

PROCEEDINGS THURSDAY, APRIL 16, 1936.

The Meeting was called to order at 10:30 a. m. by the Secretary, Major Edgar B. Tolman, who presided.

Rules of Civil Procedure, Tentative Draft III, March, 1936, taken under consideration.

Title - The words "for the district courts of the United States and the Supreme Court of the District of Columbia" are to be inserted in the title before subtitle I. Strike out the word "federal" in the first line of the title.

Subtitle - JUDGE OLNEY - Proposes the following as substitution for the subtitle: "I. SCOPE OF RULES--ONE PROCEDURE."

Rule 1

JUDGE OLNEY - Suggests the following as Rule 1. "Scope of Rules. These rules shall govern the procedure in the district courts of the United States and in the Supreme Court of the District of Columbia in all civil cases wherein it is sought to obtain the relief previously obtainable by actions at law and suits in equity. They are to be construed in all particulars so as to further and secure as speedily, simply, and inexpensively as possible the just determination of every action."

MR. SUNDERLAND - Suggests that if the above is to be adopted, there be added at the end of Rule 1 lines 4 to 9 of our second rule, with the following changes--lines 4 and 5 to stand; change lines 6 to 9 to read as follows: "and when the ends of justice so require, the court may relax or dispense with any of these rules in order to relieve a party from the results of accident, mistake, surprise, or inadvertence on his part, and from the results of fraud, misrepresentation, or other misconduct on the part of an adverse party."

Rule 2

MAJOR TOLMAN - At the end of the rule dictated by Judge Olney there should come in as Rule 2 the rule presented by the Reporter as Rule 1, with slight modifications, to read as follows: "Rule 2. One Form of Action and One Mode of Procedure. Hereafter there shall be only one form of action and one mode of procedure. The form of action shall be known as 'civil action' and the procedure shall be known as 'civil procedure.'"

Rule 3

Line 2 - After the word "either" insert the figure "1" in parentheses; after the word "or" insert the figure "2" in parentheses. After the figure "2" substitute: "by both filing the complaint with the clerk of the court and delivering the summons and a copy of the complaint to the marshal."

Line 4 - Insert between the words "such" and "delivery" the words "filing and."

Line 7 - Strike out the words "such time" and substitute the phrase "the time for service."

PROCEEDINGS THURSDAY, APRIL 16, 1936

The Meeting was called to order at 2:00 p.m. by the Secretary, Major Edgar M. Tolman, who presided.

Rules of Civil Procedure, Tentative Draft III, March, 1936, taken under consideration.

Rule 3. (continued)

JUDGE OLNEY. Change lines 15, 16 and 17 to read as follows: "A voluntary submission by the defendant to the jurisdiction of the court shall be the equivalent of service of summons and complaint upon him."

MAJOR TOLMAN. In the Note to the Supreme Court, 5th line from the bottom of page, insert "by or" after "filed".

Rule 4

MR. HAMMOND. In the Title, insert "Form and" after "Summons:".

Line 3. Strike "drawn" and insert "prepared".

Line 5. Strike "or other defense".

Lines 15, 16, 17. The sentence beginning "In all cases" is stricken out and note is made to consider it in Rule 6 under marshal outside the district.

MR. HAMMOND. Line 23. Before the second "and" and the word "complaint" insert the words "of the".

JUDGE OLNEY. Lines 25, 26 and 27 and the first word of line 28 to read as follows: "of Columbia and also whenever the validity of an order of a commission, board, department or other governmental agency of the United States is attacked in the action by sending a copy of the summons and of the complaint by registered mail to each agency".

JUDGE OLNEY. Line 28. The last sentence of subdivision 1 of section (c) is to read: "Affidavit of such service and mailing shall be filed with the court."

NOTE. In every case throughout the rules where a requirement for filing is specified, it shall be in words "filed with the court".

MR. MORDAN. Line 28. Strike "Affidavit" and substitute "Proof".

Rule 4 (continued)

MR. MORGAN. Line 32. After the word "by" insert "delivering a copy of the summons and of the complaint to the chief executive officer thereof or by".

MAJOR TOLMAN. Line 33. After the word "process" insert "on any such defendant".

MAJOR TOLMAN. Line 35. Strike out "a mentally" and insert the word "an".

MAJOR TOLMAN. Line 36. Between the words "and" and "complaint" insert the words "of the".

JUDGE OLNEY. Line 37. Strike out the words "a copy" and substitute the word "copies".

Lines 37, 38, 39. To be stricken and the following to be substituted:
"personally or by leaving copies thereof at his dwelling house or usual place of abode with some adult person who is a member of his household."

Line 42. Between the words "and" and "complaint" insert the words "of the".

MAJOR TOLMAN. Line 45. Strike out "a mentally" and insert the word "an".

Line 48. After the word "process" insert "on such".

Rule 5.

DEAN CLARK. "At the request of any party the clerk of the court shall issue subpoenas to secure the testimony of witnesses. A subpoena shall state the name of the court and the title of the action, shall be directed to one or more persons by name and shall command each such person to attend and give testimony at a hearing or trial of the action or the taking of his deposition at a time and place therein specified. When the requesting party so requires it the subpoena shall also command any such person to produce the books, papers or the documents designated therein, subject, however, to the provisions of Rule 35, subdivision (a) relating to depositions.

"A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district and at any place without the district within 100 miles of the place of the hearing or trial specified in the subpoena." (Lines 5-9 and 15-22 of the substituted draft.)

JUDGE OLNEY referred the rule back to the Reporter for re-drafting.

Rule 6

W. HANSON. Change Title to read: "Process; Service and Proof of Service".
DEAN OLNEY. Line 8. Take out the word "proper" and insert "other" before the word "person". Second sentence to read as follows: "All other process, return and final, served in any district, shall be served by the marshal thereof, by his deputy or by some person specially appointed by the court for that purpose."

MR. MORGAN. First sentence to read: "Service of a summons or a subpoena may be made by the marshal, by his deputy, or by any other person not a party who is of sound mind and 21 years of age or over. Service of all other process, return and final, shall be made by the marshal of the district wherein the service is made, by his deputy, or by some person specially appointed by the court for that purpose."

MAJOR TOLEMAN. Line 6. Insert "The" at the beginning of the line.

JUDGE OLNEY. Line 6. Strike out the word "Return" and substitute therefor "The proof". After the word "made" insert "in writing".

Line 8. Insert the word "and" before the word "shall".

MR. MORGAN. Line 9. Put a period after "deputy". Omit the bracketed material beginning with the last three words in line 9.

