

MAJOR TOLMAN

Original Copy

UNITED STATES SUPREME COURT  
ADVISORY RULES COMMITTEE

FIRST MEETING

CHICAGO, ILLINOIS.

JUNE 20, 1935

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REPORT OF PROCEEDINGS  
OF THE FIRST MEETING OF THE  
ADVISORY COMMITTEE  
TO THE  
SUPREME COURT OF THE UNITED STATES

HELD IN  
THE FEDERAL BUILDING,  
CHICAGO, ILLINOIS

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

\* \* \* \*

THERE WERE PRESENT AT THIS MEETING:

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

Also present, upon the invitation of the Committee:

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

\* \* \* \*

*Mr. Hammond was present  
Ed. H. Hammond*

# I N D E X

## PAGE

Preliminary Statement by the Chairman - - - - -	2
Report by Mr. Tolman - - - - -	9
Statement as to Finances and Appropriations - - -	10
Motion that Committee submit its suggested rules to the Court by June 1, 1936 - - - - -	25
Motion that Major Edgar B. Tolman be ap- pointed Secretary - - - - -	39
Motion that the Secretary be authorized to communicate with local committees heretofore appointed, etc. - - - - -	41
Motion that Chairman and Reporter be authorized to request members of the Committee to act as Advisors - - - - -	61
Copy of proposed Budget submitted by the Reporter - - - - -	70
Motion that Budget be amended to include compensation to the Reporter, etc. - - - - -	80
Motion that salary of Reporter be fixed at \$5000 per annum - - - - -	86
Resolution approving Budget as amended - - - -	87
Motion to authorize Reporter to employ assistants, subject to approval of the Chief Justice - - - - -	89
Motion that, in the preparation of rules, the Committee proceed upon the basis that they shall be made uniform in all Districts - - -	102
Motion that the writing of a Code of Evidence be not included in the work here undertaken	126

### Afternoon Session

General Discussion	134
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THE CHAIRMAN: Gentlemen, suppose we get going?  
Let's check the attendance here:

William D. Mitchell, present.

Scott M. Loftin, present.

George W. Wickersham, present.

Wilbur H. Cherry, present.

Charles E. Clark, present.

Armistead M. Dobie, present.

Robert G. Dodge, present.

Joseph G. Gamble, present.

George Donworth, present.

Monte M. Lemann, present.

Edmund M. Morgan, absent. ✓

Warren Olney, Jr., present.

Edson R. Sunderland, absent. ✓

Edgar B. Tolman, present.

That completes the list.

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

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

which authorized it to combine the two.

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

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

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

committees that have been appointed.

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

and we have got to have a secretarial office; we have got to have a set-up to handle our clerical work.

I am not speaking of the Reporter's staff, that is a separate thing, but I mean the general secretarial work of the Committee.

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

MR. TOLMAN: Mr. Chairman and gentlemen:

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

(Reading report:)

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

Gentlemen:

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

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

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

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

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

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

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

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

The Circuit Judges promptly transmitted to

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

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

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

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



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

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

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

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

- (1) The State Practice act or Code of Civil Procedure.
- (2) The Federal Equity Rules.
- (3) Selected provisions of the procedural system in other states where the subject had not been dealt with in the committee's own state, such as
  - (a) pre-trial practice
  - (b) discovery and examination before trial
  - (c) joinder of parties and of causes of action
  - (d) provisional remedies, and
  - (e) summary judgments.

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

While every state which has a satisfactory code would naturally favor the largest possible conformity between the new rules and the State code, there seemed to be a recognition of the necessity of uniformity and a willingness to make concessions for the accomplishment of that end.

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

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

Edgar B Tolman

Special Assistant to the  
Attorney General

Chicago, Illinois  
June 20, 1935

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

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

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

This, of course, will cost some money.

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

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

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

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

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

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

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

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

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



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

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

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

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

I started to call your attention to this budget.

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

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

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

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

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

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

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

He has an estimate of mimeographing and printing, \$2000; secretarial staff in the Department of Justice and expenses of the Department with respect to the local district committees, he has put in at \$20,000; the Attorney General's office estimated it at \$15,000.

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

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

What is your pleasure about that?

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

doubtedly given considerable consideration to the work of this Committee.

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

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

THE CHAIRMAN: What is your pleasure about that?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

neglecting our job.

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

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

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

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

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

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

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

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

THE CHAIRMAN: Undoubtedly. It will go out to

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

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

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

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

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

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

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

MR. LOFTIN: I second the motion.

THE CHAIRMAN: All in favor of that say aye.

Opposed?

(The motion was carried by unanimous vote.)

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

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

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

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

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

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

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

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

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

His question raises this one:

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

MR. WICKERSHAM: There we have the precedent in the

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

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

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

MR. DOBIE: I would like to make one observation



there, Dean Clark, if I may.

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

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

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

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

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

MR. WICKERSHAM: They are both indispensable.

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

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

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

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

MR. WICKERSHAM: Surely.

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

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

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

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

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

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

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

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

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

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

MR. TOLMAN: We have had some interesting reflec-

tions on that subject, as a result of experience.

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

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

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

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

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

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

THE CHAIRMAN: Fifty districts, I think he said.

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

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

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

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

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

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

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

3

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

MR. DOBIE: Mr. President:

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

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

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

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

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

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

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

MR. DOBIE: I second it.

THE CHAIRMAN: All in favor say "Aye".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

or anything of the sort.

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

himself had appointed, really.

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

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

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

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

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

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

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

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

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

MR. TOLMAN: Yes.

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

MR. TOLMAN: Yes.

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

THE CHAIRMAN: Mr. Hammond ?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Reading.)



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

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

MR. HAMMOND: Yes.

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

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

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

"Dear Mr. So-and-so:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

I would like to see Major Tolman get those.

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

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

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

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

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

THE CHAIRMAN: Is there any discussion ?

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

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

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

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

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

MR. LEMANN: Yes, it would.

THE CHAIRMAN: Have you any further discussion ?  
All in favor of that resolution, with  
interpretations, say "Aye."

Opposed ?

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

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



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

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

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

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

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

MR. LOFTIN: I will second the motion.

THE CHAIRMAN: Any discussion? All in favor --

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

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

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

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

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

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

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

same authority.

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

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

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

MR. DOBIE: That is my idea.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. OLNEY: A bibliography of that sort would be

very helpful to lawyers.

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

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

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

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



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

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

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

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

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

(Copy of proposed budget is as follows:)

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

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

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

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

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

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

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

MR. CLARK: I am not sure.

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

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

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

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

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

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

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

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

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

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

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

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

(Reading letter with reference to question of compensation.)

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

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

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

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

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

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

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

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

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

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

MR. CLARK: Are you going to be away?

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

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

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

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

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



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

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

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

THE CHAIRMAN: Will you get such a resolution ready?

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

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

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

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

I make that motion.

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

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

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

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

MR. LEMANN: I second it.

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

All in favor of that say "aye".

Opposed?

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