and haven't we proceeded far enough now so we can go back to this idea of the Reporter's staff and frame a specific recommendation to the Court as to just what we think he ought to be supplied with this summer, and how much?

That is one of the primary things for us to do. If we can get that out of the way, and then dispose of three or four of the other broad questions I have here for the Committee, we can then open it up for general discussion about the forms of rules and what subjects we are to deal with. They are all interesting, but they will come appropriately, I think, after we have taken care of these other things.

Are you willing to proceed back to the question of the Reporter's staff and the budget we recommend for that purpose?

MR. LOFTIN: Is that budget sufficiently definite for a motion to adopt it as you have read it, Mr. Chairman?

THE CHAIRMAN: Well, I would like to hear from the Reporter. I think we ought to hear from him specifically now. After this general discussion, he is in a position to state again just what he thinks ought to be supplied to him now. He has a regular staff and an expanded staff here.

I will hand his figures back to him, and ask him to go over them.

(Copy of proposed budget is as follows:)

MR. DODGE: May I ask one question, Mr. Chairman?

I thought I detected one departure from the American Law Institute practice, in that you haven't provided for any salary for the Reporter. Was that included?

THE CHAIRMAN: Well, there is one item there, if I could see those figures again --

MR. DOBIE: I don't see how we can segregate him as Reporter, when he is also a member of this Committee, and it is provided that the Committee shall act without compensation.

MR. CLARK: I might say that set-up provides no salary for the Reporter, and my general view was that probably he ought not to have a salary.

Conceivably, again, on the drafting of members of the Committee for some special activities, I might draw some compensation on that item. I put down "special work by members of the Committee."

MR. WICKERSHAM: Do you think so, under the terms of the order?

MR. CLARK: I am not sure.

MR. DOBIE: How about going to the Chief Justice about that?

THE CHAIRMAN: I have already gone to the Chief about that. I will read you what he says, if I can find the letter --

MR. WICKERSHAM: I know that is the rule in the American Law Institute. No compensation is paid to members of the Committee; they get reimbursement for traveling expenses, and a per diem, but no compensation.

MR. CLARK: I think that ought to be established, too. I think we ought to fix that.

MR. LEMANN: He has in mind that perhaps some of the law school men on this Committee might take the burden of draftsmanship; that would mean very much more intensive work.

MR. WICKERSHAM: Oh, yes, quite. None of the Reporters in the Institute are compensated.

MR. LEMANN: No, and that is why this problem is now proposed. If he is a member of the Committee as well as the Reporter, then this inquiry raises the question of whether he could also receive any compensation.

THE CHAIRMAN: I can read two letters from the Chief that will clear the air considerably.

One of them is a matter we have already dealt with, but I think I might read it:

(Reading letter with reference to communication with local committees.)

THE CHAIRMAN: Now, here is his letter about the compensation.

The order which says that the members shall serve without compensation, I think, means merely that, as such, we won't have any compensation. It doesn't exclude the idea that if any of us, the Reporter or some of these law school men, actually sit down and spend weeks or months of their time drafting, that they should not have compensation; and this is his letter on the subject:

(Reading letter with reference to question of compensation.)

Now, that is the way the matter has been left; so it is not a closed matter by any means.

MR. OLNEY: It seems to me, Mr. Chairman, to be perfectly clear on principle. The Supreme Court contemplates that there shall be compensation paid for the work of reporting, and that anybody that assists Dean Clark in the work of reporting should certainly be paid for it.

There is all the difference in the world between the work of reporting and the work of the other members of this Committee.

MR. WICKERSHAM: Well, in view of that letter, it is perfectly simple for the Chairman to put before the Chief Justice definitely, a letter explanatory of that, and get a reply; then we will have no doubt about it.

I think from his letter that he didn't expect members of this Committee to do the spade work that is done by the law school men, for instance, in all the work of the Law Institute, without any compensation. I think he is mistaken in what he says about the deduction from the salary; but otherwise, he has the idea. I think we could make a definite communication, expressing the views of this Committee that work of a research character, other than that work which would be done by members of the Commitee as such, if done by a member of the Com-

mittee, should be compensated for such work, the same as if done by any outsider.

THE CHAIRMAN: Dean Clark, would you like to have until after lunch to go over these figures and prepare a definite resolution, specifying precisely whom you want to employ, and how much, in view of this subject we are just talking about, or are you prepared to do it now?

MR. CLARK: Well, I might say this: I shouldn't like to be too much committed to one single form, because I will have to make some arrangements. The two young men I have down there, Moore and Strong, are quite definite. What I put down as an expanded staff, I have worked out after talking with you on the train; and I am not sure that I can arrange for all those things I have spoken of, although I think it is very probable. That, I suppose, would allow a little lee-room, in case I cannot make arrangements?

THE CHAIRMAN: It would probably be this: The Committee would probably be willing to pass a resolution that any elimination or addition to your staff that you might need to make during the summer, while the Committee is not in session, may be taken up with you by the Chief Justice; and, if it meets his

approval, go ahead with it. I don't know how else to do it.

MR. CLARK: Are you going to be away?

THE CHAIRMAN: Well, I am no better qualified to act for the Committee than anybody else; and really, I suppose the Chief would talk to you about it. Really, the matter lies in his hands, because he has to authorize all expenditures, under the order of the Court.

MR. WICKERSHAM: Is he going to be abroad this summer?

THE CHAIRMAN: Well, he has not yet given me an outline of his plans. I think he is going up in New York for a while.

MR. WICKERSHAM: Yes, he is there now, I know. I saw him there a couple of days ago.

MR. CLARK: But I didn't have the general outline and, in fact, the funds available, clearly enough in mind, so that I haven't made final arrangements of all those details. I think they are arrangements I can make; that is the only difficulty. For instance, I have put down certain of my colleagues

for work this summer, and I may find that they have already made other arrangements.

THE CHAIRMAN: Suppose you draw up a resolution specifying the arrangements you would like to make, with the questionof compensation settled all along the line, and with a provision at the end of it that if alterations are required during the summer, that the Committee authorizes you to take them up with the Chairman, and, if they receive the approval of the Chief Justice, to make them. How would that be?

MR. CLARK: Yes, that is quite all right.

THE CHAIRMAN: Will you get such a resolution ready?

MR. CLARK: But a resolution embodying what I suggested there, I think would cover it.

THE CHAIRMAN: Well, you have got two staffs here. I don't know which one you want,now.

MR. CLARK: Well, I think it would be worth while to work out the one that I have called the larger one, the expanded staff, because I think the funds are available to do it; that is, put the two together.

MR. DODGE: I think it is the sense of the meeting that you should include in that budget compensation for the Reporter or Associate Reporter, on a scale comparable to that in force in the American Law Institute.

I make that motion.

MR. OLNEY: Can't we leave the thing to the Attorney General, so that he authorizes the Reporter to prepare a budget of his expenses, at least for the immediate budget; and that that budget has the approval of the Committee, provided it is approved by the Chief Justice?

We have got to leave some discretion with the Reporter. We can authorize him in advance, subject to that approval.

MR. DODGE: I made my motion, because I thought the Reporter might be modest.

THE CHAIRMAN: Is there a second to Mr. Dodge's motion?

MR. LEMANN: I second it.

THE CHAIRMAN: That is confined to the one point, that provision ought to be made for compensation to the Reporter for the time he actually devotes to drafting.

All in favor of that say "aye".

Opposed?

(The motion was carried by the unanimous vote of the Committee.)

I got the impression as he read it that he set that provision in his own mind, to cover the compensation to be paid to the members of the Committee for work they might do; and I should think it might not be a large enough total.

Mr. Dodge's motion, as I understood it, carried the thought that we felt he should be compensated at the rate of $5000 a year.

MR. DODGE: Yes, I think it was embodied in the motion that it be fixed in accordance with the standards of the American Law Institute.

MR. LEMANN: Is that the right figure?

MR. WICKERSHAM: Yes, 5000 a year.

MR. LEMANN: So I suppose we would have to leave it rather open.

THE CHAIRMAN: Is that at the rate of 5000 a year for the time spent?

MR. WICKERSHAM: At the rate of 5000 a year.

THE CHAIRMAN: For the time spent, you mean?

MR. WICKERSHAM: No, no. A Reporter is designated

as a Reporter of, say, Courts, at a salary of $5000 a year.

MR. LOFTIN: Mr. Chairman, I suggest that the item of $5000 be made $10,000.

MR. DOBIE: You mean Dean Clark's salary as Reporter?

MR. LOFTIN: No, he had $5000 there for special work by members of the Committee, which did not include any salary for Dean Clark at the time the budget was made up.

Now, if the salary of the Reporter is at the rate of $5000 a year under the standards of the American Law Institute, it seems to me we should add $5000.

MR. WICKERSHAM: I agree with you in principle; but shouldn't we fix the salary of the Reporter separately, and then give him an additional $5000 for that?

MR. LOFTIN: I have no objection as to how it is done.

MR. WICKERSHAM: I agree with you in principle.

MR. LOFTIN: All right.

I make a motion, then, that the salary of the Reporter be fixed at $5000 a year, and included in the budget at that figure.

MR. WICKERSHAM: I second the motion.

THE CHAIRMAN: Is there any discussion?

All in favor say "aye".

Opposed?

(The motion was carried, by the unanimous vote of the Committee.)

THE CHAIRMAN: Then do you want to have another resolution, approving this budget as drawn?

MR. WICKERSHAM: Yes.

MR. LEMANN: With the leave that you suggested, to make changes?

MR. DOBIE: That it be altered as emergencies arise, with the consent of you and the Chief Justice?

THE CHAIRMAN: On that resolution, is there any second?

MR. LOFTIN: I second it.

THE CHAIRMAN: All in favor of that say "aye".

Opposed?

(The motion was carried, by the unanimous vote of the Committee.)

MR. CLARK: Mr. Chairman, I thank you all, but I take it that you are going to discuss this with the Chief Justice. If any of these arrangements --

MR. DOBIE: No expenditures can be made, except by his approval.

THE CHAIRMAN: All our acts are advisory.

I have three or four other points --

MR. OLNEY: Before we leave that, shouldn't we authorize the Reporter to employ such other repertorial assistance as he needs? Shouldn't there be a specific resolution, so that he can get under way.

MR. LEMANN: Isn't that all in this budget?

THE CHAIRMAN: I think that is all listed here.

MR. OLNEY: It is in the budget, but I thought it was possibly necessary to give him specific authority to engage these people.

THE CHAIRMAN: That, we will have to get from the Chief Justice. This is the general lay-out, as we recommend it to the Court. When he comes to employ anybody, he has got to send in his name, profession, salary and everything, and get an order from the Chief Justice.

MR. OLNEY: There is a little difference between adopting a budget and authorizing the Reporter to employ the men when he gets the budget approved; that is the only thought I had.

MR. LOFTIN: I think, Judge, probably what you had in mind was that the Reporter should have authority to employ assistants, subject to the approval of the Chief Justice?

MR. OLNEY: I want to make it specific.

MR. LOFTIN: If you will make that motion, I will second it.

MR. OLNEY: Thatis my motion.

THE CHAIRMAN: What is your pleasure about that? Any discussion?

All in favor of that say "aye".

Opposed?

(The motion was carried, by the unanimous vote of the Committee.)

MR. CLARK: Mr. Chairman, should I report to you or Major Tolman or the Chief, or what machinery shall we have? Shouldn't I make all recommendations to you?

MR. WICKERSHAM: Yes, I think so. The point of contact is between the Chairman and the Chief Justice.

MR. CLARK: Yes, I think so.

THE CHAIRMAN: There are two or three other problems I would like to get off my chest and then I am through, so far as my agenda is concerned.

There are three questions that have arisen under this statute, about which there seems to be a different opinion among some of our members, the law school members, and I have had some correspondence with Mr, Sunderland.

I am sorry Mr. Sunderland isn't here. He is a distinguished man in this field, and has had some experience in it. He couldn't come, because he is teaching in the South; I asked him to send in writing any suggestions he had to make as to the scope of the work, and he sent me a copy of an address he has recently delivered in the South on

this very subject, to the Judicial Conference of the Fourth Circuit at Asheville. He has reiterated in that speech some of his views about the scope of the work, more particularly, as controlled by the terms of the statute, which this Committee ought to consider.

The first one is this:

The statute, Section 1, reads:

"That the Supreme Court of the United States shall have the power to prescribe, by general rules for the District Courts of the United States and for the Courts of the District of Columbia, the forms of process, writs, pleadings and motions, and the practice and procedure, in civil actions at law. They shall take effect six months after their promulgation."

Then comes the second section, which he quotes:

Mr. Sunderland takes the view that the words "General Rules" do not mean that the rules that we make shall be uniform in all the Districts. He says it is a general rule if you pass a rule that says, "Each District shall have its own rules, in conformity with the local court rules, or the State rules."

I have had some correspondence with him about that, and my position was that "general rules" meant general in the sense of being uniform in all the Districts. To the extent that we adopt rules, they should be uniform in all Districts.

Of course, we can stop short and cover certain fields, and then tack a clause on at the end that, in the points not covered by the rules, they shall conform to the local practice; but I will confess that I was rather taken aback at the suggestion.

Mr. Sunderland goes back to the resolutions passed by the American Bar Association, which he says fortify his position. But those resolutions, while they are directed at conformity, are based on the theory that if a uniform general system is adopted in the Federal Courts, and is good, that the State authorities may follow it, and in that way bring about uniformity.

We have that problem, so I would like the Committee to consider that point.

I reported at one time to the Chief Justice, the fact that that question had arisen. I sent him a copy of my letter to Mr. Sunderland, in which I took the view that a general rule meant a rule

uniform in all the districts; and that one of the principal objections that had been urged to changes in the rules is that they will be uniform and will destroy conformity, and how can a set of rules be a model for the States if you have as many different sets as you have Districts?

Of course, I am stating the extreme result of his position, but in his address to the Judicial Conference he stated his position again about that.

He says:

(Reading.)

He reaches the conclusion, therefore, that the rules we adopt need not be uniform in all Districts, but can vary, District by District, according to the local practice, with the idea of getting conformity.

Now, that question, we ought to take right up and put ourselves on record and say what we think about it, because the Reporter has to know right away whether we are going to have a uniform set of rules or not.

MR. DONWORTH: Mr. Chairman, the second section of the Act says:

> "The Court may at any time unite general rules prescribed by it for cases in equity with those prescribed in law actions, so as to secure one form of civil action and procedure in both."

We all know how general the general rules in equity are, of course. However, where there are some things unprovided for, the local court makes its own rule; but I see no escape here from the conclusion that the expression "General Rules" means to provide for a new method of procedure, the same as that expression has meant in the equity cases.

My thought would be that it is rather obvious -- in fact, I am surprised to think the language is open to the opposite construction.

MR. CLARK: Mr. Chairman, I might say Judge Donworth, I think, states the complete answer, and it is the one I should have made, and I think it can be backed up by the history.

I want to say first however, I am not quite sure how far Mr. Sunderland will go. I am not sure we are so very far apart, if at all. It is a little unfortunate that he isn't here today and we can't discuss it.

I might say, in this address he made at Asheville, I find he does suggest certain things that should be taken care of locally, and I think I would agree -- one in particular is this matter of Arrest and so on. My own view is that we can well adopt the State rule as it now exists --

MR. WICKERSHAM: Just leave it to the States.

MR. CLARK: Yes, but that means there is still a drafting problem on how to adopt them. But this is what Mr. Sunderland said, after stating there should be some use of the local rules:

(Reading.)

So, as I say, I am not sure, after all, how far we are apart.

I shouldn't have stated the history as he does. He emphasizes the desire of the American Bar to secure conformity by providing a model which the States will follow. Well, that has been stated, but I think it was not expected that the Federal system here devised would be more than a model which it would be hoped the States would adopt.

Furthermore, there is a bit of history he has not emphasized, which I think is very important, and that is as to how the second provision came into the Act.

That came into the Act directly after a very forceful address of Chief Justice Taft to the American Bar Association, urging that it be done; urging, in fact, that a unified procedure be adopted; and I think that supersedes anything Mr. Shelton may have said in 1910.

In 1922, Chief Justice Taft, at the time of the consideration of the leading case of Liberty Oil Company, where the Chief Justice went far in providing for consideration of the steps toward unified procedure, urged that the complete step be taken. When you consider that history, and

the use in the second section of the provision for the united procedure -- a term which has come to have a well-recognized significance in American law, referring to the united procedure originally adopted in the Field Code, and in the other States, it seems to me the complete basis is given.

MR. WICKERSHAM: Isn't that what the Chief Justice expressed in his address before the Law Institute last May?

MR. CLARK: Yes, and I think the Chief Justice answered the question.

It seems to me Mr. Sunderland again states the question he has stated before as to the difference in wording of the two sections; but you will notice Mr. Meacham, in his article, all he does is to re-state it. I should have supposed it didn't require re-statement; that the Chief Justice had answered it. But, having re-stated it, he doesn't specifically urge a construction contrary to the one the Chief Justice made. He simply says that may be the problem, and if there is a difference, a certain course needs to be followed, but he states no different or other course which may be followed.

So that I am not sure but what we have been ascribing to Professor Sunderland more views than he really has; and the section I just read, on what he thinks is the scope of the Committee, would help a great deal.

THE CHAIRMAN: Well, maybe you are right, but this speech of his was delivered after I had had my exchange of correspondence with him on the subject; so he had it perfectly clear in mind when he made it, that we are now having a unified set of rules for both law and equity; and he also had in mind specifically of whether our rules, insofar as we cover the subject, had to be uniform.

Of course, anybody could see there is nothing in the statute that compels the Supreme Court to cover every conceivable field of pleading, practice and procedure. They can cover so much of the field as they like; and where they do not cover it, it is easy to see that local conformity, under the Conformity Act, or otherwise, can prevail.

But, the specific question we have to decide is whether, insofar as we do adopt rules, this Committee or the Court has got any power to make a set of rules that do not apply with equal force in each District.

MR. GAMBLE: Mr. Chairman, in that connection I think we can get a good deal of help from the debates in Congress at the time of the passage of this bill, both in the Senate and the House.

Someone has furnished me with a transcript of those debates, and I think it is quite clear from this transcript that it was in the minds of both Houses that whatever rules were prescribed should be uniform in each district.

MR. DOBIE: It would seem to me it would be extremely unfortunate if we said, for instance, that the bill of discovery should be proper in the First, Third and Seventh Circuits, but should not be used in the Second, Fourth, Sixth, Eighth and Tenth. To me, I think that would be absolutely unfortunate, and not contemplated by the Act at all.

In other words, if we prescribe a rule, we are not going to make a rule to apply to one Circuit, and not to another.

MR. WICKERSHAM: Isn't a very splendid precedent furnished by the equity rules?

MR. DOBIE: I think so.

MR. WICKERSHAM: Your suggestion is that we can

propose rules which can conform the practice at common law with that in equity; and the equity rules which have been in force for many years are general rules, applicable, so far as they apply to procedure in the Federal Courts, throughout the United States.

MR. DOBIE: The same thing is true in Admiralty. You can't proceed one way in Admiralty in Portland, and another way in Seattle.

MR. DODGE: Mr. Mitchell, did you send your correspondence with Mr. Sunderland to the Chief Justice?

THE CHAIRMAN: Yes, I wrote this letter to Sunderland, and it went to the Chief. It went to the Court. He told me that the letter was read in conference in the Supreme Court.

This is what the Court had before it. I didn't ask the Chief Justice specifically whether he agreed with me or not, but I saw him afterward about it, and my inference was that not only he, but the Court itself, was in entire accord with the view I had expressed in this letter on this point, and two others which we will take up later.

I would hardly feel justified in saying I was told specifically that the Court ruled that way on it. And after Mr. Sunderland made his speech, I was sorry that I hadn't asked the Chief point blank.

This is what I said about it, and this is what the Court had before it.