Rule 7.

JUDGE OLNEY. Section (a) of this rule is to be stricken out.

JUDGE OLNEY. Change the sentence beginning in line 8 and running as far down as the word "attorney" in line 11 to read as follows: "Every other pleading, every written motion, and every written notice, appearance, claim, demand, or offer shall be served on one of the attorneys for every party affected thereby either by delivery of a copy thereof to such attorney,".

Rule 7

JUDGE OLNEY - Substitutes the following for the first paragraph of subdivision (b): "Every pleading subsequent to the original complaint, every written motion, and every written notice, appearance, claim, demand, offer, or similar paper, and every order required or permitted to be served shall be served on each of the parties affected thereby. If any of such parties has appeared by an attorney or attorneys, service upon him shall be made upon his attorney or one of them unless otherwise ordered by the court or unless the service is of an order disobedience of which is punishable as contempt or of an order to show cause why the party should not be punished for contempt, in which cases service shall be made by handing to the party personally a copy of the order. Service upon an attorney or upon a party personally shall be made either by mailing to him at his address a copy of the pleading or other paper to be served or by the delivery of a copy to him. Delivery of a copy within this rule shall mean handing the attorney or the party a copy or leaving a copy at his office with his clerk or other person having charge thereof, or, if there be no one in charge of the office, by leaving such copy in a conspicuous place therein, or, if the office be closed or the person to be served had no office, leaving it at the place of his usual abode, with some adult person who is a member of or resident in his family. Service by mail shall be complete upon mailing.

Subdivision (c) - MR. MORGAN - Suggests, instead of the last sentence, which begins in line 36 and ends in line 39, the following: "All papers used or read on either side in connection with the application for an order or a hearing thereon shall be filed with the clerk before the order is made or entered unless filing be dispensed with by order of the court."

Line 36 - MR. MORGAN - Suggests inserting after "circumstances" the following: "including an order to dismiss or an order for judgment by default."

Line 35 - MR. MORGAN - Suggests inserting after the word "filing" the words: "and in any event before the action is called for trial."

(c) Filing Papers. The summons and each pleading must be filed with the clerk of the court by the party in whose behalf it is served within ~~five (5)~~ days after notice from the adverse party requiring such filing, and in any event before the action is called for trial. For failure to comply with such notice the court may make such order as it deems just under the circumstances, including an order to dismiss or an order for judgment by default. All papers used or read on either side in connection with the application for an order or a hearing thereon shall be filed with the clerk before the order is made or entered unless filing be dispensed with by order of the court.

PROCEEDINGS FRIDAY, APRIL 17, 1936

The Meeting was called to order at 9:00 a.m. by the Secretary, Major Edgar B. Tolman, who presided.

Rules of Civil Procedure, Tentative Draft III, March, 1936, taken under consideration.

Rule 5

DEAN CLARK. Mr. Moore is to re-draft rules 5 and 35 with the possibility in mind of combining those two rules and introducing them at a later place, perhaps after Rule A6.

Rule 6

JUDGE OLNEY. This rule to be re-vamped by Dean Clark to include process generally and to provide for amendment of process in accordance with the existing statute.

Rule 32

MR. HAMMOND. Title. Between "Scope" and "and", put the word "Use".

MR. MORGAN. Substitute the following for (a): "At any time after jurisdiction has been obtained over any defendant or over the res in any civil action the testimony of any person may, whether a party or not, at the instance of any party, be taken by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence at the trial or for both purposes. But the deposition of a person confined in any prison may be taken only by leave of court on such terms as the court may prescribe.

DEAN CLARK. In (a), after the first sentence, insert "The attendance of witnesses may be compelled by the use of subpoena as provided in Rule A _____ with reference to subpoena."

MR. SUNDERLAND. Suggests the matter of numbering paragraphs and subsections uniformly throughout be referred to the Reporter.

JUDGE OLNEY. Mr. Moore is to include in Rule A6 an appropriate provision similar to the last sentence of Rule 32.

Rule 32 (continued)

JUDGE OLNEY. In line 10, after the word "corporation", insert the words "partnership or association".

JUDGE OLNEY. The third paragraph of subdivision (a) of this rule to read: "Deposition to perpetuate testimony may be taken either in accordance with the provisions of U.S.C., Tit. 28, § 644, or in accordance with the practice of any state wherein the deposition is taken.

JUDGE OLNEY. Line 27. The words "so taken" are to be omitted.

MAJOR TOLMAN. Line 33. Insert before "deponent" the words "testimony of".

MR. MORGAN. Lines 34-40 inclusive. For (2) in subsection (c), substitute the following: "The deposition of a party, or of an officer, director or managing agent of a public or private corporation, partnership or corporation which is a party, may be used by an adverse party for any purpose, but it shall not be used by any other than an adverse party for any purpose except impeachment of the deponent, unless the court finds that the deponent is unable to testify in person."

MR. MORGAN. Line 42. After "corporation" insert the words "partnership or association". Lines 43-44. Strike "in addition" and substitute "including".

JUDGE OLNEY. Line 48. After the word "or" are to be inserted the words "out of the district and".

DEAN CLARK. Lines 55 and 56. After the word "parties" strike "or their representatives" and substitute ", their representatives or successors in interest,".

DEAN CLARK. Rule to be rearranged to take care of arrangement and titles of subsections.

Rule 33

SENATOR PEPPER. Lines 11-14 inclusive to read as follows: "No deposition shall be taken before a person who is a relative or employee of such attorney or counsel or is financially interested in the action."

Rule 36.

Line 3. Strike "is not in default".

Line 17. Strike "an adverse" and substitute "another"

Line 19. Strike "adverse".

Rule 37.

SENATOR PEPPER. In line 3. After the word "who" strike out the words "is not in default and".

MR. MORGAN. Change subsection (a) to read as follows:

"(a) A party desiring to take a deposition upon written interrogatories shall serve upon every other party to the action who may be affected thereby the written interrogatories and a statement of the names and addresses of the persons who are to answer them. Within five days thereafter any party so served may serve cross-interrogatories upon the party proposing to take the deposition. The latter may within three days thereafter serve re-direct-interrogatories upon any party who has served cross-interrogatories. And within three days after being served with re-direct-interrogatories, a party may serve re-cross-interrogatories upon the party proposing to take the deposition. After the time for serving all such interrogatories has expired, the party proposing to take the deposition shall serve upon all parties upon whom interrogatories were served a notice stating the name and address of the officer whom the deposition is to be taken."

