P R O C E E D I N G S

ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

VOLUME I

April 3-5, 1944
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Washington, D. C.

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MONDAY MORNING SESSION

April 3, 1944

The meeting of the Advisory Committee on Rules for Civil Procedure, held April 3-5, 1944, in the West Conference Room, Supreme Court of the United States Building, Washington, D. C., convened at 10:00 a.m., Judge Charles E. Clark, Reporter, presiding.

... The following were in attendance:

Charles E. Clark, Reporter (Acting Chairman)
Wilbur H. Cherry
Armistead M. Dobie
Robert G. Dodge *
Monte M. Lemann
Scott M. Loftin
Edmund M. Morgan
Edson R. Sunderland
James Wm. Moore
Robert S. Oglebay
Edward H. Hammond ...

JUDGE CLARK: I shall take the responsibility of calling the meeting to order, because I guess I am the oldest veteran, in point of service at least. I am sorry to say that I didn't know until I got here that the Chairman and the Vice-Chairman and the Secretary are all absent and, I am afraid, won't be here.

* Not present at the final session.

JUDGE DOBIE: How about Major Tolman?

JUDGE CLARK: He is in Arizona. He is said to be marooned in Arizona. Mr. Gamble, I understand, is not coming. Judge Donworth is expected. I guess Judge Donworth is the only one who is expected and who is not here now.

The Chairman writes this on March 31 to the Advisory Committee, "Attention of the Acting Chairman."

"Gentlemen:

"I regret that I am unable to attend the meeting. The reason I am absent is that some fifty-five years ago, catching behind the bat without a mask in a sand lot baseball game, I was hit on the nose by the bat thrower. Nothing was done about it at the time, but the injury drove the cartilage into one nostril and I have had more or less trouble breathing ever since, and finally in my old age I decided I needed a little more wind and to have the darn thing fixed, which has required a minor operation in the nasal passages. I thought I had allowed enough time between the operation and the Committee's meeting to be able to attend the meeting, but the swelling resulting from the operation has not subsided enough so that the doctor feels I should go to Washington now. If the meeting were just a few days later, I could have made it. However, it is not very important that I be there.

"I have written out some notes with suggestions as to various rules, which is all I could present if I were present.

As each rule comes up, I would like to have my suggestion read to the Committee.

"There are only two new matters to come up which have arisen since our last meeting. One is the revision of the court reporter rules resulting from the passage of the court reporter's act, which is a minor matter and ought to be easily done; and the other is the situation resulting from the decision in Hill v. Hawes, where the Court in effect held that our rule requiring the clerk to give informal mailed notice of orders gave a party a right to rely on the receipt of the notice, and the clerk's failure to send it justified a court in exercising his discretion to extend the time for appeal by the subterfuge of vacating the judgment and immediately reentering it. The Reporter's proposals on this subject seem to acquiesce reluctantly in the decision and tinker the rules somewhat to mitigate it. I think this is the wrong approach. I wrote a letter to the Chief Justice about the case, which is attached to my notes, and I would like to have it read to the Committee; also, the Chief Justice's reply, in which he said the Court would not grant a rehearing, but invited any amendments the Committee wanted to suggest, which I interpret as an invitation to present amendments that repeal Hill v. Hawes, if we think it desirable. I have in my notes presented two alternatives. One is to make amendments reiterating more clearly our original intent and repealing, as far as express language can do so, the

decision in Hill v. Hawes. The other alternative is to assume that the Court has power to make rules affecting the time for appeal and fixing the time at thirty days from the date of notice of the judgment, instead of the date of entry, and requiring a formally served notice to start the time for appeal. My preference is for the latter. I think both should be incorporated in the draft to be printed and distributed, and let the courts and the bar comment on both.

"The Reporter has considerable more work to do on this subject and other rules in the way of preparing additional notes for the consideration of the bar and the courts. I would like to see that draft before it is submitted to the Court, as I may have some suggestions to make about the notes.

"Sincerely yours,

"William D. Mitchell"

Mr. Hammond, Senator Pepper won't be here at any time? Is that the situation? Did you have a letter from the Senator?

MR. HAMMOND: I had a letter from him. First he said he was coming, and I got a room for him at the hotel. Later, I just had a short note from him in which he said he would be unable to be here at the meeting, and to cancel the reservation.

JUDGE CLARK: Then I take it the Major won't be here.

MR. HAMMOND: The Major will not be here. He is out in Arizona, and he plans to stay there. He had his reservations

back on the 6th of April, and he said he didn't think he could get them changed.

MR. LEMANN: Is Judge Donworth coming?

MR. HAMMOND: I haven't heard that he is not coming.

MR. LEMANN: I saw a letter from him in another connection saying that he was having difficulty arranging his plans to come both to this and to the Institute meeting, and it left me rather uncertain whether he was coming.

MR. HAMMOND: As far as I know, he is coming; and as far as Mr. Mitchell's secretary knows, he is coming, because she did not mention him as one of the ones that were not coming as far as she knew.

JUDGE CLARK: I think, then, that we had better name an Acting Chairman and do the best we can. I am sorry things have developed this way, but I didn't realize it until I got down here.

JUDGE DOBIE: I believe it would save a little time if the Reporter would act as Chairman. I suggest that the Reporter act as Chairman of the meeting. I think that will probably save some time.

MR. LEMANN: He probably will do as much talking, whether he is in the chair or isn't.

SENATOR LOFTIN: With the idea of limiting the amount he can talk.

DEAN MORGAN: I think you had better do it, Charlie.

JUDGE CLARK: If you all think it would expedite matters, I will. I am afraid I will be talking all the while.

PROFESSOR SUNDERLAND: You must always ask the Chair and get permission before you say anything, Charlie.

JUDGE DOBIE: I make that motion with the idea that you don't do a Pooh-Bah stunt on us and say, "I make this speech as Chairman," and then answer it as Reporter, but I think that would expedite matters.

SENATOR LOFTIN: I will second the motion.

JUDGE CLARK: It has been moved and seconded that the Reporter act temporarily as Acting Chairman. All those in favor will say "aye"; opposed. (Carried) We will go ahead on that basis. If it doesn't work out, we can change during the course of the meeting.

... Judge Clark assumed the chair as the Acting Chairman ...

THE ACTING CHAIRMAN: Mr. Hammond, have you any announcements? I suppose we ought to decide some preliminaries.

... Off the record ...

MR. HAMMOND: I am having mimeographed Mr. Mitchell's letter and also his suggestions. He has submitted suggestions as to certain of the rules. A copy of those will be available very shortly. I have also noted in my own notes the rules as to which he has made suggestions and, if the Committee would like me to, I can read his suggestion as each rule comes up

rather than read his long list of suggestions.

Also, I have had Mr. Tolman's suggestions mimeographed, which you already have, and I have likewise made a note under each rule in my notes that he has made a suggestion, and I can present that as each rule comes up.

DEAN MORGAN: You haven't anything from Senator Pepper?

MR. HAMMOND: No, we have no suggestion from him.

THE ACTING CHAIRMAN: I might add that sometime ago I had suggestions from Dean Morgan, and those have been mimeographed. I guess those had better be put around the table.

MR. HAMMOND: Yes, they have been mimeographed.

THE ACTING CHAIRMAN: I guess they are over on the table.

MR. HAMMOND: I will see that they are distributed. I had figured on that, though, of course, that he, being here, would bring up his own suggestion under each rule.

THE ACTING CHAIRMAN: I might add that a little later today I shall have distributed some material that we prepared on very recent cases. There aren't so very many of them, but we thought you would like to have them to bring everything down to date, as far as we know. Probably the most important of the cases that we have noted here is the case a week ago on summary judgment in the Supreme Court. Then, when we get as far as Rule 75, Judge Maris, of the Third Circuit, has a very

interesting suggestion of sending up the original papers rather than copies. When we get there, I will bring that up.

I think that is all I have in a preliminary way. How shall we proceed with the rules? What is the status of the condemnation rule, Mr. Hammond?

MR. HAMMOND: All the material has been sent out, and there has been nothing further, other than what has been sent out to the Committee sometime ago.

JUDGE DOBIE: I thought (not necessarily that we are bound by it) that Mr. Littell and the Committee had gotten together on everything except the right of the Government to dismiss after the jury verdict had been brought in.

MR. HAMMOND: Yes, with the exception of the matter of the jury trial. They are together on everything, really, except the dismissal rule.

DEAN MORGAN: Yes, that is right.

MR. HAMMOND: Whenever you get ready to take that up, I shall be glad to discuss the amendment with the Committee. I know all about them and, as I said, everything has been agreed on except that dismissal rule, but we also have the problem as to jury trial or court trial. There is no disagreement between the Lands Division and this Committee, but it is a question of what this Committee wants to do as to providing for a court trial.

MR. DODGE: I would suggest leaving that until

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MR. DODGE: I would suggest leaving that until

tomorrow and going ahead with the rules in regular order today.

THE ACTING CHAIRMAN: Very well. Unless there is objection, we will follow that course. Suppose we start in, then, with the rules and with the draft. I suppose the thing to do is to take the rules now before you. We don't want to go back over anything else, do we? I suppose there is no rule of exclusion definitely, is there, but the way to approach this is to take the rules that we have here. Unless there is objection, we will go ahead, then, and the first rule is Rule 4, page 1 of Preliminary Draft III. Rule 4(e). Have we anything from the Major?

DEAN MORGAN: Rule 4(e) is the only one that you have changed, isn't it, Charlie?

THE ACTING CHAIRMAN: Yes.

MR. HAMMOND: The Major favors the second draft at the bottom of the page.

DEAN MORGAN: Yes. I think we have to have that if we are going to insert this rule on condemnation.

MR. HAMMOND: Yes.

SENATOR LOFTIN: I suggest we pass that over until we decide what we are going to do with the condemnation rule.

MR. LEMANN: Aren't we going to adopt the condemnation rule? It is just a question of what form it is going to take. If so, I think perhaps we had better take the suggestion of the Reporter, which Major Tolman recommends also. We would have to

have a rule of court in here if we had a condemnation rule, wouldn't we?

MR. HAMMOND: Yes, sir.

MR. LEMANN: The only question is whether there is any possibility that we won't adopt some condemnation rule.

MR. HAMMOND: We are going to adopt some rule, as I understand it. There is no question about that. We are practically together with the Lands Division on all the amendments except the one about dismissal.

MR. DODGE: I move we adopt the alternative rule, subject only to reverting to the first suggestion if we do not adopt any condemnation rule.

DEAN MORGAN: I second the motion.

JUDGE DOBIE: That is, put in "a rule of court," as suggested by the Reporter. I second that.

MR. DODGE: That is right.

THE ACTING CHAIRMAN: Any discussion? All those in favor will say "aye"; opposed. It is so voted. (Carried)

We next go on to Rule 6. Let me say that, as we go along, I wish the members of the Committee would look at the notes, if you haven't done so already, and at the end I should like to have some suggestions on the notes. I am just a little disturbed that Mr. Mitchell thinks the notes are not correct. He says that some of them are directed to the Committee, which of course is true, but I think in every case we have labeled

them as such. Would you be thinking about that? If you want to, bring it up at any time under a particular rule, but at the end I should like to have a little further instruction about the notes. We had contemplated that these notes, except for those directed to the Committee, were the ones that would go out with the final draft. That is what we worked on.

Now let's turn to Rule 6(b). What are the suggestions?

MR. HAMMOND: Mr. Mitchell says this:

"The revision (said to be favored by the majority) would give the Court power to entertain a motion for new trial at any time, and as the end of the term does not under our rule affect the court's power, it seems to me there would be no limit of time on the court's power to grant a new trial--and no finality to a judgment, the very thing of which we complain in the decision in Hill v. Hawes.

"If the Committee does adopt this revision, I think the note ought to state what the result is, to wit, that there would be no time limit on granting a new trial, and no finality to any judgment. I think I know what the bar would say if such a note were attached.

"I favor the alternative. If it is desirable to give some power to the court to enlarge the time for granting new trials, would it not be better to adopt the alternative, and then amend Rule 59 to place a more generous limit on time for

motions for new trial--but always with the restriction that such a motion cannot be made after the time for appeal has expired?"

THE ACTING CHAIRMAN: The Major has something, hasn't he?

DEAN MORGAN: He favors your original.

MR. HAMMOND: Yes, he favors the original.

THE ACTING CHAIRMAN: You will recall, I am quite sure, that it was the Major who brought up the proposal originally; I mean at the last meeting. Of course, I am on record as favoring the alternative, but I am not quite sure what we will do about this because the Major and Judge Donworth, among others, I think supported the change. But at least the first thing we should do is to find out the sentiment of us here present.

PROFESSOR SUNDERLAND: What is the present status of the equity doctrine of applying in equity for a new trial at law? Is that employed in practice at the present time or has that jurisdiction of equity rather disappeared?

THE ACTING CHAIRMAN: I am not sure that I know. What have you in mind?

PROFESSOR SUNDERLAND: You can apply in equity for a new trial at law.

THE ACTING CHAIRMAN: You mean a bill of review?

PROFESSOR SUNDERLAND: Yes; a bill in equity for a new

trial at law. That is the old equity practice.

JUDGE DOBIE: Haven't we a six-month limit on that in either 59 or 60, in which to move to set aside an order?

THE ACTING CHAIRMAN: No, I don't think so. Rule 60(b), you know, is a motion which is more extensive than the original law, but that provides in itself, in 60(b), that you may still have the bill for review. Mr. Moore, you might explain that.

JUDGE DOBIE: There is no time limit on that?

PROFESSOR MOORE: Three months.

JUDGE DOBIE: That is what I thought. There was a six months' limit on it.

DEAN MORGAN: But in no case exceeding six months.

PROFESSOR SUNDERLAND: A bill in equity for a new trial.

JUDGE DOBIE: Any motion to set aside an order or judgment. Isn't that the idea?

PROFESSOR MOORE: Any proceeding in equity or at law, such as the old writ of alter requiro.

DEAN MORGAN: The last sentence in 60(b) says it doesn't limit the power of the court to entertain an action to relieve a party from a judgment, order, or proceeding. That is your equity action that you are talking about.

PROFESSOR SUNDERLAND: That is the equity I had in mind. If there is no limitation on that now, if we take off

this limitation of new trials, we are really not changing the practice very much except the method of doing it.

DEAN MORGAN: Yes, but you don't get a bill in equity setting aside a judgment sustained except in very extraordinary circumstances.

PROFESSOR SUNDERLAND: Wouldn't that be true with the administration of this new trial?

DEAN MORGAN: I don't think so. I think the minute you begin to extend the time in which you can fool around for a new trial, you are going to have it happen time and time and time again. When you bring a bill in equity to do this sort of thing or a complaint starting a new action to set aside a judgment, the court will require you to make a showing. It is just a motion, the way most courts grant an extension of time for motions, at least in my experience.

PROFESSOR SUNDERLAND: How would it do to suggest that the time limit could be exceeded only in cases where, under the prior practice, we had this sort of method of going at it? I don't like to see an absolutely ironclad rule put down there for limiting the time. It seems as though there ought to be a possibility in a suitable case to extend it.

MR. LEMANN: Most states have limits, Professor Sunderland, I think, on motions for a new trial, and I don't know that there is any provision in most states to extend it. In my state you have to apply for it in three days, and of

course the lawyers, automatically almost, apply for the new trial right away. They immediately do it. That doesn't mean they have to argue it in three days.

DEAN MORGAN: No.

MR. LEMANN: That motion for new trial sometimes is not set down for hearing for thirty days. You get the time you need to present it, but it has to be immediately filed. Here it is ten days as it now stands, without any extension. When I first read this amendment, I didn't see any objection to the way the majority voted the last time, to let the judge extend it, but Mr. Mitchell is apprehensive that it may mean an definite extension.

MR. DODGE: We discussed that a good deal at the last meeting, and we added, I think, only three rules to the three that are already in the rule as adopted last time. One is the new trial motion. What were the other two?

MR. LEMANN: Rule 52(b) is the amendment of findings, and 50 is the reservation of decision on motion for directed verdict. I made a little index of it. Didn't we have new trial in the original edition?

THE ACTING CHAIRMAN: What is that, Mr. Lemann?

MR. LEMANN: In the original rule we prohibited any extension of the time for new trial.

DEAN MORGAN: We certainly did.

THE ACTING CHAIRMAN: Yes, we did.

THE ACTING CHAIRMAN: Yes, we did.

MR. DODGE: Subdivision (c).

THE ACTING CHAIRMAN: That has been ruled regularly in Supreme Court decisions as well as trial court decisions.

MR. LEMANN: So the effect of this majority vote last time is to grant an extension that we ourselves haven't previously given.

THE ACTING CHAIRMAN: And nothing is said about how far it goes, either. Some of the state provisions appear on page 4, at the bottom of the page in the footnote.

JUDGE DOBIE: We are still keeping the ten-day motion for new trial; isn't that true?

THE ACTING CHAIRMAN: We haven't taken any action yet. We are discussing it, Armistead.

MR. LEMANN: What he means, I understand, is that ten days is the standard provision now permitted by the rules for motion for new trial, under 59.

THE ACTING CHAIRMAN: Ten days is the existing rule. The question now is whether we modify to extend.

MR. LEMANN: You wouldn't cut it down in any rule.

THE ACTING CHAIRMAN: No. There was no suggestion to that effect.

JUDGE DOBIE: The only exception we now make is newly discovered evidence, isn't it?

DEAN MORGAN: Doesn't both your proposals except

60(b), which is the time for making a motion for a new trial?

MR. LEMANN: No; 60(b) is not the new trial provision.

DEAN MORGAN: What does it say? "A motion for a new trial shall be served not later than 10 days after the entry of the judgment". That is 59(b). I am sorry.

MR. LEMANN: That is 59.

THE ACTING CHAIRMAN: Rule 60(b) is the provision for motion to modify the judgment for inadvertence, excusable neglect, and so on. Of course, that still operates, and may operate in this case.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: It doesn't operate on quite the same grounds.

MR. LEMANN: Oh, very different grounds.

THE ACTING CHAIRMAN: That is true.

MR. LEMANN: This is a rather unusual provision that Judge Olney persuaded us to take over from a California Code provision in 60(b).

THE ACTING CHAIRMAN: That is correct.

MR. LEMANN: But that is not the normal case. The new trial is the normal case.

DEAN MORGAN: Absolutely.

MR. LEMANN: What was the rule in equity generally? If I brought a suit for specific performance and the judge decided against me, how long did I have to go in there and ask

for a new trial in equity?

MR. HAMMOND: Here is the equity rule, Mr. Lemann. I have it here before me.

"No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court; but if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court."

JUDGE DOBIE: That is the old equity rule.

MR. HAMMOND: That is true.

MR. LEMANN: That is tied up with the terms that we want to get away from.

JUDGE DOBIE: I am against anything that ties in with the terms. We have abolished that and, for God's sake, let's let that stay. With that exception, I am open minded on almost anything.

THE ACTING CHAIRMAN: Let me state the connection of this problem with the problem raised by Hill v. Hawes. You may consider the two separately, of course, but if you take action to modify the rules as the Supreme Court has already done in Hill v. Hawes, then you may not want to do this at the same time. You don't want to make two modifications, all looking to making a judgment uncertain.

I suppose you all remember Hill v. Hawes. That was

a case down here in the District of Columbia. Judgment was entered; the appellant claimed that he didn't get notice of it from the clerk, and he got the trial judge to re-enter the judgment, and nothing more. The Court of Appeals held that that did not extend the time, and in the Supreme Court the majority held that it did, that the appeal was within the time.

Mr. Mitchell, you see, wants to go against the rule of the case directly. My suggestion, which he says is only reluctantly accepting and tinkering with it, is found under 60(b), pages 56 and 57 here, in which we put in a provision in effect allowing the district judge to modify the judgment during the six months' period, and Mr. Mitchell has other alternatives which are stricter than that.

I just wanted to bring that to your attention.

MR. LEMANN: There is no necessary connection between this rule and the Hill v. Hawes situation.

THE ACTING CHAIRMAN: Shall I put it this way: There is no theoretical connection between the two. Practically, isn't there this connection, that you don't want to extend the time of finality of judgment in two different ways at the same time? Do you?

MR. LEMANN: Of course, I think maybe the trouble in Hill v. Hawes is the exceptional situation prevailing in the District of Columbia. I was startled to find that in the District of Columbia the time for appeal was provided by rule of

the appellate court instead of by statute. Everywhere else in the country it is provided by statute, and you have ninety days; but in the District of Columbia it is provided by rule, and the rulewas twenty days. If that chap had had ninety days, he would have found out that a judgment had been rendered against him, in all probability, and he would have gotten in in time in the original entry, but he had only twenty days. I think now they have extended it to thirty, haven't they?

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: I thought they had extended it to three months. I think they have.

MR. HAMMOND: Thirty days is the last.

MR. LEMANN: My impression is that they extended it to thirty days. You really have only one-third of the time to appeal in the District of Columbia that you have anywhere else in the country. I don't see much reason for that, but I suppose that is up to the Court of Appeals for the District of Columbia, isn't it?

MR. HAMMOND: Yes, sir. As Mr. Mitchell says, the Congress gave the Court of Appeals of the District of Columbia the power to fix the time for appeal to that court by a special act.

MR. LEMANN: It is the only court of appeals that has the power.

MR. HAMMOND: Yes, sir.

THE ACTING CHAIRMAN: Do you want to take up further Hill v. Hawes at this time or to postpone it? Mr. Mitchell has put in all his suggestions as to Hill v. Hawes in connection with the next subdivision here, (c).

MR. HAMMOND: May I suggest on that that I think it would be advisable to postpone it until I can distribute to the members of the Committee what Mr. Mitchell has to say about it. He has quite a lot to say about it and has specific recommendations in regard to it. Not only that, he has quite a lengthy letter which he wrote to the Chief Justice about Hill v. Hawes after the case was decided, suggesting that they ought to have a rehearing of the case, and he has the reply from the Chief Justice.

JUDGE DOBIE: We certainly ought to have that before us, I think, before we consider it.

MR. HAMMOND: That is my suggestion, Judge Dobie. We will have those pretty soon.

JUDGE DOBIE: Suppose we pass that. I move we pass that.

MR. HAMMOND: It will require, I think, the consideration of reading them by the individual members of the Committee before you act on it. I think you can act much quicker if you do have it that way.

THE ACTING CHAIRMAN: There is no question that we must have Mr. Mitchell's material before us. That was a great

letter he wrote. He told the Supreme Court what was what.

The present question is on 6(b). Do you want to postpone that, too. As we said, it is not necessarily connected. It all affects the general idea.

DEAN MORGAN: I don't see that the two are tied together at all.

THE ACTING CHAIRMAN: Then, will you take some action on this?

DEAN MORGAN: You remember the history of this. The original amendment that was voted by the Committee was practically the alternative, wasn't it, and then on the second meeting they cut out a lot of these places where we prevented denying the enlargement.

THE ACTING CHAIRMAN: Yes.

DEAN MORGAN: One of them that they cut out was 59, which had to do with new trial. Of course, I am not in a very good position to speak on this because I vigorously opposed the cutting out of these various matters and wanted all the lists that were in the alternative at the time.

THE ACTING CHAIRMAN: Yes, that is a correct history. I think it is only fair to say that this specific issue wasn't particularly considered at the first Committee meeting last May. What we were considering then was meeting some cases that had raised the question how far Rule 6(b) would apply in certain cases not indicated.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: There wasn't any question of the new trial particularly as such. At any rate, we voted to insert something definite to make it very clear.

MR. DODGE: I understand that the substitute rule takes away the power of the court to extend the time in three cases. First, motions for a new trial, as far as concerns paragraphs (a) and (b). That is, we had in before the time for serving affidavits.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: That is right.

MR. HAMMOND: Opposing affidavits.

MR. DODGE: Yes; opposing affidavits, where there might be a reasonable ground for it, of course. Rules 60(b) and 52(b) are the other two. Rule 50(b) is the time for filing a motion for verdict after decision reserved, or whatever you call it, which doesn't seem to me very important; but the other one is more important, and that is the possible time for amending the findings of the judge.

Those are the three things, aren't they?

THE ACTING CHAIRMAN: Yes. I don't know that it is important whether you use the expression "takes away" or not. I might just say, however, that the holding is very definite that the time cannot now be extended under 59. So, in that case you will not be taking away power; you will be adding.

MR. DODGE: Except as to 59(c).

THE ACTING CHAIRMAN: No; in 59(a) and (b).

MR. DODGE: Yes. In 59(c) you left the power of the court existing.

MR. LEMANN: In the rules as now existing, but not under this proposed alternate change.

DEAN MORGAN: Oh, yes.

MR. DODGE: First, on 59 you have two questions. The first is whether we shall take out or leave it as it was before, which gave the court power not to extend the time for filing motion, but only the time for filing opposing affidavits where there might be reason for doing it.

THE ACTING CHAIRMAN: Yes, that is correct.

MR. LEMANN: I understand, Mr. Dodge, that is as left in the original rule.

THE ACTING CHAIRMAN: That is only left in by the alternative rule. The rule voted by the Committee, you see, extends (c).

MR. LEMANN: Altogether.

MR. DODGE: You haven't changed that at all in your amendment.

THE ACTING CHAIRMAN: In the alternative rule?

MR. DODGE: Yes.

THE ACTING CHAIRMAN: We have not changed it. We leave 59 as it is now.

MR. DODGE: True; 59(c).

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the proposed change. You are taking out the limitation on 59.

MR. DODGE: No; he is leaving 59 in.

MR. LEMANN: Not in the majority vote, as I understand it.

THE ACTING CHAIRMAN: I think I understand you, Monte. Of course, it depends on the way you are looking at it whether you say leaving it in or taking it out. I think you are quite correct that what the majority vote is doing is in what was the former rule--the former rule as worded, not necessarily as it stands.

MR. LEMANN: The rule as it now stands.

THE ACTING CHAIRMAN: The former rule was 59, and that is taken out now, and these other three rules are put in the place of it. That is correct as a matter of wording.

MR. LEMANN: I think that weakens the rule, because you had a limitation in there on the power of the court, that it must not extend the time in 59 except as permitted in 59(c). You have that in the rule now. Now you are going to take that out, and that, I think, is a weakening of the rule. What are you putting in instead? You are putting in a reference to say that he must not extend it in three other cases which aren't of much practical importance, I think. Personally, I think I would rather see the rule stay as it is.

PROFESSOR SUNDERLAND: Your suggestion really is that a fellow can always just automatically make a motion for new

trial, whether he wants really to rely upon it or not. If he doesn't know, he can just do it anyhow, and then he has the point saved.

MR. LEMANN: That is right. I asked Mr. Dodge how long they allow in Massachusetts, and he said three days, which is what they allow in Louisiana. He says he never knew anyone to try to get an extension. With us, I think it would be very doubtful that the court had the power to give an extension. What is it in Florida, Senator?

SENATOR LOFTIN: I think six days.

MR. LEMANN: What is it in Minnesota?

PROFESSOR CHERRY: Thirty.

MR. LEMANN: What is it in Virginia, Judge?

JUDGE DOBIE: I don't know just what it is in Virginia.

THE ACTING CHAIRMAN: It is six days in Connecticut.

MR. LEMANN: It is ten days here as it is, and we have had no kick about it. My own general feeling has been that where we have had no kick after six or seven years, why do we change something? As far as painting the lily with these other things, which is what I think they are--25, 60(b), and 73(g)--you are never going to get these rules absolutely perfect. You are never going to get them where judges aren't going to construe them. You don't want them that way, anyhow. I should think you haven't much popular clamor to change it from the way it now stands.

DEAN MORGAN: I don't see your point, Monte, at all that you are gilding the lily when you are clearing up an ambiguity, because 6(b), as it now stands with that single exception in it, seems very clear to me to mean that all the rest can be extended.

MR. LEMANN: That is right, and there is no ambiguity at all.

DEAN MORGAN: But otherwise, the court on 25--

MR. LEMANN (Interposing): You are not going to get any rule, I think, but that some judge will see something in it that you and I won't see. The minute you pick up one little thing like that, you will have some others. It is just a question of general policy. You have had one judge who said that rule permitted him to do what the statute forbade. Is that right? Is that what he said?

THE ACTING CHAIRMAN: On the substitution rule?

MR. LEMANN: Twenty-five.

THE ACTING CHAIRMAN: The matter first came up on 76(g); that is, the filing of the record on appeal, and it was presented chiefly by the Ainsworth case, which was from the Third Circuit. This is given on the footnote on page 2. There it was held that the district court, on a motion made after the expiration of the forty-day period stated in Rule 73(g) but before the termination of the ninety-day period, could permit docketing; and if you look at 73(g), it says the

contrary. In other words, the court found a conflict between the two, and then took 6(b). That was the first of the direct queries raising the conflict.

Then, 60(b) is the six months rule, and that has been raised in a district court case, at least, and you can see that that is of some importance.

Those are the cases that have come up. They have found some difficulty. They haven't found any question about 59, which is the new trial one. That was clear, and they followed it. They found doubt about these other cases.

Then, as to 50 and 52, the Supreme Court in the Leishman case held that Rule 6(b) governed, and I guess that is all right. At least, there is nothing in either 50 or 52 against it, and therefore 6(b) comes in. That is the background.

SENATOR LOFTIN: Mr. Chairman, who proposed the change, do you remember?

THE ACTING CHAIRMAN: Who proposed the change? Yes, I will give you a little history, which is along the line Mr. Morgan was stating.

Before the May meeting, we (that is, the Reporter and Mr. Moore and Mr. Oglebay) were troubled by the Ainsworth case because that did seem to be a fairly clear conflict in the rules itself. There were two statements that looked different ways. So we then brought in a recommendation that the matter

be made definite by adding the rules where the time could not be changed. As a result of the May meeting, it was so voted. Have you got that, Mr. Moore? I haven't the exact wording, but it was, I think, very much like the alternative rule. I am not sure we had all those provisions in, because I think we hadn't discovered all the cases then, but it was much like the alternative rule.

Then, at the meeting last fall, Major Tolman, I am quite sure, was the active man who brought up the question and said that there should be greater power in the court. I think his chief interest was in the new trial order, although I think he pressed it rather generally. We had quite a discussion, in which the Committee took part quite broadly. Then, at the end we did have the vote which, as I said, was six to four. There were certain absentees, and I think one gentleman did not vote, and the Chairman did not vote. He was not counted in the six to four. That was the result.

That is the history.

MR. DODGE: You want to prevent the court from doing what the Circuit Court of Appeals for the Third Circuit evidently thought justice to the parties required, and the decision which you are objecting to is a decision where justice evidently required that there should be a motion after the forty days, because of excusable neglect.

MR. LEMANN: After all, it doesn't seem to be a very

terrible result. The main argument I understand Mr. Morgan to make, Mr. Clark, is that we have an ambiguity in our rules, and there is a conflict between them because 6(b) was held to control when it wasn't clear that it should have controlled. I shouldn't think there was any conflict. It seems to me the Third Circuit was right.

THE ACTING CHAIRMAN: You think what?

MR. LEMANN: That the Third Circuit was right, and that the result wasn't very unfortunate. You know, it is rather common practice with us to get an order extending the time limit to ninety days immediately. Just so that you won't get caught in any of this kind of argument, as soon as you take an appeal you go to the district judge and get him to extend the order for the full time of ninety days. Here was a fellow in this case who wasn't as much on his toes as that. He let these forty days run by, and then he went in and said, "Give me the ninety days," which he could have got, because I think all the district judges give it. The Third Circuit said, "All right, we will give it to him."

Now we are going to say that he can't have it, that he must be on his toes and ask for the ninety days before the forty are over. I don't see much reason that that should be singled out and that we should say the district judge can't enlarge the time.

THE ACTING CHAIRMAN: May I say still that I don't

think so. In the first place, you understand that this is how far they shall go in the district court. There is no suggestion here as to limitation on the appeal itself. As an actual matter, so far as I know, every circuit court grants mercy as it sees fit. We thought, in drafting the original rules, that there was some desirability of pressing the parties to complete their appeal papers. Otherwise, why did we put in the over-all limit of ninety days? If that is true as to anything else, it might well be true that they can extend the period beyond the ninety days. Therefore, it seemed that it was a sensible way to work it out to provide limitations on going to the district judge. It was all right to go to the district judge for temporary and immediate extension, but after there had been delay, then the whole matter should be in the hands of the circuit court of appeals. From such experience as I have had, it seems to me that that is rather desirable on the whole.

The circuit court cannot avoid a good deal of responsibility in the case of the record. I had hoped at one time that it could be done, but it is impossible. Nevertheless, the circuit court can condition its grant of remedy by getting the case on. What happens in a case of this kind where delay is started is that you then go to the circuit court of appeals, and the circuit court of appeals in my experience provides conditions, whatever may fit the circumstances. It usually is: "How soon can you get this on? If you can get this on in

thirty days and we can get it on in such-and-such session of court, we will grant it." This, of course, puts it all back in the hands of the district court.

As to the meaning of the rule, you will notice that two circuit courts of appeals have ruled contrary to the Ainsworth case. That is stated in the footnote on page 2: Mutual Benefit Health & Accident, in the Sixth Circuit; and Burke v. Canfield in D. C. Appeals.

Of course, I think all through the rules there is a public demand that the judges should do something to have justice expeditiously carried out. Our Rule 1 so states, and the provisions for the circuit court counsel in the statute for the Administrative Director require the circuit court counsel to meet twice each year to try to get business expeditiously done. Yet, without any demand, really, our whole tendency is to push the thing farther and farther away.

I find that the thing you have most freely in the courts is time. Even now, these cases come up a couple of years after. I don't quite see how they do it under our rules. I usually inquire, and counsel are very much surprised, and they find they have had various extensions, and so on. It is usually within the rules.

A week or so ago I was working on this kind of case. A judge in a patent case had decided it fairly promptly in 1941, in the winter of '41, and he wrote a good, complete

opinion which should have settled the case immediately for appeal. A year later, in the winter of 1942, he signed findings of fact and conclusions of law which were merely his opinion chopped up into paragraphs. Another year later, in 1943, he signed the judgment, and then they got up on appeal in still another year. I asked him what had happened. He said, why he didn't know. He guessed the counsel didn't seem to be in very much of a hurry, and they didn't care.

But he got into some trouble, because it was a patent for a sadiron, and when the time came, they accused him of going off with the sadirons. He couldn't find the exhibits. But that is neither here nor there.

With the public assuming the courts are responsible for the delays, that is the situation we have, and it doesn't seem to me that, in the absence of any demand from any of the bench or the bar, it is very necessary.

I should like to read something generally that Judge Chesnut said in an address before the Connecticut Bar Association which has been printed in the Connecticut Bar Journal, which I think is a pretty good statement. He said:

"My own comment from experience is that in five years of observation of the rules and their operation in a large metropolitan area, I have yet to note an instance in which they have been found lacking. Particularly it should be impressive to lawyers that no case has come under my notice in

which any lawyer or client has suffered ultimate disadvantage from default or ignorance. There are literally no pitfalls or traps from which they cannot be extricated by the reasonable discretion of the judge, where the parties and their counsel have exercised good faith and the most ordinary diligence. The reason for this remarkable result is the flexibility of the rules in giving large discretion to the judge to relieve against inadvertent mistakes, and the simplicity and clarity of the rules."

MR. DODGE: That is an argument not for cutting down the discretion of the judge, but for leaving it as it is.

THE ACTING CHAIRMAN: It is an argument that there is nothing wrong with the rules, I should think. That is the argument he made.

MR. LEMANN: Did Mr. Mitchell express any views about this, Mr. Chairman?

THE ACTING CHAIRMAN: Yes, this time he does.

JUDGE DOBIE: You might remember, too, that when the Chief Justice came in that time, Charlie, he said some very complimentary things about the rules and expressed the hope that we would tinker with them just as little as humanly possible.

SENATOR LOFTIN: I had lunch with our District Judge last week, Judge Strum. I told him we were having a meeting this week, and he made the statement that he thought the rules

were fine and had worked very satisfactorily, and he hoped that we wouldn't tinker with them any more than we absolutely had to. He thought it would be a mistake to make too many changes or modifications in the rules at this time.

THE ACTING CHAIRMAN: Mr. Mitchell's statement was the one we read before. He said this would make no finality to a judgment--the very thing of which we complain in the decision in Hill v. Hawes.

"If the Committee does adopt this revision, I think the note ought to state what the result is, to wit, that there would be no time limit on granting a new trial, and no finality to any judgment. I think I know what the bar would say if such a note were attached.

"I favor the alternative. If it is desirable to give some power to the court to enlarge the time for granting new trials, would it not be better to adopt the alternative, and then amend Rule 59 to place a more generous limit on time for motions for new trial--but always with the restriction that such a motion cannot be made after the time for appeal has expired?"

MR. LEMANN: Getting back to the necessity for a change here, it has been my thinking to make a motion to leave it as it is, not to change the rule, but then you say you have some conflict of judicial opinion here. Under 73(g) one court of appeals has held that you can't extend the time after the

forty days have run, and two have held the contrary. You ought to smooth that out. How about the others that are put in the alternative here? Have you had any judicial conflict on 50(b) and 52(b)?

THE ACTING CHAIRMAN: On 50 and 52(b), so far as I know, there is no conflict. There is a Supreme Court decision, the Leishman case.

MR. LEMANN: Which is right.

THE ACTING CHAIRMAN: I suppose it is, yes.

MR. LEMANN: Then why not leave it, especially if it is right?

Then, in 25, you have one decision that reached a correct result. The judge refused to extend the two-year period, but he gave a bad reason for it. Am I right on that story?

THE ACTING CHAIRMAN: Well, I guess so.

MR. LEMANN: He said that the statute won't permit it. What he should have said is that the statute was repealed by the rules, but I don't see why I should give a fellow more than two years. That is what he should have said. At any rate, he didn't give him any more time. It doesn't seem to me you have made much of a case for the necessity of a chance.

As far as the new trial limitation is concerned, if we left the rule as it is we would be free of Mr. Mitchell's point and your point. As it is, I think you would rather leave

it as it is than take this new rule.

THE ACTING CHAIRMAN: Yes, I would.

MR. LEMANN: Because you have given your birthright for a mess of porridge on this alternative. Isn't that right, Eddie?

DEAN MORGAN: Yes, I go with you that far.

THE ACTING CHAIRMAN: If it is a choice, yes.

JUDGE DOBIE: Do I understand you to move, then, that we--

MR. LEMANN (Interposing): I move that we make no change in 6(b).

JUDGE DOBIE: I second that motion, to get something before the Committee.

MR. LEMANN: When we come to 73(g), if you think it needs clarification, we can take it up then.

PROFESSOR SUNDERLAND: Would this imply the change Mr. Mitchell suggests in 59(b)?

PROFESSOR CHERRY: No.

MR. LEMANN: No change. Leave the rule just as it stands. That would mean that you can't extend the time for new trial, and all you can do is to handle affidavits in the way provided in 59(c).

PROFESSOR SUNDERLAND: Mr. Mitchell suggested that we might change that ten-day limit, enlarge it, if we made this thing rigid.

MR. LEMANN: I don't see why we should. I think a fellow can go in and ask for a new trial in ten days. It would carry out the general idea of Judge Strum and Lemann (a committeeman) for no changes in the rules.

MR. DODGE: It seems to carry out Mitchell's idea.

THE ACTING CHAIRMAN: Are you ready to vote on the motion or do you want to discuss it further?

MR. HAMMOND: You are going to vote not to make any change at all?

MR. DODGE: That original Rule 6 stand; that is right.

THE ACTING CHAIRMAN: That is the motion.

MR. LEMANN: As far as I can see, it hasn't given any serious trouble.

THE ACTING CHAIRMAN: I think the chief question has been 73(g), it is true. I think that is the one that the most direct authority is on.

MR. HAMMOND: I thought that the Committee was pretty unanimous before that that provision as to Rule 73(g) should go in here in Rule 6.

MR. LEMANN: To clarify this conflict.

MR. HAMMOND: Yes; because there, Mr. Lemann, the Court in the Third Circuit practically disregarded the provision of 73(g).

MR. LEMANN: They said 73(g) was controlled by 6(b).

MR. HAMMOND: Yes.

MR. LEMANN: And I think that is the logical result.

MR. HAMMOND: If you read 73(g), it has an express provision against extending the time, unless the motion to extend it is made before the original order or an extended order.

THE ACTING CHAIRMAN: That is it, yes.

MR. LEMANN: That is all right. Rule 6(b) says where there is excusable neglect, you can do it. Rule 73(g) applies to the case where there is no excusable neglect, where there is neglect that is not excusable. That is the only way that it can be done, under 6(b). Wouldn't you agree with that, Mr. Dodge?

MR. DODGE: Yes, exactly.

DEAN MORGAN: All right, Monte, but you are just saying you had better leave an ambiguity. That is all you are saying. Because you think it is too clear for dispute doesn't alter the fact at all that there was a dispute and that good courts went different ways on it.

MR. LEMANN: That is right.

DEAN MORGAN: It doesn't seem to me that that argument amounts to anything on legislative drafting, Monte.

MR. LEMANN: How would you like to change 73(g)? I was coming to that. I know you won't like it at all, but I would take care of that by changing 73(g).

DEAN MORGAN: Say that Rule 6(c) should not apply here?

MR. LEMANN: Make it apply except in cases where Rule 6(b) applies; that you are not going to change Rule 73(g) otherwise. I guess that just comes down to the question of which rule you are going to change.

MR. DODGE: Did they find in that Mutual Benefit case that there was excusable neglect for not doing it?

THE ACTING CHAIRMAN: I don't think they considered it, did they? That is the contrary case.

PROFESSOR MOORE: As I recall it, they just held that, forty days having expired, it was too late, that you had to go to the court of appeals.

MR. DODGE: In other words, they may have done an injustice to the party through not recognizing that power in 6(b).

PROFESSOR MOORE: Mr. Dodge, he could go to the appellate court, which is perhaps a little more effort, but he isn't shut off.

THE ACTING CHAIRMAN: It is just a question, when you delay should you have to get the grant of favor from the appellate court, which then controls both the grant of favor and the conditions under which it shall be exercised.

DEAN MORGAN: I think Monte must have been used to practicing before very firm judges, because the judges I practiced before and knew, if I went to them for a substitution on 25 after two years, and they had discretion, would find it

pretty hard not to grant it, but they could say, "Well, I haven't got any discretion in this matter. I would like to help you out, but I can't."

THE ACTING CHAIRMAN: The question is on the motion to continue the original form of 6(b) with no amendment. Will you discuss it further? All those in favor of the motion will say "aye"; all those opposed, "no."

I think we had better have a show of hands. All those in favor will please raise their hands.

PROFESSOR SUNDERLAND: There is no change in the original rule?

THE ACTING CHAIRMAN: That it remain just as it is. Four. Am I right now? It is four.

MR. LEMANN: Where is Senator Loftin?

MR. HAMMOND: You have to get him.

THE ACTING CHAIRMAN: Are you voting for the motion?

SENATOR LOFTIN: Yes.

THE ACTING CHAIRMAN: Five in favor. All those opposed? Two.

MR. LEMANN: It does seem a pity that we haven't got a majority of the Committee.

THE ACTING CHAIRMAN: I think I would vote against it. Six to three, was it?

MR. HAMMOND: Five to three.

MR. LEMANN: You gentlemen on the minority, if we put

in 73(g), would that make you happy?

PROFESSOR SUNDERLAND: Is that what you want?

DEAN MORGAN: I want the whole works in.

THE ACTING CHAIRMAN: I would be happier. While I don't think I would quite do it that way, yet I think probably if 73(g) were in, I would take the half loaf and let it go.

DEAN MORGAN: I want to go back to the history of the whole thing. When the whole Committee was here at the first meeting, they put in a whole string of them, and when they were here last time there were only six who wanted to cut it down to the three that now remain.

THE ACTING CHAIRMAN: That is correct.

DEAN MORGAN: So it seems to me the sentiment of the whole Committee was clearly for at least as many substitutes as you have in the proposal here.

MR. LEMANN: What rule did the Supreme Court have, 52?

THE ACTING CHAIRMAN: Their case was particularly on 52(a). That is the findings case. Where did 50 come from, Bill? Fifty is the directed verdict case.

MR. MOORE: They didn't discuss that rule.

THE ACTING CHAIRMAN: That wasn't discussed. The Leishman case--

MR. LEMANN (Interposing): What is the rule?

MR. MOORE: A motion under 50(b) can be joined in the

alternative with a motion for new trial under 59. Logically, if you keep a limitation on 59, it would seem you ought to keep a limitation on 50(b).

MR. LEMANN: Because it might be joined with a motion for a new trial.

DEAN MORGAN: That is it.

MR. LEMANN: It becomes largely a question of what your general attitude is toward changes, I think, whether your attitude is to make every desirable change or whether your attitude is to make no change unless it is important. That is what controls me in my vote. I can see the other point of view, of course.

DEAN MORGAN: My position is that certainly all ambiguities should be cleared up. It may be because I tried to teach this once or twice, and I couldn't tell the students what it meant.

MR. LEMANN: I can see that it would make trouble there.

THE ACTING CHAIRMAN: I don't know what we could do except take our vote as we go along. There is a question of policy. How final shall we consider our votes to be? Of course, this situation brings it out. We have taken a different view at every Committee meeting, and there has been quite a division, a division which I think you could say grows.

Shall we take the final majority view? Might it not

really be better to have more than one view put out? After all, we are supposed to get the advice of the bench and bar, and that is what we are planning to do. If there is a matter about which we are pretty well divided, wouldn't it after all be better to have the various views put out? State which is the majority view, but at least have them put out.

MR. DODGE: Why do that? You might say, "Several of the members of the Committee think that some or all of the following rules should be placed in the exception."

MR. LEMANN: You would have three possible views to put before them at the present moment.

THE ACTING CHAIRMAN: That is it.

MR. LEMANN: You would have to say that some of the Committee feel the rule should stay as it is, that there is not enough necessity to change it; some of the Committee think that the rule should be altered to put in all these limitations that you have in the alternative rule; and some of the Committee think that the limitation now existing as to 59 should go out but that the other limitations could go in. Those are the three views that have been taken up to now.

THE ACTING CHAIRMAN: Yes, I think so, and I am frank to say that I think, unless there is some change in Committee view, it would be wise to have them all out. Why not? We are divided, and if there is any sense in taking the opinion of the bench and bar, isn't it on this type of thing?

MR. LEMANN: It would give us more time to think about it, too, perhaps.

THE ACTING CHAIRMAN: I should be perfectly willing, however, Monte, to have stated, and I think it might be worth while to have stated, what is the majority vote finally, whenever we do establish it.

PROFESSOR CHERRY: We are not going to get any.

THE ACTING CHAIRMAN: That may be.

PROFESSOR CHERRY: We can't very well now.

JUDGE DOBIE: We are not going to have another meeting of the Committee before this goes to the Court, are we?

THE ACTING CHAIRMAN: The idea was not to have one. It will go to the Court just for permission to be sent out. It isn't intended to be adopted finally, you understand.

DEAN MORGAN: Right.

THE ACTING CHAIRMAN: The plan was that we get authority so that, before the Court adjourns for the term, we would have authority to have the material printed.

PROFESSOR SUNDERLAND: Why couldn't we list all these rules for the opinion of the bar as to which ones, taking the whole list, ought to be beyond any extension? There is 59, which is already in. Of course, I suppose there is no use talking about that period for appeal. That is statutory and settled. That is the end of it as far as 59. That is one, and then list 25, 60, 50(b), 52(b), 60(b), and 73(g). List

them all out and get the opinion of the bar as to which ones, if any, should be put in that rule beyond the extension.

THE ACTING CHAIRMAN: I should think that might be all right, but I still think it would be a good idea to have the Committee view. You could state the various views of the Committee.

PROFESSOR SUNDERLAND: You can't get the Committee view because we haven't any view. We are so divided, we should see what the bar thinks about it. We don't need to follow them.

THE ACTING CHAIRMAN: I would be afraid you wouldn't get much of a vote unless it was somewhat directed. You would get a vote from someone who was interested, who had been hit by one rule or another. I should think most people would be more or less overwhelmed by it. I should think that would be the case.

It would seem to me desirable, if you want to, that you pass some motion as to how this rule would be submitted. It would certainly be helpful if we had some guidance.

MR. DODGE: The Committee votes today in favor of retaining Rule 6 as it originally stood.

THE ACTING CHAIRMAN: That is correct.

MR. DODGE: In the light of all that has been said in prior meetings--at least all that we remember of it. Senator Loftin didn't vote--

DEAN MORGAN (Interposing): Yes, he voted.

SENATOR LOFTIN: I did vote.

MR. DODGE: Did he vote out in the corridor?

JUDGE DOBIE: He voted from the telephone booth.

THE ACTING CHAIRMAN: I saw his hand.

JUDGE DOBIE: He showed his hand.

MR. LEMANN: The pity is that we have so many absentees.

THE ACTING CHAIRMAN: Do you want to take any further action about submitting alternatives, or shall we go ahead?

PROFESSOR CHERRY: It stands on the suggestion of three possibilities, doesn't it?

THE ACTING CHAIRMAN: Do you want to make that as a motion, then?

PROFESSOR CHERRY: I understood you to state that as a suggestion a while ago, and I thought it a good one. We voted three different ways.

THE ACTING CHAIRMAN: Yes.

PROFESSOR CHERRY: It is now voted by a majority of those here present to keep 6 as it is.

MR. LEMANN: We voted really only two different ways officially, and the minority has voted another way.

PROFESSOR CHERRY: I mean groups of us have voted different ways.

MR. LEMANN: Three different groups.

PROFESSOR CHERRY: Then, there is the present proposal,

which represents the majority of the meeting last time, and there is the one representing the position of the minority the last time. I think all three should go out.

THE ACTING CHAIRMAN: Do you want to put that as a motion?

PROFESSOR CHERRY: I make it as a motion.

THE ACTING CHAIRMAN: That the three different views which have been supported--

PROFESSOR CHERRY: That have been expressed by vote at our different meetings.

THE ACTING CHAIRMAN: That the three different views which have been expressed by vote shall be submitted as alternatives when the rules are submitted for consideration of the bench and bar. Any discussion of that motion?

MR. LEMMAN: Is there any tactical objection to that? I just wonder.

DEAN MORGAN: It was previously done with the two before, and Mr. Mitchell says he favors the alternative amendment and letting the bench and bar and the Court decide which to accept. I don't know whether he would want to go with three or not.

PROFESSOR CHERRY: The third one is really to leave it as it is, with no change.

MR. DODGE: That is the first one.

PROFESSOR CHERRY: The third one, it seems, in

chronological sequence. It came up first today.

THE ACTING CHAIRMAN: Are you ready for the question on this motion, which is that the three views be submitted? Any discussion? If not, all those in favor will say "aye"; those opposed, "no." The "ayes" have it, and it is our present view that the three views be submitted.

DEAN MORGAN: We will change that next time.

JUDGE DOBIE: I should like to make the suggestion that when that goes out, there be no disparaging remarks made by the minority of the majority, or vice versa.

PROFESSOR CHERRY: No unusually disparaging remarks.

JUDGE DOBIE: We won't say that Monte Lemann over here is interpreting the rule according to his moral standards.

THE ACTING CHAIRMAN: Rule 6(c) is the next listed here. That, however, is tied up with the Hill v. Hawes situation. Mr. Mitchell's suggestions are before you. Do you want to pass them and look at them some, or shall we consider them all?

DEAN MORGAN: We had better consider his suggestion on 6(c), hadn't we?

THE ACTING CHAIRMAN: He doesn't like the 6(c) suggested change. He has something more far-reaching that he wants to go into.

MR. HAMMOND: I notice that Mrs. Dennis has put on the table before each member Mr. Mitchell's suggestions as to the

amendments, but she hasn't yet put on the table the letter to the Chief Justice in regard to Hill v. Hawes and the Chief Justice's reply. I think it would be better to defer consideration of 6(c) until we get all that material.

MR. DODGE: He says that it should be done by amendment of Rule 73, and not here, and that he opposes the addition of these words to Rule 6(c).

MR. HAMMOND: Yes, that is true.

MR. DODGE: Which seems to me to be a sensible view.

THE ACTING CHAIRMAN: He requests that his letter to the Chief Justice be read. We might stop sometime and have Mr. Hammond read it. It is a very forceful letter. I think it is not a bad idea.

DEAN MORGAN: Have you the letter?

MR. HAMMOND: I have the letter here.

DEAN MORGAN: Why don't you read it?

MR. LEMANN: May I ask a question? I took a look at Hill v. Hawes before I left New Orleans, but I didn't remember that the term of court had anything to do with that decision.

DEAN MORGAN: Oh, surely.

THE ACTING CHAIRMAN: They drag in the term of court.

PROFESSOR SUNDERLAND: After deciding the thing, they said, "Besides, the term hasn't expired."

THE ACTING CHAIRMAN: Mr. Sunderland practically

states the case. Let's have Mr. Hammond read it. It is a good letter. If we want to, we can have it read again later.

MR. LEMANN: I didn't recall that that was the ground for the decision.

PROFESSOR SUNDERLAND: They first decided it, and then they dragged that thing in.

MR. HAMMOND: This letter is dated January 27, which was after the decision of the Hawes case.

"Dear Mr. Chief Justice:

"I have examined the opinion of the Supreme Court in Hill v. Hawes, No. 4 October Term 1943, delivered January 3rd, a copy of which you handed me last Sunday at your chambers.

"This decision produces a result which the Advisory Committee in drafting the rules did its best to prevent. It also produces a situation relating to finality of judgments which cannot be permitted to endure, and if the Court does not reconsider the case, lays a difficult problem in the lap of the Advisory Committee. The Committee gave careful attention to this subject. Its records show it gave careful attention to the question whether the rules should make a change in federal practice by making the time for appeal run from the date of the notice of the judgment instead of from the date of its entry. From time immemorial the federal statues have provided that the time for appeal runs from the date of entry, not from the date of notice. Lawyers with any knowledge of federal procedure

were familiar with that.

"The Committee thought it unsafe to proceed on the theory that the statutory provision as to the right of appeal and as to the time of taking an appeal could be altered by rule, especially as the matter is one affecting the jurisdiction of the United States Circuit Courts of Appeals. The rules were drafted accordingly, and there can seem to be no mistake about the fact that the statutes providing that the time should run from entry were left undisturbed. No provision of the rules states otherwise. On the contrary, Rule 73 expressly states that the right of appeal and the time for appeal are prescribed by law. The published notes of the Advisory Committee to Rule 73 state:

> 'This rule continues in effect the statutes providing for the time for taking an appeal.'

"All the works on the new federal practice advise the bar that the time runs from the date of entry, not from the time of notice of the entry, and that the statutes on this question were still in effect. See, Moore's Federal Practice, Vol. 3, pp. 3390, 3393. He says:

> 'The time for taking an appeal runs from the entry of the judgment.'

"The bar were given other repeated warnings. At the Cleveland Institute, held by the American Bar Association and published and distributed to its members in 1938, the following appears (p. 370):

March 25-28, 1946
Vols 1, 3, 4.

Have other manuscripts of the Committee.

BW
5-6-60

'Mr. Mitchell. The statutes regulate that, and the federal statutes in all cases prescribe that the appeal must be taken within a specified date from the entry of the judgment and that is what I wanted to warn you about.'

And on page 360:

'and I will ask you to remember also that under the federal statutes which govern the right of appeal, the time for taking an appeal commences to run from the date of judgment, and not from the date of notice of the judgment. These rules prescribe in another place relating to judgments that the clerk shall mail an informal notice of the entry of the judgment to the parties. But the giving of that notice is not the thing that starts running the time for appeal; the failure to give it would not save you if you let your three months go by.'

"In a similar 'institute' in New York, it was said to the bar:

'Bear in mind that under the federal statutes which regulate the right of appeal, the time for taking the appeal runs not from the notice of the judgment but from the date of its entry.' (Proceedings published by American Bar Association in 1938, p. 318)

"It is clear enough that under these rules the time runs from the date of entry of judgment, not from the notice. Indeed, the opinion in Hill v. Hawes seems to conclude that, but it also states that counsel have a right to rely on receiving notice of entry from the clerk. The above material, coupled with the long established practice in the federal court, suggests to me that no counsel had any justification for failing to make his own inquiry at the clerk's office on the nineteenth day after the case was submitted and every twenty days

thereafter. The opinion says:

> 'It is true that Rule 77(d) does not purport to attach any consequence to the failure of the clerk to give the prescribed notice but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may well be that the effect to be given to the rule is that although the judgment is final for other purposes it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule.'

"It is hard to believe that Rule 77 could be so construed. I should suppose that to repeal federal statutes providing that the time for appeal runs from date of entry, there would have to be something definitely to that effect in the rules. To my mind the rules make it clear that the statutes remain in effect. In so important a matter as fixing time for appeal, if it had been the purpose to make the date of service of notice the critical date, it would hardly have been left to a mere informal notice by mail from the clerk, possibly by postal card, with no filing of definite proof of actual delivery to or receipt by the party served. It has generally been the practice in the federal courts for the clerk to mail informal notice to all parties of the entry of orders. This includes intermediate and unappealable orders. It is an accommodation service furnished counsel. The old equity rules provided for such notices by the clerk, and the provision for such service in Rule 77 was a mere continuation of the old equity rule. For example, the Revised Equity Rules, adopted in 1912, contained

in Rule 4 the following:

> '4. NOTICE OF ORDERS. Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor, and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order.'

"No one ever suggested that the equity rule abolished the statutory rule as to running of the time for appeal, or that the giving of the notice was necessary to start the time running, or that any litigant or lawyer had a right to rely on the notice or that he could get relief after the time for appeal expired, by showing he had not received the notice. As to lack of power in a district court to enlarge or revive the time for appeal, that is made clear by Rule 6(b), which states that a district court 'may not enlarge * * * * the period for taking an appeal.' If the court may not make an order enlarging the time, either before or after the time expires, it cannot make an order reviving it. The device of vacating and immediately reentering the judgment, for the sole purpose of reviving the right of appeal, is the equivalent of an order enlarging or reviving.

"Rule 60(b) that a court, within six months, may relieve a party from a judgment 'taken against him through his mistake, inadvertence, surprise, or excusable neglect' has no

sole purpose of reviving the right of appeal) continues for an indefinite time after a term expires. No one now can be certain of the finality of a judgment. If it can be vacated because the lawyer was guilty of excusable neglect, as a result of the clerk's failure, it may on principle be vacated and reentered during or after the term because of some other excusable neglect.

"The Court's opinion does not mention Rule 6(b) or 6(c). I have not seen the briefs, but it is hard to believe the Court could have reached the conclusion it did if the case was thoroughly argued or it had not overlooked 6(b) forbidding enlargement of time for appeal, or 6(c) about the effect of expiration of the term. It certainly overlooked 6(c) and as that is part of the same rule that contains the prohibition against enlarging time for appeal, I infer neither provision was considered when the opinion was agreed to. This may justify a reconsideration of the case by the Court. My humble opinion is that it ought to be reheard--on the Court's own motion, if necessary. If it is not reconsidered, the Advisory Committee's problem is a tough one. In that case, we surely must recommend some alteration in the rules. We already have one express and clear prohibition against enlarging time for appeal. Reiterating that statement will not help matters. We might add a provision that the district court may not evade the prohibition against enlargement by the device of vacating

and reentering the judgment, but we would hesitate to publish a recommendation that the Court adopt a rule labeling as an evasive device a course of action it has judicially approved.

"This is a long screed, and it is doubtless asking too much of you to give it any consideration, but I am somewhat at a loss to know what our Committee should do, and disturbed at being 'convicted' as one of a committee which drafted rules opening the door to discretionary revival of the expired right of appeal, even after the term is over, and of having failed so completely to express in the rules the purpose of the Committee.

"Sincerely,

"William D. Mitchell"

MR. LEMANN: How long was this after the opinion?

THE ACTING CHAIRMAN: Very soon.

MR. HAMMOND: Very shortly. The opinion was on January 3, and the letter was written on January 27.

MR. LEMANN: Did Stone and Murphy dissent? Stone dissented, I know.

THE ACTING CHAIRMAN: Stone and Murphy, yes.

MR. LEMANN: I thought it was Murphy. I wondered how that happened.

MR. HAMMOND: There was a petition for rehearing filed, and I think Mr. Justice Douglas voted in favor of granting the rehearing.

THE ACTING CHAIRMAN: Yes. The almost immediate response to this letter, I could see, was the petition denied. The letter went in between, before the petition for rehearing was denied, but the statement that came down when the petition for rehearing was denied was that Mr. Justice Douglas is of the opinion the petition should be granted.

MR. LEMANN: Not the Chief Justice.

THE ACTING CHAIRMAN: As you will see from the Chief Justice's letter, he says it is their custom not to participate in the consideration of reargument when they have been in the minority.

MR. LEMANN: Who wrote the opinion, again?

THE ACTING CHAIRMAN: Justice Roberts, Chief Justice Stone writing the dissenting opinion. You are not through yet.

MR. HAMMOND: There is a postscript.

"P.S. It happens that Hill v. Hawes arose in the District of Columbia, where the time for appeal is fixed by rule adopted by the Court of Appeals under authority of Act of Congress. This does not seem to affect the case. The district court in enlarging the time (or reviving the right of appeal by the vacation and reentry) was not setting aside one of its own rules but a rule formulated by the Court of Appeals affecting the jurisdiction of that court, with which, under no conditions, could the district court tamper. Furthermore, the fact that only twenty days were allowed in which to appeal, makes it even

more incumbent on counsel to be on the alert as to entry of a judgment, than would be the case in the states where three months was the period."

Here is the Chief Justice's reply of February 22.

"Dear Mr. Mitchell:

"This is to supplement my last letter to you on the subject of the Civil Rules, and particularly those rules which were dealt with in Hill v. Hawes.

"There will not be a reargument in the case so far as I am now advised. Being in the minority I took no part in the consideration of the question whether there should be a reargument, that being the tradition of the Court. But I am instructed by the Court to assure you that the Committee should feel entirely free to propose rules which it deems appropriate with respect both to the date or event from which the time to appeal runs, and the power of the Court to extend the statutory period of appeal by entering a new order.

"At the time the Court handed down Hill v. Hawes it put down another opinion in No. 83, United States v. Hark & Yaffe, decided January 3rd last, which also has some bearing on the question. In case you have not seen it you might do well to take a look at it.

"I hear you and Mrs. Mitchell have been down south. I wish we could have joined you.

"With kind regards, I am

"Yours sincerely,

(Sd.) "Harlan F. Stone."

Mr. Mitchell has his detailed and specific suggestions as to what to do about it, which we can take up.

THE ACTING CHAIRMAN: Of course, we want to take them up in detail when the time comes, but I can say that, broadly, he suggests two alternatives, and they are interesting alternatives. I think I can state the first by saying that its intent is to say in so many words that Hill v. Hawes is wrong, and to do it by additions to the rules involved, including the rule on appeals. The other alternative is to shorten the time for appeal to thirty days and then to provide that the time dates from notice. I think that is a short statement of it.

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: I should say that I would be quite interested in the latter. As I understand the background, there has been quite a little agitation for shortening the time. It seems to me impossibly long, really, to have ninety days for doing the very simple thing of filing a notice of appeal. It would seem to me that thirty days was appropriate. I understood that the Conference of Senior Circuit Judges had voted in favor of it. The last time I was down here, Mr. Hammond informed me that there was objection from the Department of Justice--objection somewhat led or assisted by my brother, who is the Assistant Attorney General in charge of tax work--and

they felt it would be very difficult. Be that as it may, I haven't discussed it with my brother, but I think I still would feel that thirty days was appropriate. I hadn't thought that we dared claim that much, however, and it is interesting to me that Mr. Mitchell now thinks that we should or that at least we should propose it as an alternative and takes the statement in the Chief Justice's letter as some feeling that the Court would agree.

MR. LEMANN: Are we ready to discuss that yet?

MR. HAMMOND: I would still suggest, if I may, that the members read Mr. Mitchell's suggestions before we take it up.

MR. LEMANN: We wouldn't be to these points yet, would we? These are amendments to Rule 73, both of them, aren't they?

DEAN MORGAN: And 77(d).

MR. HAMMOND: And 77(d). The only thing is that he does discuss it here under Rule 6(c).

DEAN MORGAN: The term.

MR. HAMMOND: The term. He would not change that. Judge Clark had a proposal for an addition to 6(c) to help take care of the Hawes case, but Mr. Mitchell doesn't think that is the way to do it. I also have a note from Mr. Tolman that he doesn't feel so.

MR. LEMANN: Offhand, I should think that that change

in 6(c) wouldn't be a sufficient way to do it. What would be the objection to that change, anyhow, if anybody thinks that 6(c) isn't plain enough as it is?

THE ACTING CHAIRMAN: Monte, let me just state generally the line that we were following; that is, Mr. Moore and I in particular. Rule 6(c) is a very unimportant part of it; in fact, perhaps not even necessary. Our general theory was that this decision showed that courts were always going to break down the rules, and we might as well accept it and then try to see that they did it in an orderly way.

The heart of our proposal is in 60(b), when we get there, and in general it is a granting of power to the court to act within six months. We pointed out that a court did have that power under the old rules during the term of court, and when we abolished the term and the other provisions, we took away that much power. The term of court, depending on the time when the judgment is entered, might last more than six months, you see. So we suggested that as a way of doing it, really codifying Hill and Hawes, so to speak, but limiting it to six months.

MR. LEMANN: Suppose we do this: Pass this and get the whole thing before us, until we get to 60(b), and then take up 73(g) and have all three rules. By that time we can have read Mr. Mitchell's memorandum.

THE ACTING CHAIRMAN: That is quite all right, but I

do want to take it up before any of you get away because, outside of whatever questions there may be raised on the draft, this is by all odds the most important question. This is a very important question.

MR. DODGE: This is no way to correct that decision.

MR. LEMANN: No.

MR. DODGE: It is just a platitude. Of course the continuation of the term doesn't enlarge the court's power. All they said was, "We have the power, and anyway the term hasn't expired," and they continued to execute it. They weren't enlarging it because the term had not expired, but assuming its continued existence, Mr. Mitchell says that this proposed amendment to 6(c) is not the way to do it. Let's see how he describes this on page 2 of his memorandum.

MR. LEMANN: "I think it is an awkward and improper way to deal with it," he says.

MR. DODGE: I would agree with that. Why bother ourselves by coming back to this?

MR. LEMANN: As an effective way to do it, the only question is whether this is worth doing for any other reason.

THE ACTING CHAIRMAN: As I said, this isn't a very important part of the proposal. It may not be even a necessary part of the proposal. The real proposal is in 60(b), and I shall have to say, with perhaps a little hanging of my head, that I thought I was giving way to Mr. Dodge in 60(b).

MR. DODGE: I move that Section 6(c) stand as it is, without the suggested amendment.

THE ACTING CHAIRMAN: Any discussion? This has never been voted, so this is just a suggestion. All this came up after our last meeting, of course.

JUDGE DOBIE: You would rather not put that in there about "nor does the continuation of a term of court enlarge the court's power"?

MR. DODGE: I can't imagine anybody claiming that it did.

JUDGE DOBIE: Justice Roberts seemed to have that idea.

MR. DODGE: They didn't say so. They said, "We have the power, as a matter of fact, and we note that our term is still in existence."

MR. LEMANN: The court's term. The district court's term, not the Supreme Court's.

MR. DODGE: The term of court, whatever it was. The term in the district court.

JUDGE DOBIE: Above there, it seems to be clear enough, if it is ever going to be clear.

THE ACTING CHAIRMAN: Of course, Justice Roberts did do a little more than that. "The term had not expired, and the judgment was still within the control of the trial judge for such action as was in the interest of justice to the parties

to the cause," and we think that wasn't so.

PROFESSOR CHERRY: But these words don't take care of that. I don't think these words do anything.

THE ACTING CHAIRMAN: They may not.

MR. LEMANN: The words are for emphasis and to prevent anyone, even seven eminent men, from thinking that a term is any longer important. Maybe we ought to defer to that idea instead of correcting it.

MR. DODGE: The thing can be corrected so well when you come to 73 or 77 that this language seems silly to me.

MR. LEMANN: This wouldn't be sufficient to correct it, anyhow, I think.

DEAN MORGAN: This is just the converse of the other, that the expiration of the term doesn't affect the power or its continuation.

MR. LEMANN: That is right.

DEAN MORGAN: I suppose Charlie is referring to the fact that they made orders continuing the term for specific purposes under the old system. Didn't they, Charlie?

THE ACTING CHAIRMAN: Yes. They do that, of course, now in the criminal law right along, which is a funny thing. The district attorney asks you to order that the term be continued for the purpose of this case, and apparently it is his theory that you can continue it quite indefinitely. When I have sat in criminal cases I have said, "Very well." That was

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about all I knew to say. I always wondered about the effect of it.

PROFESSOR CHERRY: The only ambiguity that there could be in the rule as it stands, it seems to me, is that we talk about the expiration of the term and, at the bottom, about the continuation. It would seem that the term would have expired, but it has been prolonged for the reasons that used to be popular in civil cases, not now. What we really mean up above where we say "is not affected or limited by the expiration of a term of court", is that it is not limited or affected whether there is a term of court or not.

MR. LEMANN: Terms of court are unimportant. But isn't it true that Justice Roberts just didn't read 6(c); not that he didn't understand it, not that he would have thought it ambiguous, but he just didn't read it, and he spilled out this sentence without having read it?

MR. DODGE: He didn't say it enlarged the court's power. He said the fact that it hadn't expired left the court's power existing.

MR. LEMANN: If he had read 6(c), it seems to me he shouldn't have said that, because he would have thought even that an entirely inappropriate comment. I don't see how anybody could doubt that, reading 6(c) as it stands, so I think Mr. Mitchell is right in saying that they just overlooked 6(c) and probably overlooked all of 6, for that matter. They never

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referred to 6(b), either.

THE ACTING CHAIRMAN: Of course, the Chief Justice shows that Mr. Mitchell's letter was at least brought to the attention of the Court, because he says that he is instructed by the Court to say that the Committee should go ahead and do whatever it felt proper. Yet it made no change in that part of the opinion.

Let me ask this: We have attempted at times to add notes stating why we think a rule should not be changed. We haven't tried to cover every rule, of course, because this isn't an exegesis of the rules, but we have done that two or three times, and of course our action on Rule 6(b), the alternative, will cover that. If we make no change here, should the Reporter write a note saying, "We make no change in 6(c) because we don't believe the Court read it"?

MR. DODGE: I wouldn't make any comment on it. I would leave the rule as it stands.

JUDGE DOBIE: When we come to that ultimately, I understand that Mr. Mitchell is opposed to a flat statement that would overrule Hill v. Hawes, that the vacating of the judgment and re-entry shall not in any way affect the time for taking appeal.

THE ACTING CHAIRMAN: No; he is not opposed to it.

JUDGE DOBIE: I thought he said that he didn't like to do it. I wouldn't hesitate to do it.

to the cause," and we think that wasn't so.

PROFESSOR CHERRY: But these words don't take care of that. I don't think these words do anything.

THE ACTING CHAIRMAN: They may not.

MR. LEMANN: The words are for emphasis and to prevent anyone, even seven eminent men, from thinking that a term is any longer important. Maybe we ought to defer to that idea instead of correcting it.

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THE ACTING CHAIRMAN: He said that to the Chief Justice, but now he takes the Chief Justice's reply as authority to do just that.

JUDGE DOBIE: I think it ought to be done.

PROFESSOR CHERRY: Look at the bottom of page 2 of Mr. Mitchell's memorandum.

MR. DODGE: The top of page 3, yes.

PROFESSOR CHERRY: ".... (and the Chief Justice's letter suggests that the Court means we should not be backward about giving Hill v. Hawes a kick in the pants) ...."

MR. DODGE: He suggests a good one at the top of page 3.

PROFESSOR CHERRY: He proceeded to kick.

JUDGE DOBIE: "One is to make amendments reiterating more clearly our original intent and repealing, ... The other alternative is to assume that the Court has power ...." Then he says he favors the latter. That is not in here. It is in his letter to the Committee.

THE ACTING CHAIRMAN: Do you want to pass this or do you want to make some motion at this time?

MR. DODGE: I make a motion that this stands as at present.

JUDGE DOBIE: That is, 6(c)?

MR. DODGE: Rule 6(c).

JUDGE DOBIE: That leaves 77(d) for further

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consideration?

MR. DODGE: Yes.

THE ACTING CHAIRMAN: The motion is that Rule 6(c) stands as in the present draft of the rule.

MR. LEMANN: I second it.

THE ACTING CHAIRMAN: All those in favor say "aye"; those opposed. It is so ordered. (Carried) No change.

Rule 7 is one that has been voted, I think, from the beginning.

PROFESSOR CHERRY: Yes. We had no trouble.

MR. DODGE: It is to make plain what was intended.

THE ACTING CHAIRMAN: There hasn't been any question about it so far. Shall we just pass it, then? All right.

JUDGE DOBIE: The idea was to put "if the answer contains" instead of "to".

THE ACTING CHAIRMAN: No; it is the other way around. The matter in brackets goes out; the matter underlined is added.

MR. LEMANN: That has never given any trouble except in this commentary. I voted against that the first time on my general idea that we shouldn't change except where we have kicks. It seems to me a mighty little thing to put in a change on it. I voted against it before, so I am just recording myself.

THE ACTING CHAIRMAN: All right.

JUDGE DOBIE: I don't see how anybody could misread that. Of course there is a reply to a counterclaim. It

couldn't be anything else.

MR. LEMANN: I guess the time for a new trial is running against him on that.

THE ACTING CHAIRMAN: Are we up to Rule 12?

MR. LEMANN: Here is where blood will flow now.

THE ACTING CHAIRMAN: I don't know. There has been so much blood flowing so many times, is there much more blood left to flow?

Let me say broadly that there is first a question on 12(a), and 12(a) in general has not in the past been particularly controversial. The attempt there has been to get into shorter and more succinct form the question of time. Rule 12(a) is quite separate from the main questions, and I think we had better consider them separately. The questions about which the Committee is divided have been on the remaining portion, beginning particularly with 12(b) and centering, really, about 12(b). So, unless you have some objection, I suggest that we first take up 12(a) and consider it.

MR. DODGE: Isn't that, as you have written it here, exactly what we voted at the last meeting?

THE ACTING CHAIRMAN: It is, with--

MR. DODGE (Interposing): Some words added at the end, which were voted for.

THE ACTING CHAIRMAN: Yes, 12(a) as printed here on pages 7 and 8, as I understand it, is what we have approved

the cause," and we think that wasn't so about the effect

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before. You did vote to add, however (I am sorry to say that we omitted it, and I sent out a letter afterwards adding it), a provision at the end:

"The time for a party to plead or otherwise move under this rule may be extended by a written stipulation of the parties once without approval of the court."

JUDGE DOBIE: Any length of time?

THE ACTING CHAIRMAN: Yes. That was definitely discussed at the time. There was a proposal (I think it was Judge Donworth who made the motion) of some time limit. I have forgotten just what it was now, but there was a time limit. Then, after discussion, that went out, and this is the way the transcript shows it was voted. As I indicated in my letter to you, I regret it, but that is that.

MR. DODGE: We discussed that at considerable length before. Is it necessary to go over that again? I think Section 12(a), as we voted it before, after long discussion, should stand.

JUDGE DOBIE: That permits one amendment, one extension.

MR. DODGE: Yes.

JUDGE DOBIE: Without any time limit. Of course, that is susceptible of abuse, but I don't know that it will be done.

MR. DODGE: You get the agreement of both parties.

It isn't introduced by one party.

DEAN MORGAN: That is before trial, once before trial.

MR. DODGE: Yes.

JUDGE DOBIE: I don't know how they are in your part of the country, but the lawyers are entirely too courteous down in Virginia. One lawyer comes to the other and makes almost any proposal and, particularly if they are friends, it is considered a sort of breach of legal etiquette not to comply with it.

MR. DODGE: He wouldn't extend it very long, wouldhe?

JUDGE DOBIE: He might, but I don't think in practical cases he will.

PROFESSOR CHERRY: This is limited to once.

JUDGE DOBIE: Yes.

THE ACTING CHAIRMAN: It seems to me a little too bad to take this entirely out of the hands of the court. Under this, the court can do nothing about it. In almost every other place we have it that the approval of the court is necessary. This, of course, came up as a result of a decision of the Third Circuit which was really on a somewhat collateral point, and I don't think that here the demand is quite sufficient for it.

MR. DODGE: The courts aren't the parties who have the real rights in the matter; they are the clients of the people. If a man asked to extend time agrees to a reasonable

the cause," and we think that wasn't so about the effect

PROFESSOR CHERRY: But these words don't take care of

t. I don't think these words do anything.

THE ACTING CHAIRMAN: They may not.

MR. LEMANN: The words are for emphasis and to pre-

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MR. LEMANN: That is right.

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extension of time, the court isn't the sufferer.

JUDGE DOBIE: I think the court in nine cases out of ten would approve it. I know I certainly would, although I did smack down about those continuances.

PROFESSOR CHERRY: Would you on a first degree continuance, a first one?

JUDGE DOBIE: Ordinarily I would not.

PROFESSOR CHERRY: That is all this is.

JUDGE DOBIE: As soon as I went on the district bench they pulled that on me. They said, "This is a matter of course, and you have nothing to do with it." I immediately instilled the idea that I did have something to do with it. I don't remember ever denying a first continuance, but I did try to get the idea across that they had to have my idea, that they couldn't do it and just run the court.

MR. DODGE: It doesn't come up very often.

JUDGE DOBIE: I don't think so. I wouldn't make any point of it.

THE ACTING CHAIRMAN: Have you any views on this, Eddie? You didn't have before.

DEAN MORGAN: No. I am not kicking about this too much.

THE ACTING CHAIRMAN: You voted against it before.

DEAN MORGAN: Yes.

MR. DODGE: I move that paragraph (a) stands as

the cause," and we think that wasn't so about the effect

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ve sat in criminal cases I have said, "Very well." That was

written.

THE ACTING CHAIRMAN: It is moved that the subdivision stand as it is here, of course with this final sentence which was part of the previous vote.

MR. HAMMOND: May I say something? There are one or two questions on the other part of (a) in addition.

THE ACTING CHAIRMAN: Then I think we ought to take them up. Don't you think so?

MR. HAMMOND: You can vote, however, on the addition and have that out of the way.

DEAN MORGAN: That is already voted on.

THE ACTING CHAIRMAN: Go ahead, Mr. Hammond.

MR. HAMMOND: There hasn't been any formal vote on the addition of that.

THE ACTING CHAIRMAN: It was voted before.

DEAN MORGAN: Last time.

MR. HAMMOND: All right. Then this is just the wording of it. All right.

This is just on the wording of the amendment of (a). In the first place, I think this is a change of the sort that need not be made. It seems to me that the rule as it stood was perfectly clear and, furthermore, that the change isn't as clear as the rule was.

I should like to ask this question: How about a reply that is ordered? What is the time for that? We do permit

a reply on order of the court. Under the amendment, what is that time? It is not entirely clear to me from the rule. I suppose it is twenty days from the date of the order, as the rule originally read, but you have in there the words, "when required by these rules," and it seems to me that the amendment doesn't cover the time for a reply on order of the court.

THE ACTING CHAIRMAN: I would answer it this way: Of course, in the first place, it must be said, as is obvious, that what Mr. Hammond says is true. It isn't spelled out in so many words, but there it is a matter of the court's order, and it seems to me that it could be taken care of only by the court in the order and that there is no reason that it shouldn't be taken care of there. It was one of those things that it wasn't necessary to express. There wasn't any reason for spelling it out in so many words.

MR. LEMANN: I wonder whether the words "suspends these periods of time" in line 17 are any better than "alters", which is the word which was used in the original. Except for cutting out the reference to bill of particulars, which of course is proper, I shouldn't think that you have improved the language substantially. It is just something else for the bar to ask, "What change did this make?" and they will sit down and compare the original with the new language. Of course, you put in a note that says all you did was to state it in more concise, understandable form, but nobody has kicked about understanding

the cause," and we think that wasn't so about the effect

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THE ACTING CHAIRMAN: They may not.

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it. I wasn't here last time, but generally I am opposed to changes for which there has been no popular or serious demand.

A bill of particulars has to come out, of course, in view of the other changes made.

THE ACTING CHAIRMAN: I think that the question before you is really which you like better.

MR. LEMANN: From my point of view, I don't really think it is a question of which de novo would have been better. It is just a question of whether the original is so defective that there is a necessity for changing it.

MR. DODGE: It isn't much of a change.

MR. LEMANN: Very little change. If I were voting de novo, Mr. Dodge, I think I might prefer this new language, but that isn't my guide.

MR. DODGE: I think you are right.

Do you think, Mr. Reporter, that this is very much of an improvement over the prior language?

THE ACTING CHAIRMAN: I had thought so, yes. I don't mean to say that I want to make any strenuous argument for it.

MR. DODGE: Did we vote on this particular change? I had forgotten that.

THE ACTING CHAIRMAN: Yes, we have approved it.

JUDGE DOBIE: I think the idea was that we made a number of changes in this rule and were almost rewriting it, and therefore that the general proposition which Mr. Lemann

the cause," and we think that wasn't so about the effect

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advanced that we ought not to make changes unless they were vital would not apply, that while we were rewriting this thing we might as well make it as clear as possible.

MR. DODGE: You state in five lines what we had in ten, which is a point.

THE ACTING CHAIRMAN: That is perhaps the chief reason for doing it. It always seemed to me that the former rule was a little awkward, with quite a bit of detail of the obvious. As I recall, the way this came up was a bit incidental. At the May meeting we had suggested that this subdivision could be shortened and, as we thought, made more concise. I think I am correct that at the end of that meeting no definite proposal had been made, but there was some discussion and it was referred back to the Reporter to come out with a draft which would be more concise, which we did at the fall meeting, and then it was approved.

That is correct, isn't it, Mr. Moore?

PROFESSOR MOORE: I think so.

MR. LEMANN: Is it plain that the word "suspends" is better and more accurate than the word "alters" in line 17? Maybe so, but I am in doubt as to whether it is as accurate.

THE ACTING CHAIRMAN: That is what it does, really.

DEAN MORGAN: It doesn't suspend the period of time.

PROFESSOR CHERRY: It doesn't suspend the period.

PROFESSOR SUNDERLAND: "Suspends" means to carry it

the cause," and we think that wasn't so about the effect

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along. You don't do that.

DEAN MORGAN: It suspends the requirement, that is all.

PROFESSOR CHERRY: I think "alters" is better.

JUDGE DOBIE: Leave it as he suggests, but with "alters" instead of "suspends".

PROFESSOR CHERRY: Leave the rule as it was on that point.

JUDGE DOBIE: How about "any" and "provided for in"? Or would you agree to give the rule as the Reporter has modified it, but instead of the word "suspends" just put the word "alters"?

MR. DODGE: Then you go on, don't you, to define what the new periods of time are?

DEAN MORGAN: Yes.

JUDGE DOBIE: What I am thinking now is whether we would make the changes suggested; that is, put "a" for "any", and "permitted under" which I do think is better than "provided for in", and then continue as he suggests with the underlined, cut out what is in parentheses and just put "alters" for "suspends".

MR. DODGE: It would be better English, anyway. You can't suspend a period. It is clear, isn't it, that you can't suspend a period of time?

JUDGE DOBIE: I don't think "suspends" is a good verb

the cause," and we think that wasn't so.

PROFESSOR CHERRY: But these words don't take care of t. I don't think these words do anything.

THE ACTING CHAIRMAN: They may not.

MR. LEMANN: The words are for emphasis and to prevent anyone, even seven eminent men, from thinking that a rm is any longer important. Maybe we ought to defer to that ea instead of correcting it.

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there.

THE ACTING CHAIRMAN: I think it is all right to put in "alters". I should think that would be all right.

JUDGE DOBIE: You suspend the running of the statute of limitations. I move, then, just to get it before us, that we adopt the Reporter's suggestion there as to the sentence beginning "The service", but that we substitute the word "alters" for the word "suspends", in line 17.

PROFESSOR SUNDERLAND: Supported.

THE ACTING CHAIRMAN: Very well. Do you want to discuss that more? If not, all those in favor will say "aye"; those opposed "no." The "ayes" have it.

Have we taken any action on the first part of the rule?

PROFESSOR SUNDERLAND: On that first sentence underlined?

THE ACTING CHAIRMAN: Yes.

PROFESSOR SUNDERLAND: I wonder whether that couldn't be improved a little by dropping out in line 12 "to a prior pleading". It seems as though that is superfluous. The time allowed for serving a responsive pleading has to be to a prior pleading. It couldn't be anything else. ".... when required by these rules, is 20 days". I should think you would want to put in after "20 days", "after service of the prior pleading". You don't know when that twenty days commenced. It would read

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then: "The time allowed for serving a responsive pleading, when required by these rules, is 20 days after service of the prior pleading."

PROFESSOR MOORE: After service of process, though, sometimes.

PROFESSOR SUNDERLAND: A responsive pleading?

PROFESSOR MOORE: Surely. Service of an answer to a complaint would be twenty days after service of process.

MR. HAMMOND: The complaint is served with the process.

MR. DODGE: Of course, the problem is almost always as to an answer. There aren't many answers to counterclaims and all that sort of thing, once out of fifty times, but the answer might be emphasized by saying, "The time for filing an answer" (that is what the ordinary lawyer wants to know) "or other responsive pleading, when permitted ...."

JUDGE DOBIE: Do you state anywhere when those twenty days start to run? Of course, we start now with the complaint, don't we, and the complaint is served on the man, instead of the old process?

THE ACTING CHAIRMAN: Yes.

MR. DODGE: Twenty days from service.

JUDGE DOBIE: From service of the prior pleading. It might be well to state that in there, as Mr. Sunderland suggests. I think it probably will be read that way, but while we are changing it we might make it so clear that not even the

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Supreme Court can misunderstand it.

THE ACTING CHAIRMAN: Mr. Moore suggests that that service of process does include service of the complaint, and I am not sure your complaint is completely valid. Is it?

PROFESSOR MOORE: When you do effect service on the United States, you serve on two or three different persons there, and the lawyers get copies of the complaint.

PROFESSOR CHERRY: That is provided for.

THE ACTING CHAIRMAN: That is only when it is completed, I guess.

PROFESSOR CHERRY: The United States is a special case.

DEAN MORGAN: You have a special one for the United States.

PROFESSOR CHERRY: That is taken care of separately.

PROFESSOR MOORE: "Service of process" is the accurate term, rather than "service of complaint."

MR. LEMANN: You had that pretty plain in the first line as it stands, so you see how you get into new arguments when you put in new language.

MR. HAMMOND: That is just my point.

MR. LEMANN: See Lemann, J., page 84: You had it very nice up there, Mr. Dodge.

THE ACTING CHAIRMAN: Mr. Sunderland moves, as to lines 11 to 16, that the words "to a prior pleading," be taken

the cause," and we think that wasn't so about the effect

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out in 12, and the words "after service of the prior pleading," be inserted after "days". Is that correct?

PROFESSOR SUNDERLAND: In 13; yes.

MR. LEMANN: Then comes Mr. Moore's point. Does "service of the prior pleading" cover you all right, Mr. Moore?

DEAN MORGAN: You can't have a responsive pleading to anything else, can you?

MR. DODGE: Yes, I think you can.

JUDGE DOBIE: Pleading to a process.

MR. LEMANN: I am not sure I caught Mr. Moore's point, but he had a point to object to on this.

PROFESSOR MOORE: Take the case where you serve a non-resident motorist, served by serving the secretary of state, who mails a complaint, and so on. It is true that the defendant is going to get a copy of that complaint, but technically the point when the twenty days begin to run is when the service of process is made, which includes not only the complaint but a summons.

MR. LEMANN: Don't you serve the summons and complaint on the secretary of state?

PROFESSOR MOORE: Yes.

PROFESSOR SUNDERLAND: Then you get the complaint at the same time as the summons, don't you, and respond to the complaint?

MR. LEMANN: Twenty days from the service of the

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summons and complaint. The complaint has been served on the secretary of state.

PROFESSOR SUNDERLAND: The response is certainly to the pleading.

MR. LEMANN: I think the original language, however, was better in that regard, if I may be permitted to say so, from the standpoint of the bar. I think they like nice direct, plain statements. He serves his answer. That is what usually happens. The other responsive pleadings, somebody pointed out, are very unusual, anyhow.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: Do you want to take it on Mr. Sunderland's motion or does somebody else want to move to amend or how do we stand from the parliamentary point of view?

DEAN MORGAN: Somebody will have to move to sbustitute the original.

MR. LEMANN: Yes. Move it, Mr. Morgan.

DEAN MORGAN: The original eleven lines.

MR. LEMANN: I move that we revert to the original eleven lines.

THE ACTING CHAIRMAN: I don't know whether parliamentarily it would be permissible or not, but I don't see why we shouldn't accept it, unless there is some objection. We might as well vote on Mr. Lemann's motion, I guess.

