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ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

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MONDAY MORNING SESSION

March 25, 1946

The meeting of the Advisory Committee on Rules for Civil Procedure, held March 25 - 28 in the West Conference Room, Supreme Court Building, Washington, D. C., convened at ten-five o'clock, Mr. William D. Mitchell, Chairman, presiding.

[The following were present:]

William D. Mitchell, Chairman
George Wharton Pepper, Vice Chairman *
Charles E. Clark, Reporter
Wilbur H. Cherry
Armistead M. Dobie
Robert G. Dodge
George Donworth
Monte M. Lemann
Scott M. Loftin **
Edmund M. Morgan
Edson R. Sunderland

James Wm. Moore
Edward H. Hammond
Robert S. Oglebay

THE CHAIRMAN: We have the Reporter's summary of comments and suggestions that have come in from members of the bar, and so on. His original document is dated January 2, and then he sent out a supplemental one running to March 20. How do you want to proceed? Shall we take the Reporter's summary and consider rule by rule the suggestions that have come in? Is there any better way to make progress? George, what do you think about it?

SENATOR PEPPER: I think that is the sensible thing

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* Absent March 28.
** Absent March 26 and 28.

to do.

THE CHAIRMAN: If there is no objection, we will follow that procedure. Keep before you the Reporter's summary of comments dated January 2 and his supplemental document dated March 20.

JUDGE CLARK: We have seen nothing since March 20. There is nothing more in the way of comments, is there?

MRS. LOIS DENNIS: No.

JUDGE CLARK: I guess that would be complete.

SENATOR PEPPER: Is the March 20 supplement cumulative? Does it include the other?

JUDGE CLARK: No. That is what has come in after our first one.

THE CHAIRMAN: We will have to take up both as we go along.

Mr. Reporter, on page 2 of your original January 2 comment you have a summary of all the changes to be reported. We had better pass that over. We can take those up in order.

JUDGE CLARK: Yes, I should think that is true.

THE CHAIRMAN: Then, we pass to Rule 6, on page 3. Will you state what you think about that?

JUDGE CLARK: I might say that in the supplemental summary I called attention to the Supreme Court decision on Rule 4(f), but I suppose you have all seen that anyway. That was the Murphree case, which upheld the provision for service

throughout the state, in which there is an interesting discussion of procedure and substance, and it certainly indicated the possibility of a very inclusive content of procedure, if they want to stick to it.

THE CHAIRMAN: I was pleased but shocked at that opinion. I never thought that rule had a Chinaman's chance, and I don't think it would have had if the Court had realized that if you could do it throughout a state, you could make a rule that would allow a federal court to issue a summons to drag a man from California to New York to defend a case in a federal court. The opinion seems to me to be wholly inadequate and superficial, but it got by. I was astounded that some of the sticklers on the Court didn't rise up about that. I was really surprised--and I suppose you were, too--that someone at least wasn't aroused about it. Anyway, there is nothing we can do about it or want to do about it except to cite it.

JUDGE CLARK: On Rule 6(b), I think as you already appreciate and will appreciate as we go along, I am not quite sure how to present these because most of the suggestions involve matters that we have considered somewhat before. Most of them, in my judgment, are not particularly important. On the other hand, they are before us. I guess all I can do is to try to call attention to them rather generally and let you jump in. You probably will do it if you are interested. There is a danger that by picking out one or two things, I may

overemphasize them. I will do the best I can.

You will notice here that this is the rule which attempts to provide in general that there shall be an enlargement of time, but certain of the rules are listed as not permitting enlargement after the specified period, except and unless those rules themselves so provide. It is an attempt to make the rule more definite and to add, if possible to the finality of judgment, that is, to make the question of finality more clear and more definite. We have listed the particular provisions in lines 16 to 18.

The most definite thing that we have, I think, perhaps a little curiously is an attack on our listing of Rule 25, which is the rule for substitution, and you will see, turning to the supplemental memorandum, that the Department of Justice, War Division, thinks that Rule 25 should be omitted from the listing and that the Committee should adopt a revised and different Rule 25(d). 25(d) of the substitution rule is the one that deals with change in public officers. Rule 25 as a whole deals with death and all sorts of substitutions of parties.

DEAN MORGAN: We have 25(a), but we don't have all of 25 excepted, do we?

JUDGE CLARK: That is correct. Even if we followed that suggestion, there would be a good deal of 25 left. You notice that the Chicago Bar Association urges that the whole

rule be omitted on the ground that otherwise injustices may result if extensions of time are not permitted.

DEAN MORGAN: That is the only comment that would seem to me to have any reason back of it that would amount to anything. I have wondered about the validity of the objection that a party, without negligence, might be unaware of the death of another party. The only place I can see where it would be true would be where you had a case that had been pending a long time, with a lot of parties.

JUDGE CLARK: Of course, that is possible, but there are these two suggestions to be made in answer to that. The first is that what we did here, of course, was to follow the old statute.

DEAN MORGAN: Yes, I know.

JUDGE CLARK: It is apparently one which has not raised any particular question. The second is that the statute itself as well as our limit is two years. We can't extend it. We have to follow the provisions of 25, which are substantially those of the statute.

THE CHAIRMAN: That has been the law from time immemorial in the courts.

DEAN MORGAN: That is right.

JUDGE CLARK: The Sixth Circuit, in the case that is cited at the top of the supplemental memorandum, has held, in accordance with our theory of the rule, that the time cannot be

enlarged.

DEAN MORGAN: Yes. There were some cases to that effect before, weren't there, Charles, when we went over it in the first place?

JUDGE CLARK: There was a district court case before.

DEAN MORGAN: That is what I understood.

THE CHAIRMAN: The Reporter recommends no further changes in Rule 6, and if nobody else has any change to suggest, we can pass on to the next.

JUDGE DOBIE: Do I understand, Charlie, that the New York County Lawyers' Association want to put the whole matter in the laps of the lawyers so that by stipulation they can do practically anything they please? Is that correct?

JUDGE CLARK: Judge Dobie, you are talking about another aspect which comes under this rule and also under Rule 12(a).

JUDGE DOBIE: I certainly am opposed to that.

JUDGE CLARK: That is the question of extending time for doing various things, particularly of extending time for pleading, by stipulation. That, of course, is a matter that we discussed pro and con, and there has been a difference of view. That came up particularly with reference to 12(a), which is the time of pleading. It comes up here because these lawyers have suggested it as a general proposition. Some lawyers had suggested that there be a rather general power in the lawyers to

control the time. So, in our first draft of proposed amendments we put in a provision that the parties might make one stipulation for an extension without limit, but only one stipulation itself. That didn't get too much approval from either side. The lawyers who believed in the idea thought it wasn't enough. They thought it was a niggardly grant. On the other hand, you may recall that a great many district judges took great exception to it. There were some from the West Coast, I think. Wasn't there one of the Washington judges?

JUDGE DONWORTH: I am not sure.

JUDGE CLARK: They noted it at the time, and they said, "All our attempts to speed up and expedite business are going to be taken out of our hands." I thought it was generally a fairly severe protest. There was protest from California, too, wasn't there? Mr. Oglebay tells me that the whole Ninth Circuit particularly was objecting. Then we took that out, and our second draft contains no extension. When I say "no extension," I mean it is always in the control of the district judge.

The whole trouble came up by a quite severe ruling of the Third Circuit. This had caused no trouble until the Third Circuit ruled in a somewhat side issue involving the question of waiver of objection of venue, I think it was. They wanted to get away from the rule that there had to be a waiver. So, they ruled that there had never been any filing of any answer, because the district judge had not officially granted

an order allowing the filing of a late answer. That stirred everybody up. I always thought that was a very harsh decision, because the district judge had acted as though it were filed, and it didn't seem to me that it needed any such formal order as that. That was the difficulty with the case. That has been the history of it.

We took out any provision of any kind in view of the protests of the district judges, and now it is pretty much in the discretion of the trial judge, unless the circuit court gets excited, as the Third Circuit did.

JUDGE DONWORTH: What is our present recommendation as to allowing a stipulation extending the time?

JUDGE CLARK: It has to be really approved by the judge.

JUDGE DONWORTH: Doesn't that put on the judge's docket a burden that should not be there? I don't know whether I am in order or not, but I might say that I think it is wrong to try to limit the courtesy of lawyers and to put the thing up to the judge in such matters as we are now discussing. Take the parallel to our suggestions here in regard to a bill of particulars. I may be out of order, but I think the abolition of the bill of particulars is a mistake, because it will not accomplish its object. The only result will be that it will compel the lawyers, who otherwise would move for a bill of particulars, to move to make definite; and if a motion to make

definite is granted, the entire pleading must be revamped, whereas if a bill of particulars is granted, the pleading stands as was and the parties have it supplemented by the bill of particulars.

It seems to me that it is erroneous to try to get lawyers to be discourteous to each other or to do away with the accommodation that lawyers usually exchange by stipulations extending any requirement, unless it is a judgment or something of that kind. I think it is erroneous to limit the lawyers in the things that they do for the purpose of making the practice of law reasonably good. When a man is leaving town or his secretary is ill or something--all those things it seems to me make it entirely proper that lawyers should stipulate in ordinary matters. I know it is true in our district, as the Reporter has animadverted it is in New York, that the motion for a bill of particulars is often put in for the very purpose of deciding what you are going to do. I don't think any harm has been done in the long run by that courteous treatment, and particularly I would be opposed to substituting a motion to make definite, which has the bad effects that I have already mentioned.

JUDGE DOBIE: I would like to say a few words, if I may, in reply to the general thesis that Judge Donworth has put out here. We have had, of course, all the way through the rules this clash between leaving it to the lawyers or imposing

undue hardships on the judge by requiring his intervention in a lot of things, which seems somewhat meticulous. Judge Donworth was a district judge, of course, and so was I. Down in Virginia particularly we have this situation. We have less power in our judges than probably anywhere else in the United States. The lawyers want to run the case. I am frank to say that I approach it from rather the opposite viewpoint. I don't want to impose any hardships on the judge and to require the lawyers to go to him in a whole lot of inconsequential matters, but I am vigorously opposed to letting the lawyers run it, rather than the judge. I am frank to say that I think the rule the way it is now in connection with this time is an excellent rule.

I have had one or two of them, for example, who have handed me up a stipulation that they were going to argue after the instructions. They said, "We know the rules provide otherwise, but we have agreed on this, and of course anything we agree on is all right with you." Others have come in there and said, "We agree on a continuance, and of course this is perfectly formal. You will do anything we agree on." I didn't adopt that viewpoint.

MR. DODGE: The important parties in every litigation are the clients, the parties to the litigation. Neither the court nor the lawyers are the important parties. The lawyers, however, are in closer contact with the clients' interests than

is the court or anybody else, and to a certain extent I object to any suggestion that the court, rather than the lawyers, should handle the litigation. I think myself that it is absurd to suggest that the lawyers can't agree to an extension of 20 days for filing an answer while one of the parties is ill or when something of that sort obviously makes it necessary. I can't conceive that a district judge confronted with that matter would overrule a stipulation of the lawyers that the time for filing an answer may be extended.

JUDGE CLARK: Mr. Chairman, might I add this? In modern times when there has been objection to delays in cases, there has been a good deal of pressure to have the judges take some action. I think we have not yet thoroughly settled how much we are going to require of the judges. I know I run into it in my work quite a little, and I have wondered somewhat about it. We run into it in two ways, and they both come as a result of the action of the statute which creates the Administrative Office of United States Courts. All the circuit judges sit on the local judicial council for our circuit, and we get from the office down here reports of judges who are delaying, and we are supposed to do something about it. We do do something, at least by moral suasion. I understand that Judge Parker has a very effective system. He really gets after them, and if they don't get the cases decided, he takes them off taking on new cases. We haven't done as much of that, but I

think we have pushed them somewhat.

The other thing is that the statute itself provides that we should take affirmative action to expedite business. There is a general demand for it. That is a pressure on the judges. I think in a way it is a sound thing. You can't push them too far, but you can push them a little. If a judge, however, says, "Time is a matter that is out of my hands entirely. I can't even exercise general pressure, even though I am going to agree with what the lawyers say," I think it means that the judges are supposed to act quite opposite to what the lawyers are really permitted to do.

As suggested here, I think that a judge is very rarely, if ever, going really to set aside a stipulation. What he is going to do, if anything, is to try to push the counsel and say, "Look here. This has been going over, and we are all being criticized." I wonder if he should not have the power to.

Judge Donworth has made the suggestion, and I think that he might have trouble going back to his own circuit, the Ninth Circuit, with that idea. There were objections from various parts of the country, but it certainly was concentrated in the Ninth Circuit. They felt quite sure that we would be spoiling their efforts to bring their calendars up to date.

JUDGE DONWORTH: In what way was that indicated? I don't recall that.

JUDGE CLARK: Have you got the references? Those were

back in the suggestions which came in earlier.

MR. DODGE: We are speaking now only of an extension of time for filing pleading.

JUDGE CLARK: That came up under Rule 12(a).

MR. DODGE: It applies there instead of here, actually.

THE CHAIRMAN: Is there any action proposed here to make any changes in the rules as originally made effective with respect to the extension by stipulation of counsel?

JUDGE CLARK: On that point, after this decision in the Third Circuit, the Orange Theatre case, and after some requests from the bar, we put in our first draft this provision, which appeared at the end of Rule 12(a):

"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."

It was as a result of that, in the discussion of that, that in the second draft we took out that sentence. So it is now back where it was.

MR. LEMANN: We discussed this at length at one of our preceding meetings and finally voted. So, we have to grant a re-hearing and go back on our own conclusion after having indicated in the second draft that we had decided to eliminate this provision that the parties might do it without leave of court. I should think it a little difficult for us to

vacillate to that extent on this point.

JUDGE CLARK: There is no question. It is a re-hearing. We have been rather free with re-hearings, I suppose.

MR. LEMANN: After we have put it out once and then took it back and have had no particular criticism on taking it back, if I read these criticisms correctly, it seems to me it would be a little difficult for us to say, "Well, we haven't had much criticism from the bar, but still we think we had it right the first time, so we are going to change our minds again."

I should think that ordinarily it would be a very busy district indeed in which the judge would not be able to sign his name to a stipulation extending the time. I can't imagine that a judge would refuse to do it, unless it had been going on for a long time.

JUDGE CLARK: I should like to read our report from the Ninth Circuit, contained in our summary of January 1945, a year ago. This is on the first draft. The Ninth Circuit Committee reported "that the Oregon federal judges say lines 37 - 40 would be 'fatal to the practice' in that court; that the Washington judges are opposed; and that in the Southern California District, where they have a rule that such stipulations are subject to court approval, business has thus been greatly expedited. District Judge Jenney declares that lines 37 - 40 would 'undermine the work of seven years.'" There were other

district judges who were opposed.

MR. DODGE: The fact is, a good many of these lawyers and bar associations have raised the question of stipulation as to the time.

THE CHAIRMAN: Oh, yes, they did it eight or ten years ago, and they have done it over and over again, and we have considered it over and over again. While we suspect that there will always be some objection to it, the proportion of the bench and bar who are objecting to having stipulations restricted is very small. I don't suppose there are over a dozen or two individuals who want to change it on our present basis, are there?

JUDGE DOBIE: Mr. Chairman, if it is in order, I would like to move that we adopt the recommendation of the Reporter at the bottom of 6(b) that we recommend no further change in the rule beyond those that we have already suggested in our previous discussion. I think there is a good deal in what Judge Donworth says, but it is a very easy thing. If a lawyer wants 10 days' extension on time to file an answer and a stipulation to that effect is presented, there is no reason that the judge cannot sign it in a minute. Of course he will grant it. I am proceeding on the assumption that these district judges are reasonable, but that they ought to control these things, and not the lawyers.

THE CHAIRMAN: If it is agreeable, I will proceed on

the theory that we don't have to adopt these amended rules as written, and unless somebody makes a motion to change the draft, we will pass on and let it stand. That will save us a lot of votes and trouble.

PROFESSOR SUNDERLAND: Mr. Chairman, I think that we haven't sufficiently answered the point the Chicago Bar Association makes on Rule 25.

MR. LEMANN: Aren't we on Rule 6 now? You mean to take out all of Rule 25? Would it not be more orderly to wait and talk about 25 when we come to it, and have the Reporter's staff make a note that if we take it out, we will have to come back and change this reference in 6? Wouldn't that be more orderly than to start now talking about the merits of the change?

THE CHAIRMAN: I really don't think so. We are on 6, and the thing comes up now about 25. It is a very easy matter to turn to it. My idea is that we ought to settle it as we go along, but that is up to the Committee.

PROFESSOR SUNDERLAND: I don't think we present any real reason at all.

THE CHAIRMAN: What is their suggestion which you say is not answered?

PROFESSOR SUNDERLAND: All we say is: "As to Rule 25 on substitution, while finality is not involved, the limit there fixed should be absolute, as it always has been by

statute." That is all we say.

THE CHAIRMAN: Rule 25 is the rule that has to do---

DEAN MORGAN: Rule 25(a).

THE CHAIRMAN: ---with death, transfer of interest, and public officers. Do they object to all three of those?

PROFESSOR SUNDERLAND: Yes, they object to the whole of 25. They say it has nothing to do with finality and that an absolute limit there without allowing the court any discretion will often produce unfairness and injustice. It seems to me that that is true. I don't see why there needs to be an absolute limit on that just because it has been done in the past for centuries. We offer no reasons whatever.

THE CHAIRMAN: Hasn't there been some good reason back of this rule?

PROFESSOR SUNDERLAND: We don't give it, if there has been any.

THE CHAIRMAN: We don't give it, but there has been a reason back of it.

PROFESSOR SUNDERLAND: I don't know what it is. I can't recall right now any real reason.

DEAN MORGAN: We followed the statute on 25(a).

MR. DODGE: Mr. Reporter, can you refer me to the page of your summary which shows the Chicago Bar Association's comments on this rule?

JUDGE CLARK: That is in the supplemental one, the

one put on the table this morning, and you will find it under Rule 6, the third paragraph.

JUDGE DONWORTH: Mr. Chairman, I am much impressed by the comments of the report of the Committee on Federal Courts of the New York Bar Association. Under Rule 6, they very strongly object to taking away from lawyers the right to stipulate for an extension of time to answer. They have several lines on this subject, concluding:

"The lawyers are responsible for the litigation and the Committee thinks that the Court should have sufficient confidence in the bar to feel that the right to stipulate would not be abused. From time immemorial it has been the practice of counsel to agree on such extensions of time."

It seems to me that the practicing lawyers of New York, with this authoritative pronouncement are entitled to consideration. It seems to me that if you put it to a vote of the lawyers of the country, they would all feel that taking away that right by striking out our amendment to Rule 6 would be a mistake.

MR. DODGE: I think that would be the feeling of at least 95 per cent of the bar of this country, and I move that we return to our former draft, rather than strike out any right of counsel to stipulate.

THE CHAIRMAN: You mean a draft that allows the stipulation of time to answer be made once? Is that the point?

JUDGE DONWORTH: Yes.

MR. DODGE: Yes.

THE CHAIRMAN: It relates only to extension of time to answer. We were discussing Rule 25, having to do with substitution. Now we have switched off to the other, without deciding the substitution business. What do you want to do about substitutions? Do you want to make a motion?

PROFESSOR SUNDERLAND: I would like to cut out that reference to Rule 25 as one of those in respect of which no extension can be made. I would like to leave that discretionary with the court.

SENATOR PEPPER: It seems to me there is a lot of merit in that, Mr. Chairman. The Chicago Bar Association calls attention very pointedly to circumstances under which the death of one of a number of defendants, without any negligence at all, may not come to the knowledge of counsel; and if that happens and the substitution is not made within two years, then under 25 there is a mandatory direction for dismissing the action as to the deceased person. That is pretty stiff medicine.