In (b), change the comma in line 2 to a period, and for the rest of the paragraph substitute the following: "The officer shall with reasonable promptness take the testimony of the witnesses in response to the interrogatories and prepare the deposition in the manner prescribed in subdivisions (c) and (d) of Rule 36. He shall attach to the deposition the notice and interrogatories received by him, and shall certify and file or mail the deposition in the manner prescribed in subdivision (e) of Rule 36."

Rule 39

Line 16. After "or" substitute "may make or withdraw objections to items previously listed".

Rule 40

SENATOR PEPPER. Lines 5 and 9. Substitute "a party" for "any party"

Rule 41

MR. MORGAN. For (a) substitute: "In any civil action in which the mental or physical condition of a party is involved the court in which the action is pending may order him to submit to an examination as to his physical or mental condition. Such order may be made only for good cause shown after a hearing following reasonable notice to the party to be examined and to all other parties, and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it shall be made."

SENATOR PEPPER. Line 8. In (b), change "Each" to "Every" and insert "an" after "such".

Rule 42

Line 11. The final clause shall read as follows: "nor be used against him in any other proceeding."

Rule 5 - REDRAFT

SENATOR PEPPER. The typewritten draft now before us for consideration as a possible substitute for Rules 5 and 35 is amended by including a new subsection (d) which is to be identical with subsection (c) down to and including the words "subpoena issued" in line 21 of the original Rule 35, Tentative Draft III. The residue of the matter in that subsection to be omitted.

JUDGE OLNEY. Line 2. After the words "by the clerk" insert "under the seal" so that it will read: "A subpoena shall be issued by the clerk under the seal of the court."

MR. MORGAN. In lieu of lines 26-32 inclusive, insert the following: "If a party who has given notice of the taking of a deposition of a witness by oral examination fails to serve a subpoena upon him and the witness because of such failure does not attend, the court may order such party to reimburse any adverse party who, in person or by attorney, attends because he expects the deposition of that witness to be taken, for all reasonable expenses, including attorney's fees, incurred by him in so attending."

SENATOR PEPPER. Without objection, the typewritten matter in the rule as perfected will become Rule A _____ following Rule A6.

It is understood that the action just taken has the effect of substituting the new rule to follow A6 for both 5 and 35.

Rule ~~A-5~~ , Subpoena
(To follow A6--formerly typewritten Rule 5, Subpoena)

Subdivision (b) Subpoenas for Taking Depositions--Place of Examination -

MR. CLARK - Suggests the following in place of the first sentence: "A copy of the notice to take a deposition, as provided in Rule 36, and an affidavit of proof of service thereof, shall constitute a sufficient authorization for the issuance of subpoenas for the persons named therein by the clerk of the district in which the deposition is to be taken."

Subdivision (c) Subpoenas for a Hearing or Trial - MR. CLARK - Suggests

the following in place of the first sentence: "At the request of any party subpoenas to secure the testimony of witnesses at a hearing or trial shall issue by the clerk of the district in which the hearing or trial is held."

Rule 43

Subdivision (a) - JUDGE OLNEY - Moves as a substitute the following: "If a party or other witness after being duly sworn refuses to answer any question, a refusal may be considered a contempt of the court in which the action is pending or, if the witness is under subpoena from the court of another district, a contempt of the latter. If the witness, in refusing to answer, does so at the suggestion or instigation of a party or an attorney, such party or attorney may also be considered in contempt."

Subdivision (b), line 6 - JUDGE OLNEY - The words "whether under subpoena or not" should be omitted.

Subdivision (c), line 22 - MR. SUNDERLAND - After the word "acted" introduce "reasonably and," and omit the last four words of line 23.

Rule 44

Lines 8 to 11 - JUDGE OLNEY - Change the last sentence to read: "If the court finds from such pleadings, depositions, affidavits, and testimony that there is no substantial issue of fact affecting the right of the moving party to judgment and that he is entitled to a judgment, it shall give judgment accordingly."

Rule 45

Subdivision (a) - JUDGE OLNEY - Change the first sentence to read: "Any party seeking to recover upon a claim, counterclaim, or cross-claim may, at any time after serving the pleading presenting the claim, move for a summary judgment in his favor thereon." Insert at the end of the paragraph: "Judgment in this manner may be rendered in an action for declaratory relief."

Subdivision (b), lines 10 to 12 - JUDGE OLNEY - Change the first sentence to read: "A party seeking to defend against a claim, counterclaim, or cross-claim may, at any time after service of the pleading presenting his defense, move for a summary judgment."

Subdivision (c), line 26 - MR. MORGAN - Strike out the word "cross-examined" and substitute "present" for it, and add at the end of the line the words "for examination or cross-examination."

Subdivision (d) - MAJOR TOLMEN and MR. MORGAN - Strike out subdivision (d) and substitute (d): "Should it appear from the affidavits of one opposing the motion that he cannot present by affidavit facts essential to the justification of his opposition, the court may refuse the application for judgment or order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as may be just."

Subdivision (e), lines 38 to 41 - Change to read: "Should it appear to the satisfaction of the court at any time that any of the affidavits referred to

in this rule were presented in bad faith, or solely for the purpose of delay, the court shall," etc.

Rule 46

Lines 4 to 8 - JUDGE OLNEY - "the court, at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall, so far as may be conveniently possible, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted."

Lines 8 to 15 - JUDGE OLNEY - Make read: "It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as may be just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly, unless the court, for good cause shown, sets aside its previous order."

Rule 6 - typewritten rule

Subdivision (c) Amendment - JUDGE OLNEY - Amended as follows: "The court may at any time, in its discretion, and upon such terms as it may deem just, allow any process or proof of service thereof to be amended, where the amendment will not prejudice or injure the party against whom the process issued."

Rule 8

Line 4 - Strike out the words "except that" and substitute "other than."

Lines 5 and 6 - Make read: "taking any action under Rules A20 and A21 (b) and the time for taking an appeal as provided by law."

Line 9 - Strike out the words "be extended so as to."

Lines 11 to 13 - MAJOR TOLMAN and JUDGE OLNEY - Strike out and substitute the following: "The period of time required for the doing of any act or

the taking of any proceeding shall not be affected or limited by the expiration of a term of court. All unfinished business of a term is automatically continued to and may be proceeded with at the next term."

Line 15 - Before the word "hearing" insert "time specified for the," and strike out the word "thereon."

Line 16 - MAJOR TOLLAN - Strike out "or by order of the court" and insert after the words "fixed by these rules" the phrase "or by special order or by a standing rule of a district court."