PROFESSOR SUNDERLAND: Just as well, yes. That is

along. You don't do that.

DEAN MORGAN: It suspends the requirement, that is all.

PROFESSOR CHERRY: I think "alters" is better.

JUDGE DOBIE: Leave it as he suggests, but with "alters" instead of "suspends".

PROFESSOR CHERRY: Leave the rule as it was on that point.

JUDGE DOBIE: How about "any" and "provided for in"? Or would you agree to give the rule as the Reporter has modified it, but instead of the word "suspends" just put the word "alters"?

MR. DODGE: Then you go on, don't you, to define what the new periods of time are?

DEAN MORGAN: Yes.

JUDGE DOBIE: What I am thinking now is whether we would make the changes suggested; that is, put "a" for "any", and "permitted under" which I do think is better than "provided for in", and then continue as he suggests with the underlined, cut out what is in parentheses and just put "alters" for "suspends".

MR. DODGE: It would be better English, anyway. You can't suspend a period. It is clear, isn't it, that you can't suspend a period of time?

JUDGE DOBIE: I don't think "suspends" is a good verb

there.

THE ACTING CHAIRMAN: I think it is all right to put in "alters". I should think that would be all right.

JUDGE DOBIE: You suspend the running of the statute of limitations. I move, then, just to get it before us, that we adopt the Reporter's suggestion there as to the sentence beginning "The service", but that we substitute the word "alters" for the word "suspends", in line 17.

PROFESSOR SUNDERLAND: Supported.

THE ACTING CHAIRMAN: Very well. Do you want to discuss that more? If not, all those in favor will say "aye"; those opposed "no." The "ayes" have it.

Have we taken any action on the first part of the rule?

PROFESSOR SUNDERLAND: On that first sentence underlined?

THE ACTING CHAIRMAN: Yes.

PROFESSOR SUNDERLAND: I wonder whether that couldn't be improved a little by dropping out in line 12 "to a prior pleading". It seems as though that is superfluous. The time allowed for serving a responsive pleading has to be to a prior pleading. It couldn't be anything else. ".... when required by these rules, is 20 days". I should think you would want to put in after "20 days", "after service of the prior pleading". You don't know when that twenty days commenced. It would read

then: "The time allowed for serving a responsive pleading, when required by these rules, is 20 days after service of the prior pleading."

PROFESSOR MOORE: After service of process, though, sometimes.

PROFESSOR SUNDERLAND: A responsive pleading?

PROFESSOR MOORE: Surely. Service of an answer to a complaint would be twenty days after service of process.

MR. HAMMOND: The complaint is served with the process.

MR. DODGE: Of course, the problem is almost always as to an answer. There aren't many answers to counterclaims and all that sort of thing, once out of fifty times, but the answer might be emphasized by saying, "The time for filing an answer" (that is what the ordinary lawyer wants to know) "or other responsive pleading, when permitted ...."

JUDGE DOBIE: Do you state anywhere when those twenty days start to run? Of course, we start now with the complaint, don't we, and the complaint is served on the man, instead of the old process?

THE ACTING CHAIRMAN: Yes.

MR. DODGE: Twenty days from service.

JUDGE DOBIE: From service of the prior pleading. It might be well to state that in there, as Mr. Sunderland suggests. I think it probably will be read that way, but while we are changing it we might make it so clear that not even the

Supreme Court can misunderstand it.

THE ACTING CHAIRMAN: Mr. Moore suggests that that service of process does include service of the complaint, and I am not sure your complaint is completely valid. Is it?

PROFESSOR MOORE: When you do effect service on the United States, you serve on two or three different persons there, and the lawyers get copies of the complaint.

PROFESSOR CHERRY: That is provided for.

THE ACTING CHAIRMAN: That is only when it is completed, I guess.

PROFESSOR CHERRY: The United States is a special case.

DEAN MORGAN: You have a special one for the United States.

PROFESSOR CHERRY: That is taken care of separately.

PROFESSOR MOORE: "Service of process" is the accurate term, rather than "service of complaint."

MR. LEMANN: You had that pretty plain in the first line as it stands, so you see how you get into new arguments when you put in new language.

MR. HAMMOND: That is just my point.

MR. LEMANN: See Lemann, J., page 84: You had it very nice up there, Mr. Dodge.

THE ACTING CHAIRMAN: Mr. Sunderland moves, as to lines 11 to 16, that the words "to a prior pleading," be taken

out in 12, and the words "after service of the prior pleading," be inserted after "days". Is that correct?

PROFESSOR SUNDERLAND: In 13; yes.

MR. LEMANN: Then comes Mr. Moore's point. Does "service of the prior pleading" cover you all right, Mr. Moore?

DEAN MORGAN: You can't have a responsive pleading to anything else, can you?

MR. DODGE: Yes, I think you can.

JUDGE DOBIE: Pleading to a process.

MR. LEMANN: I am not sure I caught Mr. Moore's point, but he had a point to object to on this.

PROFESSOR MOORE: Take the case where you serve a non-resident motorist, served by serving the secretary of state, who mails a complaint, and so on. It is true that the defendant is going to get a copy of that complaint, but technically the point when the twenty days begin to run is when the service of process is made, which includes not only the complaint but a summons.

MR. LEMANN: Don't you serve the summons and complaint on the secretary of state?

PROFESSOR MOORE: Yes.

PROFESSOR SUNDERLAND: Then you get the complaint at the same time as the summons, don't you, and respond to the complaint?

MR. LEMANN: Twenty days from the service of the

summons and complaint. The complaint has been served on the secretary of state.

PROFESSOR SUNDERLAND: The response is certainly to the pleading.

MR. LEMANN: I think the original language, however, was better in that regard, if I may be permitted to say so, from the standpoint of the bar. I think they like nice direct, plain statements. He serves his answer. That is what usually happens. The other responsive pleadings, somebody pointed out, are very unusual, anyhow.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: Do you want to take it on Mr. Sunderland's motion or does somebody else want to move to amend or how do we stand from the parliamentary point of view?

DEAN MORGAN: Somebody will have to move to sbustitute the original.

MR. LEMANN: Yes. Move it, Mr. Morgan.

DEAN MORGAN: The original eleven lines.

MR. LEMANN: I move that we revert to the original eleven lines.

THE ACTING CHAIRMAN: I don't know whether parliamentarily it would be permissible or not, but I don't see why we shouldn't accept it, unless there is some objection. We might as well vote on Mr. Lemann's motion, I guess.

PROFESSOR SUNDERLAND: Just as well, yes. That is

all right.

THE ACTING CHAIRMAN: Any further discussion? Mr. Lemann's motion is to retain lines 1 to 11 in place of the substitute in 11 to 16.

MR. LEMANN: To keep 12(a) as it stands relating to bill of particulars, and adding this provision about stipulation? Is there any other change?

THE ACTING CHAIRMAN: I thought that we had already voted to take the sentence beginning in line 16, with the change suggested.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: Do you want to reconsider that?

SENATOR LOFTIN: We only voted to change the word "suspends" to "alters".

THE ACTING CHAIRMAN: That is correct.

MR. LEMANN: That is going back to the original, and when you do that you haven't got your new result there in those lines, and it is not very significant. You have "alters" now, you see.

DEAN MORGAN: He said "these periods of time," instead of "the time fixed by these rules for serving any required responsive pleading."

THE ACTING CHAIRMAN: I might point out, too, over at the top of page 8, the addition about the bill of particulars that we suggested, and it was voted, you see, to leave out the

last sentence.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: The last sentence is so unimportant that it really seemed too bad to tack it on to the end of a long section. I don't mean the new last sentence that we have now added to it, but the last sentence as it was originally, to wit: "In either case the time for service of the responsive pleading shall be not less than remains of the time which would have been allowed under these rules if the motion had not been made."

You will see that that went out when we made all the time twenty days. The old rule had ten days after the motion. The whole thing was very inconsequential. It meant that if you got a motion decided, you would get perhaps ten extra days. It seemed simpler to make every period twenty days. It was easier to remember.

MR. LEMANN: You have ten days still referred to, haven't you, and twenty once?

DEAN MORGAN: You still have ten days here.

MR. LEMANN: In 21 and 24.

THE ACTING CHAIRMAN: The point is, if you are going back to the old rule, do you want also to retain this last sentence?

DEAN MORGAN: No, I don't think so.

THE ACTING CHAIRMAN: It is a foolish little thing,

I think, and it just causes more to worry about.

MR. DODGE: Who makes a motion and expects action on it by the court to take place within those twenty days?

DEAN MORGAN: I think it is nonsense with that last sentence.

MR. DODGE: So do I.

PROFESSOR CHERRY: It takes longer than ten days.

THE ACTING CHAIRMAN: That being so, I think the situation is that we have, for the time being at least, voted in the sentence in lines 16 to 25 with the changes as we voted them, that we haven't yet formally acted on that last sentence, and that we now have before us Mr. Lemann's motion, which is to retain lines 1 to 11 in place of 11 to 16.

MR. DODGE: In order to make progress, I move an amendment: And that the rest of (a) stand as you have written it.

THE ACTING CHAIRMAN: Yes. Very well.

MR. LEMANN: How about that word "alters"?

MR. DODGE: That has been done.

MR. LEMANN: That has been voted.

THE ACTING CHAIRMAN: Monte, do you accept the amendment?

MR. LEMANN: Yes, sir.

THE ACTING CHAIRMAN: Very well.

PROFESSOR SUNDERLAND: I just wondered why that word

in 23 was "may" instead of "shall"; "responsive pleading may be served within 10 days after" notice. You really mean it is required to be served.

MR. DODGE: That is one of those cases where "may" is to be construed as "shall."

PROFESSOR SUNDERLAND: If it is "may," then the inference is that it may be within ten days or some other time, as you please.

THE ACTING CHAIRMAN: This, you will see, is from the original rule. Why did we do it originally? You see, that is language that isn't changed.

PROFESSOR SUNDERLAND: If you are laying down a time requirement, it seems to me you ought to use "shall" instead of "may."

MR. DODGE: It means you shall have twenty days ordinarily, but you may have ten if this happens.

PROFESSOR SUNDERLAND: Yes, but shall be served.

DEAN MORGAN: You may get permission to go further.

PROFESSOR SUNDERLAND: Isn't that imperative?

MR. DODGE: It means "shall."

THE ACTING CHAIRMAN: That is the original form we had. That is not changed.

Are you ready for the question? The question now will be in substance accepting the old rule 1 to 11, accepting the new change from 16 on, subject to the modifications of

that change we have already made, which are (1) that "permitted under" is substituted for "provided for in" and (2) that "alters" is substituted for "suspends." Are you ready for the question? All those in favor will say "aye"; all those opposed. The "ayes" have it, and it is so voted. I take it, as we have discussed, that also includes the extra added sentence about the stipulation of the parties.

MR. DODGE: I think Mr. Sunderland was right that both those may's should be "shall".

PROFESSOR CHERRY: Lines 21 and 23.

MR. LEMANN: Do you so move?

MR. DODGE: Yes.

THE ACTING CHAIRMAN: Mr. Dodge moves that in lines 21 and 23 the word "shall" be substituted for the word "may".

DEAN MORGAN: Second.

THE ACTING CHAIRMAN: Any discussion? All those in favor will say "aye"; opposed. So voted. (Carried)

Now we come down to the question on the rest of the rule.

MR. LEMANN: What is the substantive change that you, without running against you on rehearings, propose to 12(b)? What is the importance of the change that you propose to the rule as voted in November?

THE ACTING CHAIRMAN: First let me say this: It was voted at that time to send out two drafts: the majority draft

as here, and the alternate draft which followed. I think it is only fair to say that the difference between them is much less than it has been before. I think that they are very much closer than they have been at any time before. It really seems to me that the general intent is much the same and also that probably the substantial result will be the same. Although I may be wrong, it seems to me, therefore, that it has now come down very largely to a question of wording. I didn't feel this quite as much at the time of the meeting as I did when we came to work on it. When we came to work on it, it seemed to me that in substance we were much closer than I ever realized. Now I think it is more a question of taste and expression.

If I may try to state the substantial difference--

MR. DODGE (Interposing): May I ask you first, is this first draft the one that we voted for after the long discussion?

THE ACTING CHAIRMAN: That is correct.

MR. DODGE: And we voted to submit an alternative draft, and you have prepared that.

THE ACTING CHAIRMAN: That is correct.

PROFESSOR SUNDERLAND: Did we vote to submit that to the bar, you mean?

THE ACTING CHAIRMAN: Yes.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: That was the understanding.

Let me say first, before I state anything more, I think that we should here first decide whether we want to follow that general program or to vary it. After we have decided that, then there are some questions of wording of certainly the first draft that have come in from various people, and there may be of the second.

MR. LEMANN: I am wondering a little bit how far we should go in submitting frequent (in more than one or two cases) alternatives to the bar. Number one, it indicates that the Committee isn't able to harmonize its views very effectively, as a court should; and, number two, it is a little confusing to the bar; and, number three, how intelligent a reaction will you get from the bar? I think only in a few instances will you have them favor you with a really well-considered preference. I don't know. I am just thinking aloud about it, Charlie. I am just wondering whether it is a good idea to do it to any considerable extent.

SENATOR LOFTIN: How many suggestions have we now in this draft?

JUDGE DOBIE: You had a good many before.

THE ACTING CHAIRMAN: I think since the last meeting (this one for 12 was the only suggestion definitely passed on then) there have developed more, and of course Hill v. Hawes perhaps presents more.

MR. LEMANN: We ought to have one in 6 at this meeting.

We just did it in 6.

THE ACTING CHAIRMAN: Yes. I think, all told, there were about four different instances. Of course, that might not be so when we get through at this meeting. I don't think there were more than four. This is the only place where at the last meeting we definitely decided to suggest alternatives.

I am a little afraid that I am talking too much, but I don't know what else to do. It is a little bit difficult being Acting Chairman and Reporter, and maybe you will want to change and get some other chairman in, because I would rather talk than not. At least for the time being I will go ahead.

If I may suggest, it would seem to me that where a matter is important (and in the past we have considered this important) we ought to do it some. I may say that that is what the Advisory Committee on Criminal Rules did. They did that in their earlier draft, and there they had really more extensive arguments than as yet we have developed. If you recall, on that various members of the Committee made long arguments, and others replied. Those were in the appendix to the Criminal Rules. If a precedent is desired, there it is.

I wouldn't rely on that particularly, but I would say this: After all, what do we really submit it to the bench and bar for? I suppose between us here we could say that we do it somewhat to estop them, quite frankly.

JUDGE DOBIE: We get their good will very frequently,

I think, by submitting it to them, even though they don't make any valuable suggestions. At least they will know there hasn't been any Star Chamber stuff.

THE ACTING CHAIRMAN: I think that is very true and very desirable, and perhaps that may be the most desirable feature. Nevertheless, I think at least in form it is our story that we are seeking advice; and if we are seeking advice, isn't a better way to do it in cases where we have doubt to ask their advice upon it? It is quite a different thing than if we were acting finally. It is quite a different thing from submitting the two different versions of thought. This, after all, is preliminary, and we haven't reached any final conclusion as to what to submit to the Court.

MR. DODGE: You put one rule up as being voted by the Committee and then an alternative as being favored by some. I certainly think that this primary rule here, for which we voted after so many debates, should be put up as the Committee's primary draft.

THE ACTING CHAIRMAN: Of course, as to the details of how it should be submitted, I don't know. Mr. Mitchell raised a question on that. He apparently desires more explanation, and that is certainly quite all right. He says this:

"Rules 12: The Committee decided at the last meeting to print both proposals for comment by the bar. In the print there should be a careful note of explanation of both."

It would be my idea, too, that we should put in as much of the Committee's vote as will be helpful, and that is what I thought we had done. We had said that this was voted by the Committee.

MR. DODGE: That is what I had in mind.

MR. LEMANN: What is the important difference, now, that you want to bring out in this note of explanation?

THE ACTING CHAIRMAN: I take it the difference is really this--

MR. DODGE (Interposing): Not more than one motion, I think.

MR. LEMANN: That you have to put it all in a motion if you want to raise any of it, and you can't keep some of it for your answer? Would that be it?

THE ACTING CHAIRMAN: No, I don't think that is it. The difference is mainly down in lines 37 to 40. That is the most important part of all. In the original draft it is this:

"If matters outside the pleadings are presented to the court upon a motion made under defense (6), such motion may be considered a motion for summary judgment and disposed of as provided in Rule 56."

The alternative suggests directly that your motion is a motion for summary judgment.

The difference, I think, really is one--I don't want to use it opprobriously, but I should say one of frankness and

directness. The Committee draft seems to me to say that you start doing one thing and end by doing another, that the motion becomes transformed in the course of going ahead from a motion like the old demurrer into a motion for summary judgment. Why isn't it more correct and more straightforward to say it is a motion for summary judgment from the beginning? The summary judgment doesn't require affidavits, and if neither party wants to submit affidavits, they don't have to.

There has been a very serious difficulty with these two rules as to which governs, as to when you have a motion under Rule 12(b) and when you have a motion for summary judgment under Rule 56, and there has been doubt in the courts, but the circuit courts of appeals have come very substantially to say in effect that it doesn't make any difference, that in effect you consider a motion to dismiss with affidavits as a summary judgment. It is in the district courts where there has been the greater confusion.

Of course, now I am frankly suggesting the alternative, but why isn't it better to say it directly?

MR. DODGE: That is the exact question that we have argued and debated at great length, and it was, as I recall it, overwhelmingly voted at the last meeting that we should retain the equivalent of the old demurrer or motion to dismiss as such, and should not in every case label it a motion for summary judgment just because one time out of a hundred somebody

will not file what is a real demurrer but will file something supported by affidavits, which is of course a motion for summary judgment. Ninety-nine times out of a hundred, where it is claimed the plaintiff has no cause of action, the motion to dismiss (as they now call it) or the demurrer should be retained as a very convenient way of quickly disposing of litigation. We voted on that at the last meeting and, I think, at the meeting before that, and debated it at great length, and my recollection is that it was overwhelmingly carried.

THE ACTING CHAIRMAN: It is true we have debated this a lot, and Mr. Dodge is quite right in saying that we have considered it perhaps as much as we can, unless we get new light as we go ahead; but I do want to say two things, and I think I am entitled to it.

First, it was not overwhelmingly carried. It was a very sharp decision, very close--so close, you see, that Senator Pepper came to the support of the alternative. We have sent it to him, and he has expressed not final approval but very strong approval temporarily. The vote was just a bit over even at the end.

Second, I am afraid I shall have to disagree with Mr. Dodge on my experience at the bench when he says that in ninety-nine cases out of a hundred it is the demurrer which is important rather than the motion supported by affidavits. I am frank to say that I think the proportion should be just reversed.

MR. DODGE: I didn't say that. I said the real demurrer is not a document that is supported by affidavits outside the record. That is a motion for summary judgment and is properly so denominated. I have never, in forty-seven years of practice, seen a demurrer or a motion to dismiss on the ground that there was no cause of action, supported by affidavits going outside of the pleadings.

THE ACTING CHAIRMAN: I still want to say what I had in mind, that the case where the old demurrer is now useful is only one case out of a hundred, and I will stick to that because I think that is shown by my experience.

MR. LEMANN: You see only a few cases. But to get back, Mr. Reporter, let's compare page 9 of this draft with page 14. I just want to see what this vital difference of opinion is in what we are going to submit to the bar. I am addressing myself now to paragraph (d) of the majority vote, which is on page 9, isn't it. It is practically in the language of the present rule. Am I right?

DEAN MORGAN: What are you talking about? Page 9? It is page 8.

THE ACTING CHAIRMAN: Page 8 is the vital part.

MR. LEMANN: Subdivision (d) on page 9.

DEAN MORGAN: Subdivision (b) on page 8.

MR. LEMANN: I was looking at the changes made in (d), because you are making changes in (d), but very little change

in (d).

DEAN MORGAN: It is (b). That is the one.

THE ACTING CHAIRMAN: The changes in the main are in (b), on page 8, and are particularly in lines 37 to 40, for which would be substituted just the direct statement that you have a motion for summary judgment, which covers everything under this. Subdivision (c) would be out altogether, and (g) would go out altogether under the draft, because neither one would be necessary.

PROFESSOR SUNDERLAND: Subdivision (c) goes out? No motion for judgment on the pleadings?

THE ACTING CHAIRMAN: It is not needed, because you move under 56.

MR. DODGE: You have left out (6), haven't you, completely?

THE ACTING CHAIRMAN: Which is (6)? It is (c) and (g) that become quite surplusage. In (b) it is provided that you can make the motion which is entirely covered by 56.

MR. DODGE: You have left out (6). The fundamental difficulty from my point of view is that you have left out (6) completely.

DEAN MORGAN: You mean on page 13.

MR. DODGE: You have provided that nothing like the old demurrer can be raised except by a motion for summary judgment.

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we ought to do it some. I may say that that is what

THE ACTING CHAIRMAN: Again I say, in the cases we have, we only get the simple motion to dismiss, with nothing more, when the parties have agreed to submit only a question of law. That is very easy. They can do it under any process under any system. They can do it, of course, under the system that is provided here.

Then there are two other situations, which are with us more frequent. One of them is where the parties do submit affidavits, the defendant saying in effect that under no circumstances is there any claim for relief, the plaintiff saying, "This is my case, and if I haven't stated it correctly, I want to amend. I think I have said it correctly, but I don't know." In that case, in all the circuits, I think, except perhaps one, we always look at the affidavits.

The final case is where you have the bare pleadings, but you are not at all sure that the plaintiff has stated his case. That is really the hardest case of all, because after all we are a court and we are trying to do what we can for the parties.

JUDGE DOBIE: But do you have many of those cases where they do submit outside affidavits on a motion to dismiss? We do not.

THE ACTING CHAIRMAN: We do, and we always consider them now. It comes to really the same thing under this final case I have said, because when you get to the final case you

are not going to dismiss the case if you think that the plaintiff by amending can state it. We have all these steps in getting up to the upper court just because formal allegations haven't been made of the kind you want to accept. What we do for the most part when we get a complaint like that, when the trial court has been trying to shorten the cause and has given judgment, is to reverse, and that is what the other circuits have been doing, too, as we have pointed out in these cases on page 11.

In the main, I think it is a waste of time not to go to it directly. You see, the point is this: Nowadays courts don't want to decide on the formal pleadings. That isn't the way we do business any more. We don't decide finally, so we have to strain to see that the parties take care of themselves.

On page 11 in the note we first point out decisions of the circuit courts taking affidavits, and then at the end the second group of cases is just as strong. "The reluctance of appellate courts generally to permit decisions on mere allegations alone is well known ...." Those are recent examples of reversals.

This is a short way of making as sure as we can whether or not there is merit in the case. You see, the difficulty of the old procedure was that you contented yourself with what the plaintiff's lawyer had said very formally, and now we don't want to decide cases on that alone because we know that

you can't rely on the plaintiff's lawyer as being the consummate pleader and bringing it out.

MR. DODGE: You have in mind the formal difficulties in the statement of the case. What I have in mind is the real function of the demurrer, not to educate the plaintiff as to some formal allegations that he has omitted, but to state in substance that he hasn't any case. He has stated it all right, but the plaintiff doesn't come within the class that are to be benefited by that statute or to have rights under it, or something like that. That, in my experience, has nothing whatever to do with motions for summary judgment. There is no room for an affidavit. It is simply a case not of whether the plaintiff has stated a cause of action but of whether he has a cause of action.

DEAN MORGAN: Bob, isn't that taken care of in the motion for summary judgment?

MR. DODGE: Not by suggesting to him that there are affidavits. A motion for summary judgment is well understood by the bar to be applicable to cases where there is apparently a question of fact on the pleadings but where in substance there is no real dispute about the facts.

DEAN MORGAN: Yes, but 56 provides that "A party seeking to recover", and so forth, "may .... move with or without supporting affidavits for a summary judgment ...." That puts the summary judgment doing just exactly what you had in

mind. Instead of your (6) on page 8, you have the sentence on page 13, beginning in line 14, ending in line 16.

MR. DODGE: That may be another form of the same thing.

DEAN MORGAN: It is. That is what I was saying. So you can't say, really, that in the alternative (6) is omitted. It is included in a different form.

MR. DODGE: But I see no advantage whatever in calling every motion to dismiss or demurrer a motion for summary judgment, which is primarily applicable to a different sort of case, as the bar understands.

DEAN MORGAN: You are practically saying, of course, that what the bar understands by summary judgment now is a motion that is based on affidavits, so that when we say a summary judgment may be with or without affidavits, we are expanding summary judgment as we know it.

MR. DODGE: That is an unusual thing. Primarily, in motions for summary judgment I think everybody understands that there is apparently a question of fact, but that the affidavits will show that there is no real dispute of fact.

DEAN MORGAN: I have no doubt that that has been true in the past.

MR. DODGE: I am against the abolition of the old-fashioned demurrer, whatever you call it, and I don't want it to masquerade as a motion for summary judgment which, to the

bar at least, suggests affidavits and the showing that there is no real dispute of fact, although there is an apparent one.

DEAN MORGAN: You would rather put a speaking demurrer in, in other words.

MR. DODGE: I wouldn't call it a speaking demurrer. If there are to be affidavits, it is a motion for summary judgment and not what I know by a demurrer or motion to dismiss for failure--I don't like "to state a claim," but to have a claim.

DEAN MORGAN: Last time, in this part that was voted by the majority, it was agreed that affidavits could be presented on (6), which is a failure to state a claim. Of course, I objected very strongly to that language.

MR. DODGE: That really made it a motion for summary judgment.

DEAN MORGAN: That is quite right.

PROFESSOR SUNDERLAND: How can affidavits be appropriate to the point raised under (6)? If you are attacking the faith of a pleading, an affidavit can't possibly have any relevance to that.

DEAN MORGAN: That was my suggestion. Instead of putting it this way, I was going to say, "On a motion asserting defense (6), a party may present matter outside the pleadings. In that event, the motion shall be considered a motion for summary judgment and disposed of as provided in Rule 56."

MR. DODGE: You can accomplish the same result by

amending the statement. If his statement didn't state his real case, he could amend it.

THE ACTING CHAIRMAN: Of course, these differences have been existing right from the beginning.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: I don't know how we are going to go very much further. Mr. Dodge has felt that way very strongly from the beginning, and I shall have to say, with all due apologies and deference, that I have felt so strongly the other way that when the time comes, I shall ask for permission to go to the Court for dissent if there is a question of raising the old demurrer.

I think the old demurrer is an outworn instrument now except in the one case where the parties agree. When I say "the parties agree," I mean when the parties are willing to go up on a bare statement of law. When they are willing, you can achieve the result very simply. They can do it by stipulating facts or any particular way. Outside of that, I feel very strongly from such experience as I have had.

I wonder if it is worth while going over those points again. We have already decided that the two ideas be submitted. I take it this discussion has been a little to the point as to whether the alternative should be submitted and, for my part, I must say that really, if we feel as strongly as this, I don't believe you are quite entitled to vote down the submission of it.

MONDAY AFTERNOON SESSION

April 3, 1944

The meeting reconvened at 1:55 p.m., Judge Charles E. Clark, the Acting Chairman, presiding.

THE ACTING CHAIRMAN: I guess we had better proceed. Might it not be a good plan to go through the rules and then come back if you want to take an over-all view, instead of trying to take an over-all view first? Anything you wish, of course.

MR. LEMANN: You mean pass 12?

THE ACTING CHAIRMAN: No, I didn't mean that. I mean we have some suggestions of correction of detail in 12(b).

MR. LEMANN: All right, let's look at them.

THE ACTING CHAIRMAN: I don't know but that it might be a little quicker to look through it and then come back and see if there is anything we want to add, either pro or con or in the middle.

PROFESSOR SUNDERLAND: I have a suggestion on (b), if this is the appropriate time.

THE ACTING CHAIRMAN: I should think so. Shall we turn to the particular letter for the moment? We have been talking in general. My suggestion really is that we turn to the particular for the time being, or to the concrete.

MR. DODGE: Yes.

THE ACTING CHAIRMAN: All right, go ahead, Edson.

MR. DODGE: I wonder, instead of submitting such a long rule, if you couldn't just state what the point of difference is by fewer amendments.

THE ACTING CHAIRMAN: That of course can be done, and I think it could be done fairly easily, but on that we have been often met with: "We want to see it. We want to see just what it means." If you are going to do that, that could be done, and perhaps in a footnote or an appendix or somewhere else, you could then let them see what it looks like, but that is a question of ways and means.

Suppose we think this over. We really ought to adjourn for lunch. We shall come back at a quarter to two.

... The meeting adjourned at 1:00 p.m. ...

PROFESSOR SUNDERLAND: In the matter that you underline in (b) you state that "If matters outside the pleadings are presented to the court upon a motion made under defense (6)," (you limit it to (6)) "such motion may be considered a motion for summary judgment and disposed of as provided in Rule 56."

Then in your note you cite quite a number of cases, and the cases don't limit themselves to (6). They are much broader. You cite about half a dozen cases; one in 124 F.(2d) which was not a motion based on failure to state a claim for relief but a motion to dismiss for want of merits based on affidavits, really a straight-out motion for summary judgment. In 120 F.(2d) I couldn't see anything on the point. In 116 F.(2d), which is from your circuit, it was a motion to dismiss for want of jurisdiction. It wasn't under (6). It was for want of jurisdiction. In other words, that was under defense (1).

MR. DODGE: I noticed that, too, in looking at those cases.

PROFESSOR SUNDERLAND: Then in 128 F.(2d), in the Third Circuit, it was a motion to dismiss for want of jurisdiction over the subject matter.

MR. DODGE: Why shouldn't it be "upon a motion made hereunder"?

PROFESSOR SUNDERLAND: That is what I thought. I

thought that since the cases are broader, if you are going to go into the thing as a summary judgment, it ought to be universally applicable to any kind of motion, it seems to me. I wonder whether the way to handle it wouldn't be maybe this: (That sentence is repeated, by the way, under (c).) It seems to me that the place to have that provision is somewhere so that it would apply both to (b) and to (c), and not have to be stated twice. Put in a separate section which would be headed like this, perhaps:

"When motion is considered one for summary judgment. If matters are presented to the court upon any motion under (b) or (c) of this rule which show that there is no genuine issue as to any material fact, and that either party is entitled to judgment on the merits as a matter of law, the motion may be considered a motion for summary judgment and disposed of as provided in Rule 56."

That wording is in harmony with our theory of the summary judgment, which makes it a judgment on the merits.

MR. LEMANN: Will you read that again?

PROFESSOR SUNDERLAND: I will read that again. This would apply to (b) and (c) both in any case where there was one of these motions.

"If matters are presented to the court upon any motion under (b) or (c) of this rule which show that there is no genuine issue as to any material fact, and that either party

is entitled to judgment on the merits as a matter of law, the motion may be considered a motion for summary judgment and disposed of as provided in Rule 56."

MR. LEMANN: Which show that there is no difference as to the facts and that there is no difference as to the law?

PROFESSOR SUNDERLAND: That there is no material difference as to fact and that either party is entitled to judgment as a matter of law. That is the wording of our summary judgment rule.

MR. LEMANN: The "and" would have to be "or" there. The trouble there, Mr. Sunderland, it seems to me, is that you are dealing with a rule that relates to the law of the case. When you come to summary judgment, as Mr. Dodge says, I think the function of that is as a means of disposing of a case where there is no dispute at all between the parties on the facts. Here we are dealing with a case where there should be no doubt as to the law.

PROFESSOR SUNDERLAND: I am just repeating the language of our summary judgment rule there. Here is the language of Rule 56. I am simply using that same language so as to connect them up.

MR. DODGE: You may well have a dispute of fact under most of these numbered sections.

MR. LEMANN: Yes.

PROFESSOR SUNDERLAND: Rule 56(c) reads as follows:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

MR. LEMANN: I think that would be confusing to put it in here, because it is an entirely different thing.

PROFESSOR SUNDERLAND: If it is a summary judgment, it seems to me that our language ought to be similar to the language that we use in the summary judgment rule.

THE ACTING CHAIRMAN: May I go back and state a little history? Of course, as you know, I would be all in favor of the general spirit of Edson's motion. There are, however, these difficulties, which your discussion has brought out in the past. I can indicate it by first stating why the limitation appears in lines 37 to 40.

First, there isn't any question but that you certainly can use affidavits on these dilatory defenses. At the last meeting we came in with a long memorandum on the cases showing that at times they even have a trial by jury, but that affidavits are used a great deal. I think everybody was quite clear that affidavits were usable there, so much so that there seemed to be no question about it. The difficulty was raised, however, when we tried to make the summary judgment cover

matter in abatement as well as matter in bar. I still think it wasn't a bad idea, and I think there was some analogy from the New York practice. Nevertheless, the members of the Committee didn't take to it very much. They thought that the idea of the summary judgment was limited to matter on the merits and not on matter in abatement.

But, you see, Edson, you raise that same question again. You make the summary judgment now go back to cover jurisdiction--

PROFESSOR SUNDERLAND (Interposing): Oh, no. On a motion to dismiss for want of jurisdiction, if it appears on that motion to the court that on the merits of the case one party is entitled to judgment, he gets the summary judgment. In other words, these matters of merits may come up on any kind of motion, and that is the nature of these cases that you cited here.

THE ACTING CHAIRMAN: Understand, I agree with you, but nevertheless I thought we were overruled. It isn't so much on the merits. It is the difference between a decision in bar and a decision in abatement. You will remember that in our discussion before there was quite an exception taken to our suggestion that a summary judgment could be had on matter in abatement.

PROFESSOR SUNDERLAND: I don't think it ought to be, but I think if the merits happen to come up before the court,

no matter what they are talking about, so that it appears from what is presented to the court that one party is entitled to judgment on the merits as a matter of law, he should render it.

MR. DODGE: I should like to raise a specific question that will raise your point as to lack of jurisdiction over the person. The defendant files what would have been a plea in abatement and a motion to dismiss the action because it, a foreign corporation, has no place of business in the district, and moves, you would suggest, for a summary judgment.

PROFESSOR SUNDERLAND: He wouldn't unless there were a showing on the hearing of that motion.

MR. DODGE: Then he files an affidavit and moves for a summary judgment. Suppose he doesn't do that. Suppose there is a real contest, as there so often is, over that one point. Ordinarily, if a jury had been claimed in the case, in the state courts of Massachusetts, anyway, there would be a jury trial on that plea in abatement.

We were told at the last meeting that that was not in accordance with the general practice and that ordinarily such a thing would be disposed of on affidavits. Isn't that so, Mr. Reporter? On affidavits or without a jury?

THE ACTING CHAIRMAN: My impression is that you are stating it a little stronger. I think the cases indicate that very often it is so disposed of, but I think they also indicate that if anybody stood out for a jury trial, they would get it.

MR. DODGE: Yes. Suppose we had that practice. Why shouldn't we have a provision for a summary judgment on that issue not covered now by our Rule 56, which obviously applies only to the merits? In other words, why isn't Mr. Sunderland's suggestion a good one?

PROFESSOR SUNDERLAND: My suggestion didn't go that far at all. I confined my suggestion to the merits of the case.

MR. DODGE: How do we come to the merits of the case under these motions?

PROFESSOR SUNDERLAND: How do you get to the merits of the case on affidavits connected with a motion to dismiss because the facts aren't sufficient to constitute a claim for relief?

MR. DODGE: That is the only one that goes to the merits.

PROFESSOR SUNDERLAND: The actual merits have nothing to do with the judgment, any more than with a motion for judgment for want of jurisdiction.

MR. DODGE: Suppose in my case the point is of jurisdiction over the person. Would you let that go along in the natural course until the jury trial could be had months later, without any possibility of getting it summarily disposed of?

PROFESSOR SUNDERLAND: You would dispose of it by a motion to dismiss. It wouldn't be a summary judgment on the

merits.

MR. DODGE: How are you going to get your trial on the question of facts that are raised, if there is a real and bona fide dispute? I think there may be a gap in our rules on that point.

THE ACTING CHAIRMAN: It is covered at the present time under (b) and (d) together.

MR. DODGE: Under (b) and (d) together?

THE ACTING CHAIRMAN: Yes; (b) is the one we had generally, and (d) is for the hearing.

PROFESSOR SUNDERLAND: Subdivision (b) is confined, as it is now worded, to defense (6), isn't it?

THE ACTING CHAIRMAN: Yes; and the reason for that is that we got beaten down on the idea that they would use the summary judgment at all for the other previous five. We tried to use it for the previous five, and we were told no, that everybody realized that you used affidavits under those five, anyhow. That is why we have this truncated form.

It seems to me, Edson, that you run right up against the objection that we ran up against, which was in effect that the profession considers summary judgment not a matter for want of jurisdiction and the like. Personally, I would doubt that view. I don't think the profession has that strong a view with respect to summary judgment, but nevertheless that was the thought, and this rule was therefore drawn on the basis of

separating the two ideas.

MR. DODGE: You have it in (c), but you haven't got it in (d). You merely have a provision that the point shall be disposed of in some way before the trial on the merits, or may be so disposed of.

THE ACTING CHAIRMAN: That is it.

MR. DODGE: That doesn't provide for any summary judgment on the kind of case I spoke of, which is quite common.

THE ACTING CHAIRMAN: I don't know. That is the basis we have been going on right along, and that is the basis the courts have been deciding on. Rule (d) is used quite a little both ways; that is, from time to time they do postpone the hearing until the trial. But I don't quite see why it doesn't cover the matter. It does give the trial judge the option of combining it with the trial, which I must say I think has worked very well, because there are lots of times you can't decide it very easily in advance.

MR. DODGE: I don't think it ought to be consolidated with the trial if a very real issue was made as to whether the corporation was subject to suit in the district. You ought not to compel a hearing on the merits until that point is determined.

MR. LEMANN: It would be foolish to.

MR. DODGE: As the rules stand now, you can't get a trial on that issue until it is reached in due course.

MR. LEMANN: Why do you say that?

MR. DODGE: Because there is no provision for it.

MR. LEMANN: What does (d) say? Turn to (d). Wouldn't (d) let you do it?

MR. DODGE: ".... shall be heard and determined before trial ...." That is before trial on the merits.

MR. LEMANN: Yes.

MR. DODGE: ".... unless the court orders that the hearing and determination thereof be deferred until the trial."

MR. LEMANN: That is the way we have always had it.

MR. DODGE: Before trial?

MR. LEMANN: Yes.

MR. DODGE: What does that mean, that the court says, "This case shall be reached for trial in one year. I presume there will be a jury sitting about six months hence, and we will have a jury trial on this issue then"?

MR. LEMANN: What do they do now in your United States District Court if you file a plea in abatement or a motion to dismiss on the ground that the defendant corporation isn't doing business in the state? They don't tell you to wait six months to try it, do they?

THE ACTING CHAIRMAN: Very rarely.

MR. LEMANN: Don't they dispose of it?

MR. DODGE: I had one recently where a jury trial was reached. I think the court would advance it for a trial by

jury. They wouldn't let you wait a year and a half. They would advance it for trial by jury, but that wouldn't give the expedition that you could get on a motion for summary judgment if there was no real issue of fact, although the papers on file indicated that there was one.

MR. LEMANN: You have had no trouble in the practice up to now in not being able to present it on a motion for summary judgment in that kind of situation.

MR. DODGE: I never heard of a motion for summary judgment on this kind of issue, on anything except the merits.

MR. LEMANN: Is there a common law right of action, a constitutional right of action, for trial by jury for such a plea in abatement?

MR. DODGE: It would be so held in the state courts of Massachusetts. I don't know what the Federal courts in Massachusetts would say.

PROFESSOR SUNDERLAND: That is true of common law. They do that in Illinois.

MR. DODGE: Trial by jury?

PROFESSOR SUNDERLAND: Yes.

MR. LEMANN: On a plea of that sort going to the jurisdiction?

MR. DODGE: On a plea in abatement as well as on the merits.

PROFESSOR SUNDERLAND: That is a common law rule.

MR. DODGE: We have no provision for summary judgment on that issue.

THE ACTING CHAIRMAN: It seems to me we are just discussing the main issue again. To my way of thinking, (d) is an absolute essential, and I think it is one of the better rules. It has worked very well. I don't see any abuse.

MR. LEMANN: Nobody is proposing to remove that, are they?

MR. DODGE: Just trying to help your desire for expedition.

THE ACTING CHAIRMAN: If I understand Mr. Dodge, that is just what he is trying to do.

MR. LEMANN: He doesn't want to change (d).

THE ACTING CHAIRMAN: He wants to make a required trial on the merits on certain types of issues.

MR. LEMANN: He wants to take your provisions for summary judgment and extend them to summary judgment on pleas in abatement. Is that right, Mr. Dodge?

MR. DODGE: Yes. You have extended the summary judgment idea to the demurrers, where in my practice they would be rarely applicable, and you haven't provided for it in these other cases of pleas to jurisdiction over the person.

THE ACTING CHAIRMAN: That was just our proposal in October, which was voted down, and we were said to be shocking the bar. We were suggesting in effect that the summary judgment

be used to cover all these points.

MR. DODGE: That is a different thing.

THE ACTING CHAIRMAN: I am sorry, but I don't quite see why it is.

MR. DODGE: You want to call it a motion for summary judgment in every case, whereas it generally is not, it seems to me.

MR. LEMANN: In your case, Mr. Dodge, as a practical matter, do you think you would often have a case where you could dispose of that plea on a motion for summary judgment?

MR. DODGE: No, I don't.

MR. LEMANN: In most of the cases don't you think there would be a real, sharp difference as to what the facts were, perhaps?

THE ACTING CHAIRMAN: I am a little surprised at that, Monte, because, as a matter of fact, I supposed that almost always you did. Let's forget for a moment the question of name. If you don't like "summary judgment," let's make it "affidavits." While we did discover some cases which suggested there might be a right of trial by jury, certainly the more usual practice is to do it otherwise; and I wrote an opinion about two weeks ago on that very question, on service of due process on a receiver of a railroad, as to whether he was to be sued as an individual or whether he was to be sued as the railroad corporation.

MR. LEMANN: That didn't involve any fact question, did it?

THE ACTING CHAIRMAN: Yes. It finally came down to the question of how much business they did in the state and also of the capacity of the person served, as to whether he was the managing agent. Although this case was tried by a jury, both parties, on the main issue, which was that of negligence (it was a personal injury and death action), were satisfied to try this issue of service and jurisdiction (the two were together there) on affidavits. That is the way it was tried, and that is the way they came up on appeal.

MR. DODGE: That is by agreement of the parties.

THE ACTING CHAIRMAN: Well, there was no more agreement than there always is in this kind of case. The way it came up was that the defendant trustee, trustee of the organization, made a motion to dismiss, filing his affidavits in which he said, "I don't do business in the state. My residence is in Illinois," and so on. "The man served is not a real agent," and so forth. Then the plaintiff filed reply affidavits. You could call that agreement. I mean they didn't get together and agree on it, but both sides thought it was natural, and so did the court.

MR. DODGE: In my office a good many times we have been through long, extended trials of questions of fact as to whether a foreign corporation was doing business within the

state. I don't think the cases where there is no real issue of fact are common. Almost always there is a real issue which has to be tried out. So the summary judgment wouldn't be so useful in most cases.

MR. LEMANN: That is what I was thinking.

PROFESSOR SUNDERLAND: Under this sentence as you have it, "If matters outside the pleadings are presented to the court upon a motion made under defense (6)," suppose it appeared from affidavits under defense (6) that the action was prematurely brought, let us say. Would you consider on that showing that a summary judgment would be proper? That would be a case where it appeared from matters outside the pleadings.

THE ACTING CHAIRMAN: One thing I have thought about that all the while is that this all comes to a question of labels. That is one reason I don't like this rule. I do think it does overemphasize the question of names. I would say that I certainly would consider the issue on affidavits. I wouldn't have the slightest hesitation.

PROFESSOR SUNDERLAND: Would you grant a summary judgment there? It would still be in abatement, wouldn't it?

THE ACTING CHAIRMAN: If it were still premature, yes, or I would grant a judgment, whether you call it summary judgment or not. I certainly would by the time when the appeal was no longer premature. As a matter of fact, in our circuit we would say, "It is all taken care of." We wouldn't make them

start suit over again.

PROFESSOR SUNDERLAND: But that would be a case that would come squarely under your sentence here. It would be matters outside the pleadings presented to the court upon a motion under defense (6), and it would show a ground for abatement. Then under your rule you would have to have a summary judgment, make a summary judgment while in abatement.

THE ACTING CHAIRMAN: I see what you mean. I hate to argue against you. What do you say about the point that was raised before? The difficulty I am finding is that we go back over these things the same way. Taking the defenses (1) to (5), I have no doubt, and I guess you have none, but that affidavits can be used.

PROFESSOR SUNDERLAND: I think so.

THE ACTING CHAIRMAN: There may be a remote right to trial by jury. We don't need to worry about that because it isn't often claimed. But in the ordinary case it is going to be by affidavits. When we decide on that, is it going to be summary?

MR. LEMANN: It wouldn't be covered by lines 37 to 40, would it, because that is restricted to matters coming up under defense (6) only. The more I hear of this discussion, the more dubious I am about the consistency of that sentence that has been interpolated here: "If matters outside the pleadings are presented to the court upon a motion made under

defense (6), such motion may be considered a motion for summary judgment ...." If you leave the sentence in at all, it seems to me you would have to remove the limitation.

JUDGE DOBIE: That is what Sunderland's motion is.

PROFESSOR SUNDERLAND: That is my motion. If we are going to allow it under defense (6), we ought to allow it under all of them.

JUDGE DOBIE: In a proper case.

PROFESSOR SUNDERLAND: But if we do allow it under all of them, we ought to provide that, if they do come up under any of them, the results must be on the merits, or it isn't a summary judgment.

MR. LEMANN: On the merits of the particular motion or the merits of the whole case.

PROFESSOR SUNDERLAND: The whole case.

MR. LEMANN: That is going to confuse the lawyers terribly, Mr. Sunderland, because they think of a disposition of a case on a jurisdictional point as not a disposition on the merits. When you say that is a disposition on the merits, I certainly think you are going to confuse the lawyers.

PROFESSOR SUNDERLAND: The way you have it here, they will make a motion for dismissal for want of jurisdiction.

MR. LEMANN: Yes.

PROFESSOR SUNDERLAND: What kind of judgment do you get there?

MR. LEMANN: Not a judgment on the merits, I would say.

PROFESSOR SUNDERLAND: You get a judgment, dismissal, not on the merits. A summary judgment, differing from that, is a judgment which is rendered on the merits.

MR. LEMANN: Then, if you are correct in your definition of summary judgment, you ought not to use it for these other defenses.

PROFESSOR SUNDERLAND: That is what I think, but I have given up that position because we seem to be drifting in the direction of handling this thing under all of these heads.

MR. LEMANN: They talked you out of it, against your better judgment.

PROFESSOR SUNDERLAND: I think we ought to keep that summary judgment rule by itself and not say anything about it under this rule.

MR. LEMANN: I would agree. Of course, I ought to be estopped, because I wasn't here.

PROFESSOR SUNDERLAND: It seems to me it ought to be general.

MR. DODGE: Summary judgment on the merits has nothing whatever to do with these defenses here, except (6).

PROFESSOR SUNDERLAND: It has just as much to do with it as affidavits under (6) have to do with (6). This proposal of outside matters appearing before the court under (6) is a

pure anomaly. I can't conceive of anybody with a logical mind ever making any such showing under (6), because (6) refers solely to the face of the pleading; and yet we say, if on a matter relating solely to the face of the pleading, affidavits are brought in which disclose the merits of the case, then the thing will be called a summary judgment, and a summary judgment will be rendered, which I think postulates a procedure based upon absurdity.

MR. DODGE: I agree to that, but a motion to dismiss a case for want of jurisdiction over the person has nothing to do with the merits of the case, which may involve an admitted serious controversy over the facts. You have a method of disposing of the case right here, which has nothing whatever to do with the merits.

PROFESSOR SUNDERLAND: What I think we ought to do is just to allow these motions to dismiss, and leave the summary judgment rule to operate as it has been operating.

MR. LEMANN: Mind you, that summary judgment, as far as I understand it, is a new view in most of the states, to most of the lawyers through the country. Don't you think that is a fair statement, Professor Sunderland?

MR. DODGE: Comparatively new.

PROFESSOR SUNDERLAND: Well, yes, I would say so. The great majority of the states don't have it.

MR. LEMANN: Now you have them sort of accustomed to

it, and you have them sort of educated about it. They are not professors or teachers of law, trying to make a thing 100 per cent consistent, maybe, and I think you are going to confuse them.

PROFESSOR SUNDERLAND: By introducing it in here.

MR. LEMANN: Yes.

PROFESSOR SUNDERLAND: That is what I think.

MR. LEMANN: My own notion would be to take it out of this sentence.

PROFESSOR SUNDERLAND: I think it will be extremely confusing to have it at all.

THE ACTING CHAIRMAN: I think it must show that professors of law are now considering it, and not people who have actually to struggle with it, for this discussion is purely academic. I know if you start with the logic of the old demurrer, you couldn't have any speaking demurrer. That is what we were taught in common law days.

MR. LEMANN: What is a speaking demurrer? Would you mind telling me?

THE ACTING CHAIRMAN: A speaking demurrer is a kind of epithet. It is like your hip pocket rule, and so on. It is a term that somebody devised because they didn't like the idea. A speaking demurrer is one that is supposed to contain affirmative allegations. In the old days that would not be in accordance with the theoretically perfect system. Then, if

you were filing a demurrer, you should rest or fall (I suppose that is the origin) and say, "He hasn't got a good complaint." That is all right if you want to make the face of the complaint the most important thing, but that isn't practical nowadays. It seems to me that, if you were in the midst of trials, you would see it is not.

It has been stated here several times now that Mr. Mitchell, for example, was worried about this form of wording, but he said he recognized that courts don't like to decide cases now merely on the paper pleadings. We don't like to for the very natural reason that it isn't justice to do it. Actually, in the long run, no court sticks to doing it that way. What usually happens is some sort of postponement, a reversal, and we go back and do it over.

One in a while, of course, if a court does try to carry out these rules, you may have actually thrown a person out when his lawyer has made some mistake of allegation. It is just what is said in the letter that Judge Learned Hand wrote (and I sent it around), where he said that if the poor oaf knew what he was doing, it would be one thing. But they don't know on technical details. They think they have a claim, and they want to put it up. It is the duty of the court to pass on it. Even though the complaint isn't technically accurate, it should be done.

I wonder, Edson, when you say we should have a motion

to dismiss, what you would do if you were a judge. If you have a plain motion to dismiss, the case has been dismissed below, you think technically it should stand up on the complaint as put up, but the parties tell you they have something that is a good complaint, what would you do?

MR. DODGE: Let them amend the declaration, not file affidavits about it. That is the way they do it in my practice.

THE ACTING CHAIRMAN: That would be easy enough if we were down in the trial court, but we can't let them amend. The way these things come up is that the district judge after a time becomes a little weary. That is only natural. Finally he is likely to say, "Out you go," and then it comes to us. A part of our proper job, I take it, is to ameliorate the harshness of the rules.

MR. LEMANN: Where does this go? Of course, I don't come in contact as much with the appellate judges as I do with the district judges, but the average district judge has no trouble down my way, I think, in permitting amendments. If anything, he may permit too many at times, and I don't think the appellate judges have any special monopoly on hating to see people thrown out of court. I think the district judges are just as anxious, in my experience, to keep people from being thrown out of court. Don't you feel that way, Scott?

SENATOR LOFTIN: They are very liberal down my way.

THE ACTING CHAIRMAN: I don't think that is any

answer to what I am saying at all, if I may say so. Of course, the district judges hear perhaps a hundred cases to our ten, and they have been exercising their patience and granting their amendments, and all that, and those cases are taken care of after a long while, usually three or four whacks at the thing in this process of education, whereas one would do just as well if they could listen to the merits and it wasn't merely a question of polishing up the pleadings.

That is the thing that I think is by-gone, and why should we now try to make rules to make the pleadings something very definite and precise, when our whole tendency is to get away from it? You can't re-educate the bar back now because our pleadings aren't that good.

But then in the few that we get, the district judge has given it up, and it comes to us, and the question is about the same in the district court as it is with us, although the wrong the district judge does may be more permanent if we don't try to do something about it.

I think it is just trying to turn the clock backward if you try to make judges decide on the mere face of the pleadings. I don't think they are going to do it, anyway, and I think you are going to have the kind of hodgepodge that we have been having. They have reached a rule that is fairly sensible for the most part, but they have done it by being illogical, as Edson puts it. But I think it is better to be illogical and

try to get to the merits of the question than it is to be logical and say we still believe in demurrers and negative pregnants, and whatnot.

MR. DODGE: We shouldn't proceed on the theory that all demurrers are merely based on formal defects due to the ignorance of the lawyer, or something of that sort. The important demurrer raises the merits of the existence of the cause of action or the existence of the defense, and that is where the demurrer is useful and, in my judgment, it ought not to be adversely affected by rules here simply because there are a lot of incompetent pleaders who omit formal allegations that ought to be in the statement of a really good claim.

DEAN MORGAN: How about it, though, Mr. Dodge? Aren't you just fighting over terms? Don't you get just exactly the same result under Judge Clark's proposal. If you can make a motion for a summary judgment on the pleadings, that is, you make a motion for summary judgment with or without affidavits, if you have everything in the pleadings, your motion is just as good as your demurrer. It serves exactly the same purpose. If you haven't got everything on the pleadings, it can be supplied by affidavit, and you can get to the merits a good deal quicker. By your method, he says, "This pleading is bad," and you go back and amend it. Then you have to have a demurrer to the amended pleading to show whether or not he does have a cause of action.

MR. DODGE: That happens once in a while.

DEAN MORGAN: Surely it does.

MR. DODGE: Once out of forty demurrers you might get these repeated attempts to amend.

THE ACTING CHAIRMAN: I would just reverse those figures completely. I am quite sure it is the other way. It is out of proportion.

MR. DODGE: It may be in the appellate court, but it isn't in the practice of the law.

DEAN MORGAN: Let's see, Mr. Dodge. You are talking now about your particular practice, where you practice with lawyers who put their cards on the table.

MR. DODGE: All kinds of lawyers.

DEAN MORGAN: Of course, I haven't practiced in Massachusetts.

MR. DODGE: I have practiced with the cheapest kind of lawyers you ever saw, all kinds of them.

DEAN MORGAN: That is a place where I can run in competition with you, without any question!

MR. DODGE: I have had the same kind that you have had.

DEAN MORGAN: All right. In seven or eight years of practice, I never once saw a demurrer interposed which really went to the merits and determined the case on the merits; never once.

MR. DODGE: In forty-seven years of practice, I have seen a great many upon which cases were legitimately disposed of, not as a matter of form but as a matter of substance.

MR. LEMANN: Who suffers most from your objection to this demurrer basis? Is it the plaintiff who has failed to state a cause of action or is it the defendant who wanted to bring in something on a speaking demurrer and somebody wouldn't let him bring it in?

THE ACTING CHAIRMAN: I think for the most part it is the plaintiff. I mean it is the man who is trying to state a case and--

MR. LEMANN (Interposing): Doesn't know how. He has left out something that he should have put in, or he should have negatived something that he failed to negative. He isn't a good enough draftsman. The facts are available.

THE ACTING CHAIRMAN: I think that is really an over-simplified statement, because in a good many of these cases he won't know how until the court has finally disposed of it. For some reason or other the case doesn't look attractive (that is the hardest kind of cases that we have to deal with), and you doubt that he is going to win eventually. Then there is always the inclination to throw him out summarily, and I think generally it is unwise. You don't shorten things that way. So in that case it is awfully hard for him to make a pleading that is going to be held complete.

I have noticed that, and I was telling Mr. Dodge at lunch that we have just reversed a case where they tried three times below to state a case under the Sherman Anti-Trust Law. It is going to be a long, drawn out trial, and it doesn't look very attractive. I don't think they could ever have stated a case that would have gotten by. We in the upper court rather doubt that he will ever prove his case, but we don't see how it could be shut out. So we have proceedings going on for two or three years.

MR. LEMANN: Here is what I was getting at when I asked you that question. If it is the plaintiff who suffers, he can always be protected by leave to amend, you say?

THE ACTING CHAIRMAN: No, he can't always be protected.

MR. LEMANN: You don't think he can ever get it stated? That is pretty tough on the defendant, because if the plaintiff can never get the case stated, the defendant has to go to bat on a case that he doesn't know just what it is about until he gets in the court room. That is sort of tough on the defendant, isn't it?

THE ACTING CHAIRMAN: As a matter of fact, it can be tough either way. I don't believe that getting the thing out on the merits is tough on either party, and I want to say right now that on Mr. Dodge's case of what you might call the Puritan law, I would agree with him entirely that that is a

good case to have decided separately in advance, but I still should like to ask how many of those cases that he has seen in his forty-seven years of practice weren't cases where the parties were willing. You see, if the parties accept, it is a question of law, and under any of these rules we can bring it up very easily. You can call it a demurrer or you can call it anything else. That is the case where it works, but I think that is going to be almost automatic. Whenever the parties are ready to go to bat on a question of law, the court is ready to hear them, and it is all very simple, and of course there are quite a few cases disposed of there. They don't run into large numbers, but there are cases and there are good cases under some of the new statutes.

But that is all taken care of automatically. The case is where one side is resisting.

MR. LEMANN: Let me get back to your hardship case. We will stick for a while to the plaintiff, and then I am going to come to the defendant. This plaintiff has made three attempts to state a cause of action. He hasn't succeeded yet.

THE ACTING CHAIRMAN: We have held he has.

MR. LEMANN: The third time you figure he has?

THE ACTING CHAIRMAN: No. We would have sustained the first complaint, as a matter of fact.

MR. LEMANN: You would have sustained the first one. How is that fellow going to be any better off with this change

in the rule?

THE ACTING CHAIRMAN: Of course, in some cases he may not be. You can't make any rules perfectly automatic. But he is going to be able to say this--

MR. LEMANN (Interposing): What is he going to put in an affidavit that he couldn't have put in an amended petition?

THE ACTING CHAIRMAN: He is really going to plead in detail, if you so wish, or he is going to meet the other side. What happens on the affidavits is that this brings out the issues very much more than the formal pleadings do. The formal pleadings are so broad now that they don't bring out the points.

MR. LEMANN: Are you maintaining that we ought to have more particulars in the petition?

DEAN MORGAN: Heavens no.

THE ACTING CHAIRMAN: I don't think so.

MR. LEMANN: You are arguing against yourself, then, I think.

THE ACTING CHAIRMAN: No, I don't. It seems to me that is what makes it workable.

MR. LEMANN: I should think it very easy for a fellow to state a cause of action now, generally, because he can be so general. I don't see how you can help him by an affidavit, because he can't bring in in an affidavit what he couldn't put in an amended petition, if he wanted to.

THE ACTING CHAIRMAN: You see all these, and then of

course we see them a good deal in court, but we see them all by hindsight. I mean by that that the case is all presented, and you wonder how it comes as it does. That is one of the things I get over and over again. I just wonder how the parties got to where they are. I can't explain it except that I know we are looking back at it, so to speak. Nevertheless, they do come up over and over again, and it is one of the most troublesome things ever.

I think that one of the worst wastes we have now is the attempt to be summary in justice. It isn't so easy to be summary, and you are going to disappoint somebody if you do it. It might be all right to disappoint them if you are sure of your grounds, but the thing of it is that you are usually putting them off on some question of technical pleading that never satisfies them, and they come back some other way, by bill of review or something of that kind. The affidavits give them a chance to say everything they want, and if they haven't done it then, it is their own fault.

MR. LEMANN: I still don't see why he couldn't put it in his petition.

THE ACTING CHAIRMAN: Theoretically, yes. In fact, I think that if a person did say that on such-and-such a day I did this and did that, and so on, we probably nowadays wouldn't strike it out. In the old days they would strike it out as evidential, and so on. We probably wouldn't do it now.

MR. LEMANN: He says the defendant did this, that, and the other thing?

THE ACTING CHAIRMAN: Practically no lawyer is going to do that. Even today they don't do it.

MR. LEMANN: What is he going to put in the affidavit that he can't put in the petition? That is what I want to know. The plaintiff, now, the poor plaintiff that we are trying to protect because he is a poor pleader, and we want to keep it in court. We all agree to that, but I don't see how you are going to help him by saying, "Bring in some affidavits. You don't have to put it in the petition, but give it another name, put in an affidavit, and swear to it." He doesn't have to swear to a petition. He has to swear to an affidavit. "Put it in an affidavit, and you will be better off." I don't see how he is better off.

DEAN MORGAN: You are making a grand argument for the abolition of the demurrer altogether, saying that if they want to get to trial right away, let them put it in their answer, which is what Charlie advocated to begin with.

MR. LEMANN: I don't think that would follow, Eddie.

DEAN MORGAN: I think that is exactly the point.

THE ACTING CHAIRMAN: I think so.

DEAN MORGAN: That is the only way to cut out shadow-boxing. That is what you are saying.

PROFESSOR SUNDERLAND: Doesn't this sentence that we

are talking about, "If matters outside the pleadings are presented to the court upon a motion mader under defense (6)," come to this: Doesn't that in effect say that if on a pure demurrer the parties file affidavits, then the court can consider the affidavits in rendering judgment? That is an absurd case, because people on a pure demurrer don't put in affidavits, and it is this suggestion that it is good practice to put in affidavits on a pure demurrer which I think is misleading.

THE ACTING CHAIRMAN: I don't think that is absurd in anything except the mind of a theoretical person. I think practically you get it over and over again. Of course, again as Monte is suggesting, if these fellows acted perfectly mechanically, it would be all right, but they don't.

DEAN MORGAN: Furthermore, Edson, we aren't going to have any pure demurrers.

PROFESSOR SUNDERLAND: But these are pure demurrers.

MR. LEMANN: Maybe fellows like Senator Loftin and I have been lucky in our practice. Mr. Dodge says he practices with many poor lawyers.

MR. DODGE: All kinds.

MR. LEMANN: But I don't see much shadow-boxing in my part of the country on demurrers based on failure to state a cause of action. Where we used to run into the delays, and still do, was on what we call dilatory motions that don't go to the guts of the controversy at all. The fellow hasn't told

you enough detail. You want to know when this happened and where this happened. Those are the things that make the delay. We don't have much shadow-boxing on whether he stated a cause of action. My own feeling has been that really it expedited the administration of justice, didn't delay it, to find out whether a fellow had a case or didn't have a case.

THE ACTING CHAIRMAN: Then you want a motion for a bill of particulars. You want the old special pleadings.

MR. LEMANN: I say that is what has made the trouble. I have been consistently with you on limiting the bills of particulars, as far as that is concerned. There again I think in your zeal to reform at times you may defeat your own purposes. I don't know. Maybe I have just been lucky to practice with intelligent people who know how to state their cases.

DEAN MORGAN: Maybe you have, Monte.

MR. LEMANN: But I can only go according to my own experience.

DEAN MORGAN: I haven't seen a case book on pleading that has been made up of very modern cases, but you can take any case book on pleading or practice and find nothing but shadow-boxing from almost one end to the other. Isn't that right, Professor Cherry? There are just thousands of cases. There isn't any question about it.

MR. LEMANN: I doubt that you will find many under these rules, Eddie.

PROFESSOR SUNDERLAND: Don't we preserve the pure demurrer? We do, don't we?

PROFESSOR CHERRY: Not in the alternative.

MR. DODGE: Under the rule as it stands here.

PROFESSOR SUNDERLAND: Ground (6) is the pure demurrer.

THE ACTING CHAIRMAN: No, it is the impure demurrer.

PROFESSOR SUNDERLAND: It is the pure demurrer, failure to state a claim.

PROFESSOR CHERRY: You do except that.

PROFESSOR SUNDERLAND: That is the pure demurrer. Now we go on to say that in the case of a pure demurrer, if affidavits are filed, then the court may render a judgment based on the showing of the affidavits.

DEAN MORGAN: That is changing it into a motion for summary judgment. There isn't any question about it.

PROFESSOR SUNDERLAND: It is ridiculous to say, on a pure demurrer, if affidavits are filed the court can do so-and-so, because affidavits aren't filed, unless the lawyer is a perfect dumbbell, and I don't think we ought to prescribe a lot of rules of what to do if all sorts of fool things are done.

PROFESSOR CHERRY: He is not a dumbbell necessarily. He may have read the C.C.A. opinions:

DEAN MORGAN: He is up to date. Edson, you are a back number, just where I was last week.

MR. LEMANN: Has anybody ever taken the cases in the

Federal courts in the last ten years where a fellow has been thrown out of court, just thrown out of court because he hasn't stated a cause of action, and the case has been reversed? I don't believe there is a single case where he has amended and he has finally prevailed on the merits of the case. I would like to see some study made. It would be quite a job to go back as you did for the Wickersham Committee and make a study of the actual records for ten years and see how often it happened about this thing that we are so excited about.

THE ACTING CHAIRMAN: Of course, I don't think that would be any answer, Monte, if I may say so. I think that is one difficulty. The judges are quite sure that they can tell from the face of the complaint and the attitude of the lawyers and one thing and another that there is nothing in the case, and in a great many cases that is likely to be so. In the Sherman Anti-Trust case that we reversed, I can't believe that they are going to get a judgment eventually, but I believe they are entitled to try it out, and I don't believe we can stop them. I think the way that that has to be settled is by a formal judgment finally, after hearing it. I think we are probably not doing our duty if we try to shut them out.

On all this, I wonder how many of you have read these cases that we put in on page 11. It seems to me that the circuit courts have been reaching a pretty good result. They are under some difficulties of analysis, but they have done it.

MR. LEMANN: Under the rules as they now stand?

THE ACTING CHAIRMAN: Yes.

MR. DODGE: They would have reached the same result exactly if the substance of the affidavits had been put as it normally would, outside of these few cases, in the form of an amendment of the complaint.

THE ACTING CHAIRMAN: Of course, you would never have any of these questions if (a) the lawyer was very skillful and (b) he could foresee the reaction of the court. The latter is very important, too. It isn't merely being a good lawyer; it is foreseeing the reaction of the court.

MR. DODGE: He doesn't have to be any more skillful to amend his declaration than he has to be to prepare an affidavit; less so, if anything.

DEAN MORGAN: If he is a good lawyer, he won't foresee.

MR. DODGE: Those cases are exceptional cases. In most cases, if the demurrer points out a defect, he files at once a motion to amend. He doesn't prepare an affidavit and begin to go into the question of sworn testimony.

THE ACTING CHAIRMAN: If I may say so, again that is a complete oversimplification of the question. Monte was trying to get this piecemeal, and of course that is always one way. That is what the demurrer really was for. What you did in the old cases (I used to see it in my state practice) was

to move to strike out a part here, and then a part there. Eventually, you would demur. You always wanted to take the case piecemeal.

This is not as simple a thing as that this fellow should have put in his complaint what he put in an affidavit. It is a question of the court's trying to find out if there is any merit, and where it is, and the defendant's affidavits often are more important than the plaintiff's. I mean, the defendant's affidavits are on whether the plaintiff has a claim or not.

It is a question of whether we must look at the formal allegations, pleading and reply, or whether we can try to go underneath and see, as we do in the course of the argument, what the question is. It changes the whole emphasis on the question really at litigation between the gentlemen before us. The latter is, I think, still informal. If we can go to the real question, we can get it, and even if we do it by questions from the bench, we can do it. It isn't a question of allegation any longer. It seems to me that is the whole difficulty. You place the emphasis still on the formal documentary statements rather than on the real controversy.

MR. LEMANN: Charlie, the courts have reached what you think is the correct result on the rules as they stand, and they haven't needed any amendments to do it. You haven't anything to the contrary to show where it has given any trouble.

THE ACTING CHAIRMAN: Oh, yes, I have.

MR. LEMANN: How many cases? Are they cited here?

THE ACTING CHAIRMAN: No. A few are cited, but, you see, the question usually came up in the district courts. The district courts started out on the theory (this is what a good many of them said) that a speaking motion is not allowable, talking good old common law pleading. That was the ruling in several parts of our circuit. In the Southern District of New York and in the Eastern District they were going to town on that. As soon as it got to us, we announced that you could take affidavits on all these motions, which is the rule we follow. That is the same thing that has been done in most of the circuits. The two where there seem to be questions are the Fifth--

MR. LEMANN (Interposing): That is the defense that is coming in now, is it?

THE ACTING CHAIRMAN: Of course, it can be either.

MR. LEMANN: The speaking demurrer, though, is where the defendant wants to do something.

THE ACTING CHAIRMAN: He is the one that files the pleading, of course. This thing I don't think you can fairly separate between the two. Sometimes it is a question in whose favor the courts, knowing the real issue, will benefit, and it may be the defendant and it may be the plaintiff. You can't be sure in advance which it is.

DEAN MORGAN: They did it by main strength and awkwardness. There is no question that it wasn't justified by the rule. They just did it by main strength and awkwardness. Although the rules don't call for it, they got that result.

MR. DODGE: Is that ever done? Does the defendant undertake to support a demurrer by filing an affidavit of facts?

THE ACTING CHAIRMAN: I didn't know anybody still called it a demurrer. He at least calls it a motion to dismiss, and on a motion to dismiss I think there is considerable basis for the argument which went on. If you recall, there are two different parts of the rule which speak of having a motion supported by an affidavit. One is 41--

PROFESSOR SUNDERLAND (Interposing): What is the affidavit for?

DEAN MORGAN: It isn't for failure to state a claim or ground for relief.

THE ACTING CHAIRMAN: It doesn't state what it is for.

MR. DODGE: You can't possibly have an affidavit in support of an old-fashioned demurrer. I think the Reporter talks as though demurrers were always to form. The demurrer I am interested in saving is the demurrer to substance, which is the vital demurrer.

THE ACTING CHAIRMAN: The demurrer for substance I think takes care of itself. As I said, I am all for the essence of that, but I never saw any difficulty with that.

That is the case where there is a real question of law and the parties are agreed on it, and they raise it.

MR. DODGE: I don't want to call it a motion for summary judgment, which suggests affidavits.

DEAN MORGAN: It suggests affidavits to anybody who doesn't agree to Rule 56.

MR. DODGE: You have to wait for time for affidavits. The demurrer and the old-fashioned demurrer, whatever you call it, can be disposed of quickly.

PROFESSOR CHERRY: Mr. Reporter, I hate to offer any other language because we have a proposed amendment and proposed alternative, but it seems to me that the alternative is trying to make it possible for the party moving to make his motion a motion for a summary judgment instead of a motion to dismiss, and I think it overreaches itself by not allowing him to make it anything else, by not allowing him to make it the old-fashioned demurrer or the motion to dismiss. That language, however, does take care of his need, but the need that this discussion has been considering is the need of the man who wants to oppose the motion.

I should like to suggest the use of the alternative, with these two changes: First, to reinstate what is No. 6 of the proposal to amend and what is in the rule itself, that is, the failure to state a claim. Then, to add at the end of line 16 on page 13, in the alternative, some such sentence as this:

"A motion which does not demand a summary judgment" (you see, the preceding sentence says that he may demand it) "may nevertheless be treated as a motion for summary judgment when it appears at the hearing that the case can be disposed of on the merits thereby, in which event the parties shall submit affidavits and have further hearing as such times as the court shall direct."

That is in effect what has been done in those C.C.A. cases that have been referred to, except that the court has treated it as a motion to dismiss, a speaking demurrer, or whatnot.

Wouldn't some language of that sort really take care of all the situations?

First of all, if the moving party wants to make it a motion for summary judgment, this alternative says he may. However, this proposal would retain his opportunity to make it a straight-out motion to dismiss on the basis of the pleadings he is attacking, and nothing else. But if he does that, and at the hearing the judge sees that this "poor oaf" again hasn't pleaded his case properly but may well have one, he can say that this is to be treated as a motion for summary judgment and fix the time for submitting affidavits and hearing with those affidavits.

Doesn't that take care of all these needs?

MR. DODGE: He can amend his complaint.

PROFESSOR CHERRY: He can still do that, if he wants to. If it turns out that what you ought to have here is a motion for summary judgment, and the plaintiff ought to be allowed to support his attacked pleading by showing that he really has a case but hasn't stated it properly, the judge says, "All right, I am going to treat this that way. Bring in your affidavits on both sides," because on that supposition the only affidavits you have are those the plaintiff has brought in, because the original moving party thought he was moving to dismiss on the pleading alone, the old-fashioned demurrer.

Why doesn't that take care of the whole trouble? I know you won't like that because it retains the possibility of the thing that is now in the rule that represents the old demurrer for failure to state, and so on, but why shouldn't that be retained. All the difficulties that your circuit has had can be met by calling to the trial judge's attention that if he thinks this is a case for disposition on the merits, he can make it a motion for summary judgment.

THE ACTING CHAIRMAN: All I can say is that I don't like it very much, although I would say it is better than having the old demurrer in its pristine glory. If it is a question of going back that far, of course what you are suggesting is better. It is not as simple as the practice we have already reached. What it does is to take two steps to reach what is now done simply in one. If the parties and the court know and

take time to see what they are doing, presumably your two steps, while taking more time, ought to get the same result; but every time you add to the machinery of litigation you make more chance for defects in carrying out the process.

I know how it is going to operate in the Southern District of New York, as it would in any crowded district. It might be all right where the judge will sit down with the parties and take his time, but these come on on a motion calendar with a couple of hundred a day, something like that, not all motions to dismiss, but every kind of motion, and they are pushed through just as rapidly as they can be. It is an awful job. Here comes a motion to dismiss formally on the face of the pleading, and then the judge is going to look over the pleadings very rapidly. True, if every lawyer is on his toes and he gets time enough from the judge to get him interested, you might make it work, but you can only do it by taking up his time, whereas the simplest thing is what they are doing now, you see, where the practice is already known.

PROFESSOR CHERRY: You mean that judge wouldn't let the party amend?

THE ACTING CHAIRMAN: What do you gain by it? I don't see that you gain anything except just a gesture to the past.

PROFESSOR CHERRY: But take your two hundred a day. If he gets that kind of thing, he won't let the man amend?

THE ACTING CHAIRMAN: Oh, no.

PROFESSOR CHERRY: I don't mean that. Then you are going to get another step, anyhow.

THE ACTING CHAIRMAN: It is a question. Of course, if he sees the case and gets it over, that is all right, but when you have two hundred motions facing you, you have to get it over pretty fast.

PROFESSOR CHERRY: All right, suppose you don't get it over. He is going to let him amend.

THE ACTING CHAIRMAN: Here again you have to go through the machinery, and I don't see that the machinery does any good. There is always a chance of slip. If your machinery works perfectly, yes, you have everything, and all you have done is to take more time. If it slips anywhere, if the judge is tired and wants to get home and doesn't see the point, if the lawyer stutters a little and doesn't make it clear, you haven't got it. There it is. For every additional wheel you put in there is another chance for a crack in the cogs. I still don't see anything you gain by it except a gesture that somebody thinks you must still have the old demurrer.

DEAN MORGAN: But you have it, Charlie, as far as that goes. You have it in your motion for summary judgement, without affidavits.

THE ACTING CHAIRMAN: You have it without the two steps.

DEAN MORGAN: I know; and then you particularly provide, don't you, in 56 that he shall not grant the motion for summary judgment without giving an opportunity to amend. So you aren't going to get away from the exercise of the function that is performed by the old demurrer. It is only a question of speeding up the process in the majority of cases, that is all. You can't stop a person from attacking a pleading by a motion for summary judgment on the ground that it doesn't state any ground for relief.

MR. LEMANN: Would you abolish all demurrers?

DEAN MORGAN: Yes.

MR. LEMANN: If you were a judge, you mean to say that a man could sue me and say, "Lemann offered to pay me a thousand dollars," and that is all?

DEAN MORGAN: That is all.

MR. LEMANN: There was no pretense that I got any consideration for it, and then I would go down to court with my witnesses. You would favor that if you were drawing this up?

DEAN MORGAN: I say, do what you do here. Put in your answer. You say for your first defense that it doesn't state ground for relief and, for your second defense, you deny it.

MR. LEMANN: Could I bring up my first defense in advance?

DEAN MORGAN: That would be discretionary with the

judge, yes.

MR. LEMANN: If you were the judge, would you let me bring it up?

DEAN MORGAN: Sometimes. It might depend on who you were.

MR. LEMANN: You would think, then, that the idea of trying out in advance--

DEAN MORGAN (Interposing): Sometimes I wouldn't let them bring up anything in advance.

MR. LEMANN: That is the trouble. You gentlemen are wanting to make a system based upon a poor opinion of a large section of the bar.

DEAN MORGAN: I don't care about that. Flexibility in the rules is what counts. I wish they would abolish all reporting of the rules. We ought to have a law to prevent their reporting decisions on these Federal rules.

MR. LEMANN: All decisions. Then Mr. Justice Roberts wouldn't have to say, "It is like a railroad ticket--good for only one day," because that is what the Supreme Court is heading for now.

DEAN MORGAN: This is on practice that I am talking about.

MR. LEMANN: Why limit it to practice?

JUDGE DOBIE: One of these rules won't work because of the ignorance of the rural lawyers, and the other rules are

going to impose a great burden on the busy metropolitan judges. So where are we?

MR. LEMANN: It seems to me if you went to the logical extent, you would say, "Take each case as it comes, and let the judges decide it and not have any rules."

DEAN MORGAN: That is right.

MR. LEMANN: You realize yourself you wouldn't go that far.

MR. DODGE: I think we have voted several times to retain the demurrer.

DEAN MORGAN: There is no doubt about that.

MR. DODGE: We have voted to retain it.

DEAN MORGAN: You can't abolish the function.

MR. DODGE: Shall we take much more time in considering its abolition?

JUDGE DOBIE: I don't think so.

DEAN MORGAN: That fundamental we fought out from the very beginning. We have to have something that performs the function of the old demurrer. There is no doubt about that.

MR. DODGE: The only question really, then, is Sunderland's suggestion that if matters outside the pleadings are presented to the court, and so forth.

MR. LEMANN: We have two or three suggestions. Mr. Sunderland's is that if it stays in, it ought not to be so limited.

PROFESSOR SUNDERLAND: I would like to take it out.

MR. LEMANN: Then you say we had better take it out. I should be inclined to take it out and be willing for the courts to deal (Mr. Morgan says they are going to deal with it anyhow) with the cases as they come up. They are handling them satisfactorily under the rules as they now stand.

THE ACTING CHAIRMAN: Monte, I might ask you about that, what would you do with these decisions that have gone the other way?

MR. LEMANN: Where are they? One thing I was reproaching myself about as I was talking was that I really ought to look at the cases, which I haven't done.

THE ACTING CHAIRMAN: I wish you would, because it seems to me that these cases--perhaps they are illogical--reach natural results.

MR. LEMANN: Have you cited the cases that you are now speaking of that go the other way?

THE ACTING CHAIRMAN: The cases on page 11. We have pretty thoroughly established the rule in four different decisions (they are not all down there, as a matter of fact) that we are going to look at the affidavits. Do you say to us that we mustn't? I take it that is what you want to do now.

MR. LEMANN: No. I would favor leaving the rule as it stands, changing it only by putting in what you say about indispensable party and by putting in what you say about leave

to amend. Otherwise, I wouldn't change the rule. I wouldn't stop anything being done now.

I would take the view, Charlie, that you have a pretty workable set of rules now that the bar is getting to understand pretty well and likes, that the judges like, and they are getting justice. I wouldn't change them unless you had some glaring trouble with them. Now you want to liberalize them by putting in leave to amend. I would have thought they were now giving leave to amend, but apparently somebody thinks that some of the judges are not liberal enough and put in lines 36 and 37.

THE ACTING CHAIRMAN: Of course, what we are trying to do here is to discuss polishing up a rule that I don't really believe in, anyway. I am satisfied with the alternative rule. It has been voted that that be submitted, and I want to submit it.

As to the major rule, of course those who were for it I suppose should, after all, state it as they want it. This is the way that you voted, because you did vote before for the use of affidavits. There wasn't any question about that. That was discussed at great length, among other things. As I said, Mr. Mitchell, who more or less sympathized with this general position, agreed that the courts are not going to decide questions on pure matters of pleading alone. It is a little foolish to try to put blinders on them.

All I can say is that if you want to do it, I am not on that side of the fence and I can't say you shouldn't. Only, just in passing, I will ask, are you going to say that we should change our rule and the Sixth Circuit's and the Third Circuit's, and so on? I take it now you would say, "No, let's leave it indefinite, as it is now, so Judge Sibley who doesn't like the rule generally can hold the other way," as Judge Sibley is doing, although not too clearly. I am not sure he has seen all the ramifications in this Fifth Circuit case, but it looks pretty much the other way in this Kohler v. Jacobs case.

DEAN MORGAN: A great many trial judges have been doing it.

THE ACTING CHAIRMAN: A great many trial judges in the Southern District of New York. Of course, we have now beaten them somewhat into submission the other way. Are they to go back and do the other thing?

DEAN MORGAN: They had the same constitutional objection I have to using an affidavit on failure to state a claim, just as in Pennsylvania they make you verify a demurrer and swear that the fellow doesn't state facts sufficient to constitute a cause of action.

MR. LEMANN: Was I the only member absent at the last meeting?

THE ACTING CHAIRMAN: Mr. Oglebay says yes, you were

on this point. We had a pretty good, full discussion of it before.

DEAN MORGAN: That was the time before last.

THE ACTING CHAIRMAN: Last time.

DEAN MORGAN: Monte wasn't here last time.

MR. LEMANN: I wasn't here in November. I wondered if I was the only one who wasn't here.

MR. HAMMOND: I think you were.

MR. LEMANN: I think Charlie is right that the people who voted to put this sentence in should decide whether to leave it in. As he says, he isn't for it, anyhow, and he has an alternative that suits him down to the ground.

DEAN MORGAN: I know, but if this other goes to the other, I don't want to seem to be such a damned fool as to want an affidavit on failure to state a claim. I want to change the language there and say: "On a motion asserting defense (6), the party may present matter outside the pleading, and in that event the motion shall be considered a motion for summary judgment and disposed of as provided in Rule 56."

MR. DODGE: I will take your language if it is going to be in at all, but shouldn't it be that if the plaintiff, instead of amending his complaint, chooses to file an affidavit, he puts himself in the position of filing a motion for summary judgment or forces the other fellow to treat it as such?

MR. LEMANN: What do you get a summary judgment on

when you file an affidavit without amendment?

DEAN MORGAN: Pleadings and affidavit.

MR. LEMANN: On the cause of action stated in your petition.

JUDGE DOBIE: He might in his affidavit state things that are not in the complaint but which add to the complaint, which show that he is not entitled to anything at all, and in that case of course the judge could go ahead and dispose of it. I think these affidavits would be much more frequently filed by the man who is interposing a motion to dismiss, or whatever you call it, than by the plaintiff.

MR. DODGE: How can he file that? I don't understand how he could file that in support of a motion to dismiss for failure to state a claim.

JUDGE DOBIE: He states facts in addition to those stated in the complaint.

MR. DODGE: Then he isn't basing his motion on the failure of the complaint to state a cause of action. He says that the complaint plus something else shows that he hasn't any cause of action.

JUDGE DOBIE: Yes.

MR. DODGE: That isn't the old-fashioned demurrer.

JUDGE DOBIE: No, it isn't the old-fashioned demurrer. It is the modern speaking motion to dismiss.

MR. DODGE: That is a straight motion for summary

judgment.

THE ACTING CHAIRMAN: Of course, there is another way out that the courts may take, and that is to call these always a motion for summary judgment, and I think they may take that if they are forced to. It is all right, if they were sure to do it, if we put in our rules, "Whenever a motion to dismiss is supported by an affidavit, it shall be known as a motion for summary judgment and so treated." I don't object particularly, but you see actually this comes up, as I can see, over and over. They make a motion to dismiss. Somebody perhaps told them not to, but that is what they call it.

MR. DODGE: It isn't under section (6), though. It is some other kind of motion.

PROFESSOR SUNDERLAND: I think there is such a thing as overworking the summary judgment. You could, if you wanted to, make all litigation go forward under the form of application for summary judgment. I don't think that would help anybody. It would mix everything up in a common mess.

DEAN MORGAN: That is just what we said here in the alternative.

MR. LEMANN: Charlie, under 56, that is the summary judgment rule, couldn't you really do anything that you properly ought to be able to do? You just suggested adding a sentence here that courts may consider as a motion for summary judgment any motion drawn under this section, and if the motion would

entitle the mover to relief under Section 54, he shall have that relief." Is that about what you said to put in?

THE ACTING CHAIRMAN: You mean under this main rule? I think that is about what the main rule says, yes.

MR. LEMANN: Haven't you got that without saying it? You say, "Well, the district judges don't know it, and we have to tell them," but you tell them, and when you tell them, that tells them.

THE ACTING CHAIRMAN: Of course, in a sense what you say is so. There was this history that we speak of. Quite a good many of the district judges, not all of them, said you can't have a speaking motion. That was the favorite form of expression, and writers like Moore and the California Law Review and the George Washington Law Review have articles on the speaking motion. You will find all that. Then most of the circuit courts have decided the other way.

MR. LEMANN: They treat it as a motion for summary judgment.

THE ACTING CHAIRMAN: They do, and they don't. What they usually say is something like what Judge Hand said in that Boro Hall case, which is the first one here. "It can be treated as equivalent to summary judgment, but it doesn't make any difference, anyway; we will take the affidavits." That is usually the kind of thing they do. They say, "We will do it either way. If necessary, we could call it a summary judgment."

MR. LEMANN: Are we going to try to legitimize what you consider as a bastard child under the rules as they now exist? Do you think it is a bastard child that needs legitimizing? All you are trying to do is to validate the result that is reached. I don't think it needs any validation.

THE ACTING CHAIRMAN: Of course, I am a little troubled, too. Here are two distinguished legal scholars, Dean Morgan and Professor Sunderland, who get terribly upset by the form. I must say that I don't feel that way at all. I know that historically it is illogical. Of course. There isn't any doubt about it. But, as you say, if the bastard child were thoroughly legitimatized, I wouldn't worry, but when two great scholars protest it, and two circuit courts--

DEAN MORGAN (Interposing): You don't need to damn me by that term "scholar," because what I am talking about is just plain English.

MR. LEMANN: You need a scholar to know that.

DEAN MORGAN: Failure to state a cause of action, failure to state a ground for relief. It isn't a question of failure to state; it is failure to have a ground for relief.

THE ACTING CHAIRMAN: I will say that I thought the language that Eddie sent in was good language.

DEAN MORGAN: Thank you, Charlie.

THE ACTING CHAIRMAN: Still, it isn't my rule, but if I had any power I would accept it, for that matter.

PROFESSOR CHERRY: Yours is good language, too.

MR. LEMANN: Would you be willing to say that we go to the people on an amendment which would strike lines 38 and 39, that sentence beginning with "If matters", taking it out and going to the country without it, and that Judge Clark should go to the country on his substitute?

MR. DODGE: That would be better, I think.

MR. LEMANN: As I followed the discussion, that would be your idea, Mr. Sunderland.

PROFESSOR SUNDERLAND: Yes, that would suit me exactly.

MR. DODGE: That would suit me, too.

MR. LEMANN: Then you would strike the corresponding language, I take it, in 50 and 51.

PROFESSOR SUNDERLAND: Yes.

MR. LEMANN: Because that is the same.

PROFESSOR SUNDERLAND: The same thing.

DEAN MORGAN: Of course, that was voted by the majority.

PROFESSOR SUNDERLAND: They have to stand together. Both go in, or both go out.

MR. LEMANN: It is all voted by the majority, Eddie. It would be a reconsideration if you were going to--

MR. DODGE (Interposing): If the defendant files an affidavit, it ceases to be under section (6). If the plaintiff files an affidavit, of course the court will say, "Amend your

declaration accordingly, and demurrer is overruled."

MR. LEMANN: Or they say, "We consider it as equivalent to an amendment of your declaration."

THE ACTING CHAIRMAN: They can't consider the affidavits even if they are in the record.

MR. DODGE: Of course they would say that. If a fellow made a statement of fact, is not entitled to a motion to amend the declaration, and you have a statement in addition to his claim, of course any judge would take that as a motion for amendment.

THE ACTING CHAIRMAN: The only thing is that they didn't.

MR. DODGE: Who didn't?

DEAN MORGAN: Some of the district judges.

THE ACTING CHAIRMAN: The judges in the Southern District. I don't think Judge Sibley is doing it. Judge Garner decided the question in the Eighth Circuit in the Cohen case here, and I stuck my neck out enough to write him about it afterwards. He said he wasn't going to do it, anyhow.

MR. DODGE: The plaintiff filed an affidavit?

THE ACTING CHAIRMAN: I don't remember which is which. In most of these cases they both file affidavits.

MR. LEMANN: Who was this judge who told you he was going to pay no attention to you?

THE ACTING CHAIRMAN: Judge Garner, of the Eighth

Circuit.

MR. LEMANN: That illustrates what I said before. No matter what we do, we can't prevent some judges from doing things that we don't think they should do.