PROFESSOR SUNDERLAND: There ought to be a good reason for it if you have any such rule, and I don't see the reason.

SENATOR PEPPER: I don't see any reason.

DEAN MORGAN: Is this any more than the former

statute? That is what I want to know.

JUDGE CLARK: It is a two-year statute of limitation in one sense, an old statute of limitation. Really, it is a little difficult for me to think of a case that amounts to anything where they would not know and act in the case of the death of a party in two years. I wonder if it shouldn't be ended.

PROFESSOR SUNDERLAND: The Chicago Bar Committee says:

"On the question of substitution of parties because of death, various of us have experienced in our practice situations in which we represented plaintiffs, for example, and the death of a party defendant was not brought to our attention by defending counsel until more than two years ..."

That would be a very easy thing to occur. I can't see any compelling reason that there should be that absolute restriction.

MR. DODGE: Equity Rule 45 allowed substitution within a reasonable time, without any time limit beyond that. So, under Equity Rule 45 you might have gotten the substitution after two years.

PROFESSOR SUNDERLAND: Yes.

JUDGE DONWORTH: Mr. Dodge, you would favor leaving the thing in the words of the statute, as our former rule has been, and leaving the question of an extension just open?

Would that be your thought?

MR. DODGE: I would strike out the reference to Rule 25 in Rule 6.

JUDGE DOBIE: That leaves it in the discretion of the court and removes the absolute prohibition. I don't object to that.

MR. DODGE: Yes.

THE CHAIRMAN: This is what bothers me. These various provisions in Rule 25 have been Congressional policy for I don't know how long, a hundred years maybe. You have to move promptly to get a public officer substituted. If the man dies and you let it drift on and do nothing about it, you can't come back ten years afterwards and ask to have somebody substituted. There must be some reason that those statutes were adopted. Nobody here seems to think there was any, but I don't believe we have had a system like that, which has been enforced strictly for all these years in the federal courts, unless there was some solid ground for it, and I don't believe that we should drop it overboard just because we don't see any good reason for it. I am suspicious. I hate to do it myself.

MR. DODGE: Was there a statute that limited the effect of Equity Rule 45?

THE CHAIRMAN: There were specific statutes about officers of the United States.

DEAN MORGAN: And about other substitutions.

THE CHAIRMAN: There was a statute about other substitutions. Nobody ever claimed that an equity rule set aside the statute. I don't remember what the equity rule was. I think our notes show the statutes under which this rule is framed.

JUDGE DONWORTH: I have the statute before me. Would the Chairman like to see it?

THE CHAIRMAN: Does it relate to all these grounds stated in Rule 25?

JUDGE DONWORTH: Perhaps it would aid if I read this.

"Section 778 U. S. Code. Death of Parties; Substitution of Executor or Administrator.

"When either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a scire facias from the office of the clerk of the court where the suit is depending 20 days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party in

the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court.

"The provisions of this section shall apply to suits in equity and in admiralty as well as to suits at law, and the jurisdiction of all courts of the United States shall extend to and over executors and administrators of any party, who dies before final judgment or decree, appointed under the laws of any state or territory of the United States, and such courts shall have jurisdiction within two years from the date of the death of the party to the suit to issue its scire facias to the executors and administrators appointed in any state or territory of the United States which may be served in any judicial district by the marshal thereof. No executor or administrator shall be made a party unless such service is made before final settlement and distribution of the estate of said deceased party to the suit.

"This section shall apply to suits in which any party has deceased prior to November 23, 1921, as well as to suits in which any party may have died thereafter or may die hereafter."

That doesn't relate to officers of the United States. Is there another section?

THE CHAIRMAN: That section has to do with the estates of deceased persons.

JUDGE DONWORTH: Yes, it has.

THE CHAIRMAN: I can understand that lawyers might come in and say, "We have had a case where we didn't know the man had died, and we have a right against the estate because we didn't know about it"; but what about a case where you have a suit against a person and he dies, nothing is done about it for two or three years, and there isn't any time limit on the substitution? What is there that terminates the possibility of his representative being dragged in any time? If they move to dismiss because they haven't been substituted, what is the time limit? When would they make such a motion? You see, there are two sides to the thing, it seems to me.

Obviously, one purpose of this rule about deceased persons was to enable the person who had a claim against the person deceased to bring in his executors or administrators and allow them to come in also, but wasn't it the purpose in that two-year limit to free the estate and the representatives of a deceased person from liability in some pending case that they had never heard anything about, and not to hold them liable because their ancestor had died and there was no time limit on substitution? Wasn't there some point about that?

PROFESSOR SUNDERLAND: It would be up to the representative, when the party died, to appear in court and suggest

that they enter it on the record.

THE CHAIRMAN: Why should he?

PROFESSOR SUNDERLAND: He could protect his estate in that way.

JUDGE CLARK: How would he always know, too? That presupposes that he can be sure of knowing every possibility of suit against his estate.

PROFESSOR SUNDERLAND: Certainly the representative of the deceased person is more likely to know about the death than the parties on the other side of the litigation.

JUDGE CLARK: That wasn't quite the point.

PROFESSOR SUNDERLAND: It seems to me it is all right to put the burden upon them.

DEAN MORGAN: Would they know about the litigation, though? That is the question.

PROFESSOR SUNDERLAND: Almost certainly. Why not?

DEAN MORGAN: Why? That is what I want to know; not why not. He may not know about the litigation.

SENATOR PEPPER: If the representative does know that the decedent has died, that he has become the executor or administrator, his business is to sit tight and not to communicate the fact to anybody, because if it isn't discovered within two years, the action is dismissed as to him by compulsion under Rule 25.

THE CHAIRMAN: Suppose the case was pending two years.

If you had that situation arise, it would mean that nothing at all was done on the case for two years. If a lawyer went into court representing John Jones and continued to represent him and pretended that he represented him for two years after his client was dead, he would be disbarred. So, I think that this is a case of a suit being practically abandoned for two years, with a dead defendant, and the lawyer who represents him has to default, walk out of court, or else say that he hasn't any client.

SENATOR PEPPER: I didn't mean a case in which there was representation by counsel, but here is a defendant, one of a good many, who dies, and letters are taken off testamentary of administration. No counsel is involved, and nothing happens within two years which requires them to participate in the proceeding. The representative just sits tight. By compulsion, the action is dismissed as to that defendant at the end of two years. A case of that sort which involves hardship has never come to my attention, but here we have a responsible bar association asserting that, as a matter of fact, in various cases this thing has happened without fault of anybody and that the penalty is an unreasonable one.

THE CHAIRMAN: You mean a case where a man is sued and summons is served on him, where two years go by after his death, nothing is done in the case, and he is not represented by counsel. How could that be unless he dies between the date

the summons was served on him and the time necessary to go to a lawyer and employ him to appear for him? He certainly is represented by counsel, or else he has defaulted anyway. I can't think of a case where any active proceedings could be taken in a lawsuit during that two-year period with a dead plaintiff or a dead defendant. It is an abandoned case; practically, it is permitted to die.

The statute says you have to revive it within two years. You let it kick around for two years and don't do anything because your defendant is dead or your plaintiff is dead, you don't ask for substitution, you practically have notified the people that you have lost interest in the case, and they go ahead and settle up their affairs regardless of the lawsuit. A little while after, along comes an application for substitution.

I think there must be some reason back of these statutes because they are so old and have been there so long. It may be that if we studied the thing, went into it, and looked up the basis for it and what the courts have said about the reasons for it, we might conclude that they aren't well founded, but I hesitate to brush all that stuff aside on a discussion around this table as to what we think might happen in a certain case, unless we plowed into the matter deep enough to know why these statutes have remained on our books for years and years and years without any objection from the bar or the

courts or anybody else.

SENATOR PEPPER: Perhaps I laid too much stress on this statement which is asserted as a matter of fact by the Chicago Bar: "In some instances the litigation remained active, and counsel for the plaintiffs, as well as counsel for defendants, assumed in perfect good faith that the party or parties defendant were still alive." Either that is a fact or it isn't, but if it is a fact, it is a pretty good reason that, in that state of excusable ignorance, there should not be a compulsory dismissal of the suit as to the dead man. If they are mistaken, if they have stated that those are facts and they are not, I have nothing more to say.

JUDGE CLARK: Mr. Chairman, this case from the Sixth Circuit is perhaps interesting both ways and presents the question as clearly as you might wish. I might say the court was divided there. Judge Simons, who dissented, said that since we had not included 25 in 6(b) before, he thought there was still time. This was a suit by a bank receiver Anderson. There have been quite a few cases by Anderson. Some have gone to the Supreme Court.

"The appellant, receiver of The National Bank of Kentucky, moved in the district court to revive against the respective executors of seven defendants named in civil actions brought against them, while alive, to recover stock assessments held lawful in Anderson v. Abbott, 321 U.S. 349." That is the

Supreme Court case that created a good deal of discussion at that time. "Each of the appellee executors had previously moved to dismiss the action, against his individual decedent, because not revived within two years after the death of the defendant."

I shall pass over some of the discussion and come down to a description of the parties.

"There is no factual controversy presented by this appeal. Indeed, the facts of record are stipulated. It is conceded that each of the seven decedents against whose estates revivors are sought died more than two years prior to the time the bank receiver made his motion to revive. The estates of five of the decedents are 'still open and undistributed,' the estate of one 'is still open,' and the state of the seventh, Albert Yungkau, was 'immediately delivered to the beneficiaries of his will.'

"It is stipulated that in each instance the appellant receiver had no knowledge of the death of the defendant shareholder until 'after the two-year period fixed by Rule 25 had expired.' It is further agreed that the receiver has been diligent in the performance of his duty; that he brought actions against approximately 5000 of the 6000 shareholders of Banco-Kentucky Company [that is a subsidiary or holding company, I forget which, which was held also responsible; that was the Anderson v. Abbott case in the Supreme Court] who

lived in all parts of the United States and some even in foreign countries; that many of these shareholders during the progress of the litigation changed their residences; and that with the limited staff at his disposal, it has been 'impossible for the receiver to learn of the movements and residences and even the death of defendants, and without such knowledge he could not bring actions for revivor until after he learned of the death.'"

I think that is all the statement of facts. I will give you any more that you want. The argument on one side says you can't do it, and on the other side it says you can.

DEAN MORGAN: Does it give any of the history back of this thing?

PROFESSOR MOORE: The majority takes the position it is essentially a statute of limitations there.

MR. LEMANN: Did that come up after our rule?

JUDGE CLARK: Yes. That is just decided.

MR. LEMANN: They held that the time could not be extended?

DEAN MORGAN: That is right.

JUDGE CLARK: Under our present rules, yes.

MR. LEMANN: Was there an attempt to get the time extended? There was an attempt to make a substitution after the time expired. One of the questions was whether under our then rule--they give the rule then in effect, the rule as it

then stood and as it now stands--it would have the same effect that it would have by express provision under this.

JUDGE CLARK: This is what the majority (Judge Martin) said:

"The language of the rule is clearly imperative. Prior to the adoption of Rule 25(a)(1), the period of limitation for reviving an action against the estate of a defendant was fixed by Section 778 of the Judicial Code at two years after his death. No purpose is manifested to change the limitation period in the adoption of the civil procedure rule in question. On the contrary, the same limitation is written into the rule. If, within two years after death, substitution of the proper parties has not been made, the rule commands the court to dismiss the action against the deceased party."

JUDGE DOBIE: Those would be the facts in the case most likely to happen, where a receiver of a national bank was enforcing the old double liability of stockholders. There would be sixty, seventy, a hundred, or two hundred people.

THE CHAIRMAN: Five thousand.

JUDGE DOBIE: Yes.

THE CHAIRMAN: Of course, that is a very extraordinary case.

JUDGE DOBIE: Yes, it is an unusual case. They would be scattered all over the land. He said in the opinion that the receiver couldn't keep up with their movements, their

deaths or marriages or births or things of that kind.

MR. LEMANN: I have a bank receivership case I have been thinking of. I have been in it seven years now. It doesn't present the death possibility, I hope. I have been thinking, while I listened to the discussion, that I think it might operate to delay appeal. If you were the plaintiff and had a man die, you might not know it for two years. I just wonder whether we would do any harm by permitting the court latitude to extend the time. If that were all put up to the court, there would have to be some reasonable showing of why it was not done.

DEAN MORGAN: It seems to me the question is whether we want to change the statute.

MR. DODGE: We have changed a great many statutes.

DEAN MORGAN: But this is a statute of limitations.

THE CHAIRMAN: You see, under the old system when a party died, the suit abated. The liability might terminate, and that ended it. Even though the death didn't end the liability, it abated, and then you had to go through the rigmarole of bringing a suit to revive the action. That was a new suit, in effect, which you had to bring. The legislature naturally placed a statute of limitations on it, a short one, two years. For a good many actions, we have a two-year statute, a three-year statute, and a one-year statute. So, they placed a statute of limitations on the revival of the

action. They had to place some limit. Those who want to change this draft now would like to leave discretionary with the court what the statute of limitations is. You could revive the action ten years afterward if the court thought it just, fair, and right.

MR. LEMANN: Could you bring a new suit against the heirs of the distributees and rely on the original suit as interrupting the statute of limitations?

THE CHAIRMAN: I don't understand your question there. As I understand it, it has to be brought within two years.

MR. LEMANN: This is a substitution, isn't it, in Rule 25?

JUDGE DOBIE: You mean bring a new suit instead of continuing the old suit.

MR. LEMANN: That is right; bring a new suit. I wonder whether the receiver in this Anderson case could have turned around and brought a new suit.

DEAN MORGAN: This statute of limitations would prevent the revival. That would be an action to revive.

MR. LEMANN: You couldn't bring an independent action on the individual cause of action? That is what I was asking.

SENATOR PEPPER: In most cases these questions of limitation arise as respects the initiation of the suit. This is a case where a suit is pending; the man is a defendant, and

other people are being held liable on the same cause of action. The question is whether the mere lack of knowledge that he has died is to increase the percentage of liability of his co-defendants and exempt him. It just doesn't impress me as reasonable.

JUDGE DONWORTH: We should bear in mind, I think, that there is a parallel question also covered by Rule 25 in reference to an officer going out of office. The language of the section we have just been considering about the two years, death, and so forth, is that "such courts shall have jurisdiction within two years from the date of the death of the party to the suit to issue its scire facias", and so forth. In the case of the officer who goes out of office, the language is a little different and the term is different. I am now reading from Section 780, speaking about the failure of a person to hold an office, and so forth. The language is:

"it shall be competent for the court wherein the action, suit or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the service, it be satisfactorily shown to the court", and so forth.

So, the principle involved in this other section is the same as in the section we have been considering, but the

time is very much broader, only six months in this case. I suppose one question is whether our general language will be such that it would enable the court to grant an extension in both of those sets of cases.

THE CHAIRMAN: Here is the situation: Suppose you want to modify the present rules about revival or substitution and make them more amenable to the circumstances of a particular case. If you simply strike 25 out of 6(b), leaving 25 just as it is, you still leave a conflict in the decisions between that court you just quoted from, the Third Circuit, and others, evidenced by the disagreement among the judges themselves as to whether, even though 25 isn't mentioned in 6(b), the court has a right to set out to grant relief against the limitation.

Everything that has been said here this morning against the old statute, both as to officers, personal death, transfer of interest, and so on (transfer of interest naturally would be a question for the plaintiff, I suppose, to have the assignee to step into the case), is based on the theory that the party has been trapped by ignorance of what has happened. Isn't that right? You don't claim in these rules that if a fellow knows that his adversary is dead and doesn't move within two years, he can then substitute, and the same with an officer.

Why not leave 25 in, if you are going to grant

modification. Leave 25 as it is in 6(b), make it one of the rules that you can modify, that the court can enlarge except as therein provided, and then go to Rule 25 and put a short clause in there stating that any substitution provided for in the rules may be allowed in the discretion of the court beyond the time limits specified, provided a party has been misled, provided that, without fault of his own, he is ignorant. Put some little clause like that in there, so that if a man goes merrily along and if the lawyer on the other side doesn't tell him that one of his clients is dead, and he is a bank receiver and can't keep track of all the defendants, and so on, if he is ignorant of the fact which should have made him come to court, without fault of his own, the court in its discretion may allow the substitution at a later date.

That would be a just rule and nobody could kick about it, but if you simply place no restriction at all on the court's power, give unlimited power, without any limit on his authority to grant extensions, I don't like that.

PROFESSOR SUNDERLAND: That would make it much clearer in view of that Sixth Circuit decision, certainly. Then you would know exactly what the power of the court was.

THE CHAIRMAN: You would have to do something, because if you struck 25 out of 6(b) you would have this difference of opinion as to whether 25 can be modified under 6(b).

PROFESSOR SUNDERLAND: I think your suggestion is

much better than just striking 25.

THE CHAIRMAN: The man has a statute of limitations on him if he knows the fact or ought to know it and doesn't move.

MR. DODGE: You think that would be better than to substitute for the words in Rule 25 "within two years", the words of the old equity rule, "within a reasonable time"? Yours is more specific.

THE CHAIRMAN: It is a statute of limitations, and "within a reasonable time" doesn't depend on the knowledge. I think two years is a reasonable time, if you know the fact and there is no argument about it.

MR. DODGE: Certainly. The Supreme Court has so ruled.

THE CHAIRMAN: It fluctuates with the individual qualities of the judge.

MR. DODGE: I think your suggestion is a good one.

PROFESSOR SUNDERLAND: I move that the Chairman's suggestion be adopted.

JUDGE DOBIE: I second the motion.

THE CHAIRMAN: That means that we will leave 25 named in 6(b) as one of the rules the time limit of which cannot be enlarged except as provided by the rule itself, and then we will put in 25 a short section.

JUDGE CLARK: Do you want to decide now whether you

are going to put something in, or are you deciding now simply to postpone that until 25, which I think is the appropriate place to have it? Are we also deciding affirmatively that we are going to change 25?

THE CHAIRMAN: We haven't voted on it yet.

JUDGE CLARK: I mean, does this motion carry with it that action?

MR. LEMANN: If we do what the Chairman suggests, will we have any fixed limit in 25 or will we just say "two years unless the court sees fit for reasonable ground"?

THE CHAIRMAN: No. You have limits in 25 that can't be altered except as provided in 25, and 25 says they can be altered if the party seeking the substitution, and so on, without fault of his own, is ignorant of the fact that the event occurred which was cause for substitution. I haven't drafted it properly. In other words, a man can't linger six months after an officer is dead and revive a suit against his successor, if he knows all the time during that six-month period that the officer is dead.

MR. LEMANN: I am just wondering whether you would have to refer to 25 in 6 if you changed 25. You are really providing the possibility of extension in 25 itself.

DEAN MORGAN: That is what 6 says.

PROFESSOR SUNDERLAND: We have other cases just like that, where the other rules referred to have provisions within

them providing for extension.

THE CHAIRMAN: "except to the extent and under the conditions stated in them", you see. That applies to all those. Each one of them has some provision for extension by the court.

MR. DODGE: You are talking only of 25(a) as to death of a party, and not as to 25(d) about public officers.

THE CHAIRMAN: I am talking about all of 25.

MR. DODGE: Including the public officer business?

THE CHAIRMAN: If a public officer dies in six months and you are ignorant of the fact and the government doesn't tell you, I don't see any difference between that and a state case when it comes to fair treatment.

JUDGE CLARK: I should like, Mr. Chairman, to vote against changing the federal rules of limitation. I presume, then, I should vote against this motion, although of course I am in sympathy with the idea that 25 is the place to consider it. I just want to make clear the way to vote.

I want to say, while I know it is very popular now to do away with all limitations and ideas of res judicata, and so on, I think it is really unfortunate myself. Limitations generally are a wise thing. This is an old one that, so far as I can see, has been in line with the general views. I think in the case of the receiver in the national bank case cited, it was a good thing to have a limitation. That was a very serious

case where the Supreme Court extended liability to the stockholders of the holding company, and the fact that these estates had been in process of distribution (some of them had been distributed) was sound reason for saying it couldn't be revived against them. Personally, I think it would be a little too bad to take away the two-year period.