Line 17 - Strike out the word "provisionally."

Line 22 - After the words "other action" insert between commas "if any."

Rule 9

Passing over for the moment. To be taken up later in our session.

Rule 10

Line 2 - Strike out the clause "and pleadings amending or supplementing them."

Lines 3 and 4 - Let read: "(a) a complaint; (b) an answer; (c) where provided by these rules, a reply, and such further pleadings as the court may order."

Line 5 - Omit the words "or of a co-defendant."

Lines 11 to 13 - Strike out the parentheses.

Line 13 - Strike out "hearing on the."

Lines 13 to 15 - MAJOR TOLLAN - To be rewritten as follows: "The rules applicable to pleadings shall also apply to all papers provided for by these rules so far as concerns caption, signing, and other matters of form."

Lines 16 and 17 - MR. MORGAN - Change to read: "Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used."

PROCEEDINGS FRIDAY, APRIL 17, 1936

The Meeting was called to order at 8:15 P.M. by the Secretary, Major Edgar B. Tolman, who presided.

Rules of Civil Procedure, Tentative Draft III, March, 1936, taken under consideration.

Rule 6, TYPEWRITTEN RE-DRAFT

MR. MORGAN. Lines 19 and 20. Strike all after the word "amended" line 19 and substitute the following: "unless it clearly appears that material prejudice will result to the substantial rights of the party against whom the process issued."

Rule 11

MAJOR TOLMAN. Line 1. Insert "personally" before "signed", making the first line read "Every pleading shall be personally signed by".

Line 9. Strike out the words "the purpose of" and insert after "This rule" the words "with intent to defeat its purpose," so that line 9 will read: "of this rule with intent to defeat its purpose, it may be stricken from the files as sham and".

Line 12. Strike out the words "of the purpose of the" and insert "of this".

Line 16. After the word "pleading," insert the words "and shall be"

Rule 12

MAJOR TOLMAN. Line 3. Change the word "docket" to "file".

MAJOR TOLMAN. Line 4. Strike out the word "pursuant" and insert the words "as provided in".

MR. MOORE. Line 6. Strike out the words "it states".

Line 7. After the word "side" insert "be stated with an appropriate indication when there are other parties".

Rule 13

MAJOR TOLMAN. Line 13. Strike out the word "provisions" and substitute "obligations set forth in".

Rule 13 (continued)

Line 19. Strike out the words "be treated as" and substitute therefor "have the effect of".

Line 22. Strike out the words "to controvert with qualifications" and substitute the words "to deny in part".

Line 27. After the words "subject to" the following: "the obligations set forth in".

Line 28. Strike out the words "which must be pleaded to by these rules" and substitute therefor "to which a responsive pleading is required".

Rule 14

JUDGE OLNEY. Line 4. Strike out the words "the legal existence".

Line 5. Strike out the word "or" at the beginning of the line. Add after the words "be sued" the words "nor the legal existence or character of an artificial person that is made a party except to the extent required to show the jurisdiction of the court".

Line 13. Strike out the word "directly" and substitute "generally".

Strike out all of (2) and substitute the following: "Malice, intent, knowledge or other condition of the mind of a person may be averred generally without the necessity of setting up circumstances from which it may be inferred but in all averments of fraud or mistake the circumstances from which the fraud or mistake may be inferred must be stated with particularity."

MAJOR TOLMAN. The meeting adjourned after consideration of paragraph (2) in Rule 14.

Rule 12

line 12 - FR. 1203 - Delete the clause beginning "an, each defense" to read: "an, each defense other than by way of denial shall be separately stated," etc.

Rule 14

subdivision (2) - FR. 1204 - strike out and substitute new subdivision as follows: "In all averments of fraud or mistake, the circumstances constituting the fraud or mistake must be stated with particularity. Malice, intent, knowledge, or other condition of the mind of a person may be averred generally."

subdivision (4) - FR. 1206 - strike lines 22 to 26 and rewrite subdivision as follows: "[4] Judgment. In rendering a judgment or a decision of any domestic or foreign court or judicial or quasi-judicial tribunal, board, or officer, it shall be sufficient to allege generally that the judgment or decision was given or made."

subdivision (b), line 29 - FR. 1207 - Insert "therefor" after the word "demand."

subdivision (7), lines 36 and 37 - FR. 1208 - strike the clause "taken to be true" and substitute "considered like all other averments of material matter."

line 40 - FR. 1209 - Delete the word "and" and begin a new sentence: "and shall be stated separately as matters," etc.

Rule 16

line 1 - strike out "subject to these rules" and begin sentence: "The complaint shall be sufficient if it contains," etc.

line 4 - strike out "and" and insert "and."

Rule 18

lines 1 to 3 - strike out and substitute: "The answer, reply, or other re-

responsive pleading shall be served in short and plain terms the denial or matter in avoidance of such claim asserted."

line 4 - strike out "answer or reply" and substitute "responsive pleading."

Rule 17

Subdivision (a) - strike out for lines 1 to 4: "Except as otherwise provided in these rules, an answer shall be served within the time required to be stated in the summons, and a reply within ten (10) days after service of the answer."

Subdivision (b), line 7 - strike out the words "the Court's."

lines 8 to 11 - rewrite the subdivision as follows: "All objections concerning the sufficiency of the service of process, venue, and lack of the court's jurisdiction shall be raised by the defendant at one time by motion. This motion shall be made before answer; shall constitute a special appearance without being denominated as such; and shall be decided as a preliminary matter. No such objection may be raised by a defendant at any other time or in any other manner, but the court may at any time of its own motion raise the objection of its own lack of jurisdiction. This rule shall apply to and govern such objections when made by a third-party defendant."

"It shall also apply to and govern any of the above objections which may be made by a party, etc."

Note. The Chairman is to report to Chairman Mitchell, to the protest of Judge [unclear] the motion which has now been taken as to subdivision (b) of rule 17. This is in line with Major Tolson's preference for Mr. Loren's draft, as to which Judge [unclear] suggestion regarding the venue, or, in the alternative, for Judge [unclear] redraft.

Subdivision (c), lines 24 and 25 - strike out the words "at one and the same time," so that it shall read "all defenses shall be heard at the trial of the action."

Note. In reporting to Chairman Mitchell, the Chairman is to call his particular attention to the dissenting opinion of Judge [unclear] and Major Tolson with the

inclusion, in subdivision c of rule 17, of the matter in lines 27 and following, the ground of the objection being that the insertion of this matter here is redundant, in view of the statement made by them that all the points, from lines 27 to 36, inclusive, are elsewhere adequately covered in the rules, which averment the court traverses.