DEAN MORGAN: Heavens! When they have the rule here right this way?

PROFESSOR SUNDERLAND: I wonder how many cases there are of this type. There is only one in the Second Circuit cited, and that isn't in point.

THE ACTING CHAIRMAN: I can't agree with you. I noticed what you say, but I think there are four directly in point. I don't see why that doesn't come right under 12(b). Rule 12(b) as originally stated was a whole, and I don't see how you can pick out parts of 12(b) and say that those parts that we want, we will use affidavits on, and the rest we won't. It seems to me that is one of the most illogical things. Rule 12(b) was certainly a unit. No differentiation is made between them.

PROFESSOR SUNDERLAND: This sentence we are talking about is limited to (6), and that is not a case that is supported by your case from the Second Circuit.

THE ACTING CHAIRMAN: Of course, this (6) is not my idea. This (6) is what we were driven to as amanuenses of the majority of the Committee. We were driven to (6) because the majority in working out their rule, not I, thought it clear

from the first five that affidavits were usable.

SENATOR LOFTIN: Do you remember, Mr. Chairman, whose language the particular clause we are discussing now is in or who it came from?

MR. DODGE: Lines 37 to 40?

THE ACTING CHAIRMAN: Can you tell that?

PROFESSOR MOORE: I think that was Judge Donworth's.

SENATOR LOFTIN: Judge Donworth?

PROFESSOR MOORE: I believe so.

MR. LEMANN: With him not being here, it is a good way to remove it. I move we remove it, delete it and the corresponding language in 49 to 51.

PROFESSOR SUNDERLAND: I support it.

THE ACTING CHAIRMAN: Well, you have heard the motion. Any further discussion? If not, all those in favor will say "aye"; those opposed, "no."

MR. LEMANN: Better hold up the hands.

THE ACTING CHAIRMAN: Yes, I think so. All those in favor hold up their hands. Five. All those opposed will hold up their hands. Two.

PROFESSOR CHERRY: I did not vote. I don't like it either way.

DEAN MORGAN: I don't like this stuff myself.

THE ACTING CHAIRMAN: One not voting.

SENATOR LOFTIN: Do I understand your objection is

that it doesn't go far enough?

MR. DODGE: I move that section (b) with that change be affirmed.

THE ACTING CHAIRMAN: You mean section (c)?

MR. DODGE: Section (b). There are one or two other changes. There was one other change on failure to join an indispensable party added, and the power to amend, cautionary power.

MR. LEMANN: It is a prohibition against refusing amendment, isn't it?

DEAN MORGAN: That is right, a regular code provision.

MR. LEMANN: I am surprised that you have to put it in, but you say you do.

DEAN MORGAN: If you don't, it is discretionary with the trial judge.

MR. LEMANN: I mean I should think every trial judge would permit it. Down my way they would.

DEAN MORGAN: All of them won't.

MR. LEMANN: I second Mr. Dodge's motion that we approve (b) as amended today.

THE ACTING CHAIRMAN: All right, are you ready for the question? All those in favor will say "aye"; opposed, "no." The "ayes" have it.

MR. DODGE: I make the same motion as to (c).

THE ACTING CHAIRMAN: It is moved that (c) be approved

with deletions comparable to those voted in (b).

PROFESSOR SUNDERLAND: Supported.

THE ACTING CHAIRMAN: Any discussion? If not, all those in favor will say "aye"; those opposed, "no."

DEAN MORGAN: No.

THE ACTING CHAIRMAN: Carried.

MR. DODGE: The same motion might as well be made on (e), (f), (g) and (h).

THE ACTING CHAIRMAN: There isn't a change in (f), is there? Just (e), (g), and (h)?

MR. DODGE: Yes.

DEAN MORGAN: Bob, you don't mean that . On (h) you don't want to approve that the objection of failure to state a legal defense may be made by motion or at the trial on the merits. You don't want failure to state a claim to be a legal defense to be made at the trial.

MR. LEMANN: That is in the present rule. Isn't that in the present rule?

DEAN MORGAN: I grant you that it is, but it is damned foolish.

MR. LEMANN: There has been no suggestion to change it, has there?

DEAN MORGAN: What do you say about it? It is a matter of sense. Failure to state a legal claim or defense at the trial.

MR. DODGE: I don't see any sense in that.

DEAN MORGAN: There isn't any sense to that at all.

MR. LEMANN: Is that a motion for arrested judgment?

DEAN MORGAN: You can't move for arrested judgment. Certainly that is all it is. It is a common law motion for arrested judgment. Do you think there is any sense in that?

MR. LEMANN: Of course, I am colored by my own defective experience, but with us we can raise the point that the fellow has no cause of action on appeal.

DEAN MORGAN: Has, but this is states. Of course you can raise the fact that he has no cause of action at any time, but not that he hasn't stated it. That seems to me perfectly absurd.

MR. LEMANN: It got by us before. Mr. Morgan gets upset, but it got by his eagle eye. I don't see how an infamous thing like this got by.

DEAN MORGAN: Surely it did, but, by George, that doesn't mean, because I have been blind on one occasion, that I have to keep my eyes shut.

MR. LEMANN: I am disappointed in you, though.

THE ACTING CHAIRMAN: I think maybe we had better take these up one by one, because it seems that we have some suggestions on them. We voted (c). Suppose we now take up (d). I think (d) should probably have the changes voted because, you see, we added the indispensable party. In the light of

what we have done, that would be a small change, but one that would be needed, I should think.

MR. LEMANN: Which is that?

THE ACTING CHAIRMAN: Section (d). That is substituting (7) for (6).

DEAN MORGAN: You agreed on that. He moved that.

MR. DODGE: Yes.

THE ACTING CHAIRMAN: Then (d) is accepted?

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: I am taking these up separately because we have some suggestions. Now let's consider (e). Mr. Hammond?

MR. HAMMOND: Mr. Tolman made a suggestion on this, and I thought I ought to call the Committee's attention to it. There is an insertion in lines 65 and 66, and here is what Mr. Tolman says: "I think the underscored words in these lines are not only unnecessary but are also too peremptory. I should like to see them deleted."

DEAN MORGAN: That is in which one? (d)?

MR. HAMMOND: In (e).

JUDGE DOBIE: "and the motion shall not be granted unless the conditions herein specified are shown to exist."

PROFESSOR SUNDERLAND: That is something you might add to every provision throughout our rules.

MR. LEMANN: It seems to imply that the judge will

grant the motion without their being shown to exist. If I were a district judge, I would not enjoy that imputation.

THE ACTING CHAIRMAN: Of course that is what they have been doing. I think this was Mr. Mitchell's suggestion.

MR. LEMANN: An admonition.

THE ACTING CHAIRMAN: That there should be an admonition, too.

PROFESSOR SUNDERLAND: On the ground that they are more likely to fail to follow this rule than they are most of our rules where we don't put in any such thing?

THE ACTING CHAIRMAN: No. It was a question of trying to make it clear.

MR. LEMANN: It is clear. This sounds like rapping them on the knuckles.

DEAN MORGAN: "We mean what we say."

MR. LEMANN: "We don't mean what we say ordinarily, but here we do."

JUDGE DOBIE: If one ground for a motion is stated and nothing else is said, if that ground doesn't exist you certainly can't grant it under this rule. I think there is something in what somebody said, that if you put it in here and don't put it in other places, it will imply, "Well, boys, we mean it here, but maybe we don't in other instances."

THE ACTING CHAIRMAN: What do you want to do?

PROFESSOR SUNDERLAND: I move it be deleted.

JUDGE DOBIE: I second the motion.

THE ACTING CHAIRMAN: All those in favor will say "aye"; those opposed, "no."

DEAN MORGAN: No.

THE ACTING CHAIRMAN: I think it is passed five to two, as usual.

SENATOR LOFTIN: Who was the second one?

THE ACTING CHAIRMAN: I was.

MR. LEMANN: What this Committee needs is a little new blood and reconstitution.

THE ACTING CHAIRMAN: Of course, you had better not press that too far. It might well be considered.

Let's see, what is the next suggestion?

MR. HAMMOND: Mr. Chairman, I happen to note another suggestion of Mr. Tolman's, back in (e). That is the "Motion for Judgment on the Pleadings," on page 8. It seems to be a matter of form. The sentence in lines 48 and 49, the underscored lines, stayed in, didn't it?

PROFESSOR SUNDERLAND: Yes.

MR. HAMMOND: He suggests that that should read: "If the court finds that a party is entitled to judgment on the pleadings, reasonable opportunity shall be given for amendment, before entry of judgment."

MR. DODGE: That is just another way of stating the same thing.

MR. HAMMOND: It seems so to me.

MR. LEMANN: A little bit more exact, perhaps, but then you would have to change the corresponding language in 36.

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: Has anybody any suggestions or any motion?

SENATOR LOFTIN: Section (c) has already been approved.

MR. HAMMOND: It was my failure to bring up Mr. Tolman's suggestion.

JUDGE DOBIE: Do you think there is any danger if we we don't adopt the Major's suggestion? No court is going to grant summary judgment if a party asks leave to amend and shows to the court that he can cure the defect by amendment, is he?

MR. HAMMOND: I didn't understand you.

JUDGE DOBIE: I say, no court is going to grant summary judgment if one of the parties applies for leave to amend and it is proper that he should be so permitted.

MR. DODGE: We have already provided that the court must give him the opportunity, and this is just a change of language.

PROFESSOR SUNDERLAND: Different wording.

MR. DODGE: After the underlined words in 60 to 62

of course we want to strike out the words "or to prepare for trial." So many of the courts have read it out of the rule, anyway. But is your change of language necessary? Does it correct sufficiently or improve those words which have passed the test now for so long?

DEAN MORGAN: We have fought over this a long time.

THE ACTING CHAIRMAN: Yes, we have. Of course, I think the motion for more definite statement ought to go with the bill of particulars, too. I think they ought to be consigned to the limbo of forgotten things.

DEAN MORGAN: I voted for that last time, but it didn't get by.

MR. LEMANN: This is one thing that has given rise, as you say in your note, to more variation in the decisions than almost any other point in the rule, isn't it?

DEAN MORGAN: That is right, and that is why we kept 65.

MR. DODGE: A good many of the courts read those out of the rules. I came across that in my practice a few months ago.

JUDGE DOBIE: What gave trouble was trying to make fanciful distinctions between bills of particular and motions for more definite statement, a lot of courts holding that a bill of particulars was only to prepare you for trial, whereas a motion for more definite and certain statement was so that

you could plead. They didn't know when to grant which and why, so you just practically cleaned out the bill of particulars. Isn't that correct?

THE ACTING CHAIRMAN: Yes. Of course, the history of this is that some of us thought this whole rule was unessential and misleading. We were told, however, to make definite provisions limiting the use of the provision which was made originally in some statements found in Moore's book, which in turn came from some cases, and it was suggested that those be put in. Those have been put in, and then they were voted for.

Here we are steadily losing ground, one by one. Half of it has been voted out already. The second half is now on the spot. All I can say is that I do feel the Committee is on a little retreat toward special pleading, and I think it is a little too bad when you remember Judge Chesnut's general views of the effect of the rules, and so on. I hate to see it going this way.

MR. LEMANN: Going which way?

THE ACTING CHAIRMAN: Going toward special pleading. That is what I think the amendments are tending toward.

MR. LEMANN: What amendments go that way?

THE ACTING CHAIRMAN: I think what you are doing in (b) and (c) is a direct step that way. That has been my main point, but we don't need to go over that again. Now aren't you going to leave us a little, even in vague and ambiguous

them from granting the motions so freely as they did.

MR. DODGE: Do you think this would do it?

DEAN MORGAN: I think it would help, and that is one reason I think you made a mistake in striking out that matter in 65 and 66.

MR. DODGE: All right. Let it go, then.

THE ACTING CHAIRMAN: You don't want to put both back in, then?

MR. DODGE: What is the idea of striking out "A bill of particulars becomes a part of the pleading"?

DEAN MORGAN: We don't have any bill of particulars now.

PROFESSOR CHERRY: We don't have any at all.

MR. DODGE: That is the reason, is it? That is satisfactory to me. Then I move that (e), with the words struck out which we have just stricken out in lines 65 and 66, be approved.

PROFESSOR SUNDERLAND: What is your motion, Mr. Dodge?

MR. DODGE: That (e) as it is written here be approved, subject to the amendment made by striking out in lines 65 and 66 certain words.

PROFESSOR SUNDERLAND: Yes.

THE ACTING CHAIRMAN: Any discussion? All those in favor say "aye"; opposed, "no."

DEAN MORGAN: Note that I didn't dissent on this one, Charlie.

THE ACTING CHAIRMAN: The "ayes" have it, and it is so ordered.

MR. LEMANN: Section (f) stands as is; no changes by anybody.

THE ACTING CHAIRMAN: Next we come to (g). That was Mr. Monte Lemann's proposal. He was willing to cut it down to more or less one motion.

MR. LEMANN: That is right.

THE ACTING CHAIRMAN: This has been approved. Does anybody want to re-do it?

PROFESSOR SUNDERLAND: I should like to raise a point, which is a small point. It reads this way: "A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him." That is all right. "If a party makes a motion under this rule and does not include therein" (in that one motion) "all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion", and so on.

That means if he makes a motion, say, to strike scandalous matter or if he makes a motion to strike or for a more definite statement, and doesn't include in that motion these various grounds for dismissal, he waives them.

DEAN MORGAN: That is right.

PROFESSOR SUNDERLAND: They don't belong in that motion.

DEAN MORGAN: Of course he ought to join them.

MR. LEMANN: He puts them in the answer, Mr. Sunderland. He doesn't waive them.

PROFESSOR SUNDERLAND: I suggest that line 88 read: "If a party makes a motion under this rule and does not include therein or in some other motion made at the same time all of the defenses and objections then available ...."

MR. LEMANN: What advantage would there be in two sheets of paper?

PROFESSOR SUNDERLAND: You can't make a motion to dismiss as a part of a motion to strike out scandalous matter. They are different motions.

DEAN MORGAN: You can move (a) to do this, and (b) to do that, and (c) to do this and that.

MR. LEMANN: If I were doing it under this rule, I would first move to dismiss the action because of failure to state a cause of action, and then I would go on, without in any manner waiving the foregoing, to make all my others. I don't see how it would help to have two sheets of paper.

PROFESSOR SUNDERLAND: You have three motions; you want to dismiss, you want to strike out scandalous matter, and you want a more definite statement. Do you have three motions

or one motion with three parts?

MR. LEMANN: You would have to have only one motion, and put them in the answer.

PROFESSOR SUNDERLAND: If that is one motion, this is all right, but I think they are three motions. There is one paper, but wouldn't there be three different motions? You move (1) to dismiss, (2) to--

MR. LEMANN (Interposing): I would say that, technically, under the terminology of these rules, it is one motion, and that one motion has in it--

DEAN MORGAN: Various grounds.

MR. LEMANN: --various grounds, various purposes and ends desired. Under the terminology of this rule it would be one motion. The main difference made by this rule, as I understand it, is that before you had three bites. You could have one motion to dismiss for lack of jurisdiction.

JUDGE DOBIE: You could move to strike out scandalous matter, and stop there.

MR. LEMANN: Then you could bring in another motion, and then you had your answer. This was a concession to the speed of justice by saying you could have only one motion, but you can put other things in your answer.

PROFESSOR SUNDERLAND: If that strikes the rest of you as being all right, it is all right with me. It seems to me that we have three different types of motion.

JUDGE DOBIE: Say something like "at the same time" instead of "include therein".

MR. LEMANN: Even if you were perfectly clean and not within the jurisdiction, you would have to add your objection to scandalous matter, you would have to add your objection to failure to state a cause of action. All your objections would have to go in there, unless you wanted to save them for your answer.

PROFESSOR SUNDERLAND: What kind of motion would you call it?

PROFESSOR MOORE: I suppose, Edson, that is technically right about its meaning include therein or join therewith other motions stating all defenses and objections, because the first sentence talks about joining with it "the other motions herein provided for".

JUDGE DOBIE: It is really a question of time. You can't do anything different, whether there are one, two, three, or four papers. Isn't that right, Eddie?

DEAN MORGAN: That is right. It is just a question of English.

JUDGE DOBIE: If you want to improve the English and make it perfectly clear at the same time. I suppose some lawyers would prefer having two papers.

MR. LEMANN: I hadn't looked at the first sentence.

DEAN MORGAN: That is usually required, Monte.

MR. LEMANN: We removed 6(c) when we were arguing on Hill v. Hawes.

THE ACTING CHAIRMAN: What does who want to do, and which and why? How does it stand?

MR. LEMANN: You want to change the language, Professor Sunderland.

PROFESSOR SUNDERLAND: I want to insert something. I think you had something drawn, didn't you, Eddie?

DEAN MORGAN: No. I just said "include therein or join therewith other motions stating".

JUDGE DOBIE: I think that is better, because that fits with the first. The first one treats them as two motions. It says, "A party who makes a motion under this rule may join with it the other motions".

PROFESSOR SUNDERLAND: That is all right.

JUDGE DOBIE: Now we say, if he makes a motion, he must "include therein," which would seem to indicate there is one motion.

PROFESSOR SUNDERLAND: That is all right.

MR. LEMANN: I would say leave it alone because it is purely a stylistic change. It hasn't hurt anybody. If we start making stylistic changes, I think we could make a great many.

PROFESSOR SUNDERLAND: One sentence treats them as different motions, and the next treats them as the same motion.

PROFESSOR CHERRY: If he wants to say this is a motion or several motions, what difference does it make?

THE ACTING CHAIRMAN: Major Tolman, I see, has a suggestion, too. He says that the words "and then available to him" don't need to be repeated. He wants to leave them out the first time, and not the second.

MR. DODGE: They are always available. All these exist at the beginning, or not at all.

THE ACTING CHAIRMAN: Not all of them. Some of them may come in only on amendment, you know. That is, suppose he moves for a bill of particulars and then gets it. Then the complaint is amended. Then he may have further--I shouldn't say "bill of particulars," a motion for more definite and precise statement, which is about the same thing. But, you see, it could come up on amended pleading.

PROFESSOR SUNDERLAND: Just to get a vote, may I make a motion and see if anybody will second my motion on that? It is that 88 and 89 read:

"If a party makes a motion under this rule and does not include therein or in some other motion made at the same time all defenses ...."

JUDGE DOBIE: I will second that. I think that makes it a little clearer.

THE ACTING CHAIRMAN: All right. Any further discussion?

PROFESSOR CHERRY: I don't think that does it, because the trouble is that the first sentence is amended now. Your first sentence treats it as separate motions. Now your second is going to make it alternative with him whether he makes it one or more. You have the same difficulty still.

JUDGE DOBIE: The second sentence starts out by treating it as one, and the first sentence treats it as two.

PROFESSOR CHERRY: That is right, and no harm has come of it. I don't see why any amendment is called for, but if you are going to make an amendment, you had better amend the first sentence, too, because you would still have a difference between your first and second sentences.

PROFESSOR SUNDERLAND: Where? I don't see it.

PROFESSOR CHERRY: Because the first sentence says they are separate motions. Now your second one says they may be one or they may be separate. They are still different.

PROFESSOR SUNDERLAND: The first one says that you may join two motions.

PROFESSOR CHERRY: That you may join with it the other motions. That treats them as separate.

PROFESSOR SUNDERLAND: There are three motions, aren't there?

PROFESSOR CHERRY: Yes.

PROFESSOR SUNDERLAND: To dismiss, to strike, and to make more definite and certain. If you use one, you may join

another one with it.

PROFESSOR CHERRY: All right, why not say that? That is not what your present suggestion is. If you want to say that, you could say, "If a party makes a motion under this rule and does not join with it all defenses ...."

JUDGE DOBIE: This says "include therein".

PROFESSOR SUNDERLAND: That won't apply to a case where he makes a motion to dismiss on one ground and doesn't include the ground for the other motion in the same case.

THE ACTING CHAIRMAN: Do you want to discuss the matter some more? It has been moved and seconded as you have heard. Are you ready for a vote on Mr. Sunderland's addition to line 89 of "or in some other motion made at the same time" after the word "therein"?

PROFESSOR SUNDERLAND: "or in another motion made at the same time".

MR. DODGE: What is the idea of having two sheets of paper?

MR. LEMANN: We have a paper shortage, too.

THE ACTING CHAIRMAN: Shall we vote?

PROFESSOR SUNDERLAND: Put it quickly:

THE ACTING CHAIRMAN: All those in favor of the motion will say "aye"; those opposed, "no." In the opinion of the Chair the "noes" have it. The "noes" have it. The motion is lost.

I guess that takes care of the Major's suggestion because the Major's suggestion was to strike out something already in.

Shall we pass on to (h)? As far as I can see, I think Eddie is right; I don't believe that the defense of failure to state a claim is good, even if the rule says it is. I mean, practically, I don't believe it is, and it shouldn't be.

MR. LEMANN: Have we anywhere that the fellow who has no claim can be brought up at any time? That is what I thought.

DEAN MORGAN: Proved.

THE ACTING CHAIRMAN: That is what this was intended to do.

MR. LEMANN: That is what I thought it was.

THE ACTING CHAIRMAN: But of course the word "state" there is a troublemaker. I don't think we ever thought it as important as it has become later.

MR. LEMANN: It hasn't made any trouble, has it?

THE ACTING CHAIRMAN: The place it has made trouble is in (b).

MR. LEMANN: But not here.

THE ACTING CHAIRMAN: I don't know that I know, but if it means all it means in (b)--of course, I never thought it did; I thought we were making it carry the whole weight of historical meaning in (b)--then it must carry that same weight

of historical meaning in (h), and then it is clearly wrong in (h).

MR. DODGE: If we strike it out, no court will decline to direct a verdict if no claim is established merely because there was no motion to dismiss.

DEAN MORGAN: Certainly not.

MR. LEMANN: Why not substitute the word "prove" for "state"?

THE ACTING CHAIRMAN: That is the idea.

DEAN MORGAN: Hold on. Wait a minute, you can't do that on a motion for judgment on the pleadings. ".... may be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings". Then you could strike out "or at the trial on the merits," and let it go at that. "and except (2) that, whenever it appears by suggestion of the parties ...."

PROFESSOR CHERRY: Striking it out might suggest to somebody that we are trying to say that something could have been considered under the rule as written and that that can no longer be done.

JUDGE DOBIE: Is there any verb, "establish" or something like that, that will get rid of that mess we are getting in about "state"?

MR. DODGE: The point there is that if you don't file a motion for failure to state a cause of action, you can

put that in your answer.

DEAN MORGAN: I don't think you ought to be able to make it for a motion for judgment on the pleadings, anyhow.

MR. DODGE: You ought to be allowed to put it in your answer.

DEAN MORGAN: Yes, that is it.

MR. DODGE: That is all that this says, "that the defense of failure to state a claim upon which relief can be granted .... may .... be made by a later pleading".

DEAN MORGAN: Yes.

MR. LEMANN: "if one is permitted". You have to keep that.

DEAN MORGAN: That is right.

MR. LEMANN: You wouldn't want to let it come in after that, but I think you ought perhaps to have somewhere that failure to prove a cause of action can always be brought up.

DEAN MORGAN: You can say, "or that a cause of action is not proved or that it has no claim upon which relief can be granted".

MR. LEMANN: "may always be brought to the attention of the court"? Or do you mean to put it in under (2): "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter or that an indispensable party is not joined or that no claim exists upon which relief may be granted"?

DEAN MORGAN: Yes.

MR. LEMANN: Entitling the party to relief.

DEAN MORGAN: That is the place to do it.

MR. LEMANN: Would that do it?

DEAN MORGAN: Yes.

MR. LEMANN: How about that, Mr. Reporter? The suggestion is that we omit in lines 100 and 101 the words "or at the trial on the merits", and that we insert in line 103: "or that no grounds exist entitling--"

DEAN MORGAN: "upon which relief".

MR. LEMANN: "--upon which relief may be granted.

THE ACTING CHAIRMAN: I guess it does what you want it to do. Of course, in the alternative (h) you will see we did the other thing. We made it a question of "prove" there, and there is no motion for judgment, anyhow. But that is another story.

DEAN MORGAN: You see, this has to work into the phrasing that we have here, Charlie.

THE ACTING CHAIRMAN: Yes, that is true.

DEAN MORGAN: We wanted to abolish judgment on the pleadings; we wanted to abolish a lot of things.

THE ACTING CHAIRMAN: I guess that is so.

MR. DODGE: But you want leave, if possible, to put in an answer instead of a motion to the effect that there is no claim.

DEAN MORGAN: I think that is quite right.

THE ACTING CHAIRMAN: All right. Then Mr. Lemann, I take it, moves, in subdivision (h), line 100, to strike out "or at the trial on the merits".

DEAN MORGAN: "or by motion for judgment on the pleadings or at the trial on the merits".

THE ACTING CHAIRMAN: Is that included?

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: Fine. To strike out "or by motion for judgment on the pleadings or at the trial on the merits" in lines 100 and 101, and to insert in line 103 after the word "joined"--now will you give what you had, Monte?

DEAN MORGAN: "or that no ground exists upon which relief can be granted".

THE ACTING CHAIRMAN: "or that no grounds exist upon which relief can be granted".

PROFESSOR MOORE: You have to take care of the defense, too.

THE ACTING CHAIRMAN: Yes.

MR. LEMANN: I am just wondering about striking out those words about motion for judgment on the pleadings, because the remark makes me a little suspicious, and Mr. Dodge yields such ready acquiescence. That got by me. I am just wondering.

THE ACTING CHAIRMAN: I withdraw my joy.

MR. LEMANN: Suppose a man brings in an answer in

which he sets up a defense that is no good; he doesn't state any defense in his answer. How are you going to get that, then? We have been using that for years now in Louisiana. Where a man comes in with an answer (which he has to make under oath with us), but on the face of it the defense that he states is no good in law, we have found it very useful to go in with what we call a motion for judgment on the pleadings.

DEAN MORGAN: You could demur to the answer, couldn't you?

MR. LEMANN: Demur to the answer?

DEAN MORGAN: Surely. Why not?

MR. LEMANN: We have never had a demurrer to pleadings or pleadings after the answer, but we do provide for judgment on the pleadings. Judgment on the pleadings is what we had here, and I thought that was a useful thing to have.

JUDGE DOBIE: They used to demur to a defense, didn't they? If I should bring suit against you in tort, and you pleaded infancy (which is no basis of relief from tort, of course), I could demur to that in common law.

MR. LEMANN: In common law you could, but not in our practice, but we have it, you see, by moving for judgment on the pleadings. We we want to eliminate that?

MR. DODGE: No. We had that before.

MR. LEMANN: Where do we have it now?

PROFESSOR SUNDERLAND: There is a section on that.

MR. LEMANN: Section (f)?

DEAN MORGAN: Yes.

MR. DODGE: Not section (f); section (c).

MR. LEMANN: That is right. We don't need it there. Why laugh? Why exult, Dean? You have these people giving you nothing, just a stone, and you thought it was bread!

PROFESSOR SUNDERLAND: You can renew your exultation now.

DEAN MORGAN: "by motion as hereinbefore provided". You have it here.

MR. LEMANN: That is right.

DEAN MORGAN: If he doesn't make a "motion as hereinbefore provided", he has to put it in his answer.

THE ACTING CHAIRMAN: It still stays that that comes out, I take it.

MR. LEMANN: Yes.

THE ACTING CHAIRMAN: Now going down to 103, I think Mr. Moore has a point.

DEAN MORGAN: Yes, he has.

THE ACTING CHAIRMAN: You have said, "or no ground or claim or defense exists".

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: Will that cover it?

DEAN MORGAN: That is right; "or no ground or claim or defense".

PROFESSOR MOORE: I think you ought to split it up and have: "except (2) that the defense of failure to prove a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the defense of failure to prove a legal defense to a claim may also be made at the trial on the merits, and except (3) ..." Then let (3) relate solely to jurisdiction with the usual terms there: "whenever it appears by suggestion of the parties ...."

MR. LEMANN: I think Mr. Moore's suggestion is better than the suggestion we had previously.

MR. DODGE: Not striking out from the answer, necessarily, the allegation that there is no claim stated.

PROFESSOR MOORE: No. No. 1 states that.

MR. LEMANN: He is just changing the present (2) in lines 101 to (3) and putting in a new (2).

MR. DODGE: So that it reads how?

PROFESSOR MOORE: I am taking the language out of our alternative (h) at the bottom of page 14 and the top of page 15, which reads:

"(2) that the defense of failure to prove a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to prove a legal defense to a claim may also be made at the trial on the merits, and (3) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction

of the subject matter, the court shall dismiss the action."

MR. LEMANN: If in your (h) in the redraft on page 14, we took out the reference to summary judgment--

PROFESSOR MOORE (Interposing): I am not proposing our (h).

MR. LEMANN: I am wondering whether it might not be better to lift it into (h). I am just wondering if you took out your (l) on page 14--

THE ACTING CHAIRMAN (Interposing): It would be just the same.

MR. LEMANN: It would be just the same.

THE ACTING CHAIRMAN: Either take the one as you moved it or substitute the one in the alternative (h). I think it comes to the same thing. Doesn't it?

MR. LEMANN: You have indispensable party. How did we settle with Mr. Moore about indispensable party before?

THE ACTING CHAIRMAN: I am a little sorry to see them come back in, but technically it is correct. I think we probably thought they weren't important enough, and we may even have thought it came in under the defense of failure to state a claim.

MR. LEMANN: I wouldn't think that in the ordinary use of language, would you? I think we should have said something about it. I wonder how it got by everybody.

THE ACTING CHAIRMAN: I wouldn't know. I am a little

sorry to see indispensable parties coming back into the law.

MR. LEMANN: You can't get along without them!

DEAN MORGAN: Not if they are indispensable.

"If no ground of defense exists, you will have to give judgment accordingly," or something of that sort is the way to have it end.

THE ACTING CHAIRMAN: Moore suggested a quite longer one, that in place of the (2) of the present (h) you take (2) and (3) from the alternative (h) on 14 and 15.

MR. LEMANN: I think that will do it, don't you? If it is in the alternative, it must be O.K.

DEAN MORGAN: Probably something is to be said for that, Monte.

THE ACTING CHAIRMAN: Of course, the only thing is, Monte suggested it. Well, Moore suggested it originally.

MR. LEMANN: That takes the poison out of it.

MR. DODGE: He leaves out of that reference to the failure to state a legal defense. This is "prove," isn't it, and not "state"?

PROFESSOR MOORE: Your (1) stays in.

MR. LEMANN: We want to get away from "state," don't we? It gets away from that trouble that we have with "state" in the rule as it now appears.

MR. DODGE: That is all right.

THE ACTING CHAIRMAN: The motion, as I now understand

it, would take the existing (h) down to the word "permitted" in line 100, and thereafter would take the alternative rule beginning at (2) and going on through it.

DEAN MORGAN: What line?

THE ACTING CHAIRMAN: Take the alternative rule beginning at line 57 on page 14, to the end.

Is that now agreeable? Are you ready to vote? All those in favor will say "aye"; those opposed, "no." The "ayes" have it, and it is so voted.

That covers everything except the alternative rule, and I don't know that you want to sit down and go over that, do you? Eddie, I will say that I think your suggestions are fine.

JUDGE DOBIE: Doesn't what we have done practically take care of the alternative rule?

THE ACTING CHAIRMAN: Take care of it? You mean it makes it more important than ever.

PROFESSOR SUNDERLAND: My theory is: the worse the alternative rule is, the better.

THE ACTING CHAIRMAN: The alternative rule is now the only hope of the white man and free people. (Laughter) But does anybody want to discuss it or say anything more?

DEAN MORGAN: I said enough last time, Charlie.

THE ACTING CHAIRMAN: Then we will consider that we have now finished Rule 12 and the two drafts.

MR. DODGE: They will be put up as a Committee rule and a rule favored by some members.

MR. LEMANN: The majority of the Committee.

THE ACTING CHAIRMAN: I suppose so.

MR. LEMANN: I am a little troubled that we have such a small group here and that we vote five to six votes, but I just wondered if there was any feasible way to get the reaction of the absentees on some of these changes. Mr. Dodge says, not without hearing the discussion. I think he is right, because it is very difficult to get an intelligent reaction without hearing the debate.

DEAN MORGAN: It certainly is. There is no question about it.

MR. LEMANN: I guess we just can't help it.

THE ACTING CHAIRMAN: I don't know on that. I thought they heard a very intelligent discussion before, and they reached a result which has now been overturned.

MR. LEMANN: They have forgotten it.

THE ACTING CHAIRMAN: I guess that always happens.

JUDGE DOBIE: If we had a hundred meetings, every time we came back there would be a great many suggestions of changes, and a number of them would be made. There is no doubt about that.

MR. DODGE: I don't think we have made any real changes in the substance of what we voted before.

MR. LEMANN: Have you made any changes in your opinions?

JUDGE DOBIE: Sometimes we do, and sometimes we don't. Every judge sees every opinion, whether he signs it or not. He makes suggestions, and then the judge who wrote the opinion gives his reactions to it. If there is any really serious objection, we have another conference and vote on it.

MR. LEMANN: You change your own vote, though, don't you?

THE ACTING CHAIRMAN: The only thing this reminds me of is a story of three fellows who escaped from an insane asylum. The three were in a well together, with one on top and the others hanging from him below. He said, "Hang on, boys, while I spit on my hands." I think that is really what Mr. Dodge is doing. We are spitting on our hands.

Let me say this, which I was going to bring up before. I have a letter from Judge Donworth, which has been handed to me.

"Honorable William D. Mitchell

"Dear Chairman Mitchell:

"In spite of my best endeavors to arrange for attendance at the meeting of the Committee beginning April 3, I find that it is impossible for me to make the connection in these strenuous times.

"I authorize the signing of my name to the report

which is to be made to the Court at this time." That is really very nice.

"I regret exceedingly that I shall not be able to cooperate with the members of the Committee at this session. Both as a matter of public duty and for the pleasure that these meetings bring, I should be present if circumstances at all permitted.

"With kind regards,

"Yours very truly,

"George T. Donworth."

So I am afraid we are not going to have Judge Donworth with us.

... Brief recess ...

P R O C E E D I N G S

ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

VOLUME II

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April 3, 1944

THE ACTING CHAIRMAN: Shall we proceed? I take it we are up to Rule 13. Is that correct? Has anyone any advice to offer on Rule 13?

PROFESSOR SUNDERLAND: It is all right.

THE ACTING CHAIRMAN: This change was particularly to meet the objection made by Justice Rutledge for the Court in the case cited in the note. The word "a" was left out in the first line, and that was sent to you in a correction sheet. "A pleading shall state as a counter-claim ...."

DEAN MORGAN: It is O.K., it seems to me. I move the adoption.

MR. DODGE: Second.

SENATOR LOFTIN: Second.

THE ACTING CHAIRMAN: It is moved that we adopt Rule 12, which I take it means both (a) and (1).

JUDGE DOBIE: With the "a".

THE ACTING CHAIRMAN: All those in favor will say "aye"; those opposed. It is so voted. (Carried)

DEAN MORGAN: Have we gone by anything of Tolman's? I don't know.

MR. DODGE: No.

DEAN MORGAN: The next comes under 15.

THE ACTING CHAIRMAN: I suppose you must have noticed

what we say on page 19, that we made a small change. I take it that is voted and approved.

DEAN MORGAN: Oh, yes. I think that was clear.

THE ACTING CHAIRMAN: Rule 14 is another old favorite, and I guess I shall just have to ask you to look it over and see what you think.

MR. LEMANN: In line 10, the third-party defendant may assert against the plaintiff any defenses which he has to the plaintiff's claim?

DEAN MORGAN: No.

MR. LEMANN: Which the third-party plaintiff has to the plaintiff's claim.

MR. DODGE: We had a lot of discussion about that.

MR. LEMANN: The third-party defendant may assert against the plaintiff. I suppose you thought he would make his defenses against the original defendant sufficiently under 7 and 8. I was just wondering whether it was clear that he could assert his defenses against the original defendant, but I suppose the idea is that that is covered by the preceding sentence.

DEAN MORGAN: Oh, yes.

JUDGE DOBIE: This just extends it to the plaintiff's claim.

DEAN MORGAN: But, you see, we are arguing whether the defendant didn't set up a defense.

MR. LEMANN: We had that in the original rule.

DEAN MORGAN: Yes.

MR. LEMANN: But it wasn't limited to the plaintiff.

DEAN MORGAN: No.

MR. HAMMOND: In connection with that, Mr. Lemann, that is one of the reasons that I suggested putting in line 7: "shall make his defenses to the third-party plaintiff's claim". It seems to me to make it a little clearer. But I had several suggestions about amending that preceding sentence, the first sentence of the rule, and we can take those up later. The Reporter put those in a special note.

THE ACTING CHAIRMAN: Yes, if you will on page 22.

JUDGE DOBIE: Is there anything materially different between Mr. Hammond's suggestion and that second sentence the way it is now?

THE ACTING CHAIRMAN: Aren't they all underlined? I think they are all underlined in his, so that you can see from looking at it.

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: Armistead, look at page 22, Mr. Hammond's suggestion. The underlining shows what he has added, and the brackets show what is left out.

JUDGE DOBIE: I see.

PROFESSOR SUNDERLAND: I thought Mr. Hammond's form was quite clear. I thought it was a little better than the

original.

MR. HAMMOND: The original doesn't seem to me to be clear.

MR. DODGE: We have left in the words, "his counter-claims and cross-claims against the third-party plaintiff". We have them in as to cross-claims.

PROFESSOR SUNDERLAND: I move that Mr. Hammond's form be substituted.

MR. DODGE: Is it necessary to repeat those words so many times, Mr. Hammond? We have said, "shall make his defenses as provided in Rule 12 and his counter-claims and cross-claims against the third-party plaintiff or any other party", without any commas. Doesn't that all go back to "against the third-party plaintiff"?

MR. HAMMOND: You don't make a cross-claim against a third-party plaintiff.

MR. DODGE: You might.

DEAN MORGAN: You might, surely.

MR. LEMANN: You change this rule only for the reasons stated at the top of page 22?

THE ACTING CHAIRMAN: What is that, Monte?

MR. LEMANN: Is that at the top of page 22 the only reason for changing this rule?

MR. DODGE: No.

THE ACTING CHAIRMAN: You know, the whole business is

a very substantial change.

MR. LEMANN: This is the last sentence, yes. I was overlooking the middle page.

MR. DODGE: We had a lot of discussion about this.

THE ACTING CHAIRMAN: The general purpose we have in mind in this change, Monte, is to eliminate the bringing in of a man answerable only to the plaintiff.

MR. LEMANN: Yes.

DEAN MORGAN: Yes.

PROFESSOR SUNDERLAND: I think it is a little bit complicated situation that is presented here, and I think this spelling out that Mr. Hammond gives it makes it very clear. It is very good.

JUDGE DOBIE: You have a lot of parties in there, and it may be well, as Hammond does, if you spell it out. You can't do it wrong. There is no question about his having spelled it out correctly, is there?

MR. DODGE: He has left out cross-claims against the third-party plaintiff.

PROFESSOR SUNDERLAND: There aren't such things.

DEAN MORGAN: That would be a counter-claim against the third-party plaintiff, wouldn't it? The cross-claim would be against another third-party defendant, wouldn't it?

MR. HAMMOND: Yes. A cross-claim is against a person who is on the same side that you are.

JUDGE DOBIE: Did you move that we adopt the Hammond language?

PROFESSOR SUNDERLAND: Yes.

JUDGE DOBIE: I second that.

MR. LEMANN: Why were the words "against the plaintiff" inserted in line 10? What else could it mean without that? He may assert that only against the plaintiff, as you see from the next line.

DEAN MORGAN: Ordinarily, he is not a party as against the plaintiff, where the plaintiff doesn't make his pleadings against him.

MR. LEMANN: I mean, what did you add by putting in those words, in view of the fact that you have the words "plaintiff's claim" in line 11? I wasn't sure I caught the significance of the change.

DEAN MORGAN: Oh. Well, I suppose that is to prevent a judgment from going against the defendant if such a defense were put in. I don't know.

MR. DODGE: It is really a defense that he sets up in the action between the plaintiff and the original defendant.

DEAN MORGAN: Yes.

MR. DODGE: In addition to the defense of his own.

MR. LEMANN: It says he may assert any defense which the defendant has to the plaintiff's claim. What do the words "against the plaintiff" add? They don't do any harm, but isn't

it implicit?

PROFESSOR SUNDERLAND: It makes clear who it is.

DEAN MORGAN: Ordinarily he puts in his answer to the third-party plaintiff, and not to the original plaintiff.

MR. LEMANN: Without these words added, you have: "The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim." Why did you put in those words?

DEAN MORGAN: He may not have any defense to the third-party plaintiff's claim.

THE ACTING CHAIRMAN: You see, Monte, it is a question of clarity, and it would seem to me it is needed a little. Perhaps you may imply it. If you go back, you may ask, "Why wasn't it in the original draft?" The reason it wasn't in there was that it wouldn't be necessary at all, because the third-party defendant could make claims against the plaintiff generally, the plaintiff could claim against him, and so on. That was quite clear. Now we have started restricting the impleader, the bringing in. So, if you left it out, it is a possible construction to say that the third-party defendant may assert any defense which the third-party plaintiff has to the plaintiff's claim in his (that is, the third-party defendant's) answer to the third-party plaintiff. You see, there is more reason for thinking that might be the intent if you didn't have it in than there was in the original rule.

MR. LEMANN: Now as I understand it, the main thing you wanted to get here was to avoid shoving on the plaintiff a defendant whom he didn't want. Plaintiff sues defendant. As we originally had it, the defendant could say to the plaintiff, "Here is the fellow who is liable to you. You sue him. I am out." We have eliminated that. The only way that new fellow can be brought in is for the defendant to say, "If I am liable to you, Mr. Plaintiff, this new fellow is liable to me." Is that right?

DEAN MORGAN: That is right.

MR. DODGE: That is one point.

MR. LEMANN: You can't bring him in merely by saying, "He is liable to you."

DEAN MORGAN: "He is liable, and I am not."

MR. LEMANN: "And I am not." You can bring him in only to the extent of saying, "If I am liable to you, he is liable to me."

DEAN MORGAN: Joint tort-feasor.

MR. LEMANN: Or, "He is liable with me."

DEAN MORGAN: Take the joint tort-feasor case.

MR. LEMANN: I don't quite see what you had in mind, what you thought you were putting in by adding the words "against the plaintiff", he "may assert against the plaintiff any defenses which" he "has to the plaintiff's claim."

DEAN MORGAN: No; which the original defendant had to

the plaintiff's claim.

MR. LEMANN: That is right. But wouldn't that necessarily be against the plaintiff? I wasn't sure what you were driving at.

THE ACTING CHAIRMAN: No.

DEAN MORGAN: Not necessarily.

THE ACTING CHAIRMAN: Monte, if you considered this an entirely separate battle between the original defendant and the new man he brought in, they would be fighting it out. This, however, says that the new man can fight the original claim.

MR. LEMANN: Oh. You thought that wasn't plain without these words?

THE ACTING CHAIRMAN: Yes, exactly.

MR. LEMANN: I would have thought it was plain enough by saying he can assert any defenses which he has to the plaintiff's claim.

DEAN MORGAN: No, no.

PROFESSOR CHERRY: This isn't his defense. He wants to state the other fellow's defense so the other fellow doesn't raise it.

MR. LEMANN: Do you mean the third-party defendant may assert against the plaintiff any defense which either the third-party plaintiff (the defendant) or the third-party defendant has to the plaintiff's claim? That is really what you mean, isn't it?

DEAN MORGAN: No.

PROFESSOR CHERRY: It comes to that.

MR. LEMANN: Yes. It is a little confusing.

MR. DODGE: It probably would be implied. We weren't quite insistent that he should have the right to knock out the liability of the defendant to the plaintiff, because in most cases his liability is secondary if the defendant is liable to the plaintiff. That is the main defense.

THE ACTING CHAIRMAN: Mr. Sunderland has moved Mr. Hammond's version for the second sentence.

DEAN MORGAN: You had some objection to that, Charles.

MR. LEMANN: That is the same sentence I was talking about.

THE ACTING CHAIRMAN: That isn't the thing that troubled us. What we don't like is the fourth sentence.

DEAN MORGAN: Oh, I see. All right.

THE ACTING CHAIRMAN: The fourth sentence, and again it is the last one.

DEAN MORGAN: Is that another one of Hammond's?

THE ACTING CHAIRMAN: No, I don't think that Hammond is the father or certainly not the sole father of the particular things I object to. That is a particular point later on.

MR. HAMMOND: May I say something about what Mr. Lemann has been talking about, "against the plaintiff"?

THE ACTING CHAIRMAN: Surely; go ahead.

MR. HAMMOND: That bothered me a little bit, too. Does that mean now that he has to file a pleading to the plaintiff's complaint? It would seem to tie him down to that.

THE ACTING CHAIRMAN: It says "may", and I think this is a case where, if he has anything he wants to make, he files it; if he doesn't have, he wouldn't. I should think that would be the interpretation.

MR. HAMMOND: It is just a question of how. Does he put it in his third-party answer or does he have to file a pleading?

MR. DODGE: Yes, it is a basic part of his defense, and frequently his own defense, that the defendant is not liable to the plaintiff; therefore, he is not liable to the defendant.

MR. HAMMOND: Yes, sir, I understand that; but if you put the words "against the plaintiff" in there, it seems to me that that might require that he file a pleading to the plaintiff's complaint.

MR. DODGE: Yes, there might be ambiguity about that.

MR. HAMMOND: If you left it out, he could do it either way. He would probably put it in his answer.

MR. DODGE: I think we meant here that it should go in his answer to the defendant.

DEAN MORGAN: It would have to be served on the plaintiff, too.

MR. DODGE: Yes, it has to be served on the plaintiff.

DEAN MORGAN: You wouldn't have to have two.

MR. LEMANN: I think it would be a little clearer on first reading if it read this way: "The third-party defendant may also assert any defenses which the defendant has to the plaintiff's claim." And take out the words "against the plaintiff", because that is bound to be so. I don't know who else that could be or whom it would be asserted against except the plaintiff, if they were defenses to the plaintiff's claim.

THE ACTING CHAIRMAN: Do you want to comment on that, Mr. Moore?

PROFESSOR MOORE: No.

MR. LEMANN: The redundancy made me wonder, what is there that I am not getting, you see, Mr. Moore. It seems to me you have a redundancy.

PROFESSOR MOORE: I don't think we put it in. I think the Committee voted it. Just why, I don't recall.

MR. LEMANN: That is one nice thing. If we all drew salaries here and had nothing else to do, we could keep busy forever, because we never could remember why we did a thing and we could come back and change our minds.

PROFESSOR MOORE: We didn't suggest it in our draft.

THE ACTING CHAIRMAN: We have what Judge Dobie calls a lullaby.

PROFESSOR CHERRY: I think the reason is this:

Asserting it against the plaintiff means preventing the plaintiff from recovering even from the defendant.

DEAN MORGAN: That is right.

PROFESSOR CHERRY: Instead of having him say, "He can recover from you. Now I have to show that it is against you, that you shouldn't have suffered that loss." It is admitting him to that extent to a share in the original battle. I think it was intended to be.

MR. LEHMANN: That is right. It does it without those words. When you say, "may assert any defenses which the original defendant has to the plaintiff's claim", that is bound to be against the plaintiff.

PROFESSOR CHERRY: The danger was that that might be thought to be subordinated to the main action, I think, that he has to stand by and wait until the plaintiff makes out his case against the defendant, and then as a defendant he can show that.

MR. DODGE: They didn't have those words in the original rule, and no trouble was caused by that omission.

THE ACTING CHAIRMAN: Shall we go back to sentence two? We haven't decided that yet. You recall it is Mr. Sunderland's motion to substitute Mr. Hammond's draft as it appears on page 22. Are you ready for the question? All those in favor will say "aye"; those opposed, "no." Well, the "ayes" have it, and that draft is substituted.

That brings us to the third sentence. Does anybody want to make a motion as to that?

PROFESSOR SUNDERLAND: I move we take it as it is.

MR. LEMANN: You mean this way or the way we originally had it?

PROFESSOR SUNDERLAND: With the words "against the plaintiff" in. I think that makes it clearer.

THE ACTING CHAIRMAN: Are you ready for the question on that?

MR. DODGE: It doesn't make much difference.

SENATOR LOFTIN: Question.

THE ACTING CHAIRMAN: All those in favor of the draft as is will say "aye"; those opposed, "no." The "ayes" have it, and it is so voted. (Carried)

I did raise a couple of questions, and I don't know that there is much use going over at least all of them again. I thought that the next sentence, number four, added some principles of substantive law. You will notice that we discussed them somewhat on page 22 at the bottom.

MR. LEMANN: You mean, "The third-party defendant may also assert against the plaintiff any claim he has against him"?

THE ACTING CHAIRMAN: Yes.

JUDGE DOBIE: I thought you were talking about the next sentence.

MR. LEMANN: Not the sentence beginning on line 11.

JUDGE DOBIE: No; on 14.

MR. LEMANN: Before you come to 14, as I read that sentence I wondered whether it was consistent with the rule of compulsory cross-claim. You are not implying that a defendant must assert against the plaintiff any claim growing out of the same transaction?

DEAN MORGAN: That would be the third-party plea.

MR. LEMANN: I realize that. I am just raising the question for consideration. Do you think it is perfectly plain that that shouldn't apply to the third-party plaintiff?

DEAN MORGAN: Oh, yes. Of course, there is no issue between the plaintiff and the third-party defendant unless the plaintiff amends his complaints and states it against him. That is the whole purpose of the amendments striking it out.

MR. LEMANN: He can make his counter-claims if he wants to, but he doesn't have to.

DEAN MORGAN: He can, if it arises out of the same transaction. That is, he can really begin another lawsuit against him (that is what it means) arising out of the same transaction. He can make him a party and sue him. The idea there was this, wasn't it, Charlie: that this would probably come in as an ancillary thing, so you wouldn't have to have any diversity, and so forth.

THE ACTING CHAIRMAN: Yes, that has been the general

theory of jurisdiction.

MR. LEMANN: That applies to all. I am just raising the question of the counter-claims.

DEAN MORGAN: It wouldn't apply if the plaintiff made the third-party defendant a party. You would have to have diversity between him and the third-party defendant.

MR. LEMANN: That is right; but here the third-party defendant can be brought in without diversity, we assume. Then, when he gets in he has permission to assert the counter-claim if he wants to.

DEAN MORGAN: Yes.

MR. LEMANN: He could never have had that heard in the Federal court originally because he and the plaintiff belong to the same state. On the theory that we have, he can do it, but he doesn't have to do it. He can say, "Well, it grows out of the same transaction, but I don't care to get all these things disposed of in this one proceeding."

DEAN MORGAN: That is right.

MR. LEMANN: "I would rather bring another suit, as far as that is concerned. I have a claim against the plaintiff growing out of this same occurrence, and I am called into this suit, but I think I will just save that and bring that up afterwards." It is not very likely to happen.

DEAN MORGAN: "I am hauled into this suit, but the plaintiff hasn't sued me."

PROFESSOR SUNDERLAND: But the third-party plaintiff has sued him.

DEAN MORGAN: If the plaintiff makes him a party, that is a different matter.

MR. LEMANN: It would be governed by the rules applicable to defendants.

DEAN MORGAN: I think there is a question whether the court is going to hold it is merely ancillary there.

MR. DODGE: Yes.

MR. LEMANN: Haven't they passed on it? I think some courts have.

DEAN MORGAN: Not in this kind of case.

MR. LEMANN: How about it, Mr. Moore? Haven't they passed on this third-party defendant thing?

PROFESSOR MOORE: I don't recall any on this precise point. They have that you have to have independent jurisdiction for plaintiff's claim against this fellow.

DEAN MORGAN: They say there has to be diversity there, don't they?

PROFESSOR MOORE: Yes.

DEAN MORGAN: But for the defendant's claim over, there doesn't have to be diversity.

PROFESSOR MOORE: That is right.

MR. LEMANN: The defendant's claim against this fellow, I mean.

DEAN MORGAN: That is right.

PROFESSOR MOORE: If the plaintiff wants to assert a claim against the third-party defendant, there has to be jurisdictional ground.

MR. LEMANN: In the very case where they decided that, didn't they decide there was jurisdiction over the third-party defendant on the claim over by the original defendant? because if they didn't assume that, that third-party defendant would be out altogether. Do you catch the point I am making?

PROFESSOR MOORE: Most of the cases hold that you don't need independent jurisdiction for the third party to claim against the third-party defendant.

MR. LEMANN: That is right. That is what I said to Mr. Morgan. I thought that had been decided. That is what I thought he was saying.

DEAN MORGAN: That is quite right, but we are talking about the third-party defendant asserting a claim over against the original plaintiff.

MR. DODGE: Or the plaintiff asserting a claim against him.

DEAN MORGAN: If the plaintiff asserts a claim against the third-party defendant, there has to be diversity.

MR. DODGE: Yes.

DEAN MORGAN: We are assuming that there doesn't have to be diversity here if the third-party defendant asserts a

claim against the plaintiff, and I don't know whether that is true or not.

MR. DODGE: Why doesn't it follow from the other?

DEAN MORGAN: I don't know.

MR. LEMANN: If it grows out of the same transaction.

DEAN MORGAN: Quite so, and he is improperly on that transaction with the third-party plaintiff, the original defendant.

MR. DODGE: And the plaintiff has elected to follow up, knowing that the third party may be brought in; yet he can't assert a claim against him.

THE ACTING CHAIRMAN: Of course, I am being illiberal here and I am raising a question about that, too; only I haven't raised the jurisdictional point.

JUDGE DOBIE: We can't do anything about that, either, can we?

THE ACTING CHAIRMAN: I don't want to stick our needle into constitutional jurisdiction on any of these technicalities.

DEAN MORGAN: I am glad to know how you regard the Constitution, Charlie.

THE ACTING CHAIRMAN: I don't think it is a very good thing, anyhow.

DEAN MORGAN: Why not? You don't want it all saddled up in one action? That is a reversal of form, Charlie, I must

say.

THE ACTING CHAIRMAN: I know it, and you told me so last time.

DEAN MORGAN: You are still stubborn?

THE ACTING CHAIRMAN: I am. I will say this, that unless I can get somebody like Monte interested, I won't raise the point again, but I just want to be sure. Monte, have you read the paragraphs on 22 and 23? If they don't strike fire from anybody, I shall not say any more.

MR. LEMANN: I did, and when we got down to that I wanted to ask you whether I understood your last sentence on page 22. Are we ready for it now? Have we gotten to that? I guess we have. "Seemingly an insurance company which by present law could only defend by admitting policy coverage to the insured may hereafter defend against the plaintiff and later on against the insured."

THE ACTING CHAIRMAN: Isn't that so?

MR. LEMANN: You can't do both now. I was not sure when I read it. With the present large allowances of inconsistent pleas and inconsistent defenses, and so on, I would have thought it at least possible that that insurance company might say, "Well, I don't think he has any claim, and if he has any claim, I am not liable to the defendant." You say he can't do it.

THE ACTING CHAIRMAN: Understand, I don't pretend to

be an insurance expert, but I understand there is some authority in insurance law (I am not talking now about pleading law; forget the Federal rules generally, but think of Erie Railroad v. Tompkins and state law and all that sort of bunk, but nevertheless it exists), that there is a rule of some standing at least, that to come in and take over the burden of the defense, you had to agree that you had a policy for the insured, unless you got him to stipulate to raise that question later. This is a question, you see, between the insured and the insurer.

MR. LEMANN: Here you are the insurance company. Plaintiff sues defendant. Defendant says, "I am not liable to the plaintiff, but if I am, the insurance company is liable to me." Now the insurance company is hauled in. He says, "I want them in." They don't get themselves in; they are yanked in. When they are yanked in, can't they say, "We don't think we are responsible (a) because the plaintiff has no claim and (b) because we are not liable on the policy"?

You say, no, you think that state law in many states, at least, say they can't do that, but I think that is rather hard on them if they can't do that, because they have to make their choice then between the two.

THE ACTING CHAIRMAN: Look, Monte, you practically stated my point, and I think that explains about all there is. I think it is hard on the insurance companies, but is the Rules Committee of the Federal courts the place to make the law

easier for insurance companies?

DEAN MORGAN: I don't think it is easier for insurance companies when you allow them to drag them in.

THE ACTING CHAIRMAN: I am quite sure I am right about the New York law, for example, because--

DEAN MORGAN (Interposing): Not when they are dragged in.

THE ACTING CHAIRMAN: Take the situation as you have stated it. There is a policy of liability insurance covering an automobile accident, and there has been some misrepresentation. If the insurance company takes hold of the defense, with nothing more (suppose there hasn't been any Rule 14), without any of this Rule 14, all the defendant has done is simply to notify the insurance company.

MR. LEMANN: That is different.

THE ACTING CHAIRMAN: Then the insurance company takes over and, as I understand the New York law, the insurance company cannot then raise the question of misrepresentation under the policy.

MR. LEMANN: That is right.

THE ACTING CHAIRMAN: Except that in some cases they do get an agreement.

MR. LEMANN: That is a somewhat different situation, isn't it?

DEAN MORGAN: I think you are right there, Charles.

MR. LEMANN: I run over a man on my way to the office, and I am sued for $10,000. I say to my insurance company (or what I think is my insurance company), "You come and defend against the claim." They have to make up their mind that they are going to come and defend that claim without my being in it at all or that they are going to take over the defense and relieve me or that they are going to say they are not responsible on the policy. If they say to me, "All right, Lemann, we will take over the case," and they take over the case and win it, that will end it; if they lose it, then they can't be heard and say afterwards, "Well, Lemann, it is just too bad. We lost the case, but we are not responsible to you, anyhow."

That is what you say is the New York law. Is that right?

THE ACTING CHAIRMAN: I am not trying to decide what would be true under a third-party practice as such. I am stating the New York law--

MR. LEMANN (Interposing): On that point.

THE ACTING CHAIRMAN: --of insurance as I understand it.

MR. LEMANN: Is that exactly this case, though?

DEAN MORGAN: That is a different proposition.

THE ACTING CHAIRMAN: I wonder if it is; and if it is very different, it means that a defendant is a damned fool if

he uses Rule 14, and if his lawyer knows his way around and knows his P's and Q's, he won't use it.

DEAN MORGAN: He may not.

THE ACTING CHAIRMAN: All he will do will be to notify the insurance company to come in, and that puts it up to the insurance company.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: Whereas, if the defendant thinks, "Now, let's have a short cut and go under Rule 14," then he finds he has given away something pretty valuable, and the reason he has given it away is that we here don't like that rule of law.

MR. LEMANN: I don't know that we don't like it, because they are two different things. In the case I put the insurance company goes ahead and fights that case, and I am not there at all. They are fighting it.

MR. DODGE: All the time.

MR. LEMANN: But in this case I am there, too, and I can do all I want to do to knock out the plaintiff. I don't have to rely on the insurance company to knock him out. They haven't misled me or said, "We will take charge of this." I am in there fighting, too. I don't have to rely on them. That would be my idea of the difference, you see.

MR. DODGE: Why do you say in your note on 22 that he might fight the plaintiff and later on contest his liability

to the defendant? Everything is in this case, isn't it?

THE ACTING CHAIRMAN: Later on means, of course, in the same action. I don't suppose you are going to go to the jury on both questions at the same time.

DEAN MORGAN: Why not?

THE ACTING CHAIRMAN: I don't believe in it. I suppose theoretically it is still possible.

DEAN MORGAN: They aren't going to take two bites at the cherry, are they? You are not going to give them two juries.

THE ACTING CHAIRMAN: Nevertheless, I don't want to battle over that issue. All I meant was that he would have the two separate issues. I think he probably could get them tried on different days.

MR. DODGE: This seems to be wholly different from the voluntary assuming of the defense and the waiver of any denial of liability to the defendant.

THE ACTING CHAIRMAN: I don't know. Of course, as I have stated before, if nobody is interested, that ends it. It seems to me you are allowing the insurance company a defense that it wouldn't have under ordinary rules of law.

Let's go on to the other point, the final one, that you have a new principle of joinder for the common question of law test in Rule 22.

DEAN MORGAN: What is that?

THE ACTING CHAIRMAN: You have only the common transaction test.

MR. DODGE: I don't think that is Rule 22. Isn't it Rule 20? Rule 22 is the interpleader rule.

THE ACTING CHAIRMAN: I guess that is right, isn't it?

MR. DODGE: I guess it is 20, on permissive joinder.

PROFESSOR SUNDERLAND: Rule 20 is right.

THE ACTING CHAIRMAN: That is right, isn't it? Yes, it should be 20.

MR. LEMANN: Let's see how that comes in, Charlie. Lines 20 and 23.

MR. DODGE: Lines 11, 14, and 23, isn't it?

MR. LEMANN: Your point is that the final addition is the same as the one before, is that it? Isn't the addition in 20 to 23 a limitation of the original language of the rule? The original rule, line 17, read: "The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant."

DEAN MORGAN: That is out.

MR. LEMANN: That is out. You say, however, we have substituted a broader rule when we say he may assert against the third-party defendant any claim which "he has against him which arises out of the transaction or occurrence which is the

subject matter of the plaintiff's claim against the third-party plaintiff and the third-party defendant thereupon shall assert his defenses", and so on.

DEAN MORGAN: I don't quite get your last objection, Charles.

THE ACTING CHAIRMAN: That is on line 17, where it was originally "The plaintiff may assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant." Under the original rules of joinder, you could join defendants where there was a common question of law or fact. What has happened here is that there is in substance a joinder under this rule, first the original defendant and then this one.

Now we change it and say that the plaintiff may join any claim which arises out of the transaction or occurrence sued upon, and so on. We have left out of the joinder there at least the law part of it, the common question of law. We have changed the wording of the common question of fact, although it may be in substance much the same.

MR. LEMANN: We have limited it a little bit, if anything, because under 20 you could join them whether there was a question of law or fact in common.

THE ACTING CHAIRMAN: Yes, that is true; this is a limitation.

DEAN MORGAN: Yes. What is wrong with it?

MR. LEMANN: I don't see how it is, really.

THE ACTING CHAIRMAN: Why should you change it over from the original 17 to 19? I mean, what is there gained?

MR. LEMANN: That is worth asking always.

DEAN MORGAN: The point is that then you have the jurisdictional question there, haven't you?

THE ACTING CHAIRMAN: Have you really helped the jurisdictional question by this?

DEAN MORGAN: The only theory upon which you could say you have helped it is that by confining it to that particular transaction you have thereby made it just ancillary.

PROFESSOR MOORE: I don't think, when you put this in, that you are stating that in any particular case there is going to be jurisdiction. I think all you are saying is that procedurally, if there is jurisdiction, plaintiff may set up a claim.

MR. LEMANN: Have we had any kicks about this, Mr. Moore? No kicks about this.

DEAN MORGAN: This first one?

MR. LEMANN: No, these two sentences we are talking about. Mr. Moore and Judge Clark say on page 22 that they would suggest leaving out the fourth sentence, which begins on line 11, and also leaving out the stuff that is underlined in line 20. Is that right, Mr. Moore? You suggest leaving them both

out?

THE ACTING CHAIRMAN: That is what we suggested, yes.

MR. LEMANN: That would get you back to where we are now, and I ask, always being in favor of stare decisis, why we don't stay where we are now. Nobody has kicked about it.

THE ACTING CHAIRMAN: Of course, as to 11 you wouldn't have any kick about it because 11 is new, you see.

MR. LEMANN: I mean we have had no kick, no claim that we ought to expand the rule to cover this underlined material from line 17 on.

THE ACTING CHAIRMAN: Line 17 on. We haven't had any kick about that. I don't know that it is quite fair to separate the points. We have had a good deal of kicking about this main point of claims against plaintiff, and there is nothing to center any question on the last part, but maybe that isn't a fair way to look at it.

MR. LEMANN: What we are talking about now, as I understand it from your criticism, is whether we are going to give express permission to the third-party defendant to assert claims against the plaintiff and to the plaintiff to assert claims against the third-party defendant.

THE ACTING CHAIRMAN: There are two separate questions. As to the first one, the asserting by the third-party defendant of claims, you have all decided that he should. While I have not agreed, I take it that is settled. Now let's consider that

we have passed that. Lines 11 to 14, then, stay in.

Lines 17 on, are a somewhat different question and are unconnected in theory or otherwise with the other. Treating them separately, we suggest that it is simpler and more consistent with the other part of the rule (namely, Rule 20) to leave in 17 to 19 as it was originally than to add this substitute, which is a little complicated and is restrictive as far as it goes. Here there is no particular reason for being restrictive, except on the question of jurisdiction, and we don't think that the rule says yes or no on jurisdiction. The rule is subject to our general rule that we are not extending jurisdiction.

MR. LEMANN: If you can get by jurisdictionally on one of these things, on lines 20 to 23, I should think you could get by jurisdictionally on the other. I don't think your jurisdiction difficulties would be very different in one from the other. I thought from your language, the comment on page 23, that you wanted to change both these things.

MR. DODGE: If you added the last one, wouldn't it necessarily expand the scope of the third-party defendant's right against the plaintiff? If the plaintiff came in with some disconnected matters, certainly the defendant could open that up.

THE ACTING CHAIRMAN: Of course, every time the plaintiff expands, it is likely to expand the defense. That is

clear enough. That was clear enough under Rule 20. But if you are providing a general rule of joinder in 20 for a common question of law or fact, why do you say where the party is already in (brought in, it is true, on another ground), then your joinder is limited to only the same occurrence, which perhaps is equivalent to the common question of fact? Why make a different test there than you do under Rule 20 generally? It doesn't seem to me there is any reason for it, and it just adds a complication.

MR. DODGE: You would make it broader in the second question only or in the first place, too?

THE ACTING CHAIRMAN: I am not sure that I know what you mean by "second question."

MR. DODGE: These two successive underlined passages, the first and second.

THE ACTING CHAIRMAN: In the first one, line 11, I suppose you would say we are restricting it. We were suggesting a restriction over what you think should go in. Our trend that way is restrictive, yes, that is true; restrictive on what the insurance company can plead, if you will, yes.

MR. DODGE: As to the original matter, although it can plead anything if the second section is taken advantage of by the plaintiff.

THE ACTING CHAIRMAN: If the plaintiff once decides to step out, why not then, in that case, since the plaintiff

has opened the doors? But going on to the question you asked, in line 17 what we are suggesting I suppose in a way is a little expansion over what the lines would be in 20 to 23, but it is expansion of the same kind that was in originally, and we don't see the reason for the restriction over what was here originally. In addition, we think that consistent with the general joinder rule of Rule 20.

MR. LEMANN: I wonder in this discussion why you wouldn't go back to the idea of leaving the rule the way it was. Here are the reasons that you want to change it, as I read the notes: No. 1, it is futile to tell the plaintiff that he must sue the new person when he doesn't want to sue him and the court says he doesn't have to. It does no harm. If he doesn't want him, he doesn't want him. No. 2, you say there is a jurisdictional problem presented. The court says that he can't sue him on a new claim. Is that right, Mr. Moore?

PROFESSOR MOORE: The plaintiff couldn't sue.

MR. LEMANN: Yes, the plaintiff couldn't. So you say, "Now let's change the rule." I was listening to your objections to some of this language, and you make two objections. One is that you don't like the language in 19 to 23, but then you go on to say that also it would be better to leave out the language in 11 to 14. Don't you say that?

DEAN MORGAN: Surely.

THE ACTING CHAIRMAN: Are you raising the question as

to whether we shouldn't go back to Rule 14 as it exists today? Is that the question?

MR. LEMANN: Yes.

THE ACTING CHAIRMAN: On that you have to consider various things. One of them is that various parts of the bar are quite aroused by it. In particular, the insurance people are on my neck right along. They have even sent people out to interview me. There is a Mr. Benoy, of Ohio, head of the Insurance Section, who came out and visited Moore and me. I think he sent all of you (I think they have been distributed) the votes of the Section. They have been terribly upset about it. I would say that in itself was sufficient, but--

MR. LEMANN (Interposing): What part of the present rule don't they like?

THE ACTING CHAIRMAN: They don't like this idea that you can be forced to be a new defendant, so to speak. Of course, there are several things they don't like about it, anyway. They would like to have it made clear that the jurisdiction is quite limited, and some things like that. I mean, among others, that is one of the things they don't like. They don't want to have any thought that the insurance company could be brought in and that the plaintiff could sue directly over against the insurance company, except as it is provided in some cases by statute.

I was going to add that I don't think those objections

alone would count because, after all, every rule may hit some people favorably and others unfavorably. But I add to it that I think the rule was a trap before and that it covered more than it really could carry out.

In that connection, your friend and the now great exponent of the rules, Judge Porterie, has held definitely that we couldn't force a defendant on the plaintiff. He and one other district judge, Beaver, of Georgia, have both held that you can't do it; that is, that where the original defendant cites in a new person, ipso facto the plaintiff's claim is broadened to include that new defendant. He suggests that the plaintiff doesn't even need to amend his pleading. It is because of that.

In the first place, I didn't think it worked. We cite the Brown v. Cranston case where there was a question under the New York law of suits out of one automobile accident, and it involved the construction of the New York law of joint judgments and contribution. Under the New York law, you can only get contribution from a joint tort-feasor when the judgment is joined, and the judgment is a condition precedent. We struggled quite a while, and finally decided that we couldn't do anything under that and therefore allowed the man who had been cited in to answer.

It is a combination of the fact that we don't think the rule really works and that a lot of people do. Some who

do are worried about it, and some, like Judges Deaver and Poterie, just think they can make it work anyhow. I thought that was ground for taking it out. It clears up a complication, one that has caused a good deal of trouble.

MR. DODGE: Would you strike out both of these underlined passages?

THE ACTING CHAIRMAN: Yes, for somewhat different reasons. I had better make it a little stronger than that--for quite different reasons, I guess. The first reason is the one I have discussed, and it has been somewhat rejected, I guess definitely rejected. That was, I thought you were extending rights through a procedural guise. If you don't agree, that settles that, and that brings in 11.

The second one I suggest for quite a different approach. The second one is that it seems to me to make it more consistent with the general idea of our rules, and it is also less complicated in statement; partly because it would then be consistent and partly because of the mere manner of statement, too.

DEAN MORGAN: Four and five are consistent with themselves in that they are both based on the theory that you want to clear up everything in this transaction, as far as you can.

MR. LEMANN: Four and five?

DEAN MORGAN: The two underlined sentences that he is

talking about.

MR. DODGE: We don't want to force a litigant on the plaintiff, and what is the objection to leaving out any question of rights as between the plaintiff and the new party summoned in?

DEAN MORGAN: If a new party is summoned in, while he is in court there, why shouldn't the third-party defendant be able to clean up the whole transaction?

MR. DODGE: He should, as far as he is concerned.

DEAN MORGAN: That is what it says, any claim against the plaintiff which arises out of the transaction or occurrence.

MR. DODGE: That is between the third-party defendant and the plaintiff.

DEAN MORGAN: Yes. He should be able to clean it up right then. This was the theory of that fourth sentence, and then the fifth sentence gave the plaintiff the same privilege.

MR. HAMMOND: As I recall it, the Committee at the last meeting discussed this an awful lot, and they voted, except for Judge Clark, to adopt those two sentences.

MR. DODGE: The first one would be misleading to the bar because--well, no, it wouldn't be if these two stand just as they are here. If we restore the old lines 17 to 19, the first one becomes very misleading.

DEAN MORGAN: Yes, indeed, it does.

MR. DODGE: If we leave them as they are, that

misleading character is gone.

DEAN MORGAN: That is what happened here.

MR. LEMANN: The alternative would be to restore it and to leave out the first part, the first sentence we are talking about.

MR. DODGE: As being implied anyway.

MR. LEMANN: As not being very important, nobody having raised any point about it. That is the only point I had that we ought to consider. Then add here to the language as it stood.

In fact, I don't know how convincing the case has been made to change the rule, in view of the experience with it. Judge Clark says that it has given rise to diversity of opinion among the district judges as to whether you can force a defendant on the plaintiff. That is one thing.

DEAN MORGAN: We had a good deal of information on that when we first handled this.

MR. DODGE: I don't remember. I remember the discussions on the other points in this rule, Mr. Hammond, but I don't remember that this particular thing was discussed so much. Was it?

MR. HAMMOND: It really was, yes; very thoroughly.

THE ACTING CHAIRMAN: I will say that I think lines 11 to 14 were discussed quite a bit. There isn't any doubt about it. Mr. Morgan got quite excited and said I was getting

worried about something that wasn't so. I said this was substantive law, and Mr. Mitchell said that was the first thing he had ever heard me call substantive law, which I must say was a valid touch that time. That was discussed. I don't think very much was said about this latter. I don't recall that this was ever specifically discussed, that is, lines 19 to 23.

MR. LEMANN: The other point about not forcing another litigant on the plaintiff would be cared for by a little change in line 5.

MR. DODGE: That was taken care of. That was what we discussed so much.

MR. LEMANN: That is simple.

DEAN MORGAN: It was 10 and 11 that we discussed so much.

THE ACTING CHAIRMAN: Professor Moore says that we were making the whole fight on 10 and 11.

DEAN MORGAN: That is where you made most of your fight before, Charles.

THE ACTING CHAIRMAN: Yes.

DEAN MORGAN: That is where you said I got excited. I got vociferous, at any rate.

MR. LEMANN: Where is that? The sentence beginning in line 11, you mean?

THE ACTING CHAIRMAN: Lines 10 and 11. It doesn't

make much difference. I guess you don't like it, whichever place it comes.

MR. LEMANN: That doesn't change much that I can see that you didn't already have.

DEAN MORGAN: He wanted it stricken out.

MR. LEMANN: You want it taken out. You haven't made much change in that, to my way of thinking.

DEAN MORGAN: We didn't care much about that. He wanted to strike lines 10 and 11, and that is where I got excited.

THE ACTING CHAIRMAN: It seems to me that the point where we are is that, without a vote particularly, you have pretty thoroughly settled everything now, except the last suggestion from line 17 on. If you say you are not interested in that, we will call that done, too. I am simply saying that it is more consistent, as well as clearer. This one, I think, is no particular justification for it, but if you want the limitation there, of course I can't say any more.

PROFESSOR SUNDERLAND: Don't they belong together?

THE ACTING CHAIRMAN: Why do they belong together? I have heard that suggested.

PROFESSOR SUNDERLAND: There is a reciprocal relation. One says what the plaintiff states against the defendant, and the other says what the third-party defendant has against the plaintiff.

THE ACTING CHAIRMAN: They are entirely different things. There is no reciprocal relation except that one happens to follow the other as a sort of rhythm or chorister song. There is a different theory behind them.

PROFESSOR SUNDERLAND: The theory behind both is that you take care of all these matters arising out of the same transaction at once, isn't it?

DEAN MORGAN: I move that this be adopted as is.

MR. DODGE: With the underlined words?

DEAN MORGAN: Yes.

MR. DODGE: Second the motion.

THE ACTING CHAIRMAN: All those in favor say "aye"; those opposed, "no." It is adopted.

DEAN MORGAN: You are the lone dissenter this time.

THE ACTING CHAIRMAN: Well, I have been that before.

DEAN MORGAN: I like to see somebody there besides myself.

THE ACTING CHAIRMAN: I might say about this, which is a change in the existing rule, that I will adopt Mr. Justice Roberts' statement about changing things. A new generation of the Committee will come on after us, and they will change what we have done, and so on.

DEAN MORGAN: I hope they will.

THE ACTING CHAIRMAN: Rule 17. Is there any question about 17?

MR. HAMMOND: On the word "federal." We have never used that before.

DEAN MORGAN: Federal receiver.

MR. HAMMOND: "Federal court" in line 11.

DEAN MORGAN: Federal receiver, too. We have always said "Court of the United States" before.

THE ACTING CHAIRMAN: I guess that is so.

DEAN MORGAN: Don't you think that is better, Charles?

THE ACTING CHAIRMAN: I guess so. Don't you think we should make that change? "Federal court," I suppose, is a slang expression.

MR. HAMMOND: District Court of the United States; Federal District Court. I don't know.

PROFESSOR MOORE: It seems to me to be a very short way of saying precisely what you have in your mind.

THE ACTING CHAIRMAN: "and except (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Rules 66."

DEAN MORGAN: That is what I think we had better say, particularly if you are going to spell "federal" with a small "f."

THE ACTING CHAIRMAN: Do you want to move for a change?

DEAN MORGAN: I move that change.

JUDGE DOBIE: Rule 66 simply says that we follow the old practice, doesn't it?

PROFESSOR CHERRY: That is the old rule. We propose to amend it here.

JUDGE DOBIE: It is?

THE ACTING CHAIRMAN: All those in favor of the change striking out "federal" and inserting "a court of the United States" say "aye"; those opposed, "no." It is so voted. (Carried)

Class Actions is only a footnote. I hope you are keeping in mind the query I raised before that I would like to have some advice about the notes as you go along and at the end. Mr. Mitchell, I take it, felt the notes were inadequate. I think that is his view, although he doesn't discuss that in detail.

DEAN MORGAN: Did he mean that generally, Charles, or just that where we are suggesting changes we should explain more fully why we are suggesting the changes?

THE ACTING CHAIRMAN: That may be what he had in mind. I think perhaps it was. It isn't made very clear.

MR. HAMMOND: He also made the point that some of the notes ought to be to the Court and not to the bar, you see, and it has just struck me that my recollection is that this was to be a note just to the Court. I think he may have had this one in mind.

MR. LEMANN: I wondered why you wanted to say anything to anybody about it.

MR. HAMMOND: At the May meeting this is what Mr. Mitchell said, that the most we ought to do in any event is to give a note to the Supreme Court calling attention to it, and the Committee at that time thought that there ought to be that note.

MR. LEMANN: To the Court.

MR. HAMMOND: But it was to be just a note to the Supreme Court.

MR. LEMANN: I should think that is as far as we should go, and my notion is that I doubt that the Supreme Court are going to read these things, that they will say, "Let them go to the bar, and let's hear what the bar says." I just wonder whether it is worth putting in even for the Court. We have decided that we ought not to do anything about it, and I should think they would just as soon not be troubled with it.

THE ACTING CHAIRMAN: Let me suggest a little of what my reaction would be on this. It is a little along the line I suggested earlier. While I don't think that we can be expected to make a complete exegesis of the rules, after all, a part of our job is to trace ambiguities and to try to make the rules as clear as possible in certain situations where trouble has developed. It does seem to me that there is a little obligation

to try to do something about it, either directly pro or con. This is a standard case now, since Erie Railroad v. Tompkins. I say it is a standard case; it is a case upon which there have been several law review notes; it is a case upon which litigants raise the question every time. The courts have been worried about it, but to date they have dodged it.

MR. LEMANN: What could we do about it? If it is in Erie Railroad v. Tompkins, the rule is going out, and we can't stop it. The only thing we can do, it seems to me, is to say it is so clearly bad that we will take it out before the Court says so, and we don't want to do that, do we?

THE ACTING CHAIRMAN: As I understood Mr. Mitchell's original position, it was just about that, that it was now so clearly doubtful that it ought to go out. It seemed to me that that was pretty harsh when various courts, including my own Circuit, have upheld it, for us to say that they are all wrong, and also when you consider the history of the rule as established by the Supreme Court.

Furthermore, there is quite a social question involved here, too. The New York Legislature has just passed a law providing for this very thing, also providing other things. It provides that if a stockholder doesn't represent 5 per cent of the stock, he has to put up a pretty heavy bond for costs. That was before the Governor, and I haven't seen his action. All I have seen to date are some very warm arguments that he

ought to veto it. In fact, if any of you read the publication The Nation (probably you don't), the last number has a long editorial saying that this will be a test of Governor Dewey's social service, whether he vetoes the bill or not; that if he signs the bill, there will next be a drive in the Federal courts for the same rule, which of course was amusing under the circumstances.

But whatever be the past history, now to make a change is to make a change in substantive law. Hence, I thought--and I think the Committee agreed--that we ought not to take it back. Then, as Mr. Hammond says, Mr. Mitchell thought we ought to make some warning.

MR. LEMANN: That is the most we ought to do. Read it again.

MR. HAMMOND: "The most we ought to do in any event is to give a note to the Supreme Court calling attention to it."

MR. LEMANN: That is the most we ought to do. I don't think we ought to take a lot of time talking about it. We have more important things to do. If you think we ought to tell the Supreme Court that some people think this is no good and that every court that has passed on it so far thinks it is O.K.--

THE ACTING CHAIRMAN (Interposing): What Learned Hand said is that we will let the Supreme Court repeal its own rule.

That is what he said, practically. He made that offhand remark. In the actual case there is nothing except "Judgment affirmed." This was no written opinion.

DEAN MORGAN: Yes, that is the point. They dodged it.

PROFESSOR SUNDERLAND: There was some suggestion. Who made that suggestion? You don't cite any suggestion.

THE ACTING CHAIRMAN: Suggestion has been made, outside of litigants (of course, it has been made by them all along), in the law reviews, in the Columbia Law Review and maybe in the Virginia Law Review.

PROFESSOR SUNDERLAND: It seems to me you ought to cite those suggestions. This is just blue sky stuff as it stands, because we don't know who made the suggestions, or where. Then you should cite a few decisions, at least.

THE ACTING CHAIRMAN: That could be done easily enough, except that I suggest this: It again depends on whether this note is for the Court alone. If it is for the Court alone, we don't need to make any extensive suggestion. This is a kind of apology, so to speak, because, theoretically, when the case actually gets to them, they will get all the argument they should need from the briefs.

I might add, however, that I don't quite see why we should distinguish between the Court and the public here, if we are going to do anything. I shouldn't think that very often we would in this kind of note. That is, I should think, if

we are going to put anything in, we ought to put it in for everybody. The question is as open to the bench and bar of the country as it is to the Supreme Court.

PROFESSOR SUNDERLAND: But their opinion doesn't cut any figure. It is the opinion of the Supreme Court that counts. What do we care what the bar think about it? They may think one way or think another.

MR. LEMANN: Suppose the bar came in and said, "We think this rule is all wet. We like the rule, but we don't think you can maintain it."

THE ACTING CHAIRMAN: I don't think that quite hits the point, as I see it. The idea is, why didn't you, faced with Erie Railroad v. Tompkins, take out that rule? The answer is that the weight of judicial opinion so far upholds it, and we think it should stay in until the Court passes on it.

MR. LEMANN: I don't think it would ever occur to the average lawyer to take out the rule, and we can tell those who do ask about it that until the Court passes on it, it is O.K. I don't see any sense in sending it to the bar. If I were the Supreme Court, I wouldn't think it was worth anything to me, unless you were going to brief the point seriously and say to them, "We want you to debate it." If I were the Supreme Court, I would much rather not decide it on just a recommendation from the Committee. I would rather wait until it was argued before me.

THE ACTING CHAIRMAN: I think, as a note to the Supreme Court, this has decided limitations. As a matter of fact, I think, as a note for the public, it is quite useful, and I still think there is some importance. We have met now three or four times on the rules that were supposed to be troublesome. A lot of people think this rule is troublesome. I must confess that I do think so myself, for that matter.

MR. LEMANN: Troublesome or doubtful politically?

THE ACTING CHAIRMAN: I am using the word "troublesome" as covering a lot of ground. Yes, if you want to put it so. If you were to ask me what was going to be the fate of this rule in the Supreme Court, I don't know but that I would want the anti side rather than the pro side.

MR. LEMANN: You wouldn't favor taking it out, would you?

THE ACTING CHAIRMAN: No, I wouldn't, not when you consider the history and the present draft, and so on. But, after all, it seems to me a little odd that we don't even mention the question, because it is a real question. Somebody said that they didn't think the lawyers thought much about it. Of course, the lawyers who aren't in the business don't, but you don't see a lawyer who is in the business of defending a stockholders' suit, or vice versa, but that he brings it up every time.

MR. DODGE: There is no Federal statute on the subject?

THE ACTING CHAIRMAN: I beg your pardon?

MR. LEMANN: This was an equity rule.

THE ACTING CHAIRMAN: No, there is no Federal statute. This is an equity rule.

MR. LEMANN: This is almost verbatim an equity rule.

JUDGE DOBIE: What is that old case?

THE ACTING CHAIRMAN: Hawes v. Oakland.

JUDGE DOBIE: It is verbatim, the decision in Hawes v. Oakland in the equity rule.

THE ACTING CHAIRMAN: At that time they were taking further steps in the Piccard v. Sperry case. I can't say for sure now that I know of any specific cases in the Supreme Court. There are a lot of cases in the trial courts. We have one of ours now that we decided recently that I should think may go up, but at any rate I can't say now. At the time that we had the Piccard v. Sperry case they said they were going right on up. I don't know really what happened. I suppose they probably settled. That is what usually happens.

JUDGE DOBIE: We had one case in which I wrote the opinion, somebody against the National Cash Register Company, and we stood by the rule. There were several grounds for affirming Oakland, and that was one of them.

MR. LEMANN: We just govern rights of access to the Federal courts here. You can't come into the Federal courts under these circumstances without making this proof. If the

fellow says his local law permits him to go into his own court, he can go into his own court, and I would have thought it was perfectly all right, but I don't see any use in--what is that old statement?

JUDGE DOBIE: It is a dirty bird that fouls its own nest.

MR. LEMANN: It raises a doubt, but we don't think it is a good doubt. If we think it is a good doubt, let's say to the Court, "Let's take this rule out," but we don't think so. We think the rule is good. Wait until somebody questions the legitimacy of my child. But I want to tell you that some people don't think so.

THE ACTING CHAIRMAN: That isn't quite so. The Federal courts have been rather apologetic. Take this Gallup v. Caldwell case from the Third Circuit. As I remember, Judge Goodrich wrote that opinion, and he made quite a good deal of apology for it. He said two things, as I recall: first, that until it had been declared invalid, they shouldn't do anything, and second, that there was nothing to show that the state rule was to the contrary. I think you will find a considerably apologetic tone of voice in a good many of the Federal courts.

DEAN MORGAN: When they bring a stockholders' suit, they aren't relying on any Federal right or diversity of citizenship. How can the Federal court say, "You can't come in,"

if you have diversity of citizenship and over $3000 involved, if it is a substantive right?

MR. LEMANN: Substantive right. The Federal courts don't have to give anybody access to the Federal courts for every lapse.

DEAN MORGAN: Substantive rights of citizens of different states, where more than $3000 is involved. Why not, I should like to ask?

MR. LEMANN: Can't you abrogate the citizenship?

DEAN MORGAN: The Supreme Court can't.

MR. LEMANN: Congress has told us we can determine--

DEAN MORGAN (Interposing): They haven't said anything about jurisdiction. They say we haven't anything to do with jurisdiction.

PROFESSOR CHERRY: We started out in the equity rules, and when we had our own doubts, we felt that we shouldn't fail to keep in being what was in the Federal equity rules, isn't that right, even though we didn't know then what the Court might say about it if it came up.

MR. LEMANN: Mr. Morgan raises another doubt. I thought the whole doubt originally suggested was whether we ran into Erie Railroad v. Tompkins.

DEAN MORGAN: Surely. When we had this rule, Erie Railroad v. Tompkins didn't amount to anything, and matters of general law were decided by the Supreme Court as Federal law.

They had this as a settled rule, and consequently we took it. The same thing with reference to burden of pleading, with reference to contributory negligence, and so forth. We never tied it up with burden of proof, because we would have said, if we had thought of it at that time, that the Court would have said burden of proof was a matter to be decided by a general Federal law and that they didn't care anything about the state law. Then along came Erie v. Tompkins. Several rules that we have had in here might have caused lots more debate among us if Erie v. Tompkins had been decided. We have a brand-new question here now, and it isn't clear, by any means. I think it is very doubtful whether this isn't a clear case of substantive law.

THE ACTING CHAIRMAN: I don't want to overstate the position of anybody not here, but I think I am right that, if you go back, you will find that the Chairman was pretty definite about it. I thought, first off, that he was going to have the rule out by main strength, anyhow.

MR. LEMANN: He says there, "At the most, report it to the Supreme Court." That is the most he would do, if you want to go on what he is reported as saying. The way I feel is that we ought to make up our minds whether we think this rule is clearly bad, and if so, we ought to take it out; and if we don't think it is clearly bad, I wouldn't make any apologies for it. My own notion is that, if we don't say to

take it out, we ought not to say anything and let it stay.

THE ACTING CHAIRMAN: I think really, from the standpoint of the discussion, we attach a significance different from what the Chairman meant there.

MR. HAMMOND: I can get the transcript.

MR. LEMANN: I don't know that we ought to stop longer on this. The only point you have here is what you can do with that note.

DEAN MORGAN: Yes. That is quite a different thing.

MR. LEMANN: You vote either to leave it in for anybody or to leave it in for the Supreme Court or to leave it out.