The first point in Sunderland's article or report to the local committee in Ohio is the subject of conformity between State and Federal practice.

(Reading.)

That is the letter I sent to the Chief Justice, and after it had been submitted to the Court, I had a conference with him. We just referred generally to this subject, and I inferred from what he said there that they were in entire accord with that view.

MR. WICKERSHAM: It seems to me that is the correct interpretation of that statute, and meets the purposes of the statute. I think the purpose of that statute was quite clear, and it would be a perversion of it to suggest a set of rules which would be applicable in some districts and not in others.

MR. GAMBLE: Mr. Chairman, would it be in order to make a motion that, in the preparation of these rules, we proceed upon the basis that they shall be made uniform in all districts?

If so, I will be glad to make that motion.

THE CHAIRMAN: You mean by that, insofar as we adopt rules, they shall be uniform?

MR. GAMBLE: Yes, sir.

THE CHAIRMAN: Leaving open the idea that where we stop short and don't cover a field by rules, that

then the conformity features may enter into it?

MR. GAMBLE: Yes, that is what I mean.

MR. CLARK: Mr. Chairman, I think that is all right; certainly the purport of it is quite my idea; that is, that what we are after is uniformity. Would that exclude decisions such as Mr. Wickersham has suggested, and that I tentatively agree with?

MR. WICKERSHAM: We wouldn't cover those.

MR. GAMBLE: I don't mean it to cover those.

MR. WICKERSHAM: No, he doesn't mean to cover those. Insofar as we do adopt a rule, that it be general in its application; but if, for instance, we decide it is inexpedient to adopt rules on provisional remedies, covering certain fields like the granting of attachments --

MR. CLARK: That would stillpermit us to adopt a rule saying the State rule would apply?

MR. WICKERSHAM: The conformity statute covers it.

MR. GAMBLE: No, I think the Conformity statute is probably repealed.

THE CHAIRMAN: Our draft will probably wind up

with a statement at the tag end of it to the effect that, insofar as any matters are not covered by these rules, under the Conformity laws, the practice under local rules will be followed.

MR. WICKERSHAM: Yes, that is your idea on it?

MR. CLARK: Yes.

MR. LOFTIN: That is the motion, then?

MR. GAMBLE: Yes, that is what I intended.

MR. DONWORTH: This discussion overlooks a motion that was adopted a while ago about an invitation to the existing committees.

You will recall that those committees were appointed entirely under Section 1, and they were not requested to present anything along the lines of unification of law and equity. In fact, there was some discussion in the State Bar Association in Washington as to whether those committees had any function any longer, because, to prepare a set of rules in purely law actions would not coincide with the work of this Committee.

I do not think this suggestion I am now making calls for any reconsideration at all, but I think we must bear that in mind; that what we

get from those committees will be only along the line of material that we will draft into our uniform rules.

THE CHAIRMAN: Well, they will be told that we are headed for a unified system.

Is there any further discussion of the resolution about what the general rules mean?

MR. WICKERSHAM: Question.

THE CHAIRMAN: All in favor of that resolution say "aye".

Opposed?

(The resolution was carried, by the unanimous vote of the Committee.)

THE CHAIRMAN: I will make this statement at this time: Of course, every action of this kind that we take will be summarized and reported to the Chief Justice. We are in the perfectly gorgeous position of having a boss to tell us whether we are right or not, and who is going to have the last word on questions of Constitutional and statutory construction. No Congress has ever had that beautiful position. If we report a thing this way, and we get no kick back from the Court, or they say, "Go anead," we can be perfectly free of all doubt as to whetner we have misconstrued the law or our function or anything else. I never was in a position that I enjoyed as much as that, before.

MR. WICKERSHAM: That is the great advantage of being advisory, merely.

THE CHAIRMAN: Yes. Now, the next point I would like to bring up, if you will permit me, is another point that Mr. Sunderland has raised and insisted on. It, in turn, was the subject of a letter to him, copy of which went to the Court.

He says that Section 1 of this Act says that these rules, the common law rules shall take effect within six months after their promulga-

tion and thereafter all laws in conflict therewith shall be of no further force and effect.

Now, he says when you come to Section 2, you don't find any expressed statement in that that the unified rules shall supersede all laws in conflict therewith.

Therefore, his conclusion is that if we adopt a unified set of rules, that insofar as they relate to common law actions, they are free from statutory restrictions; but insofar as they relate to equity actions, they are tied hand and foot.

MR. WICKERSHAM: Oh, no.

THE CHAIRMAN Now, he has again made that point in his address down there; and that also went to the Court, in this form:

(Reading.)

THE CHAIRMAN: That went to the Court, as well as to the Chief, and I never heard anything to the effect that they didn't agree with that.

MR. DOBIE: I move, Mr. Chairman, that we proceed on that assumption.

MR. CLARK: Mr. Chairman, I wholly agree with your view, and I disagree with Mr. Sunderland. If you don't mind, I think we ought to add one thing more as a part of his argument, so that we have it before us.

I have in mind the earlier provisions of the statute conferring the equity rule-making power. This was a part of his argument: That the earlier grant of power to make rules in the equity court was as follows: This is in the 28 U.S.C.A., Section 730:

> "The Supreme Court shall have power to prescribe from time to time, and in any manner not inconsistent with the laws of the United States -_"

Now, he says, and I suppose is quite correct on that, that therefore the equity rules incorporated various statutes. Now, his argument is that under the new rules, Section 1 provides as to the law

rules, that they shall repeal the things which are inconsistent. Nothing is said about the equity rules, so his idea is, when you put the two together, you have the equity rules with this limitation, and the law rules without any limitation.

I think that is his argument, and I think we had better have it before us.

MR. LEMANN: It is a good technical argument, but the result seems to me to defeat the argument.

MR. CLARK: I think that is the answer. Probably, as I suggested, it was answered by Chief Justice Taft in bringing up the question of unified procedure. "Unified procedure" is a well recognized thing in this country. When they speak of that, they mean something different than the other equity rules.

THE CHAIRMAN: It strikes me that it is just because the Court might make any rules in equity different than the statute, that Congress wanted to have the chance to take a shot at it; that is why they reserved the power of veto.

MR. CLARK: Of course, I agree entirely with that interpretation, but I didn't want Mr. Sunderland to

think we hadn't tried to get his point as fully as we could.

MR. WICKERSHAM: Well, the motion has been made that we proceed on the other theory.

THE CHAIRMAN: Here again, we have the assurance that if we so report it to the Court, we will be checked on.

MR. WICKERSHAM: Yes, I think so.

THE CHAIRMAN: Is there any further discussion of that point?

All in favor of the resolution say "aye".

Opposed?

(The resolution was carried by the unanimous vote of the Committee.)

THE CHAIRMAN: Now, I have just one other thing -- do you want to adjourn for lunch?

MR. WICKERSHAM: It isn't one o'clock yet.

THE CHAIRMAN: All right. Here is another point, and that is whether or not the statute gives the Court power to deal with the rules of evidence under the head of procedure and practice; and whether, if it does, it is expedient to deal with them.

I find that most of our law school friends are itching to get their hands on Evidence, because they think they need a uniform system, and they want to tackle it, and they have made some very powerful presentations which I have seen, of the need for it.

My feeling about that has been that it is a case of the wish being father to the thought, and that a statute such as this, which talks about pleadings, practice and procedure, wasn't intended to authorize the Court to re-write the laws of evidence.

You can make arguments that, in a sense, rules of evidence are matters of procedure rather than substantive law; but I think Dean Clark has some ideas about that.

I will just read here what I said to the Chief Justice on that point, in this same letter to Mr. Sunderland, who has that view quite strongly; then we would like to hear from Dean Clark about it:

(Reading.)

THE CHAIRMAN: That is what I said in that letter.

MR. LOFTIN: May I ask, Mr. Chairman, did you get any reaction?

THE CHAIRMAN: The same as the others; that is, a pleasant smile, and the assurance that the Court had read the letter and they were pleased with the way we were going at things; something to that effect. I never asked him point blank.

MR. LOFTIN: No objection, at least?

THE CHAIRMAN: None at all.

MR. CLARK: Mr. Chairman, this point is one of a great deal of importance, I think; and there is another point of a similar nature that has caused me a great deal of trouble, and that is the matter of courts of review.

THE CHAIRMAN: I have got that under a separate heading, here.

MR. CLARK: Yes. The two are not identical, except that conceivably the philosophy we apply to our decision in one case might apply to the other.

My view, shortly stated, is this:

First, that there is a great necessity of doing something in both those fields, evidence and appellate review. Second, the matter is certainly -- I can't say clear; it is doubtful -- under the Act, I can't say there is authority, but I think some argument can be made.

In the matter of appellate review, in particular, if we continue the present system of two forms of review in equity and law -- review of all the facts in equity, and review of only questions of law on the law side -- you present an element which will be reflected back into the trial courts, and will tend to preserve the old distinction between law and equity.

That is the great difficulty there. It will inhibit a good deal the tendency to a uniform system; so that I really think that question is perhaps more important than the evidence question. The evidence one is perhaps a little more apart. Nevertheless, the evidence situation has been quite unfortunate. I think I may quote the leading authority on the subject; that is, Dobie on Federal Procedure:

(Reading.)

MR. WICKERSHAM: Why does he limit it to Federal Courts? I agree with his remarks, if they are extended to all courts.

MR. DOBIE: I was writing only of the Federal Courts.

MR. WICKERSHAM: You don't limit it to those?

MR. DOBIE: No, sir, I do not; but at that time, in that book, I was writing only on the Federal Courts.

MR. CLARK: Now, on the criminal side of the Federal Courts, with which we don't touch, of course, but where there is a good deal of analogy, the Court has done a great deal. They started out in 1851, in United States vs. Reed, to try to apply the law of evidence of 1789. That didn't work, so the recent decisions -- particularly, in the Wolf case, they come pretty close to establishing a fairly up-to-date and uniform system. Now, I may be a little too hopeful, but I think the tendency is that way, by judicial decisions on the criminal side.

On the law side, they are supposed to be following the conformity system now, but as only a part of the "hodge-podge of evidence rule in the

Federal Courts," we now have some vestiges of the three systems, criminal, equity and law.

If we are setting out to make a model of procedure which will be uniform, and we can't cover this, it is unfortunate.

THE CHAIRMAN: You draw a distinction between the methods of taking testimony?

MR. WICKERSHAM: That is different.

MR. CLARK: Oh, I wanted to bring that out. Now, is there a difference? If you hold the method of taking testimony is a matter of practice --

MR. WICKERSHAM: Isn't there a distinct difference between the rules of evidence and procedure in taking testimony, or the different things that may be offered in evidence?

You have got a whole body of statute law, for instance, regarding the things that may be used in evidence, how they must be authenticated, and so on.

MR. CLARK: You can make a brief either way, by citing certain precedents.

MR. WICKERSHAM: You can. There is a great deal

of loose thought on the subject.

MR. CLARK: I have had this question raised as to rules of discovery: Are rules of discovery procedural, or evidence? Specifically, it has been suggested by a good many -- Professor Sunderland suggested in his address that we ought to have modern rules of discovery. It is a matter he has worked on a great deal. Is that within our power?

THE CHAIRMAN: That has nothing to do with the rules of evidence, as to the admissibility, the competency of witnesses, and so on. It deals with the procedure in obtaining evidence.

MR. CLARK: I should like very much, myself, to hear from the leading authority on the subject.

MR. DOBIE: I don't like to be referred to like that. I am really very dubious about that point, and I would like to hear discussion. I think there is a good deal in what you say.

For example, the "fishing" deposition, we may deal with that; or the methods of taking testimony, of course, I think we will have to deal with, references to Masters, and things of that kind.

But when you go to the whole question of

the competency of witnesses and the admissibility of testimony, if we go into that, we have got to draw practically a complete Code of Evidence. That is going to be extremely difficult.

I would like very much to hear from Professor Sunderland on that point, as to whether he definitely thinks we ought to do that whole thing, or not.

MR. CLARK: I tell you he does.

THE CHAIRMAN: I have got his word on that.

MR. DODGE: Is there any code of rules in this country or in England that undertakes to deal with the rules of evidence?

MR. OLNEY: Oh, yes, under the code rules, they do in some places.

MR. DODGE: Those are statutory codes?

MR. OLNEY: They are statutory codes. They are not put out as a code of procedure, necessarily, but they are statutory codes of evidence.

MR. WICKERSHAM: Yes, but those are statutory codes of evidence, Judge, aren't they, as distinguished from rules of procedure?

MR. OLNEY: Yes.

MR. CLARK: In the original Field Code, there are many provisions relating to evidence. Of course, they did not undertake to cover the whole field of evidence, but there are lots of statutes on evidence.

MR. WICKERSHAM: Well, I have a memorandum of the numbers of sections in the Federal Judicial Code that deal with evidence; there are a large number of sections, but it is almost all providing modes of taking evidence, either by deposition or by witnesses, books and writings that may be produced, and a few things like Section 638, for instance, that any admitted handwriting of a person may be used for comparison, and so on.

In other words, Congress hasn't been entirely logical in that, but there are a whole lot of statutory provisions which regulate the procedure; and then there are a number of statutory provisions which deal with the things that may be offered and must be received in evidence, how they must be authenticated, and so on.

MR. CLARK: I might say that I don't think it will be so much of a job if we start on it as

suggested, because my conception of dealing with the law of evidence is mostly to say there shall be none. That isn't quite the way I would put it, but I would think there should be fairly free admissibility.

THE CHAIRMAN: What do you think would be the reaction of the Bar? Mr. Hammond --

MR. WICKERSHAM: There would be a howl from the Atlantic to the Pacific.

MR. HAMMOND: Just on the question of whether there are any acts on evidence, there is the India Code, supposed to be about 1870. I know about that. I thought I would mention that.

MR. CLARK: Did you people consider somewhat the question of extending the rules?

MR. HAMMOND: We have thought about that evidence question considerably.

MR. DOLGE: I would like to have your reaction, Mr. Hammond.

MR. HAMMOND: Well, I don't know as we came to any conclusion in the matter. The term "procedure" is probably broad enough to include evidence, and there was a decision of the Supreme Court which so held --

I have forgotten the name of it --

MR. CLARK: Yes. Mr. Sunderland cites that in his argument.

MR. WICKERSHAM: Yes, but in general, when you start to make rules for procedure at common law and in equity, you wouldn't consider that that included the making and establishing of a code of evidence, like Stevenson's Code, for instance.

MR. HAMMOND: Well, personally, I should want the authority in the Act to say evidence, before I would do anything.

MR. WICKERSHAM: Yes, it seems to me so. The general intendment of the word "procedure", doesn't include ordinarily the word "evidence." We say, "procedure and evidence."

MR. HAMMOND: Yes, you usually speak of both.

MR. WICKERSHAM: It seems to me we will have our hands full enough with what we have got to do, without going into the field of evidence.

MR. DONWORTH: There are probably some procedural matters that do involve substantive law, that there

is no reason why we should keep away from for that reason. You take the matter of the right to examine the plaintiff in a personal injury case before trial; I think that would be a proper matter for us to go into.

MR. WICKERSHAM: Yes.

MR. DONWORTH: And if someone says, "Why, you have gone into the matter of evidence," we say we have, to the extent we think it is essential for our purpose.

MR. WICKERSHAM: Procedure; but that is a different thing from the rules which govern the kind of evidence that may be produced, what witnesses may testify to an opinion on direct examination, what on cross examination, and so on.

MR. LEMANN: I have a matter of rather large importance pending now, where an action was brought in the Federal Court against the heirs of a deceased person. We have a statute that parole evidence cannot be used in such a case where the action is brought more than a year after death. Is such a statute controlling in this Federal Court action? If we go into the field of evidence, and undertake

to prescribe rules on that subject, would we have the authority then to decide -- I presume we would -- that statutes of that sort would no longer be controlling?

MR. WICKERSHAM: Well, I ran over the subjects dealt with in the Federal Judicial Code:

Section 631, competency of witnesses, as governed by State statute.

Section 635, mode of proof in trial of cases at law, shall be by oral testimony taken in open court.

Section 636, books and writings may be compelled to be produced at trial.

Section 638, any admitted handwriting of a person may be used for comparison as to genuineness.

Section 643, depositions may be taken also according to the laws of the State or District.

Sections 644 and 645, deal with depositions. in perpetuam or in memoriam.

Sections 647 and 648, subpoenaes.

Section 653 deals with letters rogatory.

Section 654, witnesses could be subpoenaed from any District, until 1928, by permission of the Court; and so on.

MR. DODGE: All questions of practice.

MR. WICKERSHAM: All questions of practice, rather than substantive law; but that is all already in the statute.

MR. CLARK: Well, you know, I am not quite so sure why you say that so quickly. I should say you have been reading a good many statutes on evidence that are general; the oral testimony statutes, for example.

MR. WICKERSHAM: Yes. As I say, it is not logical, but these are statutes; these are provisions which are put in the Federal Judicial Code.

MR. DOBIE: Of course, there are a great many statutes where the two run right together. For example, in a number of States they say that unless incorporation, alleged in a declaration, is specifically denied, no proof of it need be offered. I think clearly that is a procedural statute, and I think we have a perfect right to make rules on that subject; and the same thing as to what they say about handwriting, and a number of those things; so that there are going to be some things for our attention.

MR. WICKERSHAM: Oh, yes, there always are; but

the whole question now is as to whether or not we are going to make a code of evidence.

MR. DOBIE: Yes, whether you are going to take up the hearsay rule, and promulgate a code on that?

MR. WICKERSHAM: Yes. In other words, whether we shall take Wigmore, and revise him for Federal procedure.

MR. OLNEY: I am quite sure the Bar at large has in mind tne very distinction mentioned in the letter Mr. Mitchell read.

MR. WICKERSHAM: It seems to me so.

MR. OLNEY: We have in mind, for example, that such things as the matter of discovery are procedural rights. I, for one, am very much interested in seeing that we devise a proper method for discovery,--

MR. WICKERSHAM: Yes, that is procedural.

MR. OLNEY: (Continuing) --in Federal courts. But wewould look upon that as procedural.

MR. WICKERSHAM: Certainly, I would.

MR. OLNEY: But if we endeavor to formulate rules of evidence, in regard to the admissibility of tes-

timony --

MR. WICKERSHAM: We won't get in before Congress in 1936.

MR. OLNEY: (Continuing:) --we are biting off something that we won't be able to chew at all.

THE CHAIRMAN: I call your attention to one other fact: We are dealing here, not with the question of whether "procedure" in some uses includes "evidence". We are dealing with the use of that word in that particular statute; I have inquired and searched, and I think I am safe in asserting that at no time in the last ten years that this statute has been under consideration has anybody in the American Bar Association, or in the debates in Congress over the bill, or any of the discussion of it, ever suggested that it included the job of writing a text book on evidence, to establish one system of rules of evidence in the Federal Courts and another in the State.

There has never been a breath of that mentioned, which is a significant fact when you come to think about a particular Act.

MR. WICKERSHAM: Well, I move that it is the sense

of this Committee that the writing of a code of evidence is not included within the general scope of the statute, as we understand it, and the work that we are undertaking.

Of course, certain provisions which relate to the method of procuring evidence, and certain borderline cases are dealt with; but the general view of the Committee is that it is not within the contemplation of the Act that a code of evidence shall be prepared.

MR. CLARK: I wonder if Mr. Wickersham would be willing to include the word "tentative sense"?

MR. WICKERSHAM: Yes.

MR. CLARK: Because, it may be that when we get farther along --

MR. WICKERSHAM: Well, all right. It is the present sense of the Committee --

MR. CLARK: All right.

MR. LOFTIN: I second the motion.

THE CHAIRMAN: Is there any further discussion?

MR. WICKERSHAM: There again, if the Court differs with us, they can say so.

MR. DOBIE: Yes. If they ask us to prepare a code, we will do it.