MR. LEMANN: It might have happened in the same way if you hadn't had a holding company, with a receiver with a lot of defendants, if there hadn't been any holding company there, 5000 direct shareholders. I don't think that is much of a distinction on the point.

JUDGE CLARK: I don't want to make a distinction on that. I was just saying that that shows the remoteness of the claim, the fact that the executors, and so on, would hardly expect this. It is another suggestion. A statute of limitations often gets rid of claims that don't have much life, and certainly start up with a lot of life. That is the only point of showing the attenuated circumstances of the right. That is the only objection.

DEAN MORGAN: Mr. Chairman, are we going to take up 25(a) now and dispose of it?

THE CHAIRMAN: We are hot on the trail. Why revive all this thing after we have laid it aside? I think we might settle this thing one way or another right now.

DEAN MORGAN: We don't need any motion on 6 if you

are going to leave it as it stands. If we are going to vote on 25(a), I just want to ask whether we have authority to remove a statute of limitations.

PROFESSOR MOORE: We did change the statute a bit as to substitution of officers. The statute there required that substitution be made within six months after the officer's death or separation from office. The rule permits substitution within six months after the successor takes office. So, we did modify Section 780 originally.

THE CHAIRMAN: When I made the suggestion, I was not withdrawing my feeling that I think we should not tamper with this thing at all without knowing more.

JUDGE DOBIE: Don't we state in the rule that any statutes which are in conflict with this rule are to that extent abolished and those that are not remain as before?

THE CHAIRMAN: Provided they don't affect the substantive rights of the parties.

JUDGE DOBIE: Yes, and don't extend jurisdiction.

DEAN MORGAN: That raises the old question of whether a statute of limitations is substantive or procedural. There is a lot of conflict on it. It depends on the way it is raised, and so forth. I think you have got to consider both those things if you are going to fool with 25(a). Then, is this provision for action against the officer really a consent by the United States to allow that sort of thing?

THE CHAIRMAN: There is another point.

DEAN MORGAN: If that is true, you couldn't change the statute on that. I don't think you can just pass this off on the ground that you want to do what is equitable, as if you were a legislature and were sitting on questions of substantive law as well as on questions of procedure.

MR. DODGE: Do you think the limitation of two years on bringing in an estate is substantive law?

DEAN MORGAN: If it says so, if it says the action is barred. I don't know whether it is substantive or procedural. There is certainly plenty of question on it.

PROFESSOR SUNDERLAND: This relates to a pending suit, not to the commencement of a suit. I think the question might be a different one.

DEAN MORGAN: It is abating the action. The action abates it in common law, and the statute says it can be revived within two years. That is what it says.

MR. HAMMOND: You are using the term "jurisdiction," too.

DEAN MORGAN: It puts it in terms of the jurisdiction of the court. So, you run up against both jurisdiction and the question of substance there. I think that has to be debated.

THE CHAIRMAN: I think the course to pursue is a pretty formidable point as far as the officer.

DEAN MORGAN: When you fool with officers of the

United States, I think you are monkeying with a buzz saw.

JUDGE CLARK: I might add on the question of the officers that Professor Borchard, of Yale, has written at length and very persuasively, I think, that the provision in Rule 25(d) that "Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States", is foolish. I should think that if we were going to redraft it, we ought to take out things of that kind. The question is whether we should start doing it. If you are going to change the rule, why do you want anything about that? I mean, if that is our power, if we are a legislative body, if we are going to do it that way, we ought to do really a nice job.

JUDGE DONWORTH: I think, in spite of Professor Borchard, that that language has a function there. We know the case of Ex parte Young, where the Supreme Court held that while you can't sue a state, you can sue an officer of a state. Suppose that after declaring that he was going to enforce a state law whose validity was in question, Mr. Young went out of office and was succeeded by Mr. Jones. It should not be proper to bring Mr. Jones in unless Jones in some way had said, "I am going to pursue that unconstitutional course." I

think there is a reason for that language there.

JUDGE CLARK: I suppose in one sense that is true. The only difficulty is that from the standpoint of the other party, there you are, you haven't got protection, and you are just sort of in suspense, so to speak. You may be going to do it; you may not. This really forces the issue, so to speak, and you can get the case decided and ended.

JUDGE DOBIE: There is a good deal in what you say, Judge, because in that Young case they said when he acts beyond the Constitution he is not acting as attorney general at all; he is really a private individual. I have always doubted that he was acting as attorney general. Anyhow, that is what the Supreme Court said, and they have never gone back on it.

JUDGE CLARK: That is true, but how do you get protection in that case in view of the litigant who has been threatened? A new man comes in, and there you are.

THE CHAIRMAN: You have to start a new suit, get a new injunction order, and everything else every time an officer resigns, and they were resigning periodically in those days to get rid of those suits. They were resigning so fast you could not keep up with them.

JUDGE CLARK: Of course, they do resign today, too.

MR. LEMANN: I see that in the note to Rule 3 we said: "When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule",

and so on. "The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations." I remember that we talked about our power. I always thought a statute of limitations was procedural, but I remember we have had some debate about that, and you see that this note rather saves that point. It says we are not too sure what the Supreme Court may hold about it.

THE CHAIRMAN: The Supreme Court has held that the burden of proof isn't procedural, that it is a matter of substantive right of the litigant. We can't change it by these rules.

DEAN MORGAN: That is right.

JUDGE DOBIE: Isn't it pretty generally held that these statutes concerning adverse possession of land are practically entitled that they are substantive rights? Isn't that true?

THE CHAIRMAN: That is another thing.

SENATOR PEPPER: We are discussing two questions at once.

PROFESSOR SUNDERLAND: We have changed the time to bring appeal, which is a time limit during the pendency of the suit, and we didn't consider that we were getting into substantive law there.

SENATOR PEPPER: I think we have discussed it long enough. In order to bring the thing to a head, I am going to make a motion which takes no account of this public officer business in subsection (d), which deals only with (a) of Rule 25. I do it just to get the thing disposed of one way or the other. I move that subsection (a) of 25 be so modified that the second clause of subsection (a) shall read as follows:

"The court within two years after the death, or upon cause shown within a reasonable time after the expiration of that period, may order substitution of the proper parties."

JUDGE DONWORTH: I second the motion.

SENATOR PEPPER: That is just to deal with the question that was discussed in that receivership case, which is evidently in the minds of the Chicago Bar people.

THE CHAIRMAN: You said clause what? Clause two?

SENATOR PEPPER: The thing now reads: "If a party dies ..."

THE CHAIRMAN: Clause one. I thought you said clause two. Didn't you?

SENATOR PEPPER: I beg your pardon. I am now reading the whole thing, so that my reference to clause two will be clearer. What I meant by clause two was the matter after the comma, beginning with the words, "the court", but I will read the whole thing.

"If a party dies and the claim is not thereby

extinguished, the court within two years after the death, or upon cause shown within a reasonable time after the expiration of that period, may order substitution of the proper parties."

That may not be the best draftsmanship, but I think it conveys the idea sufficiently to vote it up or vote it down.

JUDGE DOBIE: In other words, you remove the absolute prohibition at the end of two years and leave it in the discretion of the court.

SENATOR PEPPER: That is right. I make two years the bar unless cause is shown.

JUDGE DONWORTH: You put in two thoughts in that connection: first, that there must be a showing of cause; and, second, that it must be done within a reasonable time.

SENATOR PEPPER: That is right, the old Equity Rule 45 as to the time, showing that the normal case is one for the application of the two-year period.

THE CHAIRMAN: Are you ready to vote on that?

[The question was called for.]

THE CHAIRMAN: All those in favor of revising our proposed Rule 25(a)(1) accordingly say "aye"; opposed.

JUDGE CLARK: No.

THE CHAIRMAN: The "ayes" have it.

We don't need any change in Incompetency, do we?

JUDGE CLARK: I shouldn't think that was limited as to time. Mr. Moore was raising the question whether the two-

year limit didn't apply there, but I should think not. That was something that we brought in. That was not in the statute.

THE CHAIRMAN: I am afraid it does. I think Mr. Moore is right.

"(b) Incompetency. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative."

JUDGE CLARK: A similar sentence is in the next one.

THE CHAIRMAN: It doesn't state any time limit, though, does it?

DEAN MORGAN: Served on the party as provided in Rule 5.

MR. HAMMOND: The motion is served. It means served within the time.

THE CHAIRMAN: What about (b), Incompetency? It is more difficult to find whether a man has become incompetent than it is to decide that he is dead.

MR. LEMANN: It would be consistent to make it read, "within the period provided therein", after the reference to subdivision (a).

THE CHAIRMAN: If there is anything in the point that (b) relates back to (a), we have already taken care of it.

MR. LEMANN: No, because you have put it back to (a) only on a particular point, as to motion served as provided.

There may be some doubt as to whether the present language reads the limitation as to time into (b).

THE CHAIRMAN: I said, if it does now, we have taken care of it.

MR. LEMANN: If it does now, but it doesn't, do you think? At least it is open to argument. Wouldn't it be better to make it explicit?

MR. DODGE: There are no time limits at all in (b) or (c).

MR. LEMANN: Mr. Mitchell says it may be argued that (b) adopts the time limit of (a), but I think that would be doubtful.

THE CHAIRMAN: There hasn't been any question raised on the rule, I suppose. There is no occasion for dealing with (c), Transfer of Interest, because there you go on with the stockholders substituted or those originally named. You do either, so you don't lose anything.

SENATOR PEPPER: I think we had better let the public officer business alone, for the reasons suggested by Judge Donworth.

PROFESSOR SUNDERLAND: I think there is less reason to apply this flexible rule in the case of officers because there won't be a lot of officers, and an officer is a conspicuous person. You are pretty sure to know whether he is alive or dead.

THE CHAIRMAN: I have sat in the Supreme Court and seen very distinguished members of the bar thrown right out in the snow because some officer they were suing had died and there had not been a substitution for at least six months. What do they call it? What kind of process is it you go through with?

JUDGE DOBIE: Scire facias. That is abolished now.

THE CHAIRMAN: I think that the question of the consent of the community to be sued, as Eddie Morgan says, enters into this. We have agreed to change 25 for relaxation in the case of individuals.

DEAN MORGAN: Are you going to put a time limit in (b) and (c) also?

PROFESSOR SUNDERLAND: I move that the time limit be inserted in (b) and (c).

DEAN MORGAN: I think it is without time limit now.

SENATOR PEPPER: If there is now a time limit on (b), it is because of the provisions of (a), and if we change (a) I should think we would leave the situation as it was before, namely, that the limit fixed by (a) is applicable to (b). I should think the same thing would apply.

DEAN MORGAN: But is it applicable?

MR. LEMANN: Is that a correct assumption? Would it be correct to assume that (b) does necessarily require the limit of (a)? I think that is arguable, don't you think so, on

the wording of (b)?

DEAN MORGAN: I supposed it was without time limit.

MR. LEMANN: I did, too. I should think, if there was any argument, it was in favor of the idea that there was no time limit.

PROFESSOR SUNDERLAND: It ought to have the same time limit as (a), and it ought to be worded to make that clear.

MR. LEMANN: Instead of assuming that it is clear that (b) does carry over the time limit of (a). I wouldn't think that was clear.

SENATOR PEPPER: It could easily be taken care of by making (b) read as follows: "If a party becomes incompetent, the court, within the limit of time specified in subdivision (a) and upon motion served as therein provided, may allow", and so forth.

THE CHAIRMAN: Suppose a man who is a defendant becomes incompetent, as crazy as a bedbug, but he is still weaving around, but the plaintiff doesn't know it. That doesn't say that the judgment is incompetent. After he has been crazy for two years, his lawyer steps up and says, "This fellow has been nutty for two years, and the time limit has gone by. I move to dismiss the suit." It is a very different thing where there is a event that happens, like a death or an adjudication of incompetency or something that is a visible act, perceptible to anybody who is around where it

happens. Rather than say that you have a time limit on a fellow who becomes incompetent, I think you had better leave it as it is.

MR. LEMANN: Do the words "his representative" at the end of that paragraph imply that there has been some judicial proceeding?

SENATOR PEPPER: I was proceeding on the theory that incompetent means one who has been declared incompetent as evidenced by the fact that a guardian or other representative has been appointed.

DEAN MORGAN: He may have been appointed after the two years.

THE CHAIRMAN: Yes, but it doesn't say adjudicated incompetent.

SENATOR PEPPER: I will modify my suggestion so it will read this way: "If a party has been adjudged incompetent, the court, within the time specified in subdivision (a) of this rule and upon motion served as provided therein, may allow the action to be continued".

PROFESSOR CHERRY: The time limit beginning with what, Mr. Chairman, the actual incompetence or the adjudication?

JUDGE DOBIE: The adjudication.

SENATOR PEPPER: The adjudication. The adjudication is the equivalent of the death that is referred to in the other subdivision.

PROFESSOR CHERRY: Mr. Chairman, isn't the situation that we had a two-year statute which we had to do something about when we were framing this rule originally, and we went as far as that goes and used it, feeling that that was the settled practice? As to this, we don't have any, do we? As far as I recall it, there has been no suggestion of any difficulty about (b) or about (c). Aren't we stepping into something here that we ourselves have not considered before and on which there has been no suggestion of difficulty from the judges and lawyers? I would be inclined to guess that the time limits for (a) would not apply to (b). Why should they?

THE CHAIRMAN: That is the question in my mind. Why should they? What is the origin of subdivision (b)? Where did we get it?

JUDGE CLARK: They came from state statutes. They were not in the federal statutes at all.

THE CHAIRMAN: What do the state statutes say?

JUDGE CLARK: I think New York is one.

THE CHAIRMAN: How are they worded?

JUDGE CLARK: These are a combination and adaptation of the New York Civil Practice Act, California, and also Nevada. Do you have the statutes?

PROFESSOR MOORE: No.

THE CHAIRMAN: Why not let it rest as it is? It is not vital about the time limit there anyway, and there would

be difficulties. If you say he must be adjudged incompetent, then even if you know he is crazy as a bedbug, you continue the suit against him until some of his friends or relatives step in and have him adjudged, and then they force you to bring in his representative. If a man is incompetent and obviously so even though he hasn't been adjudged, ought not the plaintiff or the other party to be able to implead his representative and to have the power to do it right away instead of having a crazy man in the courtroom?

JUDGE CLARK: I had occasion to deal with a case of transfer of interest, subdivision (c), and I know there is no time limit in that, but that is optional.

THE CHAIRMAN: You don't lose anything by not substituting, so there should not be any time limit.

JUDGE DONWORTH: I favor the suggestion of the Chairman to let this alone in view of the difficulties that would arise from any change.

MR. HAMMOND: What is the time limit now? Is it governed by (a) or by (b)?

JUDGE DONWORTH: At any time if the man becomes incompetent, no matter how long. The court can take care of the situation as it arises.

SENATOR PEPPER: You see, there is no such penalty for inaction for two years under subdivision (b) as there is under (a). The vice of (a), as I saw it, was that a case

might arise in which liability would be extinguished on account of inaction within two years. There is nothing of that sort in (b). Either (b) is subject to the time limit of (a), or it isn't. If it is, we don't have to change it. If it isn't, it isn't within the mischief of that.

THE CHAIRMAN: My own feeling is that there really is a very thin case to claim that there is any time limit now. It says, "If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow". Now you go back to (a), and you find the time limit of two years and the matter of service in two distinct and separate sentences. It says, "the court within two years ... may order substitution", and then there is another provision in which it goes on to say, "The motion for substitution may be made by the successors of representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5". Rule 5 doesn't say anything about the time limit. So, I really feel that (b) does not incorporate the time limit now in (a). There is no reason that it should.

PROFESSOR SUNDERLAND: There is no provision for dismissal in either of those, which would indicate there was no time limit.

JUDGE DONWORTH: Yes. You think that is right, don't you?

PROFESSOR SUNDERLAND: I would think so, yes.

THE CHAIRMAN: Yes. The action isn't subject to dismissal simply because the defendant becomes insane, and you haven't done anything about it.

DEAN MORGAN: That is right.

MR. DODGE: I think (b) and (c) should stand as they are.

THE CHAIRMAN: Then, if there is no objection, we have adopted the amendment of Senator Pepper on 25(a)(1) and have made no change in Rule 25 in other respects, and we have left the reference to Rule 25 in Rule 6(b). Is there anything else on Rule 6(b)?

MR. HAMMOND: I have a question I would like to ask, if I may. In line 14 of 6(b) it says, "but it may not extend the time for taking any action under", and then it sets out the rules. My question is whether the court may permit the act to be done after the time. I think the purpose of changing "enlarge the period" to "extend the time" was both to prohibit an extension before the period expired and to prohibit the court from permitting the act to be done after the period expired, you see, but I question whether the mere change of the word "enlarge" to "extend" does that.

I think it would be better to prohibit both expressly. I would leave "enlarge" the way it is, and then I would put this in after the "(g)" in line 18: "or permit the acts prescribed

under those rules to be done after the expiration of the period specified therein".

JUDGE DONWORTH: What subdivision of Rule 6 are you considering?

THE CHAIRMAN: Rule 6(b), line 14. Your view is that when it says "may not extend the time", that does not apply to an extension before the expiration, but only afterwards, or vice versa?

MR. DODGE: Vice versa.

MR. HAMMOND: It applies only to an extension before expiration of the time.

THE CHAIRMAN: It is not an extension of time to do it after the original time has expired?

MR. HAMMOND: Yes, sir, that is it. I think we ought to follow the first part of the rule, in other words, in connection with this. You see, (1) up there in line 5 is ordering the period enlarged before the expiration, and then we put in (2), "upon motion made after the expiration of the specified period permit the act to be done". I rather thought that we ought to make it perfectly clear that we ought to do the same thing when we got down to those exceptions.

THE CHAIRMAN: The question is whether the word "extended" applies to an order made after the original time fixed by the rules has expired. Why doesn't it? Isn't that extending the time?

JUDGE DONWORTH: I think it is.

THE CHAIRMAN: I think the point, however, is made that the term "extend the time" applies literally only to an order made for that extension before the original time expires, but it seems to me that either one is an extension.

JUDGE DONWORTH: Of course, the word "enlarge" is often used, but I don't see any difference between "extend" and "enlarge."

THE CHAIRMAN: The point that strikes me is that I didn't suppose there was, either, but now we strike out "enlarge" and substitute "extend." Does that have some significance?

MR. LEMANN: One trouble with "enlarge" might be that we ourselves have indicated in lines 7 and following that we thought "enlarge" was restricted to application made before the expiration of the period, and then we went on in (2) and made a special provision for what happens when you come in after the original period has expired.

THE CHAIRMAN: In line 7 we treat "enlarged" as applying to an application made either before or after expiration of the period.

MR. LEMANN: Do we?

THE CHAIRMAN: Oh, yes. We can't enlarge it unless the application is made before expiration, which means that an enlargement would apply to an application made afterwards,

don't you see?

MR. LEMANN: Yes.

PROFESSOR SUNDERLAND: Then, we ought to leave in that word "enlarge" in line 14, oughtn't we, and say "enlarge or extend"?

MR. HAMMOND: And then stick in this other thing: "or permit the acts prescribed under those rules to be done after the expiration of the period specified therein".

THE CHAIRMAN: If you said, "but it may not enlarge the period or extend the time for taking any action under Rules 25," and so on, "except to the extent and under the conditions stated in them", then you would have it. What do you think about it?

MR. HAMMOND: You still have "enlarge or extend".

JUDGE CLARK: We changed the wording a little to "extend the time" in an endeavor to cover both (1) and (2). I suppose there might be some question, but it is hard to prophesy on this this sort of thing. It seems to me the intent is so clear that I can't believe we are going to revamp 25, 50, 52, and so on, when we said they haven't done it.