THE ACTING CHAIRMAN: I don't want to insist too much on it. It just seems to me that we give the appearance of dodging one of the more important questions if we don't say something about it. It is in discussion one of the more important questions that have arisen under the rules, and I think it is only fair to say that in fact it is. Therefore, I should think it would be worth while to say that we at least know that something is going on in the world about the rule. I don't see much reason for making a note just for the Supreme Court. I think it is more important to make it to show to the public generally that we are trying to keep up with what is going on in our own subject.

PROFESSOR SUNDERLAND: Suppose we get a lot of advice

from the bar after we submit this to the bar, what will we do with it? We won't do anything about it.

DEAN MORGAN: That is what I think. We won't get any advice from the bar.

PROFESSOR SUNDERLAND: We won't get any, in the first place, and if we got it we wouldn't do anything about it.

MR. LEMANN: We will let people know that we are not asleep at the switch, that we know there is debate about this rule and debate about other rules, too.

DEAN MORGAN: I think you are right that the Supreme Court ought not to attempt to decide it until it is argued.

MR. LEMANN: With all they have to do, I think they would be very ill advised, Eddie.

DEAN MORGAN: They will have to hear argument on it.

MR. LEMANN: I don't think you are going to get anywhere on a note. I think they all know we know that. They all read Moore on Federal practice.

JUDGE DOBIE: Suppose we put this up to the Supreme Court with a little caveat. Do you think that, by approving the rule, they necessarily meant that when the case came before them they were going to hold the same way? Frankly, I don't.

MR. LEMANN: They never heard the arguments on the Federal rules.

JUDGE DOBIE: I say the mere fact that they approved the rule, even if we put a caveat in there, wouldn't mean that

they were going to decide that way when it came up before them. They could very well hold, on argument and all that, that this was substantive law.

MR. LEMANN: It is very embarrassing to put this note up and pass it and to have them say it wasn't good.

JUDGE DOBIE: I don't object to its being embarrassing. I have put things up to them before this, and it didn't embarrass me.

PROFESSOR SUNDERLAND: It doesn't seem to me that there is nearly as much obligation to submit a note to the Supreme Court on a rule which has already been adopted and is in operation as there is with a new rule that we are suggesting.

MR. LEMANN: I think you are right.

PROFESSOR SUNDERLAND: I am in favor of letting this rule ride as it now stands.

MR. LEMANN: I move we omit the note in sending out the material. I move we omit it from any public statement.

MR. DODGE: Second.

THE ACTING CHAIRMAN: It is moved and seconded that we omit any note to Rule 23.

JUDGE DOBIE: But keep the rule?

MR. LEMANN: Oh, yes.

THE ACTING CHAIRMAN: Retaining the rule. Any discussion? If not, all those in favor will say "aye"; those opposed, "no." The "ayes" have it, and it is so voted.

You might be interested in just a point that has come up, which we have just decided. We have had the question raised as to whether (b), being announced as a class action, is not subject to the representative requirements of (a). We had quite a debate on it, and I have gone with the majority of our court in holding that is not. I think Mr. Moore thinks that perhaps I made a mistake.

DEAN MORGAN: What rule is that?

THE ACTING CHAIRMAN: That is 23(a) and (b).

DEAN MORGAN: That is a son-of-a-gun. That is the worst rule in the business. It is lovely on its face. If anybody asks me anything about it, I tell them Bill Moore is the only one who knows anything about class actions, anyhow.

THE ACTING CHAIRMAN: It caused me to be a little worried when he said we might be wrong on 23(b). You can see how it comes up. It is called a class action in (c), and obviously it includes both (a) and (b) as class actions. In this case, a defendant said, "Here, this plaintiff has to show that he adequately represents the stockholders." But we have held that he doesn't need to. Of course, before the rule, take the Ashwander v. TVA case and the Carter Coal case, one poor little stockholder did sue all alone. That is what we held.

PROFESSOR MOORE: Hawes v. Oakland, however, was a class action.

DEAN MORGAN: It was a class action.

THE ACTING CHAIRMAN: Yes, but you can have a class action by a stockholder, and he can also go on his own. That is, there is a difference, I think. I think it was true in the Oakland case that there was a difference between derivative and representative action. Whereas the two might be together, they didn't need to be. The question is whether, by what we did in 23(b), we didn't make the requirement that derivative action must also be a representative action.

DEAN MORGAN: I see.

THE ACTING CHAIRMAN: I think there is a question there.

DEAN MORGAN: I am with you.

THE ACTING CHAIRMAN: That helps me out a little.

DEAN MORGAN: I am with you on that one. I am glad to find that Bill is wrong on one of these class actions. You know you are wrong now, when I am against you.

THE ACTING CHAIRMAN: I think it was an arguable point all right, but I don't think we made as much change in the shareholders' suits as that might mean.

Shall we pass, then, to Rule 24?

JUDGE DOBIE: That was really that case of Mitchell's, the Black Tom case.

THE ACTING CHAIRMAN: That is it, yes.

DEAN MORGAN: Have you any comment on that, Mr. Hammond? Has Mr. Mitchell any comment on 24?

MR. HAMMOND: No.

THE ACTING CHAIRMAN: I don't see that he has.

DEAN MORGAN: "or subject to the control of or disposition by".

THE ACTING CHAIRMAN: This was his suggestion, I think, originally.

JUDGE DOBIE: I think it ought to be adopted.

THE ACTING CHAIRMAN: Unless there is some objection, we will consider that Rule 24 as presented in the draft stands.

Now, Rule 26. Are there any suggestions? Mr. Morgan had a suggestion down at the bottom of the page. Are there any before we get to the bottom of the page? That is on (b). Are there any suggestions as to (a)? If not, we will pass to (b), and on (b) Mr. Morgan has some suggestion of wording.

DEAN MORGAN: I thought it might be "forbid or restrict the scope of inquiry into papers and documents", because you want to forbid in some cases.

MR. DODGE: Surely.

JUDGE DOBIE: "Forbid" instead of "limit".

DEAN MORGAN: "forbid or restrict the scope of inquiry into".

MR. DODGE: "Limit" and "restrict" mean about the same thing.

JUDGE DOBIE: You substitute "forbid" for "limit".

DEAN MORGAN: That is right.

MR. LEMANN: I suppose this is put in here for purposes of emphasis. As a matter of artistic arrangement, I just wondered, as I read it, why we should single this out, because section (b) right now will give you the right to limit the scope of examination. I suppose the thought is that this is something that needs emphasis.

MR. DODGE: Which would do that?

MR. LEMANN: Rule 30(b), generally. Wouldn't the court already have the right under 30(b) to do what the lines 24 to 26 say?

PROFESSOR SUNDERLAND: Rule 30(b) provides that they may make an order that the scope of the examination shall be limited to certain matters.

MR. LEMANN: Or that certain matters shall not be inquired into.

DEAN MORGAN: That is right.

MR. LEMANN: I just said to myself when I read it that this is already there, and it is not very artistic, it seems to me. It is like something else we had back here a while ago, when we took out on this go-around that the court must make these facts appear before it enters the order. You remember that. Didn't we take that out?

JUDGE DOBIE: We have a lot of specific enumerations in 30(b). There is no question about that.

THE ACTING CHAIRMAN: This was the product of a large

number of suggestions to the Committee, questions in some of the cases, and the product of quite a little debate here. You see, one of the questions which has been raised has been how far you could get discovery of the case which has been worked up by the other side, discovery of a claim agent's material, and so on. As a result of considerable discussion, we decided to handle it this way, and I think that it should be made very specific, and more specific than it is in 30.

I am not sure but that it is better for the sake of emphasis to have it here. Of course, you might ask the question whether perhaps more orderly procedure might be to put it in 30, and there is something to be said for that. There isn't a complete answer, except that this is the rule that gives the authority, and it upsets people now.

MR. LEMANN: Yes. Well, I think the only objection is an artistic one. I think the emphasis is good here.

THE ACTING CHAIRMAN: It is an emphasis that is important. Of course, a lot of people will be disappointed that we haven't gone much further. The suggestion is made definitely that we prohibit inquiry generally, but once you start prohibiting, it is pretty hard to know how far to go, and very likely the language you use can be used by some district judges to restrict it much further than we intended.

MR. LEMANN: The new sentence in 22 to 24 reads: "It is not ground for objection that the testimony will be

inadmissible at the trial if the testimony is sought for the purpose of discovering admissible evidence." I think that is clearly correct, and correct under the present rules.

DEAN MORGAN: But it has been held otherwise by a number of courts.

MR. LEMANN: I know it has, but you might put in there, "Always remember that under Rule 30(b) that may be restricted," because this is also subject to abuse. You could go into a good many things.

PROFESSOR SUNDERLAND: It seems to me that that whole sentence really is out of place, because it amounts to this: We state in one rule what you can do under another rule. In Rule 26 we say what you can do under Rule 30. It seems to me that Rule 30 is the one that ought to state what you can do under it.

Furthermore, I think there is another rule that is just as important as Rule 30(b), and that is Rule 34, dealing with documents. I think that Rule 34 ought to have the same provision that Rule 30(b) has with relation to these documents that are gotten up in preparation for trial.

I wonder whether the thing to do wouldn't be to cut out that last sentence and then introduce a specific reference to this sort of document in 30(b) and also in 34.

MR. LEMANN: Also note that in lines 15 and 16 of this page 27, you already have, "Unless otherwise ordered by the

court as provided by Rule 30(b) or (d)". So you are just repeating it right in the same paragraph.

PROFESSOR SUNDERLAND: Yes.

JUDGE DOBIE: Are you going to leave in that sentence, "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony is sought for the purpose of discovering admissible evidence"? I think you went to bat for that, didn't you?

PROFESSOR SUNDERLAND: I believe that ought to be in there.

JUDGE DOBIE: I think so, too.

MR. LEMANN: This other is a point that has given real trouble, as I understand it.

PROFESSOR SUNDERLAND: My suggestion would be that in Rule 30(b), in line 20, we introduce "or that designated restrictions shall be imposed upon inquiry into papers and documents prepared or obtained by the adverse party in the preparation of the case".

Then, in 34--

THE ACTING CHAIRMAN (Interposing): Edson, as you go along, might it not be just as well to say, "in the preparation of the case for trial"? That is an expression we use right along.

PROFESSOR SUNDERLAND: All right; yes.

THE ACTING CHAIRMAN: Did you say there had been some

question about that?

MR. LEMANN: Would you put it on page 32?

PROFESSOR SUNDERLAND: Page 32, line 20.

MR. LEMANN: You would insert it after the word "matters"?

PROFESSOR SUNDERLAND: At the beginning of that line, before the word "or", "or that designated restrictions ...."

MR. LEMANN: "or that inquiry into papers and documents prepared or obtained by the adverse party in the preparation of his case shall be prohibited or restricted"?

MR. DODGE: "forbidden or restricted".

PROFESSOR SUNDERLAND: Then the same thing, in substance, introduced in Rule 34, line 8, (that is on page 37) after the word "control". Add there: "subject to such restrictions as the court may deem just regarding inquiry into papers and documents prepared or obtained by the adverse party in the preparation of the case for trial".

MR. LEMANN: Why not say, "subject to limiting orders under Rule 30(b)"? because you might want to restrict it otherwise.

PROFESSOR SUNDERLAND: All right.

MR. LEMANN: I think you ought to expand that reference in 34 to make it harmonious with 30(b). Don't you think so?

PROFESSOR SUNDERLAND: I think that would be all right. Probably it would be better.

MR. DODGE: Yes. I agree to that.

JUDGE DOBIE: There is no question in your mind that the judge has power to forbid or restrict.

DEAN MORGAN: Oh, no, none at all.

MR. DODGE: What was that?

JUDGE DOBIE: I am of the opinion that, without this amendment, it is in the power of the judge in certain instances to say, "I forbid the inspection of that particular document. I don't think it will serve any useful purpose, and it is a confidential document," or any other good reason he wants to give.

MR. DODGE: As I remember it, a great many criticisms of the rule came to us because it didn't specifically refer to that, and there has been some trouble.

DEAN MORGAN: That part has been abused, going after the other fellow's preparation.

MR. DODGE: Not left to the discretion of the court, but forbidden.

THE ACTING CHAIRMAN: I should like to ask this, Edson: You don't feel that the judge should do it? I mean, you are not making it so that it is a kind of compulsion on the judge?

PROFESSOR SUNDERLAND: Not at all, no.

THE ACTING CHAIRMAN: I think your language ought to make it quite clear that it is in his discretion. I don't

think there should be the conclusion from the change made that every time a litigant comes up and says, "Why, this is going to affect the preparation of my case for trial," the judge must pass on that as a matter of fact and immediately so decide that it does and then restrict it.

PROFESSOR SUNDERLAND: It will come right along with these others in Rule 30(b) that certain matters shall not be inquired into or that the scope of the examination shall be limited to certain matters "or that designated restrictions shall be imposed upon inquiry into papers or documents prepared or obtained by the adverse party in the preparation of the case." It seems to me that the context makes it perfectly clear that it is discretionary in all these instances.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: I guess it does.

PROFESSOR SUNDERLAND: Then, in 34, if you make a reference back to 30(b), you are all right.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: What do you wish to do? Shall we so vote?

JUDGE DOBIE: Put that in the form of a motion.

PROFESSOR SUNDERLAND: I move that we strike out the last sentence in 26(b) and introduce in 30(b), line 20, the language that has been suggested.

DEAN MORGAN: The substance of the language.

PROFESSOR SUNDERLAND: The substance of the language that has been suggested. And that we introduce in 34, line 8, after the word "control", "subject to such protective orders as the court may make", or "subject to any protective order mentioned in Rule 30(b)".

MR. LEMANN: "subject to such protective order as the court may make, as provided in Rule 30(b)".

PROFESSOR SUNDERLAND: "any protective order mentioned in 30(b)".

MR. LEMANN: You will have to polish it up.

PROFESSOR SUNDERLAND: You see, 30(b) relates to oral examination and provides that the court may make the protective orders in the course of an oral examination, so it doesn't apply literally.

JUDGE DOBIE: You want to extend it to the documents.

PROFESSOR SUNDERLAND: I want to extend it to the documents, so "subject to any of the restrictive orders mentioned in 30(b)"--

MR. LEMANN (Interposing): "any applicable".

PROFESSOR SUNDERLAND: "subject to any applicable protective orders mentioned in Rule 30(b)".

MR. LEMANN: I think that covers it. You may have to polish it up, but you have the general idea.

Of course, it is a little tough to practice law these days because the other fellow can go through all your papers and

all your--

JUDGE DOBIE (Interposing): You can go through his.

MR. LEMANN: He can go through yours, and you can go through his, but he gets the benefit of all yours.

DEAN MORGAN: It is just like the English practice that you have to furnish the other side with copies.

MR. LEMANN: You furnish them with everything you do.

DEAN MORGAN: You furnish the other side with copies of all the papers that you are going to introduce.

MR. LEMANN: I had a case recently (I have mentioned it before) where I was made a witness so that I couldn't try the case, and I was examined. My deposition was taken for two weeks in my office, and all my private papers and all my letters to my clients were called for. I could have stood on privilege, but I didn't think I should under the circumstances of the case. They even got the memoranda that I had made for my own guidance in making arguments to the court, and, as the lawyer on the other side said, "That was your innermost thought, was it not, Mr. Lemann?" I said, "Yes, that was my innermost thought".

MR. DODGE: The court would probably have protected you on that.

DEAN MORGAN: I'll be darned if I'd have done that. I wouldn't have given him that stuff.

MR. DODGE: I think the court would have protected you

on that.

MR. LEMANN: It was a fraud case, in which he was accusing me of fraud.

JUDGE DOBIE: I don't think he ought to kidnap your brain child.

THE ACTING CHAIRMAN: Are you ready for the question? That involves the changes indicated in Rule 26(b), Rule 30(b), and Rule 34. Any further discussion? If not, all those in favor will say "aye"; those opposed. It is so voted. (Carried)

... The meeting adjourned at 6:00 p.m. ...

P R O C E E D I N G S

ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

VOLUME III

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TUESDAY MORNING SESSION

April 4, 1944

The meeting reconvened at 9:30 a.m., Judge Charles E. Clark, Acting Chairman, presiding.

THE ACTING CHAIRMAN: Gentlemen, there have been distributed this morning copies of this memorandum, "Recent Decisions on the Federal Rules." That is mainly for information, so that you can keep up with the hottest reports from the Court. If you find food for thought in any of the cases, that will be fine. I do suggest, however, that you may want to look at the résumé of the Supreme Court decision a week ago on the summary judgment. That is down under Rule 56, the Sartor case, which I should think had some troublesome aspects.

I think our understanding was that we would turn momentarily this morning to the eminent domain rule, the condemnation rule. If there is no objection, we will now take that up. Mr. Hammond, will you present it?

MR. HAMMOND: Yes, sir.

THE ACTING CHAIRMAN: I guess you had better tell us first what we should have before us.

MR. HAMMOND: You want a copy of the October 26 draft that was sent out with the material, and then the list of amendments that went with it. There was a letter, dated January 13, signed by Mr. Tolman.

DEAN MORGAN: Committee comments under date of

February 17, too.

MR. HAMMOND: Yes. The letter of transmittal was dated February 25.

MR. LEMANN: Have you an extra copy of the January 13 communication, Mr. Hammond?

MR. HAMMOND: I will get you a copy. Shall we go ahead?

THE ACTING CHAIRMAN: Yes, I should think we might go ahead.

MR. HAMMOND: As Judge Dobie said yesterday, we have really reached an agreement with the Lands Division as to everything except the dismissal of action rule or paragraph. I think that the way to take the thing up is to put your copy of the October 26 draft in front of you, and also the list of amendments, and we can take up the amendments one by one. Do you all have that?

THE ACTING CHAIRMAN: Why don't we do this, Mr. Hammond? You go down through the amendments and state what you wish. Do we need to take up each one, unless there is objection? I should think that we could consider that, unless some member of the Committee raises objection, we accept it. They have been studied, and I should think they are more or less formal, without stopping for a vote on each one of them.

MR. HAMMOND: Yes. I will read what the amendments are. Shall I do that?

THE ACTING CHAIRMAN: Present it any way that will be clear.

MR. HAMMOND: All right. Amendment No. 1 is just a very minor matter of form, and it is in line 11. It is to begin a new paragraph with that sentence in line 11, if there is no objection to that. The reason for making it a new paragraph is just that the first sentence deals with the title of the action, and the other deals with the body of the complaint.

MR. DODGE: Are these amendments which your committee and the Department of Justice have agreed to?

MR. HAMMOND: All except the one on dismissal of action, and then there are three new amendments suggested by the Lands Division which have never been considered by this Committee, and they are Department of Justice amendments A, B, and C.

MR. DODGE: I would suggest, if you are all agreed, that those that are mere matters of form be not adverted to at all.

MR. HAMMOND: All right, sir. You mean you want me to skip those?

MR. DODGE: I should think so. State only those that are of substance.

THE ACTING CHAIRMAN: I guess you will have to use your judgment and state those that you think are important for us to think about. I should think most of these are.

MR. HAMMOND: All right.

Amendment No. 2 arose out of the desire of the Committee to have the complaint state the authority for the taking and the public uses for which the property is sought to be taken, and that sentence in Amendment No. 2 includes those two things.

Shall I go on to the next one? If anybody wants to say anything, just interrupt me, or I shall go right ahead.

Amendment No. 3 will go on page 2 of the 10/26/43 draft and inserts the same provisions regarding a statement in the notice of the authority for taking, the public uses for which the property is sought to be taken.

Amendment No. 4 is purely formal, and 5 and 6 are the same.

Amendment No. 7 is, after the word "attorney" in line 46 of the 10/26/43 draft, insert the words ", in lieu of the service prescribed by Rule 4,". It wasn't clear from the original draft whether that was to be included in the service prescribed by Rule 4 or whether it was to be additional. My recollection is that the Committee wasn't concerned about that at all. They just wanted to know what the Lands Division wanted on it.

Amendment No. 8 is formal, and 9 is formal.

Amendment No. 10 is the insertion of a new subparagraph under subdivision (c)(3). That came up by a statement

Judge Donworth made at the last meeting. He thought that the rule provided that, if you didn't get service upon a person whose name and address were known, there would be a service to "Unknown Owners," but I didn't think that was clear from a reading of the two rules together, the two subparagraphs, (ii) and (iv). This just makes it clear that, even if you know the name and address of the defendant, if you cannot get service that way, then there will be a publication of service to "Unknown Owners." The Lands Division had no objection to that. Of course, if there already has been service to "Unknown Owners," there is no use in starting a new service to them.

Amendment No. 11, line 78. After the word "plaintiff" insert the words "which shall also show the method of service upon each defendant". Then, Amendment No. 12, in line 79, after the word "shall" insert the words "suffice to justify the method of service upon each defendant and shall have like force and effect as the return of the marshal."

DEAN MORGAN: That is what I have objection to. It seems to me that is going beyond the limit to say that the certificate of the attorney shall suffice to justify the method of service because he didn't get an order of the court in a place where he was supposed to have an order of the court. It would cure the thing if he just "certified," but I can't go that far.

PROFESSOR CHERRY: I think we were all opposed to it

when that came up.

DEAN MORGAN: Before, I objected to the attorney's certificate being the equivalent of a marshal's return, but I was overruled on that. This goes even a step farther than that, and it seems to me that goes beyond the verge.

MR. LEMANN: What was the argument? To expedite the proceeding and to obviate any objection to the service? Does the Department of Justice suggest this?

MR. HAMMOND: I think that this was originally worked out before the last meeting, and these particular words were used in a prior draft.

DEAN MORGAN: Oh, no, they weren't used there, Mr. Hammond, because the draft we had last time, as I remember it, merely made the return of the certificate the equivalent of the return of the marshal. That is all.

MR. LEMANN: That is there now.

DEAN MORGAN: The return of the marshal wouldn't do this; it wouldn't suffice to justify the method of service at all.

PROFESSOR CHERRY: No. This is something new.

MR. LEMANN: I wonder why there is a necessity for this, because that is a judicial function, really, isn't it?

DEAN MORGAN: Absolutely.

MR. LEMANN: There is no other method of service upon each defendant. Correct?

MR. DODGE: "Suffice to justify" means conclusive of service.

DEAN MORGAN: Absolutely.

MR. LEMANN: Suppose one of the defendants wants to claim that he wasn't unknown, that he was there and could have been served, and that he never heard of the case. "It is ridiculous to say I was unknown and to publish a notice." In the draft I read, if I saw the latest one, this is to be published only twice, isn't it? The notice of publication is only to be for two weeks, two issues.

MR. HAMMOND: Yes, sir.

MR. LEMANN: It seems very little, according to what I am accustomed to, to have just two newspapers, because you might easily miss two.

MR. DODGE: Would the Government object if we struck these words out?

MR. HAMMOND: I don't know that they would, no, seriously. If you recall, at the last meeting we had a lot of discussion about whether there should be an order of court. Mr. Mitchell suggested to them that they ought to have an order of court in advance, before they could publish against unknown owners. The representatives of the Lands Division were up here, Mr. Lemann, and they stated the reasons that they didn't want that. They seemed to convince the Committee that it would be too burdensome and troublesome to go to the court

first to get an order for a publication against unknown owners.

MR. DODGE: That has nothing to do with this particular point, has it?

DEAN MORGAN: No.

THE ACTING CHAIRMAN: I had stepped out. May I ask what are the particular words?

JUDGE DOBIE: What you object to, as I understand it, Eddie, is that you don't want the plaintiff's attorney to be in an impartial role and have his certificate conclusive.

DEAN MORGAN: When you say that his certificate shall suffice to justify the method of service upon each defendant, it is just too much for my stomach.

JUDGE DOBIE: In other words, you have the counsel for the United States certifying and stating certain things, and that is practically the same as the marshal's return. Isn't that it?

DEAN MORGAN: It is more than that. The marshal's return never justifies the method of service.

PROFESSOR SUNDERLAND: It just says what he has done.

DEAN MORGAN: It just tells what he has done.

MR. LEMANN: At most, it would be a presumption that what he did was right, and it would be only a presumption.

THE ACTING CHAIRMAN: The original appears in this draft of November. They thought it quite important, and we had quite a discussion about that before.

DEAN MORGAN: As to the effect of the marshal's return. We had that.

MR. HAMMOND: But Mr. Morgan is not objecting to that now. He is objecting to the insertion before that of the words "suffice to justify the method of service".

THE ACTING CHAIRMAN: I don't quite recall the background of this particularly.

DEAN MORGAN: This wasn't discussed.

THE ACTING CHAIRMAN: That is true. We haven't had it before. But I am not quite sure--

DEAN MORGAN (Interposing): You were in the Committee, Charles. I forgot.

MR. HAMMOND: It was in a prior draft, and there was some discussion of those words at the last meeting. You recall that, Mr. Sunderland, do you?

PROFESSOR SUNDERLAND: I don't recall that.

DEAN MORGAN: No. I am sure there wasn't.

MR. DODGE: I don't recall that we discussed that.

MR. LEMANN: You move to strike it out, Mr. Morgan?

DEAN MORGAN: I move not to adopt that amendment.

PROFESSOR CHERRY: It is a proposed amendment.

MR. LEMANN: I second the motion.

THE ACTING CHAIRMAN: Is there any discussion?

DEAN MORGAN: I gave you my notion, Charles, in the copy that I sent you, at your request.

THE ACTING CHAIRMAN: Yes.

MR. HAMMOND: I tell you what I will do. I will look up the transcript sometime on that from the last meeting, but you can take it out now, if you want to, and just not adopt it. If I find anything in there that would shed any further light--

MR. LEMANN (Interposing): It is strange that Major Tolman didn't discuss it. In his memorandum he says: "Many of those proposals have already been approved by the Committee at its last session. Others are matters of form and style and require no discussion. This communication will not deal with proposals of either of those categories." He assumes, apparently, that this is within one of those categories. I hardly think I would call that form or style.

DEAN MORGAN: That is substantive.

JUDGE DOBIE: There are ample methods of service. If we strike this out, it wouldn't hamstring the Government.

DEAN MORGAN: No.

JUDGE DOBIE: In other words, this is going far beyond anything we have ever done, isn't it, as Mr. Morgan says?

THE ACTING CHAIRMAN: I have an idea that probably it is more innocent than we are thinking, but it is true that the words do sound pretty pretentious. I wonder if the Department doesn't have some different idea, that this is just going to take the place of the order of publication, so to speak. I don't believe they intend it, but I can't say from background

just what they did intend to accomplish. It is true, the words standing all alone could be stretched pretty far. I can't quite visualize. I suppose it is that the certificate of the attorney shall be in effect proof of compliance with the order of publication, and I doubt that it would be much more than that.

DEAN MORGAN: You don't have an order of publication.

PROFESSOR CHERRY: You don't have an order at all.

THE ACTING CHAIRMAN: You can have.

DEAN MORGAN: Oh, yes, you can have. I noticed that one place.

JUDGE DOBIE: You want to strike out lines 77--

DEAN MORGAN (Interposing): I want to move that the proposed amendment in line 79 be not adopted.

JUDGE DOBIE: You are willing to leave 77 and 78 in?

DEAN MORGAN: Oh, yes; that is all right.

JUDGE DOBIE: It is all right to prove it by certificate; it is proof, but you don't want it to have the effect of the marshal's return.

MR. DODGE: You don't want it to have more than the effect of the marshal's return. We want to leave it with the same effect as a marshal's return, and not to be conclusive of proper service.

DEAN MORGAN: Of the method of service. Do you get the point there, Judge? They are proposing to put in after

"shall" in line 79 the words "suffice to justify the method of service upon each defendant and shall".

JUDGE DOBIE: No, I didn't have those words.

DEAN MORGAN: That is what I don't want.

THE ACTING CHAIRMAN: Of course, in one sense it may mean nothing more than what is in (3), which gives a good deal of choice, and (ii) says "At his election". This is a kind of endorsement of what he has elected, I suppose.

MR. HAMMOND: I think that was it.

DEAN MORGAN: If you have it in already, you don't need this.

PROFESSOR CHERRY: This would go way beyond mailing to his address.

THE ACTING CHAIRMAN: I think we might strike it out, subject to whatever you may find.

MR. HAMMOND: All right.

THE ACTING CHAIRMAN: I don't really think they need it. Of course, it is a kind of threatening thing, you see. I don't think they probably intend to carry it as far as the words might justify, but you can look it up and see if you find anything later.

All those in favor of the motion will say "aye"; those opposed. The "ayes" have it, and that particular amendment, Amendment No. 12, line 79, is not approved.

PROFESSOR SUNDERLAND: There is another slight point

there. I notice they use the term "official return" in lines 76 and 77 for the statement of the service made by one specially appointed by the court. He is not an official, and in Rule 4 we expressly state that in that case it will be an affidavit, not a return. In other words, we are not sticking to our definition of what we mean by a return. I don't think it can be a return when it is made by a person specially appointed, who is not an official.

DEAN MORGAN: "one specially appointed by the court".

PROFESSOR SUNDERLAND: He can't make a return. He has to make an affidavit. We provide in our Rule 4 that the one specially appointed shall make an affidavit.

DEAN MORGAN: I see. That is right.

PROFESSOR SUNDERLAND: We are just using the wrong word here, that is all.

JUDGE DOBIE: Would you say "by return or by affidavit"?

PROFESSOR SUNDERLAND: Yes.

JUDGE DOBIE: It is an official return when you have it by the marshal or the deputy, but it is an affidavit when it is by a person specially designated.

PROFESSOR SUNDERLAND: Yes.

THE ACTING CHAIRMAN: Do you want to put that in the form of a definite suggestion?

PROFESSOR SUNDERLAND: I think it would be clear

enough if we said "shall be proved by official return or affidavit."

DEAN MORGAN: You move to insert that in line 77?

PROFESSOR SUNDERLAND: Yes.

DEAN MORGAN: I second the motion.

THE ACTING CHAIRMAN: What do you say to that, Mr. Hammond?

MR. HAMMOND: I was just looking back to the other rule, our own rule.

PROFESSOR SUNDERLAND: Rule 4(g) provides: "If service is made by a person other than a United States marshal or his deputy, he shall make affidavit thereof."

MR. HAMMOND: Yes, I see. What do you want to insert?

DEAN MORGAN: Just "or affidavit" after "return".

MR. HAMMOND: I see.

PROFESSOR SUNDERLAND: Mr. Moore suggests "shall be proved as provided in Rule 4(g)." How about that?

PROFESSOR CHERRY: That would be better, because "return or affidavit" is a little awkward.

PROFESSOR SUNDERLAND: It is a little bit awkward.

PROFESSOR CHERRY: It isn't meant to be an alternative. It is one return.

PROFESSOR SUNDERLAND: I suggest the wording: "shall be proved as provided in Rule 4(g)."

JUDGE DOBIE: Substitute that for "by his official return"?

PROFESSOR SUNDERLAND: Yes.

... The motion was regularly seconded ...

THE ACTING CHAIRMAN: Any discussion? All those in favor will say "aye"; those opposed. So voted. (Carried)

MR. HAMMOND: Shall be proved as provided in?

JUDGE DOBIE: Rule 4(g).

DEAN MORGAN: Or (d).

THE ACTING CHAIRMAN: That is in lines 76 and 77 of the October 26 draft.

DEAN MORGAN: Right.

MR. HAMMOND: Of course, 4(g) doesn't say--

DEAN MORGAN (Interposing): Rule 4(d), isn't it?

PROFESSOR MOORE: (g).

DEAN MORGAN: Is it (g)?

MR. LEMANN: Yes.

PROFESSOR SUNDERLAND: As a matter of fact, (g) isn't very complete.

PROFESSOR MOORE: It ought to be made complete.

PROFESSOR SUNDERLAND: Yes.

DEAN MORGAN: Yes.

PROFESSOR SUNDERLAND: It is just an implication. It doesn't say in terms that the marshal shall make the return, but it implies it.

THE ACTING CHAIRMAN: Is there anything more on that?

JUDGE DOBIE: I think that will take care of it. That won't give any trouble.

PROFESSOR SUNDERLAND: It hasn't given any trouble heretofore.

THE ACTING CHAIRMAN: All right, let's go ahead, then.

MR. HAMMOND: The next one is Department of Justice Amendment A. This is a new amendment of theirs in line 98. They want to change the words "final judgment" to "compensation is determined and paid", so that the sentence will read: "The plaintiff may as a matter of course and without order of court amend the complaint at any time before compensation is determined and paid."

JUDGE DOBIE: In other words, they can amend under this after the compensation is determined, but before it is paid.

DEAN MORGAN: Just what is the purpose of that, Mr. Hammond?

MR. HAMMOND: They say--there is an exhibit to this, Exhibit A, you see, attached to the list of amendments.

DEAN MORGAN: I know. They don't like the term "final judgment." I grant that. But I want to know why they want to amend as of course after compensation has once been determined, without any order of court or anything of that sort. They might amend the description by cutting out one piece and

thereby effect a dismissal.

THE ACTING CHAIRMAN: According to their memorandum, it is a little different from that. They say that it has been held in my Circuit, as well as others, that an appeal lies from the judgment of taking, not from the fixing of money but just from the formal judgment of taking.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: Actually, that is one of the earliest of the steps. It comes very soon. As a matter of fact, I think very often it looks as though it were a matter of form. I don't suppose it is, but I mean as a practical matter.

DEAN MORGAN: It is under our present procedure; it is just a matter of form now, isn't it?

MR. LEMANN: I am a little confused as to how they do this thing. I got the impression, reading this memorandum of the Department, that after compensation is fixed, if the Government doesn't like it, they can say, "We don't want the property. It is too much money. The jury has brought in an excess valuation, and to hell with it. We don't want it."

DEAN MORGAN: That is right.

MR. LEMANN: That is what they mean, that until it is paid, even after it has been fixed, the thing isn't finished. Is that right, Mr. Hammond? On the other hand, we talk about a declaration of taking that may come even before the

compensation is fixed. When that is done, they are irrevocably committed to take it. Is that right?

THE ACTING CHAIRMAN: That is correct, yes.

MR. LEMANN: They take a chance, then, on what the jury does vote. They say, "We have to have the property. We absolutely have to have the property." They go in and get a judgment of taking, and they take it before they pay for it, before it is even determined how much they are to pay for it, but they have to have it for some paramount purpose and need, so they enter this judgment of taking.

Am I analyzing this right? Is that the way it goes?

SENATOR LOFTIN: Yes, that is quite right. They have done that all over the State of Florida.

MR. LEMANN: Then after they have done that, Scott, they can't recede.

SENATOR LOFTIN: There are some right nice questions involved as to how far they can recede after they go to trial and on the question of compensation.

MR. LEMANN: After they take a judgment of taking, they can't recede, can they?

SENATOR LOFTIN: They might not recede. They might take it up at a certain time. They usually take it either outright or by the year.

MR. LEMANN: For the use of it; but whatever they say they are taking in that judgment, they are bound to take.

SENATOR LOFTIN: At least they have to pay for it as long as they keep it.

MR. LEMANN: Yes.

DEAN MORGAN: But suppose they don't want to keep it; suppose they back out.

JUDGE DOBIE: I understand that is the later one.

DEAN MORGAN: That is the later one.

JUDGE DOBIE: The Government want the right to go in and take it and do everything they want. They say, "We think this is a $50,000 piece of property, and if the jury doesn't agree with them and says, "No, you have to pay $75,000," the Government wants the right, after putting the owner to all that expense, to end the trial, to go in and dismiss.

PROFESSOR CHERRY: They wouldn't need to dismiss if they can do this. They could amend it down to dismiss the things that cause the trouble.

MR. HAMMOND: Mr. Morgan brought up that point, and I felt more or less the same way. Why should they be able to dismiss at any such late date as that? Suppose I read you a little memorandum I wrote about this amendment.

"The excerpt from the letter of Mr. Littell to Mr. Tolman, dated January 8, 1944, and quoted in Exhibit A, further demonstrates, I think, the ambiguity of the words 'final judgment' in condemnation actions. So, as between 'before final judgment' and 'before compensation is determined and paid'

I think the latter is preferable. But I fail to see the reason, and have never heard any, why the Government should have the right, as a matter of course and without court order, to amend the complaint up to any such late date in the proceeding as final judgment or before compensation is determined and paid, and I am particularly concerned about what the Government may do in the following situation if it is given the power to so amend the complaint up to either of such late dates.

"The Government files a complaint in condemnation. Thereafter, and before a final judgment, and before compensation is determined and paid, it enters into possession and actually takes some of the property included in the complaint. Can the Government thereafter, under this amendment provision, amend the complaint so as to exclude the property taken and dismiss as to that property? I don't see why not. And that it may want and attempt to do so is shown by United States v. Sunset Cemetery Company" (which you gave us a reference to), "where they attempted to do so even in a case where a declaration of taking had been filed.

"Of course, if subdivision (h), Dismissal of the Action, is amended by any one of the three suggested amendments, it might be argued that the Government could not dismiss in this situation, but with the amendment provision reading the way it does, it would at least be doubtful, and some court might with some justification hold that by the amendment provision

we have given the Government power to eliminate from the proceeding the property taken, and therefore, after that is done, the Government can dismiss in spite of what subdivision (h), Dismissal of the Action, says.

"I therefore think that at least something should be done in the amendment subdivision about this particular situation and, in the absence of any knowledge on my part of any reason why the Government should be given this power to amend as of course and without court order up until any such late events in the proceeding, I am not in favor of giving it to them."

JUDGE DOBIE: How late do you think they ought to be allowed to amend, to have the right to amend as a matter of course?

MR. HAMMOND: If you will let me go on with this, I smoked them out on it a little bit.

JUDGE DOBIE: I beg your pardon.

MR. HAMMOND: "If it is not to be given them, I see no reason why the general rule on amendment of pleadings, Rule 15, should not be applicable to condemnation proceedings." Then I state how that could be done.

"If sufficient reasons are shown for the Government's need of this power, I would add a qualifying or 'except' clause to the amendment subdivision of the condemnation rule covering the particular situation I have hereinbefore referred

to so as to eliminate any doubt or question as to whether the Government has the power to amend and then dismiss in that situation. Thus, the following clause could be added after the words 'before compensation is determined and paid': "but the plaintiff may not amend the complaint so as to exclude from the action anything as to which there has been a taking under the condemnation statute used or as to which there has been an actual taking.'"

Then I suggest to Mr. Tolman that he write to Mr. Littell and ask him why he needs that power to amend at any such late date, and I have a letter here from Mr. Littell. "Dear Major Tolman:

"This will acknowledge receipt of your letter of February 8, 1944, in regard to subdivision (e), Amendment of Pleadings, in which you suggest that in lieu of the terms 'final judgment' or 'compensation is determined and paid' the provisions of Rule 15 of the Federal Rules of Civil Procedure perhaps should be left to apply." That is the general rule on amendments.

"Almost from the beginning of our study of a proposed condemnation rule, careful consideration has been given to working out a provision as to the time after which the plaintiff should not be allowed to amend as of course. As an abstract proposition the right to amend as of course at any time before the determination and payment of compensation has the semblance

of being unduly favorable to the plaintiff. I believe, however, that we should be very careful to distinguish a condemnation proceeding from the ordinary action, and viewed in this perspective there are, I think, strong reasons to support the draft of the subdivision which I sent to you with my letter of December 27.

"It has been our experience that the vast majority of all amendments which are made by the plaintiff provide merely for formal and technical changes which do not affect any substantial change in the character of the proceedings. I believe that I can say safely that at least 75 per cent of the amendments which we make are for the purpose of clarifying or correcting the description of the property taken; I use the term 'clarifying or correcting' in the sense of rendering certain a description which while probably sufficient as a matter of law may, due to the pressure of work or for some other reason, contain errors which are clerical or even typographic. It would seem to me to be entirely unnecessary in respect to such a class of amendments to require leave of court or consent of the parties in advance as would be required by the provisions of Rule 15.

"Turning to a classification of the remaining 25 per cent of amendments which we have found from experience to be made in condemnation proceedings, I will say that nearly all of them involve such matters as the inclusion or exclusion of

certain interests in the property condemned or a change in the quantum or character of the estate to be acquired. For instance, we may be advised by the War Department that an unencumbered fee simple title is necessary and will proceed to file a petition accordingly. Subsequently that Department will decide that there is no occasion for the forced removal of an existing power line, road or related easement, and so we will amend the petition to provide for a fee title subject to such easement.

"An exceedingly small number of amendments (which I judge will be made not more often than once in one hundred times) involve a substantial right of the landowner. In such cases the proposed draft of subdivision (e) which I sent you would nevertheless seem to protect the landowner. While it is true that under the proposal neither leave of court nor consent is required in advance, the plaintiff is required to serve notice of the filing upon the parties affected thereby, and at least one copy of the amendment is required to be furnished to the clerk for the use of the defendants. Any party affected thereby is given the same time to answer, if he believes an answer necessary, as he is given to answer the original complaint. Moreover, although under the proposal the amendment would be made as of course, there would seem to be no question that any party after receiving notice of the filing of the amendment could appear, move to have it stricken and secure

adjudication of any right prejudiced by the amendment.

"When one considers the numerous defendants involved in an ordinary condemnation proceeding, the experience of this Division that at least three-fourths of all amendments relate to simple matters of description or other formal matters, and the fact that the defendants are not deprived of their day in court in any event, I feel that the right to amend as of course at any time before compensation is ascertained and paid is quite reasonable. The provisions of Rule 15 would, on the other hand, cast a great burden upon the plaintiff and the court, which I believe is unwarranted. In the event, however, that the Committee concludes that the determinative time should be put forward, I suggest that the time of trial on the issue of compensation be used. I am unable to suggest any earlier time without going back to Rule 15, and if some compromise is made, the time of trial would be, I think, the most reasonable point to select.

"With kind regards, I am

"Sincerely,

"Norman M. Littell

"Assistant Attorney General"

DEAN MORGAN: It seems to me that you would accomplish their objective if you provided that the notice of amendment should be served upon the parties as they do here, provided the amendment should not go into effect until a certain

time thereafter, in which time the parties would have a chance to appear and object.

MR. DODGE: All we are afraid of is that by the amendment they will in effect dismiss part of the case.

DEAN MORGAN: Partly that, and partly affect the interests of the landowner.

THE ACTING CHAIRMAN: Of course, you want to have in mind that this may be very often and of great interest to the landowner, and you don't want to stop that.

DEAN MORGAN: After two months.

THE ACTING CHAIRMAN: As you know, nothing is going to stop the War Department, and Littell has to do what he is told, or he isn't doing the job.

Their practice, as I see it and as Littell more or less indicates, is that the War Department says, "We have to have this big tract," and then they file the formal taking. It is taken within a few hours. Littell has a record he is very proud of, of the time when the Government takes title. I have acted as district judge and have signed some of those orders. The first thing the property owner may know is that the Government has the property. But in a sense nothing has happened yet. That is on paper.

Then, the War Department often finds that it doesn't need all that it has claimed. Then they start a process of withdrawing.

It isn't going to do us any good to sit here and say the War Department ought not to do that way. They are just going to, as we know, and if we push them further, the War Department will be worse, I think. I mean, the War Department isn't going to be hampered, and if it is going to sacrifice the property owner more to grab and keep, it will. Therefore, we have to deal with them in reality somewhat, and we want to have it some way that when Littell works it out and can relieve some property owner from some details of it or perhaps relieve him altogether, he can do it, by all means.

MR. DODGE: If the other fellow agrees. Suppose that the Government has taken the land for one year, has kept the farmer from raising any crops on it and from doing anything with it, and then after that year has expired, by amendment seeks to discontinue as to three-quarters of the land, the use of which the owner has been deprived. That is in effect a dismissal after it has caused damage.

THE ACTING CHAIRMAN: Of course, I would agree that they certainly ought to pay, but isn't that the other point? Isn't that the matter of the dismissal rule that we have been worrying about?

MR. DODGE: That is what we are afraid of, really, here. Suppose we should add to the words they propose: "provided, however, that no amendment shall have the effect of a dismissal which would not be permitted under Rule 8," or

whatever it is.

THE ACTING CHAIRMAN: That, I should think, would be the idea. Isn't that it, Mr. Hammond?

MR. HAMMOND: Something like that.

DEAN MORGAN: That is it.

MR. LEMANN: If they come in and amend it at any time as they propose before compensation has been paid, the case has really already been tried, hasn't it, and the compensation fixed. Logically, they could come in and say, "We didn't object to certain easements originally." Then they change their mind after compensation has been fixed, and they say, "No, we can't have these telegraph lines, we can't have these drainage ditches, we can't have oil wells on the property. We find we have to get rid of them." So they amend then to take more than they originally proposed to take. If you adopted their language, they could do that, I suppose, even after compensation had been fixed. Yet, it wouldn't make any sense. The court would then have to say, "You will have to change that compensation because you are taking more," wouldn't he? You would have to have another trial.

MR. DODGE: Another trial, yes.

MR. LEMANN: I wonder whether that will work in logically in this proposed language.

JUDGE DOBIE: I rather doubt it.

MR. LEMANN: Didn't you cover that in your amendment

about taking more property? I wasn't sure that I followed all of your counter-suggestion.

JUDGE DOBIE: Monte, I rather doubt, from what they said here and a good deal that they said before us in our Judicial Conference in North Carolina and from that letter, that what they would normally do would be to take as much as they started out to take. They are pretty likely to say, "We want the whole thing," and then the War Department may say, "We don't want all of it."

MR. LEMANN: But the other thing might happen.

JUDGE DOBIE: Of course it might. I want to do anything we can to expedite these things, because we have a great many of them in our Circuit. Of course, in Virginia, around Norfolk, there have been fabulous numbers of them, up, I think, into the thousands, and I want to do anything I can to make this thing easy and expeditious. But I have the same feeling that I think most of us have, that we ought not to allow the Government to go ahead and seize a man's property, have the case tried, compensation determined, and have the use of it, and then before compensation is paid, to say, "We don't want this man's property" and have a right to amend as a matter of course. That is what I am afraid of.

MR. DODGE: That ties in with the provisions that we are coming to later.

JUDGE DOBIE: If these were formal amendments, I

wouldn't object; but if they are substance, I think it is really going quite far.

DEAN MORGAN: How about this suggestion of Mr. Littell's that they can make this amendment at any time before trial as to the amount of compensation?

MR. LEMANN: That would cover the case I put.

DEAN MORGAN: Then say, "provided that they shall not amend so as to dismiss."

SENATOR LOFTIN: Suppose they kept it for a year and came on for trial, and on the day of the trial they dismissed as to half of the property.

DEAN MORGAN: We say, adding Mr. Dodge's statement, too, that it should not operate to be a dismissal, you see; both those things: time of trial and then preventing the dismissal.

SENATOR LOFTIN: I am in favor of anything that will protect the property owner in situations of that kind.

MR. DODGE: He is the fellow we have to look after here.

SENATOR LOFTIN: Yes.

MR. DODGE: Nobody is representing him, except our subcommittee.

THE ACTING CHAIRMAN: That, of course, is true, but we don't want to be too theoretical, so that we make him worse off.

MR. DODGE: Oh, no.

THE ACTING CHAIRMAN: I mean the war is going forward, and we may get him just turned down. I should think this is all right, only I wonder about the trial.

DEAN MORGAN: He said trial of the question of compensation.

MR. HAMMOND: Here are his exact words: "I suggest that the time of trial on the issue of compensation be used."

THE ACTING CHAIRMAN: Still, I was going to say, trial is always a bit indefinite.

MR. HAMMOND: Yes, I think so.

THE ACTING CHAIRMAN: I don't see why there it shouldn't be the judgment fixing the compensation.

DEAN MORGAN: Oh, no.

THE ACTING CHAIRMAN: Why not?

PROFESSOR CHERRY: They will wait and see what the verdict is. Then if they don't like it, they will amend it all out of whack.

THE ACTING CHAIRMAN: That goes back a good deal to the other question of dismissal that they have made. If there is no appropriation, what are they going to do? And what are we going to do, too?

PROFESSOR CHERRY: You can't do anything, but, on the other hand, if there isn't appropriation, what would they be allowed to do then?

MR. DODGE: Why should we give him more than he is willing to take? He is willing to take the beginning of the trial on the issue of compensation.

THE ACTING CHAIRMAN: Of course, I think it has to be that. It has to be what Mr. Dodge says. If you don't like the suggestion I just made, it has to be the opening of the trial or the beginning of the trial.

DEAN MORGAN: The beginning of trial is what you mean.

MR. DODGE: With the proviso that nothing should operate for discontinuance except as provided in the later rule.

DEAN MORGAN: Yes.

MR. DODGE: That ought to satisfy them.

MR. HAMMOND: You say the beginning of trial. Maybe something might come up in the testimony, and they might want to amend before--

PROFESSOR CHERRY (Interposing): You are right in court then.

DEAN MORGAN: You see, they are in trial in court, and there is no trouble about it at all.

MR. DODGE: Weren't his words "the beginning of the trial" or "before the trial"?

MR. HAMMOND: "In the event, however, that the Committee concludes that the determinative time should be put forward, I suggest that the time of trial on the issue of compensation be used."

MR. DODGE: Before the trial. I move that we accept those words, with the proviso that no amendment should operate as a discontinuance which would not be permitted under the later rule.

DEAN MORGAN: Second the motion.

JUDGE DOBIE: That adopts the trial?

MR. DODGE: The trial.

PROFESSOR SUNDERLAND: The beginning of trial.

MR. DODGE: "Before the trial" would mean before the beginning of the trial, wouldn't it?

MR. HAMMOND: May I get the exact words on that?

THE ACTING CHAIRMAN: You had better come back to this. Mr. Dodge's motion was to accept Mr. Littell's words. You had better read his words again.

MR. HAMMOND: Yes, I know.

MR. DODGE: Before the time of the trial.

THE ACTING CHAIRMAN: That is a little modification of his words, isn't it?

MR. DODGE: Isn't that what he said? Before the time of the trial?

MR. HAMMOND: "In the event .... that the determinative time should be put forward, I suggest that the time of trial on the issue of compensation be used."

MR. DODGE: Time of trial.

MR. LEMANN: On the issue of compensation. There might

be some other.

THE ACTING CHAIRMAN: We say "before the time". Maybe they are the same thing. Let's be clear which we are going to say.

MR. DODGE: He is going to substitute for "final judgment and payment of the award" the "time of trial". "Before" is in there anyway; the word "before" or "until".

MR. LEMANN: Time of trial on the issue of compensation.

SENATOR LOFTIN: "Before" is already in there.

MR. LEMANN: You are going to add to that ....?

MR. DODGE: "Provided, however ...."

THE ACTING CHAIRMAN: I will state it. See if I have it right. Mr. Dodge moves in line 98 of the October draft, after the word "before", that there be inserted "the time of trial of the issue of compensation."

MR. DODGE: "provided, however ...."

THE ACTING CHAIRMAN: Don't we usually say "except"?

PROFESSOR CHERRY: Or "but".

THE ACTING CHAIRMAN: "except that no judgment of dismissal shall be made contrary to the provisions of subdivision (h)".

MR. DODGE: "except that no amendment should be made which will have the effect of dismissal contrary to the provisions of subdivision (h)".

THE ACTING CHAIRMAN: All right. Is there any further discussion?

MR. LEMANN: In discussing it, I wondered whether the language suggested for dismissal could be used. On the last page of Major Tolman's last memorandum, of February 25, 1944, he says: "The subcommittee chairman submits another draft which adopts Mr. Hammond's ideas with some modifications of phraseology. It reads as follows:

"'(1) On Motion of Plaintiff. If the plaintiff desires to dismiss a condemnation action as to all or any of the property, he shall serve on the defendants whose interest will be affected thereby, and not in default, a motion to dismiss. The plaintiff shall not be entitled to dismiss as to any property if possession has been taken, whether actual or by implication of law. ....'"

As I read that, I wondered if that could be used. You pulled it in--

MR. DODGE (Interposing): By reference.

MR. LEMANN: --by reference. I wondered if you couldn't take it bodily as the test for amendments also.

MR. DODGE: I think we had better refer to the rule as we are later going to adopt it.

MR. LEMANN: Only write in the same words.

MR. HAMMOND: That is what I suggested, using my draft, and not Major Tolman's. The way I had it was this.

MR. LEMANN: You are talking about amendments now?

MR. HAMMOND: Yes. I would add: "but the plaintiff may not amend the complaint so as to exclude from the action anything as to which there has been a taking under the condemnation statute used or as to which there has been an actual taking."

THE ACTING CHAIRMAN: Mr. Hammond, I was a little worried about that first alternative, "as to which there has been a taking under the condemnation statute used". Doesn't that mean formal entry of taking just a whole tract? Doesn't that defeat--

DEAN MORGAN (Interposing): It is a thing we have to discuss, I suppose, Charles, under dismissal, and that is why I think it is a perfectly good thing to refer to (h).

MR. DODGE: You have dismissal by consent in there, too.

MR. HAMMOND: Let's have Mr. Dodge's wording there again.

THE ACTING CHAIRMAN: Mr. Oglebay says he has it. Suppose you read it.

MR. OGLEBAY: I understand that the motion was to add after the word "before" in line 98, the following words: "time of trial of the issue of compensation, except that no amendment shall be made which has the effect of a dismissal under subdivision (h)."

THE ACTING CHAIRMAN: As a matter of wording, "which has the effect of a dismissal contrary to subdivision (h)."

MR. DODGE: That is what I meant.

DEAN MORGAN: That is what you said.

MR. LEMANN: "which would result in a dismissal not permitted by subdivision (h)."

THE ACTING CHAIRMAN: That is better.

MR. HAMMOND: "except that no amendment shall be made which will result in a dismissal not permitted under subdivision (h)."

DEAN MORGAN: That is right; that is the thing.

JUDGE DOBIE: That sounds all right, I think.

MR. LEMANN: This applies to "The plaintiff may as a matter of course and without order of court amend the complaint at any time".

DEAN MORGAN: That is right.

MR. LEMANN: Is it quite plain that under the rules otherwise they can amend at other times with an order of the court?

DEAN MORGAN: By 15, yes.

MR. LEMANN: I think that is plain.

DEAN MORGAN: Rule 15 makes that.

THE ACTING CHAIRMAN: Do you think Rule 15 would cover? Suppose it is held that the original taking is a final judgment, would Rule 15 still apply?

DEAN MORGAN: It says: "Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

JUDGE DOBIE: Any time by leave of court, as I understand it.

MR. DODGE: That is right.

THE ACTING CHAIRMAN: This question of judgment comes in. I think that is probably all right. Nothing is said about judgment in (a), but look at (b), which says that a certain type of amendment (in the second sentence) can be made "even after judgment".

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: There might be an implication that under (a) the amendment is not to be made even after judgment. I don't know. I just throw that out. I suppose that wouldn't affect Mr. Dodge's immediate motion, anyway.

DEAN MORGAN: I should think that would be an a fortiori thing, Charlie. If you can amend as of course at any time, and the judgment of taking is before the amendment, of course, obviously, you can get an amendment with leave of court at the trial.

THE ACTING CHAIRMAN: I should think so. Are you ready for the question on Mr. Dodge's motion?

SENATOR LOFTIN: Question.

THE ACTING CHAIRMAN: All those in favor say "aye"; those opposed. So voted. (Carried)

MR. HAMMOND: The next amendment is 13, lines 98 to 100, and that is just a rephrasing of that.

DEAN MORGAN: It makes it clearer.

MR. HAMMOND: It is to make it clear and to take care of that business where under the original rule we didn't have any notice to a party who was in default. Mr. Mitchell suggested, suppose they make an amendment whereby they take some more of his property. He should have a notice. I think that clears it up. You see, both the ones that are in default and the ones that are not in default will get notice, in accordance with the rule.

DEAN MORGAN: I think that is all right; yes.

MR. HAMMOND: Department of Justice Amendment B, lines 102 to 104. That is to strike that sentence and to insert another sentence. That is a new suggestion. I think it is quite unobjectionable, but it is also unnecessary. The real change is to add "in the form and manner and with the same effect as provided in subdivision (d) of this rule."

MR. DODGE: Which would be implied anyway.

MR. HAMMOND: Yes.

MR. DODGE: That is harmless.

MR. HAMMOND: But it is perfectly all right.

DEAN MORGAN: I don't see any objection to that, if

they want it.

MR. HAMMOND: I don't, either.

THE ACTING CHAIRMAN: All right, then; go ahead.

MR. HAMMOND: Amendment No. 14, lines 108 and 109. Strike the words "abate the action or".

DEAN MORGAN: Why?

MR. HAMMOND: Because the condemnation action doesn't abate.

DEAN MORGAN: Well, that is just assuming that it doesn't abate. Why wouldn't it abate? If they named a particular party, if they were trying to get his interest, and he died, if you apply the common law rule the action would abate as to him, and you wouldn't have a substitution of his heirs or anything of the sort. It seems to me that they are just inviting trouble by striking "abate the action".

MR. LEMANN: It is the idea that it is proceeding in rem against the property.

DEAN MORGAN: That may be the notion, but it isn't an admiralty proceeding. This isn't like an admiralty proceeding.

MR. LEMANN: No, but it is a proceeding to take property. It doesn't make any difference who owns the property.

MR. HAMMOND: That is the point, Mr. Lemann.

MR. LEMANN: The Government is going to take the property, and it doesn't care who owns it--dead people or crazy

people. It isn't a proceeding in personam, where it naturally would abate if the fellow you are suing died. I think that is their point.

DEAN MORGAN: I think it is, but I think it is a debatable point.

MR. LEMANN: Is it proper for a distinguished scholastic committee of professors, eminent practitioners, and judges to use the word "abate" in a proceeding of this character?

MR. HAMMOND: That is what I thought. I am guilty of this suggestion.

MR. LEMANN: If the professors in pleading are willing to use the word "abate," who am I to object?

JUDGE DOBIE: I think Littell made that very clear, that it is the philosophy of these actions that they are really in rem, that they ought not to abate when a person dies, and that really comes into the picture when the question of compensation comes up.

MR. LEMANN: They are really in rem.

DEAN MORGAN: It depends on what you mean by in rem.

PROFESSOR CHERRY: Why shouldn't the words stay in? If they are unnecessary, they are unnecessary. It expresses what we think the law is or should be.

MR. HAMMOND: I don't think the Department would have any objection if they stayed in.

DEAN MORGAN: I don't care whether you take it out, as a matter of fact, because you can't require any other person to be substituted as a party. That settles it.

THE ACTING CHAIRMAN: Mr. Hammond pleads guilty.

MR. HAMMOND: I am guilty.

DEAN MORGAN: If he wants an artistic job done, I haven't any objection.

THE ACTING CHAIRMAN: What is happening, anyway?

DEAN MORGAN: Let the amendment go as far as I am concerned. I just wanted to know why it was, that is all.

MR. HAMMOND: The next one is on (g)(1), Trial, By Jury. The first amendment is No. 15, lines 113 and 114. Strike the words: ", and may be withdrawn by any party by filing a notice of withdrawal". In lieu of that, turn to Amendment No. 18, line 118, and you insert there a new sentence reading: "A party may withdraw his demand as to any lot, parcel or tract by stipulation of the parties affected thereby who are not in default or by order of court."

MR. LEMANN: That makes it a little bother to provide for an order of court where people are in default. Is that the only effect of the change?

MR. HAMMOND: This matter arose at the last meeting by the suggestion that, under the rule as it read, the Government might demand a jury trial and then withdraw it, when the landowner, relying on the Government's demand, hadn't made a

demand.

MR. LEMANN: I see.

MR. HAMMOND: In our general rules we had a provision to take care of that, which required in such a case the consent of all the parties, you see.

MR. LEMANN: This requires a stipulation instead of a notice.

MR. HAMMOND: This requires a stipulation or an order of court. This was worked out with Mr. Tolman. I rather felt that the order of court ought to be upon motion and notice and that we ought expressly to say so. I didn't see any reason that it shouldn't be given, but there is the danger, if you don't say "upon motion and notice," that it might be an ex parte order, for which no notice is required under our general rules.

Do you see what I mean, Mr. Lemann? Do I make that clear?

DEAN MORGAN: The idea is that the party who has claimed the jury can't withdraw it without the consent of the other party.

MR. DODGE: You mean, if the other party has claimed the jury, you continue to have the jury trial.

DEAN MORGAN: Yes, that is it.

MR. LEMANN: If the Government claimed the jury, you might not claim it because, you say, "The Government has

claimed it, so I didn't have to claim it." Then the Government comes along and says, "We've changed our minds, and we don't want the jury," and you might lose it under the original draft because you didn't originally claim it. Under this amendment, it would take your consent or an order of court.

MR. DODGE: And I might have protected myself against difficulty by also claiming one. We have that all the time in Massachusetts.

DEAN MORGAN: They always double-claim?

MR. DODGE: Each party claims a jury, so the other fellow's waiver of jury trial won't affect him. It really isn't very important, because a fellow is already protected. If he really wants a jury trial, he claims it.

MR. HAMMOND: They said that adding the words "upon motion and notice" was not necessary, and I think Mr. Tolman rather agreed with them, because he said the court would always protect the other party if they went to get an order of court to withdraw it anyway.

MR. DODGE: To protect a party who hasn't taken the trouble to claim a jury trial but who now claims that he wants it, who has relied upon the fact that somebody else has claimed it. It isn't very important.

PROFESSOR CHERRY: We have protected the parties generally in our Rule 38. "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the

parties."

MR. LEMANN: This puts that in.

MR. DODGE: Is that in our old rules?

PROFESSOR CHERRY: Yes; for that very reason.

MR. DODGE: Just to protect the parties.

MR. LEMANN: We have to protect the "poor oafs," that is all. Some of us are "poor oafs" ourselves now and then.

PROFESSOR CHERRY: I think in a good many states it is true that if one party makes the demand, that is that.

MR. LEMANN: This is all right, anyhow. I see no objection to this amendment, Mr. Hammond.

MR. HAMMOND: I have just that slight one as to whether we should add "upon motion and notice". Here is what I wrote on that.

MR. DODGE: What is the other rule?

PROFESSOR CHERRY: Rule 38(d).

MR. HAMMOND: I am reading what I said about "upon motion and notice".

"A party should be given notice of the withdrawal by his opponent of a demand for jury trial because he may have relied on that demand and not have demanded the jury trial himself. Rule 5(a), which provides for service of motions, excepts therefrom motions which may be heard ex parte; and Rule 6(d), which provides for service of motion and notice of hearing thereof not later than five days before the time

specified for the hearing, unless a different time is fixed by the rules or by order of the court, exeepts therefrom motions which may be heard ex parte. In view of the fact that subdivision (g) gives any party the right to demand a jury trial, a possible and, it seems to me, reasonable interpretation of that provision would be that a party must himself demand it or else lose the right to it, and his opponent's demand for a jury trial gives him no right to one. Therefore, having lost the right to demand one himself, and having acquired no right to one by virtue of the fact that his opponent has demanded one, the opponent's motion to withdraw his demand is one that may be heard ex parte, and he is not entitled to have a copy of the motion served upon him under Rules 5(a) and 6(d) or to any notice of hearing on the motion under Rule 6(d)."

MR. LEMANN: Why not put in "upon motion and notice"? I don't see any objection to it.

MR. DODGE: We haven't that in our regular rule on the subject.

MR. LEMANN: We haven't any order of court in there.

DEAN MORGAN: No, but, you see, in the non-condemnation cases the party has the right to a trial by jury, and the court can't by order deprive him of it. In condemnation cases, he doesn't have any right to trial by jury.

MR. DODGE: He doesn't have a right unless he demands it.

DEAN MORGAN: I know; but I mean he doesn't have any constitutional right to trial by jury, so the court could order this to be tried without a jury, even though he has demanded it.

MR. LEMANN: In cases that were not common law actions he wouldn't have a right to trial by jury, either.

DEAN MORGAN: But these are not common law actions.

MR. LEMANN: I mean general equity suits covered by the old rule.

DEAN MORGAN: You can't get a trial by jury in an equity case, anyway, under our rules.

MR. LEMANN: Not now. I mean previously he wouldn't have had any right to trial by jury.

DEAN MORGAN: Certainly not, and he wouldn't have had a right to trial by jury here. You are giving him a right to trial by jury in this case, and then you are providing that it might be taken away from him, Mr. Hammond says, under certain circumstances. Do you want it taken away from him without giving him a hearing? That is really the question.

MR. LEMANN: I say we don't, do we?

DEAN MORGAN: I don't think we do.

MR. LEMANN: That is why I say, why not put it in there. Major Tolman, I understand, reasoned, "Well, the judge is not going to do it ex parte."

MR. HAMMOND: Yes.

MR. LEMANN: The only question is, Shall we put a restraint on the judge who might do it ex parte? I say, why not put in the restraint?

THE ACTING CHAIRMAN: Perhaps I misunderstood this. I don't suppose that that is what this meant. A party may withdraw his demand by stipulation or by order of court. Isn't that it?

MR. LEMANN: Yes, but the point is that the order of court should not be entered ex parte; that the Government, for example, shouldn't be able to go to the judge and say, "We changed our mind. We don't want a jury. We are asking an order withdrawing the demand for the jury," and the judge say, "O.K. Hand me a pen." The idea is that the judge should not sign the order without saying, "Let's hear what the other fellow says about it. He may want the jury."

THE ACTING CHAIRMAN: Why not? Still, if I understand it, the Government apparently is the other party, and the only other party as to this--

DEAN MORGAN (Interposing): No.

THE ACTING CHAIRMAN: Why not?

DEAN MORGAN: The Government isn't the other party, Charlie. The landowner is the other party. The Government, we will say, has demanded a jury trial, and the landowner, relying upon that, as in our general rule he has a right to, doesn't demand a jury trial. Then the Government afterwards says, "We

withdraw our demand." They can't get a stipulation or don't want to get a stipulation. They get an order of the court, without letting the defendant have a chance to be heard on it.

THE ACTING CHAIRMAN: Wait a minute. In the first place, anybody can withdraw it when they are not in default, I take it.

DEAN MORGAN: No; only by stipulation.

THE ACTING CHAIRMAN: Yes.

DEAN MORGAN: That is all right; if you get the stipulation of the other party, that is O.K.

THE ACTING CHAIRMAN: Yes.

DEAN MORGAN: But can he get it by an ex parte order, without stipulation? That is the only question, Charles.

THE ACTING CHAIRMAN: I see what you mean. Of course that presupposes that the Government has demanded a trial by jury.

DEAN MORGAN: They say you can do it by endorsing it on the complaint and, as I understand it, the Government wanted trial by jury in these cases.

PROFESSOR CHERRY: In the TVA cases especially they wanted jury trial.

MR. LEMANN: I suppose you might conceive that the Government originally might not have claimed it, that the defendant claimed it, and then that the defendant changed his mind, and the Government might say, "Well, we don't want you to

change your mind. We have a good reason that you shouldn't. We want to be heard before the judge orders it."

Where there is a refusal to execute a stipulation, I should think the judge ought to have a hearing, when he can get the parties.

MR. DODGE: Would you move to adopt Mr. Hammond's suggestion?

MR. LEMANN: Yes, I would say so. What about the people in default? Motion and notice?

DEAN MORGAN: People in default aren't entitled to jury anyhow, I should suppose.

MR. LEMANN: You say in the line before, "by stipulation of the parties affected thereby who are not in default".

DEAN MORGAN: Yes.

MR. DODGE: "or by order of court or upon motion and notice."

MR. LEMANN: You wouldn't want to say "upon motion and notice to parties not in default." Would that be necessary? You wouldn't want to give notice to parties in default.

DEAN MORGAN: No.

MR. LEMANN: I wondered, if you put in motion and notice, whether it might require notice. Is there a general provision that parties in default get no notices?

THE ACTING CHAIRMAN: This wouldn't mean to parties outside of the two parties who are faced off.

MR. LEMANN: No.

THE ACTING CHAIRMAN: You don't want to make it so broad that they have to notify all the parties.

DEAN MORGAN: Oh Lord no. It ought not to be.

MR. DODGE: I move that we adopt Mr. Hammond's suggestion.

JUDGE DOBIE: I second the motion.

THE ACTING CHAIRMAN: You have heard the motion. Any further discussion? If not, all those in favor will say "aye"; those opposed. So voted. (Carried)

MR. HAMMOND: A question that comes up under this rule (there is no specific amendment in regard to it) is the question that was much discussed at the last meeting, as to whether we can abolish a court trial by rule of procedure. Mr. Mitchell, as you recall, very strongly felt that we could not do that by a rule of court, especially where there is an express provision in statute for a court trial. There are other members of the Committee who feel (I know Major Tolman does) that it is a matter of procedure and that we can do it. I believe that Judge Donworth feels the same way, and we have the other member of the subcommittee here. I don't know that you (to Judge Clark) have expressed your view on it.

Before I give you my own thought in regard to it, I should call your attention to the fact that the Lands Division has an office memorandum, which was distributed, discussing

this question, a very full and good memorandum on the subject, and their conclusion is that you can abolish the court trial by court rule.

DEAN MORGAN: Put it the other way: Grant a trial by jury, not abolish the court trial.

MR. HAMMOND: I think I should probably go back to Mr. Mitchell's idea that the Government had a right to a court trial.

DEAN MORGAN: But if the Government doesn't claim it, the Government doesn't want it.

MR. HAMMOND: But the thought that I had about it was that the Committee might save itself a lot of trouble in deciding this question if they would consider this question first: Suppose we assume that we have the power. Should we exercise it? Would it be good policy to promulgate a rule abrogating a statute which gives a trial by court of the issue of compensation? It seems to me, even if we decide we have the power, that we ought not to do it, because I think that Congress would not like it, and we would run into difficulties with these agencies (and there are just a few of them, really) that have that provision--the TVA particularly.

MR. LEMANN: How many are there?

MR. HAMMOND: The TVA and the District of Columbia.

MR. LEMANN: What is the provision? Who fixes the compensation? The judge, or the three commissioners, or

something like that?

MR. HAMMOND: They have commissioners in the TVA, and they are very well satisfied with them. In the District of Columbia they have two sets, one for Federal condemnations and the other for District of Columbia condemnations. I don't recall the details of it, but I think they have a small jury there to try those.

MR. DODGE: I think they have a jury of five.

Your suggestion is that at the beginning of line 111 we insert the words "Except where another method of trial is prescribed by statute"?

MR. HAMMOND: Yes.

MR. DODGE: "a party may demand a trial by jury".

MR. HAMMOND: Yes; except where a statute of the United States expressly provides for a different method of trial.

JUDGE DOBIE: The TVA have three commissioners. Then you have an appeal to a three-judge court, all three of whom may be district judges. Then you have an appeal to the circuit court of appeals, and in reviewing that, the circuit court of appeals is not bound by that finding at all. It goes into the whole thing de novo. We had one of those cases. It has been pending, I think, about four years now, and has been to the Supreme Court three times.

DEAN MORGAN: Why does the Lands Division want a

jury trial?

MR. HAMMOND: Why do they want a jury trial?

DEAN MORGAN: Yes. I understood them, when they appeared here, to say they wanted a jury trial.

THE ACTING CHAIRMAN: It is the speed, as I recall it; the expedition.

MR. HAMMOND: That is one thing, and they have found that juries treat them--

DEAN MORGAN (Interposing): Better than commissioners.

MR. HAMMOND: --better than commissioners, on the whole, I think.

MR. LEMANN: It is the Government you are speaking of now?

MR. HAMMOND: Yes. They find that, on the whole, it is more satisfactory to have a trial by jury.

MR. DODGE: Does the Department of Justice want this change made which you now suggest?

MR. HAMMOND: They have no objection to it whatever.

MR. DODGE: Do they affirmatively ask for it?

MR. LEMANN: They don't ask for it.

MR. HAMMOND: No, they don't ask for it, but they have no objection to it. They don't care if we except the TVA and the District of Columbia.

MR. DODGE: What did Mr. Mitchell say about it? Did he think we should make that exception?

MR. HAMMOND: The one that I made?

MR. DODGE: Yes.

MR. HAMMOND: That has never been submitted to Mr. Mitchell. May I ask where you got that language that you first quoted?

MR. DODGE: I invented it.

MR. HAMMOND: It is practically the same that I had written out.

MR. LEMANN: Great minds!

THE ACTING CHAIRMAN: Mr. Hammond, there is a bill for a statute.

MR. HAMMOND: Yes. I should call attention to that. There is a bill pending in Congress now.

MR. LEMANN: There is a bill pending in Congress to do that?

MR. HAMMOND: Senate 919. It has passed the Senate and has been called up in the House, but it has been asked to be postponed. The Lands Division doesn't know for what reason. Have you seen that bill, Mr. Lemann? Everybody else is more or less familiar with it.

MR. LEMANN: No.

MR. HAMMOND: It makes certain exceptions and provides for a demand for jury trial of the issue of compensation in the cases not excepted.

MR. LEMANN: There are quite a few exceptions, aren't

there?

THE ACTING CHAIRMAN: Is that going to cover the TVA case? Will that amend the TVA Act or supersede it?

MR. HAMMOND: No, the TVA is excepted.

THE ACTING CHAIRMAN: Oh, yes, I see.

MR. LEMANN: Line 11 is what I was looking at.

MR. DODGE: TVA is the only exception.

MR. HAMMOND: TVA and the District of Columbia are excepted.

THE ACTING CHAIRMAN: A statement here in the last memorandum of Major Tolman's is that the passage of that bill might make the question academic. In one sense it does make it academic, but in one sense it makes it more necessary. It makes it more necessary as to these things that they except.

MR. HAMMOND: Not only that, but this Act expires on December 31, although I understand there is a proposed amendment to change the last section to make it last as long as the war lasts.

MR. LEMANN: But it still would be temporary.

MR. HAMMOND: It is still temporary, yes.

MR. LEMANN: Then, we have two difficulties. One is that it is temporary, and two is that it does except the District of Columbia and the TVA, whereas if we pass our rule in the proposed form, we won't be excepting the District of Columbia and the TVA, will we?

MR. HAMMOND: Yes, under Mr. Dodge's form.

MR. LEMANN: The way we have it here, before you and Mr. Dodge got busy, the way it is here, we would be overriding S. 919.

MR. HAMMOND: Yes.

MR. LEMANN: I hardly see how we could do that. Even though S. 919 is temporary, it shows that even temporarily whoever wrote this doesn't want to force a jury trial upon the District of Columbia or the TVA. Is S. 919 a Department of Justice project?

MR. HAMMOND: Yes, that was prepared by them.

MR. LEMANN: They evidently felt that the TVA and the District of Columbia would object to any provision which forced a jury trial.

MR. HAMMOND: Exactly so.

MR. LEMANN: So, although they had a war measure, they preserved their immunity from jury trial, and we would be coming along in peacetimes and forcing a jury trial upon those.

MR. DODGE: Treating it as a matter of practice.

THE ACTING CHAIRMAN: Yes. I should think that is all the more reason for having something in.

MR. LEMANN: If we are going to force it, it raises a very serious question of policy with me, of whether this group should undertake to force a jury trial in two cases where the Congress, even in wartime, wasn't prepared to force a jury

trial on them. Who are we to say, "Well, they can be forced to submit to a jury trial"?

MR. DODGE: Why not put in the words of exception at the beginning and let it go at that.

JUDGE DOBIE: I move that it be done. I agree with Mr. Lemann. I believe Congress would resent it very much if we stepped in here and tried to overrule a thing like the TVA.

MR. LEMANN: "Except as provided by a statute of the United States"?

THE ACTING CHAIRMAN: Mr. Hammond, can you suggest the language you had before?

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: Would you listen to this, please, so we will get it exact?

MR. HAMMOND: In line 111, after the heading "By Jury," insert at the beginning of the sentence: "Except where a statute of the United States expressly provides for a different method of trial,".

MR. DODGE: I move it.

JUDGE DOBIE: I second it.

PROFESSOR SUNDERLAND: It would be better to say "requires" rather than "provides for". It might provide for several.

MR. DODGE: "Provides for"? I think I would rather leave it "requires". If the Act of Congress permits the jury

trial, we want to permit it.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: "Except where a statute of the United States expressly requires a different method of trial"? Is that the way it is to stand?

MR. DODGE: We didn't have the word "expressly" in it.

MR. HAMMOND: Yes. I did.

JUDGE DOBIE: You didn't have "expressly".

MR. LEMANN: I think you had better take out "expressly".

MR. DODGE: Yes.

DEAN MORGAN: Just say "requires".

MR. LEMANN: It is just an adjective of emphasis.

MR. HAMMOND: It is more than that, Mr. Lemann.

MR. DODGE: You had the word "requires". We could say "either expressly or by implication requires", if we want to accept it.

MR. HAMMOND: I was thinking, you know, that they have these conformity acts, and the conformity act governs a lot of this, most of these condemnations, and we want to abolish that.

MR. DODGE: I see.

MR. HAMMOND: The word "expressly" is very important.

MR. LEMANN: Then you ought to put a note in, I think, referring to that, so people will not think that we use an

adjective of emphasis without reason.

DEAN MORGAN: Did you say "expressly requires" or "expressly provides"?

MR. HAMMOND: I said "expressly provides for".

THE ACTING CHAIRMAN: All right, what is the motion going to be now?

DEAN MORGAN: "Requires" or "provides for"?

MR. LEMANN: Mr. Dodge made the point (I thought it was good) that it ought to be "requires", because if the statute permits several methods, there is no reason that we shouldn't permit a jury trial.

DEAN MORGAN: That is right. I think so.

JUDGE DOBIE: How about "expressly requires"?

MR. LEMANN: Yes; "expressly requires".

THE ACTING CHAIRMAN: All right, is that acceptable now? All those in favor say "aye"; opposed. So ordered. (Carried)

MR. HAMMOND: That brings us down to Dismissal of Action, and on that we have on page 3 of the amendments a draft which is labeled "Amendment No. 19." That is a draft prepared by Mr. Tolman in an effort to carry out the instructions of the Committee at the last meeting, taken from a reading of the transcript by him, and endeavoring to use the various phraseology that was used by the different members, and selecting the one that he thought represented the consensus of

of opinion. I rather think that Mr. Tolman has more or less abandoned that particular draft, because in the report of the subcommittee you will notice that he has a sort of redraft of my suggested amendment, which you will find on page 4, labeled "Hammond Amendment" to distinguish it.

MR. LEMANN: We have three drafts now, have we? Maybe four. On page 3 there is the committee draft, and on page 4 there is the Hammond Amendment. At the bottom of the page is the Department of Justice Amendment. Then in this latest communication, of February, we have the committee's final suggestion.

MR. HAMMOND: Just Mr. Tolman's. I don't think that has been approved by the other members of the subcommittee.

MR. LEMANN: It has their names, "Respectfully submitted."

MR. HAMMOND: But you will notice that they have never agreed on it.

THE ACTING CHAIRMAN: He says, "The subcommittee chairman submits another draft which adopts Mr. Hammond's ideas with some modifications of phraseology."

MR. LEMANN: I see. And then he puts the names of all the committee down. I get it.

THE ACTING CHAIRMAN: We thought this was all desirable information which should be brought to the attention of the Committee.

MR. HAMMOND: And, unfortunately, there is another. I had to redraft my own.

MR. LEMANN: Still another?

MR. HAMMOND: I don't know whether you have it or not. If you haven't, I will give it to you. It is called a redraft of the amendment. It was sent to the members of the Advisory Committee in the letter dated January 27, 1944.

MR. LEMANN: I have that.

MR. HAMMOND: It is really just to correct a word in there. I don't know how you want to take this up. I don't know how much you have studied these drafts.

MR. LEMANN: What is the final point of difference between your draft and that of the Department of Justice?

MR. HAMMOND: Their draft doesn't take care of the very thing that the Committee thinks should be taken care of.

DEAN MORGAN: The Department of Justice want just what they said in the first place, practically.

MR. HAMMOND: Suppose I read you my criticism of the Department of Justice draft. In their letter of explanation of it, Mr. Littell says he thinks he has made quite a concession by the provision in there that they can't dismiss, provided possession has not been taken.

MR. LEMANN: His views are in Exhibit C, pages 1, 2, and 4, are they?

MR. HAMMOND: Yes. Do you want to read those over

first?

MR. DODGE: Everybody agrees that this rule applies only where title has not passed. That is, we start with the assumption that the title has not passed. You say in your draft, "If the court finds that there has been no taking under the condemnation statute used and no actual taking ...." Just how are those to be correlated to the idea that we are talking about, a case where title hasn't passed. What kind of taking would there be except the taking of possession?

MR. LEMANN: He doesn't use the words "vesting of the title" in the redraft. That is in the Department of Justice's. He doesn't use it, as I understand it. You see, here is the Department of Justice's, and here is his (indicating).

MR. DODGE: Oh, yes. You didn't make that preliminary statement.

MR. LEMANN: He has no "as of right". You see, they have a provision "as of right", and he doesn't use that.

MR. DODGE: You say, "If there has been no taking under the condemnation statute used" (that would mean a taking of title) "and no actual taking", which would mean going into possession.

MR. HAMMOND: Yes. I was following the language in the Danforth case more or less. That was a Mississippi flood control proceeding, and they held in that case that there was

no actual taking and therefore no interest could be allowed on the award, or something like that. There was some kind of question involved, and Mr. Justice Reed clearly indicated in that case that if there had been an actual taking--

MR. DODGE (Interposing): Of possession.

MR. HAMMOND: --compensation would have had to be paid. It seems that what they did there was to go into the property in connection with this flood control business, but the Court concluded that what they had done left the landowner in no worse position than he was before, that they had done things in there but that his property was just as well off as before, if not better than it was before they went in there.

I will read you the two excerpts from that opinion that I was following. He says:

"Unless the taking has occurred previously in actuality or by the statutory provision which fixes the time of taking by an event such as the filing of an action, we are of the view that the taking in a condemnation suit under this statute takes place upon the payment of the money award by the condemnor. No interest is due upon the award until taking. The condemnor may discontinue or abandon his effort."

Then, later on in the opinion he says:

"The Government could become liable for a taking in whole or in part, even without direct appropriation, by such construction as would put upon this land a burden actually

experienced of caring for floods greater than it bore prior to the construction."

MR. DODGE: Your words are: "Where there has been no taking under the condemnation statute used and no actual taking." Do those go beyond words like this: "Where there has been no taking of title or possession"?

MR. LEMANN: They said "At any time prior to the vesting of the title" and also "provided possession has not been taken." That is in the Department of Justice's. It seems to me that they cover both points. You have possession; you don't say anything about title. You say possession has been taken, whether actual or by implication of law. If anything, they have more limitation, because they have all the possession taken. You could write in at the end of their language: "provided possession has not been taken, either actually or by implication of law", and if you added that to their words, you would have everything that is in your rule plus some language about the vesting of title.

MR. DODGE: Except that they haven't provided for determining compensation in the case.

MR. LEMANN: I was going to raise that question. The committee chairman says he submits Mr. Hammond's language with some modification, including the statement: "As to property so taken, just compensation shall be awarded in the condemnation action." The Department of Justice say they

don't know just what you mean by "just compensation" in that connection.

MR. DODGE: They have to take a chance on that.

MR. LEMANN: That is right, but what I am wondering is whether that is the introduction of a point of substantive law, and what is the necessity for it?

MR. DODGE: It would prevent the necessity of bringing a new suit, that is all. We discussed that point a good deal at the last meeting.

PROFESSOR CHERRY: Yes.

MR. LEMANN: But they can't do it if they have taken possession under the limitation here; and if they haven't taken possession and if title hasn't vested, how would any compensation be due, Mr. Dodge? They can't dismiss if either of those things has happened. If none of them has happened, how can just compensation be due? They already have the limitations in as to when they can dismiss.

MR. DODGE: We are not talking about a dismissal if possession has been taken.

MR. LEMANN: No, we are not. They have excluded that. So I don't see, with these limitations, how you could get to the point of compensation. If you wanted to paint the lily, where it says "provided possession has not been taken", you could add "either actually or by implication of law", and it seems to me you would have every safeguard in their draft.

Then they couldn't dismiss as of right if there had been either vesting of title or possession actually or by implication of law.

MR. HAMMOND: We want to go further than that, too. We don't want to allow the court to dismiss it without awarding just compensation.

MR. LEMANN: You mean the court could do it on its own motion? I don't get that.

DEAN MORGAN: The court couldn't, on motion, dismiss without awarding compensation.

MR. LEMANN: Under this, there would be no right to dismiss if title had vested or if possession had been taken.

DEAN MORGAN: No right to dismiss, but what about the discretion of the Judge?

MR. DODGE: The court couldn't step in and dismiss an action.

DEAN MORGAN: But here he moves to dismiss, and the court says, "You may dismiss."

MR. DODGE: There is no provision about motion to dismiss.

MR. HAMMOND: Their argument is that our general rule, Rule 41(a)(2) will then come into play.

MR. LEMANN: "shall not be dismissed at the plaintiff's instance".

MR. HAMMOND: "except upon such terms".

MR. LEMANN: "save upon order of the court and upon such terms and conditions as the court deems proper." We have to tell the court, "You must not dismiss without compensation"? The court says, "Yes, it is proper to dismiss it without compensation"? Is it thinkable that in a case where compensation ought to be given, the court would think it proper to dismiss without it? With all the doubts about the judges, I shouldn't assume that he would do anything like that. If he did, you could appeal.

MR. HAMMOND: They want an express statement in the rule that they can't--

MR. LEMANN (Interposing): Who is "they"?

MR. HAMMOND: --have a dismissal if there has been anything taken.

MR. LEMANN: You have it here, except, you say, you are afraid the judge will do it. You have a limitation in this language submitted that it can't be dismissed as of right if there has been possession taken.

MR. HAMMOND: That is as of right.

MR. LEMANN: How else would it be done? By permission of the court?

MR. HAMMOND: Yes.

MR. LEMANN: Then you are afraid that the court would give them permission, when possession had been taken, to dismiss it without compensation, that the court would think it

proper to do that?

MR. HAMMOND: Yes; they do all the time.

PROFESSOR CHERRY: Their whole contention to us, Mr. Lemann, was that they couldn't retain it and--

MR. LEMANN (Interposing): You speak of "they."

PROFESSOR CHERRY: Mr. Littell and his associates.

MR. LEMANN: But he didn't want this just compensation provision in.

DEAN MORGAN: Of course he doesn't.

PROFESSOR CHERRY: For that very reason, that they are not entitled to it. If he has to go to the court and get permission, he still doesn't want any compensation.

MR. LEMANN: He can't dismiss under this draft if possession has been taken.

DEAN MORGAN: What draft?

PROFESSOR CHERRY: Without going to the court.

MR. LEMANN: They all do it.

DEAN MORGAN: That is as of right.

MR. LEMANN: What other situation is there in which they are going to do it? They are going to go to the court for permission, and you are afraid of the court; is that it? You have to tie some limitations on the judge.

MR. HAMMOND: That is it.

MR. LEMANN: That is the committee's fear.

MR. HAMMOND: Yes.

MR. LEMANN: You are afraid that he will say, "No, I couldn't do it, but I will go to this judge and say, 'Judge, the rules wouldn't permit me to dismiss as of right because I have taken possession. Now, Judge, I want you to let me dismiss it after I have taken possession, so this fellow will get nothing.'" I can't imagine that a judge would do it. I can't imagine that he wouldn't be reversed. I can't imagine that constitutionally a fellow wouldn't be entitled to just compensation.

DEAN MORGAN: But he would be required to do it in another action. That is the whole point.

MR. DODGE: Mr. Hammond, you say judges are constantly doing it. After the Government has actually entered into possession and caused a lot of damage, are the judges dismissing the action without giving them anything?

MR. HAMMOND: Yes. They cite a case there, the most recent case where they very clearly did just exactly that thing. The court said, "You have to go to the Court of Claims. I admit you have suffered damage, but your remedy is in the Court of Claims." That is the thing that the Committee wanted to prevent.

MR. DODGE: That is where the remedy lies? If the Government, without any formal taking, has come on my land and done a lot of damage with a view to some prospective public improvement, I then have to go to the Court of Claims,

ordinarily speaking?

DEAN MORGAN: Yes.

MR. HAMMOND: That is their position.

DEAN MORGAN: Surely. It is just as if the Government could come into any action.

MR. LEMANN: You have a remedy in the Court of Claims. The fear is that the judge is going to permit that, and you ought not to be sent to the Court of Claims.

MR. DODGE: Of course the thing ought to be disposed of by the pending action before any dismissal by order of the court is permitted.

PROFESSOR CHERRY: That is the point.

MR. LEMANN: Would they take possession without going to the court at all?

DEAN MORGAN: Yes.

MR. HAMMOND: Yes, they have, under the Second War Powers Act, and the First War Powers Act in the last war had a provision.

MR. LEMANN: Then you have to go to the Court of Claims, haven't you, and there is no pending action? That is what I asked you.

MR. HAMMOND: No pending action. Pardon me. Yes.

MR. LEMANN: They can go take your property.

PROFESSOR CHERRY: Then they have to start the action.

THE ACTING CHAIRMAN: I suppose that may happen. We

had a case somewhat of that kind.

MR. LEMANN: I don't know.