THE CHAIRMAN: I don't know whether we will or not. I will reconsider my acceptance --

MR. DOBIE: You may resign?

MR. OLNEY: I don't think there is any danger of the Court asking us to do it.

MR. CHERRY: It is perfectly safe to be willing.

THE CHAIRMAN: If there is no discussion, what is your pleasure?

All in favor say "aye."

Opposed?

(The motion was carried, by the unanimous vote of the Committee.)

MR. DOBIE: Mr. Chairman, before we adjourn for lunch, I would like to bring up a matter that seems to me quite important, just to know the sense of the Committee.

It seems to me rather important that what this Committee does in our proceedings here be not given out to the public. It seems to me that the Secretary and the Chairman should be the ones that would take care of that. I think it would be very unfortunate, for example, if one of us went back and told a newspaper reporter what we had done here, or that General Wickersham had advocated so-and-so, or Dean Clark thought this.

MR. WICKERSHAM: Or that Mr. Dobie, the great authority on Federal procedure,had certain views.

MR. DOBIE: I have no official position, but that is my idea. I have discussed it with Dean Clark, and he seems to agree with me. I do think it is rather important, --

THE CHAIRMAN: I am glad you brought that up.

MR. WICKERSHAM: I think it is very important.

MR. DOBIE: (Continuing) --that we do not give out

any information to reporters; that we leave that to the very sound discretion of yourself and Major Tolman.

THE CHAIRMAN: I would like to go a little further than that.

MR. DOBIE: The reason I brought it up now is, before we went to lunch --

THE CHAIRMAN: Yes, you are right about it; I am glad you mentioned it.

We are an Advisory Committee to the Court. We have got to bear in mind that it wouldn't be courteous to the Court, and they might resent it, if we disseminate stuff, or circulate decisions that are confidential, or do anything of that kind without their authority. And I think we not only should not tell newspaper reporters what is going on in our meetings, but that when it comes to the drafting work and all that sort of thing, we ought to use care not to give any publicity to it. It will have to be submitted to a good many people, but it always will be confidential; and we never ought to give out anything as our conclusion or draft until the Court says so. I think they would be very quick to pick us up on that.

MR. WICKERSHAM: Yes.

MR. DOBIE: I think if a reporter came to you and you wanted to give out that the Committee had met and started on its work, that is quite all right, anything you want to give out; but I think individual members should not, because it seems to me there is that germ of a great deal of harm and dissension, which might very seriously affect our work.

THE CHAIRMAN: That will be taken as the sense of the meeting, unless there is some objection.

MR. WICKERSHAM: Yes.

MR. DONWORTH: Mr. Chairman, some of us come from a distance, and may be interested in how long a session we may have at this time. Have you in mind having another session tomorrow?

THE CHAIRMAN: Well, the progress we are making, I am in hopes, if we don't spend too much time at lunch, we can come back here and plug along this afternoon and fix things up so that anybody who wants to leave can go tonight; but that is up to the Committee. I am at your service, as long as you

want me.

MR. DONWORTH: I am also. I was just looking for a general idea.

THE CHAIRMAN: Yes. We can't tell what we will get into this afternoon. We are going into some of these particulars, and they may take some discussion; but I really feel, from what I know, we ought to finish late this afternoon, or may be early this afternoon.

MR. DONWORTH: I didn't wish to hurry proceedings at all.

THE CHAIRMAN: Lunch is set for us across the street. It is a quarter past one. How much time do we need for lunch?

MR. DOBIE: We lunch in a body, do we?

THE CHAIRMAN: That is at your pleasure. Major Tolman has kindly made arrangements for us at the Club over here, for those of us that want to go together.

MR. WICKERSHAM: That is a good idea. Well, if we are going to lunch together, I suppose we

can adjourn for an hour. If we get back sooner, all right; if we get back a little later, that will be all right.

THE CHAIRMAN: Did you have an idea you had some engagement that would take you elsewhere?

MR. DODGE: Yes, I had. I was hoping somebody would say a quarter past two.

MR. CLARK: Couldn't we say two o'clock, and that will probably mean a few minutes after?

(Whereupon the meeting adjourned until two o'clock p. m., of the same day, June 20th, A. D. 1935.)

AFTERNOON SESSION.

THE CHAIRMAN: Will the meeting come to order?

Mr. Hammond has called my attention to a provision of the Act which is badly drawn, and we ought to have the sense of the meeting on it.

It says that they "shall have power to prescribe by general rules for the District Courts of the United States and for the courts of the District of Columbia" --

MR. DOBIE: "Supreme Court of the District of Columbia", isn't it?

THE CHAIRMAN: It should be, but it isn't; but it obviously meant that court in the District of Columbia that corresponds to the United States District Courts, which is the Supreme Court; so that, unless there is some objection, we will take it as the sense of the meeting that we should construe that as being the Supreme Court of the District.

MR. DODGE: I think the Court so construed it in the order.

MR. DOBIE: Yes. In the order of the Court, it is "The Supreme Court."

THE CHAIRMAN: Now, we have a miscellaneous lot of matters that the Reporter would like to bring up.

The first one he has raised is the question of how far, if at all, our rules will affect the matter of appellate review.

Now, in order to start the discussion on it, I will just simply say that I have had the idea that we have nothing to do with appellate review, in one sense. On the other hand, there are a good many procedural matters in the course of trials and proceedings in a lower court that ultimately form a basis for appellate review. My thought has been that, in any matter of that kind that has to do with the proceedings in the District Court, we have power to act; and I will illustrate that in this way:

For instance, I think we could make a rule that if a man made an objection, and his objection was overruled, or sustained, it wouldn't be necessary for him to note an exception; it would be taken that the exception was noted.

That is an illustration of a step in the trial court that we ought to have control over, that really has a bearing on the review feature.

That is all I have to say about that, but

that point is open for discussion.

What is your thought about that, Mr. Reporter?

MR. CLARK: A real problem comes up there, which is reflected back in the union of law and equity.

The present situation is that in equitable actions, following the old system of review of the English Court of Chancery, the Court is expected to review the facts as well as the law. That developed, really, at a time when testimony was taken by deposition; it was entirely a matter of formal papers, and it is no longer nearly as necessary, if at all, as it was under the former procedure.

In actions at law which go to the jury, I suppose it would be unconstitutional to review the facts; certainly, the procedure is to review only errors of law.

That is the formal distinction which is reflected back into the necessity of some separation.

I might say that I have great difficulty in finding lawyers or law teachers or other people who could tell the difference between law and fact; generally, it seems to be that whatever

the appellate court wants to review is either law or fact, as the case may be. The distinction, I do not think is nearly as real and vital as the formal requirements make it.

If we have to continue those two systems of review, we are to that extent preventing a complete union.

Now, in the States, those two systems of review are continued in some of the code States, and not in others. They are continued in New York, for example; and in my judgment, that has been one of the reasons why the union of law and equity has not been more satisfactory in New York. They are not continued in a great number of States, including my own, Connecticut; and I know there are special provisions in New Mexico and Arizona. My impression is they are not continued in Minnesota, but I don't know that I am sure about that.

MR. CHERRY: You are right.

MR. CLARK: Now, I should suppose that we have got to make provisions regulating somewhat the procedure for a judge acting without a jury. In fact, I think the provisions for waiver of

jury trial, and the jury trial right generally, are essentials.

Now, if we leave the matter there, in the case of a trial to the court without a jury, we are going to have the situation pretty uncertain. That is one of the features now that is pretty uncertain in Federal procedure, the method of appeal where jury trial is waived.

I should suppose, in any event, we would want to carry the proceedings on through to the final action in the District Court; that would probably be within our power; but how can we do it unless we know what the function of appellate review is going to be?

That is somewhat the problem. That is a necessary part of our proceedings. The scope of our job includes the preparation of steps to the end of the action in the District Court, and yet those steps are conditioned by the scope of appeal.

THE CHAIRMAN: Can't we accept the present system, statutory or otherwise, that fixes the scope of appeal?

MR. CLARK: Yes, we can accept it.

THE CHAIRMAN: Have we any option about it?

MR. CLARK: Well, I don't know. I throw out the question. That, again, is a similar question: How extensive is the scope of our statute?

I might say that I hate to accept it, because it does provide for the divided form of appeal.

MR. DOBIE: There is another point in there, of course. Any fact found by a jury can only be reviewed, as you know, in accordance with the common law; you have got to watch out for that pretty closely. I think there is a point of difficulty. You remember that case of Dimick against Pate, don't you?

MR. CLARK: Yes.

MR. DOBIE: And you probably remember the very recent case they decided on the 3rd, where the Judge reserved the right, and then the Circuit Court of Appeals could hand down a decision without any trial.

There are going to be some right pretty points here; and probably this group knows that the law on what you have to do on appeal is in a

pretty muddy state. There are some decisions in there that say practically everything.

THE CHAIRMAN: Could you be more specific, and illustrate? I am not quite clear that I got the drift of it, what kind of rule or subject matter you have in mind that would raise the question.

MR. CLARK: Well, the question will come up very directly on waiver of jury. You have a provision now for trying a case in the Federal courts without a jury, and the form of appeal and how to take it is, as Dean Dobie said, very uncertain indeed.

The way that would be raised, I think the way that procedure could be simplified, and the way it is done in a good many code States, is by some provision of this kind: That if a jury trial is not claimed in a certain period, it is thereby waived, and the case goes on the calendar for trial by the Court.

Assume trial is had by the Court, and the Court has entered its judgment. What then is to be the method of appeal? Is it now to be as it would be if the judge were sitting as Chancellor; that is, a review of the facts; or is it now to be, as it was originally, a review of errors of law only?

THE CHAIRMAN: Why do we have to know that? I don't understand that.

MR. CLARK: Well, if the appeal is to be on a review of the facts, the simple way of doing it, and the only proceedings required by the District Court Judge would be as follows: To certify the evidence; all the evidence would go up.

If, however, the appeal was to be similar to the appeal in law actions, there would have to be some way which could be devised without great difficulty, whereby he filed a finding of facts; and the appeal was made for errors of law, rather than on the finding of facts he signed.

Now, the question is going to come up as to the provisions to be made in a case of waiver of jury trial, for proceedings after judgment -- unless, perhaps we want to stop and say that we will do nothing with proceedings after judgment. If we were to decide that, we would have nothing to do with motions to set aside verdicts --

MR. WICKERSHAM: Oh, that would be proceedings in the District Court; motions to set aside verdicts, motions for new trial --

MR. DOBIE: And motions <u>non obstante veredicto</u>; I

think we have got to go into those.

MR. WICKERSHAM: Yes, you are still in the District Court.

MR. LEMANN: So that would hardly be a line of cleavage, perhaps.

MR. CLARK: Yes. I had thought we really needed to cover all proceedings in the District Court.

MR. LEMANN: Yes. If you did that, you certainly would take in some of what are generally called appellate matters; those proceedings in the District Court, and your motions for appeal, petitions for appeal, and citations.

MR. DONWORTH: Also the presentation of the bill of exceptions.

MR. LEMANN: Yes.

MR. DONWORTH: I think that needs clarifying, the procedure with reference to a bill of exceptions in the Federal Court. I think that is within our jurisdiction, because it is a proceeding in the District Court; and the matter of terms of court, I think that is within our jurisdiction.

At present, you know, unless the Judge

within the limits of the term of Court either extends the term or takes cognizance of the pendency of the bill of exceptions -- if he doesn't either extend the term or enter some order to take cognizance of the bill of exceptions, his power to settle the bill dies with the term.

I think that is for us to regulate; and on the specific matter that Dean Clark has referred to, it is true that when a jury is waived in the District Court at present, a complicated situation arises. In the first place, the statute says if the jury is waived in writing, the procedure shall be so-and-so. I think the decisions are that if the jury is waived, not in writing, the Judge is practically an arbitrator, --

THE CHAIRMAN: There has been an amendment to that statute, which I drew myself, which says that if the waiver is oral, in open court, it is as good as a written one.

MR. DONWORTH: Quite so; but if not entered in the minutes in open court, then the judge is an arbitrator.

Now, further, of course there is a difference in the attitude of the appellate courts toward a law action and an equity action.

If a jury is in fact waived, then the constitutional provision Dean Dobie has referred to, of course, does not apply; and then it is purely statutory, as to what kind of review you have.

In an equity case, the judge certifies the evidence; and then the appellate court, while theoretically entitled to render a decision de novo on the evidence, of course, gives great weight -- varying degrees of great weight, to the findings of their own court. Whereas, in a law case that goes up, whether a jury is waived or not, the procedure is quite different. You must have a bill of exceptions instead of a certificate of evidence, and so on.

It seems to me that all those matters are for us to recommend something on; and if we run into the question of the absolute procedure on an appeal, I think we might recommend the enactment of certain legislation to fit in with these rules, which Congress and the Supreme Court could consider as proper to be enacted, independently of what we recommend within our jurisdiction.

MR. DOBIE: There is that bill of review in equity, too, Judge, which is proper after the end of the term; whereas, in law, as you said, you can't do

anything at all unless there is something taken.

There is a great deal of spade work tobe done there, and I do say, if I have to say so, that is one of the best chances this Committee has got, to get rid of the complications; and I must confess I am hardly in accord with what you gentlemen said, that is, within our province.

MR. WICKERSHAM: Don't you think the settlement of the bill of exceptions is within our province?

MR. DOBIE: Oh, absolutely.

MR. CLARK: How far do you think we can go, Dean Dobie?

MR. DOBIE: Well, I think we will have to study the individual provisions, to answer that; but my general attitude is that we ought to go as far as we can, of course, watching out for the Seventh Amendment.. In that waiver of jury, as General Mitchell said, the statute very recently had to be written; if it wasn't written, of course, it is now in the opinions of the Court.

But the extent of the review, and whether you have to ask the trial judge for findings of fact, and what the appellate court can do; there

are hundreds of cases on that, and in the Circuit Court of Appeals a great many of them are absolutely in conflict. I think that is a field in which we cando a great deal.

THE CHAIRMAN: Why isn't this the right idea about it? It is admitted, so far as appeals are concerned in the upper courts, we haven't anything to do with them; we haven't the power to change the powers of the appellate courts as to their methods of review or what they can review; that isn't within the scope of this statute.

On the other hand, we certainly have the right to deal with all proceedings in the trial court, settling bills of exceptions, and all that sort of thing, that may ultimately form the basis for appeal.

Now, isn't it our task to take the existing law that regulates the appellate courts as to the nature of their review, and then, knowing what the lower courts have to do to prepare the basis for that, have our rules deal with those actions of the lower court that are required to form the basis for the review which is now permitted by law in the appellate courts?

It seems to me we have to draw a sharp line between procedure in the trial court which creates a record for review, and anything that amounts to a shift or an attempt to shift the powers of the appellate courts, or the nature of their work.

Doesn't that draw a sharp line, of itself, right there?

MR. DODGE: There is another very vexed question that makes a lot of trouble, and that is as to the effect of a request for an ordered verdict by both parties. That has led to a tremendous amount of litigation, as to what is open in the court above. Is that to be taken as a submission of all questions to the judge?

MR. DOBIE: I believe in New York, and General Wickersham will bear me out -- I believe they have a peculiar practice there of a one-man jury; I believe the bailiff, or sheriff, something like that; and I understand that has given some trouble. I remember there are a number of cases on that, where they make the distinction where a directed verdict is requested by both parties, and in these late cases, where it is requested by one. That Baltimore Line against Redman, decided on June 3rd,

backtracked on the Holstman case, if the judge, in refusing to give a directed verdict, reserves his decision on that.

MR. LEMANN: Can't we reach the tentative conclusion that we should consider it within our province to pass upon all so-called appellate procedural matters which transpire in the District Court?

MR. OLNEY: Is there any question about this: That we are not asked to advise the Court in any way whatsoever about the procedure in the appellate courts? Our function is simply limited to the District Courts.

MR. LEMANN: Yes, that is what I think we have all been having in our minds here recently, because the statute says the Supreme Court shall have the power to prescribe by general rules for the District Courts of the United States the forms, process, and so forth, in civil actions at law. So I would assume that we probably couldn't go beyond the District Court; but that, up to the moment where the District Court loses jurisdiction, we would go, even though that covered all these preliminaries

we have talked about here to an appeal.

MR. OLNEY: Doesn't it necessarily follow from that, just as the Chairman has said, that we will have jurisdiction, and it should be our duty to revise the procedure of the District Courts, in view of the existing law as to the methods of appeal? And that is just as far as we can go; we can't go any farther.

MR. LEMANN: It seems to me there is a possibility, when we get to the actual job we are on, we might find it desirable to recommend some changes in the methods of appeal, but that we would have to confine ourselves there to recommendations, perhaps to tie up what we thought was desirable; but for the moment, I think we would have to proceed on the theory that we could only go up, at least to what happens in the District Court, and having in view the present statutes, except insofar as we wanted to make recommendations for changes in them -- which would be merely placatory, I suppose.

MR. WICKERSHAM: Here is the provision of Section 875 of the Judicial Code:

(Reading.)

Now, all that has got to be done in the District Court. The question of a bill of exceptions on appeal, for instance. I suppose we could recommend, at all events, that a review of a judgment, whether at law or in equity, should be prosecuted by appeal, and not by writ of error.

THE CHAIRMAN: I should doubt that.

MR. WICKERSHAM: You have no doubt of that, have you?

THE CHAIRMAN: No. I doubt if we have anything to say about the method of appeal.

MR. WICKERSHAM: Well, that is a proceeding in the District Court.

MR. DOBIE: We couldn't change the method, I don't think. Of course, the writ of error is abolished in the Federal Court.

THE CHAIRMAN: They passed a new law, making everything an appeal, anyway.

MR. DOBIE: Yes. Of course, it is practically the same thing, under a different name.

MR. WICKERSHAM: At all events, isn't it perhaps

a little early to decide fully what we can do?

If we are agreed that anything which is done in the District Court is within the scope of our undertaking, there will come borderline cases; in connection with those, we might recommend something to be done to facilitate the consideration of the case in the Court of Appeals or the Supreme Court, as the case might be.

MR. DOBIE: Of course, one trouble you are going to run into there, General, you have ten Circuit Courts of Appeal, and so many of their matters are governed by their rules -- but I think we will find these judges very amenable.

MR. WICKERSHAM: Yes, very true. And then, after all, there are some statutory provisions that govern.

THE CHAIRMAN: Do you want any more specific instruction about that?

MR. CLARK: No, I think that is enough for the present.

THE CHAIRMAN: You have got the general sense of the Committee?

MR. CLARK: Yes, we can't foresee all; and it cer-

tainly seems clear that we want to cover all the District Court procedure.

THE CHAIRMAN: Well, the Reporter also asks this question:

Shall procedural expressions familiar to the profession, although subject to criticism for inaptness, be employed; such as "the real party in interest," "cause of action" and "ultimate facts"; or shall new and better phraseology be attempted wherever possible and desirable?

MR. CLARK: I might say in that connection that most of these are used in the equity rules, such as the word "real party in interest". The real party in interest is the designation of the plaintiff, and that is an expression coming from the original Field Code; it caused a great deal of trouble, because the courts thought at once that it meant somebody having the beneficial interest -- and it does mean that, but it also means a trustee, for example. The word "real" was rather misleading than otherwise.

On the other hand, it is now a standard expression, used in a great many codes.

What shall we do; try to improve upon

recognized but unfortunate phraseology, or accept it?

Now, the expression "ultimate facts" is one about which a great deal of debate can be made; but that is used in the equity rules as to the complaint, that the complaint shall state the ultimate facts. Shall we try to improve on these standard expressions?

THE CHAIRMAN: Well, it has two sides to it. Of course, an ideal code might improve the terminology a great deal.

On the other hand, I remember when I studied torts under the old system. Twenty years later, I picked up a modern text book by a law writer on torts, and I hadn't the faintest idea of what he was talking about; they had invented a lot of new epithets, terminology and expressions that might have been much better than the old, but that are new.