THE CHAIRMAN: If you agree with Ed in the proposition that you are going to leave "enlarged" in line 7, you should not strike it out in line 14 and use the word "extend" because you are drawing a sharp distinction between the two. Why did you change "period" to "time", anyway? What difference

does that make?

JUDGE CLARK: It is hard to think back now, but it would be my idea that we did it in order to cover both (1) and (2). That is why we avoided "enlarge the period" and tried to get a more general expression.

THE CHAIRMAN: The trouble is that you kept it in 7 in language that plainly implies that the enlargement refers to time before or after the original time has expired. You say you can't enlarge it if the request is made after the time, don't you see?

JUDGE CLARK: Mr. Moore, why did you do this, anyway?

DEAN MORGAN: Couldn't you avoid all that, Mr. Chairman, if you just said that the court may not enlarge the period specified in Rules 25, and so on, except to the extent . . .?

MR. LEMANN: Of course, this is just a prohibition, anyhow, isn't it? It says you can't do it unless the rules that are referred to permit it, and if those rules are plain that you can permit it before or after the period has expired, isn't that all that is important? Could you reasonably say that under this "but" clause we are talking about here you could permit the act to be done after the period expired, although you couldn't extend the time? I shouldn't think so. In other words, this is a negative clause that we are talking about in 14 on.

What would be the argument, Mr. Hammond, that someone

would make under your point? How would it come up?

MR. HAMMOND: After the period had expired, someone might come along and say, "The rule says you may not extend the time. 'Extend the time' means the same as 'enlarge.' It has to be done before the period has expired."

MR. LEMANN: Do you think they mean the same?

MR. HAMMOND: Yes, I do.

MR. LEMANN: Then, your argument would be that you couldn't have extended the time if I had asked you to give me more time before the original period had expired, but you could give me more time now that the original period has expired. That would be a rather difficult argument, I should think.

MR. HAMMOND: You can permit the act to be done following the previous language of the rule, where you make a distinction under (2).

JUDGE DONWORTH: Won't the Court say that if the Committee has changed the language, it must have intended some change in the intent? It seems to me we should not change any language unless there is something vital to be reached by the change.

MR. HAMMOND: My point is that I think we ought to explain what the change is, more than just by substituting the word "extend". It is explained in the notes, but we ought not to have to rely on the notes. In the notes on page 6 we say:

"The phrase 'extend the time' is substituted for

'enlarge the period' because the former is a more suitable expression and relates more clearly to both clauses (1) and (2)."

THE CHAIRMAN: Why not make the same change in line 7, strike out "enlarged" and say--

MR. HAMMOND [Interposing]: What I would do is leave "enlarged" up there, leave "enlarge" in 14, strike out "extend the time", and then add the clause that I suggested before: "or permit the acts prescribed under those rules to be done after the expiration of the period specified therein".

SENATOR PEPPER: Just to bring the thing up, I move the suggestion of Mr. Hammond. Let's vote it up or down.

THE CHAIRMAN: You said one or the other.

SENATOR PEPPER: He proposes to keep the rule exactly as it is, leaving "enlarge the period" in line 14 in consonance with the use of the word "enlarged" in line 7, and then to make the insertion in line 18, which would have the effect of dealing with the case in which a question is raised as to whether the act can be permitted if application to do it is made after the enlarged or extended time has expired.

THE CHAIRMAN: I would like to have him read his exact provision, so that we can have the exact wording of it.

MR. HAMMOND: All right.

THE CHAIRMAN: Commencing in line 14, "but it may not ..."

MR. HAMMOND: "but it may not enlarge the period for taking any action under Rules 25, 50(b), 52(b), 59(b), (d), and (e), 60(b), and 73(a) and (g), or permit the acts prescribed under those rules to be done after the expiration of the period specified therein, except to the extent and under the conditions stated in them."

MR. DODGE: How does that change the existing rule? It says in substance that it may not exercise either of these powers with respect to these various rules, except to the extent and under the conditions stated in them.

SENATOR PEPPER: As I understand it, the contention is that the existing rules, by using the term "enlarge" or substituting for it the suggested word "extend", deal only with the case in which an enlargement or extension is asked for before the expiration of the original limit and that they are silent as to the situation in which an enlarged or extended period has expired. Then the question comes up whether on motion the court may permit the act to be done, and Mr. Hammond's suggestion is that we ought to negative the power of the court to do that by the proviso that he has inserted.

THE CHAIRMAN: You see, Robert, the whole thing comes about by the construction in lines 5 to 12. It is divided into two paragraphs, numbered (1) and (2). The first is that "the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged

if request therefor is made before the expiration of the period originally prescribed". The second is, "upon motion made after the expiration of the specified period permit the act to be done". It treats enlargement as a thing granted before the time expires, and second, in a separate subdivision, it says a different thing; it says it may permit the act to be done on an application made after the time expires. It draws a distinction right there and places a meaning on enlargement which limits it to an extension or enlargement, or whatever you want to call it, that is made before the original time expired.

If you are going to let that stand, Hammond wants to preserve it later on by saying "enlarge", which covers subdivision (1) above, and also saying "may permit the act to be done or may not permit the act to be done", which covers the second case.

I think the trouble all arises because those two paragraphs in the early part of the rule are built that way. Isn't that your idea, or have I got it all wrong?

MR. DODGE: The idea is that it may not exercise either of these powers with respect to these excluded rules.

MR. HAMMOND: That is different language to accomplish the same thing, I think. The only point about it is that I think that after the period has expired under one of these excepted rules, somebody might come in and say, because of the previous wording of that, that even though the period

has expired, it may permit the act to be done after that period.

THE CHAIRMAN: I don't understand that. I can understand the enlargement permitting the act to be done afterwards, as if that wasn't an enlargement, but was an extension or some other phrase, but I don't get the idea there.

MR. HAMMOND: Maybe I haven't made it clear. You start out in the first part of the rule about general extensions of time. One says you can enlarge it if you do it before. Then you have a separate clause, and that says, "upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect". Then you make certain exceptions. The question is whether under those exceptions you have made it clear by merely changing the words "enlarge the period" to "extend the time" that you could not file a motion after the period had expired to do the act. I think somebody might well come in and say that. You certainly don't want to permit anybody under those rules to come in after the time for excusable neglect or any other reason to extend those times.

DEAN MORGAN: That is just what you want to do in 25(a).

MR. HAMMOND: That is a special provision stuck in 25(a), Mr. Morgan, and I think they certainly don't want it as to the others, do you?

THE CHAIRMAN: Why don't you do this and at least

cover my point? It says: "may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion order the period enlarged where the failure to act was the result of excusable neglect". You have used the word "enlarged" both times, and then when you come down to line 14 you don't stick to "enlarged" because it means both. You say "but it may not enlarge the period for taking any action under Rules", and so on, "except to the extent and under the conditions stated in them."

The idea that I see in the thing now is that the Reporter has put "enlarged" in line 7 as meaning only an enlargement before expiration of the original time, and in (2) he has treated the motion made after the expiration as not asking for an enlargement but for something else, permitting the act to be done.

I thought that Hammond's point was that down below, unless we covered both those cases, we were missing it. Why say "upon motion made after the expiration of the specified period permit the act to be done"? Why not say, "upon motion made after the expiration of the specified period order the period enlarged"? Call it enlargement, whether it is afterwards or before.

JUDGE CLARK: Apparently in our original rules we

didn't interpret "enlarge the period" that way. Then it read "or (2) upon motion permit the act to be done after the expiration of the specified period", and so forth. When we originally came to this we didn't think the period could be enlarged after it was closed.

THE CHAIRMAN: I have exhausted all my thinking on it. What is your pleasure? There is a motion before the house, which has been definitely read into the record, to change the verbiage. What do you think about that, Charlie?

JUDGE CLARK: I don't think it is necessary. I can't believe that this can be subject to any misinterpretation. It may not do any harm, but each time we come to these rules we get a little different quirk about them. You see from the note on page 6, which Mr. Hammond read, that we changed this language with the idea of making it cover both (1) and (2), and now we are really wondering if the change isn't wrong. I suppose we can't really prevent all sorts of questions being raised. We have to try to think whether we have covered the general intent.

THE CHAIRMAN: Why don't we strike out "enlarged" in line 7 and say "order the period extended if request is made before, and upon motion made afterwards permit the act to be done"?

JUDGE CLARK: That might be an advantage, don't you think?

THE CHAIRMAN: Then you are not snagged by using the word "enlarge" down in 14, which limits you to subdivision (1).

MR. DODGE: "Extend" covers both of them.

THE CHAIRMAN: It ought to.

MR. DODGE: It seems to me that no question could possibly arise there, really.

JUDGE DONWORTH: The situation is complicated, is it not, by the fact that after the letter (b) we entitle the whole subdivision "Enlargement." I haven't found out yet what is wrong with the present Rule 6(b) as now in force.

JUDGE CLARK: You mean why we made any changes at all?

JUDGE DONWORTH: Yes.

THE CHAIRMAN: You understand why the rules mentioned in lines 16 to 18 were inserted, don't you, Judge?

JUDGE DONWORTH: I haven't so far, but then that is a small matter.

THE CHAIRMAN: No, it is the whole basis of it. The point is that this general power of enlargement in Rule 6(b) has been construed by some courts to be applicable to Rules 25, 50(b), 52(b), 59(b), and so on, so as to enlarge the time specified in those rules even though they were fixed limits.

JUDGE DONWORTH: Which we do not favor.

THE CHAIRMAN: No. So, we mentioned them here to show that this broad power does not include tampering with those rules. However, that is another matter. That is not

what we are discussing here.

What is your pleasure? Was there a second to Mr. Hammond's motion?

JUDGE DOBIE: What is Mr. Hammond's motion again?

JUDGE DONWORTH: Shouldn't Mr. Hammond make a draft of this subdivision as he proposes to make it?

THE CHAIRMAN: I remember what he said. In line 14, "but it may not enlarge the period for taking any action under Rules 25, 50(b)," and so forth, "or permit the acts"

MR. HAMMOND: "prescribed under those rules to be done after the expiration of the period specified therein"

THE CHAIRMAN: "except to the extent and under the conditions stated in them."

MR. HAMMOND: That is right.

THE CHAIRMAN: Can you state it again?

MR. HAMMOND: You just worded it.

THE CHAIRMAN: No, I didn't. You interrupted, and you stated one thing. I didn't seem to have it exactly.

MR. HAMMOND: Change lines 14 and following to read: "but it may not enlarge the period for taking any action under Rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), or permit the acts prescribed under those rules to be done after the expiration of the period specified therein, except to the extent and under the conditions stated in them."

THE CHAIRMAN: Is there any second to that?

SENATOR PEPPER: I don't know whether Mr. Hammond wanted to make the motion.

MR. HAMMOND: I don't think I am in a position to make it.

SENATOR PEPPER: That is the reason I made it, to bring it up for you, but if there is no second, that ends it.

JUDGE DONWORTH: Are we sure that we want to strike out the final clause, "or the period for taking an appeal as provided by law"? Are we sure that should go out?

THE CHAIRMAN: Yes. We have a clause in the appeal rule that allows extension in case of certain emergencies. If we have no second, the rule stands as the Reporter has it.

MR. LEMANN: I suppose the Reporter will have in mind the necessity of changing his note, or will that go out? The note on page 3 won't be in the final draft, anyhow. I suppose you would have notes, but if you are now going to change Rule 25, you will have to change or modify, I think, the language of our reference to it on page 3. I thought the word "Thus" at the beginning of that second paragraph was not an improvement. It was not in the first draft. I think you would also improve the style of the next paragraph by leaving out the reference to 52(b).

THE CHAIRMAN: What are you referring to? The note?

MR. LEMANN: I am talking only about the note.

THE CHAIRMAN: What page is that on?

MR. LEMANN: I should think, Mr. Chairman, that these matters could be considered by the Reporter, without stopping for debate.

THE CHAIRMAN: They are all notes that will have to be carefully gone over and revised in the light of the final report to the Court, giving the Court just what information they want.

MR. LEMANN: Yes, that is right. I was simply noting a suggestion for the Reporter's consideration when he comes to it.

JUDGE CLARK: What our course of procedure is going to be might have some bearing. Are we going to publish a report and distribute it now? That is, will the bench and bar see anything more, or do we go to the Supreme Court directly now?

THE CHAIRMAN: I have assumed that we would go to the Court on everything we are ready to report on, possibly not on 71A.

JUDGE DOBIE: We can't keep submitting them to the bar again and again and again. I thought we had had enough submissions.

THE CHAIRMAN: We have on everything except 71A. We made one submission and made no second one. We held that up for further consideration. In fact, if we are going to adopt the Condemnation Rule, it ought to go to the bar,

undoubtedly, but there is nothing else that I know anything about that should go.

JUDGE CLARK: I rather thought that was what we planned. I think we may want to keep that in mind when we are considering how extensively we want to make changes. I presume, though, if you were going to the Court, we would publish a report which would be available for distribution. That is what we did before. I don't know how widely it was distributed, but there was a printed report.

THE CHAIRMAN: This will be our report, the notes revised and the recommendation that the following changes should be made. It goes right in as we have it in this preliminary draft.

JUDGE DONWORTH: Will there be a Committee on Style for this final report?

THE CHAIRMAN: I think there ought to be. We had one before. Is that gentleman still alive out in Chicago?

JUDGE CLARK: Oh, yes, unless he died very recently. He certainly was alive when we were considering these drafts of amendments. He wrote at great length and very interestingly, as usual. How long ago was it? Not over a year, was it?

MR. HAMMOND: But he never has sent anything in on the second one, has he? His name is Velde.

JUDGE CLARK: Mr. Velde.

THE CHAIRMAN: We are through with Rule 6(b), then,

are we?

JUDGE CLARK: I should think so. I have two comments more on other provisions of Rule 6. On Rule 6(c) there is a Chicago man who has written quite a good deal, and he raises the question whether it is not substantive law. I should think our story is that it is not, but I mention it. That is Mr. Elmer M. Leesman.

THE CHAIRMAN: There is one lawyer, now in Germany, an Irishman whose father was hung many years ago as an Irish rebel, who had a case in the Supreme Court and presented a petition for certiorari in which he took the position that the Court was wrong in holding that, under the existing law, it could not consider a case anew after expiration of the term when this was still pending. He said in that brief that if it is a jurisdictional matter on which the Court has no power to grant a re-hearing on an application made after the end of the term, then the federal rules are wrong because they have treated the expiration of the term as a matter of procedure and say it is not jurisdiction or substantive rights because they have dealt with it. So, it had the Court on the horns of a dilemma. He had a very persuasive kind of brief that this old rule that a court can't deal with a case after the expiration of a term is not a matter of fundamental jurisdiction at all, that it is a matter of rule built up by the courts themselves to govern their procedure to bring litigation to an end.

He based his argument on the proposition that if it was jurisdiction, if the Supreme Court was right in saying it had no power to consider a case after the expiration of the term, then the rules were void because they had been dealing with the expiration of term not as a matter of jurisdiction but as a matter of mere procedure. He was urging the Supreme Court to grant him leave to file a petition for re-hearing after the expiration of the term. That was his argument.

I think he stirred up a little something, and the Court were worried about it because they couldn't figure out that it was anything else but jurisdiction. They had said time and time again that they had no power to act after the term ended, and yet they were confronted with their action in the federal rules dealing with expiration of term as a thing you could brush aside by a procedural order.

JUDGE DONWORTH: You are familiar with the fact that the Supreme Court a few months ago decided that, there being no terms of court in bankruptcy, the court can always change a judgment in bankruptcy matters? Are you familiar with that?

THE CHAIRMAN: Because there are no terms?

JUDGE DONWORTH: Yes. They hold that the statute about terms of court does not apply to bankruptcy, and they imply that it does not apply in equity, and, therefore, that regardless of the expiration of the term rule, the court may change its judgments in bankruptcy within a reasonable time.

Mr. Reporter, are you familiar with that?

JUDGE CLARK: Yes. Of course, that is an old, well settled rule in bankruptcy. There are a lot of cases. The Wayne Glass case is a leading case. It is true that the Supreme Court indicated something to the contrary. You remember Hill v. Hawes, that famous case down here in the District of Columbia. They said something could be done in that case, that being a civil case, because the term had not expired. I think they just forgot. That was our theory before. That is one reason that we tried to strengthen this, because they referred to it as still in existence in Hill v. Hawes.

THE CHAIRMAN: Have we any other suggestions on Rule 6 that you want to bring up?

JUDGE CLARK: I am not sure. On 6(d) there was a suggestion that I think doesn't amount to anything.

THE CHAIRMAN: Don't bring it up, then. We have to depend on you. If you are going to bring every single one of these lawyers' letters up here, whether they add any substance or not, it is going to take up a long time to get through. They have all been distributed, and I assume that all of us have looked them over and perhaps have made notes as to those we want to bring up and consider important.

JUDGE CLARK: I shall be glad not to. This one on (d) is all covered here. It is from a Chicago lawyer, and we answered him, we thought.

THE CHAIRMAN: If you don't think it deserves the attention of the Committee, that is a matter that is up to you. I am not saying whether it does or not. Don't bring them all up just because some lawyer has written in, if you think he doesn't know what he is talking about or hasn't any basis for what he says.

JUDGE CLARK: Then, I will pass to 7, but I think that the Committee should probably all follow these summaries. We want to bring up everything that is in the summaries. On 7 there is the same sort of suggestion, but perhaps we should pay some attention to it. This is from the Chicago Bar Association, on the change we made of a reply to a counter-claim. They say, in the first place, that they don't think the change is very necessary or that there is enough doubt to justify it, but that if we are making the change, it raises two questions. The first is on the proposition of making it limited as we do in lines 2 and 3.

You see, we take out there shall be a reply "if the answer contains", and we make it "there shall be a reply to a counterclaim". The way that came up was that the question was raised if that didn't mean that we were saying that whenever the answer contained a counterclaim there must be a reply to everything, including the matter of defense in the reply as well as the counterclaim. So, we limited it. They say the same proposition applies to the answer to the cross-claim in

lines 4 and 5.

They also raise the question whether we are not abandoning our idea that the counterclaim must be pleaded in the answer. Referring to the latter, I don't believe that is so at all. I don't think the mere fact that we take out the reference to the answer here changes the general statement of the pleading of counterclaims. It takes it out of the answer.

As to the other, perhaps technically they are right as to lines 4 and 5, "an answer to a cross-claim, if the answer contains a cross-claim". Possibly that should be an answer only to a cross-claim.

As to the other, we thought there was enough substance to raise the question, and it is mentioned, you see, in the commentary that is cited in the note of the original and in this case from Illinois. That is all.

I suggest that it seems to me that while there is something in the suggestion from the Chicago Bar Association, yet practically our change was some improvement. The additional change they suggest I think is a still slighter point and is not very important. I am a little inclined to leave it as we have it in the proposed amendment.

THE CHAIRMAN: Let's see now just what it is. "There shall be a complaint and an answer; and there shall be a reply if the answer contains a counterclaim". That is the way it read. The point against that was that if the answer had

a counterclaim plus answering material stating defenses to the plaintiff's claim, the rule was so worded that, if you had a counterclaim in it, you had to reply not only to the counterclaim but to all the rest of the answer. You have cleared that up.

JUDGE CLARK: That is right.

THE CHAIRMAN: Now let's go to the cross-claim; "an answer to a cross-claim, if the answer contains a cross-claim". The very evil that you have cured in the case of the answer to the counterclaim exists, you admit, don't you, in the cross-claim and third-party complaint?

JUDGE CLARK: I think that is true.

