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PROCEEDINGS
of
MEETING
of
ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE
of the
SUPREME COURT OF THE UNITED STATES.

Friday, February 21, 1936.

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Friday, February 21, 1936.

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

Washington, D.C.

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

Present:

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

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

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

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

Mr. Morgan. Yes.

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

Mr. Morgan. Yes, I agree with that.

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

Mr. Tolman. Yes.

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

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

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

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

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

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

Mr. Morgan. That is true.

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

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

of facts and law, and so on.

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

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

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

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

Mr. Donworth. Yes.

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

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

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

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

and get back substantially towards the common law forms.

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

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

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

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

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

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

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

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

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

Mr. Clark. Well I think it is serious.

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

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

Mr. Dodge. Here is the English rule:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Chairman. Are you ready for the question?

All in favor say aye. Opposed no. The ayes seem to have it. The ayes have it.

(g) ADMISSION BY FAILURE TO DENY.

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

The Chairman. A matter of substance.

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

The Chairman. Section (g) in line 76.

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

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

until they have been decided by the Supreme Court.

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

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

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

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

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

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

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

Mr. Donworth. What is your suggestion?

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

in the brackets.

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

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

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

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

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

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

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

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

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

Mr. Morgan. I cannot help that.

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

Mr. Morgan. That may be.

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

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

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

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

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

Mr. Morgan. Yes I do.

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

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

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

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

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

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

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

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

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

practically none at all.

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

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

The Chairman. There is that point about it.

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

I call attention particularly to lines 13 to 17:

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

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

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

Mr. Morgan. Of course he will.

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

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

Mr. Loftin. I think that is true.

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

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

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

Mr. Tolman. Will you repeat your question?

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

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

Mr. Olney. The principle is the same.

The Chairman. Both, probably.

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

Mr. Clark. Yes.

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

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

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

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

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

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

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

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

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

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

Mr. Morgan. Yes, that is all right.

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

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

The Chairman. That is a matter of arrangement.

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

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

Mr. Morgan. I agree.

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

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

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

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

Mr. Morgan. That is alright with me.

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

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

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

Mr. Morgan. That is in Rule 21.

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

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

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

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

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

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

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

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

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

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

Mr. Cherry. Guardian?

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

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

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

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

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

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

The Chairman. That is right.

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

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

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

The Chairman. If approved by the court.

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

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

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

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

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

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

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

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

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

changing a lot of law.

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

Mr. Morgan. I do not object to that.

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

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

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

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

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

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

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

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

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

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

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

Let it go at that.

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

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

Mr. Clark. No.

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

that a general denial does not raise it.

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

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

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

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

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

Mr. Clark. There is no question about that.

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

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

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

Mr. Doble. It certainly is in some States.

Mr. Pepper. I am glad to know that.

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

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

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

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

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

Mr. Pepper. I see.

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

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

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

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

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

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

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

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

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

I imagine the argument in favor of putting this in is to arise at the desired uniformity of rule we are hopeful of reaching if we can. Therefore I would suggest it is desirable to leave it in, and that, with respect to the case that Judge Olney puts, while thoroughly proper to make, is quite unlikely to happen, and it will not make much trouble.

Practically there is hardly anything that we can provide that you cannot think of some situation arising in connection with, even though it had not been foreseen, or even if we do think of it the situation is going to develop where the rule as framed is not going to work. If we discarded the rules on that possibility I am afraid we would cut down a good deal here that we ought to put in.

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

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

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

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

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

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

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

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

Mr. Morgan. Yes, quite so.

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

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

Mr. Dodge. I second the motion.

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

Mr. Lemann. I vote to keep it in.

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

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

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

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

Those in favor of the motion raise their hands.

There are six who voted in favor of striking out the sentence.

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

I vote for striking it out.

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

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

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

sue.

Mr. Donworth. All right.

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

Mr. Clark. Yes.

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

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

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

Mr. Dodge. I think it sounds rather naive.

The Chairman. Is there a second to the motion?

Mr. Olney. I second the motion.

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

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

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

Both cannot be truthful.

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

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

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

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

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

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

The Chairman. Are they matters of substance?

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

In (b) the statement is made that --

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

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

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

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

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

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

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

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

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

Mr. Olney. I do, indeed.

The Chairman. That is a stock phrase.

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

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

"Denials must fairly meet the substance of the allegation

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

That ought to be "with qualifications" --

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

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

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

Mr. Morgan. Yes.

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

Mr. Morgan. Yes.

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

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

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

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

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

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

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

Mr. Clark. I thought we had.

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

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

Mr. Morgan. Exactly.

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

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

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

The Chairman. That is what Mr. Morgan wants.

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

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

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

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

Mr. Morgan. If you have the proof.

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

expense.

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

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

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

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

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

much. I think Sunderland's stuff, calling for admissions --
Mr. Clark. That helps a good deal. You are right about
that.

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

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

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

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

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

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

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

particular jurisdiction.

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

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

Mr. Dobie. To be sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Morgan. You have the latter part of it there --
"Would raise issues of fact not arising out of the preceding pleadings"--

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

Mr. Sunderland. Yes I think so.