THE ACTING CHAIRMAN: We had a case where the original taking excepted easements of telephone wires, and so on, and then actually they took down the telephone wires. The telephone company appealed in an eminent domain proceeding, and the district court held, and we affirmed, that there was no taking of it; that it was just a trespass, and they had to go to the Court of Claims.

MR. LEMANN: All the time I have clients whose ships they have taken. They are not going to bring a suit in wartime. They take the ships. They say, "We want the ship." I have clients in the ice business. They say, "We want your ice. We will take it, and we will tell you what we will pay you for it. If you don't like what we pay you for the ice and the ships, you sue us." That is happening all the time.

MR. HAMMOND: Surely.

MR. LEMANN: Constantly. It happened in the last war, when I was here in the Shipping Board. We took ships. We told the people what we would take and what we would give them for it, and if they didn't like it they could go to the Court of Claims. I didn't think it was terrible. I was on the Government's side then, and I am on the individual's side now. I don't see anything terrible about going to the Court of Claims when the Government comes in and takes property. That is what

the Court of Claims is for.

DEAN MORGAN: Have you been before them often?

MR. LEMANN: Once.

DEAN MORGAN: A swell court to get anything out of!

MR. LEMANN: I don't think you can use that case logically to say that you have a bum court.

DEAN MORGAN: Charlie is telling us we ought to be practical here, and I agree on that point.

MR. DODGE: Here is a case where the Government has brought a suit, hasn't it, and one of the issues is the determination of compensation for what they have done. They seek to abandon it after they have taken possession and inflicted a lot of damage. They seek to abandon it by motion to the court. Why shouldn't we provide that the damages should be assessed then and there in the suit already pending, instead of forcing the landowner to go down to Washington to the Court of Claims?

DEAN MORGAN: You see, Major Tolman's draft on page 3, says: "the plaintiff may dismiss the action in whole or in part by filing a notice with the court setting forth", and so forth, "but if the plaintiff has taken title or possession of the property sought to be acquired or of any part thereof or interest therein the plaintiff may not dismiss until just compensation has been awarded."

Why isn't that just what we insisted on last time?

MR. DODGE: Yes, it is. That is what we voted for

last time.

DEAN MORGAN: And why doesn't that say, just as clearly as you can say it, that when you take title or possession, as Monte said--my difficulty has always been to know what "title" means.

MR. HAMMOND: Yes, I think that is the trouble.

MR. LEHMANN: You have "possession" in there, too.

DEAN MORGAN: "or of any part thereof or interest therein".

MR. DODGE: We are talking only about cases where the Government has moved the court.

DEAN MORGAN: That is right. They have already gone in.

MR. DODGE: It hasn't the right to discontinue of its own volition. It files a motion for leave to discontinue. We propose to condition that as Major Tolman suggests and as you suggest.

MR. LEHMANN: You have two methods of handling this mechanically. One is to put in a dismissal as of right, with no provision for a motion, which is the Department of Justice draft, and I think it is the original draft that I have before me. Then it is changed around to have nothing under "As of Right", but only by motion of the plaintiff. You have to make up your minds which of the two methods of handling it you will adopt, or whether you are going to combine them, because they

are two different methods.

MR. DODGE: Insert paragraph (3) on motions in this Department of Justice amendment.

MR. LEMANN: You would have to do that.

MR. DODGE: "The court may dismiss the action on motion, but only upon determination of just compensation." Something like that.

THE ACTING CHAIRMAN: Always it seems to me that this is a case where there is a certain lack of directness in the language used on both sides. You might easily say that we weren't saying what we were doing or that the courts wouldn't realize what we were trying to do unless they had the benefit of our discussion.

I take it what we are trying to do is to say that damages shall be awarded in the same action. Why don't we say that in so many words? What we do is to say it in terms of "just compensation", but I don't think that the court or the people will think of it as what we are driving at.

For example, "If the court finds that there has been a taking under the condemnation statute used or an actual taking, the court shall not dismiss without awarding damages for the period of occupation."

MR. HAMMOND: I think that the Lands Division justifiably would object very much to the use of the word "damages," because one of the things that they claim they are afraid of

is that the court will award for things which are not really compensable under the just compensation amendment to the Constitution.

THE ACTING CHAIRMAN: I know they do, and of course I think there is something in their fear. Then, in the face of that, we make it a lot wider than that. We say that there should be a just compensation, which may be for the fee, which may mean that you have to take the land willingly even though nobody is going to use it any more. So, in a sense, we make it worse than their worst fears.

MR. HAMMOND: I rather thought that, if we followed the Constitution a little, that would be better for them.

THE ACTING CHAIRMAN: Mr. Hammond, under your draft may a court do this, which is what I suppose we contemplated? They have been in possession for a year. They now want to withdraw. May the court say, "Your title is only for a year. It ceases now, and the amount of compensation you pay for the year is as follows"? Is that the substance of what you are doing?

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: I suppose that is what was intended.

MR. HAMMOND: For whatever taking there is. I based it on the word "taking".

THE ACTING CHAIRMAN: Yes. I thought that was what

was intended, and I think that is what we have all been driving at. Nevertheless, isn't your language likely to mean this? In the case that I put, where the Government wants it only a year, and we are discussing its having to pay for the year, your language means now that they can't give it back, that they have to take it in fee simple and pay the full amount.

PROFESSOR CHERRY: No, I don't think so.

THE ACTING CHAIRMAN: Why not?

PROFESSOR CHERRY: They are permitted to dismiss by the court's order, so they are not going to get the fee simple.

THE ACTING CHAIRMAN: But they can't dismiss here.

PROFESSOR CHERRY: No, no. This is a condition.

THE ACTING CHAIRMAN: There has been a taking, and the motion shall not be granted except as to what has not been taken. Of course, I suppose you are going to say that what has not been taken is the remainder of the fee beyond a year.

PROFESSOR CHERRY: Not necessarily that. We have had up these cases where the taking, although it has meant possession for only a year, has damaged the land for ten years ahead, because they gave back what was a farm as a set of gullies that he can't farm. That is one of the cases that we were discussing with Mr. Littell. We can't undertake in any rule here to say what the court should hold as being the measure of recovery there.

I would agree with Mr. Hammond's draft, that "just

compensation" is constitutional language and as far as we can go. So far as the court holds there has been a taking, that is what they will give compensation for, and that is going to differ from case to case.

THE ACTING CHAIRMAN: I suggest a game with you. I suggest we put it up to six district judges and ask them what they conclude that means and if any of them think that what has been taken means the year of taking and not the rest. I think that the normal thing you think of is so much land and that what you have taken has been Blackacre and perhaps not Whiteacre, and therefore as to Blackacre you can't go back on what you have taken.

DEAN MORGAN: Don't you think the difficulty here is that you have tried to do too much in one section? That is, you want to give these people a right to dismiss unless the plaintiff, to use Mr. Tolman's words, "has taken title or possession of the property sought to be acquired or of any part thereof or interest therein". They can dismiss as of right unless they have done that. Second, on motion of the court. If they have taken possession, it may be dismissed, on motion, upon payment of just compensation for whatever interest has been taken.

MR. DODGE: Yes.

THE ACTING CHAIRMAN: Yes, I think that is true.

DEAN MORGAN: It seems to me that is what you ought

to do. You ought to have "As of Right" and "On Motion" in two separate subdivisions.

MR. DODGE: That is the idea, exactly.

THE ACTING CHAIRMAN: Shouldn't you expand your idea a little to make it clear that it is for whatever interest taken or for the length of time taken? You see, originally the idea is that they have taken it for the full period, and unless you get in the time element, I don't believe it is going to be a natural deduction.

DEAN MORGAN: I think you will probably have to draw the language pretty carefully there, but certainly it seems to me you ought not to allow him to dismiss as of right "if the plaintiff has taken title or possession of the property sought to be acquired or of any part thereof or interest therein".

MR. DODGE: The Government agrees to that.

DEAN MORGAN: They don't agree to that extent. They just want it in case you have taken possession, whatever that may mean.

MR. DODGE: In whole or in part.

DEAN MORGAN: Yes. Then the next thing is "As of Right," and I agree with Charlie that you have to draw that language as to compensation for whatever interest has been taken so that it will mean that if you have taken less than the amount that is stated in the complaint or in the action, only as to that amount shall you get compensation; that it be

the actual interest taken. I don't know just how you would draft it.

MR. HAMMOND: That is the trouble.

DEAN MORGAN: That is my difficulty there, but I do think you have to split it. You have to give them the right to dismiss up to that time.

MR. LEMANN: Mr. Dodge's suggestion (see if this is it, Mr. Dodge) is that you have to make two motions. First, that you adopt the Department of Justice's draft of (h)(1).

MR. DODGE: "As of Right."

MR. LEMANN: At the bottom of page 4. Adding at the end the words: "either actually or by implication of law."

DEAN MORGAN: I don't agree with that. I don't like that "by implication of law." Why don't you use Tolman's, and instead of saying "provided possession has not been taken", say "unless the plaintiff has taken title or possession of the property"?

MR. LEMANN: He has title in the first line. You would have to rewrite the whole thing if you were going to do that. I thought he had it all right.

DEAN MORGAN: Where?

MR. LEMANN: Department of Justice, page 4, "As of Right." "At any time prior to the vesting of the title sought to be acquired in the action". That takes care of title. "the plaintiff may dismiss the action in whole or in part, without

court order, by filing a notice with the court setting forth briefly and concisely the property as to which the action is dismissed, provided possession has not been taken."

Then I switch over to Major Tolman's, and I see he uses the language: "If possession has been taken, whether actual or by implication of law."

So I was adopting his language, but if you don't like the words "whether actual or by implication of law"--

DEAN MORGAN (Interposing): I am talking about his original draft.

MR. LEMANN: I am looking at the first one, though, Eddie. Assuming that there was some idea that you would bargain with words about using "whether actual or by implication of law", personally I shouldn't think you would have to use it.

MR. DODGE: I shouldn't think so.

DEAN MORGAN: I wouldn't think so, if you are going to agree, Monte, that title and possession are the only two things.

MR. LEMANN: That is right. As of right, and that is what we--

DEAN MORGAN (Interposing): What I am talking about is what you mean by "title."

MR. LEMANN: I don't see how you help anything by eliminating a reference to title. The point is: "or of any part thereof or interest therein". If you take less than the

fee, have you taken title?

MR. DODGE: You have taken title to the interest you have acquired.

MR. LEMANN: That is what I would say.

DEAN MORGAN: Suppose you go after the fee, and you have taken an interest less than the fee. Have you taken title?

MR. LEMANN: To that interest.

DEAN MORGAN: All you have taken is title. Title to what?

MR. LEMANN: You think it means fee simple property?

DEAN MORGAN: I don't know what it means. I don't think anybody knows what "title" means.

MR. DODGE: This is the title sought to be acquired in the action.

DEAN MORGAN: Suppose you go after the fee simple. They have taken something less. They haven't taken title, and they haven't taken possession.

JUDGE DOBIE: In a lot of cases they take a right, you know.

MR. LEMANN: That is all they seek to acquire.

JUDGE DOBIE: That is all they seek and pay for.

MR. DODGE: The title sought to be acquired in the action.

MR. LEMANN: Let's have a substitute for this

"As of Right" language. Personally, I would be willing to vote it the way they propose it, except "As of Right."

THE ACTING CHAIRMAN: What is going to be the rest of yours?

MR. LEMANN: Then I understood there would be added a paragraph (3) under (h) which would follow the paragraph (2) now appearing, "By Stipulation", and paragraph (3) would be on the motion of plaintiff.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: Go ahead.

MR. LEMANN: That would provide that it could be done on motion, provided that if possession had been taken, whether actually or by implication of law, the action should not be dismissed without the fixing of just compensation.

THE ACTING CHAIRMAN: For the interest?

MR. LEMANN: I would stop there, as far as that is concerned. I don't think it could mean anything but compensation for the property possession of which had been taken. You could add that, if you wish.

DEAN MORGAN: "For the interest taken" is what you mean.

MR. LEMANN: "just compensation for the property of which possession has been taken."

THE ACTING CHAIRMAN: I think you had better say "for the interest which has actually been taken."

DEAN MORGAN: That is it. That is what you want.

MR. LEMANN: You already have the words "by implication," so you have to decide whether you are going to keep them or take them out. They weren't my original suggestion. I thought somebody thought they were helpful. I would be willing to take them out.

THE ACTING CHAIRMAN: I will throw in my little all, because I think in general that this is a good idea that Monte is putting forward. I should say for my part that I really think that "title to the interest sought to be acquired in the action" is all right, because that goes back to what they have asked for. Of course, in a sense, title is always indefinite, but nevertheless this is whatever their prayer is, and it goes back. This is the alternative, and I don't believe you need "whether actually or by implication." I am a little afraid of the word "implication." It is what the court finds is possession.

So I should say that No. 1 of Monte's is good, and I should think that the other paragraph he suggests adding should be by order of court. Don't you mean that?

MR. LEMANN: That is right.

THE ACTING CHAIRMAN: By right, by stipulation, and then by order of court.

MR. LEMANN: That is right.

THE ACTING CHAIRMAN: Then I think your language would

be all right, only I would substitute for the time thing, "just compensation for the interest which has actually been taken."

MR. DODGE: Yes.

DEAN MORGAN: I agree to the latter part, all right, but I don't agree to the first part, "As of Right." I think that if any interest has been taken, just compensation should be granted for it. I think that at any time prior to the vesting of the title sought to be acquired in the action, the plaintiff may dismiss by filing a notice, unless the plaintiff has taken title or possession to any part of or interest in the property sought to be acquired."

MR. DODGE: How can he have taken title to something less than the title sought to be acquired in the action?

DEAN MORGAN: Oh, many ways. He can seek a fee simple and take an easement ultimately, for example.

MR. DODGE: It must be described in the instrument of taking.

DEAN MORGAN: No.

MR. DODGE: Or described in the petition.

DEAN MORGAN: It wouldn't be described in the petition. They go in to take all of Blackacre, the fee simple title, as Charlie suggested and as they suggest in that memorandum, and ultimately they take possession for a year, as we supposed before, or they go in and remove a building, or something of

that sort.

MR. DODGE: Without any filing of a suit describing what they are taking?

DEAN MORGAN: It is said that they are going to take all of Blackacre.

MR. DODGE: They have said in the petition that they are going to take all of Blackacre.

DEAN MORGAN: Now they go in and just take a part of Blackacre and a building on it. They destroy the building. At the end of a year, they walk off. That is before they have trial. They haven't the title.

MR. DODGE: They can amend the petition so as to show they are taking only a limited interest.

DEAN MORGAN: Yes, that is what they are going to do now. But they are going to dismiss now, quite altogether, and say they aren't taking anything now. If they dismiss and quit, then the defendant has a claim against them in the Court of Claims.

MR. LEMANN: But they can't dismiss it as of right, Eddie, in your case, because possession would have been taken.

DEAN MORGAN: Not of all of it.

MR. LEMANN: It doesn't say that possession has been taken of all. That isn't the language.

MR. DODGE: "in whole or in part".

DEAN MORGAN: Where does it say that? It doesn't say

anything about "in whole or in part".

MR. LEMANN: Down here it is provided that possession has not been taken. I should think that would mean that if any possession has been taken of anything, they couldn't dismiss as of right. That is what I should think that language clearly meant.

THE ACTING CHAIRMAN: I don't see why you shouldn't add that, if you want to; but, Eddie, I don't see why title comes in down there. You have suggested: "provided possession or title has been taken in whole or in part." How can they take title when they haven't any judgment for it?

MR. LEMANN: Title is taken care of by the first two lines.

THE ACTING CHAIRMAN: I agree with you on that.

DEAN MORGAN: When I said that, I thought you had omitted that. Or you could say: "provided that possession or any interest in the property has not been taken". You see, I am bothered by title, because I don't know what title means, and I don't believe you know what it means.

THE ACTING CHAIRMAN: Not too well.

DEAN MORGAN: I don't believe anybody knows what it means.

THE ACTING CHAIRMAN: But I have made some decisions.

DEAN MORGAN: If you mean all the beneficial interest, you mean what we call title in fee simple; and Monte is going

on the theory that when you say "title and possession," you have said everything you can say.

MR. DODGE: It may be title to a leasehold interest or an interest for one year, or anything.

DEAN MORGAN: All right.

MR. DODGE: That is the title sought to be acquired.

DEAN MORGAN: But the title sought to be acquired may be the fee simple, and they may have taken title to a leasehold interest.

MR. DODGE: Can't we take care of this by adopting in substance the Government's agreement as to paragraph (1), which is at the bottom of page 4, agreeing in exact totidem verbis to (3), which becomes (4), and inserting a new paragraph (3) covering the substance of Mr. Hammond's "By Motion of Plaintiff" paragraph so as to take care of--

MR. LEMANN (Interposing): By order of court, that is.

MR. DODGE: --by order of court, yes. He has it "By Motion of Plaintiff." It is "By Order of Court."

DEAN MORGAN: "By Order of Court."

MR. DODGE: If title or possession has been taken, plaintiff may move to discontinue, and so forth, that the damages shall be assessed in that action. Leaving the working out of the language to the Reporter and Mr. Hammond.

DEAN MORGAN: That is all right with me.

MR. DODGE: Who will send us a draft within two days?

MR. HAMMOND: It is an awfully difficult thing.

MR. LEMANN: And it must be returned within two further days.

PROFESSOR CHERRY: Why the delay?

MR. DODGE: Isn't that the way to dispose of this according to our vote at the other meeting and according to the consensus of opinion today?

DEAN MORGAN: I so move.

MR. DODGE: I seconded the motion.

THE ACTING CHAIRMAN: I was wondering if we couldn't have some language along this line by early afternoon. Can't you write out just what we have been talking about?

PROFESSOR MOORE: Not on the basis of the discussion, no.

THE ACTING CHAIRMAN: Sure, you can. My staff has gone back on me.

MR. LEMANN: Why not have Mr. Morgan bring in a draft, because he is the one who is worried about this language now. If it would get by Dodge and by the "Lemon" here, I think it would get by the "Cherry", wouldn't it?

THE ACTING CHAIRMAN: I think it would be better to get some language that looks like something we want, and not try to correspond. That is too bad. I really think we have gotten close enough now. Eddie, couldn't you get something?

DEAN MORGAN: I will try my hand at it, but I think

Hammond could probably do better.

THE ACTING CHAIRMAN: You do that by this afternoon and let us look at it. If it doesn't work, it doesn't, but I think it would be better to try it here; don't you think so?

MR. HAMMOND: Much better. This is an awfully difficult rule to draw.

THE ACTING CHAIRMAN: Let's temporarily leave it that way, that Mr. Morgan will try his hand at a draft along the lines that have been suggested, which involves: a dismissal as of right, which cannot apply when any interest has been actually taken by the Government; a dismissal by stipulation, upon which we are agreed; and a dismissal by order of court, which shall provide for just compensation for the interest actually taken.

Can you go ahead with those instructions, Eddie?

DEAN MORGAN: I think Hammond had better do it, too.

MR. DODGE: Hammond and you together.

THE ACTING CHAIRMAN: All right.

MR. LEMANN: I guess this is a very difficult rule because we have (1) the Department of Justice, (2) the TVA and the District of Columbia, all the public bodies that have their own legal staffs, and (3) the Congress. I should think that this rule would be more provocative of objection and opposition than any of our regular rules. Wouldn't you think so, Mr. Hammond?

Hammond could probably do better.

THE ACTING CHAIRMAN: You do that by this afternoon and let us look at it. If it doesn't work, it doesn't, but I think it would be better to try it here; don't you think so?

MR. HAMMOND: Much better. This is an awfully difficult rule to draw.

THE ACTING CHAIRMAN: Let's temporarily leave it that way, that Mr. Morgan will try his hand at a draft along the lines that have been suggested, which involves: a dismissal as of right, which cannot apply when any interest has been actually taken by the Government; a dismissal by stipulation, upon which we are agreed; and a dismissal by order of court, which shall provide for just compensation for the interest actually taken.

Can you go ahead with those instructions, Eddie?

DEAN MORGAN: I think Hammond had better do it, too.

MR. DODGE: Hammond and you together.

THE ACTING CHAIRMAN: All right.

MR. LEMANN: I guess this is a very difficult rule because we have (1) the Department of Justice, (2) the TVA and the District of Columbia, all the public bodies that have their own legal staffs, and (3) the Congress. I should think that this rule would be more provocative of objection and opposition than any of our regular rules. Wouldn't you think so, Mr. Hammond?

MR. HAMMOND: I don't think we will have any objection from Congress, probably, or from the landowners, certainly. The real objection is from the Department of Justice, and they don't want the rule unless they can get it the way--

MR. LEMANN (Interposing): The way they think it will work.

MR. HAMMOND: Yes.

MR. LEMANN: And the TVA people and people like that are also affected.

MR. HAMMOND: They haven't been consulted about it so far, but we figured that when the draft goes out to the bar with the rest of it, we would hear from them on it.

MR. LEMANN: Tell me, are most of these condemnation proceedings under state statutes under conformity practice?

MR. HAMMOND: Yes. We may get some objection from Congress on that. As to the provision we were talking about before, about the trial by jury, Congress may not want to abolish that. It is unlikely that that conformity will be abolished.

MR. LEMANN: I haven't tried that. My firm has. But my impression is that in my state we have a jury of freeholders, property owners, not an ordinary jury. I guess that is so in many states. If this provision were adopted, you would have a regular, ordinary jury, wouldn't you?

JUDGE DOBIE: You mean no man can sit on that jury

unless he is an owner of property?

MR. LEMANN: Yes. We feel that in expropriation cases a property owner is especially qualified to make a guess of what the property is worth.

THE ACTING CHAIRMAN: Gentlemen, wouldn't it be a good idea if we got up and stretched our legs for about five minutes? Of course, Mr. Morgan might be through by then.

MR. DODGE: First, let me ask Mr. Hammond if I understood him correctly that most of these takings for war purposes by the Government are made under state authorization.

MR. HAMMOND: That is what I understand.

MR. LEMANN: What is your procedure, Mr. Dodge?

MR. DODGE: I never knew them to proceed in Massachusetts in accordance with our state practice, which is to file an instrument of taking vesting title and then to go to a jury on the landowner's petition for compensation. I think they are always started by a Government suit in a Federal forum.

MR. HAMMOND: Yes, but they follow the state procedure in the Federal court.

MR. DODGE: It is quite different from the state procedure. It is a suit by the Government instead of by the landowner, and they don't get title ordinarily until the judgment.

MR. HAMMOND: Of course, they have the special Declaration of Taking Act.

... Brief recess ...

THE ACTING CHAIRMAN: You have covered everything, have you?

MR. DODGE: He has it.

THE ACTING CHAIRMAN: Fine. I knew he would. All right, we will resume. I understand that we have it all settled.

DEAN MORGAN: We will throw this to the lions again.

THE ACTING CHAIRMAN: Shall we vote to accept it, or would you like to have it read?

DEAN MORGAN: I think you had probably better have it read, just as a matter of precaution or form, shall I say.

THE ACTING CHAIRMAN: Very well. I think it is risky, but nevertheless, go ahead.

DEAN MORGAN: Taking the form at the bottom of page 4 of the memorandum, which is the Department of Justice Amendment C, strike out the words "provided possession has not been taken" and insert "unless the plaintiff has taken possession of or some interest in the property as to which the plaintiff seeks to dismiss."

MR. LEMANN: Possession?

MR. DODGE: "or some interest in the property".

DEAN MORGAN: "possession of or some interest in the property".

MR. LEMANN: What does "taking some interest" mean?

Of course it doesn't mean interest in the populace. It means a property interest.

DEAN MORGAN: It means a property interest, of course. "Interest" is a very good American Law Institute expression.

JUDGE DOBIE: It is about the broadest thing you have.

MR. DODGE: If he has built a telegraph line across it or something like that, without taking possession.

DEAN MORGAN: That has been done.

JUDGE DOBIE: Will you read that again?

PROFESSOR SUNDERLAND: Will you read the rest of that again, Eddie?

DEAN MORGAN: "unless the plaintiff has taken possession of or some interest in the property as to which the plaintiff seeks to dismiss."

JUDGE DOBIE: That sounds all right to me.

DEAN MORGAN: Then, a section "By Order of the Court." "At any time before compensation has been determined and paid, the action may be dismissed by the court after motion and hearing, except that the action shall not be dismissed as to any part of the property of which plaintiff has taken possession or in which plaintiff has taken any interest until just compensation has been awarded for the possession or interest so taken."

JUDGE DOBIE: I think that is very good.

MR. DODGE: "until just compensation has been awarded

in the action."

DEAN MORGAN: "or other interest", really.

MR. LEMANN: "other interest" would help it, I think.

DEAN MORGAN: I think you ought to have there "possession or other interest."

MR. LEMANN: That would help it a lot, I think.

THE ACTING CHAIRMAN: (2) stays in, doesn't it? That is by stipulation.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: And (3) is by order of the court, as you have given. Does "Effect" stay in as (4)?

MR. HAMMOND: Yes. That has to be considered.

DEAN MORGAN: Yes, I should suppose so. That wouldn't mean they couldn't start again, would it?

THE ACTING CHAIRMAN: Then don't you want to put in "Except as otherwise provided in the notice or stipulation of dismissal or order of dismissal ...."?

MR. LEMANN: Notice, stipulation, or order of dismissal.

MR. DODGE: How could you prejudice the Government in its right of eminent domain?

DEAN MORGAN: You never could. There wouldn't be an action if they didn't have a right to take it anyhow.

MR. DODGE: Whether it is with prejudice or without prejudice, you can't affect the Government's right.

MR. LEMANN: This is just stating the obvious.

DEAN MORGAN: That is stating the obvious.

MR. HAMMOND: You can stop the Government.

DEAN MORGAN: No, you couldn't either. I don't think so.

MR. DODGE: You couldn't make it with prejudice even by stipulation.

MR. LEMANN: You could really omit that, don't you think, Mr. Hammond?

MR. DODGE: Does that amount to anything, Mr. Hammond?

MR. HAMMOND: I don't know. It has always been in there.

DEAN MORGAN: Suppose they gave notice of dismissal with prejudice. Lord bless me, that wouldn't stop them for a minute. How could it?

MR. LEMANN: Let's see. Suppose they had an issue as to whether there was any need for it.

DEAN MORGAN: They might not need it today, and might need it tomorrow.

MR. LEMANN: Suppose they start tomorrow.

DEAN MORGAN: Exactly. I would like to see anybody try to put a limitation on the Government's power of eminent domain, by rule of court or otherwise.

PROFESSOR CHERRY: Or by the Government by stipulation.

MR. HAMMOND: Do you want to leave in the words

"Except as otherwise provided"? That seems to give the court power to dismiss it with prejudice.

MR. DODGE: The court couldn't dismiss it with prejudice to the Government's right of eminent domain.

MR. HAMMOND: Why have those words "Except as otherwise provided" in there, then?

MR. DODGE: I think the whole paragraph should go out.

MR. LEMANN: You either take it all out or leave it all in. Do you move to leave it out, Mr. Dodge?

MR. DODGE: I can't conceive of any dismissal being with prejudice.

MR. LEMANN: Move it out.

JUDGE DOBIE: Suppose the court had tried a public necessity or something of that kind.

MR. LEMANN: That is the point I raise, but then they said you might have a new necessity; that you don't have one today, but you might have one tomorrow.

JUDGE DOBIE: Make the basis clearly res judicata if the Government came back.

MR. LEMANN: You could at least say that they had to show some new necessity, that they couldn't relitigate it without showing a new need.

MR. DODGE: That isn't often a judicial question. Is it ever?

MR. LEMANN: Oh, yes, we have it, where there is a

need for it.

DEAN MORGAN: Where it is for a public purpose.

JUDGE DOBIE: That Gettysburg Battlefield was one of those cases.

MR. LEMANN: Sometimes it is the extent of the taking that is required. They want to take more than they need. I think you can litigate that. They want 100 acres. You say, "You don't need 100. You need just 50." You can litigate that.

MR. DODGE: You can certainly litigate the question of public use, public purpose.

DEAN MORGAN: There is one thing on which it could be done.

MR. LEMANN: That is the point I raised, and then you said there might not be a public purpose today but there might be one tomorrow.

DEAN MORGAN: You were talking about necessity. Yes, there might be a different public purpose.

MR. LEMANN: That is right.

MR. DODGE: That isn't so likely. The public purpose, you think, might be with prejudice.

JUDGE DOBIE: All this says, really, is "Except as otherwise provided". The court's dismissal doesn't have to be prima facie without prejudice. I don't think that can do any harm.

MR. LEMANN: It can't do any harm.

MR. DODGE: I thought at first that it was foolish, but I see there is a chance for it. Suppose there is a condemnation petition, and an answer is filed setting out that the taking is invalid as it is not for a public purpose, and there is a dismissal by the Government with prejudice. That would preclude the Government if it was not a public purpose at that time, wouldn't it?

DEAN MORGAN: I should think so.

JUDGE DOBIE: As I say, I don't think any judge is going to do it, but I don't think it does any harm. I think the Government Department likes it. It says that the dismissal normally is one without prejudice.

THE ACTING CHAIRMAN: Are you ready for the question?

PROFESSOR CHERRY: It makes it conform to our other dismissal statutes.

THE ACTING CHAIRMAN: Yes, it does.

JUDGE DOBIE: I don't think it is highly important, but I believe it probably serves a useful purpose. I move it be kept in.

DEAN MORGAN: Let it be.

THE ACTING CHAIRMAN: Unless there is objection, that will be kept in. Now do you want to move the adoption of the whole proposal?

JUDGE DOBIE: Yes, I make that motion, in the Morgan manner.

THE ACTING CHAIRMAN: Is there any discussion of that? That will be on Mr. Morgan's proposal, with the final section being section (4), "Effect," as is except that it contains a reference also to the order of dismissal.

JUDGE DOBIE: That is right.

THE ACTING CHAIRMAN: Are you ready for the question? All in favor say "aye"; those opposed. So voted. (Carried) That finishes up that.

JUDGE DOBIE: We ought to give a vote of thanks to Morgan.

MR. DODGE: It didn't take the entire forty-eight hours that were allowed.

THE ACTING CHAIRMAN: Does that cover the entire condemnation rule?

MR. HAMMOND: There was one thing that I didn't mention under Amendment No. 19. That is, there are some differences between the statute and our rule. These are just minor differences, but I think that we ought to follow the statute on them.

DEAN MORGAN: Which statute is that?

MR. HAMMOND: That is S. 919 about the demand.

JUDGE DOBIE: Where is that in here?

MR. HAMMOND: Do you have a copy of the statute, the wording about demand? It is just slightly different.

DEAN MORGAN: Demand for jury trial, you mean?

MR. HAMMOND: Yes. I think we ought to adopt the provision in the statute in our rule. That is agreeable to the Department of Justice.

DEAN MORGAN: You want trial by jury demanded in this way?

MR. HAMMOND: Have you the language definitely? I think we had better have it.

DEAN MORGAN: Yes.

MR. HAMMOND: All right, I have it. You have the rule. The statute says that "Any party may demand a trial by jury of the issue of compensation by filing with the clerk of the court a demand therefor in writing at any time after the commencement of the condemnation proceedings, and not later than ten days before trial."

THE ACTING CHAIRMAN: What are you going to do? Are you going to leave in what we have as to withdrawal?

MR. HAMMOND: Oh, yes; and the amendment we made at the beginning of that section. It is just to make the rule conform to the statute as to that time.

DEAN MORGAN: The way you get it, Charles, that is all.

THE ACTING CHAIRMAN: Is that agreeable?

DEAN MORGAN: Yes, it is all right, since we are going to be bound by it anyhow, I should suppose.

MR. HAMMOND: Yes, it goes along with it.

THE ACTING CHAIRMAN: All right, then, we will consider

that adopted.

JUDGE DOBIE: That finishes up condemnation proceedings. Good.

THE ACTING CHAIRMAN: I want to ask one thing more. I don't know whether we should do anything about it, but, Mr. Hammond, is there any view as to the procedure? Is this to go out to the bench and bar?

MR. HAMMOND: Yes, the Committee decided that it would. Of course, I think that the Department of Justice would be just as glad to have it go in, because they are anxious to get it before them. The Committee decided last time that they wanted it submitted to the bench and bar, like the rest of the rules.

THE ACTING CHAIRMAN: I should think it would be just as well to keep the two proposals separate when they go to the Court, and so on, but I suppose that is a question of detail that we can take up as we go along. I had forgotten that we did so decide, but I guess you are right, all right.

PROFESSOR SUNDERLAND: We decided we weren't going to give them special treatment.

MR. HAMMOND: I think that the Committee felt it would be a good idea to submit them at the same time to the bar, because then the lawyers would probably give some attention to the condemnation rule, whereas if they just sent out the condemnation rule--

DEAN MORGAN (Interposing): A lot of them wouldn't pay any attention to it.

THE ACTING CHAIRMAN: I think that is right, but I was wondering if they should be tied up all the way through, particularly as they go to Congress.

MR. HAMMOND: On that, I just don't know, but I think that the Lands Division may want to submit it to Congress immediately.

DEAN MORGAN: By joint resolution, he said, didn't he?

MR. HAMMOND: Amend by special joint resolution or something to get it in there quickly and get it disposed of quickly.

Of course, there is another minor thing in connection with that that I didn't think we had to take up at this time. We will have to have an effective date rule for this. That would be different.

DEAN MORGAN: It will have to lie there for a year.

MR. HAMMOND: Yes. We will have to have a special effective date rule for the condemnation rule, and we will have to have another one for the amendments.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: We will consider the condemnation rule, as amended herein, approved.

End Vol. III

P R O C E E D I N G S

ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

VOLUME IV

April 3-5, 1944
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TUESDAY MORNING SESSION (CONTINUED)

April 4, 1944

THE ACTING CHAIRMAN: Next, I think we ought to take up the problem suggested by Hill v. Hawes, because that is important and we ought to consider it. I would add, too, that we have had distributed before you a proposal coming particularly from Judge Maris, as to transmission of original papers as the record. I would propose, of course subject to your approval, when we finish Hill v. Hawes to take that up as being rather interesting and important. Then, unless some member of the Committee wants to take something out of order, I think we might just as well then go back to the regular course. So, unless there is objection, unless some member of the Committee who won't be here tomorrow and wants to call up any particular rule, we shall proceed with that understanding.

JUDGE DOBIE: I think we will finish tomorrow. Don't you, Charlie?

THE ACTING CHAIRMAN: I should think so.

DEAN MORGAN: We ought to finish tomorrow easily.

THE ACTING CHAIRMAN: I should think so. We will probably be surer tonight as to the situation, but I should think we will.

Turning to the Hill v. Hawes problem, I think that the best thing to do is to take the suggestions that Mr. Mitchell gave. Mr. Lemann had to step out temporarily, and he will be

back after lunch.

PROFESSOR SUNDERLAND: What rule is this under.

THE ACTING CHAIRMAN: I will give them to you. I was going to say that Mr. Lemann favored Mr. Mitchell's first alternative or the substance of it, however it is worked out. I will give you Mr. Mitchell's suggestions.

The main one of his first alternative is in connection with Rule 77(d), which is the one as to notice by the clerk, which apparently seems to have been the thing which led Mr. Justice Roberts in particular and the Court to feel that further time should be given. Rule 77(d), you may remember, is Notice of Orders or Judgments.

"Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers."

It was our theory right along that that didn't affect the time of appeal. Didn't we say so in the notes? I have forgotten.

DEAN MORGAN: You said so in the notes, I believe.

I am not sure.

THE ACTING CHAIRMAN: Will you look at the notes? Apparently the Supreme Court didn't examine the notes.

PROFESSOR MOORE: As to 77?

THE ACTING CHAIRMAN: Rule 77(d).

PROFESSOR MOORE: No, we don't say.

DEAN MORGAN: Remember what I said about Justice Roberts saying that he thought we ought to put in that rule which provided for notice of the entry of judgment, a statement to the effect that that did not affect the time of appeal?

THE ACTING CHAIRMAN: Yes. That is really Mr. Mitchell's proposal. I am reading from page 3 of the original copy of Mr. Mitchell's proposal. I guess it is probably the same.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: He says:

"The first proposal (to repeal Hill v. Hawes) can be effected by adding to Rule 77(d) the following:

"'As the time for appeal is fixed by law, runs from the date of entry of the judgment, and not from the date of notice of entry, the failure to give or to receive notice of entry does not in any way affect the time for appeal, or relieve, or authorize a court directly or indirectly to relieve, a party from failure to take an appeal within the time fixed by law.'"

Mr. Lemann has the same idea, but Mr. Lemann wants to know why something comparable to what we have in 73(b) as to the clerk isn't the idea. That is the notice of appeal. We have, "Notification of the filing of the notice of appeal shall be given by the clerk", and so on. Then at the top of the page, page 88 of the Rules, "but his failure so to do does not affect the validity of the appeal."

DEAN MORGAN: That is the place I think it ought to go.

THE ACTING CHAIRMAN: You think it should be back here?

DEAN MORGAN: Back in the judgment, yes.

THE ACTING CHAIRMAN: Wouldn't it go here in 77(d)?

DEAN MORGAN: It might go here.

PROFESSOR SUNDERLAND: The same language put in 77(d).

THE ACTING CHAIRMAN: Yes.

PROFESSOR SUNDERLAND: The same language you have in the other.

THE ACTING CHAIRMAN: I wonder if Mr. Mitchell's isn't a little too strong.

PROFESSOR SUNDERLAND: Like a sledge hammer.

MR. HAMMOND: He says he wants to knock it in the head.

THE ACTING CHAIRMAN: Well, this is not only knocking it in the head, but it is knocking it in other parts of its anatomy.

DEAN MORGAN: Where is the provision that the clerk

must send notice?

THE ACTING CHAIRMAN: That is 77(d). That is the one I was reading.

DEAN MORGAN: Of the judgement? Is that what it says?

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: Yes.

"The failure to serve notice of a judgment or order under this rule does not extend the time of appeal." Why isn't something like that the thing?

DEAN MORGAN: Yes.

JUDGE DOBIE: He wants to take a crack, I think, at that thing about vacating a judgment and entering another one, doesn't he? I think he wants to do that in terms. That is why he put in there "does not .... authorize a court directly or indirectly to relieve, a party from failure to take an appeal within the time fixed by law." In other words, he is repudiating Hill v. Hawes there by rule, and the Supreme Court, I think, said they thought it would be all right.

MR. DODGE: The Supreme Court conceded, didn't it, that the rules mean what they say and that the statute means what it says, and that there the notice was not effective.

DEAN MORGAN: No.

MR. DODGE: That was out of the case, but they held that the court might vacate the judgment and enter a new one. That is the whole point.

JUDGE DOBIE: That is a pretty silly procedure, it seems to me.

DEAN MORGAN: Yes. Did I tell you I had a conversation with Mr. Justice Roberts? He said that if we put in this requiring notice, we must have done it for some purpose, and that if we didn't intend it to have any effect on the judgment or the effectiveness of the judgment, we ought to have said so.

MR. DODGE: Did the Court decide, or did the Court have any question about that?

DEAN MORGAN: I am not sure. Certainly Mr. Justice Roberts had a question about it.

MR. HAMMOND: Yes. He stated that in so many words in his opinion.

MR. DODGE: In his opinion. I thought the Hawes case went on the effect of the vacating of the judgment and the entry of a new one.

THE ACTING CHAIRMAN: It seems to me the opinion rather built itself up on several things, including the term of Court. They just put themselves in a solvent position where they eventually had to say it must be that way.

PROFESSOR SUNDERLAND: It said that the notice or failure to give notice could be relied upon by the party, and if he could rely upon it, then it would be bound to have this effect.

MR. DODGE: But they didn't give it effect.

DEAN MORGAN: They gave it the effect of allowing the judge, at any rate, to set aside the judgment and enter a new one, you see, and he was very specific about that particular thing in his talk with me. I said to him, "We were informed that that was the custom, that the clerk of the court always did it." He said, "That is all the more reason why you should have left it out if you weren't going to give some added effect to it."

MR. DODGE: Do you think we are improving the situation enough by merely adding the words, "The failure to give notice does not affect the time of appeal"?

DEAN MORGAN: No.

THE ACTING CHAIRMAN: I think perhaps it might be a good idea to read just a little of the opinion. I suppose this is the important paragraph.

"It is true that Rule 77(d) does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may well be that the effect to be given to the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule. The Federal Rules of Civil Procedure permit the amendment or vacation of a

judgment for clerical mistakes or errors arising from oversight or omission and authorize the court to relieve a party from a judgment or order taken against him through his mistake, inadvertence, surprise or excusable neglect. (See Rule 60(a), (b).) These rules do not in terms apply to the situation here present, as the court below held. But we think it was competent for the trial judge, in the view that the petitioner relied upon the provisions of Rule 77(d) with respect to notice, and in the exercise of sound discretion, to vacate the former judgment and to enter a new judgment of which notice was sent in compliance with the rules. The term had not expired and the judgment was still within control of the trial judge for such action as was in the interest of justice to a party to the cause.

"The judgment is reversed", and so on.

You see, he gets it all in. He gets three prongs to the result.

JUDGE DOBIE: I think it is silly to say that they can think of no reason for putting it in there unless it extended the time for appeal. That is just bunk, Charlie. You can see how they answered that, but they have a mighty poor imagination.

MR. DODGE: What is the suggestion for 77?

THE ACTING CHAIRMAN: Mr. Mitchell's proposal (I will read it again) is that:

"As the time for appeal is fixed by law, runs from the date of entry of the judgment, and not from the date of notice of entry, the failure to give or to receive notice of entry does not in any way affect the time for appeal, or relieve, or authorize a court directly or indirectly to relieve, a party from failure to take an appeal within the time fixed by law."

DEAN MORGAN: I don't think that hits it. I think Roberts could still say that the defendant might be misled and that there would be excusable neglect, even though it didn't in any way affect the time to appeal. I am going on the question of excusable neglect, not on the question of time of appeal at all, directly or indirectly or otherwise.

PROFESSOR SUNDERLAND: What does excusable neglect have to do with it? We have no rule on that, have we?

DEAN MORGAN: No. He said the court can relieve a person for excusable neglect of anything.

PROFESSOR SUNDERLAND: Anything at all?

DEAN MORGAN: Anything, certainly, in the interest of justice.

PROFESSOR MOORE: Especially when the term of court has not expired.

PROFESSOR SUNDERLAND: I don't see how they can extend the time for appeal just because there was excusable neglect in not taking it. They can't do that, can they?

MR. DODGE: They can relieve him from the judgment because of excusable neglect and then re-enter it, as they did here, and wouldn't this change prevent the district court from doing that?

JUDGE DOBIE: I should think it would.

DEAN MORGAN: It probably would, if the language is as strong as he has it, but I think you could hit it more directly.

THE ACTING CHAIRMAN: Of course, he wants to put something in 73(a). I had better give you that, too. This is to put at the end of 77(d).

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: Then, in 73(a) he would add after the word "prescribed" in the third line, the following in brackets:

"(which runs from the date of entry of the judgment, not from the date of notice of the entry)."

He says: "This seems a silly business, to recite in the rule what the statute says, but how else can we make it clearer than we already have, that the time for appeal is a statutory matter?"

PROFESSOR MOORE: Wouldn't that have to go in Rule 72 also?

THE ACTING CHAIRMAN: Are we to touch 72?

PROFESSOR MOORE: You would have the same problem

coming up.

THE ACTING CHAIRMAN: I don't know. I think there is something in what you say, but I don't think, if I were doing it, I would touch 72. Rule 72, you recall, is the appeal from a district court to the Supreme Court.

JUDGE DOBIE: They don't want us to mess with that. We made the suggestion to them once, you know, that they cut out citation and all, and they were as cold as a mother-in-law's kiss to that suggestion.

PROFESSOR MOORE: But, Judge Dobie, suppose you have a case where the clerk fails to give notice of an order that is appealable from a specially constituted district court direct to the Supreme Court, and the time for appeal goes by. Under the doctrine of Hill v. Hawes, the specially constituted district court would be entitled to vacate the order and set it aside so that the losing party could then appeal.

JUDGE DOBIE: I think that is pretty bad, but I understand that the Supreme Court didn't want us to mess with appeals from a district court to them, that they would take care of that. We wanted to do it, you know, and to make it as simple as the appeal to the circuit court of appeals. Isn't that correct, Charlie? They were very firm on that and said, "That is for us. Don't you mess with it."

THE ACTING CHAIRMAN: Yes, although I had always understood (I don't know whether directly or indirectly or by

implication) that it wasn't just that they were perverse about it, but that they were worried particularly about appeals from state courts, state judgments, and they didn't see easily how to work the two together. Whereas they might have asked our advice about it and we might have helped them out, they didn't. I think it was more that general problem. The result, of course, is just what you say. They didn't do anything about it.

MR. DODGE: If this rule of Mitchell's had been in effect, the decision of that case would have been the other way, wouldn't it, in Hill v. Hawes?

JUDGE DOBIE: Yes; not necessarily, but probably.

THE ACTING CHAIRMAN: From the language, you would think it would be. Of course, I have a little suspicion that, after all, they decided it before they looked at the language very much. They thought this was a harsh case. "We really ought to do something about it. Now let's see what we can do."

JUDGE DOBIE: Decided first and found the reasons afterwards.

DEAN MORGAN: Say something like this, Charlie: "All parties are charged with the notice of entry of the judgment, and the failure of the clerk to serve notice of the entry of the judgment shall not in any way affect", and so forth.

THE ACTING CHAIRMAN: I should think that that was a good idea.

MR. DODGE: "affect the time for appeal."

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: I don't know whether you want to decide which of the alternatives you want to follow. Perhaps I had better run over them again. The first alternative Mr. Mitchell puts up, of which Mr. Lemann expressed approval, is the repeal (I think that is a nice word) of Hill v. Hawes. Mr. Mitchell's other alternative was accepting Hill v. Hawes, making the time date from notice of entry of the judgment, and then reducing the time for appeal to thirty days. Mr. Lemann said he thought we had power to do that; he thought our power was pretty broad, but he thought it very doubtful as a policy that we should attempt to monkey with that. He thought that that was a pretty old and pretty standard thing, that if it ought to be changed, it should be by Act of Congress.

We (that is, Mr. Moore and I) recommended really an expansion of 60(b). I just mention that here, and if nobody is interested in that, we will just take the two here.

JUDGE DOBIE: I don't think it is a good thing to make it run from notice. I think that is bad. I think we had better do it either the Mitchell way or as Morgan suggests.

THE ACTING CHAIRMAN: I take it, then, the general sentiment is to do it by way of repeal; that of the possible courses that we might take, what we most want to do is to blot out Hill v. Hawes.

JUDGE DOBIE: Yes.

MR. HAMMOND: In connection with that, Mr. Mitchell suggested two ways and says that he favors the first alternative.

THE ACTING CHAIRMAN: Does he express a choice as between his alternatives?

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: Where is it? In the letter? I don't see it.

MR. HAMMOND: It is at the bottom of page 2.

DEAN MORGAN: Charles, the Supreme Court would have power under your previous memorandum to prescribe the time for appeal, wouldn't it?

THE ACTING CHAIRMAN: I should think so.

DEAN MORGAN: The circuit court of appeals, certainly.

THE ACTING CHAIRMAN: Yes, I should think so.

DEAN MORGAN: And that would be the only theory on which your alternative would be put up, wouldn't it?

THE ACTING CHAIRMAN: Yes, that there is power.

DEAN MORGAN: Yes, and we are not doing it for the district court; we are doing it for the court of appeals on the time you appeal, because that is statutory, clearly.

THE ACTING CHAIRMAN: I don't know. I am not so sure, in a sense.

DEAN MORGAN: It is the same old thing we had before.

THE ACTING CHAIRMAN: Yes. It is the thing that

takes it out of the district court into the court of appeals. So it is fully 50 per cent district court.

DEAN MORGAN: The District of Columbia Court was given power to prescribe its period of appeal by Congress, wasn't it?

MR. HAMMOND: That is what Mr. Mitchell says.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: Mr. Mitchell, I take it, concludes a great deal from what the Chief Justice said, but I wonder, when you come to think about it, if Hill v. Hawes isn't directly a decision that we do have power over the time for appeal.

DEAN MORGAN: It may be.

THE ACTING CHAIRMAN: Just see what Roberts said.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: That is a necessary result. He is just looking at the rule. "It may well be that the effect to be given to the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal", and so on. In other words, the rule now takes care of the appeals. They may not have thought of the question of power, but it certainly seems to be there.

MR. DODGE: We don't want to change that, anyway, do we?

THE ACTING CHAIRMAN: Frankly, I wish somebody would change it, but I am not really sure it is the wise thing for the Committee to tackle it.

MR. DODGE: Three months is too long.

THE ACTING CHAIRMAN: Yes, that is what I think ought to be changed, in my judgment, because you get three months to do the very simple thing of filing a notice of appeal, and then you get three months for making up the record before you go on to make it to the circuit court, where you get a lot more time, too. Therefore, you get almost six months as of right before you really take your appeal.

MR. DODGE: Altogether too long.

THE ACTING CHAIRMAN: I don't know whether we should do it. I should say that I think we have the power, and Mr. Lemann said he had no question but that we could properly construe that we have the power.

MR. HAMMOND: You mean under our enabling act?

MR. DODGE: We always fought shy of that. Didn't we discuss that away back and decide to leave the statute unaffected?

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: That is true, and Mr. Mitchell, of course, was all in favor of construing our power in a limited way.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: But now he thinks that these events have shown that we have the power.

MR. DODGE: Which is the rule that he favors?

THE ACTING CHAIRMAN: I can't immediately find that he does. He does say that he puts them both up, and he says this: "I favor putting up alternative amendments, and let the bench and bar--and the Court--decide which to accept."

You thought that he expressed a preference.

MR. HAMMOND: I thought he did, but maybe not.

THE ACTING CHAIRMAN: I don't think it is there. It may be in his letter.

JUDGE DOBIE: I think it is in his letter somewhere; not this one, in the other one. It seems to me I found it.

MR. HAMMOND: I guess he said, "I favor putting up alternative amendments, and let the bench and bar--and the Court--decide which to accept."

PROFESSOR MOORE: He said, "My preference is for the latter," the latter being to assume that the Court has power to make rules affecting the time for appeal.

THE ACTING CHAIRMAN: What are you reading from there?

PROFESSOR MOORE: From page 2 of his letter.

JUDGE DOBIE: The letter to Stone?

PROFESSOR MOORE: No; his letter to the Committee under date of March 31.

THE ACTING CHAIRMAN: That is what we read the first day. I seem to have mislaid my copy of it.

JUDGE DOBIE: "My preference is for the latter" and "requiring a formally served notice to start the time for appeal." In other words, his preference seems to be to date it from the notice and then to make it thirty days.

THE ACTING CHAIRMAN: Yes, I see. That is what he said.

MR. DODGE: Where is that?

THE ACTING CHAIRMAN: That is in this letter dated March 31.

MR. DODGE: What page?

THE ACTING CHAIRMAN: Page 2.

MR. DODGE: Where?

THE ACTING CHAIRMAN: Just before the final paragraph, at the end of the full paragraph.

MR. DODGE: Oh, yes.

JUDGE DOBIE: "My preference is for the latter."

MR. HAMMOND: Yes, that is it.

JUDGE DOBIE: That is, to make it thirty days and to start it from the notice of appeal, and for us to take the power. Notice of judgment, I suppose, would be the time when it is received, wouldn't it? That, of course, would introduce the element that you would have to prove when the fellow got his notice.

PROFESSOR SUNDERLAND: That makes it an uncertain date.

JUDGE DOBIE: That is very bad, I think.

PROFESSOR SUNDERLAND: It is not a matter of record.

JUDGE DOBIE: No. I would rather have it sixty or forty-five days, or something like that, from the time of judgment.

MR. DODGE: Does he say here that his preference is for a rule shortening the time for appeal and making it run from notice?

JUDGE DOBIE: Yes.

THE ACTING CHAIRMAN: That is what he says in this.

MR. DODGE: Where?

THE ACTING CHAIRMAN: Going back a little on that same page, he says, "I have in my notes presented two alternatives. One is to make amendments reiterating more clearly our original intent and repealing, as far as express language can do so, the decision in Hill v. Hawes.

JUDGE DOBIE: That is the one we have talked about and the one we have read.

MR. DODGE: What page of the letter is that on?

JUDGE DOBIE: Page 2.

THE ACTING CHAIRMAN: What I am reading is from page 2, toward the end of that first full paragraph. Then he goes on: "The other alternative is to assume that the Court has

power to make rules affecting the time for appeal and fixing the time at thirty days from the date of notice of the judgment, instead of the date of entry, and requiring a formally served notice to start the time for appeal. My preference is for the latter. I think both should be incorporated in the draft to be printed and distributed, and let the courts and the bar comment on both."

It is practically time for adjournment.

DEAN MORGAN: Let's quit.

PROFESSOR CHERRY: Under the latter, he doesn't mean merely mailing by the clerk. He means a served notice.

DEAN MORGAN: That is right. That is what he means.

PROFESSOR CHERRY: Yes; which would be quite a change.

DEAN MORGAN: You are going to start the time for appeal by serving notice.

PROFESSOR CHERRY: That is right.

DEAN MORGAN: You have to do it within thirty days.

THE ACTING CHAIRMAN: I think we had better suspend now. You can think this over, and we will have it all ready by the time we get back.

... The meeting adjourned at 1:00 p.m. ...

TUESDAY AFTERNOON SESSION

April 4, 1944

The meeting reconvened at 1:50 p.m., Judge Charles E. Clark, Acting Chairman, presiding.

THE ACTING CHAIRMAN: I think we can come to order and start in on what I suppose should come to be known as the Hill v. Hawes situation.

If there is any desire to follow the second alternative (that is the alternative of shortening the time for appeal on given notice), I throw out the suggestion that the model of the Bankruptcy Act might well be followed. We could look that up, if you are interested to get the exact statement, but it is something like this. There is a shorter period if notice is given, but there is an over-all period if no notice is given. As I remember, if notice of a judgment is served, it is thirty days after the notice; and if no notice is served, it is in any event forty days.

That, I should say, would have two advantages here. First, it is a system that is in existence in the district courts and is applied by Congress. Second, it does have an end-all attached to it.

Did you hear, Edson?

PROFESSOR SUNDERLAND: I didn't hear what you said.

THE ACTING CHAIRMAN: I was saying, if we are following the alternative of shortening the period and having some

service of notice, might it not be a good thing to consider the provision of the Bankruptcy Act, which in effect is that if notice of the entry of the order is given, there is a thirty days' period; then, if no notice is given, there is a somewhat longer period but, nevertheless, a definite period, which I think is forty days. I suggested first that that would have the advantage of being a statutory scheme approved by Congress which is being applied in the district courts in that very large number of cases, and second that it didn't depend entirely on notice, that there was a statutory limitation, so to speak.

PROFESSOR SUNDERLAND: Thirty days, then, from the notice or forty days from the entry of the order?

THE ACTING CHAIRMAN: Yes.

JUDGE DOBIE: That complicates it.

PROFESSOR SUNDERLAND: I wonder what the experience in the states has been where the time runs from the giving of notice. I don't know.

DEAN MORGAN: The only thing I can say is that we did that in Minnesota with appealable orders, and it seemed to work all right there, because the person who wanted to appeal and wanted to have the order effective would immediately serve notice on him, and he knew he had to start the time for appeal running.

PROFESSOR CHERRY: That was not the clerk. That was

service by the party who wanted to start the time, and he proved that service just as he proved any other service, admission or affidavit.

I don't want to interrupt this discussion. You are talking now about the alternative, the second possibility. I have an idea on the other one when we come to it. I would rather defer it.

THE ACTING CHAIRMAN: We are discussing them both, and I think you had better give us your idea on the first one.

PROFESSOR CHERRY: I am wondering if we didn't partly get into trouble by the language we used in 77(d) as compared with the language we used in 73(b). In 73(b), on appeal, we called what the clerk does "Notification of the filing of the notice .... by mailing copies", and so on. Here our language is that "the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby". We talk about serving a notice.

One of the ways to clarify our situation, if we were not going to attempt to change the time, I think, would be to use that other language. The language is what we already have on pages 87 and 88 of the printed rules, in Rule 73(b) on Notice of Appeal, where we talk about the clerk giving notification.

PROFESSOR SUNDERLAND: "Notification" instead of "notice"?

PROFESSOR CHERRY: And not "serving notice", you see. "Notification of the filing of the notice of appeal shall be given by the clerk", and then we follow that up with: "but his failure so to do does not affect the validity of the appeal." We make that a very subordinate sort of thing. It is notification; it isn't notice; it isn't served.

Part of our difficulty or part of the thing that the Court could grab here, and probably did, was that judgment is entered, and then "the clerk shall serve the notice". That is a more formal sort of thing.

DEAN MORGAN: What do we mean, then, by the last sentence in 77(d)? "Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules".

PROFESSOR CHERRY: There are some situations, evidently, where--

DEAN MORGAN (Interposing): Mr. Moore didn't think there were. I don't know.

PROFESSOR CHERRY: The only place you get it is in Rule 5, and that says where the order requires it. It isn't the rules on their own that do it, apparently, but the terms of the order. Is that right, Mr. Moore?

MR. DODGE: What is your suggestion? Amend 77 how?

PROFESSOR CHERRY: To say that "Notification of the entry of the judgment shall be given by the clerk by mailing

copies thereof to all the parties."

THE ACTING CHAIRMAN: You want to leave out the reference to Rule 5, don't you?

PROFESSOR CHERRY: Yes. Make it merely a notification.

THE ACTING CHAIRMAN: I should think that would be a good idea. Then put in also that failure to give it--

PROFESSOR CHERRY (Interposing): Yes. Then follow it up as the other rule does with the statement that if it isn't done, there are no consequences. I confess I was rather surprised on re-reading this to find that we called that service. I mean I didn't remember it. I remember the other language. I thought of this as the same.

PROFESSOR SUNDERLAND: It is a pretty mild way of doing it.

PROFESSOR CHERRY: I didn't mean that would be all. You would follow it up with a statement. Only I do think that that language calls for change. I don't think this should be called "serving a notice" on them.

PROFESSOR SUNDERLAND: Probably not.

PROFESSOR CHERRY: That really isn't what we meant, is it. Mail a notification. He ought to get a chance to learn about it, just as we have provided in the taking of the appeal.

PROFESSOR SUNDERLAND: That was just a gratuitous accommodation that we made.

PROFESSOR CHERRY: All right, but that isn't what you think about when you talk about serving a notice. That is a very formal sort of thing.

THE ACTING CHAIRMAN: Let's see if we can work it out something like this: "(d) Notification By Clerk of Orders or Judgments. Immediately upon the entry of an order or a judgment, the clerk--

PROFESSOR SUNDERLAND: "notification shall be given".

THE ACTING CHAIRMAN: "notification shall be given by the clerk of its entry by mail upon every party affected thereby who is not in default for failure to appear".

Do we need the note in the docket?

"and the clerk shall make a note in the docket of the mailing."

PROFESSOR CHERRY: That is right.

JUDGE DOBIE: That doesn't hurt. It is good practice.

PROFESSOR CHERRY: We have it in the other rule.

MR. HAMMOND: It was in the equity rule.

PROFESSOR CHERRY: Yes.

THE ACTING CHAIRMAN: What was the expression that you gave earlier, Eddie, about failure?

JUDGE DOBIE: To serve a notice is quite formal.

THE ACTING CHAIRMAN: "Failure to make such notification".

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: "shall not affect the validity of the order or judgment".

DEAN MORGAN: "or the time to appeal."

THE ACTING CHAIRMAN: "or the time to appeal." Anything else?

DEAN MORGAN: Or you could say, "or relieve or authorize the court to relieve a party for failure to have knowledge of the entry."

PROFESSOR SUNDERLAND: You had another statement there.

DEAN MORGAN: I suggested a different method of handling it, of course, which would leave this other sentence in, if it has effect, and that was to start out by saying, "All parties are charged with knowledge of the entry of the judgment." Then go on: "Immediately upon the entry of an order or judgment the clerk, for convenience of litigants, shall serve a notice of entry by mail in the manner provided", and so forth. Then follow it by saying, "But the failure of the clerk to serve the notice shall not affect the time for appeal."

Of course, it is very much larger than Cherry's.

PROFESSOR CHERRY: I like the language you have there, Eddie, but I would add to it changing to "notification" instead of "serving a notice" while I was doing it. That is what I had in mind.

THE ACTING CHAIRMAN: I am not clear as to what you want as the final clause of the last sentence.

DEAN MORGAN: "or relieve or authorize the court to relieve a party for failure to have knowledge of the entry."

THE ACTING CHAIRMAN: That is all right, but then don't you want to say, "Any party may in addition serve a notice of such entry in the manner provided in Rule 5"?

DEAN MORGAN: That is right, surely, "and such mailing is sufficient for all purposes for which notice is required." I assume that we had some reason for putting in that last sentence, Charlie. I don't know.

THE ACTING CHAIRMAN: I was wondering if that first part of the last sentence had much reason for being. Does that refer to injunctions, by any chance?

DEAN MORGAN: It may be. It couldn't be, though, because we didn't provide for--

PROFESSOR MOORE (Interposing): I suppose that means that in order to hold a man in contempt, the injunctive order would have to be served not by just the clerk sending a notice, but by one party having the injunctive order served on the other.

MR. HAMMOND: That comes from the equity rule. It isn't the exact wording. It seems to be a change of the wording of the equity rule.

THE ACTING CHAIRMAN: How does the equity rule read?

MR. HAMMOND: Do you want me to read the whole equity rule?

THE ACTING CHAIRMAN: Is it long?

MR. HAMMOND: No, it isn't so long. It is rather interesting.

"Neither the noting of an order in the equity docket nor its entry in the order book shall of itself be deemed notice to the parties or their solicitors, and when an order is made without prior notice to or in the absence of a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof by mail to such party or his solicitor, and a note of such mailing shall be made in the equity docket, which shall be taken as sufficient proof of due notice of the order."

We have apparently rephrased that last clause. We are afraid to do away with the equity rule.

MR. DODGE: I don't like those words, "for convenience of litigants", which we haven't put in anywhere else and which might lead the clerk to think, "This isn't very important, so I guess I won't send it. It is only for convenience and is not really required." Why should you put that in?

DEAN MORGAN: Merely to emphasize the fact that it wasn't, but I think that this might be left out if you put the other in about "failure of the clerk to serve".

MR. DODGE: You have adopted in substance the last

part of Mitchell's suggestion on page 3 of his memorandum, haven't you?

DEAN MORGAN: That is right.

MR. DODGE: "the failure to give or to receive notice of entry does not in any way affect the time for appeal, or relieve, or authorize a court directly or indirectly to relieve," and so forth.

DEAN MORGAN: "for failure to have knowledge of the entry". I put it that way, instead of all that.

MR. DODGE: Why isn't that the best way to deal with it, rather than try to doctor with the time of appeal? To bring the question up, I make a motion to that effect.

THE ACTING CHAIRMAN: You make a motion that the sentence suggested by Mr. Mitchell be added to 77(d), and that doesn't mean that no other changes are to be made to 77(d); is that it?

DEAN MORGAN: That isn't what he moved. He moved my substitute.

MR. DODGE: Yes.

THE ACTING CHAIRMAN: All right. You had better state it again, then.

DEAN MORGAN: Insert before the first sentence in paragraph (d), "All parties are chaged with knowledge of the entry of an order or judgment." Then at the end of the first sentence as printed in paragraph (d) insert: "but the failure

of the clerk to serve the notice of the entry shall not affect the time to appeal, or relieve or authorize the court to relieve a party for his failure to have knowledge of the entry."

PROFESSOR SUNDERLAND: You should say "actual", because you already have him constructively notified.

DEAN MORGAN: That is right. Mr. Mitchell just wanted to guard against the court's saying, "Well, he was constructively notified; he wasn't actually notified. Consequently, it is excusable neglect," you see.

MR. DODGE: "And I will indirectly relieve him from it." You have left out "directly or indirectly".

JUDGE DOBIE: Would you put in that addition to 73(a) as he suggests?

MR. DODGE: No.

DEAN MORGAN: No.

JUDGE DOBIE: You don't think that is necessary.

DEAN MORGAN: I don't think that is necessary.

MR. DODGE: How about Mr. Cherry's suggested modification of the language of the first sentence? "Immediately upon the entry of such order or judgment notification shall be given".

DEAN MORGAN: That with O.K. with me. Instead of "the clerk shallnotify", say "notification shall be given".

MR. DODGE: I embody that in my motion, too.

THE ACTING CHAIRMAN: What Mr. Cherry made?

DEAN MORGAN: Yes. Instead of "the clerk shall serve a notice", say "notification shall be given".

MR. DODGE: My motion is that the Cherry-Morgan proposal be adopted.

JUDGE DOBIE: I second the motion.

THE ACTING CHAIRMAN: Is everybody clear what that is? Have you got that down well enough, Moore?

PROFESSOR MOORE: I think so.

THE ACTING CHAIRMAN: You will have to insert "he" so that it will be "and he shall make a note in the docket", I guess.

Are you ready for the question?

DEAN MORGAN: Question.

THE ACTING CHAIRMAN: All those in favor will say "aye"; those opposed, "no." The "ayes" have it, and it is so voted.

JUDGE DOBIE: Is Lemann coming back?

THE ACTING CHAIRMAN: Yes, he is coming back. He was in favor of this general approach.

I want to ask, do you want to consider this as finally disposing of Hill v. Hawes? I think you ought to do something about Mr. Mitchell's second alternative, either say you don't approve it or put it up as an alternative.

JUDGE DOBIE: I don't object to putting it out, but I think the Committee ought to go on record as approving what

we have done.

PROFESSOR CHERRY: Suppose it were sent back to Mr. Mitchell with the statement that we have agreed to now, and ask him if he still felt that that other ought to be put up to the bench and bar. If he does, I think it ought to be, but it may be that when he sees that wording of it, he will withdraw the other. We can't consult with him about it now. If he feels strongly enough about it and wants it to go to the bench and bar, all right.

THE ACTING CHAIRMAN: Would you rather not, then, take any action on the second alternative?

JUDGE DOBIE: We have approved this one. I wouldn't object to doing what Cherry suggests: Write Mitchell and tell him that if he wants the other, it would go out, but I think it ought to go out that we approve this one rather than the other one, that that is the Committee's view. I think the bench and bar are entitled to know that.

SENATOR LOFTIN: I haven't heard any of the discussion, but doesn't what you have approved cover the situation?

JUDGE DOBIE: If he wants the other to go out, I haven't any objection to it.

THE ACTING CHAIRMAN: There are quite different ideas that we have in mind. This directly repeals, as he puts it, Hill v. Hawes.

SENATOR LOFTIN: That is the view that you have just

approved.

THE ACTING CHAIRMAN: That is right. The other alternative which we find in the correspondence Mr. Mitchell said he preferred has quite a different approach. That was to shorten the time for appeal to thirty days but to make it date from the date of the actual notice.

DEAN MORGAN: He wanted the alternatives put up, I think.

THE ACTING CHAIRMAN: He said first that he wanted both alternatives put out, and let the Court and bar decide. Then in his latest letter he said that he himself favored the second alternative.

MR. HAMMOND: Which is the one we haven't approved.

MR. DODGE: That was primarily because he wanted the time of appeal shortened.

DEAN MORGAN: That is right.

MR. DODGE: I don't know that he was making a choice in favor of that approach.

SENATOR LOFTIN: Put it up to him and see if he still feels that it ought to be submitted to the bar.

MR. DODGE: Yes.

PROFESSOR CHERRY: If he does, we will go along with him.

DEAN MORGAN: Let me make a motion. I move that the Reporter be requested to draft an alternative following the

language of the bankruptcy provision. That, Scott, if you remember, is a shorter period with notice and a longer period without notice.

SENATOR LOFTIN: And submit that to Mr. Mitchell.

DEAN MORGAN: Yes.

SENATOR LOFTIN: To see if he still feels that it ought to go out.

DEAN MORGAN: Yes.

SENATOR LOFTIN: I second that motion.

THE ACTING CHAIRMAN: All in favor say "aye"; those opposed, "no." (Carried)

I take it the general sense is that, unless Mr. Mitchell turns out to care very much either way, you would prefer to send out just the one form.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: All right.

SENATOR LOFTIN: I hate to see the Committee sending so much out to the bar in the form of alternatives.

DEAN MORGAN: So do I.

SENATOR LOFTIN: They get the idea that we don't know our own minds up here.

DEAN MORGAN: You don't want the truth revealed, Scott.

SENATOR LOFTIN: That is right. I think we ought to conceal it.

THE ACTING CHAIRMAN: Of course, I don't feel that way when I am in the minority.

I thought that next, as being perhaps fully as important as anything, and certainly being new, we ought while everyone is here to consider the proposal by Judge Maris for Third Circuit. If you can find among the papers laid before you one under the heading of Rule 75, Preliminary Draft III, 4/4/44, Reporter's Comment, Transmission of Original Papers as Record, we have said:

"In forceful letters of February 7 and 17, 1944, to Chairman Mitchell, Judge Maris has transmitted the strong request of all members of his court for authority to substitute the original district court papers in place of extensive copies now required. He points out that in courts having the non-printing of the record rule, there is now required much copying which serves no useful end, and argues that transmission of the original papers by the district court clerk would (1) save all this waste of time and expense (2) tremendously simplify and expedite appeals by doing away with all matters of designation and the like and (3) provide a better record by giving the appellate court the opportunity to examine the original documents."

Then we express the opinion that the arguments are irresistible.

I might say that this is a very short résumé, but

I think it is a fair résumé. There were two different letters, and they were each many pages long. Apparently the whole court has talked it over, and they are quite strenuous about it. He stated it as the view of the entire court.

They consider that under our existing rule, which you know has many references to copies, and so on, they have not the power and that the existing rule requires copies. I think that is true, although of course at that time we weren't thinking of this issue, the non-printing rule, which has developed since then, but we did speak of copies.

JUDGE DOBIE: All this rule does is to permit the circuit courts of appeals, each one, to do it by rule, doesn't it?

THE ACTING CHAIRMAN: That is it, yes. That is all Judge Maris suggested. We go on here and say:

"Nevertheless, as he points out, not all courts have come even to the non-printing rule. (Thus Judge Sibley has requested that his objections to Rule 75 be reconsidered.)"

Parenthetically, I might say that Mr. Chandler, of the Administrative Office, wrote me last week that Judge Sibley has sent him that long correspondence he had with Mr. Lemann back in 1940, in which he objected to Rule 75, wanted the district judge to make up the record, and all that, that he wanted it to be considered by the Committee. I guess he felt that he hadn't succeeded in getting the consideration he wanted

through Mr. Lemann. At any rate, he asked Mr. Chandler to see that it was submitted to the Committee again. I am now taking this occasion to bring it up incidentally. I don't know that there is any more we can say about it, but at any rate he wants it before you.

Now to go back to Judge Maris: "Hence it is presumably unwise to require this from all appellate courts. We think, however, that this simple course should be made available where desired, and that certainly it should be presented in all its beauty and simplicity for consideration of the bench and bar."

Then we suggest a rule on the next page. This is just an additional section to Rule 75, a new section. Do you want me to read it?

MR. DODGE: In that first sentence, what business have we to authorize the circuit court of appeals to make rules?

THE ACTING CHAIRMAN: Doesn't that go back to this: that if we can require them to do certain things, may we not exempt them from our rule? As the Third Circuit now construes, we have required them to do certain things as to copies, and now this is to say that alternatively under certain conditions (to wit: that they wish to) they can do something else.

PROFESSOR CHERRY: Would your idea be satisfied if it said something to this effect? "Whenever a circuit court of

appeals has provided by rule ...."

DEAN MORGAN: That is right.

PROFESSOR CHERRY: Rather than our seeming to be authorizing them to make rules. I think that is a distinction which is tactful.

THE ACTING CHAIRMAN: That will be noted.

PROFESSOR CHERRY: I think there is a point there.

MR. DODGE: Certainly. In (1) of that section we have referred to "as prescribed in the rules of the court to which the appeal is taken".

PROFESSOR CHERRY: Yes.

MR. DODGE: May prescribe what part of the record shall be put in, and so forth.

PROFESSOR CHERRY: We are just taking cognizance of the fact.

MR. DODGE: "If it provides that it be not printed, the clerk of the court shall ...."

JUDGE DOBIE: I don't think the circuit court of appeals will be offended by this suggestion, do you, Charlie?

PROFESSOR CHERRY: How about Judge Sibley?

THE ACTING CHAIRMAN: I think Judge Sibley is going to hold the whole thing unconstitutional, but he hasn't done it yet, at any rate.

MR. DODGE: This is the only time we have undertaken, under the guise of prescribing rules for the district courts, to

empower the circuit court of appeals to make certain rules.

THE ACTING CHAIRMAN: It still seems to me a matter of wording.

DEAN MORGAN: You don't care anything about that, do you?

THE ACTING CHAIRMAN: No, I don't, but if we have restricted them in our existing rules, we can certainly take it away.

MR. DODGE: We haven't assumed that. In paragraph (1), just preceding the new one, "What part of the record on appeal .... shall be printed", and so forth, "shall be as prescribed in the rules of the court to which the appeal is taken".

THE ACTING CHAIRMAN: That is a different thing.

MR. DODGE: Here we go on to say if their rules do not require printing--

THE ACTING CHAIRMAN (Interposing): No. That is a different thing. That is the matter of printing. Of course we are not going to change that now. That is a different thing, and you get it several different places in the rules. But look, for example, at (g). "The clerk of the district court .... shall transmit .... a true copy", and so forth, "but shall always include, whether or not designated, copies of the following:"

DEAN MORGAN: You say the clerk has to do it, that is

all. Now you say when the rule of the circuit court of appeals so provides or provides for the hearing of appeals on original papers, then the clerk shall do such-and-such a thing. I think it would be a good idea if you could put it right after that.

THE ACTING CHAIRMAN: That is all right.

DEAN MORGAN: Don't you think, instead of (n), it ought to come in right after (g), another paragraph under (g)?

THE ACTING CHAIRMAN: That is possible, but there is a question how the whole rule will fit in.

DEAN MORGAN: Yes, that is right.

THE ACTING CHAIRMAN: What we considered was that this would be practically a substitute for everything up to (h).

DEAN MORGAN: Oh, I see, up to (h).

THE ACTING CHAIRMAN: And then that (h), and so on, would be a little different. Notice in our suggested form the last sentence, 92 to 94.

DEAN MORGAN: Oh, yes.

THE ACTING CHAIRMAN: That is, it seemed to us that the provisions (a) to (g) inclusive would be now superseded, and that (h), (j), (k), and (l) would apply, but would apply to the originals and not to the copies. That is why we put it at the very end.

DEAN MORGAN: I see. That is all right.

THE ACTING CHAIRMAN: I don't see why we can't follow

the form that you have suggested, that "Whenever the rules of the circuit court of appeals so provide, the clerk shall ...."

DEAN MORGAN: "provide for the hearing on original papers." Is that right?

PROFESSOR CHERRY: The language that you have here, just cutting out that they may provide. Whenever they do provide, and then go on as you have it.

THE ACTING CHAIRMAN: Then I suppose it would start like this: "Whenever a circuit court of appeals has provided by rule for the hearing of appeals has provided by rule for the hearing of appeals on original papers".

DEAN MORGAN: "in lieu of the procedure above provided".

THE ACTING CHAIRMAN: Yes, "then the clerk of the district court".

DEAN MORGAN: Yes, that is right.

THE ACTING CHAIRMAN: Did you get that?

PROFESSOR MOORE: Not all. What about the designation, the statement of points, and so on?

THE ACTING CHAIRMAN: Those are all out.

PROFESSOR MOORE: They should be, but if you incorporate this in (g)--

DEAN MORGAN (Interposing): No, no. We are going right down to (n). I withdrew that, Bill.

THE ACTING CHAIRMAN: The idea is that we shall not

try to empower the circuit court of appeals, but shall simply say what happens when they have acted.

DEAN MORGAN: We don't say we can't do it; we say we don't want to.

THE ACTING CHAIRMAN: All right. Did you get that now?

"Whenever a circuit court of appeals has provided by rule for the hearing of appeals on the original papers in lieu of the procedure above provided, then the clerk of the district court, within a reasonable time not to exceed 30 days after notice of appeal has been filed, shall transmit all the original papers in his file dealing with the action or the proceeding in which the appeal is taken, with the exception of those whose omission is agreed upon by written stipulation of the parties on file, and shall append his certificate reasonably identifying the papers transmitted. If a transcript of the testimony is on file the clerk shall transmit that also; otherwise the appellant shall file with the clerk for transmission such transcript of the testimony as he deems necessary for his appeal subject to the right of an appellee either to file additional portions or to procure an order from the district court requiring the appellant to do so. After the appeal has been disposed of, the papers shall be returned to the custody of the district court.

"The provisions of subdivisions h, j, k, l and m"

(m is the suggested new one that we have to consider separately) "shall be applicable but with reference to the original papers as herein provided rather than to a copy or copies."

Let me add one or two things. First, this is drawn in the light of the Court Reporter Bill, which in substance provides this: The reporter does not transcribe his notes until he is asked, but whenever he is asked by any party, he then automatically is to make an additional copy which is filed with the clerk. Hence, there is likely in a great number of the cases to be either all or almost all of the transcript, anyhow. Then we say the clerk just sends that on. If it hasn't been done, we wanted some machinery without too much trouble to get it all up.

We provide in the first place that the appellant puts in the transcript. If he doesn't, the appellee can force him to do it, but then we put in that the appellee could put in his own copy if he wished. One might say that the appellee never will do it. As a matter of fact, I think he probably would a good deal, because in the big cases usually both sides are getting the transcript, and it is probably a simpler thing many times, where the appellee doesn't care, for him to add what he wants. At any rate, this gives the machinery for getting it all up.

It all goes up to the appellate court, and then pre-

sumably the appellate court will require a certain amount of it to be printed in their brief. That is the rather outstanding feature of the so-called Judge Parker rule. That is the general plan.

One other thing. This correspondence came to Mr. Mitchell. He acknowledged it to Judge Maris and sent it on to me. Now Mr. Mitchell puts this in his suggestions to us. This is on page 7 of the original draft. I don't know that that is the same in the mimeographed copies or not. On Rule 75 he says this:

"Why not add a provision that the original record may be certified up to the Circuit Court of Appeals, if the rules of the Circuit Court of Appeals require it, as some of the Circuit Judges have suggested? Such a record should be returned to the District Court after the appeal has been finally disposed of."

Then the rest of his suggestion deals with some other matter.

By the way, Monte, I don't know whether you got the background. I was just saying in connection with this that this came from Judge Maris for the whole Third Circuit and fits in with the non-printing rule. It probably isn't applicable to other circuits. But in that connection Judge Sibley has sent on to Mr. Chandler his correspondence of 1940 with you and asked that it be presented to the Committee.

MR. LEMANN: That is in connection with the record on appeal.

MR. DODGE: What does Judge Sibley want?

THE ACTING CHAIRMAN: In the first place, the judge supervises the making up of the record and tells what goes in and what goes out, and finally signs it. The judge is responsible for the making up of the record. Then, I am not sure, but I think he is against non-printing, isn't he, Mr. Lemann?

MR. LEMANN: I didn't think printing had anything to do with it. It has been some time since I read the correspondence, but printing is required by our rules in the Fifth Circuit, and I don't think it has ever been suggested that we shouldn't have it. My recollection is that he said that records came up to them that were very messed up and that it was wrong not to require the approval of the district judge of the preparation of the transcript. Vaguely, as I recall it, I think that is the nub of his criticism. He said that now the district judge had no control over it and that you just left it to the lawyers. He said that the lawyers from the large metropolitan districts get the records in pretty good shape, but that they deal with a lot of records that come from country lawyers who are careless in the way they are made up, and that they have a terrible time going through the transcripts to straighten them out.

JUDGE DOBIE: I don't think we have had any trouble. I think that is very largely due to the clerks.

MR. LEMANN: His idea seemd to be that if the district court had to do something about it, you would avoid that difficulty. Is that about right, Charlie? Have you got it there?

THE ACTING CHAIRMAN: Yes, I think that is correct.

JUDGE DOBIE: I don't think the district judges would welcome that at all.

MR. LEMANN: I pointed out to him that whenever the parties couldn't agree on whether the record was properly made up, the district judge had to pass on it, as provided here.

JUDGE DOBIE: That is right.

MR. LEMANN: But that didn't satisfy him. Then he made some criticism, as I recall it, of what certain words meant. I think perhaps it was "pleadings" or some other word. He said that the way we used the word, according to his understanding of the definition of the term, our language wasn't artistic.

THE ACTING CHAIRMAN: If you really want that, Mr. Chandler has it. I mentioned it, but I thought we had considered it about all we could.

DEAN MORGAN: We considered that very thoroughly before, and I think we decided that if the parties agreed, the judge in practically every case would just sign the transcript.

MR. LEMANN: I didn't know he had revived it. I sent it to you at the time.

THE ACTING CHAIRMAN: You did, yes, and we had long correspondence about it, but I got this just the end of last week. Mr. Chandler said that Judge Sibley had sent on the correspondence again, and Mr. Chandler wanted to know if I wanted it. I replied that I would mention it again but that I thought we had considered it probably as much as it was worth while.

MR. LEMANN: I know I asked him, "Judge, what would you suggest that we do?" I have great respect for Judge Sibley. I think he has made a first-rate judge. In this correspondence two years ago, I asked him, "What do you recommend, Judge? What would be your solution?" His answer was that he hadn't any recommendation to make, that this was something for the Committee to decide. Is that in accord with your recollection at all?

THE ACTING CHAIRMAN: Yes. As a matter of fact, we considered this at the May meeting, and I gave you extracts of his letters in advance. If you wish, we can send to Mr. Chandler's office, but I think, for my part, we have done all we can by it. We just disagreed, really.

MR. LEMANN: Nobody else has found any trouble have they? You haven't any complaint from anyone else?

JUDGE DOBIE: We haven't had any difficulty at all.

Under our rule they don't have to print the whole thing, and we are very stern with lawyers who do print the whole thing. We had a case the other day in which we told a man it was absolutely useless, and we made him pay for it, and perhaps we would tax the cost of appeals.

MR. LEMANN: You have a rule that would always permit that to be done. Tell me, are you discussing now the suggestion of sending up the record in the original?

THE ACTING CHAIRMAN: Yes, in the original form. Before us is the suggestion on Rule 75 in the new comment.

MR. HAMMOND: Before you take that up, I have some recollection about the Judge Sibley matter. It seems to me that Mr. Mitchell said, after we had considered it at the May meeting, that somebody was to write Judge Sibley a letter and say that we had thoroughly considered it. He has apparently never heard anything, and he was a little in doubt as to whether we had considered it.

THE ACTING CHAIRMAN: I rather think that is so. He apparently thinks that his views haven't been considered.

MR. LEMANN: He didn't write us in May, did he?

THE ACTING CHAIRMAN: No. The correspondence which he now identifies in the letter to Mr. Chandler is of May and June 1940 and is with you.

MR. LEMANN: He thinks the Committee hasn't ever had it before.

THE ACTING CHAIRMAN: Apparently, yes.

MR. HAMMOND: He has apparently never heard anything from the Committee.

MR. LEMANN: Did Chandler ask him for suggestions?

THE ACTING CHAIRMAN: No, no.

MR. LEMANN: He did this of his own motion.

MR. HAMMOND: I think I know something about that, too. Mr. Chandler wrote him, as the senior circuit judge, in regard to certain amendments of Rule 79, and he also put in this other matter about the history.

MR. LEMANN: I know I sent that correspondence not only to the Reporter but to the Chairman. The Chairman wrote me some rather caustic comments and said, "Don't repeat this part of it to Judge Sibley." I think he said Judge Sibley, he thought, was unduly critical.

JUDGE DOBIE: I am in sympathy with Judge Sibley's letter and, if you all think so, a courteous letter would be fine.

MR. LEMANN: I think we ought to ask the Reporter to write him and tell him.

THE ACTING CHAIRMAN: Do you think I should do it?

MR. LEMANN: Either you or Mr. Mitchell should.

THE ACTING CHAIRMAN: I think somebody ought to write him.

MR. LEMANN: I think it is due him. He took the

trouble to write fairly extensive letters, and I think the answers were pretty well outlined by what Mr. Mitchell and I wrote him at the time (Mitchell through me). It could be put in other words.

THE ACTING CHAIRMAN: Let me just call your attention to what Mr. Chandler said, without going into too much detail. This is Mr. Chandler's letter to me of March 30, last week.

"Dear Judge Clark:

"I have received within the last day a letter from Judge Sibley, enclosing copies of rather extended correspondence with Mr. Lemann concerning changes desired by Judge Sibley in Civil Rule 75. Specifically, the Judge has sent me copies of letters which he wrote to Mr. Lemann on May 14 and June 15, 1940.

"I presume these have been brought to your attention and the desires of Judge Sibley have been considered. I promised him, however, that I would bring his views to the attention of the Advisory Committee. I shall appreciate it if you would be good enough to inform me whether you are familiar with it," and so on.

He goes on: "I will be glad to give you copies of the correspondence, if you wish."

I wrote back to Mr. Chandler that we had considered it quite at length and that I didn't think he need bother with

copies, but that I would again mention it at the Committee meeting.

I certainly think that some notice should be taken of Judge Sibley. The question is who is the proper person to tell him that we think his idea is all wet.

MR. LEMANN: I think either you or the Chairman. I would be glad to write him myself, and would, perhaps, but he evidently wasn't satisfied with the replies I gave him and thought that I had just pigeonholed them or that Mitchell had, and that if he got by to the Committee as a whole--I think I brought it before the Committee at the time.

DEAN MORGAN: Surely, you did.

SENATOR LOFTIN: You did.

PROFESSOR CHERRY: Yes.

JUDGE DOBIE: I think it would probably be better for the Chairman to do it. I think the courteous way to handle it is to have Mr. Mitchell write Judge Sibley a nice letter and tell him it has been considered.

THE ACTING CHAIRMAN: I will ask the Chairman. I will suggest to him that he write.

MR. LEMANN: Either you or he. If he prefers that you do it, you don't mind, do you?

DEAN MORGAN: It doesn't seem to me that in a case of this kind you should try to convince Sibley. It seems to me all you should say is that his proposal has been considered on

at least two occasions by the Committee, and you regret to inform him that the Committee couldn't see its way to adopt them, and just quit. I wouldn't argue with him.

MR. LEMANN: I would state the reasons why.

DEAN MORGAN: Oh, hell!

MR. LEMANN: Tell him we don't think so, and then say, "Judge, we realize these are matters on which opinions may differ, but the Committee's conclusion was that the rule was working all right, and nobody else has kicked about it." I think we ought to tell him that.

DEAN MORGAN: I think you would only invite some more correspondence if you did that.

MR. LEMANN: Let's leave it to the Chairman and the Reporter to handle it.

THE ACTING CHAIRMAN: All right, I will try to get the Chairman to do it.

JUDGE DOBIE: If he insists that you do it, then I think you ought to do it, Charlie.

THE ACTING CHAIRMAN: Monte, you don't want to be commissioned to do it?

MR. LEMANN: I think, in view of the fact that he has written to Mr. Chandler, that perhaps he would appreciate a more official reply than I, just a member of the Committee, could give him. Don't you think so?

THE ACTING CHAIRMAN: If you would like to write the

letter, I will sign it.

MR. LEMANN: I will try it. I am perfectly willing to frame a letter, if you will sign it. I think I have the material in my files. I haven't looked at it now for four years. We can handle that, Charlie.

THE ACTING CHAIRMAN: Just as you say. If Mr. Mitchell would send one of his fine letters, I think that would be the best way.

MR. LEMANN: I think Mr. Mitchell regards all of this with special interest. Many of them were his own brain children, and I think he wouldn't mind writing. He has done it only through me. I know he asked me to omit some of his rather pungent comments, and I did.

THE ACTING CHAIRMAN: I will take it up with Mr. Mitchell. Of course, this may be just a part of his convalescence, you know. All right, I think that will take care of it.

DEAN MORGAN: Don't say, "I regret to inform you." Say, "I regret to have to inform you."

THE ACTING CHAIRMAN: Coming back to this proposal, what is your pleasure?

MR. LEMANN: What is the proposal? This rule (n) here?

THE ACTING CHAIRMAN: It is rule (n), only we have changed the beginning of it now. It was thought that we

shouldn't put it in the form of granting power to the circuit court, and now it is to read--have you copied it?

PROFESSOR MOORE: "Whenever a circuit court of appeals provides by rule for the hearing of appeals on the original papers in lieu of the procedure above provided in this rule, the clerk of the district court, within a reasonable time", and so on.

MR. LEMANN: All the rest of it?

DEAN MORGAN: Yes.

JUDGE DOBIE: Have we a motion before us?

MR. LEMANN: This will go in what rule? Seventy?

DEAN MORGAN: Rule 75.

PROFESSOR MOORE: At the very end.