THE CHAIRMAN: If you are going to be consistent, haven't you pleaded guilty when you amended as to the original answer but don't bother with it as to the--

MR. LEMANN [Interposing]: Doesn't line 4 as it stands say "an answer to a cross-claim", whereas previously lines 2 and 3, before this amendment, didn't say "a reply to a counterclaim"? That is why they wanted to change it. But is a change required in line 4 where it says "an answer to a cross-claim"? It already says "an answer to a cross-claim".

JUDGE DOBIE: In other words, the answer is limited to what is in the cross-claim.

MR. LEMANN: I would think that was quite plain, and it wasn't quite so plain, apparently, in line 3. It will be

now with the change.

THE CHAIRMAN: As it reads, it says there shall be a reply.

MR. LEMANN: To a counterclaim. That removes the ambiguity that we previously thought to exist, but there is no such ambiguity in line 4, I think.

THE CHAIRMAN: There shall be a reply to an answer to a cross-claim if the answer contains a cross-claim.

MR. LEMANN: An answer to a cross-claim, not a reply. That is the first time that the cross-claim has come into the case. The cross-claimant is a plaintiff, practically; isn't that right?

PROFESSOR MOORE: The cross-claim contains only the co-defendants, and the cross-claim is the only thing the second defendant has to answer. The other part of the material in the answer would go to the plaintiff's case, it would seem to me.

JUDGE CLARK: Yes, that is technically correct. I don't know whether this is important or not, but somebody else not quite so distinguished as the Chicago Bar Association made the suggestion before, and we have discussed it before.

THE CHAIRMAN: Your recommendation is that we do not accept it.

JUDGE CLARK: That we leave it as it is.

JUDGE DOBIE: You say "an answer to a cross-claim, if

the answer contains a cross-claim". Haven't you got the word "answer" there used in two senses, once as a pleading and once as what you do?

JUDGE CLARK: I shouldn't think so. It is true that we are saying the co-defendant files what he will call an answer, not a reply. That is, there will be two answers, if you will, an answer by the original defendant and an answer by a co-defendant. That is what we had. We just didn't have enough new titles to give to them.

MR. LEMANN: Isn't there some trouble on line 5, Judge Clark? That third-party complaint seems to me to be sort of wandering around there by itself after that semicolon.

DEAN MORGAN: No.

THE CHAIRMAN: "a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party".

JUDGE CLARK: In Rule 14, you remember, we have a third-party complaint, and we decide what shall be done with it and whether the plaintiff shall amend or not.

JUDGE DOBIE: That doesn't deal with the reply at all in connection with third-party complaint, does it?

JUDGE CLARK: No.

THE CHAIRMAN: I agree, and I withdraw my criticism. I think the point that lines 2 and 3 call for a reply to matter other than a counterclaim if the answer includes a counterclaim

is cured, and I can't see that the same difficulty arises in the rest.

JUDGE CLARK: I think that is so.

MR. DODGE: If the answer sets up something by way of recoupment, why do we come in on that? Is any reply called for there?

JUDGE CLARK: We have made it rather formal on what is designated. We thought it would be better to have an absolute rule, one that worked mechanically. It is true that the defendant may control that a good deal. So, I think the answer is quite clear in your case. If the defendant has called it a counterclaim, you call it a reply.

MR. DODGE: It is the same matter. Recoupment is really a counterclaim, isn't it?

THE CHAIRMAN: Suppose that in his answer a man doesn't designate it as a counterclaim, then you don't have to reply to it. The rule says "a counterclaim denominated as such".

MR. DODGE: I know it does. That is why I raised the question. Exactly the same claim might be asserted by way of recoupment and not be called a counterclaim.

THE CHAIRMAN: But then you don't have to reply to it.

MR. DODGE: It is the same thing.

DEAN MORGAN: A recoupment is purely defensive.

MR. DODGE: So is a counterclaim.

DEAN MORGAN: No, no.

JUDGE DOBIE: We have set-off and recoupment both set up under counterclaim, haven't we, Charlie, without any technical distinction?

JUDGE CLARK: We allow the fellow to call it a counterclaim, and that makes the reply a counterclaim. It is true in one sense, as you say, that it gives the defendant somewhat a chance in this situation to say whether he gets a reply or not, but we thought it better to have a mechanical rule so you would know and not be in doubt about it.

JUDGE DOBIE: Without any distinction between the set-off and recoupment, as those distinctions were made under the old law.

JUDGE CLARK: That is correct. Of course, I suppose that a defendant can get a reply in that sense if he really puts in something that isn't very much like a counterclaim but calls it such. The idea is that this is a formal pleading matter. It is a question of how you get the issues framed. It is better to have something that you can rely on that way than to have this whole question when you never know which is a defense and which is a counterclaim.

JUDGE DOBIE: I have another question I want to ask just for clearness. In line 5, "a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party". Does that third-party complaint have to be

filed by the plaintiff?

JUDGE CLARK: No.

DEAN MORGAN: The third-party plaintiff.

JUDGE CLARK: The third-party plaintiff is a defendant.

JUDGE DOBIE: Yes. If the plaintiff does anything, he would have made his pleadings, wouldn't he?

JUDGE CLARK: He would amend his original complaint.

PROFESSOR SUNDERLAND: Mr. Chairman, as a matter of style, haven't we got a superfluous phrase in lines 4 and 5? "if the answer contains a cross-claim". We don't say in the line above, "if the answer contains a counterclaim". We say, "there shall be a reply to a counterclaim denominated as such". Why wouldn't it be enough to say, "there shall be an answer to a cross-claim"? You don't need to put in "if the answer contains a cross-claim".

JUDGE DOBIE: There is nowhere else that it can be, is there?

JUDGE CLARK: Possibly, yes.

PROFESSOR SUNDERLAND: If we use it in one place, we ought to use it in both, oughtn't we?

JUDGE CLARK: You are assuming, Edson, that the pleader has immediately in mind the provision of Rule 13(g). I mean, if he is right on his toes and knows our technical expression "cross-claim," I think you would be right, but I

doubt if he does, and I should think that this tells him a little more, wouldn't you?

PROFESSOR SUNDERLAND: It seems to me superfluous, and it makes a distinction between a cross-claim and a counterclaim. We say a reply to a counterclaim whether the answer contains one or not, because we don't have that qualifying phrase there, but we do have it in with the cross-claim, which seems a little inconsistent.

JUDGE CLARK: You didn't want to change the terminology and make it apply to a cross-claim.

PROFESSOR SUNDERLAND: No.

JUDGE DOBIE: Just cut it out.

PROFESSOR SUNDERLAND: The phrase "if the answer contains a cross-claim".

JUDGE CLARK: In one sense, of course, that is technically so. All I am asking is, would everybody immediately appreciate the cross-claim--

PROFESSOR SUNDERLAND [Interposing]: If there is any reason for leaving it in, that is all. It doesn't do any harm.

JUDGE CLARK: That is what I should think. It didn't do any harm, and it did tell you a little something if you didn't know too much about the rules.

THE CHAIRMAN: Is there anything more on 7?

JUDGE CLARK: I think not.

THE CHAIRMAN: Then, we pass to Rule 12, don't we?

JUDGE CLARK: Yes.

THE CHAIRMAN: By the way, is there anything in your supplemental report?

JUDGE CLARK: I think I have covered the matter from the Chicago Bar Association, which was from the supplemental report. There was no motion made, and therefore it stands as it is in this draft, I take it.

The question in the comments on Rule 12 is largely concerned with the matter of the time of pleading of counsel.

THE CHAIRMAN: What do you want to bring up under 12. Are you dealing with the supplement or the original report?

JUDGE CLARK: I want to bring up something under (b), but I was wondering whether there was anything under (a). I take it that it will stand as it is in this last draft.

THE CHAIRMAN: You have a lot of stuff in your report on 12(a).

JUDGE CLARK: I have, yes.

THE CHAIRMAN: Is it stuff you think ought to be brought up?

DEAN MORGAN: That was a question of the extension of time by stipulation, wasn't it?

JUDGE CLARK: Yes. We have settled that and agreed that we are not going to do anything about the extension of time.

MR. DODGE: I was going to move that we return to the

original draft of the amendment and allow at least one stipulation of counsel extending the time for filing answer.

THE CHAIRMAN: I don't think there was any formal vote on the previous rule.

DEAN MORGAN: No, not on 12. Mr. Dodge, I think, reserved the right to move when we got to 12(a).

THE CHAIRMAN: I know. I say there was not a vote on that question before. Now it is open to question. He has made the motion. Is there any second?

JUDGE DONWORTH: Will Mr. Dodge kindly repeat his motion on this point?

MR. DODGE: I have forgotten exactly what the language was in the first draft of this amendment, but I think it provided that by stipulation the time for filing pleadings could be extended once.

DEAN MORGAN: That is right.

JUDGE CLARK: We have it here. Do you want it read?

MR. DODGE: A lot of lawyers have objected to striking out that stipulation and have asked that the power of the parties by stipulation to affect time be extended very generally in accordance with the common practice.

JUDGE DONWORTH: In our May 1944 report we actually did put in a clause as Mr. Dodge now moves. I have here the May 1944 report, and I am reading from page 11. In line 37 we added this sentence:

"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."

MR. DODGE: That is the language.

MR. LEMANN: The Reporter says we have strong disapproval of this proposal, particularly by district judges. Could we have before us the comments made on that when that draft went out?

JUDGE DOBIE: As I understand it, that is one stipulation, but any length of time. In other words, the parties can come in, the answer not being due, and say, "We stipulate that the time for filing an answer in this case shall be extended twenty-five years."

JUDGE DONWORTH: Of course, that is absurd.

JUDGE DOBIE: I mean they can do it under the rule. They can stipulate six months or eight months or any time they wish, and the court is powerless.

MR. LEMANN: Are there many of them?

JUDGE DOBIE: Of course, they won't do that often, but they might.

JUDGE CLARK: This is the Reporter's summary of January 2, 1945.

THE CHAIRMAN: 1945?

MR. LEMANN: The first preliminary draft, Mr. Chairman. I want to hear the comment on this proposal.

JUDGE CLARK: Of course, there was approval from the same people and perhaps others. Mr. George Whitfield Betts, Jr., approves the extension, as do the Chicago Bar Association, and so on.

MR. LEMANN: When you say "and so on," who else?

JUDGE CLARK: "The Committee for the Western District of Washington, the District of Columbia Committee, and the Chicago Bar Association approve the amendment of Rule 12(a), specifically including the provision for an extension of time to answer by stipulation ...

"Messrs. Gerald J. Craugh, George Whitfield Betts, Jr., and Harold Harper, all of New York, desire extensions by stipulation with no limit as to the number that may be had."

I know Mr. Betts and Mr. Harper because I have talked to them. Mr. Betts is in the Maritime Bar Association; Mr. Harper is in the New York County Lawyers' Association. They talked about the niggardliness of this grant, and they didn't think it was adequate.

Then we went on:

"On the other hand, there has been considerable objection to lines 37-40. District Judge Waring of South Carolina urges that such a stipulation be subject to court approval, or failing that, limited in time of effectiveness as for 20 or 30 days. This is concurred in by Mr. Walter Armstrong. Judge Waring states that otherwise the time may be extended

indefinitely with the acquiescence of the plaintiff, and the court loses all control over its own calendar. The Third Circuit Conference, for the same reasons, recommends that a 30-day limit be imposed beyond which the time cannot be extended. The Ninth Circuit Committee wants the rule amended so that extensions can be secured only if local rules so provide. It is stated that the Oregon Federal judges say lines 37-40 would be 'fatal to the practice' in that court; that the Washington judges are opposed; and that in the Southern California district, where they have a rule that such stipulations are subject to court approval, business has thus been greatly expedited. District Judge Jenney (S.D. Calif.) declares that lines 37-40 would 'undermine the work of seven years.'"

MR. LEMANN: We debated this at considerable length and decided to take it out.

MR. DODGE: It has aroused a good deal of opposition, and I think I know how the bar at large would stand on this question.

THE CHAIRMAN: There are a lot of things the bar at large would like to have a little more freedom to do and not have to run around to the court. They judge that entirely by their own personal convenience, comfort, and ease, and they don't pay any attention to the question of the effect on the general administration of justice. They don't care about that. It is just that they want to run the case their own way. I have

a strong feeling that this business of stipulating to extend has a very marked effect on the delay in cleaning up the calendars and the administration of justice. The cases go on and on, and you can't strike them for want of prosecution. The question comes up whether they are on the calendar or off, and somebody stipulates to extend the time for doing this. The judge just has confusion there, and his record docket is piled up with undisposed of cases. It creates an atmosphere around his court, in the clerk's office, that doesn't work. You have either to fish or cut bait, go on with your case or get out of court. That is the theory of this thing.

There hasn't been an awful lot of complaint about it. I agree that if you had a plebiscite on it, every lawyer would say, "I would like to extend the time when I feel like it."

DEAN MORGAN: If the other fellow requests it and you don't extend the time, he thinks you are a terrible sort of person.

THE CHAIRMAN: You have to do it if you haven't a rule against it.

DEAN MORGAN: When you haven't a rule against it. When I was practicing, I know we got so we would stipulate for continuance to go to the bottom of the calendar, and the court had to put in a rule that forbade that.

THE CHAIRMAN: One man wants it and the other fellow doesn't, but the other fellow has to agree to it because if he

doesn't he is punished the next time he is at the bar.

MR. LEMANN: We don't have any trouble getting our judge to sign extensions. At least, I had a case recently where he did it twice for my opponent without asking me, and I didn't think it was unreasonable. He went to the court and asked him to do it and gave him his reasons.

JUDGE DONWORTH: Would you think Mr. Dodge's motion would be acceptable if it were limited to 30 days, to extend by written stipulation without approval of court for not more than 30 days?

MR. DODGE: I never have had any experiences with stipulations extending the time as to pleadings that have caused any delay in the ultimate termination of the lawsuit. It is the commonest thing in the world for the plaintiff to agree that time for an answer may be extended a few days. I have seen no abuse whatever of stipulations with regard to the time of pleading.

THE CHAIRMAN: My observation generally is that they never do a blessed thing until the last day that they are allowed to do it. I have practiced law for fifty years, and my feeling is that they take all the time they get, but if you hustle them up a little bit, they will take that and get along with it. If you give them time, they will take every last minute of it, no matter whether they really need it or not. I never knew a lawyer to do anything before he had to, as a rule.

JUDGE DOBIE: If I were sure of having before my court the type of lawyer with whom the Right Reverend Robert Dodge of Boston practices, we wouldn't need any of that stuff; but I was a district judge for seven months and I did see a number of cases of attempted abuse of stipulation. The idea was very prevalent in Virginia that the lawyers try the case and the judge is a moderator. That is not true in the federal courts. I am frank to say that I think the judge ought to be captain of the ship. If he is a good captain and if he has lawyers like Mr. Dodge before him, he will grant these extensions right along, grant them in his office and things like that. I don't think he will have any trouble, but I think he ought to have the power.

MR. DODGE: We are not granting extensions right along. They are comparatively seldom even asked for. I practice against every kind of lawyer. Several of my opponents have been disbarred. [Laughter] But I haven't had difficulty with any of them with regard to one extension of the time for pleading.

JUDGE CLARK: I think we had a couple more supplementary observations that came in. This is in our supplementary statement of a year ago, which was before our meeting.

"The Tenth Circuit Committee and the Oregon State Bar Committee are opposed to lines 37-40, permitting one extension by stipulation. The former believes all extensions

should be subject to court approval, and the latter believes that an extension without approval should be limited to 30 days. On the other hand, the Committee of the New York County Lawyers' Association [that is Mr. Harper's Committee] desires unlimited power of extension by stipulation."

THE CHAIRMAN: I don't think this one extension business amounts to anything.

JUDGE DOBIE: I don't think one extension of 30 days is vital. If the Committee thinks so, I will gladly go along with it on that. I certainly would be opposed to any universal power.

THE CHAIRMAN: There has been a motion made, hasn't there?

DEAN MORGAN: Mr. Dodge moved that the amendment which was stricken out last time be restored.

JUDGE DONWORTH: I move to amend the motion by limiting this permission to 30 days.

MR. DODGE: I accept that.

THE CHAIRMAN: There is a motion before the house.

JUDGE DOBIE: I would like to hear Senator Pepper on that, if he doesn't mind stating his view. He has had pretty broad experience in Philadelphia and other places. How do you feel, Senator?

SENATOR PEPPER: I have kept my mouth shut because I never liked to differ from Robert Dodge, but in point of fact

I think the procrastination of members of the bar is one of the crying evils in the administration of law. We have a rule in my office that no younger man in the office shall ask for additional time for filing a pleading or filing a brief unless he comes to me and I authorize him to do it, for I find that the first thing that young fellows want to do almost as soon as they tackle the preparation of an answer is to say, "Well, let's go and get the time extended." If it is a question of filing a brief in the appellate court, they always want more time for the preparation of the brief. I am kind of hard-boiled about it just on general principles. It has been my observation that the courts are not nearly strict enough in refusing to approve stipulations. I think the judges need to be jacked up as much as the practitioners do.

MR. DODGE: Most of the time limits in Massachusetts are rigorously fixed by statute, and you can't extend the time for filing briefs; you can't extend the time for printing the record after it is there. The thing is speeded up a great deal. The time limit on filing pleadings is short, and the requests for extensions of the time are rare, because, I think, perhaps in Massachusetts we are accustomed to very short time limits on almost everything. We have to live up to them. This one thing of filing pleadings stands on a somewhat different basis. A stipulation extending the time for a little while is not uncommon, but it is by no means always asked for.

JUDGE DONWORTH: It is the practice of the district judges in Seattle to sign no order of any kind except in open court. I think that has some bearing on this matter.

THE CHAIRMAN: Of course, all those restrictions operate to influence the lawyer to say, "Well, I guess I won't bother with chasing around to ask for an extension, but I will get busy." That is the reaction to it. If you can get one easily, as by calling on the telephone, you will ask for it, but if you find you will be put to a little trouble to get it, unless you are really in a jam, you will say, "Well, I'll hustle up and get it out." I think the effect of this thing on getting law business pushed along is very great.

We have the motion, which is clear enough, that we amend Rule 12(a) to restore the language once stricken out, but to add to it the provision that the extension shall not be over 30 days. Is that it, Judge?

JUDGE DONWORTH: Yes.

[The motion was put to a vote by a show of hands, and was lost, six to five.]

THE CHAIRMAN: We have argued that at every meeting we have had since 1935. Maybe it won't be with us when we have another meeting. I hope it is dead for a while, anyway.

JUDGE CLARK: Now we come to 12(b). On 12(b) I should like to strike out the words "and received by" the court in lines 62 and 63.

MR. LEMANN: Can we take up the supplement to (a)?

JUDGE CLARK: I thought we were through with (a).

MR. LEMANN: I was reading this letter from Mr. Dougherty, the Assistant General Counsel of the Reconstruction Finance Corporation. He refers to the language in lines 17 and 18. The sentence reads:

"The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted."

I take his point to be, if I get it, that there are some proceedings in which you don't serve the United States attorney, some proceedings against an agency of the United States in which you don't serve the United States attorney. Am I wrong about his point? If that is his point, I thought he had something.

DEAN MORGAN: You are wrong about that. There is service upon the attorney, and a copy of the summons and complaint are delivered to the agency.

MR. LEMANN: I read over the summary of what he said here.

THE CHAIRMAN: I have the original rule here.

DEAN MORGAN: Did you read Clark's reply to him?

THE CHAIRMAN: Look for the paragraph on service upon

the United States, which is Rule 4(d)(4): "Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought".

MR. LEMANN: How about the RFC, for example?

THE CHAIRMAN: I just explained that to you. If you serve upon an officer or agency of the United States, subdivision (5) states that you must do it in two ways, first by serving the United States as if the United States were a party and, second, by delivering a copy to the officer or agency. To serve the United States isn't any good until you have served the district attorney under subdivision (4). So, the complainer is obviously wrong in his basis.

MR. LEMANN: I see.