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

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

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

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

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

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

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

Mr. Morgan. It is new matter.

Mr. Oiney. And it is new matter.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Morgan. He does that in Connecticut.

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

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

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

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

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

(Laughter.)

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

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

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

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

fact not arising out of the preceding pleadings."

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

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

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

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

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

The Chairman. Is there a second to that motion?

Mr. Tolman. I second it.

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

The Chairman. Thirteen is an unlucky number.

(The Chairman then called for the negative votes.)

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

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

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

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

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

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

Mr. Morgan. Failure of consideration is.

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

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

Mr. Olney. Will you repeat that last statement?

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

Mr. Olney. That is just the point.

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

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

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

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

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

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

the East Side of New York.

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

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

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

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

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

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

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

The Chairman. That has been stricken out by vote.

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

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

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

Mr. Donworth. What words have gone out?

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

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

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

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

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

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

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

Mr. Clark. All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Clark. Yes.

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

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

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

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

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

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

Mr. Clark. Why not?

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

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

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

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

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

whether or not he is going into the Federal courts. He sues for \$2,990. If he can recover the \$9,000 it is going to give the courts a lot of trouble. A lot of codes have that provision, that when you ask for money you cannot get more than you ask for.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Chairman. Have you a rule to that effect?

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

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

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

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

District judge. He has applied to the District judge for leave to apply to the Circuit Court of Appeals for a writ of prohibition to prevent the District judge from doing the thing which he has just done, and that question is going to be discussed next week in the Circuit Court of Appeals.

The Chairman. As the rule is drawn, if the motion to set aside the service of the process is denied, and then the party who has made it applies for a writ of prohibition, and the Circuit Court of Appeals throws him out on the ground that they have not any jurisdiction, or that they would not grant it if there was an adequate remedy by appeal, then he can go back to the trial court and go on with the general appearance without waiving his right, as it is worded. You make a futile application to the court that has not any jurisdiction to grant you a writ, to save your rights.

Mr. Lemann. I suppose it is on the theory that the upper court might say that your remedy is sufficient by appeal, and they would not interfere. If they took that view, you ought to be penalized, because they will not prohibit. I suppose that is the theory of this.

Mr. Loftin. In order to get the matter before the committee, I move that the language in brackets be left out.

The Chairman. I would like to ask Dean Dobie if I am right in the general impression that in United States Circuit Courts of Appeals they will not grant writs of prohibition to the lower courts where there is a right to review by appeal.

Mr. Dobie. That is my understanding. I was just going to read an extract from --

Mr. Clark. This takes away the possibility of an excep-

Mr. Lemann. And he thinks the Carroll case does not provide a different version of the same thing? Well, I shall go that far, myself.

Mr. Dobie. I should like to go as far as we can in this case, and put it up to the court. As you know, there was a case where a brakeman was bringing a suit, and in his suit he claimed that the Leamann coupler was an unsatisfactory type. And then, later, he amended and said that the Leamann coupler was a satisfactory type, but that this one was defective. Now, to my mind it is hideous to hold that that is barred.

Mr. Morgan. Was that in a Federal case?

Mr. Dobie. No; an Illinois case.

Mr. Morgan. Well, the Illinois rule is crazy, anyhow.

Mr. Clark. How about the Wulf case?

Mr. Morgan. You start with the Wilder case, where Chief Justice White always got "balled up"; he used the test of departure, in pleading as to scope of amendment. He said that you depart from law to law, or from fact to fact.

Of course in the Wulf case they went to the other extreme and changed from the Kansas State Act to the Federal Employers' Liability Act, and they changed from intrastate commerce to interstate commerce, and also changed from the woman's suing in her own right, to a representative capacity, administratrix. That looked as if they were going to limit it.

Then, in the Kinney case Mr. Justice Holmes said that when you are talking about the statute of limitations, you ought not handle this in any analytical fashion, but you ought to consider whether the purpose of the act is going to be defeated by this changed version, and that it ought to be very

that sort of preamble. It seems to be a little bit confusing.

Mr. Clark. It can be done. I am not sure which is less confusing.

Mr. Pepper. I am not sure either.

The Chairman. We will consider that in recasting.

Mr. Dodge. What do you say to this, Mr. Clark: "that the plaintiff is not liable"?

Mr. Clark. Those rules are quite extensive. We are trying to get it so that interpleader does not limit the ordinary rules of joinder.

Mr. Morgan. Does this new statute talk of interpleader where the party does not admit liability to either? Does the new statute cover that? I understood that was the English rule.

Mr. Pepper. What case was that?

Mr. Morgan. Where the new statute covers the case of interpleader.

Mr. Pepper. Is this the new one?

Mr. Morgan. Yes.

Mr. Clark. Whether it does or not, I don't know really; it should.

The Chairman. It is now 10 o'clock, gentlemen. We will adjourn until tomorrow, at 9:30 o'clock.

(Thereupon, at 10 o'clock p.m., an adjournment was taken until Saturday, February 22, 1936, at 9:30 o'clock a.m.)

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