MR. LEMANN: This wouldn't contemplate printing at all.

THE ACTING CHAIRMAN: No, this doesn't affect that. In fact, we still continue (1), you see, in line 92, which is the present provision authorizing the circuit court to take care of that. I shouldn't say "authorizing"; recognizing that the circuit court may take care of it.

MR. LEMANN: As a matter of interest, how many circuits would use this, do you suppose?

THE ACTING CHAIRMAN: There are several now. You can't tell. Not necessarily would every non-printing circuit do it.

MR. LEMANN: How many are there?

THE ACTING CHAIRMAN: The non-printing circuits now include the Second (we have come to do it this winter), the Third, the Fourth, the United States Court of Appeals for the District of Columbia; and in the First Circuit there is a provision, only I think there in the First Circuit it is a sort of second alternative, not the original. Isn't that correct, Armistead?

JUDGE DOBIE: I think so.

MR. HAMMOND: In the First you have to do it by order of the court.

THE ACTING CHAIRMAN: In the First it isn't an automatic system. In the First you do it by order of the court.

MR. LEMANN: In your Circuit, how? Automatically?

THE ACTING CHAIRMAN: Yes.

MR. LEMANN: What do you do? Do you have several copies of the transcript, or just one?

THE ACTING CHAIRMAN: Just one.

MR. LEMANN: You pass it around?

THE ACTING CHAIRMAN: Yes; except that we have the usual provisions of this rule which requires the parties to print as an appendix to their respective briefs the matter they rely on.

JUDGE DOBIE: Anything in particular that they want to bring to the attention of the court. Then you always have

the transcript before you on the bench, haven't you, when the appeal is heard? We do.

THE ACTING CHAIRMAN: It is a curious thing that, although our rule was adopted November 22, I haven't yet seen an appeal that way.

JUDGE DOBIE: We always have the transcript on the desk when the case is argued.

THE ACTING CHAIRMAN: Have you had any trouble with the admiralty bar?

JUDGE DOBIE: Not the slightest, except their making some very bum contentions before us, particularly New York lawyers.

THE ACTING CHAIRMAN: The admiralty bar demanded an audience with Learned Hand. They said we were violating the statutes of the United States in that case which provided for admiralty rules. Learned Hand finally put them off by saying they could still print if they wanted to. So the admiralty appeals are still printed in the old style.

JUDGE DOBIE: We have never had any of that.

MR. LEMANN: Can you tax the other fellow with costs if you don't have an agreement with him and you print?

THE ACTING CHAIRMAN: As yet, we haven't put real teeth in the rule. We have just stated the rule. Learned Hand refused the admiralty bar because they ought to realize that it was optional, anyway. I think the admiralty bar is a

little on the pompous side, but this time I thought it was correct. Our new rule says, "In lieu of the former rule, you should do thus." There is no penalty attached.

MR. LEMANN: I should think if a fellow printed and won the case, that the other fellow might say to him, "I won't pay the cost of printing because you had no business printing." It wouldn't be optional in that sense.

JUDGE DOBIE: We do that if he prints too much. We did it the other day.

THE ACTING CHAIRMAN: It has been our idea to work into it gradually, to put on the penalties a little later, but for the time being indicate a preference for this and not to force them to do it yet.

MR. LEMANN: I had a case recently with a voluminous transcript, in which there was no question about printing, but the question was about making up copy to go to the appellate court. The case was tried out in Texas, and there were a great many letters and original reports introduced in evidence. Some of these things were minute books that obviously had to go up in the original, but a great many of them were letters and reports that could be copied. After a good deal of struggling, my correspondent in Houston went to the district judge. If it had been in my own office, I would have assumed that I had to have copies and have them certified and sent up to the appellate court. He went to the district judge and got the district

Judge to sign an order to send everything up in the original, all the correspondence, everything.

It worked all right. It saved a lot of trouble in locating copies and the expense of having copies made. When it got to the court of appeals, they simply took that original record and sent it to the printer. They had to print. There was no argument about the printing end. That is the rule. But it did obviate the necessity of making copies of a lot of letters, and I wonder if the rule shouldn't permit that always to be done.

MR. DODGE: Haven't we got that in here somewhere?

MR. LEMANN: I thought it was rather a stretching of the rule about original papers and exhibits in paragraph (i):

"Whenever the district court is of the opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor".

We proceeded under that rule. No objection was made. The district judge signed an order.

I think it does cover it, but it isn't the normal procedure. I thought it was a pretty sensible one, though. I think some district judges might not have signed the order, Scott, to let it be done.

SENATOR LOFTIN: He might have thought there was some special reason that those particular exhibits should have been

seen by the appellate court.

MR. LEMANN: There wasn't any reason that they should see the originals. They could see copies. Some of them were themselves copies.

SENATOR LOFTIN: That rule seems to contemplate that there is something about the exhibit itself that the appelate court should see.

MR. LEMANN: That is what I thought. That is why I thought we were stretching the rule. When you read the rule over again, Scott, I think you would say that the words "should be inspected by the appellate court" are not essential to the application, because it goes on to say, "or should be sent to the appellate court in lieu of copies". The language, when you look at it, is broad enough to authorize that to be done.

SENATOR LOFTIN: You get in under the wire on the second alternative.

MR. LEMANN: I think there are a good many district judges who would not have permitted it to be done, as this district judge did, and I wondered, "Well, is it perfectly plain that it ought to be done?" I think it is the sensible thing to permit it to be done. Why should the record stay in the district court at all? Why shouldn't it all go up to the appellate court, and all come back? which is what you have here.

THE ACTING CHAIRMAN: Yes.

MR. LEMANN: You have provided for that in this rule,

but this would fit in only where there is not to be any printing.

JUDGE DOBIE: Under the English system, if you take an appeal from King's Bench to the Court of Appeals, I think it goes right on up. Of course, that is a department of the same court.

MR. DODGE: I don't think they have any printed records at all.

PROFESSOR SUNDERLAND: Except in the House of Lords.

MR. DODGE: I meant in the Court of Appeals.

PROFESSOR SUNDERLAND: No, they don't have any printed records.

MR. LEMANN: I think this new amendment may cover what I was talking about, even though the court of appeals said it had to be printed after it got up.

DEAN MORGAN: Oh, yes; quite so. I move the adoption of rule (n).

... The motion was regularly seconded ...

THE ACTING CHAIRMAN: Any further discussion? If not, all those in favor will say "aye"; those opposed, "no." The "ayes" have it, and it is so voted.

Armistead, I would like to ask you, what do you say to the admiralty bar claims to us that we had no power to do this to them. You see, their theory is that the statute requires printing, and that admiralty rules are made only by

virtue of the special admiralty rule statute, which doesn't authorize superseding statutes.

JUDGE DOBIE: We never had the question up. I have never thought about it at all. I strongly doubt, though, the validity of the contention.

THE ACTING CHAIRMAN: They have been pretty strenuous about that. Of course, the Maritime Bar Association of America voted almost unanimously not to adopt the Federal Rules. They did because they hoped to get a trial de novo. As a matter of fact, in our circuit we say that the findings of fact should stand unless clearly erroneous in admiralty cases as well as any other. So I think the result of it is that they don't get the very thing they wanted out of not taking the Federal Rules. Nevertheless, they voted against it.

That is one reason that the Supreme Court didn't go farther. The Supreme Court, Justice Stone, talked to Walter Armstrong and me and was quite interested in adopting the Federal Rules generally for admiralty, and the Maritime Section of the American Bar Association approved this. The Maritime Bar Association, however, opposed it, and therefore the Supreme Court adopted only certain provisions, such as the discovery of material, and so on. This winter, Judge Magruder has written me asking for some help, because the First Circuit has a rule substituting notice of appeal in admiralty cases for the decision of any allowance of an appeal. He said that while

they have had the rule for two or three years there, an admiralty lawyer, or lawyers, has now objected that it is illegal, and he asked me for help. I wrote back and said in effect that I thought it was a fine thing, but I was afraid of the Alaska Pillsbury case which had held otherwise out in the Ninth Circuit. I didn't quite know whether he could sustain it or not. He wrote back very mournfully that he appreciated my interest, but he thought I hadn't given him much help.

JUDGE DOBIE: We have never had the question up that I remember. I don't think we have.

THE ACTING CHAIRMAN: Do you require an allowance of appeal in the admiralty cases, too?

JUDGE DOBIE: I don't think so.

THE ACTING CHAIRMAN: What do you think about it? Do you think that is legal? It ought to be, of course, but I mean under this lay-out. As a matter of fact, we have been worried about it, and we now pretty much require an endorsement of the district judge.

JUDGE DOBIE: I don't remember the question's ever having arisen.

THE ACTING CHAIRMAN: Maybe I have suggested something to you that you had better not know about.

JUDGE DOBIE: We don't have an enormous amount of admiralty down there. About three-fourths of it comes from Baltimore, and one-forth of it comes from Norfolk. We have never

had a South Carolina case in five years, and we have had one from North Carolina.

THE ACTING CHAIRMAN: I think with us that the admiralty bar is the most individualistic of any.

JUDGE DOBIE: I think they are, too.

THE ACTING CHAIRMAN: There are other suggestions as to 75, but I think there is no reason for taking those up out of order. I suggest now that we go back to Rule 27, unless some member of the Committee wants something special taken up. If not, let's go back to Rule 27. That is the point to which we had arrived.

MR. HAMMOND: I think you had a suggestion, didn't you, Mr. Morgan, on 27?

THE ACTING CHAIRMAN: Yes. In line 7 is the underlined new material, and Mr. Morgan had suggested this in place of the new material: "and the court may order the provisions of Rules 34, 35, and 37 applied". You had an alternative: "the court may by order make the provisions of Rules 34, 35, and 37 applicable to any proceeding hereunder".

In other words, Mr. Morgan is adopting the Reporter's suggestion at the foot there, of including these other rules, and has changed the form of statement somewhat.

Monte, we just turned to Rule 27. That is the point which we had reached. I should like to find out, have you been able to check up on what we did with the Hill v. Hawes

situation?

MR. LEMANN: Mr. Dodge just told me.

THE ACTING CHAIRMAN: I take it that is along the line you had in mind.

MR. LEMANN: That is my own idea.

THE ACTING CHAIRMAN: I want to report to Mr. Mitchell. The Committee view was that, unless he wanted to put up the alternative about the time, we wouldn't take action on it, if that is all right.

MR. LEMANN: That would be my idea, yes. I think we would meet a great resistance in the bar to cutting down the time. We have ten days' limit now on supersedeas. Ninety days otherwise ought to be retained, I think.

THE ACTING CHAIRMAN: All right. Now coming back to Rule 27, Mr. Morgan's language is quite acceptable, although he has two alternatives. I think perhaps you had better make some motion, Eddie.

DEAN MORGAN: I move the adoption of the second alternative. He might make a general order, you see.

THE ACTING CHAIRMAN: Yes. Mr. Morgan moves that for the underlined material in lines 7 and 8 of Rule 27 there be subetituted the following: "and the court may by order make the provisions of Rules 34, 35, and 37 applicable to any proceeding hereunder".

MR. HAMMOND: Before the vote is taken on that, I

Just want to call your attention to this: You, Mr. Reporter, had suggested, also, Rules 33 and 36. I was wondering what Mr. Morgan's reason was for omitting those.

DEAN MORGAN: Did I omit them?

MR. HAMMOND: Rule 33 is Interrogatories to Parties.

DEAN MORGAN: Yes. You have a separate way of meeting 33, objections to interrogatories, haven't you?

PROFESSOR SUNDERLAND: You can do everything by these other rules that you can do with 33 and 36. They really aren't very essential.

DEAN MORGAN: Can you?

PROFESSOR SUNDERLAND: They result in nothing but ex parte affidavits, anyway.

MR. HAMMOND: I knew you had some good reason.

DEAN MORGAN: I don't know whether I did or not. I thought I did at the time. I have forgotten.

THE ACTING CHAIRMAN: When you said 37, you meant 36, didn't you?

DEAN MORGAN: Probably. Let me see.

THE ACTING CHAIRMAN: It should be 36, and not 37, if it goes in at all, shouldn't it?

MR. DODGE: What has 36 got to do with this?

DEAN MORGAN: Admissions of fact.

MR. DODGE: In connection with depositions to perpetuate testimony, admissions of fact from an adverse party--

DEAN MORGAN (Interposing): From a party that is expected to be adverse, yes.

MR. DODGE: I don't see why we have to drag that in here.

PROFESSOR SUNDERLAND: It seems to me that unnecessarily complicates it. We don't need to resort to that at all. We don't need to resort to interrogatories of parties.

THE ACTING CHAIRMAN: Of course, Rule 34, the original one, may not be very directly applicable.

DEAN MORGAN: No.

PROFESSOR SUNDERLAND: That is different. You have to get hold of documents. There is no other recourse to get the documents.

DEAN MORGAN: You might have to have a physical or mental examination, too.

PROFESSOR SUNDERLAND: You might. Put in 34 and 35 along with the deposition provision, and you have everything you need and it keeps the procedure a little simpler.

DEAN MORGAN: You don't think you need 36?

PROFESSOR SUNDERLAND: I don't think you need it.

DEAN MORGAN: Rule 36 rather than 37, clearly. That was a mistake.

THE ACTING CHAIRMAN: Yes.

PROFESSOR SUNDERLAND: I don't think you need either 33 or 36.

DEAN MORGAN: Why not the admission of the genuineness of a document?

MR. DODGE: If you are going to examine him, why do you want that? You mean to file notice to admit before there is any suit pending?

PROFESSOR SUNDERLAND: You can do that through your deposition.

MR. DODGE: You can accomplish the result by this deposition.

MR. LEMANN: Of course, you could say just 36 generally, couldn't you? You could always accomplish 36 by a deposition.

PROFESSOR SUNDERLAND: Yes, you can, but of course here we are dealing with procedure before a suit has been instituted, and I don't think we ought to make it too complex.

MR. LEMANN: It isn't often resorted to.

PROFESSOR SUNDERLAND: No.

THE ACTING CHAIRMAN: How do we stand, then?

PROFESSOR SUNDERLAND: I move that we add to that underlined portion in lines 7 and 8, 35 only, so that it reads: "compliance with Rules 34 and 35."

MR. DODGE: Second the motion.

THE ACTING CHAIRMAN: And follow Mr. Morgan's language. He wants to make it: "and the court may by order make the provisions of Rules 34 and 35 applicable to any

proceeding hereunder".

PROFESSOR SUNDERLAND: Yes, that will be all right.

THE ACTING CHAIRMAN: Any further discussion?

DEAN MORGAN: I don't care to make any point on 36. I think you can accomplish it under 34 and 35.

THE ACTING CHAIRMAN: All right, those in favor of the motion say "aye"; opposed. (Carried)

MR. HAMMOND: There was one question I had noted here, whether there ought not to be the same provision in subdivision (b) of Rule 27, page 37.

THE ACTING CHAIRMAN: Any suggestion about that? What do you say, Edson?

PROFESSOR SUNDERLAND: I suppose theoretically it ought to follow the same way.

JUDGE DOBIE: In other words, the same consideration before appeal; is that the idea?

THE ACTING CHAIRMAN: Does anybody wish to make a motion?

MR. LEMANN: I think it ought to go in there logically. It doesn't often happen, but I think a corresponding change should be made in paragraph (b), and I so move.

DEAN MORGAN: I second the motion.

JUDGE DOBIE: Leave the wording to the Reporter.

THE ACTING CHAIRMAN: Mr. Moore is working on the suggestion that it can be stated more shortly. Would you read

what you have just been whispering in my ear?

PROFESSOR MOORE: The idea is to adopt essentially the provisions back in (a)(3), isn't it?

THE ACTING CHAIRMAN: Yes.

PROFESSOR MOORE: "may make an order under the same conditions as prescribed in subdivision (a)".

MR. LEMANN: Put that on page 37, the last paragraph of (b)?

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: What do you think of that?

MR. LEMANN: I think that is all right.

PROFESSOR SUNDERLAND: I think that will cover it.

THE ACTING CHAIRMAN: All right, all those who approve say "aye"; those opposed. So voted. (Carried)

Rule 28. Mr. Morgan, who came from the district court, I believe, thought that up in Massachusetts there might not be enough notaries around, and this was voted before. Mr. Oglebay has been reading the Holmes-Pollock Letters, and you will find this in the list of new cases. See the dictum of Holmes, J., in a letter to Pollock, page 267: "The Notary Public, like the domestic dog, is found everywhere."

JUDGE DOBIE: There is no objection to that. It just broadens the power. Down in our part of the world, notaries are as common as dogs.

MR. HAMMOND: The question is on the use of the word

"master." That is the only thing.

DEAN MORGAN: You put "master" here because the definition includes referee, auditor, or examiner, under 53(a).

THE ACTING CHAIRMAN: Yes. You will notice the Reporter's note at the foot of the page that covers that. It seemed to us the master was quite the simple way of doing it, but that was the longer form that was preferred.

PROFESSOR SUNDERLAND: I think the shorter form is much better.

JUDGE DOBIE: I think so. I think "master" is much better.

PROFESSOR SUNDERLAND: When we have gone to the trouble of defining a word, it seems to me we might as well use the definition.

MR. HAMMOND: That wouldn't be construed as giving any power to the master, I don't think.

DEAN MORGAN: Why not?

MR. HAMMOND: The ordinary power of excluding testimony and all that sort of business.

DEAN MORGAN: Oh, no. There are only certain masters that have that power under the rules.

THE ACTING CHAIRMAN: Under 53(c), the order of reference may limit his power and direct him.

JUDGE DOBIE: I move its adoption.

THE ACTING CHAIRMAN: It is moved that the amendment

as submitted here be adopted. All those in favor will say "aye"; those opposed. It is so ordered. (Carried)

Rule 30. Rule 30(a) was a suggestion which was made because of a case where it seemed somewhat harsh to require a managing agent to appear without fees, and this was inserted. I frankly don't like it and objected somewhat at the time, but nevertheless the Committee voted it, and that is that.

MR. LEMANN: In the note on page 33, you have: "where the party involved resides in one district and the action is pending in another district far removed." You mean you make a witness go?

DEAN MORGAN: Make a party. That was the case. They made a Wisconsin party come to New York to give a deposition in New York.

MR. LEMANN: Where is our rule on where you can make a fellow go? Which rule is that?

DEAN MORGAN: That is a witness, not a party.

MR. LEMANN: But where is the rule that applies to where you make a party go?

DEAN MORGAN: A party or a witness?

MR. LEMANN: We have a rule for each. Give me both, please.

DEAN MORGAN: Depositions.

MR. LEMANN: That is what I have been looking at. In 45 I think perhaps you have it. That is a witness.

DEAN MORGAN: If he was just a witness, and not a party, you would have to take it in his county, or something of that sort.

MR. LEMANN: The bottom of 59 would be the ordinary witness, wouldn't it?

DEAN MORGAN: That is right.

MR. LEMANN: Where do we get where you make the party go?

DEAN MORGAN: You don't get any, do you?

MR. LEMANN: If you are going to make him go, there must be something here to make him go, if you summon him as a witness. In my one case that I keep talking about when they made me a witness, I was attorney for a party, and instead of my going to Texas, they came over to New Orleans and took my deposition. They had lots of agents of my corporate client who were in a sense parties, and they never suggested that they could make them go over to Texas. Maybe they could have and just didn't know it.

THE ACTING CHAIRMAN: I think this comes really, as one might say, almost back-handed. If you look at Rule 37(d), there is a penalty for failure to attend.

MR. LEMANN: I shouldn't think that enlarged the right to make a party testify. Suppose a party didn't want to testify. You don't have to testify just because you are a party, do you? Don't you have to be summoned as a witness? If you want to

examine the other fellow, don't you have to subpoena him as a witness?

SENATOR LOFTIN: I think there is some provision about giving him a notice.

PROFESSOR MOORE: When you are going to take the deposition of B, the adverse party--

MR. LEMANN (Interposing): When you do, he is the witness. You examine him as a witness.

PROFESSOR MOORE: But you don't have to subpoena him.

DEAN MORGAN: No.

MR. LEMANN: Where is that?

PROFESSOR MOORE: Rule 37(d).

MR. LEMANN: I wouldn't have thought it was so plain as that. Is that what the court relied on in that case? Could I look at that case?

THE ACTING CHAIRMAN: There appear to have been cases that so held. In that last list of cases that we sent out is Collins v. Wayland, Ninth Circuit, 139 F. (2d) 677, where a proper notice--

MR. LEMANN (Interposing): Is that the list that you handed us this morning?

THE ACTING CHAIRMAN: I don't think it is limited to this. I understand there are several more cases than this, but this happens to be a recent one.

MR. LEMANN: Under what rule?

THE ACTING CHAIRMAN: It says: "Where a proper notice to take plaintiff's deposition in the district of suit was served on the plaintiff, who was a resident of another district, and the plaintiff failed to appear, the court did not err in dismissing the plaintiff's complaint upon notice; if plaintiff desired relief he could have obtained it by motion under Rule 30(b)."

That is, it puts it up to the plaintiff to ask for relief.

MR. DODGE: There is no specific limitation here on the place where you can take the deposition of a party, although there is of a witness.

THE ACTING CHAIRMAN: That is it.

DEAN MORGAN: That is right.

MR. DODGE: He has to go to the court for relief, and here you are helping him a bit by providing for the payment of travel.

DEAN MORGAN: You may make him come to the district where the court is held, you see.

MR. DODGE: If you want to do that, you have to pay him.

THE ACTING CHAIRMAN: It seems to me that the difficulty was that that is a case where the district court has been on the whole perhaps a little arbitrary, and we change our whole rules in the ordinary case where the district court is

not arbitrary to cover that case. We require a tender in the very ordinary case to a party, and that, I should think, in all except these exceptional cases is just a nuisance; the idea of taking the deposition of a party in New York City and giving him sixty cents, and all that sort of thing. That is why I am sorry to see the provision go in.

DEAN MORGAN: That is trivial, of course. Ordinarily, if you are going to subpoena a party as a witness, you have to make your tender, don't you?

MR. LEMANN: Why does this belong in 30(a) rather than in 45(e)? Rule 30 certainly applies to witnesses other than parties, and you don't put the witness fees in 30(a) for ordinary witnesses; you just put witness fees for parties. The lawyer will ordinarily say, upon reading that, "Where is the provision for ordinary witnesses? Here I am, looking at a rule on depositions which deals with all witnesses, and I see something in here about fees for parties made witnesses." He says, "Well, go over and look at 45. That is where I will find the other people."

I don't see much logic in that. If you are going to put it anywhere, I should think it should be in 45.

Suppose, instead of the plaintiff, it is the defendant. You sue him. I don't suppose the question would be so likely to arise. Suppose I sue a Massachusetts corporation doing business in Louisiana. I sue him in the only place I can get

venue, and so on. I could make him come down there from Massachusetts to take depositions. I never thought I could.

MR. DODGE: You mean an officer of the corporation, as if he were a party.

MR. LEMANN: Yes.

THE ACTING CHAIRMAN: Of course, the court can take care of this. In the list of cases we have just given you, if you will look at the case just before, you will see that is a case where the court took care of it.

MR. DODGE: Is an officer of a corporation a party within the deposition rule?

THE ACTING CHAIRMAN: There is a provision about managing agents.

PROFESSOR MOORE: That is over in 26(d)(2), and it makes an officer, director, or managing agent essentially a party when he goes to use his deposition.

MR. DODGE: That is only when you use it.

PROFESSOR MOORE: Yes.

MR. LEMANN: Where is the rule we have been discussing which entitles you to force a party to come anywhere, to make the managing agent of a corporation come anywhere, or the president of a corporation? If I sue the United Fruit Company in California, can I make the president go out there from Boston?

PROFESSOR MOORE: I suppose 37(d) does.

MR. LEMANN: Suppose he says, "I don't want to go"?

PROFESSOR MOORE: Rule 37(d). The officer himself, I suppose, is not subject to contempt, but the corporation is subject to the penalties provided in 37(d).

THE ACTING CHAIRMAN: The case that brought this up originally was the Fruit Growers Cooperative case, Fruit Growers Cooperative v. California Pia and Baking Co., Inc., and that was a case before Judge Campbell in the Eastern District. He held that the third-party defendant should be permitted to take the depositions of plaintiff's employees even though plaintiff asserted no claim against the third party if the third party's defense is negligence of the plaintiff.

"The plaintiff is a Wisconsin corporation, with its only office and place of business at Sturgeon Bay, Wisconsin.

"The defendant and third-party plaintiff is a domestic corporation, with its principal place of business in Brooklyn, New York.

"The third-party defendants are railroad corporations organized and existing under the laws of the State of New York.

"The plaintiff sold 175,000 pounds of cherries to the defendant and third-party plaintiff by written agreement .... and delivered said cherries .... in three carloads to the Ahnapee and Western Railroad Company" for so-and-so, for which the plaintiff sues.

"The answer of the defendant .... denied due per-

formance of the sales contract by the plaintiff, and, as an affirmative defense and counter-claim, alleged negligence of the plaintiff in packing and stowing the said cherries for shipment", and then brought in the railroad companies.

"The third-party complaint alleges, in effect, that the said shipment of cherries was damaged while in the care and custody of the railroad carriers en route", and so on.

"The answer of the third-party defendants is in substance a general denial with affirmative defenses that the said third-party defendants and other carriers were not negligent in transporting the shipment". ....

"The third-party defendants have served notices of the taking of the depositions on the plaintiff's attorneys, by oral examination in a law office in New York City of the plaintiff and the employees of the plaintiff having knowledge of said sale, condition, packing, preparation for shipment, and shipment of the cherries on the following points." ....

It was held that plaintiff should produce its employees having knowledge. Then he goes on:

"With reference to the question of expenses, it does not seem to me that plaintiff, who sought relief in this forum, should have the right to require the payment of the expenses of the taking of the depositions in the forum of its choice of its officers or managing agents.

"If the plaintiff objects to the depositions being

taken in the Southern District of New York," orders may be entered providing for the taking of the depositions in this district; that is, the Eastern District.

MR. LEHMANN: That wouldn't help them much. It never had occurred to me. It just slipped my mind. It is perfectly obvious to the rest of you gentlemen, but it never had occurred to me that if I brought a suit for a client in Boston, I would have to send all my people up there to testify if I couldn't take their depositions in New Orleans.

PROFESSOR SUNDERLAND: Couldn't that matter be taken care of by a protective order?

MR. LEHMANN: Not this kind of judge.

THE ACTING CHAIRMAN: Judge Campbell didn't want to do it, but what could he do?

PROFESSOR SUNDERLAND: It is just the case we contemplate for a protective order.

THE ACTING CHAIRMAN: There is another case we cite here, Stevens v. Minder Construction Co., in the Southern District. That is what the Judge did. "Where notice to take deposition in the district in which suit has been brought is served on plaintiff residing in another district far removed," (that was in Virginia; that is far removed from New York) "the court may under Rule 30(b) alter the place of taking, prescribe the form of the questions (whether oral or written), or direct prepayment of expenses for attending at the taking."

MR. LEMANN: I didn't realize that when a party was testifying he became subject to a different rule than that applying to ordinary witnesses, but apparently that is true.

MR. DODGE: He has the right of application to the court.

DEAN MORGAN: I didn't suppose that, either, Monte, until this case came up. I hadn't supposed that he had two characters.

MR. LEMANN: It never occurred to me that I could make that guy come all the way from Boston.

PROFESSOR SUNDERLAND: Why do we have to have this provision in here about tender when it is taken care of by a protective order?

THE ACTING CHAIRMAN: That is my view entirely.

MR. LEMANN: In your view, this interpolated language shouldn't go in at all, but you have to rely on the protective order. Is this mandatory? Yes, this is mandatory.

MR. DODGE: I question that this happens enough to make it necessary to amend this rule.

DEAN MORGAN: So do I.

MR. LEMANN: You have a backdoor out of this, anyhow. It is mandatory, "shall", but you can get relief from the application of the provision by an order of court, which brings you back to the court backhandedly.

MR. DODGE: You have to rely on the power of the

district judge to protect you.

MR. LEMANN: You have two or three cases saying he would protect you.

MR. DODGE: Yes, and one case where he didn't protect him.

MR. LEMANN: I think the payment of the expenses is probably only a part of the hardship.

JUDGE DOBIE: One day's attendance isn't very vital, is it? Of course, the mileage may amount to something.

MR. LEMANN: Suppose you are going to keep him for a week.

MR. DODGE: Leave the rule as it stands, except for that change in (b), the words "time or".

THE ACTING CHAIRMAN: This is one place where I believe in the Lemann principle of constitutional law.

MR. LEMANN: The only one? Isn't that sad?

THE ACTING CHAIRMAN: I could add one or two others, but this is one. Of course, another place was the extension of time of answer by stipulation. There I believe in the Lemann principle thoroughly.

MR. LEMANN: Well, you believe in constitutional law when it suits you.

PROFESSOR SUNDERLAND: Why not include the word "expense" on the next page, if you are making this motion inclusive?

THE ACTING CHAIRMAN: If you do get down to (b), I call your attention to the fact that you put in a considerable insertion at the end of line 19. You took over the provision from Rule 26(b).

PROFESSOR SUNDERLAND: That has been disposed of.

THE ACTING CHAIRMAN: Yes, that has already been voted. I think we probably had better have some motions on this. I shall have to say that Mr. Mitchell was distressed by this Fruit Growers case, and I think he brought it up originally. While I have disagreed with him, I think at least we ought to have the courtesy of a motion.

DEAN MORGAN: We didn't discuss the protection, did we?

PROFESSOR SUNDERLAND: I don't think we did.

DEAN MORGAN: About going to the court and getting an order. That is really all it puts on him.

MR. LEMANN: You tell him my heart bleeds with him, but I think the provision of one day's expense wouldn't stop the bleeding much if you have to go to the judge anyhow.

DEAN MORGAN: The mileage is what he is talking about.

MR. DODGE: To bring the matter to a focus, I move that Rule 30 stand as it is now, except for the insertion of the words "time or" in line 17 and the word "expense" in line 27.

JUDGE DOBIE: I second the motion.

THE ACTING CHAIRMAN: Subject, of course, to what we

have already voted in line 19. All those in favor will say "aye"; those opposed, "no." The "ayes" have it, and it is so voted.

THE ACTING CHAIRMAN: We turn to Rule 33, which is the next one. Is there any wish for discussion? My recollection is that we went into this pretty thoroughly.

PROFESSOR SUNDERLAND: I should like to make one suggestion, the recasting of a sentence. I think the wording of the sentence beginning on line 18, page 34, suggests that the practice is improper.

"If interrogatories are served after a deposition has been taken, or if a deposition is sought after interrogatories have been answered, the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require."

That assumes that that isn't a proper practice. It seems to me it would be better to word it this way:

"Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, subject to such protective orders, on motion of the deponent or the party interrogated, as justice may require."

THE ACTING CHAIRMAN: Mr. Oglebay mentioned a bit of post mortem. He says we suggested that and that you and Senator Pepper didn't like it. But I suppose that is an

inadmissible suggestion.

PROFESSOR SUNDERLAND: Entirely inadmissible.

THE ACTING CHAIRMAN: It doesn't make any difference now. Of course, if more light comes to us later, and we realize how good the Reporter's draft was originally, so much the better.

PROFESSOR SUNDERLAND: I don't like the implication there that that isn't good practice. It ought to be considered proper practice unless there is a reason against it.

DEAN MORGAN: You don't think it is good practice, though, do you?

PROFESSOR SUNDERLAND: I don't know why not.

DEAN MORGAN: I should suppose you ought to make up your mind.

PROFESSOR SUNDERLAND: If you don't get all you want with the deposition.

DEAN MORGAN: If you take your deposition first and don't get all you want, you are pretty dumb at that time.

PROFESSOR SUNDERLAND: If later you want something more, it seems to me you ought to take a cheap way of getting it.

DEAN MORGAN: I should say it is a practice you ought not to encourage.

PROFESSOR CHERRY: I should think these words are rather neutral, but I should also think the words you are

suggesting would encourage the practice.

DEAN MORGAN: Yes.

PROFESSOR CHERRY: It would be an implication I don't think these words have.

PROFESSOR SUNDERLAND: I don't see why it shouldn't be encouraged.

DEAN MORGAN: I should think it ought to be discouraged. You don't want to be pestered with two or three proceedings before the trial.

PROFESSOR SUNDERLAND: You take a deposition, and you want something more. Why should you have to take another deposition instead of taking so many interrogatories?

DEAN MORGAN: If you have made a mistake, of course it gives you a chance to rectify, but you don't want to encourage people to make mistakes or to do sloppy work.

MR. DODGE: The implication is rather farfetched.

DEAN MORGAN: I don't think there is very much implication.

MR. DODGE: I move that Rule 33 stand as it now is.

JUDGE DOBIE: How about "service" instead of "delivery"?

MR. DODGE: That is to harmonize with the other rule.

JUDGE DOBIE: I say, you agree to that.

MR. DODGE: As written, with the underlined words inserted.

THE ACTING CHAIRMAN: All right, are you ready for the question?

MR. LEMANN: I was just wondering. I guess it is all right, but lines 18 to 21 don't seem very artistic in view of lines 24 and 25. Lines 24 and 25 seem to be rather all-inclusive. It is a matter of emphasis, perhaps, to put in that special case. You have a special case, haven't you, in 18 to 21?

MR. DODGE: That is a different thing.

DEAN MORGAN: That is altogether different.

JUDGE DOBIE: I second that motion.

THE ACTING CHAIRMAN: That is the motion to adopt the provision as amended?

JUDGE DOBIE: Yes.

THE ACTING CHAIRMAN: Are you ready for the question? All those in favor say "aye"; those opposed. It is so voted. (Carried)

Rule 34 now. Here, too, we added something, didn't we, from 26?

PROFESSOR SUNDERLAND: Yes.

DEAN MORGAN: "subject to such protective order as the court may make under 30(b)", or something of that sort, wasn't it?

PROFESSOR SUNDERLAND: Yes.

THE ACTING CHAIRMAN: That has already been voted, in line 8.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: Was there any other suggestion about the rule?

DEAN MORGAN: This is just what we voted last time.

THE ACTING CHAIRMAN: Yes. If there is no objection--

DEAN MORGAN (Interposing): We don't have to change everything we did last time.

THE ACTING CHAIRMAN: Not the second day. The first day we do. That will be considered approved.

Rule 36. Any question?

MR. LEMANN: Rule 36 would permit you to cut down the time for answer to ten days from twenty, wouldn't it? The only comment that occurred to me as I read it is that a fellow ordinarily gets twenty days, but here any time after commencement of the action, before answer, that you serve a demand on a fellow to admit facts, he has to do it in ten days. It is quite something to notice that you ordinarily give twenty days, but here you get only ten.

MR. DODGE: Twenty to file an answer to a pleading.

DEAN MORGAN: This isn't an answer to pleadings.

MR. LEMANN: No, but it causes you to go forward. I have no objection, but it is a considerable advance over the original provision, where you couldn't serve a notice like this until the fellow had had his time to answer.

DEAN MORGAN: Rule 36 had ten days to begin with.

MR. LEMANN: Yes, but you couldn't do it before pleadings were closed, Eddie. You couldn't serve.

DEAN MORGAN: I get your point now.

MR. LEMANN: I am just calling attention to a rather radical change. Personally, I don't object to it, but it is a radical change. We ought to do it with our eyes open. You see, you can do this the minute you file suit, and you can call upon him to admit the truth of any relative matters of fact set forth in the request. All I have to do if I want to cut your time of answering down to ten days is just to take certain allegations in my petition and serve you with a separate notice and ask you to admit their truth. You have to do it in ten days instead of twenty. I think that amounts to cutting down the time to answer to ten days.

DEAN MORGAN: If that is all you are going to get, if your interrogatories are drawn that way, you haven't asked for much information.

THE ACTING CHAIRMAN: Let me point out this: If you look at the note, you will see that we made changes all along the line here. This is all subject to the protective orders of the court. That is one main reason for making the change in 26, and of course if you make it in 26, why not in 33, and why not in 36. But if we don't make it in 26, which is the ordinary deposition one, parties and very often plaintiffs felt that they were tied up, and we had various cases brought

to our attention. There was the original requirement in 26 that you had to get an order from the court at an early time, and in one case a lawyer in Connecticut was trying to take the deposition of a fellow leaving on a boat from Seattle for Australia. By the time that he got orders taken and his lawyers out to Seattle to raise the question of whether it was an order from Connecticut or an order from Seattle, and by the time he got the order, the fellow had gone. He never did get the witness. It is that kind of little machinery that seems to be not worth while, and the better way to do it seems to be to allow it to be done at once and then go to the court for protection if you need it.

MR. LEMANN: In other words, you have fifteen days; is that right?

THE ACTING CHAIRMAN: What?

MR. LEMANN: On interrogatories you have fifteen days. Am I right about that? You have three time elements, as I see it. Am I right? For depositions, only reasonable notice. You could do it immediately, as soon as you draw your petition.

THE ACTING CHAIRMAN: I don't quite see where you get fifteen days.

MR. LEMANN: Rule 33.

THE ACTING CHAIRMAN: That is ten.

MR. HAMMOND: Line 8.

MR. LEMANN: Line 8 of your redraft. the third

sentence.

THE ACTING CHAIRMAN: I see.

MR. LEMANN: You have left it fifteen days. I just took another look at it. Am I wrong? Look at line 8 of page 34 of this material. Fifteen days.

DEAN MORGAN: This is deposition.

MR. LEMANN: These are interrogatories.

DEAN MORGAN: Deposition by interrogatories, is it?

MR. LEMANN: Yes, Interrogatories to Parties, page 34 of our material, line 8, fifteen days.

DEAN MORGAN: That is right.

MR. LEMANN: If I were in an institute, I would say, "Gentlemen of the Bar: You have four ways to proceed. No. 1, if you are not alert, you will just file an ordinary petition and wait for an answer in twenty days. No. 2, if you want to be really streamlined, you should immediately serve a notice to take the deposition of the adversary and give him reasonable notice, which I think would be forty-eight hours, unless you get a protective order and take his deposition to ask him about things. No. 3, you can initiate interrogatories to him, in which case, however, you have to give him fifteen days. No. 4, you can call on him to admit certain facts, in which case you can give him ten days. You have four methods open to you."

THE ACTING CHAIRMAN: That shows how flexible the

sentence.

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THE ACTING CHAIRMAN: That shows how flexible the

rules are:

MR. LEMANN: Of course, it is confusing, and if they should ask me, "Mr. Lemann, why did the Committee make these different time elements?" I should have to say, "Gentlemen, it is due to the desire of the Court for greater flexibility."

JUDGE DOBIE: Admissions are very much simpler. He doesn't have to answer the questions.

THE ACTING CHAIRMAN: The rules originally had these comfortable variations. You started your accounting at a different time, but you did have this flexibility in the original rules. That is, Rule 33 was always fifteen, Rule 36 was ten, and so on.

MR. LEMANN: Flexibility is a frill.

PROFESSOR MOORE: You might add a fifth, Mr. Lemann. Plaintiff can move for summary judgment the minute he starts his action. That forces the defendant to do something within ten days.

THE ACTING CHAIRMAN: Can't you do some of it pre-trial?

MR. LEMANN: That would take only the same time limit, though, ten days, as one of the others. That wouldn't give you another time.

PROFESSOR MOORE: That is right.

MR. LEMANN: Maybe we ought to change that:

SENATOR LOFTIN: Do you think they all ought to be

uniform?

MR. LEMANN: I don't know. I was just thinking aloud. I should think the fifteen days ought to be ten, probably. I can't see much reason for fifteen in 33, but there I go against my constitutional principle of no change where none is demanded.

JUDGE DOBIE: I think, unless there is some quite obvious reason for that, we had better leave it alone. It would be confusing. I don't think any of this is very vital.

THE ACTING CHAIRMAN: We are at 36 at the moment. Shall we go on to 41? Does somebody want to do something definitely about 36?

DEAN MORGAN: I can't quite see why we give them less time here than in the other. Do you know why, Charlie?

THE ACTING CHAIRMAN: Ask Edson. Edson did this originally.

JUDGE DOBIE: If you have interrogatories, you may have to give a long, involved answer, but here you just admit this or don't admit it.

THE ACTING CHAIRMAN: You say "Yes" or "No."

JUDGE DOBIE: Yes. You probably should be able to make up your mind about that pretty quickly.

PROFESSOR SUNDERLAND: Judge Chesnut made the point in dealing with interrogatories that the time was so short that you couldn't expect parties to do very much work in hunting information. But I don't know whether there was any real reason

for having a fifteen-day limit in one case and a ten-day limit in another.

DEAN MORGAN: You did it to begin with, Edson. You must have had some reason.

MR. LEMANN: What an assumption!

DEAN MORGAN: Did you see that show a long time ago, "I'd Rather Be Right," where a Cabinet member was explaining how they had put gold in a hole in the ground, and Roosevelt asked, "Did we do that?" The Cabinet member said, "Yes," and Roosevelt said, "Well, we must have had some reason for it."

PROFESSOR SUNDERLAND: I can't recall at the moment just what my reasons were, if any.

THE ACTING CHAIRMAN: I hear no motion.

DEAN MORGAN: The changes are exactly what was voted, as I recall it.

THE ACTING CHAIRMAN: Yes.

MR. LEMANN: The only open question, I suppose, is whether you want to have intervals of ten in one place.

JUDGE DOBIE: I move we leave it as it is here.

THE ACTING CHAIRMAN: It is moved that we leave Rule 36--

MR. HAMMOND (Interposing): I think Mr. Lemann had some suggestion.

MR. LEMANN: No, I was just calling attention to the fact, Mr. Hammond, that it gives a little variety in the rules,

and something else for you to make one reason stand out in contrast with the other. You can say, "Gentlemen, you contrast that with this. This is ten and that is fifteen." If they ask me why, I will quote Mr. Roosevelt: "There must have been some reason." You might say, as you suggest, that on admissions you don't need more than ten days, and on answers to interrogatories you need a longer time.

DEAN MORGAN: Where you have to investigate, and so forth.

MR. HAMMOND: I was just wondering, if you permitted the request at as early a time as commencement of the action, what a court would do under (2) at the end, because some or all of the requests for privileges are irrelevant. How would he determine whether they were irrelevant if no answer had been filed?

THE ACTING CHAIRMAN: By affidavits. That is actually the case. I mean we always get this sort of thing by affidavit.

MR. LEMANN: An affidavit that it is relevant.

DEAN MORGAN: An affidavit to show why it is irrelevant, usually.

MR. LEMANN: You have the petition. That would give you at least some indication. I suppose if you sued me for breach of promise, you couldn't go in and ask whether I ran over somebody with an automobile.

DEAN MORGAN: Except in New Hampshire. In New

Hampshire, you know, they amended an action in assumpsit on the common counter to an action for wrongful death before the statute had expired.

MR. LEMANN: You voted last time, I understand, to make all the things permissible as soon as the suit is filed. If Mr. Wickersham had been here, you wouldn't have done it. He fought and bled with that. But the argument was that you can get an order to do it now, that most judges will give you the order, and why not make it automatic? It is a considerable increase, I think, in the right to use this power to make it immediately available. I think it is certainly something that should be permitted.

THE ACTING CHAIRMAN: There was considerable demand for it and also some statement on the part of various district judges that they didn't see from their end that it was anything more than a nuisance. It is interesting, too, if you make these after answer now, to note how long the answer actually is. As I called to your attention, Mr. Hammond has some figures on tax suits, and the period of answer seems to be growing longer and longer, notwithstanding the rule.

MR. LEMANN: This rule will stop that, Charlie. I have had one case at the bar since these rules came up in which they took my deposition, and they extended the time to answer for about a year while they were examining me. They would examine me for a week or two and come back and examine me again

after several months, because I had to go away or they had to go away, and they didn't file the answer until they finished the deposition because they told the district judge they didn't know how to answer until they got all the information.

THE ACTING CHAIRMAN: Of course, that is true, and we are inviting them to extend the time still more. That is the general trend of our changes. But if that is the case, I should say that is all the more reason that you don't want to put obstacles in the way of parties who need to move promptly before they lose the testimony. Where a man is going to Australia or to the South Pacific or whatnot, you don't want more obstacles. The longer the issue is delayed, the more reason for making it freer.

I guess we still have no motion on Rule 36, and we will pass on, shall we? We will take 36 as approved in the form here.

Rule 41.

DEAN MORGAN: You have to insert Rule 70 here.

THE ACTING CHAIRMAN: Yes, the condemnation rule should be included here.

JUDGE DOBIE: Reference to it, not incorporation.

DEAN MORGAN: Rule 71, isn't it?

MR. HAMMOND: Rule 71-A.

THE ACTING CHAIRMAN: It would be the insertion in line 3 of Rule 71-A. All right, shall we consider that

approved?

On Rule 43 and Rule 44 you will see here again an informative note.

MR. LEMANN: If we are not going to have them one place, we should not have them in another. I move the note be deleted in the print.

THE ACTING CHAIRMAN: Before I put the motion, I would like still to make a little speech about it. I still think that is a little unfortunate. This happens to be one of the matters that has been discussed a great deal, one of the great academic criticisms of the rules. I think the criticisms have been greater than the practical results justified, but be that as it may, it has been criticized, and criticized rather strongly.

I should think that if we sit for two years, and it takes two years then for the amendments to go through, and we don't show any knowledge of any objections of any kind, I should think it was a showing that we hadn't fully done our job. I think really that there is an obligation on the Committee to consider matters of this kind, and one way of considering them, of course, is to decide that at the moment we don't think anything should be done, but it seems to me we should say this. This is one way of saying so. Of course, there are other ways. We could make a formal report and say we have done so-and-so. But this does it succinctly.

MR. LEMANN: How many such notes have we? We had one yesterday on class suits.

THE ACTING CHAIRMAN: There is at least one more. I don't know whether there are more than that or not.

MR. LEMANN: I was just wondering. If we have one, why not have them all?

DEAN MORGAN: The other one was on account of the Supreme Court proposition. It was the question of the Erie v. Tompkins case, which was a rather different kind of question.

MR. LEMANN: It may be that this stands on a special footing.

DEAN MORGAN: Charlie, you can just recite: "We have left undone the things we ought to have done," and there is no helping it.

THE ACTING CHAIRMAN: Yes, and one of the things that we have left undone is consideration of the American Law Institute's proposed law of evidence.

DEAN MORGAN: That is what I say.

THE ACTING CHAIRMAN: Don't you want any boost for that?

MR. LEMANN: I would like to boost it, but I don't know whether this is a boost or a knock.

THE ACTING CHAIRMAN: There are also four or five notes which contain references to the Soldiers' and Sailors' Civil Relief Act.

DEAN MORGAN: Those have got to go in, I think.

THE ACTING CHAIRMAN: Why? Doesn't Monte's principle apply somewhat to them? An example of that is Rule 55; another, Rule 62. There are several cases of that.

DEAN MORGAN: I noticed those when we went through.

THE ACTING CHAIRMAN: Rule 64.

MR. LEMANN: As to those, of course they are very valuable for the guidance of the bar, but I guess there are a good many things we could put in for their guidance.

THE ACTING CHAIRMAN: In our suggestions for the Committee we raised the question, "What is to be done in the light of the Soldiers' and Sailors' Civil Relief Act?" and didn't we suggest the possibility of putting it in one rule, the default rule? Then when it came up, I know the Chairman, among others, was quite insistent that we should call attention to this, on the ground that our rules might be misleading to a lawyer.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: You see, the Soldiers' and Sailors' Civil Relief Act actually modifies Rule 55.

MR. LEMANN: Of course, we might deal with that particular thing by repetition, by saying at some appropriate point, "Attention of the bar is directed to the fact that Rules Blank, Blank, Blank, and Blank are affected by the Soldiers' and Sailors' Civil Relief Act." Are there any other

statutes that may affect some of these rules, which have been passed since the adoption of the rules?

MR. OGLEBAY: I may say there has been no effect except actively to modify the effect of Rule 55, and that is the only one we called attention to originally. Then Mr. Mitchell and some others thought that we should call attention, since it was a very important Act, to other places where it might be important, although it didn't actually affect the rule itself. So we drew those up, too, although we didn't originally make any suggestion.

MR. LEMANN: I don't think it is very important. It can't do any harm to put it in. Maybe it is a good idea to put them all in. I don't think it is worth hesitating much about it.

JUDGE DOBIE: I should think those on the Soldiers' and Sailors' Civil Relief Act ought to be put in as a caveat or warning. I don't think it would do any harm.

MR. LEMANN: I should think that anyone dealing with a soldier or sailor would know that he has certain provisions that he has to look after. However, the question now, of course, is what to do with this note on the Code of Evidence. I made a motion to omit it, but I will withdraw the motion if everybody thinks we should say something about it. It is just a matter of taste.

JUDGE DOBIE: What is the status of the whole situation

about the Code of Evidence? Do we intend to take it up sometime and go into it?

DEAN MORGAN: That is what you said we were going to do.

THE ACTING CHAIRMAN: Yes, we did say we were going to do that.

DEAN MORGAN: I drew an amendment for 43 and 44 at the request of the Reporter at one time.

THE ACTING CHAIRMAN: That is correct, and the Reporter supported the amendment.

MR. LEMANN: My recollection is that a year ago, you yourself, Eddie, said that you thought we ought not to undertake it.

DEAN MORGAN: I thought we didn't have time for it, that is quite true. I said that at that session we couldn't possibly do it.

MR. LEMANN: I thought you wanted to wait until the bar was more familiar with it, or something of the sort.

DEAN MORGAN: Oh, no. I would be perfectly willing to go after it right away, as a matter of fact.

MR. LEMANN: After the war is over.

THE ACTING CHAIRMAN: This came as a direct outgrowth of the discussion that took place when Mr. Morgan's amendment came in, and then it was decided we didn't have time to consider it. I have forgotten, but I think it was the suggestion that

we make a note.

MR. OGLEBAY: Yes; Senator Pepper.

MR. LEMANN: I withdraw the motion. Let it stand.

THE ACTING CHAIRMAN: All right. Rule 45.

MR. LEMANN: That is the representation we are going to do something about.

THE ACTING CHAIRMAN: I think we should.

MR. LEMANN: Do we have a mandate to continue now as long as we want to?

THE ACTING CHAIRMAN: At the pleasure of the Court, but I take it, under the mandate we could continue indefinitely at the pleasure of the Court. I don't understand that there is anything in the order now that says that once we have presented amendments, we are through.

MR. LEMANN: I wonder in this sort of thing whether we ought not to get a specific direction from the Court.

MR. HAMMOND: I think that was Mr. Mitchell's idea, before we actually went into it.

MR. LEMANN: Before we do a lot of work on it, for example. It seems to me you had something like that in your own mind, Eddie, a year ago.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: What were the terms of the order? Wasn't it that the Court asked the surviving members to constitute a standing committee? Have you the terms of the

order?

DEAN MORGAN: I think Mr. Mitchell thought we ought to have a special authorization, that there was no use of our working on it unless we did have.

MR. LEMANN: It seems to me that we had some notion of taking the general temper of the bar about it, too, perhaps, but at least the Court.

DEAN MORGAN: We had to check with the Court first to see whether they wanted or were willing to have us go into that.

THE ACTING CHAIRMAN: That is an obvious thing. We are not going to meet down here unless our expenses are paid, and our expenses have to be authorized by the Court. Of course it is almost automatic. We can't expect them finally to commit themselves and say, "Now, do thus and so," but we certainly are not going ahead and do any particular work unless they authorize the expenditures and do know about it.

MR. LEMANN: On something as extensive and far-reaching as that would be. I am not thinking merely of the expense, but of the time to be put on it, and then have them say, "Well, we think it is too much of an undertaking." I think we ought to fight it out with them in advance.

DEAN MORGAN: Oh, I think you have to do that.

THE ACTING CHAIRMAN: Here is the order continuing this Committee. Justice Stone, on January 5, 1942, announced the designation of "a continuing Advisory Committee to advise

the Court with respect to proposed amendments or additions to the Rules of Civil Procedure for the District Courts. Personnel shall consist of the surviving members, or as many of them as are willing to serve, of the Advisory Committee appointed by the orders of the Court dated June 3, 1935, and February 17, 1936."

It is a continuing Committee.

MR. LEMANN: Are you going to entertain on the tenth anniversary of the Committee next year for the survivors?

THE ACTING CHAIRMAN: Maybe we should take steps for some celebration each anniversary date, but what is the date that we take? Is it the date of the passage of the enabling act? Goodness knows, it was one of the worst enabling acts that ever could be devised. It ought to be the appointment of our Committee.

SENATOR LOFTIN: I would say the appointment of the Committee.

THE ACTING CHAIRMAN: That is something. We might appoint a subcommittee to arrange the annual dinner.

DEAN MORGAN: I think we had better get on with these rules.

JUDGE DOBIE: I think so, too.

THE ACTING CHAIRMAN: Is 45, therefore, unquestioned?

PROFESSOR SUNDERLAND: I would like just to introduce the word "designated" in line 6. It says, "directed to produce

documents". It would read: "directed to produce designated documents", to emphasize the fact that you have to identify your document before you can tell anybody to bring it in. We use that same language in our Rule 34 regarding discovery and production of documents.

DEAN MORGAN: You don't want a blanket order.

PROFESSOR SUNDERLAND: No blanket order.

DEAN MORGAN: I feel that is true, too.

JUDGE DOBIE: In other words, just put "designated" between "produce" and "documents". Do you want to repeat it?

PROFESSOR SUNDERLAND: There is no need to repeat it. It is in 34. That reads: "any designated documents, papers, books, ... or tangible things".

SENATOR LOFTIN: "any designated"?

PROFESSOR SUNDERLAND: Just the word "designated".

JUDGE DOBIE: I make that motion, Mr. Chairman.

THE ACTING CHAIRMAN: In 45(b) there is a little different wording. That is the subpoena for trial. "directed to produce the books, papers, or documents designated therein".

PROFESSOR SUNDERLAND: That is the same thing.

THE ACTING CHAIRMAN: Yes, I should think so. All those in favor will say "aye"; those opposed. So voted. (Carried)

Any further question about that? If not, we will pass on to Rule 50. This, I take it, we discussed at very

considerable length last time. We had two suggestions. One was in a form which was supposed to be straightforward, and the other was one that followed the old course of avoiding the decision in the Slocum v. New York Life Insurance case. I think we pretty well settled this, didn't we, Bill, at the last meeting?

PROFESSOR MOORE: I believe so.

THE ACTING CHAIRMAN: We talked it over. This is in line with what we worked on. Has anyone any question about it?

PROFESSOR SUNDERLAND: I wonder whether we are using "new trial" here in the correct sense. It provides in lines 15 to 17: "If no verdict was returned, the court on motion may direct the entry of judgment as if the requested verdict had been directed or may order a new trial." According to the definition, "new trial" means examination after verdict of jury or decision of court. If there hasn't been any decision or any verdict, you don't get a new trial.

DEAN MORGAN: You mean there was a mistrial in the first place.

PROFESSOR SUNDERLAND: There would be a mistrial, but not a new trial.

PROFESSOR CHERRY: He doesn't have to order a new trial, then.

PROFESSOR SUNDERLAND: It is automatic that you try it again, but it is not a new trial.

THE ACTING CHAIRMAN: Isn't that what we had in before?

JUDGE DOBIE: Do we make any direct provision as to whether the appellate court can enter judgment?

THE ACTING CHAIRMAN: Whether the appellate court can enter judgment?

JUDGE DOBIE: Yes, where there is no motion for judgment.

THE ACTING CHAIRMAN: We practically cover it. Look at lines 17 to 19. It says the district court's failure to order judgment is the equivalent of a denial.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: So we get at it by not saying what the appellate court may do, but we say what the district court has done.

JUDGE DOBIE: You think that under this the appellate court can direct a verdict, with no motion for judgment non obstante veredicto, final judgment, without sending it back?

THE ACTING CHAIRMAN: That is the intent of this. If it doesn't do it, we haven't done what we thought we were doing.

JUDGE DOBIE: We have had it to occur and occur, and the Supreme Court has dodged it every time, you remember.

THE ACTING CHAIRMAN: That is true.

PROFESSOR SUNDERLAND: I suggest that, instead of "new trial", we substitute "another trial".

THE ACTING CHAIRMAN: I don't object, of course. This, according to Mr. Lemann's view, is something that has given no trouble for five or six years, isn't it? You see, the language of the original rule, the original rule as printed on page 64, says: "If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

PROFESSOR SUNDERLAND: I just took occasion to check up that thing, and I found that nowhere could you find a definition of "new trial" that included another trial after there had been a failure to render a verdict.

DEAN MORGAN: You can say it is another trial.

PROFESSOR SUNDERLAND: It is another trial. It is not technically a new trial at all.

THE ACTING CHAIRMAN: Shall we change that, then?

DEAN MORGAN: All right.

THE ACTING CHAIRMAN: Does the Lemann principle apply?

MR. LEMANN: I should think so. I would rule it would apply.

THE ACTING CHAIRMAN: Mr. Sunderland moves that for the words "a new" in line 17, the word "another" be substituted. All those in favor say "aye"; those opposed, "no."

I think we will suspend and have some--

DEAN MORGAN (Interposing): Let's finish this rule.

MR. LEMANN: I have just a foolish question which you

can answer right away on the last sentence, that "If the motion for judgment is sustained, the contemporaneous ruling"--

DEAN MORGAN (Interposing): That is right.

THE ACTING CHAIRMAN: If we are going to finish this, I shall have to call for a show of hands. All those in favor of Mr. Sunderland's motion raise their right hands. Two. All those opposed. Three. It is lost.

SENATOR LOFTIN: Not on the merits, just on principle.

MR. LEMANN: --"contemporaneous ruling on the motion for new trial is effective only in the event that the judgment is reversed." I wonder if a judgment could be reversed in such a way that the upper court might dispose of the case so that your motion for new trial wouldn't be effective.

DEAN MORGAN: Yes, the court could. It could say that and order a new trial, if it were based on alleged erroneous instructions, and so on, rather than on sufficiency of evidence.

MR. LEMANN: The upper court could dispose of the case? That is what I meant.

DEAN MORGAN: It might.

MR. LEMANN: Finally, by direction, so as to shut off the motion for new trial.

DEAN MORGAN: Not unless the order on the new trial was assigned as cross error, or something of that sort.

THE ACTING CHAIRMAN: I am not sure that I got the

question. I thought that was just what the appellate court could do. Look at page 44, the final paragraph of the note.

MR. LEMANN: Yes.

THE ACTING CHAIRMAN: Is it intended that the appellate court shall take any of these various courses that would be appropriate?

MR. LEMANN: I thought so, but then I wondered how you would have a motion for a new trial effective in the event that it was reversed, if the judgment disposed of the case. That was my only question.

PROFESSOR CHERRY: If the reversal disposed of the case?

MR. LEMANN: I am talking about the top two lines on page 44 of this print. Have you got that?

PROFESSOR CHERRY: What you want is that it not be effective unless the judgment is reversed?

MR. LEMANN: I don't know that that would help. I don't know that it is important enough to bother about. I think the language isn't very precise.

... Brief recess ...

THE ACTING CHAIRMAN: I think we might proceed now. Referring particularly to the question Mr. Lemann raised at the end of Rule 50, lines 22 to 26 are explained in the footnote at the top of page 45. "The first sentence of the new paragraph of subdivision (b) incorporates the proper district

court practice established by the Supreme Court in Montgomery Ward & Co. v. Duncan. The second sentence avoids the situation illustrated by County of Allegheny v. Maryland Casualty Co. in the Third Circuit (contemporaneous unconditional order for a new trial cancels out a judgment notwithstanding the verdict and there is no appealable order)."

There is a still more recent case from the Seventh Circuit, McIlvaine Patent Corporation v. Walgreen Co., 138 F.(2d) 177, and it holds that where the trial court granted a motion for a new trial and also granted a motion for judgment notwithstanding the verdict, the appellate court assumed that the order granting the new trial was subject to the implied condition that it was not to be effective unless the judgment notwithstanding the verdict was reversed, rather than treat the order for new trial as cancelling out the order for judgment even though the order for new trial did not so provide on the face. They say that they assume from that and from the memorandum of the district judge that it was conditional. Then they quote Moore's Federal Practice. Then they say:

"Otherwise, the order for a new trial might well cancel the judgment n.o.v. and result in no appealable order cited in this case. Rather than treat the order granting the new trial as having this effect, we prefer to hold that the judgment stands subject to appeal and subject to the condition that, if reversed, the order granting the new trial will become

effective."

In other words, this incorporates that result in this case, or is intended to.

MR. LEMANN: I will admit the reason was that I was addressing myself to the felicity of the language in 26 on page 44. That was my only point. It isn't very serious.

THE ACTING CHAIRMAN: I suppose, from the way the court talks of it here, we may assume that the order granting the new trial was subject to the implied condition that it was not to be effective.

DEAN MORGAN: That is all right, but Monte says, suppose that the appellate court should order judgment unconditionally for the plaintiff.

MR. LEMANN: Or the defendant, or whatever it was.

DEAN MORGAN: If it isn't for the defendant, the moving party, if it is for other than the moving party--

MR. LEMANN (Interposing): There wouldn't be any occasion for a new trial. It would dispose of that. This seems to be a little inartistic for that situation. If the appellate judgment disposed of the case finally, of course the new trial would be out, too. Your language would imply that it would still be open. I suppose anybody could construe that.

THE ACTING CHAIRMAN: I suppose so.

MR. LEMANN: Have I made the point, Mr. Moore?

THE ACTING CHAIRMAN: If the motion for judgment is

sustained, I suppose that then the motion for new trial does go out the window.

PROFESSOR MOORE: I think the motion for judgment is sustained in the district court.

DEAN MORGAN: Sustained and granted. Sustained, I see.

THE ACTING CHAIRMAN: No, this is an attempt to make a suggestion to the circuit court of appeals without saying to them in so many words. This, I take it, is the meaning: If a motion for a judgment is sustained by the district court, then the C.C.A. deals with the motion for new trial only in the event that it reverses that judgment of the district court.

DEAN MORGAN: I don't think you will ever get that out of the language.

MR. LEMANN: They wouldn't deal with the motion for new trial necessarily, then, because they might dispose of the case finally. I don't know whether they may deal incidentally or inferentially with the motion for new trial.

PROFESSOR CHERRY: If they agree with the action of the trial judge, they say, "Action sustained."

DEAN MORGAN: We say "granted".

PROFESSOR CHERRY: Have we said that elsewhere?

DEAN MORGAN: Yes.

PROFESSOR CHERRY: That would make it quite clear that you are referring to the action in the trial court.

MR. LEMANN: "effective only in the event that the cause is remanded by the appellate court", instead of "the judgment being reversed." It is effective only in the event the cause is remanded.

DEAN MORGAN: "that the judgment is set aside and the cause is remanded."

MR. LEMANN: That would cover it.

PROFESSOR SUNDERLAND: I should think that would make it clear.

MR. LEMANN: "the judgment is set aside and the cause is remanded by the appellate court."

DEAN MORGAN: I should think that would be a much better way to put it.

MR. LEMANN: That would cover my point. Do you see any objection to that, Mr. Moore?

PROFESSOR MOORE: I think that is all right.

THE ACTING CHAIRMAN: What is it? "If the motion for judgment is granted".

MR. LEMANN: "by the district court contemporaneously with a motion for new trial, it is effective only in the event that the judgment is set aside and the cause remanded by the appellate court."

PROFESSOR MOORE: You want to say, "after it is granted by the district court, its contemporaneous ruling".

PROFESSOR CHERRY: If you say "its", you don't need

"by the district court".

THE ACTING CHAIRMAN: "only in the event the judgment is reversed and the action", I guess. I don't think we say "cause". "and the action remanded."

MR. LEMANN: All right.

PROFESSOR SUNDERLAND: Would you say "cause"?

JUDGE DOBIE: "case".

PROFESSOR SUNDERLAND: "case" or "cause". You don't say "action".

MR. LEMANN: I don't think you would use "action" ordinarily.

THE ACTING CHAIRMAN: I think I am right that nowhere in the rules does the word "cause" appear.

MR. LEMANN: "case remanded".

THE ACTING CHAIRMAN: That is all right.

PROFESSOR MOORE: Or "further proceedings."

MR. LEMANN: "by the appellate court." That is all right. I think that is what the man needs ordinarily, probably.

THE ACTING CHAIRMAN: I take it this is the way it will read: "If a motion for judgment is granted by the district court, its contemporaneous ruling on a motion for new trial will be effective only in the event the judgment is reversed and the case is remanded by the appellate court for further proceedings."

MR. LEMANN: That is right.

THE ACTING CHAIRMAN: All those in favor of this wording say "aye"; opposed. It is so voted. (Carried)

Is there any other matter in this rule? If not, we will pass on to Rule 52. Any suggestion about Rule 52? This is a rule we have discussed a good deal.

DEAN MORGAN: No.

THE ACTING CHAIRMAN: I should like to say, as to the addition at the end in lines 11 to 15, that of course there is nothing in any rule that can be final and automatic, but it does seem to me that our statement in our opinions in the Second Circuit of this principle, the principle particularly in lines 11 to 15, has been very helpful. The district judges have been trying to carry it out, and it seems to me that it has had two effects. One of them is that it disposes of the case much more promptly. That may or may not be important, but I think that is the case. The other is that it seems to me the findings have been better. They really have followed it out.

DEAN MORGAN: Yes.

JUDGE DOBIE: Have you ever had cases in which they asked you to remand the case for specific findings, where they weren't separately included? We had that case.

THE ACTING CHAIRMAN: We have done it, yes. We started this out in a case that we remanded.

JUDGE DOBIE: We refused to do it in this particular case because Judge Paul wrote a very elaborate opinion, and they

were all in the opinion.

THE ACTING CHAIRMAN: We wouldn't do it there. We will get the findings from almost anything.

JUDGE DOBIE: Yes.

THE ACTING CHAIRMAN: The only case I think of immediately where we remanded is where there were no findings anywhere.

JUDGE DOBIE: I think it is an excellent thing, though, to make that express provision. Judge Caffey, I know, is one who was very bitter against it because he said a lot of times it was silly.

THE ACTING CHAIRMAN: I think it has been quite helpful.

JUDGE DOBIE: In many cases, particularly patent cases, they are extremely helpful.

THE ACTING CHAIRMAN: Rule 52 is passed.

MR. HAMMOND: Just a minute. I have a few suggestions here from Mr. Tolman that I guess I had better call your attention to.

THE ACTING CHAIRMAN: All right.

MR. HAMMOND: In line 12 he says change "of" at the end of the line to "thereof".

DEAN MORGAN: No.

THE ACTING CHAIRMAN: No. It is "a part of .... the opinion". I don't see what the "thereof" is going to be.

MR. HAMMOND: Here is the rest of it: Strike the "or" that follows and insert a period.

THE ACTING CHAIRMAN: I am sorry, I think that would be too bad. Of course, if this were a new matter, and we didn't have the worries of the district judges and the circuit case in the Supreme Court that raises the question, it would have been very simple, but now it does seem to me that the rule should make it abundantly clear, even if it is stating the obvious. Don't you think so, Armistead?

JUDGE DOBIE: Yes. I move its adoption as changed here.

THE ACTING CHAIRMAN: Is there anything more?

MR. HAMMOND: I didn't quite state it, but I guess you have it enough. Part of the same thing is to begin a new sentence where "or" was: "If filed separately ...."

THE ACTING CHAIRMAN: I am afraid that now I don't know what he did want.

DEAN MORGAN: What is the rest of it now?

MR. HAMMOND: The first is to change "of" to "thereof" and strike the "or" and then begin a new sentence with the word "If". Strike the word "but" and substitute "they must be filed", "If filed separately, they must be filed contemporaneously with the opinion or memorandum."

JUDGE DOBIE: I don't think that is helpful, frankly.

THE ACTING CHAIRMAN: I am a little in doubt just what

to say in answer to that. In the first place, that is really what I have in mind. It says it a little more drastically. I think, on the whole, I don't want to wave too much of a club at the district judges. Of course, Major Tolman might well reply, "If you are going to do it, you had better do it as directly as you can," but, on the other hand, I am not sure but that I would rather put it in backward. I don't see why this doesn't state the hope, if you will, that we have. It doesn't use the word "must". Whereas I would like the district judge to think it was "must", I don't know whether I want to put it in plain language.

MR. HAMMOND: He has a personal remark here, too. He says, "Personally, I think the new matter in lines 11-15 will not accomplish the result hoped for."

THE ACTING CHAIRMAN: All I can say is that I think it has done a great deal. I don't think any mechanical rule will accomplish everything, but I certainly will testify that I think it has been very helpful.

SENATOR LOFTIN: As a matter of practice, won't a great many of the judges simply file a memorandum and ask the lawyers to prepare the findings of law and fact?

THE ACTING CHAIRMAN: Yes, and those findings aren't worth a damn. They are simply useless.

SENATOR LOFTIN: Your idea is to try to avoid that and to have the judge prepare the findings of law and fact.

THE ACTING CHAIRMAN: Of course, you can't avoid it particularly. The judge can ask for suggestions of findings in advance of announcing his decision, but the judges who are interested in carrying out what the appellate court wants will try to make their own statements, and those will be both directer and shorter than what the counsel prepare.

DEAN MORGAN: We always used to do it in Minnesota. The court would tell us to give him a short memorandum of findings or, if he was in doubt, he would ask each side to submit findings. In my district, at any rate, we always used to be careful to separate facts from law and to be sure that we had the facts within the pleadings, and so forth, so that when we had the facts, the conclusions of law necessarily followed.

PROFESSOR CHERRY: Considering that we started with a situation where a good many of the district judges resented the idea of making any findings at all and said that there shouldn't be any until after you found out what was revealed, I should say that the rules in five years have accomplished wonders. If this additional language will carry it still further forward, I think that is fine. I mean, we have to look back and remember the opposition we had to that by the district judges.

THE ACTING CHAIRMAN: I know a great deal of the opposition has been in the Southern District. They thought they were put upon, and the retaliation of getting long findings

from lawyers didn't bother the Supreme Court, because they didn't have anything to do with them. It was just useless as far as we were concerned.

DEAN MORGAN: The lawyers hadn't been used to drawing them, so they just cut up the opinions.

THE ACTING CHAIRMAN: That is what they did right along when that was the case, and it was a kind of silly performance all around, really. The judge wasn't putting any mental effort in it. He would put some mental effort in his own original opinion, and this helps out there. Frankly, I don't know that I care much either way. It is much the same idea.

MR. HAMMOND: It seems to be. It is just a change in language, more or less, and it does make it a little stronger that they must be filed.

THE ACTING CHAIRMAN: I am inclined to think I would leave it as it is, as being less ferocious. I am not sure. I don't think that we would reverse if a judge had not followed this procedure, if we could see what the real case was. I suggest we leave it as it is.

DEAN MORGAN: I so move.

JUDGE DOBIE: I second the motion.

THE ACTING CHAIRMAN: Unless there is objection, we will leave it as it is.

Rule 54. You have here the suggestion we worked on

for change, and Mr. Hammond has worked out another which is before you. Mr. Morgan went over Mr. Hammond's draft and has made a few suggestions. I am perfectly ready to accept that. Let me say two or three things, first.

I have no illusions that any rule can settle the very difficult question of final judgment, final judgment as distinguished from an unfinal judgment. That is a difficult question. I think there will always be some borderline decisions on it, and I don't want to claim more for a change in the rule than there is. I say that because I think that sometimes there has been the thought that by making these changes we were going to close the matter.

All I can say is that the former rule we had did develop certain doubts in the minds of the judges. It didn't say all we had in mind. In the first place, it stated only half the rule. It stated when the judgment could be entered and not when it couldn't, and I think there was a real ambiguity about it. I have no doubt that we can help out the situation very materially by getting a clearer statement. We are not going to do away with all cases, and I certainly don't claim that we can, but I think that we are going to make it helpful to district judges who want to pass on the subject, and not make the matter difficult. I think they will have a somewhat clearer idea.

So I think that the attempt that we are making here

is quite worth while, and I think the suggestions we have are quite helpful.

If you will follow Mr. Hammond's before you, you can see that what he has done is to change the order and to state first that when the matter is finally adjudicated, judgment can be entered. Then he states at the end when the entry of orders is only provisional. He has spelled out quite a little more than in the original form the idea we are after. As I said, I am quite ready to accept his suggestion.

I call attention to the changes suggested by Mr. Morgan in Mr. Hammond's draft. If you will look down to the fifth line of the Hammond draft, where it says "and such entry shall terminate the action as to them", change "such entry" to the words "when entered"; "and when entered shall terminate the action as to them."

Now going down to the next sentence: "The judgment or judgments may be entered even though claims, counterclaims, cross-claims or third-party claims, arising out of other transactions or occurrences, are then undetermined, but, in that event, the court may stay enforcement of the judgment or judgments until the entry of a subsequent judgment or judgments and may prescribe". In other words, Mr. Morgan suggests taking out the words "the court" right there. "and may prescribe such conditions as are necessary", and so forth.

The second paragraph states in effect that the entry

of a judgment which does not settle all the claims out of a single occurrence shall not terminate the action, and so forth, "and the judgment," (Now I am reading from the end of the fourth line from the foot of the page) "order or other form of decision". Now, in place of the words "may be vacated or modified", take the words "is subject to revision". Then go on: "at any time prior to". Change "such" to "the" and make it "prior to the entry of a judgment or judgments adjudicating all such claims or demands for relief."

DEAN MORGAN: Page Mr. Velde;

MR. HAMMOND: By the way, Mr. Velde went over the Criminal Rules.

DEAN MORGAN: Did he de-such them?

MR. HAMMOND: He de-sucked them.

DEAN MORGAN: I move the adoption of Mr. Hammond's draft.

THE ACTING CHAIRMAN: With the changes?

DEAN MORGAN: With the changes, yes.

THE ACTING CHAIRMAN: Before we go further, Mr. Moore is making some suggestions. Have you got it before you now?

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: He suggests, in the line which would be 14, which is the first line of the second paragraph, that you ought to take out the word "judgment" there and insert it in other places later on that I shall refer to.

MR. HAMMOND: What line is this?

THE ACTING CHAIRMAN: The second paragraph. There will be certain other cases below that I shall speak of. The reason, he says, is that we define "judgment" in 54(a) as any official decree or order from which an appeal lies. Therefore, he suggests that that second paragraph would read like this:

"The entry of any order or other form of decision as to one or more, but not all, claims for relief, including counterclaims, cross-claims and third-party claims, arising out of a single transaction or occurrence, before the entry of a judgment or judgments adjudicating all such claims or demands for relief, as provided in the first sentence of the preceding paragraph, shall not terminate the action as to the claims or demands for relief adjudicated by the order or other form of decision, and the" (again strike it out) "order or other form of decision is subject to revision at any time prior to the entry of a judgment or judgments adjudicating all such claims or demands for relief."

DEAN MORGAN: I think that is much better.

JUDGE DOBIE: Delete it in the text, but leave it in the next to the last line.

MR. LEMANN: "in the preceding paragraph". Don't you want to say "in this rule"?

THE ACTING CHAIRMAN: Yes; that is all right. It is the preceding paragraph, anyhow, but I guess maybe it would

be surer to put it in. "the preceding paragraph of this rule".

MR. HAMMOND: "this subdivision of this rule", if you are going to put it in.

MR. LEMANN: It is still of this rule.

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: I don't know. Do you think that is really very necessary?

MR. LEMANN: In the drafting of contracts, and so on, we usually say "as provided," and in statutes I think very often it is done, too. I don't think you would find the draftsmen for Congress saying, in a revenue act, "as provided in the preceding paragraph," but I think they would say, "the preceding paragraph (b)," perhaps, "Section 'blank' of this Act." I don't think you would ever use language as general as "the preceding paragraph" in careful draftsmanship.

MR. HAMMOND: Then, "of the preceding paragraph of this rule"?

MR. LEMANN: Yes, that is what I suggested. The criticism is, either don't do it at all or make it more precise.

DEAN MORGAN: "the first sentence of this subdivision (b)".

MR. LEMANN: It is plain enough, I guess, without any, but I think it not very good draftsmanship.

PROFESSOR CHERRY: No.

MR. HAMMOND: "as provided in the first sentence of

the preceding paragraph of this subdivision of this rule".

DEAN MORGAN: "of this subdivision (b)".

MR. LEMANN: That is right.

MR. HAMMOND: "the first sentence of this subdivision (b) of this rule".

JUDGE DOBIE: If this paragraph isn't right, you would be out of luck.

MR. HAMMOND: I want to say something about striking out the word "judgment" in those cases. I thought you had trouble that the thing that they entered was called a judgment.

THE ACTING CHAIRMAN: That is true. As a matter of fact, they call it almost any old thing. It may be called a judgment.

MR. HAMMOND: That is why I stuck "judgment" in.

THE ACTING CHAIRMAN: I know there is that difficulty. I don't know quite how you are going to meet that. What they do is to enter a decree and enter a judgment, and then they appeal from it.

DEAN MORGAN: "other form of decision" is enough to include a thing that they call a judgment but which, by our definition, is not a judgment because it is not final and appealable. That is the difficulty. We define a judgment, don't we?

MR. HAMMOND: Let's see that now.

THE ACTING CHAIRMAN: It is in Rule 54(a), which is

just before this, you see. It is in the same rule.

DEAN MORGAN: It is just too much to disregard it there. "includes a decree and any order from which an appeal lies."

THE ACTING CHAIRMAN: It seems to me that either you have to change that definition--

DEAN MORGAN (Interposing): Or you have to knock it out here.

THE ACTING CHAIRMAN: --which could be done, but we have hung to that in all the rules, practically, or you have to leave it out and take your chances that they still may violate that. I recognize that. You can't do the impossible, really.

MR. HAMMOND: I appreciate that fact.

PROFESSOR CHERRY: What Eddie said here is "The entry of any order or other form of decision, even though it is called a judgment ...." It shouldn't be, but it has been. The trouble is where it has been called a judgment, isn't it?

MR. HAMMOND: You could probably make it "The entry of any form of decision, whether called a judgment or order ..."

PROFESSOR CHERRY: Our only trouble is where they call it a judgment. Where they don't call it a judgment, we probably are not having trouble.

THE ACTING CHAIRMAN: "The entry of any form of decision, however designated ...."

PROFESSOR CHERRY: I was wondering if something like

that might do it.

THE ACTING CHAIRMAN: What do you think of that? "The entry of any form of decision, however designated ...."

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: You have to repeat it on down.

DEAN MORGAN: I don't know whether you have to do that now.

THE ACTING CHAIRMAN: You have to repeat it some, but not very much; not enough to do any harm, I should think.

MR. OGLEBAY: You have to repeat it in the fifth line from the bottom.

DEAN MORGAN: "shall not terminate the action as to the claims or demands for relief adjudicated by the form of decision".

JUDGE DOBIE: You have to repeat it in the fourth line from the bottom, "or other form of decision, however designated".

MR. DODGE: If you say "or other form of decision", you identify it.

DEAN MORGAN: If you leave order in.

THE ACTING CHAIRMAN: "The entry of any order or other form of decision, however designated". Now go down to the fifth line from the bottom. "shall not terminate the action as to the claims or demands for relief adjudicated by the order or other form of decision".

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: And why can't you say "it"; "it is subject to revision".

MR. DODGE: "such order or decision".

THE ACTING CHAIRMAN: Not "such". "and the order or other form of decision is subject to revision", if you want to repeat it.

DEAN MORGAN: I think you might as well repeat it, to make it absolutely sure. It isn't going to hurt anything.

THE ACTING CHAIRMAN: All right. Now, Mr. Morgan moves the--

MR. HAMMOND (Interposing): Just one point.

THE ACTING CHAIRMAN: All right, go ahead.

MR. HAMMOND: I cut out "demands for relief" up above, but I notice I didn't cut it out down in the fifth line from the bottom.

THE ACTING CHAIRMAN: Perhaps I ought to speak a little on that, Eddie. I would like to have you think of that. When I made the original draft, the reason I put in demand was that I was a little afraid that there was some tendency to say that a claim for relief is equivalent to a cause of action, and I wanted to make all the claims that might arise out of a single cause, to use the old expression. I put in something to make it broad, and that is why I put in "all claims or demands."

DEAN MORGAN: You can put it in up at the top.

THE ACTING CHAIRMAN: I wonder if it wouldn't be just as well to have it in. That is really what I am coming to. Put it this way: Suppose that some court comes along and says, "Why, a claim for relief really means cause of action," and then you change the words "claim for relief" to "cause of action" throughout, and you might have this old question arising; whereas, if you put in "claims" and "demands," you have a word of art and a word of science, too, and it would be more inclusive.

What do you think about that, Eddie?

DEAN MORGAN: I don't know. Up here you have "all claims for relief".

MR. HAMMOND: He had "or demand" in his draft.

DEAN MORGAN: He had "all claims or demands for relief", that is right.

MR. DODGE: "claims for relief and claims or demands for relief".

MR. HAMMOND: What is the difference?

DEAN MORGAN: Are you thinking about a claim, the word "claim," and then a demand for relief as another thing? Is that right?

THE ACTING CHAIRMAN: I was putting in this little bit of history. We actually did leave out the words "cause of action," and we used the words "claim for relief." From a

single cause of action you may have many rights of action, to use that terminology. If you literally define "claim for relief" as being a cause of action, you may have several rights. When I say "all claims for relief and demands," I am in effect saying "all causes of action and rights therefrom," getting it to an inclusive form.

MR. DODGE: I think in the rules generally we have used the expression "claim for relief," not supplementing it by the words "or demands."

THE ACTING CHAIRMAN: That is of course true.

MR. DODGE: And I don't quite understand what the words "or demands" add.

THE ACTING CHAIRMAN: What do you think?

PROFESSOR MOORE: It is new.

THE ACTING CHAIRMAN: Do you think it is worth putting it in or not?

MR. DODGE: All the way through the early rules I notice the reference is to claims for relief.

THE ACTING CHAIRMAN: I am inclined to think that probably it doesn't add much.

DEAN MORGAN: I think you might as well leave it out.

THE ACTING CHAIRMAN: If this doesn't do it, possibly "or demands" won't either.

DEAN MORGAN: No.

THE ACTING CHAIRMAN: It should be uniform, it is true.

MR. HAMMOND: Strike it out, then, in the fourth line from the bottom.

DEAN MORGAN: No.

THE ACTING CHAIRMAN: And also in the sixth line.

MR. HAMMOND: That is right.

JUDGE DOBIE: Isn't "demand for relief" the term that you more frequently find?

MR. DODGE: Not in these rules.

THE ACTING CHAIRMAN: It is demand for judgment.

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: "Demand for judgment" is the term we use. In this same Rule 54(c) we talk about a demand for judgment.

JUDGE DOBIE: Yes.

THE ACTING CHAIRMAN: I think this is now in pretty good shape. Do you have any more? Mr. Morgan still moves the adoption. All those in favor will say "aye"; those opposed. It is so voted. (Carried)

DEAN MORGAN: How about the note?

MR. LEMANN: Didn't we vote to put in all those?

THE ACTING CHAIRMAN: Nobody raises a question on 55. Rule 56. This is a provision that was agreed on last time, and down at the foot, the alternative draft of Rule 56 is tied up with alternative Rule 12. Unless you like, I don't know that we need go back over that. If you want further explanation, I

can give it to you very shortly, but the two are tied in very closely together.

DEAN MORGAN: I think so. This is the one in case the alternative is not adopted.

THE ACTING CHAIRMAN: That is it, yes.

MR. HAMMOND: I have a note here from Mr. Tolman, who says: "There is so little real difference between the majority and the minority of the Committee in regard to the time at which a motion for summary judgment may be made that I would not burden the court with the controversy."

THE ACTING CHAIRMAN: I wonder, too, first, whether Major Tolman really read it, because after all, if he means that there is so little difference between the majority and minority on Rule 12, that would be another question. There is a big difference. If he is limiting his ideas to Rule 56 alone, he hasn't studied what we have put before him. Furthermore, again I must say that I don't quite think it is fair for the majority, on a matter on which we are as divided as this, not only to vote the minority out but to say they must shut their blooming mouths. It ain't the American way.

PROFESSOR CHERRY: I thought you were going to come around to saying that the majority ought to agree with the minority.

THE ACTING CHAIRMAN: What did you say?

PROFESSOR CHERRY: I think the practical effect of

the Major's suggestion is that the majority ought to agree with the minority. He knows blamed well the minority is going to speak.

JUDGE DOBIE: In this 56, the only thing you do is cut out that ", at any time after the pleading in answer thereto has been served," is it?

THE ACTING CHAIRMAN: The only change in the main rule is to cut out the time limitation, yes.

MR. HAMMOND: Yes.

JUDGE DOBIE: We all agreed on that, didn't we?

THE ACTING CHAIRMAN: Yes.

MR. HAMMOND: Except Mr. Lemann, who wasn't here last time.

PROFESSOR SUNDERLAND: Why not say "at any time"? If we don't say anything about it, one wonders what about the time. Wouldn't it be clear if we just said "at any time"?

THE ACTING CHAIRMAN: I have forgotten. Why didn't we say "at any time"? Why was that?

PROFESSOR MOORE: I think that would be a good addition.

MR. LEMANN: What is the language now appearing in 26, the corresponding rule? Rule 26 is after the commencement of the action. The point we are discussing now is Mr. Sunderland's query as to whether we ought not merely to delete the reference to pleadings and to insert that the party may

move at any time for a summary judgment. I suggested that perhaps we should use the corresponding language which we use for taking a deposition.

THE ACTING CHAIRMAN: I should think that is all right. "at any time after commencement of the action".

MR. LEMANN: Unless, maybe for variety, we would like to use different words. It gives some (what do you call it) frills and flexibility. We sometimes seem to make a point of using different words where we mean the same thing. I don't know whether that creates some uncertainty in the profession, which is accustomed to looking for reasons where none exist.

DEAN MORGAN: That is for stylistic purposes.

THE ACTING CHAIRMAN: I don't want to bring up anything here, Monte, but our alternative does say just that: "at any time after the commencement of the action".

MR. LEMANN: I was going to find some other merit in your alternative, perhaps. I won't permit myself.

THE ACTING CHAIRMAN: I don't know. I'll have to look it over and see what is wrong with it.

MR. HAMMOND: That would mean, then, if you put in "after the commencement of the action", to do it before pleading has been served.

DEAN MORGAN: Oh, yes. That is what we say. That is what it is for.

PROFESSOR SUNDERLAND: No one would suppose you would

say that you could do it before the beginning of the action, would they? So why put in "after the commencement of the action"?

MR. LEMANN: Where is this happy language in the alternative 56?

MR. DODGE: I can't find it.

THE ACTING CHAIRMAN: It is on page 15 of this draft.

MR. DODGE: Show it to me. Where is it?

THE ACTING CHAIRMAN: Page fifteen of this draft.

MR. LEMANN: Read it to me on the point that we are now discussing.

THE ACTING CHAIRMAN: What we do is to take out the time statements of the two top subdivisions. Then we expand (c) to gear it into what we have done previously in 12.

MR. LEMANN: That is not too artistic, because to that extent (c) overlaps (a).

THE ACTING CHAIRMAN: Oh, no, it doesn't, not in the alternative.

DEAN MORGAN: This is just telling them that either party may do it with or without affidavits, and then (c) is the time when made.

MR. LEMANN: (c) is the time.

THE ACTING CHAIRMAN: Why not move to substitute the alternative for the ancient one here, unless it is geared up with 12 and you don't want to take it separately?

MR. LEMANN: Why not, if it has merit in it--as to which I am expressing no final opinion. (Laughter)

THE ACTING CHAIRMAN: Do I understand that you want now to move to substitute alternative Rules 12 and 56?

MR. LEMANN: I haven't committed myself expressly, but back to where we are on this point. If we are working on 56(a) on page 51, the point made by Mr. Sunderland, as I look at it, is that (a) should specify that it may be done at any time.

DEAN MORGAN: After commencement of the action.

PROFESSOR SUNDERLAND: Why add "after commencement of the action"? It couldn't possibly be before. Nobody would suppose that he could do it before the action.

MR. LEMANN: I suggest that we use the language we used in 26, as I have a weakness, apparently, for saying the same thing when I mean the same thing, and in the same way--

DEAN MORGAN (Interposing): That is too bad. That shows you have no originality!

MR. LEMANN: That's right. But perhaps the language of 26 should be changed. Turn back to page 27 of our material, Mr. Dodge.

MR. DODGE: This alternative on page 15 doesn't seem to me to differ in any very material respect.

MR. LEMANN: He says that when he gets down here to (c), he specifies time.

MR. DODGE: Yes.

MR. LEMANN: He says we don't specify time.

MR. DODGE: The only difference is that in one case it is after answer and in the other case it is at any time.

MR. LEMANN: We are going to take out after answer now, you know.

MR. DODGE: What else is in the alternative Rule 12 or Rule 56 on page 15? Isn't Tolman right when he says it really isn't important enough to put up an alternative rule?

DEAN MORGAN: No, no.