JUDGE CLARK: Monte, if you will look at the next sentence of what Mr. Mitchell was reading, Rule 4(d)(5), you will see that the next sentence says that "If the agency is a corporation", and so forth. It includes that.

MR. LEMANN: Yes. But he doesn't know what he is talking about.

THE CHAIRMAN: He didn't read the rule carefully. Is there anything else on 12(a)? Have you anything to bring up, Charlie?

JUDGE CLARK: Not on 12(a). I have on 12(b) when we get to it.

DEAN MORGAN: There is a lot of text on 12(b).

THE CHAIRMAN: Unless we have something further on 12(a), we will go to 12(b).

JUDGE CLARK: My suggestion is the same for 12(b) and (c). It is that we strike out the words "and received by" in lines 62 and 73 of 12(b) and lines 73 and 74 of 12(c). Those are similar things.

[The meeting adjourned at twelve-fifty o'clock.]

MONDAY AFTERNOON SESSION

March 25, 1946

The meeting reconvened at one-forty-five o'clock, Mr. William D. Mitchell, Chairman, presiding.

THE CHAIRMAN: Gentlemen, we are up to Rule 12(b). The Reporter has something to say about that.

JUDGE CLARK: What I have suggested is that the words in our addition "and received by", referring to the court, should be eliminated, so that the rule would be in effect that if matters outside the pleading are presented to the court, the motion shall be treated as one for summary judgment. Of course, this is a matter that we have discussed at some length and quite extensively since the proposition of amending the rules was first considered, but there has been an interesting development in the cases where we have been working, and my suggestion is based upon a combination of two propositions. The first is that I am afraid these words are simply question-begging and trouble breeding, and the second is that the cases, in my judgment, have clearly and overwhelmingly gone beyond them. Either the words will not mean anything or, if they do, they are a restriction on the simple and desirable practice which has developed.

I might say that this came to my attention very clearly at a meeting of the judges of the Second Circuit to consider the amendments to the rules. This was held in November.

I was trying to explain the proposals. After the trend of decision in my own court and other courts, the district judges now very clearly and very simply use this material. There is not any question about it. Those district judges wanted to know what this meant and what they were supposed to do, if anything. They asked, "What do we do? Do we first have a preliminary hearing, and do we pass some formal order? Do we make some recital? Or what do we do, and what happens if we don't do anything?"

I wondered about that. I raised the question because the fact of the matter is that in New York (I should say in other places, too, but certainly it is true in a crowded place like New York, and I know the way those things go) the chances are that nothing will ever appear about this in most of the records. A district judge doesn't sit down and think how a matter is going to appear on appeal. Maybe he can't. Sometimes I think perhaps he could think more about it than he does, but the fact of the matter is that he doesn't. He has a long motion calendar, and he pushes the things off and decides them and doesn't pay much more attention.

The lawyers perhaps theoretically should do a lot of things, but they don't, and they will do less because they won't understand. I mean I think there is enough ambiguity in the situation so that they won't understand; but even if it were clear, we have seen over and over again that lawyers

really don't pay much attention to what might be termed fine points. We have to take the cases as they come to us. I suppose it is merely a bromide for me to say but I do say that I am more and more impressed, as I sit as a judge, how weak the presentation of so many cases is to us. It seems as though a good share of the time we were trying to repair defects in the way they come to us. I suppose I shouldn't stress that too much. Perhaps that is a part of our business. I have rather accepted it as part of our businesss. It is a fact, none the less, and sometimes when Mr. Dodge is explaining things in Massachusetts, I wonder if generally they don't do a lot better in Massachusetts. I think they well might with different traditions. I think I would say that on the whole the few Connecticut lawyers who get in our courts do better, take things more carefully, but be that as it may, I know how things happen in a busy district like New York, and this matter is just going to be left in the air. What is going to happen if it is left in the air?

THE CHAIRMAN: Let me ask you, what do you mean by "left in the air"? What is the thing that is left in the air. I don't quite get the idea.

JUDGE CLARK: What do we require a district court to consider in material outside of a pleading?

THE CHAIRMAN: What do we require him to consider? The notes make perfectly clear what the draft was intended to

say. Maybe the draft is ambiguous, but the note makes it clear enough that when a motion under (6) to dismiss for failure of the pleading to state a claim is presented to a court and the parties start shoving in stuff outside the face of the pleading, the judge can stop it and say, "No. This is a motion for dismissal. I am not going to allow you to convert it into a motion for summary judgment and go through all that rigmarole. You have made enough of that section, you are prepared to go along with it and the other fellow has prepared on that basis, and now we will stick to it. I will exclude and won't receive this extra stuff"; or he can say, "I will receive it," or the point may not be raised at all.

However, if the stuff is handed to him, if no motion is made on it, if he receives it for all that appears in the record, if it is just like any other paper, is filed and considered and no point is made about whether it should be or not, and no formal ruling is made on it, then it is automatically converted into a motion for summary judgment. If it is presented to him and he receives it, it means that he takes it for consideration, as I interpret the rule.

Charlie is raising the point that the judge has nothing to say as to whether this is a motion to dismiss and is kept so or whether it is converted into a motion for summary judgment. Our former conclusion, as expressed in the note, was that the judge ought to be able to say, "I won't allow it

to be converted. If you want to make a motion for summary judgment, make it under Rule 56 and be done with it and prepare your papers that way. But this is a motion to dismiss for failure of the complaint to state a good claim, and that is defined on the face of the pleadings. Go on with it or drop it, but if you go on with it, it has to be that way." Our idea was that the judge would have something to say about it and that this rule was devised to take care of a great number of cases where the parties made a motion to dismiss for failure of the complaint to state a good claim and then shoved in a lot of affidavits, extraneous matter, supplementing the allegations in the pleading, and nobody objected to it and it was all taken into consideration. When the case got up to the circuit court of appeals, the court found itself with all this stuff outside the pleadings in the record, without objection, and it did or did not show as a matter of law and on the undisputed facts that one party or the other was entitled to judgment. It is that class of cases that this rule was devised to cover.

The only question I have in my mind is whether the phrase, "If ... matters outside the pleading are presented to and received by the court, the motion shall be treated as one for summary judgment", clearly enough shows that you can't convert it by merely presenting it. The court actually has to receive it, either patently by saying he will take it that way

or by just acquiescence and going ahead and doing it without anything being said about it. That is why those words were chosen, "presented to and received by". That is a little bit broader. It may be offered and admitted against objection, or it may be presented to and received without any objection, one way or another. The question I think you are driving at is whether the court should have anything to say about whether this is a motion to dismiss or can be treated as a motion for summary judgment.

DEAN MORGAN: Whether it shall be discretionary or mandatory. I suppose that is really what he is raising, isn't it, Charlie?

JUDGE CLARK: Yes, but I will put it a little broader than that: whether it is worth while, whether any substantial good of any kind is obtained by raising this question. I can see the possibilities of a fight among the lawyers on it, but rarely a question by the district judge.

THE CHAIRMAN: What do you mean by a fight among the lawyers.

JUDGE CLARK: As to just what happens.

THE CHAIRMAN: You mean whether the stuff has been received or not?

JUDGE CLARK: Exactly.

THE CHAIRMAN: If it is in the record, is presented, nobody has objected to it, it is filed and put in the record,

and the court apparently has considered it, what would the argument be?

JUDGE CLARK: If we can go on the basis that anything before us is considered and accepted by the judge, that clears up a good deal. There is no doubt about that. I think that is the attitude that most circuit courts will take, but I am quite sure that is not the answer that the lawyers will accept without a battle, unless it is made clearer than it is here.

DEAN MORGAN: That is the point, isn't it, whether you are just going to say if it is presented the court may treat it as a motion and then proceed as under Rule 56, or whether you are going to say what you say, that if it is presented the court must treat it as a motion for summary judgment and proceed under 56.

JUDGE CLARK: I want to add further that I am perfectly frank to say I don't see any reason in the world why a judge should spend his time saying, "I will," or "I won't," or what substantial benefit to anybody is obtained if he should say, "I won't treat it as a motion for summary judgment." It seems to me that there is no gain and that you just instill a problem that does not appear in the case.

DEAN MORGAN: What I would like to know, Charlie, if I may interrupt, are the cases that you have had cases where the motion was met by counter-affidavits, or how does it come up?

JUDGE CLARK: They almost always are cases of motions

that are met by affidavits.

DEAN MORGAN: Motion met by affidavits; that is, not supported by affidavits.

JUDGE CLARK: If it is not supported by affidavits, the judge would naturally, in so far as I know, always give an opportunity to file affidavits. I quite agree that this should not be a matter of surprise on one side or the other, but I don't think that there is much possibility of that and, if so, if you want to put in cautionary suggestions of that kind, we had them in before and said they weren't necessary.

DEAN MORGAN: You see, what I want to know about this is, how does a question arise? Does the moving party meet the motion? A party moves for judgment of dismissal on the ground that the complaint doesn't state a ground of recovery. If he just meets it with that motion and nothing else, that is just like the demurrer, isn't it?

JUDGE CLARK: Yes.

DEAN MORGAN: All right, what happens when he makes a motion? Does he support his motion with affidavits or does the other party meet the motion? Does the pleader meet the motion with affidavits bringing in something outside his pleadings? That is what I want to know.

THE CHAIRMAN: Either or both.

JUDGE CLARK: As the Chairman says, it may be either or both.

DEAN MORGAN: How does he get an opportunity to file affidavits on a motion to dismiss on the pleadings?

JUDGE CLARK: He just does it. You may ask, Why should he do it, and would they do it in Massachusetts? I don't know. I know the lawyers in New York do that. I mean he will make a motion--

DEAN MORGAN [Interposing]: I know, but what does he do? Does he have just enough of an affidavit to show a single fact that he has omitted or something of that sort, or does he make his whole case on affidavits then? You see, that is what bothers me about this.

JUDGE CLARK: I am not quite sure I follow you.

DEAN MORGAN: It bothers me a lot, because you will have to have affidavits and counter-affidavits and then responses to those.

THE CHAIRMAN: The rule says that it is treated as a motion.

DEAN MORGAN: Treated as a motion for summary judgment.

THE CHAIRMAN: It says if it is, then "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

DEAN MORGAN: Instead of making a motion to amend, giving the other party a chance to answer, you make him try his whole case right there on a motion for summary judgment, don't you?

JUDGE CLARK: If it is triable. This is what happens a great deal: The defendant will make a motion to dismiss strictly on the pleading. Then the plaintiff will come back with affidavits, saying, "I have this question and that question, and I want to present them." It is used a great deal to prevent the granting of the motion. That isn't the only use. As a matter of fact, if you look back on the cases, you will see that we have classified them both ways.

DEAN MORGAN: Suppose the defendant comes back and says, "Well, make your amendment, and then I want my 20 days to answer."

THE CHAIRMAN: Amendment of what? Amendment of the motion?

DEAN MORGAN: Amendment of the pleadings. This motion to support the complaint is nothing more than a motion saying, "I have a cause of action, although I haven't stated it."

THE CHAIRMAN: That is right.

DEAN MORGAN: Then he wants to amend his pleadings so as to allow this evidence of his to appear or the fact which his evidence will support to appear in the pleadings. Isn't that right? Then the defendant wants to answer that. Does he have to answer it with all his evidence, or does he get any chance to put in an answer?

JUDGE CLARK: I wish that you would go back to the cases, because the cases seem to go along, as I look at them,

much more simply than we sit here and, so to speak, pick them apart. The kind of case that you are visualizing for the moment is the case such as we had in Rossiter v. Vogel, which is one of the cases cited. That was the case of an answer put in and a motion for judgment by the plaintiff. The motion was granted below, and it came to us.

SENATOR PEPPER: That is, on the ground of the insufficiency of the answer?

JUDGE CLARK: Yes. We said we thought there were proper grounds of proof there that could be made, and we reversed, leaving it as a matter of discretion whether or not a formal amendment should be filed. We sent it back. Then, in about another year the case came up with the case thoroughly tried and with judgment for the defendant.

That is only one side of the picture, but it is an important side. If there had not been some room to us here, I don't see why we would not have had to affirm and then made a judgment which would have been quite unfortunate, as the final result showed. This is merely an authority, really, to the appellate court to do justice as it sees it on the record and without reference to the formalities of the pleading. That is really all I want, and that is what the cases are doing. The cases now are doing that in all the circuits, and even the state procedures are the same way.

DEAN MORGAN: Does it turn out, then, in most of

these cases that you have that there is an issue for trial? Is that what you are driving at?

JUDGE CLARK: It turns out both ways. You will see that we have classified them. In some cases there is not. What we do is to say that we are not bound by formalities of the allegation---

DEAN MORGAN: I grant that.

JUDGE CLARK: ---and we go to the other thing. Where it turns out to be a question practically purely of law, then we hold that the judgment stands.

DEAN MORGAN: Yes, but my point is that you are going to require on this motion for summary judgment that the defendant put in his evidence before he gets a chance to answer, aren't you?

JUDGE CLARK: If it is a case he has to meet, of course he has to do that on summary judgment proper.

DEAN MORGAN: You say it must be treated as a motion for summary judgment.

THE CHAIRMAN: He can put an answer in if he wants to. He can now, under a motion for summary judgment, if he is tackled by the plaintiff before his answer is in, which he could not have done before because our rule didn't permit it.

DEAN MORGAN: Yes, but he has to support his answer by affidavits in this case, hasn't he? He has to bring forward enough evidence, at any rate, to show that he has an issue for

trial on the answer. Must he show that he has an issue for trial on every issue that is raised by the answer or only on one?

JUDGE CLARK: It is a question as to what the motion is directed.

DEAN MORGAN: That is what I want to know.

JUDGE CLARK: You take the matter according to the form in which the motion is made. Suppose motion is made by the defendant to dismiss for failure to state any ground of relief whatsoever. The trial judge, let's suppose, has granted that motion. It comes to us, and the plaintiff says, "I have got that question, but I also have this other question," and we look over both of them. If we say that neither one has any merit, the case is affirmed.

THE CHAIRMAN: You mean he has a second question that does not appear on the complaint, but he has raised it by affidavit supplemental to the complaint?

JUDGE CLARK: It may be just like that. You see, lawyers learn about their case as they go along. If a lawyer had the case completely developed and could foresee everything that the court was going to say in the trial court, then there might not be much reasonableness, but that is an entirely unreal way to think of it. The cases come to us, and the lawyers are getting educated, and of course the judges are, for that matter. Sometimes it isn't until you get to the

appellate court that you really get the bearing of the case. This frees you from the formality of the definite allegations, and sometimes, as in the case that I gave you, Rossiter v. Vogel, it might be the difference between a recovery or no recovery. It just allows the judges to look at the justice of the whole thing and not be tied down the other way.

THE CHAIRMAN: A great deal of the discussion you are having here, especially what Mr. Morgan raises, I think, has nothing especially to do with this. They are questions that arise under the summary judgment rule. Everything you have asked applies equally as a question as to how it operates under the summary judgment.

DEAN MORGAN: I don't think so at all.

THE CHAIRMAN: The real issue, the point here, and the only one at this stage of the game, is whether a motion to dismiss for failure to state a claim on the face of the complaint can be converted by dumping in extra stuff, a motion for summary judgment at the will of either party, or does it have to be with permission of the court?

DEAN MORGAN: That is exactly what I am raising.

THE CHAIRMAN: That is all we are directing ourselves to.

DEAN MORGAN: The reason I am asking these questions is to see whether the situations are such that the judge ought not to have discretion in the matter, because I can conceive

a number of situations where it would be much better for the court to say, "We are not going to proceed in this irregular way now. If you want to make a motion for summary judgment, make it." To the other party, "If you want to make a motion to amend your pleadings, make it." Or, "I will consider this a motion to amend the pleadings, if you wish."

They never grant this motion for dismissal without leave to amend. You say that leave to amend shall be given freely here. So, I am just wondering whether you want to make it mandatory or discretionary. It seems to me that is really the question. I think the Reporter's motion is to make it mandatory. I am not yet convinced that it ought to be mandatory. If it has to be one way that you can't do it or that it is mandatory, I would much rather have it mandatory; I am sure of that.

JUDGE CLARK: I want to tell you right now that it is mandatory in practice. I mean by that that there is no suggestion in any of these cases that you are not going to consider material in the record because you haven't some formal order that it was considered below.

THE CHAIRMAN: You are talking in terms of the circuit judge on appeal.

JUDGE CLARK: I am.

THE CHAIRMAN: These are district court rules, and what we are dealing with here is how the district judge must

act. Must he receive this stuff? Has he any option to exclude it? It isn't a question of what the circuit court can do after the district judge has done something. You tell us the district judges want to know what they are to do under this rule.

JUDGE CLARK: The most important factor in this rule is, of course, the situation on appeal, because sooner or later, if the parties are at it long enough, at each other or at the district judge, they ought to get somewhere. They will educate themselves, and so on. In general, it is only when the district judge has thrown the case out that the thing comes up, and then what are we going to do about it? Are we going to follow some absolute rule of pleading?

THE CHAIRMAN: Do you mean deny the judgment or grant the judgment to a party when you say "thrown the case out"?

JUDGE CLARK: It is usually a case where the motion has been granted below.

THE CHAIRMAN: The motion to dismiss.

DEAN MORGAN: On the pleading, you mean?

JUDGE CLARK: Yes. The district judges, of course, tend to do that a little. They see a long, hard case to be tried. The case comes up to them very quickly. They haven't had all the points explored, and they grant a motion to dismiss. You have suggested, Eddie, that they will always grant leave to amend. As a matter of fact, they don't even do that.

DEAN MORGAN: They don't?

JUDGE CLARK: No. We have had some cases where that question has come up some time afterwards. No leave to amend was granted. You might ask how that happens. I think there is a practical answer to how it happens. The district judge is going down through a long calendar. He will say, "Motion granted," or "not granted," and so on. Then, in the Southern District of New York in particular and in the Eastern District they still have the practice of having the lawyers draw the orders. The judge probably should think several times, but he doesn't. He initials the orders, and there they are entered. Sometimes afterwards they try to amend or they don't know what to do, and they usually end by appealing.

What are we going to do about it? Again I come back to the cases, the bulk of which is now very large, which it seems to me are going very simply, really, that this sort of restriction is just a stepping back. They are saying that there is a kind of restriction that should be brought out, that it isn't in the case, so to speak, but let's put it in. What are we going to do with it? My guess would be that the circuit judges will still get around it in some way, and the district judges will forget it, as they do now, and very likely it may not do any more harm than to leave the thing a little uncertain.

THE CHAIRMAN: What is it that does what? I confess I don't get it.

JUDGE CLARK: The statement that the district judge has some sort of option or discretion in the matter.

THE CHAIRMAN: You want it to read that he hasn't, that on motion to dismiss for failure to state a good claim on the pleading, a party on his own motion can walk right into court and convert it into a motion for summary judgment by sticking in some affidavits, depositions, or whatnot, supplementing the allegation in the pleading? That is what you want, is it?

JUDGE CLARK: Exactly.

THE CHAIRMAN: That is what I was trying to make clear. As the rule is drawn and as it is intended to be, if a party on such a motion dumped in extra stuff, no matter whether he was plaintiff or defendant, and they were actually presented to the judge and he actually received them, and didn't exclude them, then you would have to treat it as a motion for summary judgment; but there is nothing in the rule that prevents a judge from saying, "I don't want to go at it this way. I will treat this as a motion to dismiss on the face of the pleadings alone. If either party wants a summary judgment motion, go ahead and make it."

Otherwise, of course, you start a man in on one motion and then convert it into another, and you don't know whether it is going to be converted until you get into court. Then, you have this rigmarole here about giving reasonable

opportunity to present all material which may be pertinent to such a motion.

I wonder why we have any motion to dismiss for failure to state a good claim. If either party makes it, it is automatically a motion for summary judgment. Why don't we say so and be done with it?