You are running into a serious problem there, if you hand out to the Bar a set of rules with a lot of new words in it, a lot of new definitions and so on, so that they don't entirely approve of them; you are liable to have a severe kick-back.

MR. DOBIE: I think there is another angle there.

I have talked too much, and I am going to stop, but there are some of these phrases that have been used by the Supreme Court. In one case that I remember, the problem was whether, if therewas a Federal question and a non-Federal question, and the Federal question proved devoid of merit, whether the Federal Court has jurisdiction. The Supreme Court held in that connection that they would go into the non-Federal question, if the non-Federal question and the Federal question together constituted practically one cause of action.

If we wipe out that phrase "cause of action"--do you see what I mean? In a case like that, it might be rather unfortunate, in connection with those decisions.

THE CHAIRMAN: It might take twenty years to decide what our new expressions mean.

MR. DOBIE: Yes. I believe you have got to decide that more or less conservatively. There was Wigmore's "autoptic proffer", and you all remember the outcry that went up.

MR. LEMANN: Some of these cases have construed these phrases, and insofar as they would now seem to

have a well-established meaning, it would seem that they should be retained, even though as an original proposition there could have been a happier word used.

Say that the courts now say this "real party in interest", for example, means the plaintiff. Where there is still controversy raging about them, perhaps we would be justified in hazarding the thought that we could get some non-controversial definition. That might not be a very modest assumption, of course.

MR. CLARK: Of course, there is one difficulty about these phrases, you never can be sure.

Now, the "real party in interest" phrase, I should say was pretty well accepted, that it meant not merely beneficial interest, but also a merely legal interest. In fact, the difficulty of that phrase is, it seems to mean so much, and it means so little. It didn't bring anything new into the law at all; it simply meant that the man who had the legal right to sue could sue.

MR. LEMANN: Wouldn't the better plan be, when you start drafting, you might use alternatives? I mean, it is a little difficult to have a hide-

bound rule right now.

THE CHAIRMAN: About all we can say now is whether we want the Reporter to be conservative about that, or non-conservative.

MR. LEMANN: Which, of course, he will interpret to suit himself.

MR. OLNEY: Mr. Chairman, if we do anything but adopt the rule that the Reporter shall be very conservative in that respect, we are just going to build up any amount of trouble.

Every time the legislature meets and changes some old expression, there is promptly a new crop of litigation; and that is exactly what we will find here.

So far as we can, we have got to, unless there is something genuinely the matter, something that insists on being cleared up, we have got to use the old expressions or we will be in trouble.

MR. WICKERSHAM: You will remember how much criticism we have had over the Restatement of the Law of Torts in the Institute, because of the employment of phraseology which was not the recognized and accepted phraseology of the law;

and I don't think there is any one thing that has been more criticized than the use of that language.

THE CHAIRMAN: Don't you think that our draft would raise an outcry with the Bar if we handed them something with a lot of new words in it?

MR. WICKERSHAM: Oh, there would be a howl from one end of the country to the other.

MR. CLARK: Well, I have no expectation of using autoptic proffer -- but I take it, the general feeling seems to be, to be reasonably conservative.

MR. WICKERSHAM: That is how it seems to me. And a good many of these phrases are used in the codes. For instance, Michigan:

> "All pleadings must contain a plain and concise statement, without repetition, of the facts upon which the pleader relies in stating his cause of action or defense, and no others."

Now, personally, I like that phrase: "His cause of action or defense."

MR. DOBEY: I don't think you can get away from that.

MR. WICKERSHAM: I don't think we ought to try to.

MR. CLARK: Of course, I have written two or three articles defining "cause of action" --defining it,as I still think, quite properly -- that has called forth a whole crop of articles saying that I defined it wrongly.

MR. WICKERSHAM: But don't you think the Bar in general would kick if you took out "cause of action?"

MR. CLARK: Oh, yes. I think we can perhaps lessen its use, but I don't think we can get away from it altogether.

THE CHAIRMAN: What other points would you like to bring up?

MR. CLARK: Perhaps I might run over these, and make some tentative suggestions and see how it will strike the group. I asked:

What action, if any, should be taken on the following subjects?

And I will answer, in general, I think we ought to make some rules on them:

Process; Venue -- I might say as to that --

THE CHAIRMAN: Well, Venue -- you mean the district in which a man can be sued?

MR. CLARK: Yes.

MR. WICKERSHAM: You have got statutory provisions --

MR. CLARK: Yes.

MR. LEMANN: We override that, certainly, as to law actions.

MR. WICKERSHAM: I am just calling attention, there are a lot of statutory provisions you have got to take note of. If you attempt to overrule many of them -- I mean to say, unless there is some good, overwhelming reason for a change, it seems to me it is unwise to attempt to revise the whole subject which is dealt with in the judicial code.

MR. CLARK: Well, there is a problem there; Mr. Wickersham referred to it this morning. Should we incorporate in this draft the provisions of the Code, in order to make our rules complete?

MR. WICKERSHAM: Yes.

MR. CLARK: I don't know, on that; I would like suggestions. I would rather hesitate to say. It might be easier for the lawyer to have it all in one place, but we might never be sure we had included all that we should have, or we might have included something that we shouldn't.

MR. WICKERSHAM: I don't think we ought to attempt to repeat the statute in these rules.

In the first place, it is an invitation to Congress to be constantly tinkering with it. If you take their statutes as they are, unless there is absolute necessity to modify one, they are not so apt to interfere with rules of the Court as they would be if you embodied a lot of statutory material.

MR. DOBIE: The general provisions of Venue have been pretty well established and interpreted.

MR. WICKERSHAM: You have got constitutional limitations on it, too.

MR. DOBIE: I remember that, because I wrote three articles on Venue.

One proposition there that does occur to me is, whether or not we ought to go into the great many exceptions; like, in a particular case, two defendants in the same State, but in different Districts; then in connection with that 1857 statute on local actions.

I do think we might go into the problem of whether or not it is necessary to have all of those tremendous number of exceptions -- and of course, Admiralty is absolutely separate. It is

the most liberal thing in the world.

MR. CLARK: How about a transferable case, brought in the wrong court?

MR. WICKERSHAM: You mean from law to equity?

MR. DONWORTH: Just what do you mean by that last question?

MR. DOBIE: You mean brought in the wrong District in the same State?

MR. CLARK: Yes.

MR. DOBIE: It does seem to me that we ought to go into that question of differences -- they have gotten that fearfully complicated -- differences in the Districts, and whether or not that applies to differences established by the judges. That never has been decided by the Supreme Court. What I am after is, the big things have been decided there on the big statute, but I think we might do some work in ironing out a great many of the exceptions and complications that seem to me to be utterly unnecessary.

MR. OLNEY: On this matter of Venue, do I understand the suggestion is made that we endeavor to

formulate rules with regard to the venue of the courts? Isn't that a matter entirely without our province?

MR. CLARK: Well, my general suggestion wouldn't go that far. It can be covered this way: I wondered if we couldn't make the rules of Venue a little less harsh; particularly for a transfer between courts, or at least between districts of the same State; that is, to avoid failure of an action?

MR. OLNEY: Have we anything to say, under this order of the Court appointing us, in regard to the Venue of the District Courts?

MR. LEMANN: It becomes a question of whether it is a matter of practice or procedure,

I suppose our power depends upon a construction of the wording in the statute "practice and procedure". I wondered whether Venue was ordinarily considered as covered by that expression "practice and procedure." It says, "forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law."

If we go by the rule of ejusdem generis, I should think it very doubtful.

MR. WICKERSHAM: Especially of course, as in the

Federal court, venue is determined largely by constitutional and statutory considerations.

MR. CLARK: Then I take it, the judgment is we had better stay pretty well away from it?

MR. WICKERSHAM: I should think so.

MR. DOBIE: Of course, Process and Venue are closely bound up together. I mean, they are separate things--now, after you have solved the question of Venue, the question of where to serve process is an utterly different one.

MR. LEMANN: You discuss Venue in your book on Pleadings, Mr. Clark.

MR. CLARK: A little, yes.

MR. DOBIE: Of course, even in a book, Venue is not jurisdictional; it is freely waivable. I mean, where a process runs -- as you know, now it is very restricted; process ordinarily doesn't run out of the District at all; and does "formal process" include where it runs? There are going to be a lot of those problems.

THE CHAIRMAN: You will get into hot water if you start a rule and hand it to Congress, saying you

can serve a process in the Chicago courts on some fellow in California. They will "rear up" about that; they are very sensitive about dragging a man around the country in the Federal courts.

MR. DOBIE: You remember that Roberts case; the Labor Board case, in which they held they could summon a man to any court they wanted to, but when they wanted to proceed against him they had to bring it in the court in his district. Congress has construed those statutes very strictly. I doubt if we want to do it, but it is a very complex problem, and there are so many exceptional statutes -- there are at least twenty. You probably also remember those Interstate Commerce Commission cases.

MR. WICKERSHAM: You have got special statutory provisions, and it seems to me it would be very unwise for us to get into that. Where a suit is brought in the proper District, but in the wrong Division, there might be a provision for transfer by order of the Court. I just take that, as an illustration.

MR. DOBIE: It is a very good one.

THE CHAIRMAN: And of course, you would have to do

with the procedure, the forms and methods of raising the questions.

MR. WICKERSHAM: Of course.

MR. CLARK: Then I have summary judgments; and motion for judgment by default, supported by affidavit, such as the procedure developed in New York.

MR. WICKERSHAM: That summary judgment procedure in New York has worked extremely well. By the way, have you seen Judge Sontag's paper on that ? It is an admirable review.

MR. CLARK: Yes, it is, indeed.

Well, this other motion, by the defendant, is really the converse.

MR. WICKERSHAM: The converse of it; practically the same thing.

MR. CLARK: And discovery, and rules under the Federal Declaratory Judgment Act. Those are the questions I asked.

I should think we ought to deal with these things I have just mentioned.

MR. WICKERSHAM: I think we have got to deal with Discovery, and all those cognate questions on

Discovery.

MR. OLNEY: I feel very strongly we should deal with the matter of Discovery.

THE CHAIRMAN: And I think it follows, we ought to deal with rules under the Federal Declaratory Judgment Act, too.

MR. WICKERSHAM: Yes. Well, that is a new practice.

MR. CLARK: Yes. The Federal Act was passed about the same time.

MR. WICKERSHAM: I say, but there are precedents in other States that could be used.

MR. CLARK: There is some little difficulty as to the use of jury trial, there.

MR. WICKERSHAM: Yes, there is.

MR. CLARK: One District committee, namely, the Ohio Committee, has been raising that, as to how to safeguard jury trial.

MR. TOLMAN: I wrote a letter to Professor Borchardt on that subject, and asked him if he would care to submit any ideas. He wrote me back and said he would be glad to, but he thought the Act itself was so

detailed and had so much of practice in it that it wouldn't be a very large subject.

I don't know how he figured that out, but he thinks that most of the procedure is covered by the Act, and that procedure in that Declaratory Judgment proceedings will not need very much treatment.

MR. CLARK: I might say this gentleman in Toledo, Mr. Marshall, I think, Chairmanof the Committee, wrote in at length on this matter I am speaking of, the question of jury trial, and Mr. Borchardt gave me quite a long memorandum on that point, as to what the rules should establish as to the use of jury trial.

The Connecticut Declaratory Judgment Act says that jury trial shall be had on issues, as in other actions. That is my present impression, that a rule along that line would be sufficient.

MR. WICKERSHAM: The statute is not very elaborate. It is very concise.

(Reading statute.)

MR. DONWORTH: I should think that ought to be sufficient.

MR. WICKERSHAM: Well, it may call for some rules in connection with it. There is a memorandum in here, following that, but the procedure hasn't been -- I don't think there are many cases yet that have arisen under this statute.

MR. DOBIE: There are very few in the lower courts, and the only one in the Supreme Court was a case invoking its original jurisdiction. That was the case, you remember, in which they said there was no actual controversy, and therefore they threw it out; as a matter of fact, it wasn't really necessary to decide that.

MR. WICKERSHAM: Was that brought before this statute?

MR. CLARK: No, it was a West Virginia case; and it said the State of West Virginia does not claim to proceed under the Declaratory Judgment Act; but, even if it did, it is clear there is no actual controversy. That is all the Supreme Court said.

MR. CLARK: Of course, these things get rather detailed. I don't know, it might be expecting too

much to expect offhand opinions from you all. These are all technical points, too.

You might be interested in Mr. Sunderland's suggestion on Discovery, which I think is very interesting. He suggests two alternatives: One is the State procedure, and another is a new Federal provision. That is, he wants to get lots of discovery, and that is the way he is going to do it.

That is, the idea is that you can proceed under either. He is going to get it as broad as he can.

MR. WICKERSHAM: Get it coming or going.

MR. CLARK: Has any member of the Committee any reaction as to that scheme?

THE CHAIRMAN: One leg of it put you back on to the problem of whether our rules are general or whether they aren't.

MR. GAMBLE: I think we ought to make a rule; not have an alternative of that kind.

MR. LEMANN: If he wants to get the best rule, let us examine the rules of the 48 States, and pick out the broadest one.

MR. DOBIE: That is what I think. That alternative method imposes on the appellate courts, too, the necessity of knowing the laws of all the States.

I think we ought to take the most liberal rule that there is; enact that, and leave the other out.

MR. CLARK: That is rather my conception, too. I might say, not all of the lawyers or judges feel that way. Judge Augustus Hand said to me, he thought extensive rules of Discovery might be rather dangerous, particularly in New York City.

MR. WICKERSHAM: Well, that is an observation born of experience. Of course, that has led to gross abuse.

The essential thing, it seems to me, is that these examinations before trial ought to be conducted in the presence of a judicial officer having power to rule. Otherwise, they become simply means of annoyance and blackmail. In England, where they have these standing Masters, who are competent lawyers, the rules work very well. But unless you have a judicial officer, I think it is open to very grave abuse. That is my opinion.

MR. DOBIE: Would you include Masters in chancery

in that description?

MR. WICKERSHAM: A good Master in chancery, yes. We have had standing Masters in New York; we have had some admirable men, and nobody would object to going before them. Of course, you have got to be sure you have that kind of judicial officer with power to rule on the evidence, subject to appeal to a judge, but with power to rule on the evidence, and power to rule on what shall be produced; otherwise, you have a great engine of oppression.

MR. DONWORTH: But, unless you couple that with the right of the party to suspend the taking of the testimony until there is a court ruling on the particular question --

MR. WICKERSHAM: Yes, yes.

MR. DONWORTH: Of course, that involves delay, and would be used for purposes of delay; but perhaps it is necessary.

MR. WICKERSHAM: Well, the trouble is we have that in our State practice, you know. We can suspend examinations until the question can be submitted to the Judge; and it helps very little, because the Judge is busy and hurried, and he gives very slight

attention to the question, unless it is an obvious abuse. Usually he says, "Oh, well, take it subject to objection on the trial," and that is that.

But, if you have a competent Master, with power to rule, with the right to review his decision, of course, by the Court, you minimize the evil effect of the system very greatly.

MR. CLARK: Now, I had added a series of possibilities. I don't really know whether you want to take them up or not. These appear to be certain forms of detail. I have discussed them in this recent article: Provisions as to jury trial, as to waiver, as to joinder of parties --

For example, on joinder of parties, the newer English provision, now being adopted in some of the newer practice acts, the test there is met whenever there is a common question of law or fact; they may be joined, subject to the discretion of the trial court to order separate trials; and there is fairly free joinder of causes of action.

That is the rule now in Illinois; it is the rule in New York, and so on.

The subject matters of detail are as to what we have called "third party practice"; the provisions for citing in parties. You have had some

experience in New York with that; Wisconsin has had it. That, by the way, may bring up some question that has troubled us in thinking about it, as to diversity of citizenship.

MR. WICKERSHAM: Yes, that does.

MR. CLARK: We are not just clear how to solve it. Our idea was for fairly broad provisions for citing in third parties; we felt that was desirable; and then we didn't quite know what that would do to the diversity situation.

Those are all details. I shall be glad to take them out.

THE CHAIRMAN: Don't you think we really had better leave that until you have, or you and your staff have taken what you consider the most modern and up-to-date things, and put it in shape for us to chew on; rather than attempt to guide you in advance?

MR. CLARK: Well, I do think so. I do think it might be useful, if you are willing to read over this article of mine, which discusses several of these.

MR. WICKERSHAM: That question brings up the

very question of statutory jurisdiction that has been raised. If it does interfere with the adoption of a complete system, we can't help that.

THE CHAIRMAN: There is a constitutional limitation on jurisdiction, too.

MR. WICKERSHAM: Yes.

MR. DOBIE: Of course, if you can drag them in, I don't think we can go into that, because that is clearly a question of jurisdiction. I don't think they want any advice from us on that subject.

MR. WICKERSHAM: No, I think not. There again, you run into what General Mitchell said a while ago: If you allow process to a fellow in California to bring him into a suit in New York, on the theory of making him a full party and getting a judgment against him that is enforceable everywhere, whether he appears or not, you will raise a howl.

MR. GAMBLE: Of course, we have a lot of new laws, especially new bankruptcy laws taking the place of the older forms of action, where the jurisdiction of a single court is broadened to cover everywhere. I am wondering what effect that might have. Are we to consider that kind of Act?

THE CHAIRMAN: Bankruptcy matters?

MR. GAMBLE: Yes.

THE CHAIRMAN: The bankruptcy act itself contains a clause authorizing the Court to prescribe general orders and rules in bankruptcy.

MR. GAMBLE: Yes.

THE CHAIRMAN: I wonder whether that oughtn't to be considered as a separate subject, and outside our scope? Judge Evans this morning, brought that up in conference here; I had a little chat with him. He seemed to think there ought to be some new rules respecting reorganizations, particularly, and so on, under Section 77. He said it was sort of an equity practice, and might come under the head of equity rules.

MR. WICKERSHAM: That is a suggestion that has been given --

THE CHAIRMAN: I thought we were probably going afield there; we ought to leave bankruptcy alone.

MR. WICKERSHAM: Yes, that is a separate entity. I do not think we ought to take up bankruptcy at all.

MR. GAMBLE: I grant you bankruptcy; but these new forms under 77-B, in one sense of the word, are scarcely bankruptcy, as we have known it heretofore; it is a substitute of the old equity jurisdiction by way of receivership.

I would much prefer that we would not have our way complicated with that novel procedure. But, just the same, when you talk about extra territorial process, each one of these new actions is said to be a civil action, or a substitute for a civil action. There ought to be some consideration given to the broad terms of those new statutes.

THE CHAIRMAN: Don't you think, as a result of Mr. Gamble's bringing the subject up, that we ought to conclude whether we are going to deal with bankruptcy rules in any aspect of them, or whether we are to leave any new rules under the reorganization provisions of it to be adopted as separate matter under the machinery provided in the Bankruptcy Act?

MR. GAMBLE: That is, in this summary you are going to submit to the Court?

THE CHAIRMAN: Yes. We probably ought to tell them we either are or aren't going to touch that subject.

MR. GAMBLE: In order to bring it to a concrete form, I move that it is the sense of this Committee that we do not include rules governing bankruptcy or reorganization in bankruptcy in our work.

MR. WICKERSHAM: Second it.

THE CHAIRMAN: Any further discussion of that?

MR. OLNEY: I would simply like to make it, that that is tentatively our opinion.

MR. GAMBLE: Yes.

MR. OLNEY: I am in this position, Mr. Chairman: Many of these matters that have been discussed recently, I can't form a definite opinion about them until I have got an idea of the scope of the work that we are to do and the relation of these particular things to that, and before -- I am pretty sure in my mind we want to do this particular thing; but some of these other matters that have been brought up, I am not so certain about.