THE ACTING CHAIRMAN: Mr. Dodge, do you really think it is fair to shut us out from a statement of our views? because the suggestion has been made several times that we should not be permitted to put up our views. This is an integral part of the whole problem as to 12. There is nothing separate.

MR. DODGE: I am not talking about 12.

THE ACTING CHAIRMAN: Rule 56. As a matter of fact, I am afraid that you haven't done us the honor of reading the alternative, because you would see how it is tied up. What we do in our alternative Rule 12 is to provide that the motion (what we use for the demurrer) shall be made as a summary judgment under Rule 56. Then here we specify the time when it shall be made, and it gears right into what we have done under Rule 12.

MR. LEMANN: Just to refresh my memory, will you

explain to me why (I know there is some reason that I would get if I stopped to analyze it, but you can spout it out without my stopping to do that) couldn't we review putting in your alternative; why couldn't we also ourselves put it on page 51 and, instead of using the language we are going to use, why wouldn't the language that you propose fit in with our Rule 12? You can give me an answer quickly.

DEAN MORGAN: It will here on (a) and (b), Monte, but it won't with (c), and (c) is altogether different.

MR. LEMANN: Let's see why. That is what I want to focus my mind on. I could get it, but you can hand it to me immediately.

DEAN MORGAN: Look here. Alternative (c): "A motion by a claimant may be made at any time after the commencement of the action. A motion by a defending party may be made before serving a responsive pleading within the time and in the manner permitted by Rule 12(b); or it may be made at any time after a responsive pleading has been served or where no pleading is required."

MR. LEMANN: What is wrong with that with our majority Rule 12(b)?

DEAN MORGAN: I don't know.

PROFESSOR MOORE: The majority Rule 12(b), as you have now voted it, doesn't provide for service of summary judgment.

DEAN MORGAN: Your 12(b) doesn't have a summary judgment.

THE ACTING CHAIRMAN: Rule 12(b) has the ancient demurrer. That is what you wanted.

DEAN MORGAN: You haven't a summary judgment in 12(b).

PROFESSOR CHERRY: Oh, yes.

MR. LEMANN: We haven't anything to exclude it, have we?

JUDGE DOBIE: Don't you find that some of these things may be considered under certain circumstances as a summary judgment under Rule 56?

MR. LEMANN: You take our page 51 now, straying a little bit from Mr. Sunderland's point. What does that provide? That simply provides for (a), and (b) would stay as it is.

DEAN MORGAN: That is right.

MR. LEMANN: That would mean no change.

DEAN MORGAN: All right. You don't need any change.

MR. LEMANN: I suppose the only way you would need any change would be if you wanted to emphasize the fact that the defending party could do it before serving the responsive pleading, which is now emphasized in the alternative Rule 56 on page 15, but which doesn't appear in the present draft of 56(b), and maybe we ought to take that over. You don't object to our adopting some of it. Without suppressing the alternative

rule at the point where you wish to state it, you wouldn't object to our doing you the compliment of borrowing some of your ideas, would you?

THE ACTING CHAIRMAN: No. I think you can do very well. As a matter of fact, if you start borrowing, it will be fine. I think that in the end you will clarify your Rule 12. I think that will be the result.

MR. LEMANN: That is all right. We are not proud.

THE ACTING CHAIRMAN: But don't you see, Monte, under your draft of the two rules, Rules 12 and 56, a defendant moves under Rule 12 for dismissal, and nothing is said about affidavits, and I think you intend that affidavits shall not be used. I think that is going to be a question of ambiguity in your rule, but as I understand what you want, you don't want affidavits there.

MR. LEMANN: Wait a moment. See if I get this right, Mr. Dodge. We intend that under Rule 12 a man may still file a motion to dismiss, or a demurrer, you see, and he doesn't have to have any affidavit for it. Then we intend to permit that--

THE ACTING CHAIRMAN (Interposing): Do you mean to prohibit affidavits? That is the question.

MR. LEMANN: No.

PROFESSOR CHERRY: Not the way it is worded now.

MR. LEMANN: But we also want to leave the door open for this defendant if he wishes to proceed for summary judgment,

and he would proceed under Rule 56.

THE ACTING CHAIRMAN: That is just what I say. You see, what you have is that the defendant can make, first, a motion to dismiss. It is overruled. The next day, he makes a motion for summary judgment under Rule 56. That is what you have.

MR. LEMANN: That is right.

THE ACTING CHAIRMAN: Under the rule that we have drawn up, we restrict the defendant to only one motion at a time, and the effect of Rule 56(c) as we have drawn it is that a defendant makes one motion before his answer, which can include all these things--summary judgment, and so on. But he makes only one; he can make only one. That is the meaning of the expression here that he can make a motion "within the time and in the manner permitted by Rule 12(b)". That means a single omnibus motion.

MR. LEMANN: Yes. We could take that part out, if we wanted to, for our purposes here in 56. Then you stated (I think I got the point you emphasized; I wanted to bring it out) that your main desire is to say that a man can't do both things at separate times.

THE ACTING CHAIRMAN: That is right.

MR. LEMANN: He can't demur and then move for summary judgment.

THE ACTING CHAIRMAN: That is right.

MR. LEMANN: Whereas, we would permit him to do that. That is the difference between us.

THE ACTING CHAIRMAN: That is it. Yes, I think that is correct.

MR. LEMANN: That illuminates my thinking.

THE ACTING CHAIRMAN: You have to add one thing that goes along with it. Of course, after his answer, you also permit him to move for judgment on the pleadings, and then he also can make a summary judgment. That is, he can do the same thing after answer, and again under our rule the only thing he can do is what we call a summary judgment. You see, we are leaving out the motion for judgment on the pleadings or, to put it another way, it is swallowed up in our summary judgment.

MR. LEMANN: You have a merger, just an omnibus thing.

DEAN MORGAN: That is it.

THE ACTING CHAIRMAN: That is it.

MR. DODGE: I see how your Rule 12 covers that, but I don't see how your substitute Rule 56 brings about that result. It seems to me that Rule 56, as you have revised it, would be consistent with either form of Rule 12.

THE ACTING CHAIRMAN: I don't mean to say that you may not be able to make use of our Rule 56(c). If so, we graciously offer it to you. All I was intending to say was that this form of wording, we think, is an essential of our alternative Rule 12.

DEAN MORGAN: It is not essential to yours, that is all.

THE ACTING CHAIRMAN: It is not essential, but it may be highly desirable and I recommend it for your earnest study, and we think it is essential for the combination we have. That is the point.

MR. LEMANN: Your Rule 12 says that you can't do both things.

DEAN MORGAN: That is right.

MR. LEMANN: You have to do it all at one time.

THE ACTING CHAIRMAN: That is it.

PROFESSOR SUNDERLAND: Charlie, would your rule prohibit this? The plaintiff doesn't know that he has any basis for a summary judgment, and he puts in some of these other motions. Later on, he discovers that he does have a ground. Would you say that he couldn't then make a motion for summary judgment? The facts existed all the time and were always available, but he didn't know about them.

THE ACTING CHAIRMAN: Under that, of course, the way we have it, he could do two things. If the motion has been heard, and there isn't a question of amending or changing, then he couldn't change that, and there would be only one thing he could do. He could file his answer.

PROFESSOR SUNDERLAND: And he would have to go to trial before he could ever raise the point of summary judgment.

THE ACTING CHAIRMAN: No, we haven't shut him down that much. You can still do it at different stages of the case. We haven't shut it down entirely. Of course, there might be an abuse under our rule, but I think there is less chance of it. What he can do is to move on this omnibus motion before his answer, and if he is turned down, he files his answer, and he still can do it over again, for anything we have said.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: The judge might not pay much attention to it.

DEAN MORGAN: "at any time after a responsive pleading has been served or where no pleading is required."

PROFESSOR SUNDERLAND: Then you can do it at the two stages that Mr. Lemann speaks of. You can raise your objection first on a motion, and you can raise your objection later on a motion for summary judgment.

THE ACTING CHAIRMAN: Yes, that is true. That is, we allow two motion whacks for the defendant. Mr. Lemann allows a minimum of four.

PROFESSOR SUNDERLAND: Oh, we don't have two.

DEAN MORGAN: We have the demurrer, judgment on the pleadings, and the motion for summary judgment.

THE ACTING CHAIRMAN: Yes, a minimum of four.

PROFESSOR SUNDERLAND: But the demurrer and the

judgment on the pleadings have to come together.

DEAN MORGAN: Oh, no.

THE ACTING CHAIRMAN: No, no. They couldn't.

PROFESSOR SUNDERLAND: If they are available at the same time.

DEAN MORGAN: No.

PROFESSOR SUNDERLAND: That is what our Rule 12 says, that if they are available, they all have to be put in at once. Everything available at the same time must go in at the same time.

THE ACTING CHAIRMAN: In that sense, yes, but a motion for judgment on the pleadings is usually made after answer and is usually made in contemplation of what comes in on the answer and reply.

DEAN MORGAN: Motion for judgment on the pleadings can be made only after the pleadings are closed.

THE ACTING CHAIRMAN: Yes.

MR. DODGE: Haven't we got now really only the question whether in the substitute 56(a) we should insert the words "after the commencement of the action"?

DEAN MORGAN: Monte raises the question whether you shouldn't insert (c) from it.

MR. LEMANN: We got over to that, but let's stick first to (a).

DEAN MORGAN: Oh, yes; no doubt about that.

MR. LEMANN: (a) was the first point which Mr. Sunderland really raised. I said that I thought we ought to make it more explicit, and I suggested that we use the same language we used in the amendment to Rule 26. All you would have to say is "may after the commencement of the action", I suppose.

THE ACTING CHAIRMAN: Mr. Sunderland says it is tautological, but I don't know that that is any final objection.

MR. LEMANN: Let's go back and change the language on page 27.

THE ACTING CHAIRMAN: He asks, how can there be any before the action commences? How can you have a motion for summary judgment in an action that has not commenced?

PROFESSOR CHERRY: The same would be true under 26.

MR. LEMANN: I think it might sound a little better to say "at any time after the commencement of the action".

PROFESSOR SUNDERLAND: I think that is all right.

MR. LEMANN: So moved. Mr. Sunderland moves that Rule 56(a)--

THE ACTING CHAIRMAN (Interposing): Mr. Sunderland moves, and Mr. Lemann seconds.

MR. LEMANN: That Rule 56(a) be amended from the form shown on page 51 by inserting in line two after the word "may" the words: "at any time after commencement of the action".

PROFESSOR SUNDERLAND: I second it.

THE ACTING CHAIRMAN: All those in favor will say "aye"; those opposed. The "ayes" have it, and it is so voted.

MR. LEMANN: Now, paragraph (c). Do we need anything more under (c) or (b)? I think "at any time" is there, isn't it?

DEAN MORGAN: You see, it is a party against whom it is sought. He wouldn't be a party until after he had been served.

MR. LEMANN: That is right. It seems to me we don't need any help from you, Dean Clark. It is repudiated.

DEAN MORGAN: That is what we tried to tell you, but you wouldn't listen to us.

THE ACTING CHAIRMAN: The thing of it, Monte, is that you thought we had something better.

MR. LEMANN: You are the one who referred to that alternative rule and said we took care of it.

THE ACTING CHAIRMAN: You thought we had something better about (c). Of course, that is true. We do have.

DEAN MORGAN: It is not up our sleeve. It is there.

THE ACTING CHAIRMAN: I have a suggestion--a question, at least--on this recent Supreme Court decision, but before we take that up, is there anything else in 56? If not, I wish you would take a look. I don't know whether we should do anything about this or not. Have you read that, Edson?

PROFESSOR SUNDERLAND: Yes. I don't know what we

should do, if anything.

THE ACTING CHAIRMAN: If you will look at this memorandum of recent decisions.

DEAN MORGAN: Oh, yes.

THE ACTING CHAIRMAN: I hope you will notice that I didn't pepper you with stuff in advance, at least. It was only when you got down here.

DEAN MORGAN: Don't rub that in, because I overlook the stuff in advance.

THE ACTING CHAIRMAN: I know you do. Now turn over to Rule 56. That is on the third page and over on the next page. This is the case decided a week ago Monday. You will notice the facts involved. Summary judgments had been granted below in the Fifth Circuit. The case had been tried, I think, four times before.

DEAN MORGAN: And then get a summary judgment finally?

PROFESSOR CHERRY: That what we say, "at any time"!

DEAN MORGAN: That is like the Wilkins v. Sears case, where they tried the case for thirteen months, and then the verdict was decided on the ground that there was no evidence to go to the jury.

MR. LEMANN: Would this have been avoided by any alternative rule of the minority?

THE ACTING CHAIRMAN: No. This is a question of what

the Supreme Court has done to our existing rule.

MR. LEMANN: I think you ought to provide a rule to avoid four trials of a thing like this.

THE ACTING CHAIRMAN: I don't think we could even do a thing like this. That isn't the point, really, that I brought this up for.

You will see that the defendant moved for a summary judgment, averring that there existed no reasonable basis for dispute that during the period in question there was a market price at the wells and that it did not exceed three cents per m.c.f. In support of the motion, affidavits, a stipulation of facts and several exhibits were filed. The plaintiff resisted the motion on the ground that it was inadequately supported on the face of the defendant's papers. Summary judgment for the defendant was granted by the district court, and the circuit court of appeals affirmed.

Mr. Justice Jackson, speaking for the Court, quoted the last sentence of Rule 56(c): "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except" (notice this "except" clause, because it suddenly assumes a great importance) "as to the amount of damages, there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law." He emphasized the phrase "except as to the amount of damages"

and said: "Where the undisputed facts leave the existence of a cause of action depending on questions of damage which the rule has reserved from the summary judgment process, it is doubtful whether summary judgment is warranted on any showing."

I will stop right there and say that that is just something that I never saw in the rule before. I thought our reservation of "except as to the amount of damages" meant that we entered a general judgment finding liability.

MR. LEMANN: Just sent the issue of damages to the jury.

PROFESSOR SUNDERLAND: The same as a default.

DEAN MORGAN: The same business as a demurrer or default.

THE ACTING CHAIRMAN: You see what the rule now means.

He went on: "But at least a summary disposition of issues of damage should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party."

He then concluded that the defendant had failed to show that it was entitled to judgment as a matter of law, since the evidence supporting the motion depended in part upon expert testimony which was not subject to cross-examination except upon trial.

Mr. Chief Justice Stone and Mr. Justice Reed dissented. The Chief Justice conceded, however, that Rule 56(c) "excludes

from the summary judgment procedure any issue as to the 'amount of damages', where there is an admitted right of recovery but the amount of damages is in dispute."

MR. LEMANN: All right, read the next sentence. That makes me wonder.

He contended, nevertheless, that "the Rule does not exclude from that procedure the issue of damage vel non when that is decisive of the right to recover", referring to Rule 56(d) in support.

Do I understand from that that in that case the issue of damages went to the whole right to recover? If so, I could understand that it might follow that you couldn't maintain the summary judgment because the whole case depended on the question of damages. It seems to me that is what that sentence implies. Doesn't it?

THE ACTING CHAIRMAN: Look at the next sentence.

MR. LEMANN: What were the facts? I think we would have to know a little more.

THE ACTING CHAIRMAN: We tried to state them in the first paragraph, you see.

The controversy involved the price to be paid to the landowners by lessees of a natural gas development. The contract price was one-eighth of the value of the gas taken, calculated at the rate of market price and no less than three cents per thousand cubic feet. Whether or not there was a

cause of action turned on whether the "rate of market price" during a certain period was above the fixed minimum of three cents per m.c.f.

As a matter of fact, they had paid the three cents, as I remember. They had paid the three cents, and this was a suit to get more, you see.

Under the state law this involved a determination as to whether there was a market price at the wells. Then the defendant moved for a summary judgment, averring that there existed no reasonable basis for dispute that during the period in question there was a market price at the wells and that it did not exceed three cents per m.c.f., which is the amount the defendant had been paying, all right.

MR. LEMANN: I don't see anything wrong with any of this language under the rule. Speaking for the majority, Jackson said, "You can't get a summary judgment because the affidavits leave some room for doubt as to what might be held. They show that the case isn't one that you could disregard a jury finding on. Therefore," he said, "you can't get a summary judgment because it is not beyond controversy whether the market value exceeded this three cents. As it isn't beyond controversy, you can't get a summary judgment." I don't see anything wrong with that.

Then Stone and Reed came along and said they didn't think that you could deny summary judgment merely because there

were expert witnesses involved.

DEAN MORGAN: That is it. It wasn't beyond controversy. Jackson said it wasn't beyond controversy because it depended upon expert testimony, and Stone said, "Well, you have affidavits from experts, and you have no denial at all or anything tending to deny them by the defendant."

MR. LEMANN: Didn't they deny the expert testimony on the other side? I would have thought they must have.

DEAN MORGAN: It says they didn't. That is the point. That is what Stone says, and the credibility of the expert is what Jackson is talking about, because he wasn't subject to cross-examination.

MR. LEMANN: He says, ".... the opposing parties did not present any probative evidence in challenge," but that doesn't mean they didn't deny it. Reading these two paragraphs together, I would get the impression that the defendants who were resisting summary judgment said, "While we don't give you any expert testimony ourselves, we don't give you any independent evidence, we do challenge this expert testimony and we would like to cross-examine these guys, and we are entitled to cross-examine." You can't just assume that what they say makes it so, and Jackson said, "You are entitled to cross-examine."

DEAN MORGAN: That is right.

MR. LEMANN: Stone said, "Well, no, not if you haven't any evidence on the other side."

DEAN MORGAN: It doesn't have to be expert, but it has to be some kind of evidence, instead of just saying, "Stand up and prove it."

THE ACTING CHAIRMAN: Let me say there are two different matters worth our consideration here. The first is the matter that you are now considering, Monte, and that is whether on the main issue you have summary judgment or not. Of course, you can say that this is a kind of thing about which judges might differ; it is very easy to differ on a thing like this, and I think probably that is all we can say.

I do feel a good deal of sympathy with the Stone point of view. I think the idea of a summary judgment is to smoke out the other fellow, and he can't simply sit back and say, "Why, I am not going to show anything now. I am simply going to claim my right of cross-examination," and so on. I don't quite think that is a good way to work it, but I mean I suppose there is a chance of a difference of opinion there.

MR. LEMANN: What I am pointing out to you, among other things, Charlie, is that I think you are unjustified in your comment that this shows that our phrase, "except as to the amount of damages", is a blind phrase. I don't think it does support that comment, because this was a very unusual case. What we meant by "except as to the amount of damages", as Mr. Sunderland has said, is a default case, a personal injury case, or some other case where liability is claimed, and all you have

to do is fix the damages. Here was a case where the so-called damages went to the whole basis of the cause of action, and I don't think that that justifies any stricture on our rule as to its being blind in that regard.

THE ACTING CHAIRMAN: Just a minute. I was then going to turn to what I think is the central question, and that is on the meaning of this phrase, and it seems to me to come up particularly in that sentence of Mr. Justice Jackson's where he emphasizes the phrase and he says, ".... the undisputed facts leave the existence of a cause of action depending on questions of damage which the rule has reserved from the summary judgment process". That is the part that seems to me to say something that we didn't intend the rule to say, "on questions of damage which the rule has reserved from the summary judgment process". The rule hasn't reserved damages as such, according to our intention.

MR. LEMANN: It has reserved damages from the summary judgment. I think it has. If Jackson meant that we meant to exclude the whole case from the summary judgment process, he was wrong, but we did mean to exclude the point of damages from the summary judgment process.

DEAN MORGAN: The amount of damages.

MR. LEMANN: I mean the amount of damages.

DEAN MORGAN: Not the existence of damages.

MR. LEMANN: The amount of damages.

DEAN MORGAN: All right, that is what we intended to exclude. Here, this depended on the existence of damages, not on the amount of damages.

MR. LEMANN: That is right in this case. That is why this case didn't involve that phrase.

DEAN MORGAN: I know, but he says it does.

MR. DODGE: He says it is doubtful.

DEAN MORGAN: He is throwing a doubt on the whole question.

PROFESSOR SUNDERLAND: No. He says that in a case where damages are a part of the cause of action itself, he thinks we can't use the summary judgment process; in other words, where there is no liability, unless you can show damages.

DEAN MORGAN: That is right.

MR. LEMANN: We have said generally that you can't apply the summary judgment process to the determination of damages.

THE ACTING CHAIRMAN: I don't think we have said that, no. I think what we intended to say was that where damages are disputed, you nevertheless can have summary judgment for the rest; and I think we intended to say, and I thought we had said, that where there is no issue as to damages (that is, if you want to put it the other way around, where the amount of damages is not disputed) you can get summary judgment. If I understand what he means, he says--

MR. LEMANN (Interposing): He says it is doubtful. He doesn't deny that. He says it is doubtful, doesn't he?

DEAN MORGAN: I know, but we don't want to leave it with any doubt.

MR. LEMANN: You don't think it is doubtful?

DEAN MORGAN: I think it may be.

THE ACTING CHAIRMAN: I didn't think it was doubtful until I read what he said. I might add this (I don't know that this adds much except that it shows the view of a commentator): I had looked at the case, and I hadn't paid very much attention to it and thought it was probably something about which reasonable men or judges were differing and that that was all there was to it. I got a letter from Mr. Willis, who is now the Managing Editor of the Federal Rules Service. The others are in the Navy or elsewhere. He said, "We are greatly disturbed about this. I have written a commentary on the decision suggesting that Mr. Justice Jackson has misinterpreted the rule. Will you look it over?" I have his comments that he intends to print. I read them over, and I talked with Mr. Moore. I wrote back to Mr. Willis and said that I thought he was correct. I presume that means that in a week or so his commentary is coming out, discussing it along the line I have been saying here.

PROFESSOR CHERRY: Did we really need to say anything in (c) about damages? In (a) we already had the statement that he moves "with or without supporting affidavits for a summary

judgment in his favor upon all or any part thereof." If in (c) we simply said that, even though upon his motion for judgment on all of it, he doesn't show that he is entitled to that, any remaining showing which he is not entitled to judgment on remains for trial, without specific damages, that would have taken care of the difficulty that has crept in. Whereas we didn't specify any other issue, we did specify damages just as a particular one of those that would often be in that category.

THE ACTING CHAIRMAN: Yes, I think that is so.

MR. LEMANN: We have Stone referring to the language of (d), which says in the second sentence: "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". Isn't that plain?

PROFESSOR CHERRY: I would leave that out.

DEAN MORGAN: That is plain.

THE ACTING CHAIRMAN: I should think so. Justice Stone, the Chief Justice, referred to that part of the provision.

I don't want to read all this, but here is a little of the commentary of Pike, Fischer, and Willis, "On summary judgment as to damages in Sartor v. Arkansas Natural Gas Corp., the Court said," and so on. He quotes what the court said and this provision that I have quoted, and he has underlined

"except as to the amount of damages, there is no genuine issue". Then he goes on. This is the Federal Rules Service.

"While it is not intended to criticize the final result of the case, it is believed that the doubt which the Court expresses is unwarranted by the rule. The italicized language in Rule 56(c) does not mean that questions of damage are reserved from the summary judgment process in that summary judgment can never be granted on matters of damage. What the rule means is that the existence of a genuine controversy as to the amount of damages is no bar to summary judgment, if there are no other issues in the case.

"This interpretation of the rule seems to me the more reasonable one, since there is nothing so peculiar about the issue of damages that it should not be susceptible of summary determination in a proper case. Indeed, the Rule 56(d) expressly provides that if summary judgment is not granted on the whole case of all the relief asked, if trial is necessary the court shall 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 on the trial the facts so specified shall be deemed established.

"On the other hand, the amount of damages will often be the only matter in the case as to which there is any room for contest, but in such case there is usually no reason not to

grant summary judgment subject to a later determination of the amount of damages by a court or jury."

Then he goes on quoting district court decisions to that effect. He cites several and discusses them.

PROFESSOR SUNDERLAND: Suppose we add to this thing that statement you just read, that where there is an issue of damages, the judgment shall be subject to a later determination as to the amount thereof. Just put that in, and that would make it clear.

MR. LEMANN: The real point in this case, the real thing they decided, was that if the plaintiff relied on expert witnesses, and the defendant denied the correctness--

THE ACTING CHAIRMAN (Interposing): It has to be the other way around, not that it makes any difference.

MR. LEMANN: That the moving party relied on expert witnesses, and the resisting party had no evidence of his own, but simply denied the correctness of the statements of the experts; that in such a case you couldn't have a summary judgment. That is the really important point in the case. You think that is wrong.

MR. HAMMOND: I think it is a little more than that.

DEAN MORGAN: I think he has to bring some kind of evidence. It seems to me that this raises exactly the same kind of question as whether verified denial prevented the striking of an answer as sham at common law.

PROFESSOR CHERRY: I don't know that it does when you get into expert evidence on a topic of this sort, because that stuff may all fall to pieces on cross-examination.

DEAN MORGAN: It may, of course. It seems to me the defendant can show why or wherein, rather than just simply deny it, as Monte says.

MR. LEMANN: Is that all he did?

DEAN MORGAN: I don't know.

MR. LEMANN: Mr. Hammond, were you going to say something?

MR. HAMMOND: I think there was a little more than that in it. There was an affidavit of the attorney for the defendant in there.

THE ACTING CHAIRMAN: No; for the plaintiff, affidavit of the plaintiff analyzing the expert testimony and saying in effect that it was no good.

MR. HAMMOND: It was of the plaintiff?

THE ACTING CHAIRMAN: Yes. The defendant moved.

MR. HAMMOND: It was of the party against whom the motion had been filed.

MR. LEMANN: I wonder why he didn't get some experts of his own, to get affidavits. That would have been so easy and would have saved us all this talk.

MR. HAMMOND: There was also in the case, Mr. Lemann, the fact that the jury in these previous trials had decided

that there was a market value in excess of this three cents on the day which followed the period covered by the claim. In other words, there had been a verdict of the jury which had established a market price, we will say, on March 1 of a given year, and the period covered in this claim went up to February 28. So the counsel in this case contended that it couldn't have changed, that it wouldn't have been three cents on February 28 and four-and-a-half cents on March 1, and the jury found it was four-and-a-half cents then.

DEAN MORGAN: Was there any evidence in the case from which the jury could have found it? Why did they have the other trial?

MR. HAMMOND: The facts are a little complicated, but this covered a different period from the period covered by the third trial. I have forgotten why, but that is a fact.

MR. LEMANN: Isn't it correct to say, in any event, that before we could proceed to change this rule because of that decision, we ought at least all of us to have read the opinion before we came to vote any change? If we are not going to consider any change, then we can pass on. If we are going to consider that that decision renders clarification necessary, I think we all ought to read it, because we have heard enough to indicate that it is a rather unusual case.

MR. HAMMOND: It is a most unusual case, and I suggest that that is probably--

DEAN MORGAN (Interposing): All your reading of the decision won't change the language of Mr. Justice Jackson to the effect that where the cause depends on the amount of damages, it is at least doubtful whether a summary judgment can ever be granted.

MR. LEMANN: Let's look at the briefs, too.

PROFESSOR SUNDERLAND: He doesn't quite say that. He says, "Where the undisputed facts leave the existence of a cause of action depending on questions of damage".

DEAN MORGAN: I grant that. I think that is clearly wrong.

PROFESSOR SUNDERLAND: It is the existence.

DEAN MORGAN: All right. That is clearly wrong. It is clearly wrong, because if the evidence is undisputed that there is some damage, then you get summary judgment. Jackson says you don't or at least that it is doubtful that you will. I think there is absolutely no doubt about that question. He would be practically saying that in any action in a case at common law where damage is of the essence, you are never going to get a directed verdict or you are never going to have summary judgment. That is practically what he is saying.

PROFESSOR SUNDERLAND: I don't think he said that. I think that isn't right.

MR. LEMANN: How would you draft language to make it so plain that he wouldn't say it again?

DEAN MORGAN: I would strike out the part about "except as to the amount of damages".

MR. DODGE: And put it in at the end of the paragraph?

DEAN MORGAN: I would delete it where it is now.

PROFESSOR CHERRY: It has occurred to some of us, Mr. Chairman, that we might use some of our rules on Mr. Justice Jackson. Why shouldn't we tender him a fee to come from next door? The expression seems to be doubtful to us. Why not submit interrogatories or give him a fee to come from next door one of these days and tell us--

MR. LEMANN (Interposing): --what a declaratory judgment is.

THE ACTING CHAIRMAN: That might be a good idea. I will say this, Eddie: Mr. Moore suggested, just as you did, that the way to do this is just simply to strike out "except as to the amount of damages".

PROFESSOR MOORE: Then you have it in the next paragraph, if there is any issue as to the amount.

PROFESSOR CHERRY: That is what I was getting at. Get those words out.

DEAN MORGAN: If he is entitled to judgment, he is entitled to judgment.

MR. LEMANN: If you took (c) alone, you would say the sentence would read: "The judgement sought shall be

rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law."

If you stopped there, Justice Jackson would come along and say, "Well, you can't have it in this case because there is a material difference; there is an issue as to one material fact."

DEAN MORGAN: What?

MR. LEMANN: The issue of the amount of damages. He say, "Therefore, you can't get it." Up to this point I think Justice Jackson would be correct. Then you would have to come to (d) and be sure that you had made it foolproof, you see.

PROFESSOR MOORE: Mr. Lemann, Justice Jackson said two things. First, he said that you never can have a summary judgment where damages are a part of the cause of action. Then he said, "If I am wrong on this, you can't get it in this case because there is a genuine dispute of fact."

MR. LEMANN: That is right.

PROFESSOR MOORE: We think he is wrong on the first proposition, don't we?

DEAN MORGAN: And he may be all right on the second.

MR. DODGE: He didn't lay it down flatly.

PROFESSOR MOORE: Yes. I am wrong on that. He said

it was doubtful.

MR. LEMANN: The point is that when so eminent a jurist as Mr. Justice Jackson is doubtful, the rule needs clarification. That is the argument of Justice Morgan?

DEAN MORGAN: It is perfectly clear that it is doubtful when he tells the whole profession that it is doubtful.

THE ACTING CHAIRMAN: When seven justices of the highest court of the land tell the profession that the rule is doubtful.

MR. LEMANN: As I understand it, they don't commit themselves to all the language used in an opinion, or they would never get through. It has to be very bad language for them to question it, notwithstanding their bricks at each other. A good deal of the language that gets by represents the writer's opinion.

PROFESSOR CHERRY: They don't throw all the bricks they might; isn't that right?

THE ACTING CHAIRMAN: That is always a problem. I have worried about that often at times, and I have discussed it with Learned Hand.

PROFESSOR CHERRY: What do you do?

THE ACTING CHAIRMAN: We have discussed how far we were bound by what our colleagues said. One of his answers was to laugh and say, "You should have been on the Court when Mann was here."

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PROFESSOR CHERRY: I just wondered. With you, do you stand for everything that Learned Hand puts in an opinion where you don't dissent?

THE ACTING CHAIRMAN: It sometimes gets worrisome just how much we do. As a matter of fact, we are always accused of doing it. There isn't any doubt about that. When the lawyers come back, the least little expression in the case is taken as though it were immediately gospel.

SENATOR LOFTIN: When a judge wants to protect himself, he says, "I concur in the result."

THE ACTING CHAIRMAN: Yes, and then the author of the opinion doesn't like it very well and asks, "What's biting you?"

DEAN MORGAN: But when one of the best judges on the court of last resort says your language leaves him in the air, it ought to be clarified. I don't think I see how you can debate that, Monte.

MR. LEMANN: I didn't challenge it. I was just trying to develop the argument pro and con. I rather think that is correct. If he said it is doubtful, we had better make it plain.

THE ACTING CHAIRMAN: What do you say would be the loss, if any, to the rule, of just striking out those doubtful words?

MR. DODGE: I was wondering whether paragraph (d)

would then fully cover the situation.

PROFESSOR CHERRY: That is the point I was raising.

MR. DODGE: If the question of damages is distinct from the question of liability, you want a judgment entered for the plaintiff and the question of damage is reserved, (d) doesn't exactly cover that. It calls for a finding as to material facts not controverted. You might strike out the words "except as to the amount of damages" and add a sentence there to the effect that "Where the only genuine issue is as to damages, distinct from the question of liability, judgment may be entered for the plaintiff."

THE ACTING CHAIRMAN: I should think so.

JUDGE DOBIE: Would the "amount of damages" be better?

DEAN MORGAN: Yes, the "amount of damages".

MR. DODGE: I didn't try to get at the exact words, but it seems to me that something like that would remove the difficulty caused by that expression of doubt.

DEAN MORGAN: That is what ought to be done, I think.

MR. LEMANN: Would you then change (d), or would you have some repetition in (d)?

MR. DODGE: Leave (d) as it is. That is the extent to which the amount is not in controversy. We are speaking now where the only controversy is as to the amount of damages, distinct from the question of liability.

PROFESSOR CHERRY: I don't know. You are leaving in

what is now in (c), Mr. Dodge?

MR. DODGE: No. I am striking out "except as to the amount of damages".

DEAN MORGAN: Then adding a sentence.

MR. DODGE: Adding a sentence at the end that you may have judgment for the plaintiff if the question of damages, which is not part of the question of liability, is the only question as to which there is a dispute.

MR. LEMANN: Let me ask you this. As I understand it, judgment shall be entered if there is no genuine issue as to any material fact. Then we are going to take damages out. Then (d) comes along and says you can enter that judgment if some of the facts are not doubtful. You can enter an order if some of the facts are not doubtful, but others are. That is not a judgment.

MR. DODGE: That is an order specifying the facts that appear without substantial controversy, and then directing appropriate proceedings to finish the case.

MR. LEMANN: But now the first two lines of (d) say: "If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked". That is a final judgment.

THE ACTING CHAIRMAN: You mean under (d), the partial one is final judgment?

MR. LEMANN: Yes.

THE ACTING CHAIRMAN: I should think that our 54(b) excellently took care of that and said it was not final.

MR. DODGE: Don't you think we can deal with it the way I suggested?

THE ACTING CHAIRMAN: I think that is fine. I don't see why that isn't all right.

JUDGE DOBIE: Well, I make that motion.

THE ACTING CHAIRMAN: Any discussion?

SENATOR LOFTIN: Second.

JUDGE DOBIE: What Mr. Dodge suggested there--

MR. DODGE (Interposing): Leaving to the Reporter to put in the proper words.

THE ACTING CHAIRMAN: --was to strike out "except as to the amount of damages in (c) and to make a separate sentence along the line that he gave.

JUDGE DOBIE: Showing that where there is no question as to liability and the only question is as to the amount of damages, then a summary judgment can be granted.

THE ACTING CHAIRMAN: Yes. Then (d) stands as it is. All right, are you ready for the question? All those in favor will say "aye"; those opposed. It is so voted. (Carried) That is all on 56.

On 58 there are two matters of some importance. The first one, I think, is the change of the language in 6 and 7, and you will see that I have suggested a change in it on page

53. I hope that that can be made. I understand Mr. Morgan agrees. I think there were some others. I rather think Major Tolman did.

MR. HAMMOND: Yes, he did.

THE ACTING CHAIRMAN: I will explain the reason for it. First, I think it is a shorter, more direct statement, anyway, and it might stand just simply as a matter of language. But the main reason that I had in mind was that some clerks, not all, seem to be very reluctant to enter judgment, and they hold the matter off and require what is almost a specific, absolute direction from the judgment. I mean more than a finding. A judge may say, "Judgment is therefore to be entered for the plaintiff," and the clerk won't take that but will wait until the judge writes something out. "I direct that judgment be entered so-and-so," which is really quite unnecessary, and I think a good many of the clerks do not require that. For example, the clerk in the District Court of Connecticut, who is an old hand and handles it very well, won't require that, but some other clerks will. That means that you are going back to the judge in very simple cases, where it isn't necessary.

The reason we added the words here where we changed "there be no recovery" to "all relief prayed for be denied" was that we wanted to hit cases such as bankruptcy discharge, where the direction was that the discharge be denied, and some clerks had felt that that wasn't covered by the explicit

language of the rule. So there was voted at the last meeting the provision that "all relief prayed for be denied". That is a step along the line, and the intent is quite all right, but I fear that language is still too technical, and the very case that I gave you where the judge in his memorandum says, "Judgment therefore should be entered denying the discharge," isn't quite in our language.

Therefore, I want to make a simpler and more direct statement, not using words that seem technical, like "praying for relief," and so on. Simply say: "When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction;"

DEAN MORGAN: Strike out the "prayed for"?

THE ACTING CHAIRMAN: Strike out the "prayed for" and "the entry of a judgment", and so on.

DEAN MORGAN: Yes. "that all relief be denied".

MR. DODGE: That would be applicable to an injunction or a specific performance where the relief was denied.

DEAN MORGAN: Yes, all relief denied.

MR. HAMMOND: Why strike out the words "the entry of a judgment"?

THE ACTING CHAIRMAN: It is the same idea. In the first place, why in the world are they necessary? This rule is on the entry of judgment, and there is no gain in putting them

in. Directly, you take them out anyhow. The additional affirmative reason is that if you are going to have a clerk who requires a definite statement, he can say that you have to have a statement, "I direct that judgment be entered for so-and-so," and unfortunately there is a tradition in New York in the state courts that the judges wait until they get a formal order, and then they mark on it "entered," and sign their initials. What all this results in is that you are not having any entry of judgment until you have had a formal drawing up of a judgment by counsel.

I think I told you before of a case where I sat in the district court and directed judgment to be entered forthwith for so many dollars damages, and I found sixty days later that the judgment hadn't been entered at all. I found it out simply by the fact that they then submitted a judgment to me to be endorsed as approved, when it was for a simple entry of money and costs.

Here again I can't say that the rule will settle all this. The rule may not. If a clerk won't enter judgment, I don't know anything in the world that can make him. I don't think even a mandamus would. Nevertheless, I think you can make it as simple and direct and as free of ambiguity as possible.

DEAN MORGAN: How does yours read now?

THE ACTING CHAIRMAN: "When the court directs that a party recover only money or costs or that all relief be denied".

DEAN MORGAN: That is what I wanted to know. You strike out the entry of the judgment. I agree.

THE ACTING CHAIRMAN: Is there any objection to that? Shall I take it that that is accepted?

There is one other point to be raised. The other point is the point at the end, which we have considered, and I bring it up only because Mr. Mitchell seems to be somewhat doubtful. I am a little surprised on the whole, because I am quite sure that earlier he was not. Our lines 12 and 13 read: "The entry of the judgment shall not be delayed for the taxing of costs." I think we have discussed this many times.

DEAN MORGAN: Have we the minutes of the last meeting? I thought Mr. Mitchell was for that. I thought he said that you ought not to delay the entry of judgment for the taxing of costs.

THE ACTING CHAIRMAN: I know he was for it in May, and quite strongly for it.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: I am not sure. I will be perfectly frank that I thought in October he was weakening, but I don't know whether that is very important, because it is quite clear that now he has weakened.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: In his memorandum he says: "In New York, the state law requires that, to be recorded in a

county clerk's office so as to be a lien on real estate, a judgment must be complete, with no unfilled blanks as to amount. Accordingly, the Federal District Court for the Southern District has a practice and local rule that entry of judgment be not made until the amount of the judgment is completed by inserting costs," and so on.

"I do not see any objection to that practice. After all, the man who gets the judgment is the one to bring about taxation of costs. Instead of the underlined sentence in lines 12 and 13, why not substitute the following:

"'The entry of judgment may be postponed by the clerk until costs are taxed or waived.'"

All I can say is what I have said earlier, that I hope that isn't done. I think that is quite unfortunate. I don't think the objection made by the clerk in New York is one that necessarily need hold up all the judgments. It is perfectly easy to provide for an endorsement of the costs at the foot of the judgment or to provide, if you wish, for supplemental order as to costs, or, in the particular case involved, the filing of the judgment in the New York local records can be delayed until it is filled in. After all, in the district court that issue is only a small part of the total number of judgments. I can't tell, of course, without having counted noses. I should have liked to have done it. If I had thought, I might have had it done. But it is perfectly obvious that

of the hundreds of judgments entered in the Federal court, only a very small proportion are going to be filed in the local land records. I mean they are judgments involving bankruptcy and admiralty and patents and unfair competition, and so on. Once in a while, if you have a judgment of copyright infringement, it is conceivable that the defendant author might have some land, and you would want to file the judgment there, but that is a very unusual case. It isn't very likely.

What I am saying is that you are making the entry of judgments in all cases delayed for what, even at best, is only a very small proportion of the cases. It hasn't been necessary before. In the cases that we put in in the footnote to 52, it is well settled in the decisions that the judgment is not to be held up for the entry of costs, and it seems to me that this local practice which has developed in Southern and Eastern Districts of New York is just a violation of the rule, and is unnecessary. It doesn't seem to me that all over the country, not merely the one place where this has come up (that is, the Southern District of New York and the Eastern District), you should delay the entry of simple judgments really just to satisfy a local worry that I don't think is very well founded.

JUDGE DOBIE: Is there any objection to that sentence?

MR. LEMANN: Mr. Mitchell makes some.

JUDGE DOBIE: Only Mr. Mitchell?

MR. LEMANN: Judge Clark, I notice you say, on page

52, the last paragraph, line 5, "although the federal rule is of long standing and well settled." What Federal rule do you refer to there? Obviously not our rule.

DEAN MORGAN: The entry of judgment immediately, without waiting for taxation of costs.

MR. LEMANN: Where is that rule?

JUDGE DOBIE: Practice.

THE ACTING CHAIRMAN: "Rule" is perhaps wrong. It is the Federal law, the Federal decisions. We went into those decisions very thoroughly, and those decisions are very clear and explicit. I think maybe in the note we ought to change "rule".

MR. LEMANN: Those are cited from a long time back: 1856, 1897. That is prehistoric.

PROFESSOR SUNDERLAND: How is that done, as a matter of mechanics where you have to pay the costs? How do you grant the judgment?

DEAN MORGAN: Charlie, you have just shown how doubtful the rule is.

THE ACTING CHAIRMAN: I have shown what?

DEAN MORGAN: How doubtful it is at the present time. It has been established for so long, it is time to upset it.

THE ACTING CHAIRMAN: Oh, I see.

MR. LEMANN: No; because a rule handed down last week is no better than a decision handed down fifty years ago.

THE ACTING CHAIRMAN: I think there are various things that can be done, but let's take the simplest thing. The judgment is entered, and it is a final order, but suppose that it isn't taken in the land records then. Suppose there is a difference between the time of the entry of the judgment, say five days, and the time that it becomes properly filable in the land records. That then means that for five days it isn't noted in the land records, but that is all it means.

MR. LEMANN: I asked Mr. Dodge what his practice is. Our practice is that you get judgment for so many dollars and costs, and that is all the judgment ever says. It never undertakes to fix the amount of costs. You come along afterwards by supplemental proceeding and tax your costs, and you get another judgment fixing your costs.

PROFESSOR SUNDERLAND: But your judgment is final where it merely says "and costs." That is final.

MR. LEMANN: That is final, and that is all we ever had. Mr. Dodge says that in Massachusetts, as I understand him, that is also their practice in actions at law, but in suits in equity they have to fix the costs before they get final decree. Is that right?

MR. DODGE: That is right. The distinction is simply that the present practice in equity in Massachusetts requires that in the final decree, if you want costs and get them, costs taxed in the amount of so many dollars must be in

the decree. It is perfectly simple to change that and have the decree call for costs to be taxed.

MR. LEMANN: If we decide to eliminate this, isn't there a provision in the Federal law that the states must provide for the recordation of Federal judgments?

THE ACTING CHAIRMAN: I think it is the other way around.

MR. LEMANN: Income tax liens, I know.

THE ACTING CHAIRMAN: I think it is this way: that the Federal judgment is a lien, except that the state law may require that it be recorded to be a good lien. That is, it is a kind of negative thing. If the state law is quiet--

MR. LEMANN (Interposing): Mr. Mitchell says you must fix the costs in New York law. He says, "In New York, the state law requires that, to be recorded in a county clerk's office so as to be a lien on real estate, a judgment must be complete, with no unfilled blanks as to amount."

I was just wondering whether we could cover his New York situation and perhaps similar situations by an express provision that a judgment could merely say, "Costs to be taxed," and it would be final in that form.

PROFESSOR CHERRY: It wouldn't be any good. New York law would prohibit it.

MR. LEMANN: I would ask, could New York law prohibit such a judgment validly made and recorded?

THE ACTING CHAIRMAN: I don't know. I don't know this specific law. I know the clerks view that it must be filled out, and there may be a specific statute. I always thought it was probably a construction of the New York law. I don't know enough about it, but I doubt that it is a statute. I think it is probably a decision of the New York County Clerk, who says, "Why, look. There is something that isn't in here," and he probably refuses it. You can't mandamus him and expect to get anywhere.

MR. LEMANN: Probably it is a New York decision.

THE ACTING CHAIRMAN: Passing that, I don't know, although I should think it would not be irrational to say that if the New York recording system is reasonable enough so that it fits in with the Federal law, then the Federal law must comply with the state system. You see, the idea of the Federal system is that the Federal judgment must be a lien , and if it is not taken care of by state law, it is a lien from the date of judgment, and in those states the title search has to go to the Federal court and search the Federal district court clerk's office. But if the state law has a recording system, then the Federal lien must follow the reasonable recording system of the state law, and I guess that this probably would be all right then.

As to your next point, which is whether we shouldn't provide for taking care of it, as a matter of fact, I don't see

why these cases don't really do it. Some of these cases leaving the thing blank; some of them just say, "or costs", and there are holdings that the judgment is entered at once and is final. I don't know of any that particularly talk about what happens in the state law. It is true they talk about Federal law. Nevertheless, there are cases where the costs were not actually taxed. I wonder if they don't cover it adequately.

MR. LEMANN: I shouldn't think we would want to adopt Mr. Mitchell's substitute, which would be a clear invitation to postpone entry of judgment.

DEAN MORGAN: Neither should I. I think that would be terrible.

MR. LEMANN: The only point, really, I should think, is whether we shall insert it notwithstanding his misgivings as to whether we should leave it alone.

THE ACTING CHAIRMAN: I should think the only thing that you would put in (and I wonder if it is very necessary) would be something like this: "The entry of the judgment shall not be delayed for the taxing of costs, but they may be added either to the foot of the judgment or by a separate order." I think that is the idea, but is that very necessary? Also take the other alternative, which I should think, if I were a lawyer, was the simplest thing to do. I would file my judgment in the record in the district court clerk's office. Then, under the Federal law, it would be final, and so on. I would tell the

clerk, "You have to accept it because that is the law." But then, if I didn't have the costs taxed, I would go around two days later and say, "Here are the costs. Now give me a certified copy for the land record." What harm has been done?

The only harm is that for two days I haven't been able to file it in the land record, and I haven't got that much notice to innocent purchasers; but, of course, under Mr. Mitchell's rule or under the state law, I wouldn't have it anyway. I mean, I am no worse off, am I? I am in a sense a little better of on questions of finality and execution through the marshal, and so on. I have it immediately, and I get notice as soon as I have a right to have notice under the state law.

MR. LEMANN: Of course, your illustration is unrealistic because the fellow who would do it in two days wouldn't give you any trouble. It is the fellow who waits two months and longer to tax his costs who makes the trouble. Why did you say you wanted to add that last sentence, "The entry of the judgment shall not be delayed for the taxing of costs"? Has it been some trouble to Clark, J., in his general field of observation of cases, or has anybody kicked about it? because I shouldn't think practically it was very important to add it. People who do business the way we do or the way they do in Massachusetts law go ahead and enter the judgment right away, as you want it done, and it is only in a few places that

I should think this point would ever arise.

THE ACTING CHAIRMAN: I have had a good deal to do with the places where it does arise. The Southern District and the Eastern District now have adopted their own rules, in which they provide that the judgment shall not be entered in the Federal office until the costs have been taxed. I think that is a violation of our rule and that it is also a violation of the decisions. There is one of these cases, The Washington, that is cited on page 53, where our Court said in 1926 that failure of the clerk thus to enter judgment is a "misprision" "not to be excused", and I think that maybe these district court clerks who follow their own district court rules conceivably may be subject to an action of damages.

MR. LEMANN: Do your district court rules sanction misprision?

THE ACTING CHAIRMAN: You say "your." Of course, they are not mine.

MR. LEMANN: Do the rules of the district courts in your circuit sanction and actually direct the commission of misprisions?

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: That is it.

MR. LEMANN: Isn't the remedy to go to your district judges and ask them how they can do such a thing?

MR. DODGE: What is misprision?

MR. LEMANN: If they persist after having their attention called to it, I doubt if they would change it because of our rule. "Misprision" sounds much worse to me than a rule of the Advisory Committee.

THE ACTING CHAIRMAN: Of course, you have to take these things as they exist. That can all be so, but you can't now get a judgment entered in New York as our Rule 58 provides. I mean in those two districts in New York. So far as I know, you can in the other two districts in New York. You can't get a judgment, because the clerk won't do it. You can try and mandamus him, if you will, but you don't get it. That is just the situation.

JUDGE DOBIE: I think we ought to put it in, anyhow, whatever they do in New York.

MR. LEMANN: The Chairman will have his blood run a little extra cold, but I am willing.

THE ACTING CHAIRMAN: It seems to me that, fairly considered, there is now a very definite ambiguity. Of course, we can sit here and say, as I do say and am perfectly willing to say, that those two district court rules are quite illegal, but certainly the lawyers aren't going to say that. The lawyers are intimidated by those rules.

DEAN MORGAN: Let me ask you this: What is the practical importance of this? Is it that the plaintiff delays the game or that he can prevent the defendant from getting up

to a certain term of court on appeal, or what is the practical disadvantage of the New York rule, if they want to do it that way?

THE ACTING CHAIRMAN: Maybe it doesn't make any difference, of course; maybe it does, but the practical effect of the New York rule is that the clerk never enters the judgment. I never have been able to get him to enter a judgment. As I said, I write down in black and white, "The clerk is directed forthwith to enter a judgment," and two or three months later they come up and ask, "Why hasn't the clerk entered the judgment?" In fact, in one case where I sat in the district court, a three-judge court, the parties wanted to appeal (it was this City of Yonkers case) and they wanted to go immediately to the Supreme Court to get a stay for abandoning the trolley line up to Yonkers. We wrote our decision and directed that the clerk should enter judgment immediately. Then I told the lawyers to go down to the Supreme Court and ask them for a stay. They came back and said, "The clerk says it will be several days before the judgment is entered." I said, "Well, what does 'forthwith' mean?" They said, "The clerk says he can't enter it until he gets the copies that the lawyers have drawn up, that have been approved by the court."

So I went down and said, "Here, now, this is the judgment." I wrote it out myself.

Maybe that is all right, I don't know. Maybe our

rule doesn't mean anything which says that the clerk in certain cases shall enter the judgment. Actually, in New York they don't do it, and I don't know how you are going to make them if you give them various ways out of it. It seems to me that this is a desirable thing to have, or else what in the world does our rule mean in those big districts, which says that the clerk shall enter judgment forthwith? I just dare you to get a judgment forthwith in New York. You just don't get it.

MR. DODGE: Those delays are not all on account of costs.

THE ACTING CHAIRMAN: No. Of course that is true. I mean that is only one thing. The other was the entry of judgment. That is a matter we tried to correct, also. But the clerk has just established his practice, which he justifies in large measure by the district court rule and by this costs rule.

DEAN MORGAN: To bring the matter to a head, I move the adoption of the rule as it is suggested here.

JUDGE DOBIE: I second the motion.

THE ACTING CHAIRMAN: All those in favor will say "aye"; those opposed. It is so voted. (Carried)

... The meeting adjourned at 6:20 p.m. ...

P R O C E E D I N G S

ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

VOLUME V

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WEDNESDAY MORNING SESSION

April 5, 1944

The meeting reconvened at 9:38 a.m., Judge Charles E. Clark, Acting Chairman, presiding.

THE ACTING CHAIRMAN: We are up to Rule 59, and I should think the main feature of any question about 59 (that is the new trial section) has been covered by our discussion of 6(b) and our conclusion that we would have three different versions to recommend on the general principle of further time. I shouldn't think, therefore, there was anything more that was worth discussing on 59. Has anyone any suggestions about it?

JUDGE DOBIE: You have cut out that thing in brackets, have you?

THE ACTING CHAIRMAN: That will really go with one of the alternatives, you see, Armistead. That will go with what was the first version put up for Rule 6(b). The second version put up for Rule 6(b) would make no change. I should think the final version which we developed, which was to leave 6(b) as it is, would probably suggest no change here.

JUDGE DOBIE: All right.

MR. HAMMOND: In connection with that, how are you going to put that up? Are you going to have three separate drafts or are you just going to have a statement in regard to it?

THE ACTING CHAIRMAN: I would suppose that in general we would have three separate drafts or at least enough

statement.

JUDGE DOBIE: We usually go on record as recommending one of them, don't we?

THE ACTING CHAIRMAN: I am not sure that in this particular case we did recommend one. In certain other cases (for example, in Rule 12) there was a Committee choice and a minority choice, but here there was, as I remember, no express preference of the Committee.

MR. HAMMOND: I was just wondering about it. I was a little worried about this alternative rule business, putting those up, too. I don't know, but I did hear that the Criminal Rules Committee had some trouble in that regard, putting up alternative rules. On this time thing, of course, you could say that some members of the Committee favored retaining the rule as is, and other members favored including in there certain other rules, with an explanation of why. My point is that I think we ought to be a little careful about how we do that, and not put up any more alternative actual drafts of rules than we have to.

THE ACTING CHAIRMAN: All I can say on that is that it seems to me we have been very limited in our differences, that there are several cases where I am quite sure members of the Committee have restrained themselves. I know that, if I were making an actual vote, there are several of the things that we have passed that I would not vote for, but I don't

expect to say anything about it. For my part, I think that we are limiting our statements to relatively important points. I may have come from a different training. I feel that expression of views is helpful. It happens to be a tradition of my court. For example, Judge Learned Hand always says that he thinks that is a helpful thing. Whenever you have real views, express them.

MR. HAMMOND: I didn't mean that to cut out the views on the thing, but it is just a question of whether you should have complete drafts. This is a different situation from most of them, I think.

DEAN MORGAN: This one (at any rate, for 59(c)), Charles, I think needs only a note here that if the changes were made in 6(b), there would have to be corresponding changes here, or something of that sort.

THE ACTING CHAIRMAN: Yes. I wanted to finish out what was my thought. I wasn't suggesting any particular form as the one to follow. When I said that I thought it better to have the full draft, it was on the point of understanding. All I could say as to the way it should be put out is that I think it should be any way that makes it clear, whatever way makes it clear to the reader so that he understands what we are talking about.

DEAN MORGAN: Our matter on 12(b), I think, has to be spelled out, but on this particular thing, where it is only a

question of whether there shall be an extension of time in particular cases, I think we can do that by a text statement perfectly simply.

THE ACTING CHAIRMAN: That is quite all right on that. As I say, anything that can be understood. That is all you need.

Then, of course, there is another question about which I haven't been clear, and that is how far it was desirable to make supporting statements. On that, what I did for this version was, as you see, to make them very brief, almost barren. I did that because I thought that was the better way to present it to you. Mr. Mitchell, in his comment, referring particularly to Rule 12, says that there should be explanation.

DEAN MORGAN: I think that is quite clear.

THE ACTING CHAIRMAN: I rather think there should be. I don't know quite how that should be developed, because I didn't believe I should write all the explanations, for example. I thought that when I got back, unless the Committee has some suggestions, I would get hold of Mitchell and go over it and see how it should be done. I think we should ask somebody from what might be termed the prevailing view to write a statement. If there is no one else, I will write a statement for the views that I am supporting.

MR. HAMMOND: I have had several people speak to me about the notes, hoping that the notes would be full and would

explain what the changes are. I think perhaps that may be what has happened with Mr. Mitchell, and that is why he spoke about the notes being fuller, too.

THE ACTING CHAIRMAN: That is another thing. I don't see why we shouldn't take it up now because I was going to ask you about it later. I did ask you to think over the notes as we went along. Mr. Moore and Mr. Oglebay and I have been working on them. These are what we had thought were adequate and in line with the previous notes that we supplied originally and somewhat fuller, as they should be. These are somewhat fuller. I suppose that is just because you don't recognize your own brain child. I was a little surprised when Mr. Mitchell made the comment, but that is all right. If they are inadequate or if something more should be done, we had better know of it now. I would like to get your reaction. How about the notes?

MR. LEMANN: I thought those I read were quite clear as indicating the reasons for the changes. Until I heard Mr. Mitchell's comment, it hadn't occurred to me that they weren't adequate. As I read the suggestions, I got the reasons from the notes quite clearly. How about you, Eddie?

DEAN MORGAN: I did, too, but I thought it might be that you might explain the impact of some of the decisions a little more fully, Charlie. That is the only thing that I thought Mr. Mitchell probably had in mind, some of the decisions

that caused us to make the changes.

THE ACTING CHAIRMAN: Of course, there are three things to which Mr. Mitchell might have referred. He might have had all of them somewhat in mind. The first thing is this question of explanations of different views, and that I had left purely tentatively for discussion, and I knew that wasn't extensive. Another is the question of whether there were certain notes for the Supreme Court. I think maybe he had the impression, just as Mr. Hammond was suggesting here, that some notes were directed to the Supreme Court, and I repeat that what I had in mind was that there would be no differentiation. I didn't see any particular reason for it. As I suggested the other day here, I think perhaps the Supreme Court has less need of any notes than the bar generally, so I was making no differentiation. Then the third is the suggestion you made just now, and perhaps it is the determination of all three. Of course, we will go over them and consider expanding the cases wherever necessary, but that would be the reaction of the Committee, would it, outside of a little expansion of that kind?

PROFESSOR SUNDERLAND: I think that is all that is necessary. I think in some of the cases you don't get enough from the note of what you feel when you go and look them up. I think there ought to be enough in the note so that you at least get an idea of what the case will be if you do look it up.

THE ACTING CHAIRMAN: I take it the view would be, then, that we don't necessarily need to stick very closely to our former form. I mean the form of the already printed notes.

PROFESSOR SUNDERLAND: No.

THE ACTING CHAIRMAN: Of course, there we didn't go into cases very much.

PROFESSOR SUNDERLAND: No. I think a little more expansion on the individual cases that are controlling would be an improvement, but otherwise it seems to me the notes are perfectly adequate.

THE ACTING CHAIRMAN: Again, I will talk with Mr. Mitchell on this, too, but I think we can go ahead on that basis as to setting up opposing points of view or anything of that kind, any suggestions you want to make. All that I have in mind is to make it clear.

It reminds me somewhat of my colleague, Professor Underhill Moore, who has some ideas about studying law on actions. At the football games at Yale, Mr. Moore gets up and stamps the seat and says, "It looks like a grand fight, if I could only get in on it, but I don't know what is going on."

DEAN MORGAN: He isn't the only one.

THE ACTING CHAIRMAN: So, if we just mention the ideas euphoniously, we can let them in on what is going on, so they can jump in and have some fun, too. If you want to make

any further concrete suggestions, of course that is all right, but I think Dean Morgan is quite correct that in this particular case it will be clear without setting it out in detail.

Is there any further suggestion? If not, shall we pass to 60? As to 60 in general, of course, all our suggestion about Hill v. Hawes is now by the Board. It is unnecessary to consider it. So the material in this second note, beginning at 56 and going on to 59, I think we can just forget. Coming back, I don't know whether there is anything more you wish to consider or not. In (a) there is an addition which was voted that mistakes could be corrected after the appeal is filed, before the record on appeal is docketed. That simply clarifies a point.

JUDGE DOBIE: You mean corrected in the district court, of course.

THE ACTING CHAIRMAN: Yes. These are district court rules. At least, that has always been our story. You will notice that at the end we substituted the word "docketed" for the word "filed", to conform with the terminology used in Rule 73(a).

PROFESSOR SUNDERLAND: But in 73(g) you don't stick to that same terminology. I notice in (g): "The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the action there docketed". The thing doesn't work out quite yet.

THE ACTING CHAIRMAN: What do you say about that?

MR. HAMMOND: Mr. Mitchell has a suggestion. He says on this: "Strike out the words 'record on' in line 6. My understanding is that it is the appeal which is docketed."

JUDGE DOBIE: I think that is improved terminology. You file a record and docket an appeal.

PROFESSOR SUNDERLAND: I think that is right.

THE ACTING CHAIRMAN: That is all right, isn't it?

PROFESSOR MOORE: I think so.

THE ACTING CHAIRMAN: All right, I think that is all right.

JUDGE DOBIE: I think that is a good thing to strike out "record on" before "appeal is docketed".

THE ACTING CHAIRMAN: Line 6, Rule 60(a), strike out the words "record on", so as to make it the appeal.

PROFESSOR SUNDERLAND: Then, to correspond with that in 73(a), you should make the same change.

THE ACTING CHAIRMAN: You had better hold that, will you, and we will take that when we get there.

PROFESSOR SUNDERLAND: All right.

THE ACTING CHAIRMAN: As to 60(b), Mr. Morgan has suggested a change, but I think that more or less covered Hill v. Hawes.

DEAN MORGAN: That is it. You were assuming you were going to change it to go in Hill v. Hawes.

THE ACTING CHAIRMAN: Is there anything left of your suggestion now? I am not quite sure.

DEAN MORGAN: I don't think so. You were going to say "where substantial justice requires," if we were going to throw it wide open to him, and I don't suppose we want to throw it any wider open than it is now.

THE ACTING CHAIRMAN: I take it that is the general view. Then this in its redrafted form was considered a good deal, and I take it this is what we agreed on. I don't think there is any question about it.

MR. HAMMOND: I was just wondering about the insertion of the words "fraud, misrepresentation or other misconduct of an adverse party." I was looking over the past drafts. We had that in there at one time, and then we struck it out.

DEAN MORGAN: Did we strike it out or did it just drop out?

MR. HAMMOND: I can give you the whole history of the thing, if you want me to, but apparently fraud itself remained in there up until the final report, and it was in the final report that we struck it out.

DEAN MORGAN: Is there any evidence of why they struck it out. I think that was inadvertence or excusable neglect on the part of someone.

MR. LEMANN: Inexcusable.

MR. HAMMOND: There must have been some reason,

between the report of April 1937 and the final report, that the word "fraud" was eliminated.

MR. LEMANN: It was in the first draft that went out?

PROFESSOR MOORE: I think I remember that. Mr. Olney was quite anxious that the California statute be taken, and the California statute, I would say inadvertently, does not mention fraud, but the decisions have read it in.

DEAN MORGAN: That is the answer, then, is it?

MR. LEMANN: The transcript of the debate would show, wouldn't it?

MR. HAMMOND: Unfortunately, we had no transcript.

JUDGE DOBIE: If you do it for misrepresentation, you certainly ought to do it for fraud, oughtn't you?

MR. LEMANN: Not like this?

MR. HAMMOND: No, the meeting at Chicago, the first meeting, was reported in full. Then the next two meetings were reported in full. Afterwards, we had no full report of the meetings. I always thought it was unfortunate that we didn't, and I have found that it has been since, but I think Mr. Mitchell thought it was unnecessary and unduly expensive.

MR. LEMANN: Haven't we had them in the last sessions?

MR. HAMMOND: We have had them ever since then; I mean since we started taking up the amendments to the rules.

MR. LEMANN: We had a reporter here, I thought, at every session I attended.

DEAN MORGAN: But it wasn't written up.

MR. HAMMOND: We had a reporter, but he took down only the conclusions after the first three meetings of the Advisory Committee.

MR. LEMANN: I see.

THE ACTING CHAIRMAN: I think Mr. Moore is correct. I know that we had some discussion, and I know there was then considerable doubt each way. That would be my recollection, too, that Judge Olney thought we shouldn't put it in because it wasn't in the original. It seems to me it is quite desirable.

DEAN MORGAN: Absolutely.

MR. HAMMOND: I am wondering about it.

JUDGE DOBIE: I move it be kept in.

MR. HAMMOND: This thought also occurs to me: It might have been knocked out because you would have the same thing under a motion for a new trial on the ground of newly discovered evidence, wouldn't you?

DEAN MORGAN: Oh, no, not necessarily on account of fraud.

THE ACTING CHAIRMAN: They are sort of correlatives.

MR. HAMMOND: In other words, I didn't want to have too many remedies to get at the same thing.

DEAN MORGAN: Knock out fraud and leave in misrepresentation?

MR. HAMMOND: Misrepresentation wasn't in there, either.

DEAN MORGAN: Was there misconduct? There was none of this (2).

MR. HAMMOND: None of this was in there, and it just followed the California statutes, you see.

MR. LEMANN: Has this paragraph been availed of much, Mr. Moore?

PROFESSOR MOORE: Oh, there are quite a few cases. They do relieve the party from a judgment because of fraud.

MR. LEMANN: I should think the lesser would include the greater. This was a novel provision when we put it in, you know. It was taken from California, and most of us, I think, had not heard of it. That is why I asked whether it proved as serviceable as Judge Olney thought it would be. But it didn't originate with the Reporter, as I recall it. It originated entirely with Judge Olney.

THE ACTING CHAIRMAN: That is true. It came from him. I will say this: This may be more a feeling I have than actual fact, but it seems to me it really has been a great thing. Mr. Moore and I have discussed it. Mr. Moore has had a little question, I think, chiefly on the ground that he thought it has been indefinite, limited, and so on, and didn't quite fit the bill. I agree with him on that, but in actual remedy it seems to me a fine thing.

MR. LEMANN: His criticism is that it is indefinite and what? I didn't catch the word.

THE ACTING CHAIRMAN: And not complete. I don't know whether that is what I said or not, but that is what I have in mind, that it isn't complete. I think it is a fine thing. It is not merely on the positive side. It is also on what might be termed the negative side. You can say to a person, that is, " Well, proceed under 60(b)." Here is the kind of case that came up and worried the district judge in New York a great deal, although I don't see why he couldn't easily have proceeded under 60(b). It was a case where another district judge had granted a motion to dismiss, without saying anything about permission to amend. Whether it was inadvertence or not, the second judge didn't know. That was the first judge's order, just an order of dismissal, with no permission to amend. The second judge asked, "What shall I do? There must be some power somewhere." That was Judge Rifkind. He wrote quite a piece on it. He finally ended by almost main strength saying, "He must amend it, and therefore the whole judgment can be reopened."

I saw him afterwards and asked, "Why didn't you use 60(b)? It seems to me that 60(b) is just the thing for that." He was quite surprised and said, "I never thought of it."

It is that kind of thing. It seems to me to give a nice little play in the joints, so to speak.

MR. LEMANN: The word "his" that you are now going to take out, might have interfered with the use of it in the case which you refer to. It wasn't the party's mistake or inadvertence. It was the first judge's ruling. You have covered that now by taking out "his", but as the rule then stood I don't know whether your judge could have used 60(b).

THE ACTING CHAIRMAN: Of course, that is true, and this came up with Hill v. Hawes in the appellate court. They said it couldn't be used there because it was the clerk's mistake.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: As a matter of fact, I think I myself might have used it because it always seemed to me that when the judge makes the mistake--it might not be so true in the case of a clerk, but in my case that I am speaking of in New York, why didn't the judge enter the original order? There would be only two reasons. One, and most likely, is that the moving party had made the mistake of not asking for it. The other might be that he considered the point and decided against it, but since there was no showing of that, it was probably the first one.

MR. LEMANN: You don't think that even with this change, 60(b) would permit a judge to take care of a situation like Hill v. Hawes?

THE ACTING CHAIRMAN: No. I suggested that as an

alternative, and that is out now.

MR. LEMANN: I mean without any change in this rule.

DEAN MORGAN: No.

MR. LEMANN: You said it came up in Hill v. Hawes. Do you think it could have been used in Hill v. Hawes?

DEAN MORGAN: No. We are talking about amending this.

MR. LEMANN: I thought you said he had discussed it in connection with Hill v. Hawes when the case was pending.

THE ACTING CHAIRMAN: We discussed it here at the Committee meeting. I think Judge Donworth brought it up two or three times.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: And, of course, the courts have discussed it. Roberts discussed it. They all decided that "through his mistake" couldn't refer to the mistake of the clerk.

MR. LEMANN: Therefore (that is why I am asking), we are taking "his" out now.

THE ACTING CHAIRMAN: Yes.

MR. LEMANN: Even with "his" out, would it cover a case like Hill v. Hawes without any further change?

THE ACTING CHAIRMAN: I wonder if it wouldn't. I don't know that I am sure about it, but why not?

MR. LEMANN: Now we have put in specifically that the

failure of the clerk to give notice shall not affect the finality of the judgment.

THE ACTING CHAIRMAN: I guess it wouldn't.

DEAN MORGAN: It wouldn't now.

THE ACTING CHAIRMAN: I guess you are right.

MR. LEMANN: I just wondered. Maybe it would. It was rather startling to me. I didn't think that was the kind of thing that this rule in California was ever intended to cover.

DEAN MORGAN: No.

THE ACTING CHAIRMAN: Well, I withdraw what I said in view of the statement that nothing the clerk does shall have any effect--

DEAN MORGAN (Interposing): --on the finality of the judgment, but you might make the argument (I was interested to hear you suggest it), notwithstanding your concession of a moment ago, that notwithstanding what we are now doing on the subject of notice, this rule might be said to give you a chance to relieve the party from the fact that he hadn't taken his appeal within the proper time.

THE ACTING CHAIRMAN: Aren't you rather concentrating on taking out the word "his"? You wouldn't want to go further than that.

MR. LEMANN: I am not saying I object to it. I am just thinking aloud, as I do with many of my questions,

without indicating my own conclusions, just to raise a point for the benefit of discussion.

PROFESSOR MOORE: I don't believe, even with the word "his" out, that the Hill v. Hawes situation is covered at all, because the judgment is not taken against the party who, you said, was inadvertent, and so on. The judgment is properly taken. It is the failure to give notice.

MR. LEMANN: I would say that is so, and that would show that you never could have applied it.

THE ACTING CHAIRMAN: I guess that is so.

Is there further discussion? Armistead, you moved its approval, I think.

JUDGE DOBIE: Yes.

THE ACTING CHAIRMAN: Any further discussion? If not, all those in favor will say "aye"; those opposed. (Carried)

MR. HAMMOND: There is one little change of Mr. Tolman's here. There is a word he wants to de-such here in line 13.

DEAN MORGAN: Oh, Yes.

MR. HAMMOND: Page 55, line 13.

THE ACTING CHAIRMAN: To make it "the".

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: In line 13, change "such" to "the".

Then we go over to Rule 62. That is one of those notes,

but I take it we have settled that. We pass 62.

DEAN MORGAN: How about 60(b)? That is all right, is it?

THE ACTING CHAIRMAN: Rule 60(b) is what I thought we were discussing. We passed (a) without a formal vote. Nobody raised a question.

DEAN MORGAN: All right.

THE ACTING CHAIRMAN: Is there any reason for not assuming 60 is approved? Rule 60(b) was approved specifically, so I think we have covered it.

DEAN MORGAN: I am sorry. I was looking at page 57.

JUDGE DOBIE: The only thing you did to 60(a) was to strike out "record on".

THE ACTING CHAIRMAN: That is it. We pass, then, 62 and 64.

Rule 65 was for suit on the bond. As we say in the note, there is no reason that Rule 65(c) and Rule 73(f) should operate differently. We have always had a provision on action on the bond given as part of the process of appeal in 73(f). Any question? If not, we will consider that approved and pass on to Rule 66.

Rule 66, you will recall, was to cover the question of capacity, and to make it a little clearer how far the rules apply to the question of receivers. We haven't any reference here, have we, to Federal rules, the point we discussed earlier?

DEAN MORGAN: I think not.

THE ACTING CHAIRMAN: Is there any question anyone wants to raise about 66?

MR. HAMMOND: Rule 17(b), Capacity to Sue, has the same wording.

THE ACTING CHAIRMAN: Where is that?

DEAN MORGAN: In 17(b), Capacity to Sue.

MR. HAMMOND: I wonder if it is amended in the same sense here.

DEAN MORGAN: I suppose so.

MR. LEMANN: What you say about a suit against a receiver not being commenced without leave of the court appointing him has been the law for sixty years, which I think is right. I don't really see much sense in a rule saying you can't sue a receiver without leave of the court. I don't know why you shouldn't be permitted to sue the receiver under modern conditions, but that is the existing law, and probably we should not make a change in it. We are sort of emphasizing it and incorporating it here. We didn't incorporate it before. We were willing to leave it to the decisions. I was wondering as I read it whether it was suggesting approval of what seems to me an anachronistic rule.

THE ACTING CHAIRMAN: I should think so. There may not be much reason for it.

DEAN MORGAN: I always thought an officer of the

the court was sued in the capacity of an officer of the court, and it would be contempt of court.

MR. LEMANN: That is foolish.

DEAN MORGAN: That is pretty silly now.

MR. LEMANN: We are sort of giving it a nod here. I am just wondering if somebody would say that we thought well of it. Before, we just left it alone. It may be the idea is that our putting in the sentence in lines 2 and 3 make it important to add 4. I guess Senator Loftin would be all for this, wouldn't you, Senator? You don't want to sue a receiver without permission of the court.

SENATOR LOFTIN: I am not a receiver now. I am a trustee now. I am not affected by this at all.

THE ACTING CHAIRMAN: Anything more on 66? The main thing you have in mind, Mr. Hammond, is whether the first sentence should come later.

MR. HAMMOND: You can do it that way and put all that has to do with an action by or against the receiver up together, or you could put the practice part first and the action part last. I rather thought the provisions dealing with the action were the things that these rules really dealt with and that those should all be put up first.

THE ACTING CHAIRMAN: Will you take that under advisement?

MR. HAMMOND: It is just a suggestion.

MR. LEMANN: Reading again your notes on page 64, it seems that you have a Federal statute now that gives pretty broad leave to sue a receiver.

PROFESSOR CHERRY: Yes.

MR. LEMANN: I just wonder how much it is true. You call attention to it, but I wonder if you aren't sort of stating an exceptional case instead of the general rule by the language you put in the rule. Some people read the rule and don't read the notes. "actions against a receiver may not be commenced without leave of the court appointing him except when authorized by a statute of the United States." When you read the note, you see you have a statute of the United States which I imagine would authorize a suit in almost every case, wouldn't it?

SENATOR LOFTIN: I think that applies generally to receivers for railroads.

MR. LEMANN: This statute?

SENATOR LOFTIN: Yes. I mean in practice.

MR. LEMANN: Yes. That is because in railroads you have ancillary receiverships more, I think, than in most other cases, don't you think so? Don't you think there are more ancillary receiverships for railroads?

SENATOR LOFTIN: More than generally.

THE ACTING CHAIRMAN: I think that actually we also apply it to a trustee in a reorganization. I think we actually

have applied it in our court.

MR. LEMANN: You mean this statute or this rule?

THE ACTING CHAIRMAN: Yes, the statute.

MR. LEMANN: I wonder what are the cases now in which a suit against a receiver is not authorized by a statute of the United States, because we have a statute quoted on page 64.

PROFESSOR MOORE: Suits in relation to property.

SENATOR LOFTIN: Any suit that does not involve the operation of the property.

THE ACTING CHAIRMAN: Any claim that is already existing.

MR. LEMANN: That antedates the receivership, perhaps; claims that antedate the receivership.

SENATOR LOFTIN: Or any other claim that does not involve the operation of the property.

THE ACTING CHAIRMAN: Adjustment of the interests of all kinds in the estate; that is, pre-receivership claims, and so forth. This is a broad statute, and it is being used right along. I don't know quite what you could say except that it is broad and yet it doesn't cover everything.

MR. LEMANN: That is right.

THE ACTING CHAIRMAN: Of course, if you thought it desirable, you could put the statute up in the rule. I think we do that some. I think we don't like to do it too much, unless it is very important.

MR. LEMANN: No. The only alternative would have been to eliminate lines 4 and 5, but I don't think so. They weren't in there originally. They seem to emphasize what may be now rather the exception to the situation.

THE ACTING CHAIRMAN: Unless there is some motion, we will pass on and take Rule 66 as approved.

Rule 68.

JUDGE DOBIE: Moore, is that used often? There are not many cases on that, are they?

PROFESSOR MOORE: Rule 66?

JUDGE DOBIE: Rule 68, Offer of Judgment.

PROFESSOR MOORE: No. It may have been used a good deal, but there aren't many cases.

JUDGE DOBIE: Yes. Ordinarily, of course, it is pretty simple in its operation.

PROFESSOR MOORE: Yes.

THE ACTING CHAIRMAN: Mr. Morgan has raised a question and made a suggestion, and I take it that, while he put it in the form of a query, what he really had in mind was something like this (he can see if I state it correctly): It would be adding in line 9 after the word "admissible": "as evidence of the fact or extent of the offeror's liability."

DEAN MORGAN: That is all right, yes. I think that is what you mean, isn't it?

THE ACTING CHAIRMAN: Isn't that what you meant, Mr.

Moore?

DEAN MORGAN: I am quite sure that is what Bill meant.

MR. LEMANN: You have even a broader statement now, though.

DEAN MORGAN: I say, he has it "shall not be admissible." Of course it has to be admissible for the fact of the offer, whether that is relevant.

MR. LEMANN: It wouldn't be relevant under this rule.

DEAN MORGAN: Not in this action, but it might be relevant in another action. You very frequently have the question of whether you were acting in good faith when you made the offer.

THE ACTING CHAIRMAN: Eddie, doesn't that now leave the "except" clause a little hanging?

DEAN MORGAN: What? "Except" where?

THE ACTING CHAIRMAN: "except in a proceeding to determine costs." It leaves that a little hanging, doesn't it?

PROFESSOR SUNDERLAND: You would cut it out, wouldn't you?

DEAN MORGAN: You don't need to have that "except" clause at all, if you put it my way: "admissible to the fact or extent of liability." Isn't that it?

JUDGE DOBIE: I think that is clearer.

THE ACTING CHAIRMAN: Let me read the sentence, then, as I take it you would suggest it. "An offer not accepted

shall be deemed withdrawn and evidence thereof shall not be admissible as evidence of the fact or extent of the offeror's liability." Period.

DEAN MORGAN: That is it. That is, "shall not be admissible as tending to prove", you see; "shall not be admissible to prove the act or extent of the offeror's liability."

MR. LEMANN: Is that a rule of evidence?

DEAN MORGAN: It is an admission otherwise, except as an offer of compromise.

MR. LEMANN: It is not a rule of substantive law.

DEAN MORGAN: No, no. It is a rule of evidence.

MR. LEMANN: It is not a part of evidential rules that might be considered to affect substantive rights.

DEAN MORGAN: I don't think so.

MR. LEMANN: It means that in any other proceeding you couldn't offer it.

DEAN MORGAN: This is saying you couldn't offer it in this proceeding or any other to show that he was liable or the extent of his liability.

MR. LEMANN: If you said, "shall not be admissible in any proceeding", would that cover what you have in mind?

DEAN MORGAN: No, certainly not, because it would be admissible for any other purpose, where it is relevant for any other purpose.

MR. LEMANN: You mean to make it admissible? I am

not sure that I follow.

DEAN MORGAN: I mean to make it inadmissible when it is offered to prove the extent or the fact of liability of the offeror.

MR. LEMANN: What other purpose could it be offered for?

DEAN MORGAN: To show that he was acting in good faith, in another lawsuit. In another lawsuit the question sometimes comes up, "What did he do in the previous lawsuit?" not for the purpose of showing the inference of liability from it but the fact that he made the offer, the fact that there were these negotiations, and so forth.

MR. LEMANN: I don't quite get it.

DEAN MORGAN: Of course you don't visualize another case where that question arises, but it sometimes does.

MR. LEMANN: Give me a case where it could possibly arise. You say you agree that the offer shall not be admissible as proof of liability.

DEAN MORGAN: Of the fact or extent of liability.

MR. LEMANN: Give me a case which would go in your statement of "for some other purpose."

DEAN MORGAN: If you had another lawsuit where the question was what negotiations did you have in this particular lawsuit, what had happened in this particular lawsuit.

MR. LEMANN: Ought you not to be permitted to go into

that?

DEAN MORGAN: Surely, to show what happened. Why do you ever put in statements that are not admissible as hearsay but are admissible for another purpose? It is just as applicable to an admission as it is to any other kind of statement. You can't foresee the cases in which it will arise. In this particular case you put it in for the purpose of showing costs, and he has just saved that particular exception, and nothing else.

THE ACTING CHAIRMAN: There has never been anything on this in the rules, has there?

DEAN MORGAN: The books are full of cases. You can't foresee things. You are making a general rule to the effect that it shall not be admissible in any case except for this particular thing, and that just won't do.

JUDGE LOBIE: You don't have to recite all those. You just say that the fellow makes this offer.

DEAN MORGAN: Suppose he wanted to put it in himself to show that he made the offer, are you going to stop him from doing it?

MR. LEMANN: I would be willing to, yes, sir.

DEAN MORGAN: Why? Not if it were relevant, you wouldn't. This is to protect the offeror. That is what this is for.

MR. LEMANN: Yes. I wouldn't be much disturbed by

the idea that I was cutting something out from the offeror. I think in the long run, if I wanted to encourage offers, I would do better to leave it inadmissible except for costs. Of course, the reason you have it in this is because--

DEAN MORGAN (Interposing): Because it does affect costs.

MR. LEMANN: --it puts the burden on the fellow who makes the offer.

DEAN MORGAN: That is because it is highly relevant in this case under your rule of substantive law. Of course, on the whole question of whether it is relevant or not, you might not even have to put it in if you used Wigmore's theory, because it wouldn't be relevant on anything but costs, and you wouldn't need this rule that it should not be admissible. It is kept out anyhow as an offer of compromise.

MR. LEMANN: I would have thought so.

DEAN MORGAN: Yes, but why do you keep on an offer of compromise? The only time you keep that out is when it is offered as an admission of liability by conduct against the offeror.

MR. LEMANN: And when does it go in?

DEAN MORGAN: It might go in if you are trying to show that this fellow acted in good faith.

MR. LEMANN: I never heard of an offer going in for that purpose, but I guess I don't know. As far as I am

concerned, I am unconvinced, but it is not important enough to question it if you think it is important, and you know much more about it than I do.

DEAN MORGAN: My point is that I don't want any rule which says a thing is absolutely inadmissible, because if you say that, you put yourself in a position where you can imagine every case that might happen where it would be relevant.

JUDGE DOBIE: That is my idea exactly. I think it is hard for us to conjure up every picture that might arise, but there is one definite thing we want to accomplish here by this thing. I believe in saying it, and I believe you have said it. I therefore move that it be amended in accordance with Mr. Morgan's idea.

PROFESSOR SUNDERLAND: Supported.

THE ACTING CHAIRMAN: You have heard the motion. I think we had better state the language again, so I will state it and you see if this covers it: "shall not be admissible to prove the fact or extent of the offeror's liability."

DEAN MORGAN: "as tending to prove".

THE ACTING CHAIRMAN: All right; "as tending to prove the fact or extent of the offeror's liability". Is that all right?

DEAN MORGAN: That is right, yes.

THE ACTING CHAIRMAN: Shall we discuss it more? If not, all those in favor will say "aye"; those opposed. It is

so voted. (Carried) I take it that means approval of the entire amendment.

DEAN MORGAN: Oh, yes.

PROFESSOR SUNDERLAND: I would like to suggest a little change in the underlined sentence. I think we have two parts to that sentence that don't belong together, and it ought to be separated in the middle of line 11. The first part is: "The fact that an offer is made but not accepted does not preclude a subsequent offer". That refers only to subsequent offers. The rest of the sentence refers to all offers. "no costs shall be recoverable by the offeree which were incurred after the making of an offer equal to or greater than the judgment finally obtained by the offeree". That is a statement applying to all offers, so I don't think it ought to be connected up in a single sentence with the obverse.

PROFESSOR CHERRY: In that connection, why not drop to the last the first part which you want in a separate sentence, because that is an independent idea?

PROFESSOR SUNDERLAND: Yes, it is an independent idea. You can make that the last sentence.

PROFESSOR CHERRY: I would.

PROFESSOR SUNDERLAND: That would be still better.

PROFESSOR CHERRY: You say he can make a second offer.

PROFESSOR SUNDERLAND: Yes. I think that is an improvement.

THE ACTING CHAIRMAN: What is that? To reverse the order of the clauses?

PROFESSOR SUNDERLAND: Yes, to cut that sentence in two, with the second part in line 11 beginning "No costs shall be recoverable". Then after that sentence incorporate as the final sentence lines 10 and 11.

JUDGE DOBIE: "The fact that an offer" down through "offer".

PROFESSOR SUNDERLAND: "The fact that an offer is made but not accepted does not preclude a subsequent offer." That would be the last sentence in the paragraph.

JUDGE DOBIE: I think that is clear enough. I move its adoption.

THE ACTING CHAIRMAN: Is that all right?

PROFESSOR MOORE: Yes.

THE ACTING CHAIRMAN: Make two sentences of the material from lines 10 to 14, and then reverse the order.

JUDGE DOBIE: And cut out the "but". One sentence will start "No costs shall be recoverable" and end with "such offer." Then the last sentence will be "The fact that an offer is made but not accepted does not preclude a subsequent offer." I think that is an improvement. I don't think it is vital, but I think it is helpful.

THE ACTING CHAIRMAN: You have heard the motion. All those in favor say "aye"; those opposed. So voted. (Carried)

I guess that covers 68.

Rule 69 is another Soldiers' and Sailors' note.

Rule 73.

PROFESSOR SUNDERLAND: That carries over a correction we made in the previous rule, in line 9.

JUDGE DOBIE: Cut out "record on".

PROFESSOR SUNDERLAND: Cut out "record on" in line 9.

THE ACTING CHAIRMAN: Yes. Is there objection? I think that would correspond.

JUDGE DOBIE: Yes.

DEAN MORGAN: Where is this, now?

JUDGE DOBIE: Cut out "record on", the third and fourth words in line 9; "before the appeal has been docketed". That is to correspond with what we did a little further back, to use the terms to file a record and docket an appeal.

PROFESSOR SUNDERLAND: I wonder if we shouldn't say in line 13 "appeal" instead of "action". We say in 12, "The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court". That is all right. "and the action there docketed". Why don't we say, "the appeal there docketed"? We are talking about docketing an appeal.

THE ACTING CHAIRMAN: I rather think so. Isn't that correct?

JUDGE DOBIE: I think that is good.

THE ACTING CHAIRMAN: Very well; in line 13, change

the word "action" to read "appeal".

Is there anything else?

JUDGE DOBIE: Drop down to line 20, "docketing the action". That ought to be changed, too.

THE ACTING CHAIRMAN: Yes; line 20.

JUDGE DOBIE: "action" there becomes "appeal". I think that takes care of all of them.

THE ACTING CHAIRMAN: I think maybe you had better look through the rest of the rule, hadn't you?

PROFESSOR MOORE: I take it we have authority, if we catch it some place else, to change it.

JUDGE DOBIE: Certainly.

THE ACTING CHAIRMAN: All right. Any further question on 73?

MR. HAMMOND: Mr. Mitchell had a suggestion to insert in 73(a).

THE ACTING CHAIRMAN: I haven't it before me.

MR. HAMMOND: I have it here. It is the same thing that he suggested be inserted in another rule.

THE ACTING CHAIRMAN: Oh, that was to take care of the Hill v. Hawes matter, wasn't it?

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: We decided not to do that, as I understood it. We thought that 77(b) was adequate. Wasn't that the idea?

DEAN MORGAN: That is what I thought.

THE ACTING CHAIRMAN: I don't know. Of course, it is open for consideration, but I don't think we need to gild or repaint the lily further, do we?

MR. HAMMOND: I think we did leave it out.

DEAN MORGAN: He says, "This seems a silly business".

MR. HAMMOND: Yes.

DEAN MORGAN: I don't think we ought to do that after we have fixed it up in the other so that you couldn't possibly misunderstand it.

JUDGE DOBIE: I think we have taken care of that.

THE ACTING CHAIRMAN: Then, we will pass on to 75. Rule 75(a) was put in this form particularly because Mr. Mitchell brought up the point of the Black Tom case, I think it is, that he was in, and you will notice that we suggested an alternative at the end. We thought this would put too little responsibility on the appellant, and Mr. Mitchell now writes: "The Reporter's substitute for 75(a) seems to be a good one." That is what Dean Morgan wrote, too, and I wonder, therefore, if you wouldn't like to look at that. That appears on page 74. The difference is that in the earlier draft on page 70 it is stated in effect that either one, either the appellant or the appellee, may start making up the record, whereas the one on 74 still leaves the responsibility on the appellant unless the appellee has already taken the ball and run with it.

Is there any question about it now? I think that since Mr. Mitchell was initially interested and since he now has approved of this alternative, it would be a good idea to take it.

DEAN MORGAN: I move the substitution of the Reporter's alternative on page 74 of the draft.

JUDGE DOBIE: I second that.