SENATOR PEPPER: I was going to raise that question. If you are going to permit a plaintiff to file an affidavit when he is confronted with a motion to dismiss because his complaint fails to disclose a ground for judgment, it seems to me by the terms of the proposition you are making the motion a futility. I can understand a rule which forbade an affidavit by the plaintiff and forced him either to apply for an amendment or to face the music under the motion. If the motion is granted, then he can apply for leave to amend, and it is easily granted or isn't granted, and if it isn't, he can go up.

It seems to me we get off on the wrong foot if, as a matter of fact, it has become the practice, as I understand from the Reporter it has, to permit a plaintiff when confronted with a motion to dismiss, immediately to present one or more affidavits supplementing his defective pleading. Does that happen, Charlie?

JUDGE CLARK: Certainly it happens, and I don't see why not. It has happened very simply and efficiently. There is only one question that I see that should be brought up, and

that is, is the other fellow unfairly surprised? We have tried to guard against that. We have tried to guard it in the rule proper. I will say that if we think in the cases that come to us that there has not been a fair chance to submit both sides, of course we reverse on that, and it is up to the trial judge to see that that is fairly done. But once you cover that--and it is a practical question whether each side had a chance to file its affidavits or not--I don't see any reason for the restriction.

You suggested, Senator, that we should always call this just a motion for summary judgment. I have suggested that from time to time. I think that is quite a logical proposition, not a necessary one. It is just because you can allow it to expand if you wish. Again I must say that there has always been a tendency here to think of the plain logic of the thing. This has gotten away from the logic. It has now so developed that I don't know whether this Committee could stop what they themselves have started. You started the idea that the wording of the pleading is not binding, and the circuit judges are not now holding them binding. You certainly have a job if you try to reverse us on that.

JUDGE DONWORTH: When did we start that? By this amendment here?

JUDGE CLARK: Oh, no, Judge Donworth. This amendment has not been in effect, and yet the circuit courts are now

unanimous.

THE CHAIRMAN: Unanimous on what?

JUDGE CLARK: On taking matters outside the pleadings and considering all these things.

PROFESSOR SUNDERLAND: What did we do that caused that?

JUDGE CLARK: You misinterpreted what I said. You are all shooting at me. I say again that I wish you would read the cases and tell us if we are wrong. I don't see anything wrong with it. What I think we did, Edson, is that originally we made the pleadings less important. I think we did all this in 1938. I have always thought so. I have argued for it, and I think we did it. I think that once you took away the God-given restrictions of pleadings, this was the only logical end. The pleadings are not the thing that are going to control, if the judges can see through it and get some other idea of the case, as we do.

Speaking of the cases, I have followed this pretty closely, and I have discussed it with others. The only circuit that I thought that was at all doubtful was the Eighth Circuit, and I had some correspondence with Judge Gardner about it because he had some dicta in one case in which he spoke of the binding effect of the pleading proper. He wrote then very doubtful about this. Since then we have had the case that we have cited here on a motion to dismiss, and he takes the

affidavits. I think it was Judge Johnsen who wrote the opinion, but nevertheless Judge Gardner was in the group.

THE CHAIRMAN: An Eighth Circuit case?

JUDGE CLARK: It is the case we have cited here.

MR. LEMANN: What page?

THE CHAIRMAN: What does it hold? I thought we put a rule in saying that the case could be dismissed if the complaint doesn't state a good claim. You had placed some emphasis on the importance of the pleading.

MR. LEMANN: Is it a statute of limitations case?

THE CHAIRMAN: Page 9 of the supplement?

DEAN MORGAN: No, of the original.

MR. LEMANN: That is a case where the defendant was getting a judgment. What confuses a little bit is that you have been talking about cases, as I understand it, where the plaintiff is trying to save his hold, as it were. He got up a defective pleading. The defendant comes in on a motion to dismiss, a demurrer, and on the face of the papers it is good, and the plaintiff says, "Well, maybe it is good on the face of the papers, Judge, but I didn't put this right. Here are the facts. Here is an affidavit that shows it the way it ought to be." Is that the case the Reporter has described to us?

THE CHAIRMAN: One of them.

MR. LEMANN: Then, that really amends the pleadings as well as states the facts for summary judgment.

THE CHAIRMAN: It doesn't amend it, Monte.

MR. LEMANN: It doesn't amend it, but it has given that result.

THE CHAIRMAN: One funny thing about our summary judgment rule, which may be something you have never thought about, is that on a motion for summary judgment made by the defendant against a bad complaint, as the rule is worded and operates, the plaintiff, without amending his complaint to make it a good complaint (otherwise, he wouldn't have any motion for summary judgment), can come along and set up by affidavits facts outside the complaint that make a good case. If so, the motion for summary judgment is denied. However, there is nothing said in Rule 56 about the plaintiff's then amending his complaint so that he is going to get a judgment on a complaint that states a good claim. As far as the rules are concerned, unless the defendant comes in with a demand that he amend the complaint and make the complaint good, the summary judgment rule permits judgment on pleadings that do not state a good claim.

The thing that we are dealing with about this conversion business is nothing different from that. It doesn't raise any new problem of that kind. That arises under the summary judgment rule itself.

SENATOR PEPPER: Mr. Chairman, it seems to me there is one fundamental thing that would help me a lot if I could have it clarified.

Is it really true that we don't seriously mean by our rules that the complaint need state a ground for relief? If it need not, then a whole lot of things follow. Among others, any old complaint will do, and when you move for judgment on the pleadings for failure to disclose a cause of action, it is a real futility because all the plaintiff has to do is to say what Monte Lemann suggested: "Here is an affidavit that cures it all up." If that is true, there is no necessity for amending the pleading so that it would show a cause of action, because it doesn't make any difference whether it does or not.

MR. LEMANN: Your affidavit has really operated as a sort of automatic amendment of your pleading in the case the Chairman has put.

SENATOR PEPPER: That is right.

MR. LEMANN: Your affidavits take the place of amendments to the pleading.

THE CHAIRMAN: If you are asking me, I won't agree, and I will vociferously and voluminously oppose any idea that under our rules as they are worded, a party, against the objection of his opponent, can go to trial and get a judgment on a complaint that doesn't state a good claim. I don't think the rules support that for one minute, and they have not from the beginning. If the plaintiff has a bad complaint and bolsters it up with affidavits to show he has a good case that he does not state, the summary judgment rule doesn't specifically state

that before he gets to trial and gets judgment, he must make his complaint good. It doesn't say so specifically, but I think that the effect of the rules as a whole contemplates that he should be required to do it.

MR. LEMANN: I thought you just told me, though, that our rules didn't require that, that they didn't work that way.

THE CHAIRMAN: Didn't work what way?

MR. LEMANN: To make him amend.

THE CHAIRMAN: The summary judgment rule doesn't.

MR. LEMANN: Yes.

THE CHAIRMAN: That summary judgment rule doesn't, but there are plenty of grounds under the rules for stating that his pleading must state a good claim before he finishes.

MR. LEMANN: But the summary judgment does away with all that.

THE CHAIRMAN: It prevents his getting a judgment against him before he amends his complaint. He stalls it off by saying, "I have a good case anyway," and when you come to trial and judgment I suppose, in order to determine res judicata and what is involved in the case, that the complaint ought to be fixed up so that it really states the cause of action sued on.

MR. LEMANN: You can look at the affidavit for that, can't you?

DEAN MORGAN: You can get a good summary judgment on a complaint that doesn't state a cause of action?

THE CHAIRMAN: That is right, if the affidavits state what your real claim is.

MR. LEMANN: Without amendment.

THE CHAIRMAN: Without amendment.

MR. DODGE: Suppose the party producing the affidavit is the plaintiff whose complaint is attacked as stating no claim, he can accomplish the same result exactly by amending his complaint, and no hardship is inflicted upon the plaintiff by requiring him to do that. I should think that a district judge who received something in the form of an affidavit which shows that the plaintiff had a cause of action might well require him to amend his complaint. If the defendant seeks to bolster up his motion to dismiss by affidavits, it shows that it isn't a motion to dismiss; it is something different. He has gone outside of the record and obviously may be required, if he wants to, to file a motion for summary judgment. If he hasn't done it, he can't support a motion to dismiss the plaintiff's claim by his own affidavit of facts outside the complaint.

THE CHAIRMAN: The defendant can't?

MR. DODGE: The defendant can't.

THE CHAIRMAN: Oh, yes, even though the complaint states a good claim specifically, the defendant can come in with affidavits saying that it is all a lie, that he has

witnesses who will testify so-and-so.

MR. DODGE: That raises a question of fact, obviously not appropriate for summary judgment.

THE CHAIRMAN: Oh, no. Half the motions for summary judgment by defendant are cases where the complaint does state a good claim. The defendant comes in by affidavit and says he has witnesses who know thus and so, and here are their affidavits. "They think the facts stated in that complaint are not true, that they are a sham." Then the plaintiff comes back and supports his allegations in his complaint by putting in affidavits showing that he has witnesses who will testify of their own personal knowledge that the statements in his complaint are true. That raises an issue of fact for trial, but there are many cases where summary judgment is granted against a plaintiff who states a good claim in his complaint.

MR. DODGE: The defendant has there converted his motion based upon the complaint into a motion for summary judgment.

THE CHAIRMAN: No, it isn't based upon the complaint, because the complaint was good. The complaint states a good claim in the case I am considering. It is invulnerable against a motion to dismiss for failure to state a good claim, but the defendant comes in and says, "You have stated a good case, but your allegations are a sham and the affidavits I present show that you haven't got any proof to this effect." The plaintiff

is put on his mettle to make some showing to the court that he has some basis to support his allegations. The court does not decide the fact on the affidavit. He simply decides that there is proof which raises a question which ought to be tried.

MR. DODGE: I am assuming that the motion we are dealing with here is a motion to dismiss the suit for failure of the complaint to state a cause of action.

THE CHAIRMAN: And you are assuming that the complaint is bad.

MR. DODGE: If the defendant puts in affidavits denying allegations of the complaint, it ceases to be the kind of motion he has originally filed and becomes a motion, at the most, for a summary judgment.

THE CHAIRMAN: As Charlie would have it, yes. As the words now have it, the judge would have discretion to say whether he would allow it to be converted and receive those affidavits or whether he wouldn't.

SENATOR PEPPER: If the defendant moved on the ground that the complaint failed to state a cause for relief, would he have a similar discretion to say to a plaintiff who brought in an affidavit at the time of the argument, "I decline to look at your affidavit"?

THE CHAIRMAN: "Make your complaint good or go out of court." Under this rule as it is worded, the judge would have discretion to say, "I will receive this stuff," or, "I won't

receive it."

SENATOR PEPPER: Wouldn't it tend to great clarity if he had to follow that course? It seems to me it would make plaintiffs more careful in framing their complaints and judges more careful in disposing of motions to dismiss if there were none of this hodgepodge business as to what you were doing. The plaintiff has to state a cause of action in his complaint. Whatever the form of it, we are agreed on that much, I guess. There has to be some ground for relief disclosed in the complaint. If so, why not make it obligatory for the court to consider a motion to dismiss for failure to state a cause of action, on the record as it stands?

JUDGE DONWORTH: That is what this says right here as it has stood since 1938.

SENATOR PEPPER: The Reporter says that perhaps we could not, by any words we use, counteract the tendency in the bar, which is to treat the statement in the complaint as rather an unimportant thing and to buttress it up by coming in at will with a supplementary declaration and affidavit.

JUDGE DONWORTH: I think the answer to this whole confusion is that the judges who have mixed up this question of stating a claim with the existence of a claim have uniformly overlooked the fact that this is not new. Clause (6) is not new. Clause (6) was twenty-five years old in the jurisprudence of the United States when we put it in here, and the judges

who have followed the line that the Reporter calls attention to ignore that fact. I have tried to get here the Equity Rules of 1912, if that is the year (it is very close to that year, anyway), but I don't find them available.

JUDGE CLARK: Here they are.

JUDGE DONWORTH: The Equity Rules of 1912 or 1911 had a section in them, quoting from memory only, saying that demurrers are abolished, and the relief formerly available by demurrer can be availed of by a motion to dismiss. So, for twenty-five years before we put this clause in here, it was a recognized situation in the federal courts that if a complaint did not state a cause of action, you could move to dismiss the case.

It being an equity proceeding (of course, it was the Equity Rules only that were being dealt with), the court always acted equitably, and I think we have all had the experience that when a motion to dismiss the complaint for failure to state a cause of action was before the court, if the plaintiff intimated to the court that he could amend as to this particular point, the court invariably suspended judgment until he did amend. There is no foundation in the rules for the idea that this is new and that it requires some drastic intervention of the judges to save it from absurdity.

Professor Moore has handed me this. I haven't read it recently.

"Rule 29. Defenses; How Presented. Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which must heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer."

That was the law twenty-five years before we put it in here, and the idea of approaching this as something new is entirely erroneous.

JUDGE CLARK: Mr. Chairman, of course I disagreed with Judge Donworth's interpretation from the beginning. We disagreed explicitly in the statement in the Institute. That has been discussed at length in all sorts of law reviews. I am perfectly willing to go back to argue the original points. I don't think that is a sound interpretation.

THE CHAIRMAN: You mean you disagreed in the Institute as to what the equity rule meant?

JUDGE CLARK: Not what the equity rule meant, but Rule 12(b), and of course, Mr. Mitchell, as you know, I disagreed with you on it.

THE CHAIRMAN: And the other fourteen members. There has never been a man on the Committee, except you, who ever made the contention that Rule 12(b)(6) didn't mean what it said.

JUDGE CLARK: There are provisions of the rules that provide for the admission of affidavits, and I have thought--

THE CHAIRMAN: Those were the rules that said when they were admissible, they would be admitted in a certain way. There never has been any difference of opinion among the Committee about that.

JUDGE CLARK: I don't know. I haven't been so sure of that, but it hasn't seemed to me that it did too much good to go back and argue that case again, because I have tried to argue it a good many times and we don't get very far on that. I simply mention it now with the statement that you will find in the cases (cases that I have written myself, as well as others), in the law reviews, and elsewhere, statements of a different point of view.

If you were to say that this provision for failure to state a cause of action is only twenty-five years old, of course that isn't true. That goes away back in our history. That is just the old general demurrer as such. It is a question how we fashion these rules around the present ideas of the general demurrer.

MR. LEMANN: All of this comes out of that summary judgment practice, as I understand it.

THE CHAIRMAN: Yes.

JUDGE CLARK: Of course it does.

MR. LEMANN: We were told that an illegitimate practice, if I may say so, had grown up by which the judges were converting demurrers into motions for summary judgment.. We

were told that here were all these illegitimate children, and we had better legitimate them and give them some standing in the law. Your proposal, as I understand, goes a little further and says that we will destroy the difference between legitimate and illegitimate, that it must always be received and the judge must always treat it. Is that what is before us? I think that unless we narrow the issues, we can get back into confusion here.

JUDGE CLARK: I want to say just how this came up. I had something to do with suggesting these changes originally. I thought some district judges were construing the rules too narrowly. Some were not from the beginning, and there was a division from the beginning. I thought the matter was in doubt and that it needed some clarification. I brought it in here, and I must say I was and always have been surprised at the objections made, because it seems to me that with one hand, so to speak, we have destroyed the binding final importance of pleading, and then with the other hand we suddenly go back in a very small way, which I don't think can ever be done, really, against our whole system.

I must say that it does seem to me that this discussion is far from anything I see in the cases as they come before me or as I read them. For example, Mr. Dodge asked, why can't a plaintiff amend when he is faced with a motion to dismiss? Why can't he amend and set up the point? Of course he

can. If he were Mr. Dodge and sat down and understood it, I suppose that is what he would do. But the fact of the matter is that they don't. Why, I don't know. I think it is partly because they are in a hurry, partly because the district judge doesn't often tell them. A motion to dismiss comes up in the hearing, and the motion is granted. Then it comes before us, and there we are. I say this is more important for the courts on review than it is otherwise, because, as I say, I think if you stayed before the district judge long enough and got him to hear you long enough, you probably would get your case out, but you don't in New York and I think you would not likely in other places. They don't appreciate it at all.

Let me say one thing more. Personally, I think that it is a real question whether we need add anything. If we now start adding things, it seems to me that we are going to destroy or make doubtful a very beneficial, worth-while practice. That is, the cases have gone beyond the thinking of this Committee. I say that directly. I think the cases have gone beyond you, and it is a desirable and beneficial thing. Again I wish you would read the cases. Are we wrong? Are we circuit judges wrong in what we have done?

THE CHAIRMAN: I haven't read the cases in the last six months, but I had read every one up to date before that in which this question had come up. The trouble has arisen in the circuit courts because when the cases got up to the circuit

court they found that affidavits had been dumped in, received by the district judge with nothing being said about it, with no objection made or anything else, just dumped in as part of the record and considered. When the cases got up there before the C.C.A.'s, they said, "This is labeled a motion to dismiss for failure to state a good claim," and that is what it was originally. If they had stuck to that, the only question would have been what the complaint stated, but the lawyers on both sides dumped in affidavits, there wasn't any objection made to them, and everybody had an opportunity to put in his affidavits. They said, "We will treat it as a proper practice."

The trouble was that the Third Circuit and some others said that these rules permitted what is known as a "speaking motion." Nobody on God's earth could make a definition of a "speaking motion." There is no such thing in the law. The phrase "speaking demurrer" was ironically used once in the common law, but what was a "speaking motion"?

DEAN MORGAN: Every motion is speaking.

THE CHAIRMAN: When the affidavits were in and you considered them, how far could you go? Could you decide a case on disputed facts on affidavits? We realized that they were talking about "speaking motions" and one thing and another, and the rules don't say anything about them. They don't mention them. In order to tie the thing down to definite practice, we provided by the rule that we are discussing today, this

proposal, that the matter be treated as a motion for summary judgment, which ties it up to that practice and prevents any kind of implication that a judgment can be rendered on affidavits if there is a genuine issue of fact. It ties it down to something that is provided for in the rules and that we know about. It left it intentionally discretionary with the trial court whether he should receive any such affidavits or not. That is all that this did.

Now Charlie wants to come in and strike that discretion out and make it obligatory on the court to treat it as a motion for summary judgment if either party wants to dump in affidavits, no matter what the motion started out to be. I say that he is getting right back to the proposition he tried to put through and hasn't succeeded for the last four years, and that was to abolish subdivision (6) in Rule 12(b), just to strike out all reference to motions to dismiss for failure to state a claim, and to make the point that used to be raised by such a motion one of the points that you could raise by a motion for summary judgment.

I say if we are going to produce that result, let's hit it head-on and abolish (6) and make everything of that kind a motion for summary judgment, whether it is limited to the face of the pleadings or is supplemented by affidavits. I don't like this subversive business of trying by sideswiping the rule to get a result that we defeated intentionally some

years ago. By my present talk I am not saying that we should not. If you want to abolish motions to dismiss for failure to state a good claim, abolish them, treat them as a summary judgment motion; but don't abolish them by making it obligatory on a court to treat such a motion as a motion for summary judgment. That is just whipping the devil around the stump. It isn't frank, and it isn't the right way to do it.

Many of the lawyers who have read this proposal have come back and said, "If you are going to do that, you might as well wipe out your motion to dismiss for failure to state a claim and have a summary judgment rule in every case."

DEAN MORGAN: May I suggest, Mr. Chairman, that at the last meeting that was the point of the debate. Some of us proposed that this all be made summary judgment, that we make a combination here and that it all be treated as a summary judgment motion, always, first on the pleadings alone and, second, on the pleadings plus affidavits. Those of us who wanted to do that were defeated, and this was a compromise provision, resulting in leaving it in the discretion of the trial judge. I was for the combination of the two, I must say, and I think the Senator was.

SENATOR PEPPER: Yes.

DEAN MORGAN: But the majority were against us. Sunderland, I think, suggested the language that we used in the amendment.