I come back to the desire that one of the first tasks of the Reporter be to send us a general outline of what he has in mind, and the subjects to be covered, and how they are to be covered;

that is, the object to be driven at. Then we can tell about all these problems very easily, I think, and very definitely.

MR. GAMBLE: I am very glad to accept the amendment to my motion, that it is tentative.

MR. WICKERSHAM: All of these, as I understand, all the resolutions we have been adopting are the tentative views of the Committee.

MR. CLARK: On Judge Olney's suggestion, of course, one of the things I wanted to get -- and I think I have it -- is how far the Committee thought we ought to go on borderline matters; and I can't very well prepare the outline without knowing. But I get the impression that the Committee wants to be a bit conservative in our assuming jurisdiction.

Is that correct?

MR. OLNEY: If I may state my view about it, my view is that we want to be quite conservative in the extent of the field that we cover; but, within that field we want to go just as far as we can, in order to liberalize the procedure and get a result that will do quick and accurate justice.

So far as extending the field is concerned,

I think we should be quite conservative.

THE CHAIRMAN: Can we accept that as a motion for general guidance?

MR. OLNEY: Well, I will make that motion.

THE CHAIRMAN: It is pretty well stated.

MR. DOBIE: I will be glad to second it.

MR. WICKERSHAM: I second it.

THE CHAIRMAN: Any discussion about that?

All in favor say "aye".

Opposed?

(The motion was carried, by the unanimous vote of the Committee.)

MR. CLARK: I wonder if the Chief Justice would nod his head or something on that; because that is fairly important, I think, too.

THE CHAIRMAN: Well, of course, I am going to take this typewritten transcript, and pick out of it all of our questions and sort them up and send them to the Chief Justice, and tell him those are the recommendations of the Committee.

MR. WICKERSHAM: And see what he has to say about it.

MR. CLARK: I have just one other question, and that is whether the Committee have other things that they think should be included; of course, I would like to have them think that over, too.

Major Tolman may have some things that will come out of these suggestions, especially these things comparable to summary judgments, new devices of that general kind that may have worked locally.

MR. TOLMAN: Well, we have some memoranda, some correspondence and some suggestions on topics that haven't been spoken of today, but I don't think I need to detain the Committee to try to get them up out of my memory now. I will send them to

Dean Clark, whatever I have.

Generally speaking, the most important things that we have have been talked about here. I think it has been very comprehensive.

THE CHAIRMAN: Mr. Hammond, is there anything you want to bring up?

MR. HAMMOND: I didn't have anything particularly, no. I thought there were matters we could probably take up with Dean Clark, and then take them up with the Committee later.

MR. DOBIE: If there is anything about the general scope that we could decide here, it would be very desirable to do it. As I understand, I think we can handle the detail matters very much better if we have got something definite.

THE CHAIRMAN: Has any member of the Committee anything he would like to bring up?

MR. WICKERSHAM: Mr. Chairman, I spoke this morning of something, and I don't know whether we adopted a resolution on it or not. That was about provisional remedies, such as Attachment, Arrest, and Injunction -- Injunction is a little different; but, if it isn't already covered, I would like to

move that it is the sense of the Committee at the present time that we should not undertake to cover the field of attachments and arrests, in these rules.

THE CHAIRMAN: Are you referring to getting jurisdiction by attachment of property?

MR. WICKERSHAM: That is what I mean, especially.

MR. LEMANN: Jurisdiction by attachment, or issuing attachments --

MR. WICKERSHAM: Attachment of property, I am speaking of.

MR. DOBIE: Of course, you know the Federal rule is you can't have any jurisdiction of the person, based on attachment.

MR. WICKERSHAM: I know. Suppose you get the question of jurisdiction, and you can get jurisdiction by attachment against property, restricted to that property. You can't get general jurisdiction based on that. Now, we have got a statutory provision --

MR. DOBIE: You can't attach in Federal courts

unless you do get jurisdiction.

MR. LEMANN: You can't bring in a non-resident by attachment. For instance, in our State, attachment may be used where you allege the defendant is about to dispose of his property --

MR. DOBIE: Oh, yes, if you get personal jurisdiction over him. In other words, that is the remedy in the Federal courts now, as decided in Barry against the Big Vein Coal Company, which you probably just read. Another big question was raised in Clark against Wells. Suppose you have got jurisdiction in the State court with attachment; then it is removed, and you can't get any personal jurisdiction over the defendant; can you dissolve the attachment because it wouldn't have been issued by the Federal Court?

MR. LEMANN: That brings in a jurisdictional point. I think we have to consider whether we should consider these matters, insofar as they would involve jurisdictional matters.

Suppose I want to sue a man, and I can do it. Now, in doing it, I must follow the State statute on how to do it. Are we going to merely

say we don't deal with that, and that still should be handled by conformity with the State statute? Then, would that involve -- we have other remedies in Louisiana; enforcement of a landlord's lien, for example, and other liens, in proceedings at law. Are we to deal with that sort of questions?

MR. WICKERSHAM: Yes, you have got the Civil Law in Louisiana.

ME. LEMANN: Well, the procedure -- I should hardly call it Civil Law. Livingston wrote the practice; tne procedure doesn't use much Civil Law terminology. A good deal of it is in the Field Code.

MR. WICKERSHAM: It is not a bad starting point, by the way, for work of this kind, the Field Code.

MR. LEMANN: I should suppose in Washington or California or Iowa, you could really sue today and attach a man in the Federal court.

MR. GAMBLE: You can, on statutory grounds for attachment.

MR. OLNEY: It is a very effective remedy, and very common.

MR. LEMANN: What Mr. Wickersham's point raises, I suppose, is whether we should say that is out of our scope.

MR. OLNEY: As I understood Mr. Wickersham this morning, he was rather desirous that we do nothing whatever; or, rather, that we keep our labors entirely out of fields such as attachments and things of that sort.

Now, I don't know that we ever did attach anybody in a case in the Federal court; but it does seem to me that certainly the suitor ought to have that right, and it is a very effective means. If a man has a promissory note and the other fellow is simply twiddling his thumbs at him, you can go in and attach that fellow's property and bring him right up to time. Of course, that is under certain conditions, carefully guarded, and all that sort of thing.

That remedy ought to be in the Federal courts; it is something that helps in the administration of justice.

THE CHAIRMAN: Doesn't Mr. Wickersham's motion mean merely this: He raises the issue of whether we should prescribe uniform rules of procedure

in attachment in the Federal courts, or whether we should leave the subject of attachment to be governed by the general rule at the end that, except insofar as these rules apply, the local State practice under the Conformity Act shall prevail? You leave the remedy, don't you?

MR. WICKERSHAM: Yes, absolutely.

THE CHAIRMAN: But you leave it to the State, under the local statute?

MR. WICKERSHAM: Yes, that was my view.

THE CHAIRMAN: He leaves the remedy there --

MR. CLARK: Mr. Chairman, I want to make clear -- I think this is in line with what General Wickersham had in mind. The Federal Revised Statutes now, which I have here, in effect contemplate using the State rules. I think you wanted to retain them, but you weren't foreclosing the question of form?

MR. WICKERSHAM: No, no.

MR. CLARK: Because we are directed to draft forms of process; and I had in mind we want to draft a simple summons, and then probably how these remedies can be used. I think we may want some

rules that deal with the question.

MR. WICKERSHAM: Well, of course, in all these things there are certain things to provide for; but I meant in general, the subject of attachment of property, the subject of arrest of the person as a civil remedy, should be left to the State practice, and we shouldn't attempt to prescribe a uniform rule.

MR. CLARK: Yes. That is, we will have some rules on the subject, and the rules will follow that idea. It seems to me we will almost need some rules.

MR. WICKERSHAM: Oh, yes, you will need some.

MR. DOBIE: There is another thing there, General, another interesting problem; that is, that attachments in Federal courts are not under the general Conformity Act, but there is a special statute that permits Federal courts to adopt such State remedies as they see fit. Some of the Federal courts have adopted en bloc the State remedies, and others have not.

I have wondered whether we want to go into situations of that kind, of allowing the Federal courts specifically, in certain instances, to adopt certain rules. Some will adopt, and some will not.

MR. WICKERSHAM: Well, take it today, you haven't uniformity in the remedy of attachment or arrest of the person. The local practice is followed in the Federal courts, with perhaps such modifications as are essential.

MR. DOBIE: Practically all of the Federal courts have adopted the State rules.

MR. WICKERSHAM; Yes, exactly; and my feeling is that it is unwise for us to attempt to modify that.

MR. DONWORTH: I think,Mr. Chairman, that the use of the expression "provisional remedies" will be broader than General Wickersham contends in his discussion. For instance, receivership is a provisional remedy.

Shouldn't his motion be confined to attachments, garnishments --

MR. WICKERSHAM: Arrest.

MR. DONWORTH: (Continuing) --arrest on civil process, and certain designated --

MR. WICKERSHAM: That is what I meant.

MR. DOBIE: You didn't mean quo warranto, or situations of that kind?

MR. WICKERSHAM: Oh, no. I used the word "provisional remedies" because that happens to be the title in the New York Practice Act, which comes from the Code of Civil Procedure, and it does include receivership; and that, I would not include in my motion.

Let me limit it for the time being to attachment of property, arrest of the person on civil process, and garnishments.

THE CHAIRMAN: Judge Olney, do you want to say anything more on that?

MR. OLNEY: Merely, again I find myself in a position where I can have no definite opinion until I see just what it is.

It will be quite satisfactory, so far as I am concerned, to provide that practice in attachments and matters of that sort, existing in the State courts, should be followed in the Federal courts.

I feel that those provisional remedies of that nature are quite essential for the complete functioning of the courts as they should function; there should be provision for it, some way or other. Just how it should be done, I am not yet in a

position to have an opinion.

It seems to me that this is one of those things that should be considered definitely, and a definite opinion reached about it when we have more information before us and can see just the scope of what we are trying to do.

That is the only suggestion I have to make.

MR. WICKERSHAM: My motion is a tentative one. All these tentative decisions we are now making are subject to reconsideration and review; but, as at present advised, it seems to me those fields we ought not to venture on.

THE CHAIRMAN: Suppose you amend it in this way: If, in the course of their drafting the Drafting Committee find it desirable to enter into that field to any extent, they may feel at liberty to propose it to the Committee?

MR. WICKERSHAM: Oh, certainly. I think that ought to apply to everything we have ruled out.

MR. GAMBLE: Mr. Chairman --

MR. WICKERSHAM: Is that motion satisfactory?

THE CHAIRMAN: Well, yes. I have got to put it with those qualifications.

All in favor of the motion say "aye".

Opposed?

(The motion was carried, by the unanimous vote of the Committee.)

MR. GAMBLE: I would like to inquire of Dean Clark if he has a copy of the list of subjects to be considered which accompanied the letter from the Attorney General to the senior Circuit Judges of January 24th?

MR. CLARK: Yes, I have that. It was published in the Massachusetts Law Quarterly at the time.

MR. DONWORTH: But that did not go beyond the law side of the Court.

MR. DOBIE: Mr. Chairman, I would like to ask a question, if it is in order.

Is there any question in the minds of the Committee as to whether there is any difficulty about our going into removal procedure, on the removal of cases from State to Federal courts?

THE CHAIRMAN: I have supposed the question of the right of removal is a thing we can't touch; but when it comes to the mere procedure in the District Court as to motions to remand, and things of that kind, it is within our scope.

MR. WICKERSHAM: Is there any real question there? That is a very simple procedure.

MR. DOBIE: The procedure is simple, but there

are some right difficult problems in there which the Supreme Court has never passed on; borderline cases; then there is the question of who can remove.

MR. WICKERSHAM: But doesn't that depend on the construction of the statute?

MR. DOBIE: The unfortunate thing about it is that those statutes are very badly drawn.

MR. WICKERSHAM: Well, is that really within our scope?

THE CHAIRMAN: Aren't you getting into the question of the right of removal?

MR. DOBIE: I think you are. That is what I am talking about. I shouldn't think that is a procedural question.

Suppose I bring a suit against Clark and Lemann; there is a possible controversy as to Lemann, but he is a resident of the State in which the suit is brought. The United States Supreme Court has never passed on that.

I should say the problem of who can remove is not a problem of procedure at all, but merely a problem of the right of removal. I don't believe that is a procedural problem, because that in-

volves the right of removal.

MR. WICKERSHAM: That is fundamental law; that is the right, not the procedure.

MR. DOBIE: Yes, I think so. There is a lot of stuff in there that I would like to see made clear, but I don't believe we can go into it. I would like to get the reaction of this Committee to it.

MR. DONWORTH: That seems to be just a case of omissions in the statute. That section says it may be removed on the petition of the defendant being a non-resident of said State, --

MR. DOBIE: And the possible controversy one doesn't mention that.

MR. DONWORTH: It goes on and says: "Whenever in any suit between citizens of different States, such suit may be removed by any person actually interested in said controversy."

It doesn't say "being a non-resident", but I think we will have to leave that to the Court to supply, some time.

MR. DOBIE: I don't think we could do that. If we could, I have very definite ideas. To me, the idea of a separable defendant -- there are two

cases, as you probably know, one holding one way and one the other. But I don't think we can go into that; I don't think that is procedure at all.

THE CHAIRMAN: That seems to be the general sense of the meeting. Of course, it may be, when you are working on this subject, you will find existing statutes that we can't change and that are not procedural matters, and it might be useful for you to accumulate a bunch of recommendations about that for amendment, just as a friendly gift to Congress; but I don't think it comes within our scope to deal with it beyond that.

Is there any other matter that anybody wants to bring up?

MR. CLARK: Mr. Chairman, under the English procedure they have certain provisions for shortening pleadings; one of endorsement on the writ a short and summary statement. Then there is another which is very recent -- they call it the new rules of 1932, I think -- providing for short ways of proceeding.

I am not sure whether we want to go into those things or not. My present impression is to be a little hesitant about it. In fact, I am

not sure that they change the situation very much, even in England. That is, there are several attempts under English procedure, definitely to shorten the pleading requirements that might occur in a complicated action.

MR. DONWORTH: Doesn't the statute that we have no connection with a case involving less than $3000, doesn't that throw some light on the problem?

MR. CLARK: I think it does, very much; and my present impression is not to go very far, if at all, in that direction; that is, have our rules quite general.

That is all I have.

MR. TOLMAN: Dean Clark, have you considered the question of costs, in connection with enforcing discipline, and control in regard to delays and fictitious defenses, on the losing party? Have you considered that as a part of the scope of the rules?

MR. CLARK: Yes, I should think so; and I should think certain provisions will come in. As a matter of fact, I don't believe they are awfully effective.

We have, for example, a provision in Connecticut for taxation of costs when the general

denial is used when it shouldn't be; and I don't believe a judge ever enforces it. But I am not sure but what it might be a good thing to have in. It looks as though --

MR. WICKERSHAM: The English judges do.

MR. CLARK: Yes. I don't suppose, though, we can change the American system of costs to the English system. The English system really makes costs mean something.

MR. DODGE: They are tremendously under attack now.

MR. LEMANN: May I ask, Mr. Chairman,has the Reporter any formative ideas, as to whether he is going to formulate an entire draft before the Committee meets again, or will it come to us in sections?

I was just wondering, in connection with the general program of the work of the Committee. I don't know whether he has been able to think that out.

MR. CLARK: Well, I don't know that I can answer that specifically. I should put it this way, that I was planning now to get a definite draft of the main features at least, if not all; possibly all,

but the main features, perhaps leaving for further consideration Discovery and these matters, by the early fall, for our meeting. Whether I can get anything prior to that to have your comment on, whether you want it that way or not, I don't know. I will be glad to have your suggestions, and I am willing to try to do it. I don't think I can get it until around the first of September, anyway. It might be just as well to try to get it to you in more complete form for the meeting in October.

MR. LEMANN: I should think we would generally prefer to have it all before us, if that is agreeable.

MR. DOBIE: You didn't contemplate any more meetings until fall?

THE CHAIRMAN: No, not until the Drafting Committee has got something for us to go over.

MR. DONWORTH: In regard to the motion adopted this morning as to our proceedings not being given out to the public, I would like an expression on this:

When we get a tentative draft from the Reporter, to what extent can we discuss that

with members of the Bar and others?

Shouldn't we have that privilege?

THE CHAIRMAN: I don't see how we can avoid it. About all we can do is when you consult people or confer with them, is to caution them and say the documents are not for publication. I think we tie ourselves down too much, and exclude too much in the way of good suggestions, if we refuse to let anybody look at anything we do.

MR. DOBIE: Yes. I had no such idea, Judge, when I made that motion. It was my idea that we should not go out and say, "General Wickersham was in favor of this, that or the other, but the rest of the fellows didn't like it, and opposed it"; things of that kind.

I don't think there is any objection at all, on the tentative stuff.

MR. DONWORTH: I would like an expression from Dean Clark on that. My idea would be, when we get the first draft on that, I would like to discuss it with some of our lawyers and judges, and perhaps at a meeting of the State Bar Association Executive Committee, something of that kind.

Isn't that along the right line?

MR. CLARK: My impression is that there, too, we should follow the model of the American Law Institute. They mark their material "Confidential", which I suppose means that they can disown it; and then it is discussed quite freely.

MR. WICKERSHAM: Oh, yes. It simply means the Institute assumes no responsibility for the mere suggestion.

THE CHAIRMAN: I will ask the Chief Justice if he won't consent to our using material that way, marked "Confidential", with the understanding that it is not to be published; and then use it pretty generally in the way you suggest. I don't think he will offer any objection to it.

MR. WICKERSHAM: You get more help from suggestions based upon a definite text than you can in any other way; but we still come back to Judge Olney's original suggestion of having a general outline of what is going to be covered.

Dean Clark, I come back to the original suggestion which Judge Olney made, about having a general outline. Is it feasible to prepare that and send it before September?

MR. CLARK: Well, yes. What I really intended to do was to send you something next week.

MR. WICKERSHAM: That is all right.

MR. CLARK: It depends a little on that -- I intended to make a fair summary --

MR. WICKERSHAM: That is what Judge Olney had in mind.

MR. CLARK: I wouldn't want to go very far.

MR. WICKERSHAM: Oh, no. As I understand, you mean a general outline of what the Reporter has in mind?

MR. OLNEY: Yes, not the details, but the general subject; not merely the subject, but also the object that you intend to drive at with your draft.

MR. CLARK: Yes

MR. OLNEY: In that connection I had in mind, too, the situation so far as San Francisco is concerned. The Circuit Judge there has appointed a committee, either directly or indirectly, I don't know; but he has appointed a committee and he thinks he is responsible for it, and he is.

I had in mind, when I got this draft, this

outline, to see him, and also to see the Committee itself and submit it to them, and ask them if they had any suggestions to make in regard to it.

I don't know what work they have done, but my thought was to interest them in it, get them interested in the thing and working along that line, and making whatever suggestions they have to make.

MR. CLARK: I think that would be quite all right.

MR. OLNEY: It would be informal. That is what I had in mind to do.

MR. CLARK: Yes, I think that would be quite desirable.

THE CHAIRMAN: On the matter of your expenses of attendance at this meeting, the thing is in somewhat of a state of confusion. owing to the fact that we haven't any direct appropriation, and all money now available is available only through the Department of Justice.

Major Tolman suggests that if each one of you will send in a statement of your expenses to Mr. Hammond at the Department there, Mr. Hammond will take whatever steps are necessary and advisable to get such an allowance as the Government regulations permit, and try to relieve you of a lot of detail about expense accounts, and so on.

MR. HAMMOND: Edward H. Hammond, just "Department of Justice", will be all right.

MR. DONWORTH: I wonder if Mr. Hammond is prepared to rule on the question of whether we should charge $5.00 a day for meals, or the actual disbursements?

MR. OLNEY: I can advise you that you had better use the $5.00.