Rule 18

second alternative - The committee favors the second alternative, as it appears in line 31 and subsequent lines.

line 30 - After the words "the court shall" insert "forthwith."

Line 32 - Strike out the word "promptly," so that the sentence will end with the words "the motion."

Rule 19

JUDGE GIBBY and Mr. CLARK - Substitute for the reporter's draft the following: "Rule 19. Counterclaim and Cross-claim in the answer. The answer may state as a counterclaim any claim which the defendant has at the time against a plaintiff, which arises out of the transaction that is the subject matter of the action, provided the court has jurisdiction to entertain the claim and can, if the presence of third parties is essential for its adjudication, acquire jurisdiction of such parties. If the action proceeds to judgment without such a claim being set up, the claim shall be barred.

"The answer may also state as a counterclaim any claim against a plaintiff which might be the subject of an independent action, provided likewise that the court has jurisdiction to entertain the claim and can, if the presence of third parties is essential for its adjudication, acquire jurisdiction of such parties.

"A counterclaim need not diminish or defeat the recovery sought by the plaintiff.

"A claim which did not arise and which was not acquired by the defendant until after answer was, with the permission of the court first had, to be presented by supplemental answer.

"When a defendant has failed to set up a claim in his answer through oversight, inadvertence, or excusable neglect, or when the ends of justice

for other reasons so required, he shall be permitted to set up such claim by amendment to his answer.

"The answer may state as a cross-claim any claim by one defendant against another, arising out of the transaction which is the subject matter of the action, including a claim that such co-defendant is or may be liable to the cross-claimant for all or part of the claim made by the plaintiff against such cross-claimant.

"If the answer states a counterclaim, the plaintiff shall answer to the counterclaim in accordance with the provisions of Rule 21. If the answer contains a cross-claim, it shall be served upon the defendant against whom it is directed, and such defendant shall reply to the cross-claim in accordance with the provisions of Rule 21. 20

"When the determination of a counterclaim or cross-claim requires, for the granting of complete relief, the presence of parties other than those to the original action, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of such parties can be had and their being brought in will not oust the court of jurisdiction of the action. 20

"The court may in its discretion order a severance of any counterclaim or cross-claim which does not go to diminish or defeat the recovery sought by the plaintiff, or may order a separate trial of any counterclaim or cross-claim. It may also pronounce one judgment or several judgments, at one time or at different times, as the convenient disposition of the ^{action} ~~cause~~ or the ends of justice may require, either on the counterclaim or the cross-claim or the claim of the plaintiff, or on all or any of them, and wherever the court has jurisdiction as to it may pronounce such judgment or judgments on the counterclaim or cross-claim, even though the action has been dismissed or otherwise disposed of as to the plaintiff. In case separate judgments are so rendered, the court may order a delay in the execution of a prior judgment until a subsequent judgment

or judgments are given.

Note. The last two sentences may be stricken out if it is discovered that they are covered elsewhere in the Rules.

Lines 24 - 28 - Omitted.

Note. In reporting to Chairman Mitchell, the Chairman is to explain our reasons for omitting the provisions in regard to assignment of claims in connection with Rule 19.

Rule 20

Line 16 - strike out the word "properly."

Lines 23, 24, 25, 26 - MR. HANCOCK - in place of lines 23, 24, and 25, and the portion of line 26 preceding the period substitute the following: "including a judgment adjudicating the rights and liabilities between the third-party defendant and the third-party plaintiff."

Rule 21

Second alternative - The Committee approves the second alternative.

Line 30 - substitute "reply" for the word "plead."

Rule 22

Approved.

Rule 23

Subsection (a) - MR. HANCOCK - take reads: (a) Amendments.

Line 5 - strike out the words "before trial."

Line 6 - JUDGE DENNY - after the words "adverse party" insert a new sentence to read as follows: "which leave shall be freely given whenever the ends of justice require."

Subsection (b) - MR. HANCOCK - take reads: (b) Amendments to Conform to the Evidence.

Lines 12, 13, 15, 19, 21 - strike out the word "proof" and substitute "evidence."

Line 16 - strike out the word "irrelevant" and substitute "inadmissible under the pleadings."

Line 22 - strike out the word "relevant" and substitute "admissible under the pleadings."

Subsection (c) - MR. HANCOCK - take lines 23 to 27 to read: "asserted in the evidence; pleading arose out of the subject, transaction, or occurrence speci-

filed, set up, or attempted or intended to be specified or set up in the original pleading."

Subsection (d), lines 30 and 31 - MR. HANCOCK - Strike out the clause

"when material facts have occurred after the commencement of the action or the service of the defense, as the case may be" and substitute "averring the occurrence of material facts after the date of the pleading sought to be supplemented."

lines 31, 32, 33 - Strike out the words "including the entry of a judgment or rendition of a decree in another action which determines the matter in controversy or a part thereof."

Rule 24

Approved.

Rule 25

line 5 - Leave out the word "expressly."

lines 8 and 10 - MR. HANCOCK - at a period after the word "domestic" and substitute for the remainder of the sentence a new sentence as follows: "Every corporation shall have the capacity to sue or be sued in the courts of the United States."

line 14 - MR. HANCOCK - Strike out the words "as an entity" and substitute "in its common name."

line 16 - MR. HANCOCK - Change the word "person" to "fiduciary."

Rule 26

Title - MR. HANCOCK - Substitute "Joinder of Claims" for "Joinder of Actions."

line 6 - MR. HANCOCK - strike "subject to the provisions of rules 27, 28, and 29" and substitute "provided that the requirements of rules 27, 28, and 29 are satisfied."

Rule 27

MR. HANCOCK - Make two subdivisions as follows: (a) Mandatory Joinder of Joins

Articles and (b) effective on-joiner of articles.

Line 13 - substitute the word "any" for "shall." - 60-

Rule 28

Line 24 - Change the semicolon to a period.

Line 25 - Strike out the word "and" and begin a new sentence with the word "Parties."

Rule 29

Approved.

Rule 30

Line 2 - After the words "the motion to intervene" insert "stating his grounds therefor."

Lines 4, 5, 6 - JUDGE JIMMY - strike out lines 4, 5, and 6 through the word "inadequate" and substitute: "The motion must be granted (1) in any action, so long as the court has control thereof, in which the applicant is or may be bound by a judgment through his representation by existing parties to the action and it appears that such representation is or may be inadequate;"

Lines 8 and 9 - strike out after the words "moving party" the rest of the sentence and substitute: "if so situated that distribution or other disposition of the property would adversely affect him."