THE ACTING CHAIRMAN: Any discussion? If not, all those in favor will say "aye"; those opposed. It is so voted. (Carried)

PROFESSOR SUNDERLAND: I just want to suggest (I suppose we have discussed it already) that the way the thing is drawn here, we are going to confuse the procedure. On page 73 in the note to subdivision (a), it is stated, "Similar procedure has been in operation in at least one circuit by rule." That is the District of Columbia. Isn't this the procedure that is in force in the District of Columbia, as a matter of fact: In the District of Columbia, in case the appellant doesn't file his record within the time limit (in other words, if the appellant is in default), then the appellee can step forward and file the record. But in the District of Columbia practice there is no provision for designation; nobody designates anything. They just use the whole record. I don't see how it is going to be possible for an appellee to designate the parts of the record that the appellant is going to rely upon.

DEAN MORGAN: Why not?

PROFESSOR SUNDERLAND: Under the rule as we have drawn it here.

MR. LEMANN: He designates the parts he relies on, and then the appellant can come in with a counter-designation.

DEAN MORGAN: Surely.

MR. LEMANN: I think it would work in the reverse just as well as it now works directly. The fact is that the appellant now designates what he relies on, and then the appellee can come in and supplement it. When you get an appeal, of course both parties are interested in the appeal. The appellee says, "I think, from our standpoint, all that we need is such-and-such." The appellant can then supplement that.

PROFESSOR SUNDERLAND: But the appellee hasn't any standpoint, has he?

MR. LEMANN: Certainly; of wanting the judgment affirmed.

PROFESSOR SUNDERLAND: But what points are going to be raised on appeal?

MR. LEMANN: He knows the points because the points have been argued in the lower court. The way it comes up, the appellee says, "All we need for this record is this-and-this. We don't need certain other things because it won't be necessary to refer to them." There may be a lot of voluminous exhibits that have been offered which, after they have gotten

into the case, it will be more or less generally agreed are not of special importance. I think it would work all right, Mr. Sunderland.

DEAN MORGAN: Yes; and if he is really in a position where he wants speed, he can designate the whole works and shoot the whole business up.

MR. LEMANN: I have done that just recently in several cases where I was the appellant and wanted speed. I designated the whole record. I didn't want to get into any controversy about what is in the record, and I designated the whole record. If you will examine the cases, I think in the majority of them they designate the whole record.

JUDGE DOBIE: Not with us. If you did that with us, we would say, "We are very sorry, Mr. Lemann. You did that to accomplish speed, but the cost of it will be assessed against you."

MR. LEMANN: That is right, we take the risk when we want speed.

JUDGE DOBIE: The court would be reasonable, Monte. Of course, if you convinced us that it accomplished speed, that would be all right.

MR. LEMANN: We would just take that risk, Armistead.

JUDGE DOBIE: If you convinced us of your good faith, that would be all right.

MR. LEMANN: Yes. As a matter of fact, you see, there

isn't much expense incurred in designating the record. The expense with us is when we get to printing. If you don't have any printing, I can't see that designating unnecessary portions of the record would make any expense, because you simply take them up, and the district clerk hands them to the clerk of the court of appeals. That part wouldn't involve any expense, Armistead. I don't think you could penalize on that. When you get to printing, that is a different story.

JUDGE DOBIE: Yes.

MR. LEMANN: Then we tell the court everything is up in the court of appeals, where the judges can go and look at it if they want to. Then, in this very series of cases, if we say to leave out certain voluminous things because they are here now, the appellee can't complain that they are not here for the court to look at, and you don't need to print them. That is what costs the money.

THE ACTING CHAIRMAN: Just in passing, I don't know how important it is, but my staff tell me that this is the court of appeals rule, and it is the new rule that Mr. Mitchell read here.

MR. LEMANN: The District of Columbia rule?

THE ACTING CHAIRMAN: Yes.

PROFESSOR SUNDERLAND: I have the rule here. It reads:

"If the appellant shall fail to file a transcript within the time limited therefor, the appellee shall be allowed

to file a copy or transcript of the record with the clerk of this court, and the cause shall stand for trial in the like manner as if the transcript had been filed by the appellant in due time; or the appellee may, after the time limited for filing the transcript in this court by the appellant has expired, and upon his or her default in respect thereto, upon producing a certificate showing the entry of the appeal and the date thereof, have said appeal docketed and dismissed."

MR. LEMANN: Is that what we are talking about? I have been familiar for a long time with the idea of the appellee docketing and dismissing the appeal.

JUDGE DOBIE: We do that all the time.

MR. LEMANN: Because the appellant takes the appeal and then he fails to perfect it.

JUDGE DOBIE: That is right.

MR. LEMANN: In order to get rid of the case, the appellee then goes through a routine docketing.

DEAN MORGAN: That is right.

MR. LEMANN: It is just a skeleton docketing, as I would call it. He doesn't file any papers at all. He just formally dockets the appeal and immediately moves to dismiss it. But this, I understand, is a different thing. It doesn't contemplate the dismissal.

JUDGE DOBIE: It is where the appellee wants the case heard and wants the judgment affirmed on the merits.

MR. LEMANN: He doesn't abandon the appeal, but what the appellee is worried about is that the appellant is going to delay the appeal. So, in order to expedite the appeal and the hearing of the appeal, the appellee wants to go ahead and perfect the record so that the case can then be fixed for argument. It becomes fairly important these days, when the courts are so congested that, if you don't get your case up fairly promptly, it may go over for a year because the court can't get to it. I understood that is what this is for.

JUDGE DOBIE: Not with us.

MR. LEMANN: I don't think that rule, which I had some difficulty in following closely as you read it, would be the sort of thing that we are talking about. I should think the court might have another rule on this subject. The rule you just read I would imagine exists in other circuits. We have a rule, I know, to docket and dismiss the appeal where you don't think it is going to be prosecuted.

JUDGE DOBIE: That is a motion, Monte, and ordinarily, as we say, the docketing is a "Christian Science" docketing. You don't do anything. The man is in default, and you just appear before the court and say, "I move to docket and dismiss."

MR. LEMANN: That is right.

PROFESSOR CHERRY: That is covered in one rule here.

MR. LEMANN: This one rule that Sunderland read deals with both? I thought the rule he read said where, because of

delays, the time for the appellant to act has expired. If that is the only rule the District of Columbia has, I don't think it would be this rule. As you read it, it applies only when the appellant hasn't acted within the time permitted. You would have to wait until his time had expired, and I understand that is what we are trying to get away from.

PROFESSOR MOORE: It is my impression that that rule has been amended, but we will send up and check on it right now.

THE ACTING CHAIRMAN: I shouldn't think that that in itself was very important. We can either leave it out or--

MR. LEMANN (Interposing): Change your note. We had better change the note.

THE ACTING CHAIRMAN: Leave it in the note or not, as you wish.

PROFESSOR SUNDERLAND: As a matter of fact, I don't think we should make a change in this thing with Mr. Mitchell not here, anyhow, because this was his particular proposal, but I am concerned about the complication of this in view of our provision for designation of parts. If it weren't for the designation of parts, if we just provided for the whole record, there would be no complication.

MR. LEMANN: I don't see that that makes any trouble, Mr. Sunderland, because, granting your idea that the appellee will make an improper designation because he hasn't anything that he wants to put in, I think you are mistaken. He wants

to get everything in that will lead to an affirmance of that judgment, just as the appellant, you might argue, wants to get everything in that will lead to a reversal of it. But as a practice, both sides as a rule try to be perfectly fair, because you don't gain anything anyhow if you didn't put it on a more ethical basis. You wouldn't accomplish anything. I always feel that we wouldn't want to be in an unfair position. I recently went over to designate portions of a record for printing, and my colleague wanted to leave some parts out. I said, "If we leave them out, the other fellows will immediately point them out and say, 'They didn't want the court to see that.'" So we leaned over backwards, and that is what usually happens.

PROFESSOR SUNDERLAND: In other words, you designate the whole record.

DEAN MORGAN: Not altogether, but everything that has any connection.

MR. LEMANN: We do that or we are certainly careful to put in everything that we think anybody could say the court ought to have. But let's assume you had a lawyer who didn't take that point of view, and he is for the appellee. He wouldn't get anywhere, because the appellant would come right in afterwards and designate whatever the appellee had left out.

PROFESSOR SUNDERLAND: There is no doubt of that.

PROFESSOR CHERRY: Suppose the designation part of it

is taken care of, hasn't Mr. Sunderland a point in the statement in line 9 that they proceed, that the appellee then proceeds?

MR. LEMANN: This is page 74?

PROFESSOR CHERRY: Page 70.

MR. LEMANN: We have a substitute for it on page 74.

PROFESSOR CHERRY: The same thing, then.

MR. LEMANN: Line 8, is it?

PROFESSOR CHERRY: I am raising the point about subdivision (d), Charlie.

THE ACTING CHAIRMAN: I suppose these things are always open, but I think it is proper for me to call attention to the fact that I tried to stage a little drive on this because I thought it was complicated and unnecessary, and I bit the dust so rapidly. I don't know where Mr. Sunderland was then, but Mr. Mitchell was very clear about it. I was worried about it.

PROFESSOR CHERRY: I am wondering what is the position of the appellee under this alternate in line 9. What is he to do under subdivision (d)?

MR. LEMANN: That is page 71, now?

DEAN MORGAN: He should do just what the appellant would have done.

PROFESSOR MOORE: If he designates the whole record, he wouldn't need to assign errors, would he?

PROFESSOR CHERRY: We have come down to (d) now, not

(b). That isn't the whole record, page 71, because it says he is to proceed under subdivisions (b) and (d), and (d) is designating the record and a statement of the points on which he intends to rely on appeal.

MR. LEMANN: It says on page 74 "as if the appellee were the appellant."

PROFESSOR CHERRY: All right. He isn't the appellant. What does he rely on?

THE ACTING CHAIRMAN: He relies on the points that he wants to make in the record.

MR. LEMANN: To support the judgment.

THE ACTING CHAIRMAN: I don't see why it can't be done. I don't see anything to prevent its being done. What he really is doing is saying, in effect, what parts of the record he wants.

DEAN MORGAN: That is right.

MR. LEMANN: And he designates certain parts and says, "These are the points I think the case turns on." The other fellow can come in then and say, "Well, you have made a very incomplete designation, and I designate certain others." That is exactly what happens now between the appellant and the appellee. The appellant designates his parts, and the appellee has to state his points. That is why we so often designate all the record, so that we don't have the trouble of designating points and the fear that we will overlook something.

THE ACTING CHAIRMAN: Of course, this is going to operate somewhat as a threat, and it may be a good thing. The appellant is going to be faced with the fact that if he doesn't get under way rapidly, the appellee may take the ball away from him.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: That may be all right, anyway.

MR. LEMANN: It really doesn't take the ball away from him, because he can come back and protect himself. It is only a mechanical device to fix up your record, isn't it, so what can you lose? But it will give the appellee a chance to expedite the appeal if the appellant doesn't want to expedite it. I should think it was an unusual case, myself, although from these discussions around the table about delays I sometimes get the impression that I must know only lawyers who are not anxious for delays, that that must be a very small segment of the bar, and that most of them do want delays. The impression I get here is that the lawyers that most of the other members of the Committee know are fellows who always want delays.

THE ACTING CHAIRMAN: I must say that I more or less subscribe to that, although I don't know that I would want to put it as a desire for delay. I think sometimes they do it just by habit or because they really don't know how to get along, and time just passes on.

MR. LEMANN: Of course, the delay is often due to the fact that lawyers have too many things to do.

THE ACTING CHAIRMAN: Yes, I think that is true.

MR. LEMANN: They try to cover too much ground. Some of them go to meetings, and some of them have too many cases to try and too many clients; and they help each other, because each fellow doesn't know when he is going to be in that fix next time. Isn't that right, Scott?

JUDGE DOBIE: Monte, we had a fellow once who asked for a continuance because he had a case before a justice of the peace sitting that day.

MR. LEMANN: In your court?

JUDGE DOBIE: Yes; because he had a case down before a J.P. You should have seen Judge Parker's face!

MR. LEMANN: Did you turn him down for contempt?

JUDGE DOBIE: No, but Judge Parker's face was quite a study.

THE ACTING CHAIRMAN: Is there any motion?

JUDGE LOFTIN: I move we proceed to the next rule.

THE ACTING CHAIRMAN: It is moved that we proceed to approve 74.

JUDGE LOFTIN: We have already approved that rule.

THE ACTING CHAIRMAN: I see. I guess we did. You are right. Shall we pass to (b). In connection with (b), you will see that we have added a provision at the end. Question

came up as to the number of copies and as to whether we were not requiring too many copies. We decided that in general we were. That is what most of the court clerks reported, but there were some who thought it necessary, so we provided for some leeway. At the end, beginning in line 23, we have, "When the rules of the circuit court of appeals so require, the appellant shall furnish a second copy", and so on; and then at the very end, "and the district court may by local rule require the filing of copies of the transcript in addition to the copy provided for in this subdivision."

I make this suggestion: Under the Court Reporter's Bill approved January 20, when the transcript is ordered the reporter is under a duty to prepare a copy in addition to the transcript that was ordered by one of the parties. He must deliver this copy to the clerk of the district court for the records of the court, and no fee is to be charged therefor. Accordingly, we believe that the appellant (or, of course, the appellee where he takes the initiative) should never be required by the district court to file more than one copy. That is, it seems to us that the statute is both inclusive and exclusive, that it is intended to be, that it is on the whole rather a good rule, and that we ought not to monkey with it. Hence, we suggest that that last part referring to the district court, not to the circuit court, should be eliminated.

JUDGE DOBIE: In other words, he has to do it under

the Court Reporter's Bill, so why put it in?

THE ACTING CHAIRMAN: Yes. Of course, as we have it, there might be more required than the Court Reporter Bill provides.

JUDGE DOBIE: Yes.

THE ACTING CHAIRMAN: That is why I say that it seems to me the Court Reporter Bill is intended to be both inclusive and exclusive. It provides affirmatively for a certain thing, and for no more.

MR. HAMMOND: Under the Court Reporter Bill is there always a copy?

THE ACTING CHAIRMAN: No. It isn't required that the notes be always transcribed, as I understand it.

MR. HAMMOND: That is what I was thinking.

THE ACTING CHAIRMAN: But whenever it is transcribed, then the reporter is required to file one automatically.

MR. LEMANN: What changes are you now proposing to add?

DEAN MORGAN: Strike out the last part.

JUDGE DOBIE: Strike out from the semicolon in line 25; cut out the district court rule because the Court Reporter Bill requires him to do that already.

THE ACTING CHAIRMAN: You are stating it a little broadly, Armistead. The Court Reporter Bill doesn't quite require all that, but nevertheless the principle is the same.

JUDGE DOBIE: Yes.

THE ACTING CHAIRMAN: That we don't go beyond what the Court Reporter Bill requires. As I said, the Court Reporter Bill does not require a transcription necessarily, but if anybody orders any transcription, there is an extra copy made which goes in the clerk's office.

DEAN MORGAN: That is the only time you will have a transcript anyhow, when one is ordered.

THE ACTING CHAIRMAN: That is true.

JUDGE DOBIE: I move that that be cut out.

SENATOR LOFTIN: Second the motion.

THE ACTING CHAIRMAN: All those in favor will say "aye"; those opposed. It is so voted. (Carried)

I should think that was all that I know of on that subdivision. Is there anything else?

We have discussed (d) a good deal. Is there any question about (d)? Let's see (g). Mr. Moore, is that last line in (g) necessary, in view of what we have done?

DEAN MORGAN: Yes.

PROFESSOR MOORE: I guess it could do no harm.

THE ACTING CHAIRMAN: I guess that is true. That is, I think the intent of the Court Reporter Bill is to this effect. I suppose it does no harm to state the negative.

MR. LEMANN: How many copies does the Court Reporter Bill require to be furnished by the stenographer?

THE ACTING CHAIRMAN: Just one, so far as the court is concerned.

MR. LEMANN: Yes. If the court wants more, they must pay for it.

THE ACTING CHAIRMAN: Yes.

MR. LEMANN: He would get extra for that, would he? That isn't covered by his salary?

THE ACTING CHAIRMAN: He cannot charge for the copy that goes to the court.

MR. LEMANN: But he can charge for extra copies?

THE ACTING CHAIRMAN: Yes.

DEAN MORGAN: If you order a transcript, you still have to pay for it.

MR. LEMANN: If you order it, he makes the transcript.

THE ACTING CHAIRMAN: As I read the bill, I thought there might be some doubt whether the Reporter kept the amounts he collected, but I guess the intent of the bill is that he does. Isn't that it? It didn't seem to be entirely clear, but I think that is intended. He gets a basic salary.

JUDGE DOBIE: And he gets those fees.

MR. LEMANN: All he has to do for the salary is to furnish one transcript, and if you want--

THE ACTING CHAIRMAN (Interposing): No, he doesn't even have to do that of himself. He furnishes no transcript unless somebody orders a part of it. You see, he doesn't

transcribe his notes all along.

MR. LEMANN: Automatically.

THE ACTING CHAIRMAN: But if anyone says that he wants either the whole transcript or some portion of it, then he has to slip in an extra copy which he deposits with the clerk, without charge.

JUDGE DOBIE: That is included in his salary, but the fees that he gets from the litigants go to him.

MR. LEMANN: Suppose I say to the clerk, "I want this transcript written up. File it with the clerk. I don't care for any copies. Write up your notes."

DEAN MORGAN: You have to pay for it.

THE ACTING CHAIRMAN: Then you would have to pay for it.

MR. LEMANN: Where am I any better off than I am now, as a practicing lawyer or a client? I am no better off.

THE ACTING CHAIRMAN: I don't suppose you are. I don't take it that the idea of this was to help the parties out completely. The idea was to have a complete record, and this particular provision about the copy was one to help out the district judges. I know they like it. Judge Hincks, in Connecticut, has always required this anyway; that is, he had a standing order with the reporter that whenever anybody asked the reporter to transcribe his notes, he (the court) wanted a copy. This carries out that idea.

MR. LEMANN: The only thing this does is to make it compulsory that there be a stenographer there to make notes.

THE ACTING CHAIRMAN: That is it. That is the main idea.

DEAN MORGAN: Then, furthermore, if you order a transcript for yourself, you don't have to order another one for the court. You see, you don't have to pay for that.

MR. LEMANN: He would charge me as much, I guess, for mine.

JUDGE DOBIE: That is taken care of by the usual rates.

MR. LEMANN: In Louisiana, for some time they have had to write up their notes and file them with the court, and they get no extra pay for that. The only way they get extra pay is when I say I want an extra copy for my office. That helped us a good deal, and it helped them because they got a steady salary, which is what they wanted.

THE ACTING CHAIRMAN: That is it. Then let's pass on. There is (h), which we have already considered, and (m) is really the thing I wanted to speak about. Unless there is some question, let's go to (m).

PROFESSOR MOORE: There is (l).

THE ACTING CHAIRMAN: Oh, yes, there is (l). That is the printing one. This is not in any of the papers you have, but I add this about (l).

Section 3 of the Court Reporter Bill provides that: "Upon request of the appellant, the record on appeal, under rules 75 and 76 of the Federal Rules of Civil Procedure, shall be printed by a printer designated by the appellant." Before I come to the suggestion we think that requires in (1), I might say that I have been a little troubled by that Section 3. That came in, of course, with the best of motives. It was announced as breaking the monopoly of the circuit court clerks and, as far as that goes, I don't object to it, of course, but I have been a little afraid that somebody, perhaps Judge Sibley, might say that that means the appellant can always force printing against the court rule. I think that would be a harsh interpretation.

MR. LEMANN: Are you reading now from the stenographer's bill?

THE ACTING CHAIRMAN: From the Court Reporter Bill. This is the provision.

MR. LEMANN: Will you read it again?

THE ACTING CHAIRMAN: I will read it again. It came up in conference. That is, this was not in the original bill. I suppose this is Judge Parker's bill, but this isn't Judge Parker's idea. It was Senator Langer of North Dakota who was going to break the monopoly. He trotted out this suggestion, and everybody took it before we could do anything about it. The intent is good enough, but I think it ought to have made

clear that it was only where the court rules required printing.

I will read it again.

PROFESSOR MOORE: They have this in mimeographed form.

THE ACTING CHAIRMAN: Mr. Moore says you have this before you.

MR. LEMANN: It is so hard to find, I think it would be easier if you read it, if you don't mind.

THE ACTING CHAIRMAN: I will read it. "Section 3. Upon request of the appellant, the record on appeal, under rules 75 and 76 of the Federal Rules of Civil Procedure, shall be printed by a printer designated by the appellant."

At any rate, that is the law of the land now, whatever it may mean. Armistead, have you any thought that somebody could come down in your district now and say, "We want to print," and you can't stop us"?

JUDGE DOBIE: No, I don't think we have gone into that at all.

MR. LEMANN: That is only a part of it. That is only Section 3. We haven't got the whole bill.

MR. HAMMOND: I have a copy of the bill.

PROFESSOR MOORE: That is the part referring to printing.

THE ACTING CHAIRMAN: Passing all this question, it is the law of the land, whatever it may mean. Turning to what I have on (1), does that mean that the words in the second line,

"and the manner of the printing and the supervision thereof", should come out?

MR. LEMANN: You mean leave in what part should be printed, so as to keep the control of the court to say that there shall be no printing, and take out the manner of the printing and the supervision thereof? I don't know, Charlie. I think the "manner of the printing" might mean the type, the margins, the weight of the paper, and proofreading, for example, and all of that, I think, might still be covered by the rules of the court, so long as they let the fellow choose his own printer. I should think, offhand, that you shouldn't take it out.

THE ACTING CHAIRMAN: I am not really sure, myself.

PROFESSOR MOORE: Isn't that really covered in the "but" clause that stays in?

THE ACTING CHAIRMAN: I don't know. There it is.

MR. LEMANN: What do you mean by "supervision"?

PROFESSOR MOORE: The clerk of the appellate court supervises the printing.

MR. LEMANN: Could he still do it, under this new Court Reporter Bill?

PROFESSOR MOORE: I don't believe so. I think the appellant can take the transcript to any printer he wants. Of course, it has to measure up to the type, paper, and dimensions. But the clerk of the circuit court of appeals will no longer

have a monopoly on the printing.

MR. LEMANN: No, but he could still supervise the printing. For instance, in New Orleans the clerk now gives it all to one printer, X, and now under this rule I could take it to Y, but he would still supervise it and read the proof. I don't read the proof now.

PROFESSOR MOORE: Does he charge you for that?

MR. LEMANN: I think he does.

SENATOR LOFTIN: Our rules have been amended.

MR. LEMANN: Our rules have been amended so as now to permit them to be printed in the district court. You can have the record printed in the district court now under our rules, but I should imagine that when you print them in the district court you don't know whether the clerk of the court of appeals supervises it or not. Does he, Scott? I have never had it done. I am perfectly glad in my case to have him do all of it.

SENATOR LOFTIN: I don't know. The lawyers asked the court to change it because they thought the cost was too high.

MR. LEMANN: Yes.

THE ACTING CHAIRMAN: That is correct, Scott. The discussion was something about the terrible charges, and I think Senator Langer said it was something that you could get done for something less.

MR. LEMANN: What Scott is speaking of is that in the

Fifth Circuit about a year ago the lawyers got the court to provide that the lawyers could have the records printed in the district court instead of in the circuit court of appeals. In other words, instead of being printed after being docketed, they could be printed before being docketed. Is that right?

SENATOR LOFTIN: That is right. The lawyers can have any printer that they desire to print the record.

THE ACTING CHAIRMAN: That is, of course, actually what we do in the Second Circuit.

JUDGE DOBIE: What is the difficulty or danger, if the circuit court of appeals wants to make certain provisions for supervision, of keeping it in, Charlie? As I understand, all Langer wanted to do was to keep the clerk from prescribing the printer and having a monopoly.

PROFESSOR CHERRY: Supervision meant very considerable fees for the proofreaders.

THE ACTING CHAIRMAN: I must confess that I can't wholly agree with Mr. Moore that it should come out. There is a problem here.

MR. LEMANN: I think, before we change it, we ought perhaps to check with the clerks again, if you think it that important, to see how they are going to interpret this rule. They may say to you, "You are quite right, there will be nothing left for us to do when the party designates another printer," or they may say to you, "We are still going to do

something about supervising the record." I don't know.

JUDGE DOBIE: And charge for it.

MR. LEMANN: Yes. They can't do it unless the court of appeals permits it. It isn't up to the clerk. It will be up to the judges, Armistead, whether they permit printing.

PROFESSOR MOORE: Do you think the circuit court of appeals could now properly have a rule that would allow their clerk to supervise the printing and charge for it, in the light of the Court Reporter Bill?

MR. LEMANN: Supervise it and charge for it. I should think so, yes. All this says is that the record shall be printed by a printer. I don't think that says anything about supervising. It may be a straw man. It may be that they won't think of doing it. But if you ask me whether they can technically do it, I think they can.

JUDGE DOBIE: I don't believe the Court Reporter Bill goes beyond the fact that the reporter furnishes the transcript that is required, and he has nothing to do with how that shall be used, what shall be done in the printing, and all like that. That is entirely beyond him. He is functus officio when he reports it and gives you the transcript.

PROFESSOR MOORE: Yes, but Section 3 of the Act was certainly designed to cut down on the costs of printing. Now, if the clerk in the circuit court of appeals still supervises the printing, despite that fact the appellant can turn it

over to any printer he wants, and then the clerk charges for supervising.

MR. LEMANN: It still saves the cost of printing, Mr. Moore.

PROFESSOR MOORE: It will save some.

MR. LEMANN: All they intended to do, I think, was to protect you against the printer's bill, because the cost of supervising--I never checked up on it.

THE ACTING CHAIRMAN: I think that is quite a permissible interpretation. Of course, this section does refer to these rules. It says, "the record on appeal, under rules 75 and 76 of the Federal Rules of Civil Procedure, shall be printed", and so on.

MR. LEMANN: Yes. You see, the trouble was that a printer in New Orleans might charge $2 a page, for example, when a printer in Atlanta might charge $1 a page, or a printer in Valdosta, Georgia, might charge 75 cents a page. That is what I thought they were getting at; not the cost of supervision, which I don't think was terribly high. I really never checked on it. I just take the clerk's bills and pay them.

THE ACTING CHAIRMAN: Of course, attention should be called to this new statute. I am inclined to think that I wouldn't change it, really. I think we should call attention to it. Of course, in a way it is self-executing.

MR. LEMANN: That is right.

THE ACTING CHAIRMAN: If it has done things to the rule, it has. We don't need to rush in and do more than it may have done.

JUDGE DOBIE: I think you could leave that to the circuit courts of appeals, and I am satisfied that they will play ball with the Court Reporter Act.

MR. LEMANN: Yes. After all, it takes action by the court the way you have the rule now. They would have to assert the power to supervise and provide the costs in order for the rule to be operative.

THE ACTING CHAIRMAN: I suggest that we leave it, calling attention to it, of course, in a note.

Passing to (m), that is a new section upon which we spent a great deal of time. It was quite necessary and, I think, a good thing before the Court Reporter Bill was passed. The question now comes as to how important it is. We did suggest that it be left out, on the ground that it was now, on the whole, unimportant. Mr. Mitchell has this comment to make:

"On page 75 of his draft, the Reporter suggests that Rule 75(m) be deleted, because of the passage of the Court Reporter's Bill.

"I disagree. In the first place, 75(m) deals with a cheap way of settling the record on appeal in forma pauperis, and certainly the Court Reporter's Bill does not affect that. The other provision in 75(m) deals with a case where a hearing

or trial was not stenographically reported. May there not be instances where that happens, even if we have salaried official reporters?"

All I can say is that I think there may be, very occasionally.

MR. LEMANN: Does the bill as a whole specify there must be? How does it read, Mr. Hammond, in Section 1 and Section 2 of the Court Reporter Bill?

JUDGE DOBIE: The reporter may be sick, or something like that.

MR. HAMMOND: Here is the provision that has to deal with forma pauperis.

MR. LEMANN: In the bill itself there is a provision?

THE ACTING CHAIRMAN: Yes.

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: Before you get to that, Mr. Hammond, isn't it true that generally every district just is to appoint a reporter, and he is to be present at all proceedings? Isn't that the background, before you get to that?

MR. LEMANN: That is what I meant to ask.

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: You see, there is supposed always to be a reporter.

MR. HAMMOND: Very definitely.

"One of the reporters so appointed for each district

court shall attend at each session of the court and at every other proceeding that may be designated by rule of procedure or order of court or by one of the judges of the court, and shall record verbatim by shorthand or by mechanical means (1) all proceedings in criminal cases had in open court," and so forth, and"(2) all proceedings in all other cases had in open court unless the parties with the approval of the sitting judge shall specifically agree to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule of procedure or order of the court or as may be requested by any party to the proceeding. The reporter shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk of the court, who shall preserve them in the public records of the court for not less than ten years."

Then it goes on about having it transcribed. You don't want me to read that, do you?

MR. LEMANN: No. What does it say about in forma pauperis?

MR. HAMMOND: "Fees for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose; and the fees for transcripts furnished in other than criminal or habeas corpus proceedings to persons permitted to appeal in

forma pauperis shall also be paid by the United States if the trial judge or a circuit judge shall certify that the appeal is not frivolous but presents a substantial question."

MR. LEMANN: I should think it covered this, and I shouldn't think that there would be any other expense of any sort in settling the record to present the case, except this transcript.

JUDGE DOBIE: I believe sometimes cases will come up in some way in which there is no stenographic record made, and I am inclined to think that that is a wise provision and that it ought to be left in. If they don't come up, it won't do any harm. They will be very much fewer under the Court Reporter Bill.

MR. LEMANN: Somebody will ask you right away, "How can you have a case when no stenographic report is presented?" You would have to put in a note which would say, "We know there is this Court Reporter Bill; we know it makes provision, but we think the provision may not always be adequate, and we put this in."

JUDGE DOBIE: I think that is all right.

PROFESSOR MOORE: It would be a very rare case where you wouldn't have a stenographic report. Such a case might occur something like this: The official reporter becomes sick this evening, and the parties want to go ahead the next day. The bill has a provision that the judge can take care of

that, if he will utilize it. He can appoint another person temporarily as official stenographer, with the consent of the Director of the Administrative Office. So, if the district judge got on his toes and called Mr. Chandler, he could appoint a local stenographer, and they would proceed. But if they don't, and they proceed with a reporter of their own or without any, you don't have a stenographic transcript.

MR. LEMANN: You can't have anything that won't give some trouble sometime.

THE ACTING CHAIRMAN: There is a little difficulty, of course, just as you have stated. As it is now, it may appear to them that we are trying to supersede the Court Reporter Bill in part.

MR. LEMANN: Or imply that we don't think it is a very complete bill. It does seem to me you are bound to say you think it doesn't cover it. It might not cover it.

JUDGE DOBIE: You might state that such cases are rare but that they may come up, and it is deemed best to make provision about it. If they don't come up, certainly it won't do any harm.

MR. HAMMOND: I think probably Mr. Mitchell had some other idea, too, about the making up of the record in the forma pauperis cases.

MR. LEMANN: If the majority of us don't think it necessary, I don't think we ought to stop on it very long.

I should say the best thing to do would be to ask the Reporter to canvass again with Mr. Mitchell. If, after hearing the points raised here (after all, he isn't here for the debate), he still felt that it ought to be retained, go ahead and retain it.

MR. HAMMOND: I am not at all sure, too, in connection with that, that Mr. Mitchell had in mind when he wrote this statement to us that exact provision in the Court Reporter Bill.

MR. LEMANN: Why not ask the Reporter to discuss the matter over again with Mr. Mitchell and leave it to them after their discussion either to keep it or to drop it?

THE ACTING CHAIRMAN: Yes, I am quite ready to do that. I suppose, in the case of an appeal in forma pauperis where the record is fairly substantial, the transcript and all, and the judge has some hesitation, might not the judge say, "Now, here, you can raise everything you want without getting the transcript in detail, and therefore I want to do it some other way"?

DEAN MORGAN: Yes; I should think that is what you had in mind about the first sentence.

MR. LEMANN: I think the first sentence might serve a purpose.

MR. HAMMOND: Yes, that is what I thought, too.

MR. LEMANN: The first sentence, I should think,

might well be retained. Personally, I would be disposed to delete the second sentence.

DEAN MORGAN: So should I.

MR. HAMMOND: There seems to be no need for the second, under the Court Reporter Bill, but I am quite sure that Mr. Mitchell didn't have in mind this provision when he wrote that.

THE ACTING CHAIRMAN: All right.

JUDGE DOBIE: Suppose we leave that to the Reporter and the Chairman.

DEAN MORGAN: I think so, and I so move.

THE ACTING CHAIRMAN: Unless there is objection, I will take that course. I will suggest that we think there may be some reason for the first sentence, but that we are all rather doubtful as to what the second sentence will do in the light of the Court Reporter Bill. Is that correct?

DEAN MORGAN: That is correct.

THE ACTING CHAIRMAN: Very well. You recall that we have added a new provision, (n), which covers the original papers. That is the one we discussed yesterday.

That covers everything down to 77. Of course, we have adopted the provision of 77(d), and the note appearing on page 76 will have to be rewritten. This note doesn't apply. The note, of course, will have to cite Hill v. Hawes, but in a little different connection. So we will prepare a different

note.

JUDGE DOBIE: We can leave that to you, I think.

THE ACTING CHAIRMAN: Very well. Mr. Chandler has sent some detailed material on 79. Is that around on the table? I will ask Mr. Hammond to present it, if he will.

MR. HAMMOND: Yes, sir; I shall be glad to.

THE ACTING CHAIRMAN: I take it that in general, of course, we want to follow the suggestions of the Administrative Office and the Conference of Senior Circuit Judges. It is just a question of getting them clearly before us. I don't believe, Mr. Hammond, that it is necessary to go back into the history, if you have what has finally been agreed on. I think we are all ready to accept the recommendations, as long as we get clearly what they are.

MR. HAMMOND: I don't know that there need be any explanation of it. It has all been worked out between you and me and Mr. Chandler. They first submitted an amendment of subdivision (b), and the chief idea of the amendment was to permit the making of records by microphotography or microfilming. I called attention to the fact that their amendment really didn't do that because it still required the papers to be kept in a book or record, you see. So I talked to them about it and suggested that they really hadn't covered the thing which they wanted to cover. Mr. Chandler took it up, even took it up with the Senior Circuit Judges, and they have approved

this (b) as it reads now. It will leave them latitude as to how they will keep these copies.

I told them that I thought all the Advisory Committee was interested in was having copies kept of these certain papers referred to, and that we in no way wanted to interfere by any rule that we had as to the method in which they should be kept. I said it was the purpose of the original rule that we wanted to leave the greatest latitude to the clerks. Of course, at that time they didn't have the Administrative Office.

The one thing that did seem to interfere was the fact that even under their amendment they had to keep these copies in a book, you see. So we worked out this draft. In fact, I drafted (b) for them and submitted it to them, and the only change that the Administrative Office made was to insert the words "with the approval of the Judicial Conference of Senior Circuit Judges".

JUDGE DOBIE: I don't think there will be any objection to that. If the Senior Circuit Judges and the Administrative Office work out a system that is more or less uniform, I think we certainly should go along with them.

THE ACTING CHAIRMAN: Then, you move the adoption of (b) as recommended?

JUDGE DOBIE: Yes; by the Administrative Office. Isn't there one on (a) down at the bottom?

MR. HAMMOND: There is. It is separately listed

here because it is a new suggestion which hasn't been presented to the Advisory Committee before. We can take that up, if it is agreeable with the Committee, after we take up (d).

THE ACTING CHAIRMAN: Let's follow his list here, then. Let's vote now on (b). I think it is just as well to do it here.

SENATOR LOFTIN: I second the motion.

THE ACTING CHAIRMAN: All those in favor will say "aye"; those opposed. (Carried)

... The draft of Rule 79(b) adopted by the preceding action follows:

"(b) CIVIL JUDGMENTS AND ORDERS. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of Senior Circuit Judges may prescribe, a correct copy of every final judgment, final order, order affecting title to or lien upon real or personal property, appealable order, and such other orders as the court may direct." ...

THE ACTING CHAIRMAN: What do you want to take next? (d)?

MR. HAMMOND: (d).

THE ACTING CHAIRMAN: Is there any objection to that as you see it here? All those in favor of (d) will say "aye"; those opposed, "no." (Carried)

... The draft of Rule 79(d) adopted by the preceding action follows:

"(d) OTHER BOOKS AND RECORDS OF THE CLERK. The clerk shall also keep such other books or records as may from time to time be required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of Senior Circuit Judges." ...

THE ACTING CHAIRMAN: What next? Is (c) next? That is next on your list.

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: Isn't that all right, too?

MR. HAMMOND: Oh, yes, that is all right. It is just a question of changing the wording.

THE ACTING CHAIRMAN: Is there any discussion of (c) on the list here?

DEAN MORGAN: I move its adoption.

PROFESSOR CHERRY: Mr. Hammond has a suggestion.

MR. HAMMOND: I did have a suggestion there. This is a note of my own which you will see there. I said: "The words 'judgments and' should be inserted before the word 'order'."

THE ACTING CHAIRMAN: Do we want to include that? Eddie, do you move that?

DEAN MORGAN: I move the adoption.

THE ACTING CHAIRMAN: Including the words "judgments and"?

DEAN MORGAN: Oh, yes.

THE ACTING CHAIRMAN: As suggested by Mr. Hammond. All those in favor will say "aye"; those opposed. So voted. (Carried)

... The amended first sentence of Rule 79(e) adopted by the preceding action follows:

"Separate and suitable indices of the civil docket and of civil judgments and orders of the nature referred to in Rule 79(b) shall be kept by the clerk under the direction of the court." ...

THE ACTING CHAIRMAN: Now, about (a).

MR. HAMMOND: "The Director has also submitted the following new suggested amendment of the first sentence of paragraph (a)". That is the original paragraph (a) of 79.

THE ACTING CHAIRMAN: The original paragraph, of course, refers to the statute. What is the status of the statute now?

MR. HAMMOND: Here is the point about that. The first sentence of the original paragraph (a) read: "The clerk shall keep a book known as 'civil docket' of such form and style as may be prescribed by the Attorney General under the authority of the Act of June 30, 1906, ... or other statutory authority, and shall enter therein each civil action to which these rules are made applicable."

After we promulgated that rule, they passed the Act

creating the Administrative Office of the United States Courts, and the authority over the clerks about keeping their books and everything now resides in the Administrative Office.

JUDGE DOBIE: I move its adoption.

SENATOR LOFTIN: I second the motion.

THE ACTING CHAIRMAN: The adoption of the suggested provision from the Director as a substitute for the first sentence in (a) has been moved.

DEAN MORGAN: Second.

THE ACTING CHAIRMAN: All those in favor will say "aye"; those opposed. So voted. (Carried)

... The amended first sentence of Rule 79(a) adopted by the preceding action follows:

"The clerk shall keep a book known as 'civil docket' of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of Senior Circuit Judges, and shall enter therein each civil action to which these rules are made applicable." ...

THE ACTING CHAIRMAN: That covers them all. Mr. Moore, we have voted all these now, with Mr. Hammond's suggestion for (c) included.

MR. HAMMOND: I have a note here that Mr. Mitchell said something about them, and all that he said was that they shouldn't be adopted.

THE ACTING CHAIRMAN: Rule 80 is another rule that we worked on a good deal, but it is our judgment that (a) and (b) are taken care of by the Court Reporter Bill. We suggested that the present subdivision (c), which is comparatively unimportant, nevertheless could have some force in connection with the case of a master, and that it might be well to put it down and still retain the formal numbering of the rule. We covered that on pages 79 and 80 of our suggestions.

MR. LEMANN: I move the adoption of the recommendation.

THE ACTING CHAIRMAN: Have I stated that correctly, Mr. Moore? I am not sure whether I have stated it.

PROFESSOR MOORE: I think so.

THE ACTING CHAIRMAN: We propose that subdivisions (a) and (b) be eliminated, with a statement in the text: "(Abrogated because of statute)". In order, however, to assure that a master will have the power--wait a minute. My suggestion goes over in Rule 53(c). This is entirely left out.

MR. LEMANN: I understand that we take this out and put the other change in 53(c).

THE ACTING CHAIRMAN: Just a minute. I guess so.

PROFESSOR MOORE: There will still be an 80(c).

THE ACTING CHAIRMAN: Yes, 80(c) still stands as a single unlettered section. There should be a provision added to 53(c) to cover the question of the master, and that would be

all.

MR. LEMANN: It doesn't seem to me that 80(c) is worth much. I wondered why we put it in to begin with, and I was told to see the Iowa Code. So the gentleman from Iowa must have added that. That would seem to be plain, wouldn't it?

DEAN MORGAN: No, because some of them require them to bring the stenographer on and make him read his shorthand notes, which is an asinine thing to do.

THE ACTING CHAIRMAN: Mr. Mitchell says, "Rule 80, as shown on page 78, goes out because of the Court Reporter's Bill," but that is a little ambiguous. He says "as shown on page 78," and page 78 doesn't take up subdivision (c). I don't believe he has really considered that separately.

MR. HAMMOND: No.

JUDGE DOBIE: There is no harm in (c) staying on. Do you think so?

DEAN MORGAN: No, there is no harm in doing it at all. Rule 43 otherwise would let it in wherever a state court would let it in. Most of the state courts now do allow it.

MR. LEMANN: This seems never to have made a rule as it stood.

DEAN MORGAN: Rule 43 is where it would go.

MR. LEMANN: You would never think this important enough.

JUDGE DOBIE: There is another reason. I would hate

to see Rule 60 drop out and change the numbers of all these rules. That may seem foolish, but I don't think it is.

MR. LEMANN: You wouldn't change the numbers. I gather that you would just leave it blank.

THE ACTING CHAIRMAN: I don't think so. Just say "Abrogated."

MR. LEMANN: That is right.

THE ACTING CHAIRMAN: That is what they did in the bankruptcy rules.

JUDGE DOBIE: Yes, that is the best way to do it.

MR. HAMMOND: And then transfer this (c) to 43?

THE ACTING CHAIRMAN: No.

MR. LEMANN: Or say, "It is believed that Rule 43 would sufficiently take care of the case originally provided for in (c)."

DEAN MORGAN: I think so, don't you, Charles?

THE ACTING CHAIRMAN: What do you say to that?

PROFESSOR MOORE: I suppose so, but suppose you have some backward state.

DEAN MORGAN: That is the only place. It would be just in case you had some backward state, but, Lord bless me, why don't you let them do it? Let them stay backward.

PROFESSOR CHERRY: If it were a new proposition, we wouldn't want to write it, but it is in there, so why not leave it?

JUDGE DOBIE: That is what I think.

PROFESSOR CHERRY: We have a number without any other use for them.

JUDGE DOBIE: I move it be kept in, Mr. Chairman.

... The motion was regularly seconded ...

THE ACTING CHAIRMAN: It is moved that Rule 80(c) be retained and that Rules 80(a) and (b) be eliminated as abrogated by the new statute. All those in favor will say "aye"; opposed, "no." The "ayes" have it, and it is so voted.

Now do you want to move the addition to Rule 53(c) as to the master, to make sure that is covered?

DEAN MORGAN: Yes, I so move.

THE ACTING CHAIRMAN: It is moved that there be added to Rule 53(c) the following: "A master may direct that evidence be taken stenographically and may order a transcript thereof in compliance with subdivision (c)(1) of this rule. The fees for such transcript may be taxed ultimately as costs." All those in favor will say "aye"; opposed, "no." That is voted. (Carried)

Rule 81. Is there any question? Is there anything that anyone wants to say about these? Have you any suggestions, Mr. Hammond?

MR. HAMMOND: Mr. Tolman had a suggestion on this. I will present it.

THE ACTING CHAIRMAN: Rule 81, line 10.

MR. HAMMOND: He says: "I have some hesitancy lest the words 'statute or by' in line 10 are inconsistent with the provisions of the Enabling Act that the rules shall supersede statutes 'in conflict therewith'. Do we need to say what might be cited against us in an attack against a rule as in conflict with a statute? See also the reference to procedural statutes in lines 18 and 19."

THE ACTING CHAIRMAN: I was just going to say, it seems to me that if we take it out here and put it back according to the statute, it isn't in conflict with the statute, I should think. Of course, the 18 and 19 one is old. We have had that.

JUDGE DOBIE: I don't believe there is going to be much conflict there. We say it it applies to those proceedings which are done in accordance with the statute.

MR. HAMMOND: My idea is that you want to retain the provisions of the statute.

DEAN MORGAN: Applicable to a particular proceeding.

MR. HAMMOND: Yes, applicable to a particular proceeding.

JUDGE DOBIE: Yes.

MR. HAMMOND: So far as they apply, and that the words ought to stay in.

DEAN MORGAN: "except as otherwise provided by statute or by rules of the district court or by order of the court in

the proceedings".

THE ACTING CHAIRMAN: Is there anything anybody wants to do? Any question or any motion? Of course, there is the reference to eminent domain, if, as, and when. That is in the original draft on page 102.

DEAN MORGAN: You have that in your notes, haven't you?

THE ACTING CHAIRMAN: Yes. Has anyone any question about Rule 81? Shall we consider it passed?

SENATOR LOFTIN: I move it be approved.

DEAN MORGAN: Second.

... The motion was put to a vote and carried ...

THE ACTING CHAIRMAN: I might say in passing that at the last meeting there was some discussion about suits under the Tucker Act, and it was suggested that we make more extended reference to United States v. Sherwood and the attitude of the Government and the fact that the Government conceded that these rules apply. You can see on pages 82 and 83 a discussion of that. Mr. Oglebay, of course, had quite a few more pages than this to begin with, but I said I thought that was a little too much, and we have cut it down some. Has anyone any suggestions? That is the way we have epitomized it now.

Forms. That was approved after considerable discussion, and I think it is very lovely. That is Rule 84. There being no objection, we will pass on.

PROFESSOR SUNDERLAND: I would like to suggest a change in Form 20 on page 90, the last sentence in the first paragraph of the note. I think probably that should come out in accordance with our action on Rule 12. The sentence reads: "It should be noted, however, that the use of affidavits or other matters outside the pleadings in connection with such defense may make it equivalent to a motion for summary judgment under Rule 56." That is eliminated in our majority draft of Rule 12, so that sentence ought to be out out.

THE ACTING CHAIRMAN: Yes. I think certainly something ought to be done with it. I am not quite sure that I know yet how far you have eliminated affidavits under Rule 12. Our discussion yesterday indicated that there was considerable thought by the opponents of Rule 12 that affidavits were still usable, and those courts, I take it, have decided that they are usable. I don't know that. All I can say is that I shall have to wait and be instructed. I suppose the courts will have to decide that still. At any rate, the last part of the reference is incorrect. If it is intended not to be equivalent to a motion for summary judgment, then I take it it should come out. Do you still want to say it is equivalent to a general demurrer?

PROFESSOR SUNDERLAND: I wouldn't say anything.

THE ACTING CHAIRMAN: I should say that was very damning, myself, but maybe I am just prejudiced about it.

If you will look at the original, page 119, we have said that it was equivalent to a general demurrer. I don't suppose that would be a wholly accurate statement, in any event. It is at least the modern substitute for a general demurrer, with perhaps some slightly different attributes. At any rate, if you will, suppose you look at the original, page 119, at least, and see if that is the way you want to leave it.

DEAN MORGAN: I think it would be perfectly all right to say it is a substitute for a general demurrer.

THE ACTING CHAIRMAN: We don't say that.

DEAN MORGAN: No. We say it is the equivalent.

PROFESSOR SUNDERLAND: I think "substitute" is a better term.

JUDGE DOBIE: So do I, because a lot of people might think it means legally equivalent and that it has a lot of the attributes of a demurrer which it doesn't have. I think "substitute" would be better there.

DEAN MORGAN: When you do demur to the complaint, of course it amounts to the same thing.

THE ACTING CHAIRMAN: All right, strike out the last sentence of the first paragraph, and in the third sentence (which becomes the last sentence), "substitute" for "equivalent".

JUDGE DOBIE: "substitute for" in place of "equivalent to".

THE ACTING CHAIRMAN: Is a substitute for?

JUDGE DOBIE: Yes.

DEAN MORGAN: Just say it is a substitute.

THE ACTING CHAIRMAN: Yes. Then, make that sentence read: "It is a substitute for a general demurrer" and stop?

PROFESSOR SUNDERLAND: Yes.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: No, you can't stop.

DEAN MORGAN: "or a motion to dismiss."

THE ACTING CHAIRMAN: Yes, they both ought to come in. Is there anything else on that? Back on your Form 17, Eddie.

DEAN MORGAN: Yes. You made an improvement. I haven't anything further to suggest. Do we have it adequately? The only thing is that unfair competition in these cases is passing off for good, and things of that kind. There are several ways of unfair competition. You can do it by other than passing off.

THE ACTING CHAIRMAN: That is correct.

DEAN MORGAN: Lever Brothers v. Procter & Gamble is one of them.

THE ACTING CHAIRMAN: I think it is all right.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: The case that more or less suggested this was Judge Clancy's decision. He wanted passing off in that case in the complaint. That, it is true, was that type of unfair competition.

PROFESSOR SUNDERLAND: There is one other change in Form 20, it seems to me, which would improve it. You had it originally and it still stands, "The third defense is equivalent to an answer on the merits." It <u>is</u> an answer on the merits. It isn't equivalent. It is one, isn't it?

DEAN MORGAN: It is an answer, yes.

PROFESSOR SUNDERLAND: Why those words "equivalent to"? It seems to me that ought to be out out, because it is an answer on the merits.

THE ACTING CHAIRMAN: Is there any reason that it shouldn't come out?

PROFESSOR MOORE: No.

THE ACTING CHAIRMAN: I should think it should.

JUDGE DOBIE: Any objection to that, Eddie?

DEAN MORGAN: No, I don't have any objection.

THE ACTING CHAIRMAN: So, "The third defense is an answer on the merits."

Form 22. See the note for the change in Form 22, which was made necessary by the amendment to Rule 14, the designation of the time limit which is required by the rule.

DEAN MORGAN: That is right. You had to stick that in.

THE ACTING CHAIRMAN: I take it that covers everything that is before us on the rules. I have one or two other matters that I want to bring up.

MR. HAMMOND: I have a note here to Form 9, page 109.

I don't know whether there is anything in it or not. I must have made it a long time ago. Is that still good?

DEAN MORGAN: Oh, yes, that is good.

THE ACTING CHAIRMAN: The form itself is certainly good.

DEAN MORGAN: You mean the note?

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: Let's see.

MR. HAMMOND: Erie Railroad v. Tompkins.

DEAN MORGAN: There is a little conflict in the Wham case.

THE ACTING CHAIRMAN: But the Supreme Court has ruled, I take it, now quite definitely in that Palmer v. Hoffman case that this is a matter of pleadings. If it is a matter of pleading, it is all right. It is a rather anomalous result, but I think we rather decided it would make things worse if we tried to change it.

DEAN MORGAN: I think you are right about that, Charlie.

THE ACTING CHAIRMAN: Therefore, I take it that this is approved under Palmer v. Hoffman.

PROFESSOR SUNDERLAND: They have gone back on the original view they had. Didn't they approve Wham?

DEAN MORGAN: No. Burden of proof and burden of pleading are quite different things, they say. Although under

modern pleading they are usually coincident, you know there are a number of instances where they are not.

MR. LEMANN: Isn't the rule pretty well settled now that the burden of proof is governed by state law?

DEAN MORGAN: Yes. They have said it three times.

THE ACTING CHAIRMAN: Yes, it seems so. I have hated to admit it, but even I have gotten so I don't dare say anything more about burden of proof.

MR. LEMANN: The extent of proof, the degree of proof.

DEAN MORGAN: You mean what will take it to a jury.

MR. LEMANN: I have an equity case, and the district court judge says my proof of fraud is not absolutely conclusive, as required by the state law, and he cites state court decisions. Have I any chance to argue in the court of appeals that they could take a more liberal view of the evidence? The evidence, I think, would convince any reasonable man by a great preponderance of the evidence, but if I have got to prove it conclusively—

DEAN MORGAN (Interposing): Beyond a reasonable doubt.

MR. LEMANN: That is practically conclusively. --and he has some strong language in the state court decisions, I have been inclined to think that I was hooked.

DEAN MORGAN: I am afraid you are licked with their attitude. They have held that whether a thing gets to the jury or not is a matter of state law, haven't they? Sufficiency of the evidence? Haven't they said that, practically, Charlie?

PROFESSOR MOORE: It is a very peculiar case.

DEAN MORGAN: I know it was a peculiar case, but I think that is a damned peculiar decision, anyhow.

MR. LEMANN: I had this point come up and, if we have finished the important business, I should like to ask what you think, as a matter of general information. In Texas, hearsay evidence is not objected to. It will not support an objection in the Federal court in Texas. Is that technical rule applicable?

THE ACTING CHAIRMAN: I don't know.

DEAN MORGAN: There you are. You are right up against that same question because it wouldn't take a case to the jury under the Texas state rule.

THE ACTING CHAIRMAN: We have had just that sort of case. We have had the problem, and a decision came up a week or so ago. We had the question under the Illinois rule in a trustee reorganization of the Northwestern Railroad. We had all this question of service of process, and we held that the trustee was practically the railroad corporation. But, then, in addition there was the question of negligence, and the judge had directed a verdict holding there was no negligence running down the case of the railroad. The plaintiff properly relied on Justice Black's views, which seemed to be those of the majority of the Court, you know. The jury is pretty sacred.

DEAN MORGAN: By gosh, doesn't he say so?

THE ACTING CHAIRMAN: We wrote up the opinion. It was entirely a question of state law, and in Illinois they still didn't direct the verdict. I am wondering a little, if that case goes to the Supreme Court, as it well might, which of the two great doctrines they will follow: the one that the jury is everything, the other that state law is everything.

JUDGE DOBIE: Have we anything before us, Mr. Reporter?

THE ACTING CHAIRMAN: Anything else? The thing I would like to have you think about a little is the recommendation for amendment of the enabling act. I have been trying to bring that up for quite a while, and it does seem to me that is an important thing. We have never thought about it.

DEAN MORGAN: Mr. Mitchell said something about that, didn't he?

THE ACTING CHAIRMAN: He did. He said he thought it should not be sent out to the bench and bar, and I wonder, really, if that isn't one way of having a real discussion about it. In the first place, I think the enabling act, rather curiously, was one of the worst drafted acts that was ever invented. The two parts of the act are inconsistent with each other, and then the parts are inconsistent within themselves.

DEAN MORGAN: You aren't going to argue that they cancel each other on that account so that we don't have any authority, are you?

THE ACTING CHAIRMAN: I don't want to, but it can be argued, however, to a certain extent. Then on top of it we have this restricted way of making amendments. I don't see any objection. Don't think that I am arguing that we should not report to Congress. I think that is easy enough. But why must we follow this very definite machinery that the Court must act within a certain time and put it in the hands of the Attorney General, who must act at a certain time, and that it must stay through a session?

It seems to me that the real idea of what we are doing is a kind of courtesy with a coordinate branch of the Government. We should notify them, but that isn't any reason that we should have a very definite and restricted procedure which in practical effect means that no amendment could be adopted by us short of two years, a year and a half at the earliest. That is the way it works out, and it means at least two years for our consideration.

JUDGE DOBIE: What do you think we ought to do?

THE ACTING CHAIRMAN: Did you see the draft that I have sent out two or three times? It now appears at the beginning of this Preliminary Draft III. I was hoping that you would think about it a little and consider it and, frankly, I had rather hoped it would be submitted with the rest of this for discussion generally.

Of course, it isn't for the bench and bar to pass on

in one sense, but it must be for Congress. I think the great objection to ever raising the question was that Congress would then get excited and might wipe out the whole power. Of course, I am no politician, and I wouldn't want to prophesy, but that seemed to be a very sweeping idea, anyway. It seemed to me that if Congress didn't like it, the most they probably would do would be not to adopt the change. I don't believe that they would now get so excited that they would take away all the rule-making power. That seems to me rather unlikely.

JUDGE DOBIE: Couldn't we do this? Why not submit it to Congress and tell them the President is opposed to it? Then I think it would go right through.

THE ACTING CHAIRMAN: The only thing is that I wouldn't be sure the President was opposed.

JUDGE DOBIE: So would I.

THE ACTING CHAIRMAN: But if there is fear that Congress might do something like that, why isn't one of the best ways to have it out in the open, with people looking at it and considering it? This is not only a question of our act. What we are thinking about, of course is our act, but these things go in ripples. Much the same problem comes up in the case of the Criminal Rules, only somewhat more so, because in the Criminal Rules, as I recall, they have three different enabling acts for different parts of their rules, with three different procedures to follow under each, and I should think

they would have a question as to which was the overriding one. I think they are assuming that the one requiring this formalized reporting to Congress is the one they must follow, but why should that be the one?

But beyond that, it is rippling down among the states rather curiously. In the last report of the New York Judicial Council they are now discussing advocating complete rule-making power, and darned if this same old act and all of its difficulties doesn't appear there. I wrote to Leonard Sacks, the Executive Secretary, about it and asked, "Can't you do better than what we have had to operate under?" He replied and said, "Why, this has been recommended by the New York County Lawyers Association, but we haven't settled the wording yet of the form of recommendation." But you see that is the way it is going. It is just going down ripple by ripple, so to speak.

DEAN MORGAN: Charles, this political question that you talk about has been bothering me. I don't know whether I am right about it or whether my observation has been too fragmentary, but I think I have observed a very marked tendency towards reaction against reforms in procedure lately in the bar. I think they are getting more conservative instead of more liberal.

JUDGE DOBIE: Some of them on the appointment of judges I think unquestionably have gone back.

DEAN MORGAN: I have been greatly worried about that, as a matter of fact. I thought that the Nebraska action was just a heavy symptom of that. When I was out in Nebraska a couple of years ago at Lincoln, advocating reforms in evidence as well as in the Federal Rules, the younger men out there were just sure that they were going to drive that thing through, and they were going to get it, all right. It was just a bunch of old fogies who were preventing it. The result was that they got it from the Supreme Court, all right, and then the Legislature not only refused to approve it, but they repealed the act which allowed the Supreme Court to make rules.

MR. LEMANN: They did?

DEAN MORGAN: Yes, sir. I notice, as I go around doing quite a lot of talk about breaking down orthodox rules of evidence, that I get a great deal more resistance than I ever have before.

JUDGE DOBIE: I doubt that we could do much about that in the absence of Senator Pepper and Mr. Mitchell. Do you think so?

MR. LEMANN: What was Mr. Mitchell's view, Charlie?

MR. HAMMOND: Here it is. "No submission should be made to the bench and bar or report to the Court at this time. The Committee has not given the subject enough consideration. I doubt if it is a matter that need be submitted to the bar. If desirable, we can submit a separate report on it in

the fall."

MR. LEMANN: The bar couldn't control it; we can't control it. It is up to Congress. Therefore, if it is a desirable thing to do, the only argument for submitting it to the bar is the hope that we could influence their Representatives and Senators to support it. As Eddie said, I would be uncertain whether we would get more help from the bar or whether we would do better to go through the Court or through the Conference of Senior Circuit Judges, perhaps, to the Congress.

DEAN MORGAN: Wouldn't we be more likely, Charlie, to get just an amendment to the act which would allow all amendments to the rules to go in effect within sixty days, and let it go at that?

MR. LEMANN: Yes.

JUDGE DOBIE: I believe the Conference of Senior Circuit Judges would have a good deal of effect on Congress--more than this Committee, in my opinion--not that I would say that they have more influence.

MR. LEMANN: You never can tell. They are not too well attended, as a rule, but after all they are the official indicators of opinion. If somebody gets up and says, "I don't think we ought to give this board a mandate of power," he is quite as likely to have it voted down as voted up. I really don't think we would get much political help by doing it.

THE ACTING CHAIRMAN: Frankly, I wasn't expecting to, but it was suggested here the other day, and I think quite truthfully, that we really don't get so much help from the bar. We get some. It is more individual. We might get it by writing to individuals anyway. The chief thing we do get from the bar, I think, is estoppel, if you want to put it that way.

MR. LEMANN: I don't think you need that on that point.

THE ACTING CHAIRMAN: Wouldn't you get an estoppel likewise on this?

MR. LEMANN: After all, you have to get it to Congress, and it doesn't make any difference about the estoppel. It is different with the criticism of the merits of our rules. I think there you have something on the point. I think there is a chance of getting help there.

THE ACTING CHAIRMAN: I don't know that I think submitting it for publication is necessarily the way to do it, really. I should like to have it brought out in the open somewhere.

MR. LEMANN: You have one wise man here on these matters, and that is Senator Loftin. His judgment ought to be worth something.

THE ACTING CHAIRMAN: We always keep sort of shying away even from discussing this question. Why can't we discuss it? Apparently it is one of those things that are taboo.

MR. LEMANN: You mean our discussing it here now?

THE ACTING CHAIRMAN: Why can't we discuss the form of the act, and if we think we ought to ask the Senior Circuit Judges for their advice, why don't we do it?

MR. LEMANN: Why not? I don't see anybody objecting to discussing it now.

JUDGE DOBIE: I am strongly in favor of that. I believe they have more influence than anybody we can go to, more than the American Bar. I don't believe Congress pays any attention to the Bar Association. I think they pay a good deal of attention to the Senior Circuit Judges, where the Chief Justice presides, and I think that is our "white hope."

THE ACTING CHAIRMAN: Even the Conference is not going to consider it unless we suggest it to them.

JUDGE DOBIE: That is what I am talking about. I want to suggest it to the Conference of Senior Circuit Judges.

THE ACTING CHAIRMAN: What do you think of my draft? I don't want to be insistent on this, but I keep suggesting it in every meeting, and then in every meeting we say, "Let's not do it now."

MR. LEMANN: Let me see another copy of it. I have succeeded in messing up my papers so beautifully that I can't find anything right now.

SENATOR LOFTIN: Mr. Chairman, of course I would be in favor of such an amendment to the enabling act, but I doubt

very much the wisdom of advocating it at the present time. I think the sentiment in this country today is very strong against bureaucratic agencies; in other words, what they call government by executive directive rather than by law. I think the feeling between Congress and the bureaucratic agencies is very strong at this time, almost bitter, and, whether we like it or not, we would be denominated one of the bureaucratic agencies in the making of these rules--by the bar, at least. To say that what we recommend and what the Supreme Court adopts should become law as far as these rules are concerned, without submitting them to Congress or giving Congress an opportunity to pass on them, just at this time might unfortunately become involved in this controversy that is going on between Congress and the executive agencies, the bureaucratic agencies, in which the people are very much concerned and over which they are very much aroused.

THE ACTING CHAIRMAN: Let me say again my thought was not to keep away from submitting it to Congress. I would report to them with the greatest of deference, and I don't see why it shouldn't be done. But there are two general things that trouble me about this. One is the method of amendment, and the other is the inconsistencies in the act itself, which the Supreme Court may take care of.

JUDGE DOBIE: Couldn't we try to get that waiting period cut out? Go to the Supreme Court, and let them send it

to the Congress and have Congress enact it, without any necessity for any incubation?

THE ACTING CHAIRMAN: I don't see that that is anything that Congress would get excited about or raise a question about. It just seems to me that we expect all the Congressmen to be stupid or malicious on that. If they want information, it is a graceful act to have it done. For example, why have the Attorney General in the picture, anyway? Suppose the Attorney General says, "I won't do it," or suppose the Attorney General has gone to Florida at the time. That is just a little bit of machinery that probably isn't very important in itself. The real difficulty is this stereotyped thing that it can go into effect only if it goes in at the beginning of a regular session and stays until the end. Why shouldn't it be a matter of reporting it at any time to Congress?

JUDGE DOBIE: I believe if we went to the Conference of Senior Circuit Judges on that, we would have a pretty good show.

THE ACTING CHAIRMAN: Then, of course, there is another thing along that line. We are going to them right along. It seems to me in a way we raise the question. There is talk that on the condemnation rules we would go to them and ask them for a special resolution. It seems to me, if anything, that would precipitate the thing more than ever. "Why do you want a special resolution? Are these special?" And so on.

It seems to me the better way to do is to say to Judge Summers, "Don't you think this is really a very awkward way of doing a very simple thing? Wouldn't it serve your purpose if the Supreme Court would always agree, or you put it in your act, or something?"

MR. LEMANN: You have it in here to report it, and you say that they shall take effect in not less than sixty days, and Congress shall be informed. Assuming that Congress wanted to retain the veto power, I should think that your provision would be inadequate to preserve it.

THE ACTING CHAIRMAN: It hasn't any express veto power now.

MR. LEMANN: I know, but you have cut down the time limit so that you have only a sixty-day interval, and then I should think Congress wouldn't have any chance to act. It might be during vacation, when they wouldn't even be here. If you are going to preserve that veto power or if you think they are going to insist on it, you will have to change the bill.

I think, No. 1, that we would all be agreed that from the standpoint of the improvement of the law, it would be desirable to have this amendment.

DEAN MORGAN: I think so.

MR. LEMANN: We wouldn't have to debate it. We would vote it. The question is a political one. Can it be attained. We wouldn't want to recommend something and have it defeated.

I think that the wise course would be to take counsel with men like the Chairman, Senator Loftin, and perhaps Mr. Sumners, perhaps the Chairmen of the House and Senate Judiciary Committees.

JUDGE DOBIE: Who is that?

MR. LEMANN: The Chairman would be the man to canvass them. If they feel as Senator Loftin thinks they feel, I don't see any use in pursuing it. I am afraid, personally, that you are right, Scott. Hadn't we better leave this (not because we don't want to discuss it, Charlie; get that idea out of your head) at the most with the statement that we think such a provision would be desirable, if it is feasible?

DEAN MORGAN: Legislatively feasible. I think that is the only question.

MR. LEMANN: Then ask the Chairman to give it consideration and let us have the benefit of his views. I presume there will be at least one more meeting of this Committee, or the survivors, as the reports come back from the bench and bar.

JUDGE DOBIE: Some of us are getting pretty old.

DEAN MORGAN: Not on this before it goes to the Court. You mean before it goes to the Congress ultimately.

THE ACTING CHAIRMAN: Oh, yes.

MR. LEMANN: That is what I mean. By that time, I assume, the election will be over. The presidential election will be past, I assume, before we take final action on this

redraft.

THE ACTING CHAIRMAN: At least, before the Court does, I guess.

MR. LEMANN: So we are not shelving this indefinitely, Charlie. We are coming back anyhow. Don't you think that is all we could do now.

THE ACTING CHAIRMAN: Yes, I guess it is. I don't know that any subject should be taboo. How do we know that political conditions are as bad as this? I should think the sensible thing was to talk to Judge Sumners. It seems to me to be the rational thing. Why do you need all this rigmarole? Does he want it?

MR. LEMANN: That is right.

MR. HAMMOND: The only thing he wants, I am sure, is the submission to Congress. I know he wants that.

JUDGE DOBIE: We couldn't possibly get away with that. You are talking nonsense, if you think that.

MR. LEMANN: If he thinks that is essential, he is not going to be content with your draft, because a sixty-day interval might come within a recess of Congress, and it wouldn't be adequate. I think you would have to change it, if that is a correct statement of Sumners' position.

JUDGE DOBIE: I believe that General Mitchell could take it up with Sumners, and it would be a courtesy, I think, to take it up with the Chairman of the Senate Judiciary

Committee, whoever he is. Nobody here seems to know. I believe, certainly, through the counsel of the Conference of Senior Circuit Judges, we could get those restrictions lifted. As to giving the power to promulgate the rules, I think that is piffle. I don't think Congress would consider that. I don't believe you could get ten votes. I think it would be silly to try.

THE ACTING CHAIRMAN: Of course, I think that they do think there is a good deal in it, and I think it is a polite gesture that is all right. I don't object to it. As a matter of fact, really, between sensible men, it is one of the silliest things ever. I mean, this reporting to Congress is really nothing. Any Congressman who is a lawyer is going to know of any action of the Supreme Court much sooner than he gets it through any letter of the Attorney General, and all that sort of stuff. The lawyer gets it in the daily press and from all the reporting agencies. You see, the reporting to Congress is nothing, really. I mean it isn't a veto power or anything else. It is a question of conveying to them news, information, and there are much better ways of doing it. I am not objecting to that, however.

JUDGE DOBIE: You don't think Congress would ever give us the power to promulgate rules without having them pass on them.

THE ACTING CHAIRMAN: Apparently there is some sort

of fetish attached to this. I say it is a little foolish, but I don't object to that in itself. I say it is a fetish because there are much easier ways of getting information as to what the Supreme Court is doing each day. The easiest way of all that I know of immediately is the Tuesday New York Times, and there are other ways--the United States Law Week, and so on. But as a matter of gesture, it is all right.

MR. LEMANN: Congressmen generally don't read either of those. But, Charlie, the thing that worries me as I listen to the discussion is that we know it took years to get Congress to pass this act, and is it true or is it not true that when they did finally pass it with their long waiting period in between, the Supreme Court stood better with Congress than the present Supreme Court stands with Congress?

SENATOR LOFTIN: And the President and the Administration stood better with Congress at that time, and it was through the intervention of Homer Cummings, as Attorney General, that that act was passed.

DEAN MORGAN: You remember what Homer said, that he wasn't able to convince a lot of people to vote for it, but he was able to persuade them to stay away when it came up.

SENATOR LOFTIN: That is right.

DEAN MORGAN: There isn't any question, if we had to have approval, we would never have gotten it.

MR. LEMANN: Another thing, the bar association and

the Supreme Court. I doubt if the Supreme Court is as popular with the bar associations or commands the complete respect of the bar associations to the extent it did ten years ago, when this was adopted. If you went to the bar associations with this, Charlie, and said, "Let the Supreme Court and the Rules Committee do this," I would be somewhat uncertain about the result, and I think I am understating the case at that.

SENATOR LOFTIN: I agree that it would be a splendid idea if Mr. Mitchell would talk with the Chairman of the Judiciary Committee of both the Senate and the House and see what their reactions to it would be.

THE ACTING CHAIRMAN: Yes, I should think so. Of course, in the case of the Criminal Rules, it might be a good idea for Chairman Mitchell to discuss the matter with Chairman Vanderbilt of that Committee. In the case of the Criminal Rules in one sense the question is more pressing because, as I said, a part of the Criminal Rules, according to the particular enabling statute, goes one way, and a part another way, and only a part are supposed to be reported to Congress. There there might be a real question as to how to do it. How can you cover three different ways in the same set of rules?

I don't see why we shouldn't consider the matter. I am not at all sure but that a person like Judge Summers would say, "Why, the whole thing should be simplified." It isn't right to have three conflicting ways of doing it. That happens

because the criminal rule making power developed in three different ways. There was a criminal appeal rule, and so on. Then, of course, with us there are different provisions. The equity rules are under a different statute, and we have already run into that difficulty I have mentioned about our printing the record rule.

JUDGE DOBIE: Do you think any formal motion is necessary? If it is, I should like to make it, that you take up with Mr. Mitchell the advisability of talking the matter over sometime with Chairman Sumners of the House and the Chairman of the Senate Judiciary Committee, with the idea of working through the Conference of Senior Circuit Judges, if they think there is any chance of getting those formal restrictions removed.

... The motion was regularly seconded ...

THE ACTING CHAIRMAN: All those in favor say "aye"; opposed, "no." It is so voted. (Carried)

MR. LEMANN: Mr. Dodge yesterday referred to this bill that he and Senator Pepper had been asked to draw up to carry out the suggestion of Judge Frank that further provision be made for the possibility of appeals from interlocutory orders. He drafted such a provision, as I understand, following the last meeting.

THE ACTING CHAIRMAN: No, he didn't draft it.

DEAN MORGAN: He and Pepper drafted a report, that is

all.

MR. LEMANN: A report, then. He was wondering what had happened to it and whether something shouldn't be done about it. What has happened? Do you remember, Mr. Cherry?

PROFESSOR CHERRY: Yes. He brought that up.

MR. LEMANN: He intended to bring it up if he were here, and he asked about it.

THE ACTING CHAIRMAN: All I know is that the Chairman sent around and asked for a vote. I didn't realize things were going that rapidly. The Chairman's first letter was a vote as to whether it should be submitted at once to the Judiciary Committee, and I must confess that I was quite shocked by that, because there wasn't really even a proposal in definite form. I was very doubtful about it, so I wrote to the Chairman protesting that I thought it shouldn't go through that way and that I thought there was a great deal of question about it anyhow. Then, on that and perhaps, too, on the report that he got from the Committee (I don't know just what he did get from the Committee), he decided that attempting to take a vote by mail was a fiasco. At any rate, he decided that it wouldn't be covered by vote.

So I supposed it would come up here, if you want to take it up, but it is a little hard, of course, with neither Mr. Dodge nor Senator Pepper here. I am here, and I dislike it, and there you are.

MR. LEMANN: We had better not now, but just for my information, what is your difficulty with it? As I understand it, there is a provision that the district judge may certify that in his opinion an appeal should be allowed from an interlocutory order. If the district judge felt that the case was so doubtful that he might be wrong and that the party should not be required to go through a long trial if he were held off, upon a certificate from the judge that party could get it passed on by the appellate court. That seemed good sense to me.

DEAN MORGAN: It was by the consent of both counsel and the approval of the district judge. Isn't that right? I think he said that is the way it is in Massachusetts, didn't he?

PROFESSOR CHERRY: Do you have that, Mr. Hammond?

MR. HAMMOND: I have here the conclusion of the report of Mr. Dodge and Senator Pepper.

"Our conclusion is that the proposal to give the United States district courts power in proper cases to allow appeals to the United States circuit courts of appeals for interlocutory orders merits favorable consideration, but as the proposal requires legislation and may not be accomplished by a procedural rule drafted by the Advisory Committee, we recommend that a copy of this report be transmitted to the Chief Justice of the United States for consideration by the Supreme

Court or the Conference of Senior Circuit Judges."

Then Mr. Mitchell sent that report around with a letter dated November 24, in which he said, "Those who approve the recommendation in the last paragraph of the attached report please notify me."

THE ACTING CHAIRMAN: Mr. Hammond, do you know definitely what report Mr. Mitchell got? I know I protested.

MR. HAMMOND: No, I haven't heard.

THE ACTING CHAIRMAN: I don't know, but I guess that probably half the Committee didn't answer.

MR. LEMANN: Really? Do you think so?

PROFESSOR SUNDERLAND: I answered approving of it.

PROFESSOR CHERRY: So did I.

MR. LEMANN: I answered approving. What did you do, Eddie?

DEAN MORGAN: I answered approving. I saw Charles' letter, and I said I wanted to be here to debate it, because the two Massachusetts acts that he referred to were pretty vague and ambiguous in content, I thought. The whole question that I thought ought to be debated was this: To what extent would the district judge make these certifications formally? In Massachusetts, according to Mr. Dodge, the certification is made only in the cases that are really doubtful; it is used not more than once or twice a year, if that often, and so forth. Under those circumstances, if it were to be used in the same

way that it is actually used in Massachusetts, I thought it might be a very good thing to save expense, and so forth; but if you had a judge who would sign just anything that the counsel wanted, you would get upstairs and back all the time.

PROFESSOR CHERRY: We have practically the same thing in Minnesota, and it is not abused.

MR. LEMANN: If you had both counsel agree to it. I don't know that you ought to require that. If you did have that, it would be a pretty good, maybe too good safeguard.

THE ACTING CHAIRMAN: If I may say so, it seems to me that that was a rather cursory way of treating a proposal that is of some importance, and I think there is great danger in that proposal for interlocutory appeals. Let me say that this might be a good thing in a theoretically perfect place like Massachusetts, and so on, but this proposal is whether we shall take political action of a certain kind. Yes, I say political action, and I mean it. Action influencing legislation.

MR. LEMANN: You don't hesitate to recommend a bill here to extend our own power. Do you call that political?

THE ACTING CHAIRMAN: Yes, it is, but it seems to me that is a political action that is right in our province.

MR. LEMANN: That is good politics.

THE ACTING CHAIRMAN: I don't think you are giving me a fair statement, because I don't think that you have thought

back over what happened. How did we ever come to think about this? We never would have taken up any general questions of appeal without some prodding. The prodding was from my distinguished and able colleague, Judge Frank. Judge Frank thought that the powers of the circuit court of appeals were too restricted on interlocutory appeals. He is used to New York practice, and the New York practice is very general on interlocutory appeals. It happens that he and I disagree very violently about that, and I feel very strongly about it.

One of the defects of the New York practice is that you run into the Appellate Division on every question of procedure in advance of trial and that you can go to the Court of Appeals pretty generally. There are certain formal restrictions, but you go up very rapidly. But that is a question by itself, and you want to consider it in its setting. It is an important matter.

That was the suggestion he made to us. He made it to Chairman Sumners of the Judiciary Committee. He made it quite generally, and Chairman Sumners suggested that it be referred back, I think, to the Conference of Senior Circuit Judges, and so on. It comes before us and, as a kind of glancing blow, it is suggested that we take up this Massachusetts practice. Thereupon, the Chairman wrote my good colleague, saying, "We have considered your matter with much interest," and so on, "and we wonder if this isn't the way to

handle it." Judge Frank and Judge Learned Hand, who also was somewhat taken with the Judge Frank proposal, immediately took that, and we endorsed the need and injected our remedy. That is what they have said, what they told me. I said, I think you are quite mistaken. The Advisory Committee hasn't passed on this." They said, "Oh, yes, you have expressed general approval, but the method is one we think shouldn't be followed." As Judge Learned Hand put it, "I don't think the district judges should have the power to enlarge our authority. I think we should have it."

I am not sure that is a sound criticism of the Massachusetts proposal, but it was the reaction that the entire Committee through there was a difficulty.

MR. LEMANN: Where did they get that reaction?

THE ACTING CHAIRMAN: They got that from Chairman Mitchell's letter, and I have seen Chairman Mitchell's letter.

MR. LEMANN: Letter to whom?

DEAN MORGAN: Frank.

THE ACTING CHAIRMAN: To Judge Frank, about the proposal.

MR. LEMANN: You mean after he got the replies from the Committee?

DEAN MORGAN: No, before.

THE ACTING CHAIRMAN: No, at the time of the discussion. I think there was really more in Chairman Mitchell's

letter than he intended. Nevertheless, I think that is not so unnatural a reading. Why are we going into legislation? We are going into legislation because certain circuit judges have suggested there is a defect, that interlocutory appeals don't go as far as they ought to, and therefore we are meeting this defect in this way.

I think, at the very least if we were going to do this, we ought to do two things. Of course, I am again expressing my opinion, but it is a very definite opinion. First, we ought to say that there ought to be no more interlocutory appeals, that there ought not to be any general provision. I am not objecting to the particular statutes, the preliminary injunction, accounting in past cases, and those things. Those are definite things, and they are right. But there ought not to be a general power. We ought to negative any idea that we are going further.

Second, if we were going to do this, we would want a definite act. All we have now are two separate and conflicting Massachusetts statutes, because that was the report, and there was no suggestion of what we were recommending, which one of the two acts, or of whether they would apply in admiralty or of whether they would apply in the criminal law or of where they would apply. In fact, the proposal is one for legislation of a very indefinite kind as our answer to a very specific and concrete thing in which I do not believe.

That was the main thing.

Now I will add one thing more, and that is this: As a separate matter, I wouldn't greatly object to the thing, only I am quite sure that it is unimportant. I am quite sure it is unimportant in the Federal system because it isn't geared to this sort of thing. As a matter of fact, we have the practice in Connecticut which is known as the reservation. While it can be used very broadly and widely in Connecticut, almost the only case where it ever is used is in will construction cases. You can see the reason, and it is of some use there. You have to have some definition of what a will means, and the judge says, "Here, I will hold that for the Supreme Court." Generally in our practice we like to have the district judge pass on it and get it in that way.

So, if this were removed from everything else and were made definite and concrete, I shouldn't feel very worried about it. I just don't think it is very important. That we should get into a legislative controversy (because, believe me, I think the question of extending interlocutory appeals is and should be just that) for something which seems to me really is not going farther than this is, I think, too bad. There are so many other legislative proposals that I believe in so much more. One of them is amending the rule-making act. Another is cutting down the time for appeals. It seems to me that those are things that are much more important, more vital,

than doing this.

So, that is the background.

MR. LEMANN: Evidently it is a controversial subject. Is that a judicial statement?

PROFESSOR CHERRY: It is a very good statement.

DEAN MORGAN: You can't handle it now with Pepper and Dodge and Mitchell away, I think.

THE ACTING CHAIRMAN: Monte, I wish you would look at their report. They quote the two different Massachusetts statutes. I think at least there should be more thinking about it.

MR. LEMANN: Could I have a copy of the Massachusetts statutes which were sent out?

DEAN MORGAN: They were in the report.

MR. LEMANN: Were they in the report? I don't recall that. I had the report and answered it.

THE ACTING CHAIRMAN: Of course, you may say that is a question of draftsmanship, and so on, but the draftsmanship of a statute is an important thing.

MR. LEMANN: Are these notes transcribed now?

MR. HAMMOND: Yes.

MR. LEMANN: I would suggest that a copy of this portion be sent to Mr. Dodge, because he asked about it yesterday. He and Senator Pepper were asked to serve on a committee, and did, and he was asking what had happened to it. I think he

would be interested in reading Judge Clark's statement. I could write him a letter, and will, but the statement would be more persuasive, perhaps. You will have an extra copy sent to him?

MR. HAMMOND: How about Senator Pepper?

MR. LEMANN: Yes, and Chairman Mitchell.

MR. HAMMOND: He gets a copy anyway.

THE ACTING CHAIRMAN: I shall be glad to have that done, but I will say that I wrote this at length to both Mr. Dodge and Senator Pepper.

MR. LEMANN: I didn't know that.

THE ACTING CHAIRMAN: I am afraid they might say not merely at length, but ad nauseam.

MR. LEMANN: I didn't know that. It may be unnecessary.

THE ACTING CHAIRMAN: I say that because I don't want to have it appear that I am surprising them. Is there anything more?

MR. HAMMOND: I have just two very minor things before you adjourn.

In your title to this preliminary draft you have the words "and the District Court for the District of Columbia". Can't we strike those off?

THE ACTING CHAIRMAN: I guess so. I guess that is not necessary.

MR. HAMMOND: All right. The other thing is a matter of saving a little cost to the Committee on printing. You will recall that Mr. Mitchell said he thought we ought to submit these rules to Congress or that there ought to be a submission to Congress of a draft of the rules showing the amendments, as well as a clean copy. If that is to be done eventually, I think we ought to start now by doing it in the way in which that is done in Congress. Whenever the Attorney General submits a bill to Congress, he always submits a clean copy and a copy showing amendments. The form which Congress uses is to strike through the matter deleted or the matter repealed, and then to put the new matter in italics.

I thought that if we could do that now, we would eventually save costs because we would have the type set up in the Government Printing Office for this, and the chances are that that could be used right on through. Would that be agreeable to you?

THE ACTING CHAIRMAN: I should think so. Isn't it just a case of taking our present draft and making directions to the printer. That is, our present draft follows underlining and brackets just because we haven't the type to do the other, and when this comes to be printed, if the printer is directed to follow your model, I don't see any reason that it shouldn't be done.

MR. HAMMOND: Yes. Possibly the printer could do

that.

THE ACTING CHAIRMAN: If there is any question about it, we will send it down here to your office to have that done. You see, we haven't the typewriters to do it, that is all. Any way to get it in print in the correct form. I quite agree that I think it ought to be as much in its final legislative form, or whatever it is, as possible.

MR. LEMANN: You would send out a draft like the one submitted to us with omitted words bracketed and new words underlined, or mechanically the equivalent.

MR. HAMMOND: Yes.

MR. LEMANN: If that were done, would you in addition send what you call a clean copy? I am not sure that I get your idea.

MR. HAMMOND: That is Mr. Mitchell's expression.

MR. LEMANN: What is a clean copy? The present rules?

MR. HAMMOND: No, the new rules as they will read, without any indication of the changes.

MR. LEMANN: In other words, you would first print the rule as it will stand with the amendments, and you would immediately below that print the present rule as shown in the material submitted to us in a way to show the changes.

MR. HAMMOND: I wouldn't do that in submitting it to the bar. In submitting it first to the Supreme Court, I would just submit it like this so that they can see, and I would also

submit it in that form to the bar. I don't see any necessity for the clean copy in that case, but of course when the Court itself gets to promulgating the rules--

MR. LEMANN (Interposing): That is a long way ahead, though.

MR. HAMMOND: I am just thinking of the matter of cost. That is all.

THE ACTING CHAIRMAN: You mean if you get it set up in type now, they can use the same type all the way through, except as we make later changes?

MR. HAMMOND: Yes. I don't know whether or not the Supreme Court will want to submit this sort of copy which shows the changes, as a matter of courtesy more or less, to the Congress.

MR. LEMANN: That is sometime ahead of us, isn't it?

MR. HAMMOND: It is quite far ahead of us, I will admit.

MR. LEMANN: They wouldn't want to tie up their type all that time from now, and besides we don't know what further changes may take place as a result either of the bar's suggestions or of the Supreme Court's suggestions. I hardly see how you could start to put things in type now for going to Congress.

MR. HAMMOND: Maybe not. I just thought it might work out that way, and if some of these weren't changed we could use

the same old electrotypes. You see, this will have to be electrotyped because there will be so many copies that will go to the bar. I think there were something like 40,000 of the first preliminary draft.

THE ACTING CHAIRMAN: Can't you or Mr. Chandler get us definite information?

MR. HAMMOND: Yes, I think possibly so.

MR. LEMANN: May I ask what the time schedule is now? I suppose that the next step will be to acquaint the Chairman and the absent members of the Committee with the changes voted at this meeting. Then, if nobody wants a rehearing because of absence, the Chairman will take it up with the Court. Is that the way it is going to work?

THE ACTING CHAIRMAN: I rather suppose so. I intended to get in touch with the Chairman at once and get definite instructions from him as to how I would proceed, but I had assumed he would probably say, "Get out the draft as soon as you get the transcript." I should think copies would be sent to the Committee but that, unless there is some question, it would be expected that we would submit it to the Court just to ask for permission to publish. Isn't that the general view?

MR. LEMANN: You haven't much more than a month, a month and a half, to do that.

THE ACTING CHAIRMAN: I suppose that is true, yes.

JUDGE DOBIE: You want to submit it to the Court

before they adjourn?

DEAN MORGAN: Oh, yes.

THE ACTING CHAIRMAN: Yes, we would have to do that, although it isn't a submission for study, necessarily. It is just so they know they have it.

MR. LEMANN: If you don't, possibly they will scatter, and the Chief Justice wouldn't want to have the trouble of sending it around and taking a vote. They adjourn the first Monday in June as a rule.

THE ACTING CHAIRMAN: That is true.

MR. LEMANN: Next week is almost the middle of April. You haven't much time.

MR. HAMMOND: I notice that Mr. Mitchell says that he would like to see the Reporter's final draft of the revised notes before submission to the Court, as he may want to suggest some additions to the notes.

MR. LEMANN: The Reporter is going to have a busy month, I think.

THE ACTING CHAIRMAN: Of course, I didn't suspect that I had any power to do otherwise than submit it to him. That was quite amusing to me. Maybe we could have gone further than we suspected.

MR. HAMMOND: I think when we are sending him a copy, we might send a copy to the other members who were not here.

THE ACTING CHAIRMAN: I should think that, if we are

sending copies, we should send them to all members of the Committee. We might as well. It would be my idea that, as soon as we get the draft, we will send it to all members of the Committee. The Chairman may want to see if there are any protests. Meanwhile, he can talk to the Chief Justice.

Isn't it the view of the gentlemen here present that we don't expect another meeting, unless something new develops before they are printed?

PROFESSOR SUNDERLAND: That is my idea.

SENATOR LOFTIN: That is what I understood.

THE ACTING CHAIRMAN: It is our general understanding, isn't it, that we don't expect another meeting unless the Chairman has some reason for calling us?

DEAN MORGAN: That is right.

PROFESSOR SUNDERLAND: Not until all this stuff gets back from the bar.

THE ACTING CHAIRMAN: Yes. So far as we are concerned, we are ready to have it submitted as we put it to the bench and bar.

MR. LEMANN: That would probably mean not until after the election, I guess.

THE ACTING CHAIRMAN: I suppose so, yes.

MR. LEMANN: I don't know that they are cause and effect, but the bar won't do much in the summer, I suppose. Did we put a time limit on the bar before? We didn't, did we?

MR. HAMMOND: I don't think that we did, no, not when we sent out the preliminary draft, and we want to be careful about that, if we do put a time limit on.

MR. LEMANN: The bar associations have appointed committees to study it.

SENATOR LOFTIN: They have standing committees.

THE ACTING CHAIRMAN: Have you anything more, Mr. Hammond?

MR. HAMMOND: No.

DEAN MORGAN: I move that we adjourn.

... The motion was regularly seconded, put to a vote and carried, and the meeting adjourned at 12:30 p.m. ...