THE CHAIRMAN: Mr. Hammond suggests you had better send in your expense accounts; maybe he can get more than the regular per diem allowance. Under

some peculiar features of this appropriation, he may get more for you; so that the best way to do it is to put in your bill, and they will get whatever the law allows. That is about it, isn't it?

MR. HAMMOND: Yes. You are entitled to your traveling expenses, including a Pullman and anything like that. Then the ordinary employes of the Government are entitled to $5.00 a day; but we are going to try to enlarge upon that, if we can, to make a more liberal allowance.

If there is any way of fixing that amount, it would simplify things. If you gentlemen want $10.00 a day, I would appreciate your saying so. Then, everybody would be entitled to that amount. If it went a little bit over, you would lose; if it went a little under, you would gain; but they are very anxious to have some set amount.

So far as this particular meeting goes, just show your traveling expenses, whatever they were, including your Pullman, and your actual sustenance, and we will take care of it in that way. But I was thinking for the future meetings, if we could sort of agree on a per diem, and then add to that the traveling expenses, it would simplify the bookkeeping and everything else.

THE CHAIRMAN: Can't we leave that to the Attorney General and the Chief Justice, to do what they think is permissible and fair under the circumstances?

MR. HAMMOND: Well, I don't know as the Chief Justice would like to limit it, anyway. He would appreciate, I think, a suggestion from you as to what a reasonable per diem would be. We realize that $5.00 is not enough to cover expenses. That is the only thought I had. If we could get some expression from you --

THE CHAIRMAN: I should think we would be cheerful about $10.00, which is double the regular statutory allowance for ordinary Government employes, and twice what a United States Circuit Judge gets when he travels around.

MR. DONWORTH: To avoid the idea that there is any profit at all, I am inclined to think it ought to be the actual disbursements.

MR. LOFTIN: Mr. Chairman, I wanted to inquire about paying for our lunch today; nobody came around to collect for it --

THE CHAIRMAN: That was arranged for by Major Tolman.

MR. LOFTIN: If the Major can get it out of the Government, all right; but if he is paying it out of his own pocket, I don't think that is fair.

THE CHAIRMAN: How about that, Major?

MR. TOLMAN: I am directed to take care of that, and send in a voucher. I hope I will get it back.

THE CHAIRMAN: I think it is appropriate at this time to say that we are all indebted to Major Tolman for his help here, and his hospitality, and in making our arrangements.

Is there anything else you want to bring up?

MR. LEMANN: Will future meetings be held in Chicago?

THE CHAIRMAN: I will consult the members of the Committee as to their preferences, before calling other meetings; just the way I did last time. I consulted everybody by wire, and reached the best compromise I could on it.

MR. DONWORTH: Personally, it is just as agreeable to me to meet in New York or Chicago. Of course,

I know New York better, but Chicago is all right.

THE CHAIRMAN: Well, it may differ at different times, depending on the plans of the members. If you are willing, I will just wire you in advance every time and get your recommendations and convenience as to date and place, and then I will do the best I can to conform to the will of the largest number.

MR. WICKERSHAM: I think it would be a mistake if all our meetings are in New York. Much as I would prefer to have them there, I think it is better to have meetings here occasionally.

MR. DONWORTH: Or in Washington, perhaps?

MR. WICKERSHAM: Or in Washington.

MR. CLARK: I might say, the Association of American Law Schools is going to New Orleans just after Christmas. That is a nice place to go.

MR. TOLMAN: I was going to suggest that, some winter time, we might meet in New Orleans.

THE CHAIRMAN: Well, if there is no further business, we are ready to adjourn.

MR. OLNEY: I move that we adjourn, subject to the call of the Chairman.

MR. WICKERSHAM: Second the motion.

THE CHAIRMAN: The motion is carried.

(Thereupon, the first meeting of this Committee adjourned subject to the call of the Chairman.)

IN SESSION.

Thursday, November 14, 1935.

The Advisory Committee met pursuant to adjournment at 8 o'clock p.m.

Mr. Mitchell. Where did we leave off? We finished with Rule 7, I believe. We are now up to Rule 8.

Dean Clark. That Rule 8 is now mainly Equity Rule 5. In that I think I would eliminate the words "for entering judgment by default." Now, we have been using the word "default", without saying "judgment by default", and trying to keep the idea of default, or order of default as not in the nature of a final judgment, on the theory that the entry of a default makes the case ex parte, and there must be further proceedings to go forward and establish the amount by another judgment. In other places we have limited the expression to just "default". And the other point I have in mind, to take out the words "or the judge" is the same point that we have discussed before. Those are the words used in the Equity rule.

Prof. Sunderland. Did we not adopt something about the judge as distinguished from the court?

Dean Clark. We did not do very much; and it is possible that we should do more. But you will remember that we provided that

"Any district judge may, upon reasonable notice to the parties, make, direct and award, at chambers or in the clerk's office and in vacation as well as in session, all such process, commissions, orders, and other proceedings, whenever the same are not grantable of course, according to the rules an practice of the court."

That is Rule 4. Now, it is possible that the word "such" is a limiting word in that expression. That is in Rule 4 that I am referring to.

Mr. Dodge. Is it customary to file motions in the clerk's office for things that the clerk can do himself?

Mr. Morgan. If they have to be done after notice, I think he will have to have a notice of a motion or a motion.

Mr. Lemann. Well, that is for anything he can do; that is just a ministerial thing, and we can just send a messenger or office boy. I do not think we would ever file a motion.

Mr. Morgan. Do you have to give notice of that?

Mr. Lemann. No.

Mr. Morgan. Suppose the clerk taxes costs and you have to give notice of taxation of costs. In good many of the code States, you do not file a notice of motion. The notice is not in writing.

Mr. Lemann. That stands a little different from the oral application granted as of course, just to issue a

complaint, or file something of that sort.

Dean Clark. That is the process of initiating suit.

Mr. Mitchell. Yes.

Dean Clark. That is true except in a case of provisional remedies. I am not sure the word "process" is not misleading here.

Mr. Donworth. Dean Clark suggests eliminating "judgment by default", which I think is an improvement.

Mr. Lemann. Suppose the defendant is defaulted for not appearing in court at the time of the trial, and default is entered at once, the clerk's function would be what there?

Dean Clark. We have not made any specific provision, except that the case shall be proceeded with ex parte, and I suppose judgment then must be entered by the judge.

Mr. Lemann. Are you speaking of when he first appears for trial?

Mr. Dodge. Could that be a default?

Mr. Morgan. There could be default in appearance, in pleadings, or at the trial.

Mr. Lemann. Well, does default cover default at the trial? In our State we use it only in default in answering and not in appearing at the trial.

Mr. Morgan. Then you would have two cases where you would use it; the first where there was no appearance of

the defendant, secondly, where there was no pleading.

Mr. Lemann. We have no special way of entering an appearance. The only way you appear is by a motion or an answer.

Mr. Morgan. So that you cannot plead unless it goes on later.

Mr. Lemann. No. We take a trial judgment by default, and two days later a final one.

Mr. Morgan. Yes, but the defendant could not appear at the hearing on the rule.

Mr. Lemann. He has two days after answering in which to ~~appeal~~ plead.

Mr. Morgan. How does he plead?

Mr. Lemann. The only way he appears is to plead. He can cut off a dilatory plea. You could not ask for a bill of particulars any more.

Mr. Doble. You mean you do not have any such thing as an appearance without pleading?

Mr. Lemann. No. Well, if the defendant pleaded and does not show up, and usually somebody says what has happened to them and they grant a continuance; but if the judge is hard-boiled he might say, "Go ahead and try your case," and the judge tries the case for the defendant.

Mr. Morgan. What is it, if he does not appear at the trial; but if he joins issue and there is a trial but if

s, yo ca

for liquid-

; if it is

is not

unless he had

bear and give

; the last

attention

this after-

e com-

e can

run

ral

ve the sum-

ons without a motion [illegible], that the defendant may demand the plaintiff [illegible] days to hand it to him; and then he answers it. That is a mere detail.

Mr. Tenworth. I thought we had adopted the syste whether or not the complaint is filed with the clerk.

Mr. Mitchell. No, we passed a resolution that a man can either file his complaint with the summons, or in certain cases not file it, but state that he attached a copy, and state in the summons that copy is attached. But when a man asks for a copy of the thing, he has 20 days. That I understood would be worked out by the drafting committee.

[illegible] Clark. I think we can work that out by the [illegible]. [illegible] can work that out. When [illegible] XX. [illegible] plaint is on file, can not the defendant go [illegible]

[illegible]. Yes, [illegible] will not have twenty days [illegible]. [illegible] will be [illegible] f.

[illegible]. [illegible] customary pro- [illegible] of [illegible] with copy of complaint.

[illegible]. [illegible] days is allowed to answer; but [illegible] without a copy of the complaint, [illegible] to demand a copy of the com- [illegible] twenty days after he has received it.

[illegible]. [illegible] had only ten days after he [illegible] receive it. [illegible] it is only ten days in New York.

r. [illegible]. [illegible], twenty days after the service of [illegible] to reply.

r. [illegible] copy, then he is allowed [illegible].

[illegible]. [illegible], [illegible] is allowed him to ask for [illegible] work out.

[illegible] to default. I was wonder- [illegible], [illegible] of those that we are consider- [illegible] for default in practice by pro- [illegible] default and get a [illegible] action by the court.

Mr. Hemann. Does not Rule 17 contemplate a pleading? Suppose I enter my appearance.

Dean Clark. Yes. Now, on the appearance I had a rule that covers that, that filing an answer shall be an appearance. But in the case of other parties, under Rule 16, they can enter their appearance. That is quite the point that Mr. Mitchell has in mind.

Mr. Mitchell. No. You say here if the defendant does not file an answer the plaintiff may take a default against him, and thereafter the action shall be proceeded with ex parte. Now, my experience has been that where there is lack of answer in default, the rule under the code statutes should provide for the entry of judgment, and in cases where the claim is liquidated the clerk enters the judgment. If it is an unliquidated claim, there has to be machinery provided for the ascertainment of the amount of damages. And I was wondering whether the drafting committee has covered those alternatives.

Mr. Donworth. Do you think the clerk under any circumstances should have the right to enter a judgment? Under our practice it is always done by the judge. I do not know how extensive the practice is, if it exists at all, about the clerk entering the real judgment.

Mr. Mitchell. Well, when I talked about the Code States, I was referring to States like Minnesota, Iowa and North Dakota, and perhaps a number of the States in the Northwest. And

their statutes provide that a case is in default--and the summons, in the first place, has to be either for a liquidated sum stated in the complaint, or an unliquidated damage claim. If it is an action on a note, for instance, for a specific sum, you file your affidavit with the clerk, following the answer, and the clerk pro forma enters judgment in the amount of the claim. But when the claim is an unliquidated claim for damages, for malicious prosecution or personal injury, then the statutes provide for the assessment of damages and the clerk can enter judgment on default if the claim is of a liquidated type like a note.

Mr. Ronworth. I see the distinction, but there is a little difference in the two forms of action, but in any case the proceeding is before the judge.

Dean Clark. Well, we did not cover that. We had a little hesitation about doing it. If the Committee thinks it should be covered, of course it can be very easily done along the line suggested. The Equity rules do not cover it. This is in effect the Equity rule taken over. The Equity Rules say the order shall be taken pro confesso. Of course, that is if it is liquidated.

Prof. Cunderland. In our State it is a question of how you ascertain it

Mr. Mitchell. When a party or his lawyer is in

default . . . it ought to be like a liquidated judgment.

. . . . . covered one way or another.

Mr. Loftin. In our State we also have the practice of entering judgment on liquidated damages. Do they do that in . . . States, Mr. Hodges?

Mr. Hodges. Yes.

Mr. Holtzoff. That is done by the clerk, is it?

Mr. Wickersham. Yes. The . . . of rules prepared by the Bar Association of the State of Minnesota provide--and it is . . . in the middle west: "Default judgments--It shall be the duty of . . . defendant to appear and file in the clerk's office a demurrer or answer to the complaint within twenty days after the service of the summons, or such additional time as allowed by law, unless the time shall be enlarged by stipulation of counsel, or by a judgment by the . . . shown. In default thereof judgment may be entered as of course upon the filing of an affidavit of no answer ~~or~~ and actions upon contract for the payment of money only, . . . for a sum certain. In all other actions, after default, the plaintiff may apply to the court to . . . the relief to which he is entitled, ascertained either . . . or . . . for that purpose, and when to be ascertained . . . ment may be entered therefor."

. . . , that, I will conclude, is the problem I wanted to bring . . . about it.

...can Clark. He just did not make express provision as to how the court would fix the judgment. If it is to be done by the clerk, without action by the court, a few words here may be changed:--The plaintiff may take a default against him, and the action shall be proceeded in ex parte as to him, and the clerk may enter judgment for the appropriate relief, subject to the power of the court to reopen the case as hereinafter provided.

Mr. Mitchell. They would apply to the judge in every case for judgment by default.

Mr. Morgan. Do I understand that in Louisiana the judge merely enters an order?

Mr. Lemann. We enter a judgment and the clerk gets it on the minutes, and two days later we appear and move to confirm that default. If is a promissory note, we offer it in open court.

Mr. Morgan. And what does the judge do?

Mr. Lemann. The judge says, "Let there be judgment."

Mr. Morgan. He signs the judgment?

Mr. Lemann. Yes, he signs the judgment, just like he does in a contested case.

Mr. Morgan. He does not in a contested case in many States.

Mr. Pickersham. Why is not the equity rule a good one to follow? It could be adapted to common law practice. If

it is an equity case the rule says the plaintiff"may take an order as of course that the bill be taken pro confesso;" that is, in other words, the decree that the defendant is in default and that judgment shall be entered.

Mr. Lemann. Is that not signed by the judge?

Mr. Wickersham. No, that means by the clerk. Now, when the bill is taken pro confesso the court may proceed to final decree, and so on. There you have got the distinction; first, the decree pro confesso, which is taken in a common law action judgment by default, then, if there is anything to be shown in the way of damages, that proceeds ex parte and the judge enters the final judgment.

Dean Clark. Yes, that is what follows. The only difference would be to put in the expression. We could have it as I have indicated, and after "the action shall be proceeded in ex parte as to him", then put in this expression, "and the court may proceed to final judgment."

Mr. Mitchell. Well, under that rule, there is a question in my mind as to how you will get judgment. Will you have to go to the court and get an order, or get a judgment as a matter of form from the clerk?

Mr. Donworth. Under our practice, even on a promissory note, the twenty days have expired, and you go into court one morning and the judge says, "Are there any motions?" And you say, "Yes, I have an action in which the defendant is in

default." it is always with the judge. But as I say, the other method is all right. We have followed the same practice in unliquidated cases as well as liquidated cases; except that the judge will require proof on an unliquidated claim, and on a liquidated one he would say, "What is this about?" And you would say, "A promissory note," and he would give judgment.

Mr. Mitchell. I think the other raises the question as to who shall settle what is to be done.

Mr. Lemann. In some places it is done one way and in other places it is done in other ways.

Mr. Mitchell. That is what I am getting at.

Mr. Lemann. The usual rule may be for the clerk to do it; and I can see where it would be objectionable to put it on the judge; and perhaps we might compromise and fix it so that the clerk could enter what corresponds to pro confesso or preliminary default.

Mr. Wickersham. Well, if there is a default, and there is no question of unliquidated damges, and the action is on a promissory note, for example, why should not the order on that be entered by the clerk? For example, in Pennsylvania they have a practice by which a man who borrows $500 and gives a promissory note--what they call a shirt-tail note, there is a provision that, in the event of failure to pay, the

maker of the note constitutes any attorney in the State as an attorney for the purpose of entering judgment against him. So that when that note become due, if it is not paid on presentation, any lawyer who is the holder of the note goes over to the court and presents the form, and the clerk signs and stamps it, and that is the judgment.

Mr. Lemann. Now, is there to be a distinction in law cases and equity cases? In our State we have a preliminary judgment by default pro confesso and a final judgment. Now, in law actions generally, under the code, you do not have that.

Mr. Loftin. Not where it is a liquidated sum under contract; that could not be equity.

Mr. Lemann. I understand that. Now, so far as it is tort action and there is a default--in case of personal injuries where the person was run over by an automobile, what happens?

Mr. Loftin. There would be no preliminary judgment.

Mr. Lemann. You would get your judgment right off?

Mr. Loftin. That is it.

Mr. Lemann. Whereas, under our statute you would have a period of grace to come in and defend, except that equity allows a large period of grace and we allow a small one. Now, it seems to me that these uniform rules are intended to reconcile those differences; that is the first thing to decide.

Mr. Loftin. What good does that period of grace do?

Mr. Lemann. For instance, if you have a default taken, you had better go down and do something about it.

Mr. Loftin. In our State you cannot enter judgment by default, unless you have a notice. But in our State the defendant never answered until you got a judgment against him, and then if he did not answer ~~and~~ the court passed a rule that they could put in a default judgment--and the legislature repealed that rule the next term. You see, it is just another reason for delay. I think interlocutory judgments are just a stench.

Mr. Mitchell. Let us look at it from a practical standpoint. In the administration of justice, the courts are overworked. Now, we have two systems to choose from in the case of default on a liquidated sum under contract; either you can take five or ten minutes of the court's time to make an order, or under the other system you would file an affidavit with the clerk for a liquidated claim, where the demand is a sum certain, and save five or ten minutes of the judge's time. Now, that is the practice. My experience has been that where you have this code system in a liquidated claim, in an action under contract for a sum certain, and the clerk can enter judgment on an affidavit and no answer is filed, it works perfectly and saves five or ten minutes of the judge's time.

Mr. Lemann. What would you do with unliquidated claims?

Mr. Mitchell. In unliquidated claims you file an action, and by court action get the assessment of damages.

Mr. Lemann. You would have no period of grace.

Mr. Mitchell. No.

Mr. Lemann. Then what do yo do with days of grace in equity if you are going to have but one system? I suppose that goes out.

Mr. Mitchell. Yes, that goes out. You could file an affidavit that no answer has been filed, and it shows a default, and the court goes on and has summary hearing to see whether you are entitled to the relief sought.

Mr. Lemann. But here you have a final judgment, because you get that judgment right off the bat. Is that right?

Mr. Mitchell. No, there have been two decrees.

Dean Clark. I think there are two different questions that need not necessarily be taken up at one time. One is the question of the affidavit to be used with the clerk. The other is to use stamps, even if the clerk does it. Now, under the question of whether you have two steps, how about the situation where default is entered for something other than non-appearance? It is now provided in the rules, that a failure to comply with the rules may result in the entry of a default; and then you should provide that notice must be

given of that entry of default; in that case you would not have it in two steps.

Mr. Morgan. You might have it in two steps. This notice might be merely to make a motion to have the judgment set aside, for neglecting, and so on.

Dean Clark. Yes.

Mr. Donworth. I would like to ask Mr. Mitchell to state the practice in Minnesota. Does it have to be on notice and does the court have to pass on it?

Mr. Mitchell. No.

Mr. Donworth. That is on a promissory note, or something of that kind?

Mr. Mitchell. That is an unliquidated claim for damages, such as damages for personal injury, and there you have to have the court rule on the amount.

Mr. Wickersham. Well, ought not the rules set forth the proceedings when the suit is for a fixed sum of money?

Mr. Mitchell. Yes.

Mr. Wickersham. Whether or not it is unliquidated or for other relief?

Mr. Mitchell. Yes. You have a choice of putting it up to the court and getting an order from the court in every case. The other is to have certain types of cases judgment entered by the clerk and in the other entered by the court.

Mr. Wickersham. Well, with regard to liquidated

claims, where there is no question of judicial action in acting in the amount of relief to be granted, but it is a pure matter of computation, ought that not to be entered as of course by the clerk? Then when you come to unliquidated damages, you must have proceedings by the court, and when you come to the proceedings followed in equity, then you must have an injunction.

Mr. Mitchell. That is the Western code system.

Mr. Wickersham. That is a logical system.