PROCEEDINGS SATURDAY, APRIL 18, 1936

The Meeting was called to order at 8:00 p.m. by the Chairman, Senator Pepper, who presided.

Rules of Civil Procedure, Tentative Draft III, March, 1936, taken under consideration.

Rule 14

MR. MOORE. Lines 11-15 inclusive. Strike out all of (2) and substitute therefor: "(2) In all averments of fraud or mistake the circumstances constituting a fraud or mistake must be stated with particularity. Malice, intent, knowledge or other condition of mind of a person may be averred generally."

Rule 30

SENATOR PEPPER. Lines 14, 15, 16. Put a semi-colon after merits and strike the rest of line 14. The balance of the sentence to stand.

Rule 31

SENATOR PEPPER. Lines 1, 2, 3. Strike the first sentence contained in lines 1, 2, and part of 3, and substitute therefor: "In case a party dies and the claim is not thereby extinguished the pending action shall not abate and the court may upon motion order the substitution of the proper parties."

Rule A1

SENATOR PEPPER. Line 3. Strike out "[remain]" and keep the first alternative.

MAJOR TOLMAN. Line 4. After the words "of the issues" insert the words "so triable of right by jury".

Line 6. After the words "service of" strike out the words "an answer" and substitute therefor the words "the last pleading and" so that it will read "twenty (20) days after the service of the last pleading and". Strike out the residue of line 6 and all of line 7 and line 8 down to and including the words "issues of fact;".

Rule A1 (continued)

SENATOR PEPPER. Lines 10, 11, 12. Put a period after "action" and strike out the second set of bracketed material.

Line 21. Put a period after "parties" and strike the rest of the line.

Alternative Rule A1

SENATOR PEPPER. In line 3 which begins with the words "Any party may", after the word "issues" insert the words "so triable as of right".

Rule A2

MAJOR TOLMAN. Line 3. Strike out the words "of fact".

Line 12. Strike out the words "of fact".

Lines 14, 15. Strike out the bracketed material in these two lines.

Line 17. JUDGE OLNEY. Add the following paragraph: "The court may also by an order made in advance so specifying try any issue, not triable by jury as of right, with an advisory jury."

Rule A3

JUDGE OLNEY. Line 4. Strike out the matter that follows (2) and substitute "upon action of a party and notice to the other parties"

Lines 6 and 7. Strike out the matter in brackets in these two lines.

Meeting adjourned at 10:00 p.m.

ROLLING MOUNTAIN, WEDNESDAY, APRIL 12, 1976

The meeting was called to order at 9:15 a.m. by the Chairman, Senator Pepper, who presided.

Rules of Civil Procedure, Tentative Draft III, March, 1976, taken under consideration.

Rule A4

JUDGE OLNEY. Line 4. Insert after the word "plaintiff" the words "by written statement".

Line 12. After the semi-colon following the word "shown" add: "if the complaint has been filed such written statement by the plaintiff shall be filed with the court and if it has not been filed shall be delivered to the defendant.

SENATOR PEPPER. Lines 7-12 incl. Strike out all matter in the subsection beginning with the words "except that an action in line 7 and ending with "cause shown;" in line 12.

Line 2. After the word "without" strike "a final determination of its merits" and substitute therefor the word "prejudice".

Lines 30, 31. In subsection (h) strike out the words "a determination of the merits" and substitute the word "prejudice" so that these lines will read: "All other modes of dismissing an action without prejudice are abolished.

lines 20, 21. Strike out these two lines and substitute: "When the plaintiff's pleading fails to disclose or his evidence fails to establish his right to recover and the court is of opinion".

SENATOR. Line 26. In subsection (c) after the word "diligence" insert the words "or has failed to comply with these rules or with any order of the court".

Line 31. Insert after the word "abolished" the following: "except where the court expressly finds that the dismissal with prejudice would work injustice".

Add a new subsection as follows: "(1) By the court whenever in its discretion it finds that any other disposition would work manifest injustice." no!

Rule A6 REDRAFT

JUDGE CLARK. After the words "United States" in line 18 starting a new sentence make the following insert: "A party may show that any witness has made statements contradictory to his testimony and" and strike the word "And".

JUDGE OLNEY. Line 6. Strike out the word "heretofore".

Lines 39-40. Strike out these two lines and substitute therefor: "a solemn affirmation may be accepted in lieu thereof."

Rule A7

Lines 1,2. Substitute the indefinite for the definite articles: "No formal exception to a ruling or an order" etc.

SENATOR PERDRER. Line 2. Strike out the words "during the course of the civil action".

JUDGE OLNEY. Line 4. Strike out "if" and substitute "that".

Line 7. After the semi-colon following "the court" strike the rest of the line and all of line 8. Substitute the following: "and if a ruling or order be made without a party having an opportunity to object thereto no objection need be made by him."

Rule A10

JUDGE OLNEY. Line 34. After the words "inconsistent with each other" insert the following: "and one or more are likewise inconsistent with the general verdict".

Rule A11

MR. MORGAN. Line 11. Strike comma after "involved" and substitute a period.

Substitute for the rest of the paragraph the following: "After the jury has been discharged, the court shall proceed to make such determination of the motion as the ends of justice shall require. If no verdict has been returned, the court may order judgment as if the requested verdict had been directed, or may order a new trial; if a verdict has been returned it may order judgment upon the verdict or judgment as if the requested verdict had been directed, or a new trial.

Strike out the Alternative Rule A11 in brackets.

Rule A-11 (continued)

SENATOR PEPPER. Alternative Rule A-11 to be the same as the first alternative with the addition of the proviso which now appears in brackets in lines 15 to 19.

Rule A12

JUDGE OLNEY. Strike sentence beginning in line 7 and ending in line 10 and substitute therefor the words "No party may assign as error the giving or the failure to give an instruction unless he shall have objected thereto before the jury has retired stating distinctly the matter to which he objects and the grounds of objection."

Rule A13

JUDGE OLNEY. Lines 5, 6. Strike the rest of the line after "made only" and all of line 6 up to the sentence beginning "when such a reference is made," and substitute in lieu thereof: "in case it appears that the court cannot otherwise give to its other business the attention and despatch reasonably required."