Mr. Mitchell. It works well and saves a lot of time for the court.

Mr. Wickersham. Yes. There is no use using the time of the court. He does not use any more judgment in those cases than the clerk; and the defendant retains a remedy. He can make an application to the court to reopen the judgment.

Dean Clark. I think that is quite all right; but I think that is a definite change from the Federal procedure. I suppose we can change the form of proof. In fact, I was rather inclined to argue in general that we could change the rules.

Mr. Morgan. I understand that is the rule.

Dean Clark. But as I understand the rule now, the clerk does not enter judgment.

Mr. Mitchell. If the court thinks it wants to be relieved of that, I see no reason why it should not be.

Mr. Lemann. In your Federal courts, do the clerks

enter judgment?

Mr. Dodge. No.

Mr. Lemann. On a liquidated claim?

Mr. Dodge. No; it has got to be approved by the judge.

Mr. Lemann. And the judge signs the order?

Mr. Dodge. He does not sign anything; he directs action.

Mr. Donworth. How about in Minnesota? Does the judge perform the action?

Dean Clark. Well, I am more familiar with it in our State. In our State courts it is done. The Federal court clerk says he never enters the order.

Mr. Morgan. He follows the usual rule, that he has got to have either a rule of the court or a statute; otherwise the clerk has no power to enter judgment.

Mr. Donworth. How about a foreclosure?

Mr. Mitchell. The rule is the same. A foreclosure action is heard on motion day.

Prof. Sunderland. There are two steps on that.

Mr. Mitchell. Not two steps in a foreclosure. You get an order for a judgment of foreclosure. Of course, there is a second rule.

I think When he gets to that stage, the thing for him to do is to take a rest. He cannot do the impossible.

It is a matter of discretion.

Mr. Wickersham. These discussions are off the record.

Mr. Mitchell. I suppose we ought to be more orderly in our proceedings, by requiring each person who speaks in this conference to address the Chair.

Mr. Lemann. How would it do to pass this, with the understanding that the Reporter will make an investigation as to the actual practice in the Federal courts with regard to entering judgments, and report on that at our next session. I do not at all oppose the idea of ~~xxx~~ entering judgment on liquidated claims, if that is done. I do say that that is not usually done in the Federal courts today.

Mr. Olney. It is done in our courts.

Mr. Wickersham. Would not the court follow the local practice?

Mr. Olney. Certainly, it is done in California.

Joan Clark. It is not a uniform practice. I wonder if it would not necessarily follow the "Uniformity Act" anyway? It is a matter of evidence.

Mr. Mitchell. My attention has been called by Mr. Hammond to the fact that the Federal courts follow the State practice, and in our State they do allow default in liquidated cases. It follows the rule in Minnesota.

[illegible]. Is there a local rule?

Mr. Mitchell. Yes, there is a local Federal rule.

Mr. [illegible]. We have a local Federal court rule.

Mr. Mitchell. I should be could find out from the secretary of the Conference. You do not know, Mr. Hammond, do you?

Mr. Hammond. No, I should not know that.

Mr. Noble. Suppose that investigation shows that the practice is not uniform, and under the Conformity Act the court would not permit the clerk to enter judgment. We want the clerk to enter judgment in the case of liquidated claims. Is that the idea?

Mr. Morgan. The judge is willing to have it done where it is the federal court practice, and saves considerable expense.

Mr. Olney. In what cases are they allowed to permit judgments to go without proof or default? That means in those cases judgment is a purely ministerial thing, and requires no judicial action in any sense, but can be left to the clerk, instead of being ordered by the judge. In cases of tort [illegible] not willing to permit judgment to go merely upon default.

Judicial action is required, and there should be some application before the judge, and this should be along that line.

Mr. Mitchell. Yes, and we ought not to be hide-bound by the practice. There the system of entry of judgment by

the clerk, and it is an efficient and satisfactory one, we ought to insist upon it and not be too timid about upsetting the old system in the Federal courts.

Mr. Lemann. Why not refer the question to the Reporter, [illegible] to make a motion on that line?

Mr. Mitchell. Well, is there any motion?

Mr. Morgan. Is there any doubt that in this group, things that where a claim for a liquidated amount, no judicial action at all necessary?

Mr. Lemann. I thought everybody was agreed about that but let us keep a record for the Reporter, let us make a record of that fact.

Mr. Mitchell. I suppose you make the motion to raise the question.

Mr. Lemann. Yes, I make that motion.

Mr. Morgan. I second the motion.

Dean Clark. Would you require then an affidavit, or would it be simply required in the form of the instrument of indebtedness?

Mr. Morgan. An affidavit of default.

Dean Clark. That is what I supposed; that is, the plaintiff files an affidavit of indebtedness and shows the instrument, if there is one.

Mr. Mitchell. That is right, and then he gets a judgment by default.

Mr. Wickersham. Where the claim is in a fixed sum which is ascertainable by ready and easy computation.

Mr. Mitchell. Yes, you will find that in our code.

Dean Clark. Yes. Judge Olney suggested that this was a mini trial act, because there was nothing more than a default, and he did not quite mean that it requires any kind of proof other than the affidavit.

Mr. Mitchell. Other than the affidavit; but I think you will find in many States that if it is on a note you are required to file the document.

Mr. Cherry. That is by rule of the court.

Mr. Mitchell. That is a matter of detail that can be worked out.

Well, the motion is clear. All in favor of that will signify by saying "aye", those opposed "no."

(The motion was voted upon and unanimously adopted.)

Mr. Lemann. I think the affidavit should also bring out the amount of difference. ~~It is not customary.~~

Mr. Mitchell. It has to show, the form of affidavit, non-appearance, and I suppose they have to show the sum claimed, and that there is no appearance.

Mr. Olney. May I inquire if this affidavit that you have in mind is an affidavit as to the merits?

Mr. Mitchell. No.

Mr. Olney. That is the affidavit simply of default?

Mr. Mitchell. The affidavit states the sum under contract, and gives the amount with interest, and states that there is no appearance and no answer, and on that affidavit the clerk makes entry and gives judgment for the exact sum.

Mr. Lemann. It is not an affidavit on the merits in the final sense?

Mr. Mitchell. No.

Mr. Lemann. You shake your head, so that is not settled.

Mr. Cherry. In Minnesota, you stick that in your bill of costs, but it is not sworn to.

Mr. Wanamaker. You make an affidavit of non-appearance.

Mr. Cherry. That is all.

Mr. Olney. If a man has not answered in the prescribed time, that is the end of the matter.

Mr. Mitchell. Yes, if he has not that ends it.

Mr. Olney. The clerk adds the interest and includes it in the judgment.

Mr. Mitchell. Yes, it is purely a ministerial act.

Mr. Morgan. And the clerk also taxes the costs at the time. If a person is in default, he is not entitled to notice of default.

Mr. Lemann. Well, there are two kinds of claims. If it is a liquidated claim, you get it from the clerk; if it is an unliquidated claim you get it from the judge.

Dean Clark. In cases where the judgment is not for failure to originally appear, but for some subsequent default--

Mr. Wickersham (Interposing). There should be an entry of an order from the judge.

Mr. Donworth. It is only for non-appearance.

Mr. Mitchell. There is only one thing, that you affidavit is merely for non-appearance. In New York, in the State procedure, do you not have to file a verified claim?

Mr. Wickersham. Of course you have to file a verified claim.

Mr. Mitchell. My impression is that that is not as it is done in Minnesota.

Mr. Wickersham. In New York the verified complaint sets forth a cause of action. If it is on a note, the proceeding is of the simplest character. Nevertheless, it is a verified pleading.

Dean Clark. Now, the complaint does not have to be verified, unless the clerk chooses; in this case it would have to be verified.

Mr. Wickersham. In this case it would have to be verified; otherwise he would have to go to court and prove his claim.

Mr. Mitchell. In Minnesota the clerk can give judgment for the sum when an affidavit is filed.

Mr. Lemann. If the man does not come in and put in an appearance.

Mr. Morgan. Yes, you are answering it on his non-appearance, and not default. And by not answering the thing he has personally confessed it; just as by answering only one allegation you can take judgment on the other.

Dean Clark. I think in some respects Minnesota is better than New York.

Mr. Wickersham. Mr. Hammond calls my attention to one variation of that rule in New York. You can serve a summons with notice, and that notice is a demand for a fixed sum, with interest. In that case, you do not have to file a complaint if there is no appearance or answer; you can take judgment by default.

Dean Clark. So you not have to file a verified complaint in that case?

Mr. Wickersham. No. That is a variation.

Mr. Mitchell. We can provide that he can file it where it is for a definite sum.

Mr. Wickersham. In New York we have that variation of a summons on a note. That is, that in the summons he says, "Take notice that the plaintiff demands the sum of_____ dollars, with interest on such a date." Now, if there is no appearance and no answer to that, then you may enter judgment by default. But ordinary cases you have to serve a complaint and verify it before you can get judgment.

Mr. Donworth. Well, this clause remains, by which after mentioning these things it says it may be rescinded or amended by the court on special cause stated.

Mr. Cherry. In Minnesota, you issue a summons and you state the consequences of default, and if it is a liquidated amount that you will take judgment.

Mr. Wickersham. That is substantially the same as our notice in New York.

Mr. Morgan. If you say you are going to demand the relief stated in the complaint.

Mr. Mitchell. If you have a liquidated claim, then you can take judgment for a stated sum, plus interest from a certain date, and it works very well.

Mr. Tolman. Mr. Chairman, there is one other clause here that it seems to cover an entirely separate thing. That is this clause which says, "and for other proceedings in the

clerk's office which do not require any allowance or order of the court or of a judge." I am wondering where we can ascertain, either under these rules or elsewhere, what are those proceedings?

Mr. Morgan. What rule is that?

Mr. Tolman. Rule 8, "and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge."

Dean Clark. Major Tolman is quite right. The Equity rule did not specify, and I frankly did not know what to do myself about it. It is left somewhat doubtful in the Equity rules.

Mr. Wickersham. That language was taken from Equity Rule 5.

Mr. Tolman. It seems to me that the situation is different.

Mr. Wickersham. I mean that language is taken from that rule.

Mr. Morgan. What about the taxation of costs? In a good many of the Code States that is provided for.

Mr. Wickersham. The matter of taxation of costs is determined by the court.

Mr. Morgan. The costs may be disbursements.

Dean Clark. This Equity rule goes back to the earlier Equity Rule of 1822. The court said as to that, that

what constitutes a motion for the grating of costs is to be inferred from the 5th Rule of Equity.

Prof. Sunderland. That same idea is included as to the court; it says when they are not granted by the court. It is the same question as raised in the other case.

Mr. Mitchell. We have got to have all of these rules, under any view that is expressed here, on the theory that they will go to the court in order to get judgment.

Mr. Morgan. Then we do not have these double steps now when the clerk takes the second step.

Dean Clark. There are still certain things that the clerk can do with the writ of sequestration or attachment, where the party has complied with the decree. That is in the provision for execution of judgment, at the end. Also I find in one of the courts that the admission of the attorney is taxed as costs. (Laughter.)

Mr. Wickersham. I [illegible] there was any State left where that was still true.

Dean Clark. None in the federal court. In the State court, you have to have a lecture from the presiding judge. (Laughter.)

Mr. Mitchell. Dean Clark, in view of the fact that it seems sort of inconsistent here, do you think you not have sufficient

instructions to put that in shape?

Dean Clark. I think I have sufficient instructions with regard to Rule 17.

Mr. Olney. Before we leave Rule 17, I notice that you use the language, "If the defendant does not file his answer or other defenses in the time provided, the plaintiff may take a default against him, and thereafter the action shall be proceeded in ex parte as to him." That would not leave out my way, I think, that the complaint or the bill would be taken pro confesso. It would not be taken pro confesso; but the man would be required to produce some kind of proof of all the averments of the bill. He would be proceeding ex parte without any opposition, but he would be required to bring proof.

Dean Clark. Yes, that is what we contemplate, that he would have to produce some evidence.

Mr. Olney. Of all the allegations of his bill.

Dean Clark. Well, that is what I had in mind, that your affidavit would be on the merits.

Mr. Morgan. Not on the liquidated claim.

Mr. Olney. When you were speaking of the judgment on default of unliquidated damages, for example, the practice was never for the court to concern itself with the merits of the case, or with anything but merely the question of the amount of damages. That has always been my understanding.

Mr. Mitchell. Will the rule not have to be con-

pletely recast, Dean Clark?

Dean Clark. Yes.

Mr. Olney. That expression in my jurisdiction, in my State, would mean that that judgment is the same as pro confesso.

Mr. Morgan. While you are on that, you might change that property rights in the action shall be proceeded in, and so on.

Mr. Donworth. Are we adopting that now?

Mr. Mitchell. We have adopted the principle, as I understand it, that in case of liquidated claims the clerk may enter judgment, but where it is unliquidated it will have to go before the court; and I think Rule 17 will have to be recast.

Mr. Donworth. There is an independent point in Rule 17 that I would like to discuss. That is, I do not find anything in the rule regarding the form of the summons. In some jurisdictions the form of the summons is set up. I think it is objectionable to allow the court to extend the time for service of the summons. In all cases, the defendant should be allowed 20 days. Now, if there are additional remedies those are taken care of by motions or special notice. For instance, we often in an injunction case file a complaint, and the summons is in an invariable form, but we apply to the court for an order to show cause in 10 days why the defendant should not be enjoined so-and-so. Now, that is in 10 days.

Dean Clark. The rule, Judge Donworth, leaving out the question of the form of the summons, is in Rule 11; that gives the form of the summons, and then there is the provision in brackets, which seems to cover what you have in mind.

Mr. Donworth. I think it is objectionable to require an invariable time for the answer; but I think there should be no change whatever in the form of the summons or the answer.

Dean Clark. Rule 11 does provide for the form of the summons, and if this provision of Rule 11 should remain the summons would have to state the time. That is the provision in brackets in Rule 11. Now, on the matter in brackets, that was merely put in there to show what the Committee thought about it. But as a matter of fact, we desired to have justice expedited; and on purely formal matters is there not something to be said about the power of the court to shorten proceedings. In a good many matters, there is nothing but formal proof; and that is why we have provided for this method; it is a method of speeding up the process.

Mr. Donworth. The court may make an order ex parte.

Mr. Morgan. Yes, ex parte; that is the trouble.

Mr. Olney. Well, although the court makes an original order shortening the time, if that is injurious to the other party, he can go to the court and have that time set aside and be allowed additional time.

Mr. Lemann. Is that the rule in California?

Mr. Olney. Yes.

Mr. Morgan. You are putting more work on your judge.

Mr. Lemann. That is a new thought to me.

Mr. Dodge. It is frequently done in Massachusetts. The complaint is filed and the time for answer is set, and the defendant comes in, and the court orders the case up forthwith; and it is referred to a master. It is a great engine for speed.

Mr. Cherry. Except for the temporary injunction, that would be for the defendant's protection.

Mr. Dodge. Not necessarily.

Mr. Lemann. Of course, on your temporary injunction, that allows you time to plead to the bill.

Mr. Dodge. The judge may want the case to be decided at once, in order that the whole issue may be determined quickly. It is an important power for the court to have.

Mr. Wickersham. How would it be, instead of having a uniform rule, to have an exception that in actions to recover a fixed sum of damages, the answer must be served in 10 days.

Dean Clark. In many States, I think in actions concerning the holding of real estate the time is made very short, in order to get a speedy determinatio .

Mr. Wickersham. In summary proceedings you mean?

Dean Clark. Yes.

Mr. Wickersham. But in certain cases in the city

courts it is 6 days after service of summons and complaint. But in dealing with these Federal district courts, you might if you want to expedite the thing provide for a further time in addition to recover a sum certain. It may be ten days instead of twenty.

Mr. Donworth. It seems to me that it would be difficult to get support for the rule with anything as unusual as that shortening of the time on an ex parte application, because it will be considered tyrannical; and the possibility of a tyrannical proceeding is not to be thought of

Mr. Dodge. Suppose it is on a return day, on short notice.

Mr. Morgan. It does not apply to time to plead after the return date.

Mr. Dodge. I thought the rule required that the answer would be ready in 2 days.

Mr. Cherry. No, the question is whether the court can, on an ex parte order, fix that time.

Mr. Lemann. If you have a suit you can file your complaint in the clerk's office, and go to the judge and say, "Judge, I would like to have quick action, and I would like you to issue a summons for the defendant to answer in ten days." And the judge may say, "I think you are right" I will make this ten days." And of course the man may

come in and say, "Judge, look here. That fellow is not telling the truth. I need the twenty days," and there will be an argument.

Mr. Wickersham. Now, as a matter of fact, how important a subject is this? The number of suits to recover a fixed sum, actions at law in the Federal court, is not very large. Those cases get into the Federal court largely by removal at the instance of the defendant but if you have a suit on a promissory note for $3,000 or $5,000, you do not sue in the Federal

county [illegible] It is a simple remedy. It is an exceptional case where we will go into the Federal court [illegible] for [illegible] under contract.

Mr. [illegible] If you [illegible] going to be much trouble, [illegible] on [illegible] note, you bring it in the [illegible] correct result. ([illegible])

Mr. Lehmann. [illegible] to give any consideration, when [illegible] time being 20 days [illegible] earlier day, to provide for [illegible] elastic time. We have ten days now; but it may be [illegible] days. [illegible] in Wyoming they think that [illegible] in Philadelphia they think it is a long time. [illegible] it not exceeding 20 days. But [illegible] in any case, your argument [illegible] not be so potent. [illegible] if you had a provision that [illegible] 40 days, it might be more potent.

Mr. [illegible] afternoon a motion to [illegible] alternatives, 20 days [illegible] to [illegible] days.

Mr. Lehmann. [illegible] settled that. It is [illegible] judicata.

P[illegible] be [illegible] could you use [illegible] to be

contest, there is no objection to 20 days. If there is no defense, you want a short notice.

Mr. Lemann. Do you mean by default?

Prof. Sunderland. Summary judgment on affidavit proof.

Mr. Lemann. Well, could you force them to answer?

Mr. Mitchell. There are some special provisions later on about summary judgment. We jumped over to Rule 17; and I had an idea that if we went back to Rule 8 or 9, we would reach that in due course.

Dean Clark. On Rule 9, I think you asked if I had sufficient instructions. Of course, I have not, quite know how to make that more explicit. It was not very explicit in the Equity rule. Possibly you do not want it in at all; you do not want any attempt to define the clerk's job. But I should say that anything we can do to have the clerk do things is desirable. We have later on, in the provisions for making up the record, if the provision stands, giving certain powers to the clerk in the first instance--to determine as to the record, and determine as to the elimination or condensation of the record, with an appeal to the judge.

Mr. Mitchell. Why would it not do to let it stand for the present and later on we can decide whether we want it back?

Mr. Tolman. That is true. I can prepare something and put it in as to that.

Dean Clark. All right; that will be very fine, and

we will be glad to have it.

Mr. Mitchell. Then we will pass on to Rule 9. Dean Clark.

Rule 9 is in part a development of of Equity Rule 6. Without requiring the motion day once a month--that is a part--because the latter part of the provision is new and is designed to make unnecessary a good many of the hearings; and the latter sentence is an attempt to provide that the normal course shall not be an oral hearing on a motion. As to that, this is like the English procedure, and there were several suggestions from different places. Judge McDermott, of the Illinois district, has a rule, and there were other suggestions that I think we have here from the local committees. I have not got the hang of these papers yet. I will ask Mr. Hammond about it. (After conferring with Mr. Hammond). Now, if you take the suggestions of the local committee, Kansas has such a suggestion; and as I say Judge McDermott has one. And I think the Colorado district judge made a suggestion of that kind.

Mr. Loftin. As I understand, Dean Clark, there is no such practice in any State at the present time.

Dean Clark. Yes, there is. It is true that the practice is not very general. The practice exists, as I understand, in Texas. It is quite similar to the English provision. It exists in the local court in Illinois, as I understand it, Judge McDermott says he has liked it when he sat in the

district court. He is now on the Circuit Court of Appeals. He applied it without formal rule.

Mr. Lemann. Is there not practice in New York by which you hand the papers to the judge, and he deliberates without any hearing or oral argument?

Mr. Wickersham. It all depends upon the judge.

Mr. Lemann. There is no rule?

Mr. Wickersham. No, there is no rule. Of course, on appeals from certain orders of the Appellate Division, there are certain matters of appeals in which no oral argument is heard unless the court requests it.

Mr. Lemann. I think in our district, the judge would take a long time to decide it; unless you decide it then and there it will be long time.

Mr. Wickersham. I think in New York the judge decides motions, generally speaking, on the argument and closes out the matter in the district court.

Mr. Loftin. That is so in Florida, and I have considerable doubt in my mind, whether this will expedite handling the business. In other words, take it from the lawyer's standpoint. If the lawyer knew he was to say anything, or what the judge thought about it, he may file a much more elaborate brief in support of his motion than he ordinarily would if he prepared an oral argument. And the same thing would be true of

counsel on the other side. And as I see it, there would be much more time taken by counsel, to begin with. And then it is submitted to the judge, with elaborate briefs on both sides; and he might not be ready to take them up and it might be some time before they are disposed of. Whereas, on oral argument, they are sometimes handed down abruptly.

Mr. Lemann. In my State, I would ask the judge to decide it very quickly. At this case no harm, Mr. Loftin.

Mr. Hodge. It is not optional with counsel.

Mr. Loftin. No, it is not optional with counsel.

Mr. Lemann. I was about to say that the second party, the moving party, may apply for a motion.

Dean Clark. May I say that the general trend has been to cut down the stages of preliminary trial, and it does not get you anywhere, and that is why the movement for the abolition of the demurrer has been so extensive. And then, by the Equity rules, the word was abolished. And hence the attempt made in the English rule. And we tried to carry it out in Rule 26, as to defenses in an effort to avoid, generally speaking, a preliminary argument on the law, except in cases where it is more apparent that that preliminary ground of battle, so to speak, would get you somewhere. Generally speaking, it does not. I have some of the judicial statistics that we worked out/ show that very strikingly. Rarely

is a case decided on demurrer. You have all the time and trouble of moving around.

Now, this is another attempt to prevent another kind of sham battle that can be made generally by the defendant, and can slow things up very decidedly. The whole attempt here is to get away from a formal hearing, to shorten the time of the parties to bring the case on, and to speed the whole process up, and generally speaking, I take it that it will mean that most motions will be denied, as they should be, and the whole practice of filing motions will be lessened; because if you file for purposes of delay, you will not get anywhere.

Mr. Dodge. This seems to me to include a motion for defining the issues. That is not a motion that would be denied in an ordinary matter. And a later rule provides that the motion shall be decided after hearing.

Dean Clark. Yes, it is possible that that particular provision ought not to be exempt. I am not sure that is not correct. The later provision, as to the formulation of issues is in Rule 38.

Mr. Yeman. Would there be any more delay in other cases, rather than less delay? If you want to level some motion at your opponent's pleading under this, you would file it and have five days, and the other fellow would have five days and the judge gets down to it when he can.

Mr. Olney. This would work exceedingly well if the judge had a good secretary, a good law clerk, who would go through these briefs for him and present a report. But if he himself has to go through and examine and read the briefs and look into all the points to see what is there, it is not going to prevent any delay or help him at all.

Mr. Richersham. That is a matter for the sub-judicial officers that they have in England.

Mr. Hodge. Yes, that would be a matter for them; but I doubt if it would work otherwise. Would you describe that as the equivalent of the judge taking a case under advisement?

Mr. Mitchell. The English have statutes providing for a standing master.

Mr. Richersham. Yes, they provide by statute for standing masters, and they do not bother to take the time of a judge with a salary of ten thousand pounds a year for passing on this.

Mr. Norman. Do you think it would result in the judge spending any time on the briefs? He might just depend on his conscience.

Mr. Clark. The fact is, I was trying to get it so that you need not file a brief. You could file a brief stating Statement of the reasons in support, and not a brief.

Mr. Richersham. You cannot rule out the briefs.

Mr. Olney. ... you would ... to limit the number of pages that could be used if we are to change it.

Mr. Lemann. I think there is nothing so clarifying as the oral hearing. The judge says, "Mr. Smith, what is your point?" Mr. Smith says, "The point is so-and-so." The judge says "Denied." (Laughter.)

Mr. Vickersham. There spoke the experienced judge.

Dean Clark. That shows the different ways those things come up. When these cases are heard first, the defendant files a motion to ..., and then he files a demurrer, and so on, and then he does not do anything more, and after a time the other side has it set for hearing, and at the first hearing the excuse is made that counsel has to go fishing, and it goes over several motions days, and is eventually heard. And the parties talk at length and get nowhere. When I was in practice I remember one case where the judge held up the decision for over a year.

Mr. Vickersham. Well, that is not the rule in the ... District Court in New York. There they are disposed of very promptly.

Dean Clark. Yes, in New York they might not as well ... at all.

Mr. Vickersham. Just as it has substance. If it has ... it will have attention, but if it is the

ordinary motion, he will delay.

Dean Clark. I understand that in the State courts you can hardly get the words out of your mouth before you are out.

Mr. Dobie. If I understand it correctly, if he files a statement of reasons his opponent is to have five days to reply. So that in all cases you get five days.

Dean Clark. Yes.

Mr. Lemann. How does that work if they stay there five or six days? He may not stay there five days. In the Western District of Louisiana the judge goes to different places and spends two or three days in each place.

Dean Clark. He can pass on these things anywhere. On your point about the five days, of course now, according to the rules, it goes for a month, or such part of it as you have to wait for motions day.

Mr. Wickersham. Well, of course, you have got to give your notice of motion in the first place, and then you have him file a motion and file a brief, and the other side would not have to appear for five days, and if he has not that time to file a reply, I think that would answer that. I was wondering whether the suggestion made is not a sound one, as it would really shorten it too much.

Mr. Lemann. If the judge does it in his bedroom, it would not delay it, and unless it has to be done in the court room it could be speeded up.

Mr. Dodge. Why not provide for standing masters and give them the function that standing masters in England have?

Mr. Wickersham. That brings up there questions of appropriations by Congress. I have always advocated standing masters. I think they are just like referees in bankruptcy. Those are standing appointments, and I have always advocated that. We will come to it later on, when we come to consider the question of examination before trial, and discovery, and that sort of thing. I feel very strongly that those examinations ought to be in the presence of some judge or officer having power to rule on evidence. There you have a use for a standing master.

Mr. Dodge. There are many cases where he could be could used.

Mr. Wickersham. Yes; it would save a very large increase in the judiciary if we had standing masters.

Mr. Mitchell. We will have difficulty in setting up, or a temptation to set up, additional machinery; and I am afraid we will run into difficulties about that, because this Congress will not appropriate money for the job.

Mr. Wickersham. It might give a place to the unemployed. (Laughter.)

Mr. Mitchell. Dean Clark, what do you think of the suggestion of Judge Dunmott about the time in which a notice

of motion shall be filed? Judge McDermott is a pretty clever fellow. There is no limit as to the time in which to make a motion to reform the pleading. Should there not be some provision for stating the term?

Dean Clark. That is covered by the 20-day provision. It goes back to the provision that within 20 days after the summons, the answer or other pleading must be served, and I provided that a motion is a pleading.

Mr. Mitchell. But suppose your motion is directed at the answer, should there be a time limit?

Dean Clark. That I attempted to cover by the time for the reply, which is 10 days.

Mr. Mitchell. That ought to be in Rule 31.

Dean Clark. Yes.

Mr. Mitchell. This Rule 9 seems to relate to motions with reference to the form of the answer, for instance. Gentlemen, we are still on Rule 9. Now, what is just the problem that you are going to decide there?

Mr. Lemann. Does it not mean that the discussion is that we should strike out all after the words "disposed of" in the fourth line?

Mr. Dodge. All after the word "causes," is it not?

Mr. Mitchell. Up to the word "causes", you would let that stay in?

Mr. Morgan. That is the first sentence.

Mr. Mitchell. Yes.

Mr. Lemann. Yes; strike out all after the word "causes".

Prof. Sunderland. I think many lawyers would resent that restriction.

Mr. Loftin. I talked with one of our leading lawyers about this very thing, and he made just this comment--that it would deprive a party of his right to be heard in court.

Mr. Mitchell. Why could you not say: "Unless the court shall direct otherwise, each motion directed to a pleading or concerning the formulation of the issues in an action may be determined primarily on such hearing as the court may allow." Now, provide for the oral argument and the brief and allow the time. That would give the judges some flexibility authority.

Mr. Dodge. I think that is about as much as you can hope to accomplish. Under the present organization of our courts, I think you can accomplish as much by such a provision as you can any way.

Mr. Lemann. Would it not be well enough to provide "summarily, within such time as the judge may decide"?

Mr. Dodge. I should say "heard and determined", instead of "determined."

Mr. Mitchell. "Heard and determined."

r. Loftin. The only thing about that is that you t appear the second time, and have two trips to the court ewe tions of the court if you say "Such time as the court may fix."

r. Lemann. Would you say "disposed of promptly",

r. Loftin. If you could fix the time, rather than court to fix the time.

f. Mitchell. The rule applies to a regular motion.

r. Mitchell. Your point is that the motion should ecify the date of hearin ?

r. Loftin. Yes.

r. Mc ersham. Yes, the usual practice today is to court, on a certain day at a certain time and place.

r. Mitchell. Well, do you think a motion of that in ought to be stated ~~at~~ after the pleading?

r. Mc ersham. The court may pass an interlocutory rder. Other forms of this that might be determined, ... however you fix the time in which a motion may be made?

r. Mitchell. Well, this says it is a form of plead-

r. Mc ersham. I was getting at the purpose of the rule itself. The proposed rule is not so limited.

r. Lemann. Judge McDermott or his successor could

tr the sup lomental rule.

Dean Clark. He has tried this rule and says it works well.

Mr. Lemann. It might work in some cases but not in others. There might be a su ple ental rule.

Prof. Sunderland. Now, this s that would work with Judge McDermott might not work with many others.

Mr. Lodge. It seems to me that it is a novel thing that the for ulation of the issues should be treated in this way.

Dean Clark. I think you are correct about that. That should not have been put in here.

Mr. Mitchell. That may be formulating of the issues in an equity case, and not in a jury case.

Mr. Lod e. Yes.

Mr. Mitchell. Are you willing to strike out the phrase "or concerning the formulation of the issue"?

Dean Clark. Yes.

Mr. Lemann. Perhaps you had better not have a broader motion?

Mr. Lodge. Would you not confine this to a motion directed to the sufficiency of the form of the pleadings?

Dean Clar . Yes.

Mr. Lodge. Of course, that is the character of motion you have in mind.

Mr. Dean Clark. That is true.

Prof. Sunderland. That is not sufficient as to the form.

Dean Clark. There are certain provisions that you can raise the questions in advance of trial, provisions that the defense may make motions to abate the action.

Prof. Sunderland. An questions of law you raise on the answer?

Dean Clark. Yes.

Prof. Sunderland. That would be sufficient.

Dean Clark. Yes, that provision at the end is Rule 26.

Mr. Mitchell. I confess that I have no clear in my own mind a motion directed to the pleadings.

Mr. Morgan. The motion to make it more definite and certain.

Mr. Wickersham. Or to strike out.

Mr. Morgan. Yes.

Prof. Sunderland. A motion going to the sufficiency would come under Rule 26, I should think, and would not require an answer.

Dean Clark. I think that is so. It would require a preliminary motion to abate the action.

Mr. Wickersham. Well, we are not discussing Rule 26

yet, and we because I want to say a few words about that.

Mr. Donworth. In view of the fact that Rule 37 deals with motions to correct or strike out, it would it not be well to strike out everything here after the word "cause"? So as it will be before the Advisory Committee, I make a motion to that effect.

Mr. Loftin. I second the motion.

Mr. Mitchell. The words from there on are to be stricken out. Is there any discussion about that? Dean Clark, is there any objection to that?

Dean Clark. Well, I am sorry to see it go out.

Mr. Mitchell. You will see a motion as to pleadings, and Rule 37 provides explicitly for that.

Dean Clark. Are we going to leave it in in Rule 37?

Mr. Mitchell. That is all that is left here.

Mr. Donworth. There might be a stump speech.

Mr. Mitchell. The question is on Judge Donworth's motion. All in favor of it will say "aye", those opposed "no."

(The motion was adopted, all voting in favor of it except Dean Clark.)

Mr. Mitchell. It is carried. Now, you can take up Rule 37, if you want to say something about prompt hearings. We are on Rule 1.

Mr. Hodge. Rule 1 we have dealt with before, have

we not?

Mr. Olney. There is one correction in Rule 9.

Mr. Mitchell. Rule 11, "Form of summons." Now, that will have to be changed to provide a form for unliquidated claims and liquidated claims in the usual way.

Mr. Tenwortl. I do not think so, Mr. Chairman. I think it can be left to him to file his answer in 20 days, that takes care of the whole matter.

Mr. Mitchell. This is Rule 11, form of summons.

Mr. Tenworth. I do think he should be required to serve his answer on plaintiff's attorney.

Mr. Mitchell. This says something about the form of summons. Now, we have already agreed that we are going to have a system by which the clerk may enter judgment as of course in a claim for a specific liquidated sum under contract; and wherever that system is used the form is in the alternative. If it is a liquidated case, it states the amount; if it is not, it asks for such relief as the court may assess. So that the form of summons may--

Mr. Wickersham (interposing). How about adopting the original New York Practice Act on that point of summons with notice?

Joan Clark. You mean the novis on for liquidated damages?

Mr. Wickersham. The form of summons for liquidated

damages.

Dean Clark. I might say that I am a little reconciled about your judgment by default.

Mr. Wickersham. Well, that particular system has worked very well.

Dean Clark. I mean about not requiring an affidavit.

Mr. Wickersham. There is some question there.

Dean Clark. I mean it is a question of fact under the New York law.

Mr. Dodge. Is it not following the English practice?

Dean Clark. I think it is.

Mr. Dodge. It is the same thing.

Dean Clark. Mr. Wickersham's suggestion is that we follow the New York practice, but I think that is what he had in mind.

Mr. Mitchell. It is just a matter of detail. If you have a liquidated claim, you state the amount you are asking for; if you have not you state you are going to ask for judgment for the relief claimed.

Mr. Lemann. It seems to me that you have to attach the summons and file it in the clerk's office, and it might be simple to say that you sign the complaint which is attached, and a copy filed in in the clerk's office.

Mr. Mitchell. That is the form used. It says, "Within the time stated the plaintiff may take judgment against the defendant or apply to the court for judgment.

Mr. Lemann. It is the same form.

Mr. Mitchell. Yes, it is the same form in either case.

Mr. Morgan. It will give him notice of what will happen.

Mr. Donworth. Is there anything in that about having to serve a copy of the answer upon the plaintiff?

Mr. Mitchell. Yes, it says you are required to serve your answer within 20 days after the service of this summons. And it seems to me that if he fails to answer the complaint within the time stated the plaintiff will take judgment for the amount asked, or will apply to the court if it is unliquidated.

Dean Clark. Of course this requirement of filing an answer with the court and filing the pleadings should be changed.

Mr. Lemann. Under this rule, he does not have to serve his answer on the plaintiff, and do s not have to file it in court at any time.

Mr. Mitchell. There is another rule which requires the pleading to be filed.

Mr. Dodge. Rule 17 provides for a period of 20 days for filing the answer or other defense.

Mr. Mitchell. I think we have covered that.

Dean Clark. There is just one other matter, in regard to the matter of service. This matter in brackets goes back to Rule 7.

Mr. Lemann. May I ask about this rule of requiring a man to file his answer in court--does that include that?

Mr. Loftin. Yes.

Mr. Mitchell. That was the intention. The summons requires him to serve his answer, and not file it. Dean Clark has just called attention to that. He said the words "file his answer" should be changed to "serve his answer."

Mr. Lemann. But there is a later rule on that.

Mr. Wickersham. That later rule is about advancing the time; but the general consensus of opinion is against that.

Mr. Lemann. Well, what are we doing about requiring the defendant to file his answer in the court?

Mr. Mitchell. Right; but my understanding is that under the system we have adopted, the practice is to serve his answer.

Mr. Lemann. And not file it?

Mr. Mitchell. And not file it.

Dean Clark. Well, Now, Mr. Lemann, we still have the pro-

vision that the claim must be filed in the court within 20 days, that is, we have the summons and complaint, and then we go right into court within 20 days. Now, what are we going to do with the answer?

Mr. Lemann. That is what I had in mind. Mr. Dodge referred to Rule 17, and I turned to Rule 17 and put it 7 days, and if that is the way we will leave it, the summons ought to cover that.

Dean Clark. Of course, we could say "serve and file."

Mr. Lemann. Yes; "serve and file."

Mr. Mitchell. We ought to be consistent. If we are not going to require the plaintiff to serve his complaint, there is no sense in requiring the defendant to serve his answer. My theory is that they ought to allow them to be served on each other. The question of filing is a matter of having the court deal with it, and the system that I have in mind simply contemplates filing the pleading a sufficient time before the trial so they will be there and the court can find them, and the case is tried. And that system usually provides that pleadings shall be filed when a notice of trial is served, and note of issue filed. Why file them sooner if they do not have to be filed when they are served?

Mr. Clark. Suppose a man files pleas and motions in abatement, and so on?

Mr. Mitchell. Well, then the court will say "close

your pleadings and file your answer."

Mr. Olney. Suppose the defendant makes a motion to strike something from the complaint and the plaintiff has not filed the complaint?

Mr. Wickersham. Well, he serves it with his notice of motion, and it comes up under his notice of motion and the court will have nothing presented to it before that.

Mr. Olney. But it is the other man who is moving; the defendant is moving.

Mr. Wickersham. Well, how does he move except on the complaint? He moves on the complaint with notice of motion.

Mr. Olney. Why should not the plaintiff file his complaint?

Dean Clark. I thought we decided that in Rule 16 which we discussed, and that is where we had our discussion of what to do if the complaint was not filed, and the suggestion was made that the filing be left with the court, and we make such reference to the filing as the court may deem proper. As I understand it, that was the decision, that it should be filed in not less than 20 days.

Mr. Dodge. It seems to me that if this case is pending at the time in the court, other parties may be interested in knowing whether the case is pending. I do not think that litigation ought to be kept out of the court, as a private matter.

Mr. Mitchell. The papers ought to be filed in time for the court to pass on the merits.

Dean Clark. If the answer is served, why should it not be filed?

Mr. Lemann. Why could that not be 20 days, stating that he must serve is answer on the plaintiff and file it in court.

Dean Clark. Later on we have a provision that when the pleadings are closed, the case goes on the trial calendar. Of course, you can change the rule. That follows Equity Rule 56. At the expiration of that time, the case goes on the trial calendar. Now, the new rules provides that when the pleadings are closed, the case automatically goes on the trial calendar.

Mr. Mitchell. Several members of the Committee suggested to me that we ought not to sit after 10 o'clock, and that time has passed by five minutes. I think you are right about it.

Mr. Wickersham. What time shall we meet in the morning, Mr. Chairman.

Dean Clark. Eight o'clock. (Laughter.)

Mr. Mitchell. You cannot floor this gentleman. (Laughter.)

Mr. Wickersham. I move, Mr. Chairman, that we meet at half-past 9 o'clock tomorrow morning.

(The motion was unanimously adopted.)

(Thereupon, at 10:05 o'clock p.m., the Advisory Committee adjourned until Friday November 15, 1935, at 9:30 o'clock a.m.