Rule A14

JUDGE OLNEY. Line 12. Let the sentence end with "to make his report." and strike out the balance of the line, substituting therefor: "Notice of any such application shall be given to the master who shall thereupon certify to the court his explanation of any past delay and the reason for any future delay that he may foresee."

Rule A15

MAJOR TOLMAN. Strike out in line 1 the words "subject to the provision of Rule A15," and begin the rule by capitalizing the word "The" at the beginning of line 2.

SENATOR PEPPER. Line 2. Strike out the word "so" before "specify".

MAJOR TOLMAN. Line 24. Strike out the words "of the parties accounting" at the end of the sentence.

Rule A15 (continued)

JUDGE OLNEY. Lines 9-16 incl. Strike out balance of the paragraph beginning with "He" in line 9 and substitute the following: "He may require the production before him of evidence touching all matters contained in the reference including the production of all books, papers, vouchers, documents and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and shall have the authority to swear witnesses and may himself examine them and the parties to the action."

SENATOR PEPPER. Line 18. "Rule 5" to be stricken and replaced by "Rule ____".
Line 21. "Rule 59" should be "Rule ____".

Rule A16

SENATOR PEPPER. Line 8. Strike out the words "accompany them with" and substitute the words "return to the court with them"

MR. MORGAN. Lines 19-26. Beginning with "but shall" in line 19, strike out everything down to and including "master" in line 26 and substitute Mr. Morgan's comment as follows: "but within ten (10) days after being served with notice of the filing of the report any party may serve objections to the report upon all other parties to the reference. After hearing the parties thereon, the court may adopt the report, or if it is satisfied that prejudicial error or mistake has been committed by the master, it may modify the report or reject it in whole or in part."

PROCEEDINGS SUNDAY, APRIL 19, 1936

The Meeting was called to order at 2:15 p.m. by the Secretary, Major Edgar S. Tolman, who presided until the Chairman, Senator Pepper arrived.

Rules of Civil Procedure, Tentative Draft III, March, 1936, taken under consideration.

Rule A17

JUDGE OLNEY. Lines 5, 6, 7. To be stricken and to read as follows:

"to the provisions of Rule A13. The compensation to be allowed to a master shall be fixed by a court and such compensation shall be".

SENATOR PEPPER. Line 12. Strike the word "in" at the end of line 12.

Line 13. Strike the words "accordance with the provisions of Rule ,".

Line 14. Strike the word "thereof".

Rule A18

SENATOR PEPPER. Line 6. Substitute "entered" for "rendered".

Line 7. Insert "determined" after the words "issue or issues".

Line 8. Strike the words "if warranted by the pleadings, proof or otherwise,".

Line 10. Strike out the word "rendered" and substitute in lieu thereof the words "or order entered".

Rule A19

SENATOR PEPPER. Line 8. Strike out the word "mentally" and after "incompetent" insert the word "person," so that it will read; "who is not an infant or incompetent person,".

MAJOR TOLMAN. Line 12. Strike out after the word "sum" everything that is there and substitute "which to be made certain requires nothing more than computation."

Line 16. Strike out the word "generally".

Line 15. Strike "mentally" and insert "person" after "incompetent".

Line 21. Strike out the words "make appropriate orders therefor and may".

Line 24. Strike out "Subdivisions (a) and (b) shall be followed" and substitute:

"The foregoing provisions shall apply".

Rule A20

MAJOR TOLMAN. Line 9. Add after the conclusion of the sentence ending with the words "conclusions of law." the following: "or to amend the judgment." and strike the period after "law"

SENATOR PEPPER. Strike lines 8 and 9 and substitute "court shall have power to open the judgment if any has been entered to take additional testimony, to amend or make new findings of fact and conclusions of law and to enter a new judgment."

MAJOR TOLMAN.

Line 14. Substitute "if" for the word "whether".

Line 15. Strike "or upon the minutes of the court, or both" and substitute "that fact will be stated."

JUDGE OLNEY. Line 16. Strike "grounds" and substitute "motion".

Line 17. Strike "stated in the motion for new trial do not appear upon the minutes of the court" and substitute "for the new trial is to be based upon affidavits".

Line 19. "any" to be changed to "such".

MR. MORGAN. Change the present (e) to become (f) and substitute as (e) the following: "(e) At any time within ten (10) days after the entry of an order for judgment or the reception of a verdict, the court may of its own motion order a new trial for any reason for which it might grant a new trial upon motion of a party." The above is taken from Mr. Morgan's comments on page 4 of this rule.

Rule A21

JUDGE OLNEY. Line 7. Insert "therein" after "errors" and substitute "and" for "or" before "errors".

Line 8. Before ^{the} "motion of any" insert "on". Substitute "on" for "upon" in the same line.

Line 9. Insert after "orders" the words "or other parts of the record".

SENATOR PEPPER. The second alternative of subdivision (a) is accepted with changes as above indicated.

Rule A21 (continued)

SENATOR PEPPER. Line 21. Before "court" change "the" to "a", substituting the indefinite for the definite article.

Line 23. The rule shall stop with the word "proceeding".

Rule A22

DEAN CLARK. Line 2. Strike out "including those required to be heard before three judges," so that it will read: "In all actions tried without a jury, the court shall" etc.

Lines 8, 9, 10. Strike the sentence beginning in line 8 with the words "The findings of a master" and substitute therefor "The findings of a master shall to the extent to which the court adopts them be considered as the findings of the court."

Rule A24

SENATOR PEPPER. The bracketed matter is to be retained.

Rule A25a

MR. HANMOND. Line 3. Strike "thereby"

Line 5. Strike out the second bracketed matter. Retain the first bracketed material omitting the brackets. After "Supreme Court" insert "of the United States" and follow with the words "governing such an appeal".

Rule A25b

DEAN CLARK. Change the subdivisions from numerical to alphabetical.

SENATOR PEPPER. Line 5. Strike "clerk of" and the number (1).

Line 6. Retain the words "of appeal", put a period after "and" and strike out the rest of that subdivision.

Line 11. Strike "and" and insert the words "shall specify the amount and surety of the bond on appeal or of the supersedeas bond if any and the surety therein;"

Rule 428b (continued)

MR. HARMON. Line 25. After the words "bond on appeal shall be" insert "filed" so that it will read "on appeal shall be filed in the sum of" etc.

Line 28. After "necessary" put a period. After the period insert "If no such bond or no supersedeas bond has been filed with notice of appeal the appellee may move to dismiss the appeal. After such bond has been filed with the clerk of the court the appellee may object to its form and sufficiency" etc. and strike out the balance of line 28 beginning "but an appellee may" down to and including "court" in line 29.

SENATOR PEPPER. Line 36. Strike "on the appeal".

Line 40. Strike the words "in its discretion".

Line 45. Strike the words "order otherwise" and substitute therefor "fix another sum or order security other than by way of bond."

DEAN CLARK. First bracketed material as corrected accepted and the second bracketed material can go out.

Rule 428c

SENATOR PEPPER. The matter in brackets is to stand as part of the rule but is to be modified thus: "When a joint party is not a party to an appeal the judgment rendered for or against him shall not be affected by the judgment rendered on such appeal insofar as such judgment concerns legal relations between him and others than such of the joint parties as have appealed; but he shall be bound by the judgment on such appeal insofar as it concerns legal relations between him and such others of the joint parties as have appealed."

Rule 430

SENATOR PEPPER. Alternative Rule, line 4. Substitute "securing satisfaction of judgment" for the words "responding to".

The second alternative as corrected is to stand rather than the first.

Rule A31

SENATOR PEPPER. To bring this rule before the Chairman as to advisability of making the change.

JUDGE OLNEY. Line 14. After the word "shown" insert "or unless the party against whom the order is directed consents that it may be extended for a longer period." Strike out the word "and" and start new sentence with "The".

Rule A32.

Re second paragraph of this rule. This matter is reported by the subcommittee as an important matter to be included in the rules although the draft of the rule had not been submitted to the whole Committee.

It is understood that the Reporter will make the 2nd paragraph of A32 as it now stands the subject of a second rule to follow "Deposit in Court".

SENATOR PEPPER. Line 5. Strike out "clerk" and substitute "court".

Line 10. Strike "clerk of the" so that it will read: "deposited with the court" etc.

Lines 12, 13. Strike the words "by the clerk and shall be" and substitute "and" so that it will read: "shall be deposited and withdrawn" etc.

Rule A33.

MAJOR TOLMAN. The rule as dictated by Major Tolman is as follows:

Rule A33. Enforcement of Judgment for Specific Acts; Vesting Title. If an order or judgment, interlocutory or final, directs the performance of any specific act, as, for example, the execution of a conveyance of land or the delivery of deeds or other documents, and the disobedient party, after notice of the order or judgment, fails to comply therewith within the time specified, the court may direct that the act be done at the cost of the disobedient party by some other person appointed by the court and the act when so done shall have like effect as if done by such party. The clerk shall, on application of the party entitled to performance, issue a writ of attachment or sequestration against the property of the disobedient

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Rule A35 (continued)

(REDACTED TALKING)

party to compel obedience to the order or judgment. The court may also proceed against such party for a contempt. In lieu of directing a conveyance the judgment may divest the title to property, real or personal, out of any of the parties and may vest it in others, and such judgment shall have all the force and effect of a conveyance by such parties executed in due form of law. When any order or judgment is for the delivery of possession, upon proof by affidavit of a demand for delivery and a refusal to obey the order or judgment, the party shall be entitled to a writ of execution or assistance." R

Rule A36

SENATOR PEPPER.

The Reporter at the request of the Subcommittee will prepare a concise and simple alternative for Rule A36, modeled on the docketing of judgments within the limits of a state in counties other than the county in which the judgment was rendered and when this Subcommittee reports to the Chairman of the whole Committee we will submit that as the recommendation of the Subcommittee, together with Rule A36 in the form presented by the Reporter.

Line 46. Strike the balance of the line beginning with "any ground sufficient" and all of line 47 and substitute the words "the ground that the statute of limitations of the forum would bar an action thereon."

Rule A38

SENATOR PEPPER. Line 16. After "entering" insert "defaults or".

Line 17. Strike "as provided in Rule A19,"

Lines 19, 20. Strike out "any such process, judgment, order or other proceeding" and insert "they".

JUDGE OLNEY. Lines 7-12 incl. Strike the entire paragraph and substitute therefor: "All trials or hearings upon the writs shall be conducted in open court and so far as conveniently possible in the regular court room of the court. All other

Rule A38 (continued)

(JUDGE OLNEY)

acts or proceedings which it is incumbent upon the court to do or conduct may be done or conducted by the judge thereof in chambers, that is, without the attendance of the clerk or other court officials and at any place either within or without the district provided no hearing shall be conducted outside the district without the consent of all parties to the hearing."

SENATOR PEPPER. Bracketed matter in lines 30 and subsequent lines stays in.

Rule A40

MR. RAMOND. Bracketed matter "or personal" in line 20 stays in.

MAJOR TOLMAN. Line 14. At the end of the line after the words "for trial" add the words "by jury".

Line 9. After the word "thereon" strike "and". After the word "appearances" insert "and all acts of the court".

Rule A41

The Reporter is requested to include as parts of the rule the matter now included in the comment on page 4.

Rule A45Line 6.

JUDGE OLNEY. After "also all" insert "further".

Lines 8, 9. Let the sentence end with the word "injustice" and cross out remainder of the sentence.

Meeting adjourned at 7:00 P.M.

The Meeting was called to order at 9:00 a.m. by the acting chairman, Judge Olney, who presided.

Rules of Civil Procedure, Tentative Draft III, March 1936, taken under consideration.

Rule 27

Strike out lines 9 and 10 and substitute the following; "When persons, who are not indispensable but who ought to be parties if complete relief is to be accorded as between the original parties, have not been made parties and are subject".

In line 23, insert after the word "accorded" "as between the original parties".

Pursuant to previous instructions, Major Tolman presented the following rule:

Material Error Must Affirmatively Appear. No error or defect in any ruling, order or other action of the court or in anything done or omitted to be done by the court or by any of the parties to the action shall be ground for a new trial or rehearing or for setting aside a verdict or reversing, annulling or otherwise disturbing a judgment or order unless it clearly appears that material prejudice to the substantial rights of the objecting party has resulted therefrom."

This rule was accepted and it was agreed that it should be entitled "Material Error Must Affirmatively Appear"; and should follow Rule A24, T.D. III.

Rule A26

Strike out the period at the end of line 44, insert a comma and add the following: "and shall be printed as provided by law."

In Alternative Rule A26, it was agreed that subdivision (d) should become (e) and the following accepted as the new subdivision (d):

"(d) The appellate court may by standing rule require that the printed briefs of the parties shall reproduce those portions of the record which may be necessary to the understanding of the parties' respective assignments of error."

It was agreed that the last paragraph of the Note to the Supreme Court should be expanded to adequately state the California and Illinois provisions relative to records on appeal.