PROFESSOR SUNDERLAND: I don't like it. [Laughter]

DEAN MORGAN: I don't like it either, but it is your words.

MR. DODGE: I would like to ask, Mr. Chairman, that we adopt the suggestion very forcibly made by the New York Bar Association, by the Los Angeles Bar Association, and by various others, with which I personally sympathize heartily, and get rid of this difficulty by forbidding the use of affidavits on a motion of this sort. If the plaintiff wants to get the benefit that he might seek to obtain by affidavits, he can amend his complaint. If the defendant wants to raise issues not appearing on the face of the complaint, he can file a motion for summary judgment instead of a motion to dismiss supported, as it were, by affidavits. Who is harmed by it if we simply abolish the use of affidavits?

DEAN MORGAN: The client.

MR. DODGE: No, he isn't.

JUDGE CLARK: The parties are harmed and the judges are harmed by being told in one breath that the pleadings are not the final thing and by being now restricted from looking behind the pleadings. It has made a mockery of the circuit judges. We have just got to shut our eyes to what we see in the past. I think that would be the worst step backward that possibly could be taken.

MR. DODGE: I doubt that on most of the issues, in

the state courts at least, anybody has ever tried to support a demurrer by an affidavit or the plaintiff has tried to get away from a demurrer by an affidavit.

THE CHAIRMAN: Robert, here is the trouble. Logically, it is unassailable. If you want to make a motion based on the complaint and answer alone, make it and stick to it. You have a perfect right to make a motion for summary judgment and then use the allegation of the pleadings as only part of the case and put in affidavits. If you want to do that, do that. That is all true enough. If you read the cases--and I have read quite a lot of them--you don't find so much difficulty in the district courts, but the trouble is that time and time again a case comes up to the circuit court of appeals where there is a motion entitled "Motion to dismiss under Section 12(b)(6) for failure to state a claim," and the motion is made: "I hereby move to dismiss this case because the complaint does not state a good claim." Signed, "Blank, for the defendant." That was the motion.

Then, during the course of the hullabaloo in the district court, somebody started putting in affidavits; maybe it was the plaintiff, to support his complaint. There wasn't any kick about it. The court wasn't asked to make a ruling about it, whether they should be in or out. They were dumped into the record, and then the case comes up to the circuit court of appeals, and here is the complaint, bad. It is a bad complaint,

and yet the undisputed facts on the affidavits that both parties have put in show that the complainant really has a good claim and ought to have judgment. I can show you cases like that.

MR. DODGE: He should have amended his complaint. That is a very irregular practice.

THE CHAIRMAN: The point is that you get up to the circuit court of appeals, and you have the answer plain on the face of it so that a final judgment can be ordered right then; but if your system is put in, they have to send the case back and go through a long rigmarole in the district court and approach it in a different way. They can't dispose of it finally right then and there. All they can say is, "The complaint is bad on its face. There was no authority to receive affidavits, so we can't consider them. The case is remanded and the case dismissed, with leave to the plaintiff to amend within 20 days." If you take the other theory, having the record in that shape, you are in position to proceed to final judgment; you settle the case right there in the court of appeals and direct a final judgment. That is a very great advantage to litigants.

MR. DODGE: There would not have been any such difficulty if the plaintiff had amended his complaint instead of filing an affidavit.

DEAN MORGAN: If he had had a lawyer instead of a

fellow who had--

THE CHAIRMAN [Interposing]: As a matter of fact, I can show you a lot of cases where that sort of record has gone up, and that is what induced me to support this present proposal.

MR. DODGE: Why not prevent such records from going up, as the New York Bar Association very forcibly urges?

JUDGE DOBIE: Aren't there cases in which the district judge is more or less captain of the ship? Take the old stock case of deceit, where you have to allege scienter. Wouldn't it be simple in that case, the district judge seeing that situation, to say to the plaintiff, "What is wrong here is that you haven't alleged this fact that the defendant knew this thing to be true, the scienter." Wouldn't amendment of the complaint be very much simpler there than to mess the record up with affidavits?

JUDGE CLARK: Yes, but how are you going to be sure that the district judge is always going to do the simplest thing? The district judges just don't. As I say, it is partly because the lawyers don't present the point, and it is partly the hurry and one thing and another. It seems to me that in this day and generation you are not, by stating the formal prohibitions, going to get back into the old days of common law pleading. The whole spirit of the times is against it.

PROFESSOR SUNDERLAND: It seems to me if we take out those words "and received by" and make it obligatory on the

court, instead of being a progressive proposal, we go back at least a hundred years to the common law which authorized the general issue which could be filed and meant nothing on its face and under which you could introduce any defense you had without any notice to the other side. I think that this amounts to just about that.

JUDGE CLARK: I don't think the general issue was such a bad idea.

DEAN MORGAN: Pleadings, Edson, now don't amount to a hill of beans anyhow, except notice, because you can change them any time you want to. You rely now for the issue upon discovery. That is what you really rely upon to find out what the case is all about.

PROFESSOR SUNDERLAND: We purport to require some notice to the other side to appear in court and meet the case. This would just eliminate all requirements of notice. You go down there to argue what amounts to a demurrer, and you find you have a wholly different case on your hands which you knew nothing about.

DEAN MORGAN: I have never seen any device yet, except discovery, that made counsel show their hands in the pleadings. If you have a general allegation of negligence and make a motion to make more definite and certain, the plaintiff puts in every conceivable specification of negligence that could have happened in that. Then what is he met with? He is met with

a general denial, contributory negligence, and assumption of risk. Nobody knows when he goes to trial what the issue is that is actually going to be tried, unless you have a pre-trial hearing. That is what happens. I have seen it happen time and time again.

MR. LEMANN: Is there a motion before the house?

THE CHAIRMAN: No.

JUDGE CLARK: I did move that these be stricken out, but of course I see you are against me. There isn't any use in continuing that.

THE CHAIRMAN: The things you wanted stricken out were the words of the original proposal which intimated that the judge would have some discretion as to whether he would receive extraneous matter or not. Charlie wants it obligatory, which converts the thing into a motion for summary judgment. I protest it, because if that is what we are doing, let's say so and not wriggle around sideways on it.

DEAN MORGAN: Won't it make it clearer if you just say he <u>shall</u> treat it as ...? That makes it mandatory if you strike out the "and received by". If you want to keep it as it is, shouldn't you say that the court <u>may</u> treat it, instead of just saying if it is offered and received by him?

THE CHAIRMAN: No. Maybe the clause is ambiguous as it stands, but as it stands it is intended to mean that if it is presented to the court and the court decides to receive it,

it isn't obligatory. The court may say, "I will not receive it, and I will not convert it into a motion for summary judgment."

DEAN MORGAN: That is right. That makes it discretionary with the court.

THE CHAIRMAN: What do you want done?

DEAN MORGAN: The objection that was made in some of the comments that I saw was that it wasn't clear, and I should have thought it would have been clearer to say, "If material outside the pleading is presented, the court may in its discretion receive it and treat the thing as a summary judgment," so as to make it clear that it is discretionary.

THE CHAIRMAN: I think that point is well taken. I think the draft is a little ambiguous.

DEAN MORGAN: If it isn't to be discretionary, then the amendment by the Reporter seems to me to hit it squarely, because he said, if it is presented, it must be treated as a summary judgment. That means he has to receive the affidavits, and so forth.

MR. LEMANN: Could we bring it up by the other point of view by proposing that lines 73 and 74 be amended to read: "outside the pleadings are presented to the court, the motion may in the discretion of the court be treated"? Would that bring it up from the other point of view? Either that or the Reporter's suggestion.

THE CHAIRMAN: No. If he receives it, he hasn't any discretion. It has to be summary judgment.

MR. LEMANN: I took out the words "and received by".

THE CHAIRMAN: Then, you would make it obligatory on him. If you hand it to him and present it to him, he is bound to treat it as a motion for summary judgment.

DEAN MORGAN: That is the same as mine. "If matters outside the pleading are presented to the court, the court may in its discretion".

MR. LEMANN: That is what I meant to say.

PROFESSOR SUNDERLAND: The Chairman made a suggestion earlier in the argument which seemed to me to make it very clear. It was to have that read "presented to the court without objection or by leave of court". That would make it perfectly clear.

MR. LEMANN: I don't think that is as plain as the other. It would seem to me that on this particular point we have our choice between the following two alternatives. Alternative No. 1, which is the Reporter's alternative, would make the second sentence in clause (c) read as follows: "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented, the motion shall be treated as one for summary judgment." That is the Reporter's proposal. Am I right?

JUDGE CLARK: Yes.

JUDGE DOBIE: He said "to the court".

MR. LEMANN: Alternative No. 2 would make it read: "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented, the court may in its discretion treat the motion as one for summary judgment." Is that correct?

THE CHAIRMAN: No, it is not, because if it is received, he has no discretion. It is a motion for summary judgment and is governed by the summary judgment rule. The discretion is in whether or not he receives the stuff at all.

MR. LEMANN: I left out the words "received by" in my dictation. I meant to leave them out. I said if they are presented. They have to be presented, or the point would not arise.

THE CHAIRMAN: I see what you are driving at, but so many of these cases reach the circuit court of appeals where the trial judge didn't show any discretion at all. He just kept mum, and he didn't exercise any discretion in treating it as a motion for summary judgment. The stuff was just there dumped in.

MR. LEMANN: What did he do?

THE CHAIRMAN: He made an order one way or another, dismissing the complaint or denying the motion, either one or the other.

MR. LEMANN: Did he treat it as a motion?

THE CHAIRMAN: No. Either he made an order dismissing the complaint, motion granted, or he denied the motion. That is all.

MR. LEMANN: Did he decline to treat it as a motion?

THE CHAIRMAN: He didn't do anything.

MR. LEMANN: What was his result consistent with?

THE CHAIRMAN: His result was the proposition that he probably intended to dismiss the complaint or refuse to dismiss it because he thought it stated a good case, but he had all these affidavits in. You don't know just what he wanted to do. When the case gets in the circuit court of appeals, you find a motion labeled "Motion to dismiss for failure to state a good claim under Rule 12(b)(6)," and then a lot of affidavits and depositions dumped in by one side or the other, and then an order of motion granted or motion denied. The C.C.A. says, "The complaint is bad. Both parties put in affidavits, and there doesn't seem to be any objection made to them, and on one vital question of law which settles the case, there is no dispute. They both agree in the affidavits thus and so is the fact and that fact calls for final disposition. So, we will not bother with whether the complaint is good or bad or anything else, because the parties have conceded by their affidavits, have practically made a stipulation, in fact. Instead of sending the case back because we reverse the action in the lower court in holding what the complaint states, we will order

judgment and end the litigation."

So, you see there is method in our madness here, "If ... matters outside the pleadings are presented to and received by the court". We are not saying that he exercises discretion in converting it into a motion for summary judgment, because half the time he doesn't. He actually took it and let it go in, and it is part of the record.

MR. LEMANN: Permitted it to be filed. What do you meant by "received". As you have stated the case to me, I infer that the trial court refused to give it effect as a motion for summary judgment in the case you put. The stuff was put in the record, but he really ignored it.

THE CHAIRMAN: There is no reason for that. He may have treated it as a summary judgment. You are asking me what he expressly did about it. I say he didn't do anything but say "Motion granted" or "Motion denied." He might have had in his head that it was a motion for summary judgment. He might have had Charlie's idea that if you have a complaint, it doesn't make much difference what it states if you put affidavits in with some more facts in them which are in addition to the complaint and which make the complaint good or bad. You don't know what his idea was. That is the whole point.

MR. LEMANN: May I ask this? If you remember the cases, did the C.C.A. affirm the district judge in most of these cases or reverse them? Did they reach the same result or a

different result?

JUDGE CLARK: No, there is quite a difference there. Monte, we have classified the cases in our draft here. It depends on what you are doing. It starts at the bottom of page 13.

"The decisions dealing with this general situation may be generally grouped as follows: (1) cases dealing with the use of affidavits and other extraneous material on motions; (2) cases reversing judgments to prevent final determination on mere pleading allegations alone."

MR. LEMANN: These are all appellate cases. Group (1) is all appellate cases, where Mr. Mitchell says the court of appeals said, "What is the use of sending this case back? The facts are admitted, and the law is plain. We will decide the case." Is that right?

JUDGE CLARK: That is right. I think those were all affirmances.

MR. LEMANN: They are all affirmances.

JUDGE CLARK: The second group, which is just as large, are cases of reversals because it appeared that it was just a mere pleading point and there ought not to be final judgment on that. I can tell that from the cases that I remember that we had. For example, you will see in Group (2) the Rossiter v. Vogel case which I was using as an example a few minutes ago. That was a case of a defense in a copyright case

that the trial judge considered inadequate. We reversed that.

MR. LEMANN: You have two more on page 15.

JUDGE CLARK: Yes.

MR. LEMANN: Why did you reverse those two?

JUDGE CLARK: The Dioguardi v. Durning case was the case of a ? made by an Italian, Mr. John Dioguardi. The trial judge didn't pay much attention to him and through him out, dismissed for failure to state a claim. I wrote the opinion and held that there was enough stated there to be a claim.

THE CHAIRMAN: That was just a bare question of the sufficiency of the complaint, wasn't it? Was there any extraneous matter offered or received?

JUDGE CLARK: Yes, there was. We weighed it by what was put in.

MR. DODGE: I think the third method of dealing with this is much the simplest and best, and that is to forbid the receipt of such matters on a motion such as this, and I want to go on record as favoring that solution of it. It has not caused the slightest difficulty, so far as I am aware, in the fifty years that I have been dealing with demurrers and motions to dismiss, where affidavits were excluded upon the consideration of this.

THE CHAIRMAN: I can show you a dozen cases in the circuit courts of appeals under that rule where the parties

would have to start all over again in the district court, although on the undisputed record in the C.C.A. one of them was entitled to judgment as a matter of law.

JUDGE DOBIE: Has anybody suggested (I am not advocating it, just asking for information) that it might be well to require the district judge to specify what he is doing?

JUDGE CLARK: I think that is the kind of thing I was trying to get away from, because he is pretty sure not to specify, and half the time it will be carelessness of either him or counsel rather than merely a failure to have his mind on it.

SENATOR PEPPER: Mr. Chairman, may I ask the Reporter this question? Taking his view as to what is desirable, would not the simplest way to attain his objective be to strike out from Rule 12 the provision requiring a motion for failure to state a claim upon which relief can be granted? Then we get rid of all our conflict, because there is nothing left except motion for summary judgment.

THE CHAIRMAN: That is what I said. If we are going to do what he wants, let's do it that way and not pussyfoot around it this way.

JUDGE CLARK: I have no question, Senator Pepper, that in another ten years that is just what we will do.

DEAN MORGAN: I will vote for that right now, Charlie.

JUDGE CLARK: You and I have voted for it many times

already, and we would vote for it now.

SENATOR PEPPER: It seems to me that clarity of thinking requires us to face the two extremes. I have tried to state one extreme, which is that we excise from Rule 12 the motion based upon the insufficiency of the pleadings to state a ground for relief. If we are not prepared to do that, then it seems to me Mr. Dodge has stated the other alternative, which is to make line 59 and subsequent lines read thus:

"On a motion under (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, no matter outside the pleading should be considered by the court. If the motion is granted, a motion to amend, if made, shall be entertained."

JUDGE CLARK: I don't think you will get anywhere in pleading by stating two alternatives, one of which is going back on the practice.

SENATOR PEPPER: I am not suggesting that we state alternatives, but I think we ought to have in our minds that we must choose one of two alternatives.

JUDGE CLARK: That just isn't so.

THE CHAIRMAN: I am afraid I don't agree with that. I think there is a third possibility. You have a motion to dismiss for failure to state a good claim. That is a right you can exercise here. You have a motion for summary judgment, if you want to go at it that way. You say it has to be one or

the other. I say there is a middle ground. You can start on a motion to dismiss for failure to state a claim, but if for any reason one of the parties thinks that under all the circumstances it would be better to convert it right then into a motion for summary judgment instead of going through the format of dismissing the motion to dismiss and going back to make a motion for summary judgment as a separate thing, they take the short cut and they apply to the court right then and there in the hearing and say, "I would like to convert this into a motion for summary judgment." If justice, equity, and speed entitle them to it, I should think the judge ought to have power to permit the transformation. That is the third alternative, and that is the one which the rules provide for.

SENATOR PEPPER: It seems to me if you provide for a motion based upon the proposition that the pleading does not disclose a ground for relief, then by the terms of the proposition if you are going to permit the plaintiff or whoever it is that has filed the pleading to introduce an affidavit, then ipso facto that does convert it into a motion for summary judgment.

THE CHAIRMAN: That is what I say. You permit it.

SENATOR PEPPER: Then, why permit the futility of a motion for judgment on the pleadings by the defendant, when the plaintiff can defeat his motion by excising it from the record and turning it into a motion for summary judgment?

THE CHAIRMAN: You can't without permission of the court. That is just the difference. If Charlie's method works and either party can permit it willy-nilly of the court, I agree with you 100 per cent, but if it is a question where the court still has the power to say, "No, I won't allow you to convert it--"

MR. LEMANN [Interposing]: What is the difference between what you are now proposing and what I dictated as the second alternative when I said the court may in its discretion?

THE CHAIRMAN: I didn't say there was any difference. I agreed with somebody that, as drawn, this is a little ambiguous as to whether the court has power to receive this stuff that is presented to it. I think it ought to be made perfectly clear that whether the court has this stuff dumped on him in addition to the pleas is a matter for his discretion; but I do say that if the point isn't brought to his attention, he isn't asked for a ruling and doesn't in words express his discretion, if it is just handed to him, nobody objects to it, and it becomes part of the record on which the order is based, then I think it ought to be treated as having been received by the judge just as if he had expressly said, "I exercise my discretion and have decided to receive this material," or just as if he had received it over objection.

MR. LEMANN: Would it make your point clear if we made it read this way or something like this? I am sticking to

line 72. Of course, you would have to make the same change above.

"If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to the court and not excluded by him"..

JUDGE CLARK: I think that would be much better.

THE CHAIRMAN: That satisfies me.

MR. LEMANN: "and not excluded by him, the motion shall be treated".

MR. DODGE: "may be".

MR. LEMANN: "shall be".

THE CHAIRMAN: "must be", because we don't want a judge deciding a case on affidavits other than in Rule 56.

MR. DODGE: They may obviously raise a question of fact. Neither party may want to ask for a summary judgment or have any ground for asking for it.

JUDGE CLARK: That is entirely covered by the rules, because the rule on summary judgment says in that case you shall not grant summary judgment. It is taken care of.

MR. LEMANN: The judge could exclude it, Mr. Dodge, by the language last suggested, and if he excluded it that would show he would be saying, "Boys, you can't do it this way. You will have to amend your pleadings. I am not going to let this stand as a motion for summary judgmeht."

JUDGE CLARK: I think your suggestion, Monte, isn't

quite what I would suggest myself, but I think it makes it clear, at any rate, and it avoids a good deal of the question of ambiguity. It probably avoids most of the question of ambiguity I raised.

MR. LEMANN: It would cover it, wouldn't it, Mr. Mitchell?

THE CHAIRMAN: Would you strike out "and received by" and substitute for those words "and not excluded"?

MR. LEMANN: "by the court".

THE CHAIRMAN: "by the court, the motion shall be treated as one for summary judgment".

MR. LEMANN: Yes.

THE CHAIRMAN: I think that clears up the ambiguity. Here is an interesting note, in pencil, which I made four months ago. I just noticed it.

"The fundamental question is whether a party who moves for dismissal under 12(b) for failure to state a claim has a right to treat it as a motion for summary judgment and a right to introduce extraneous matter, or may only do so if the court allows it. If he has a right, then it is silly to retain 12(b)(6) [I agree with the Senator about that] because a motion under it is always a motion for summary judgment on which extraneous material can be received."

On the previous page of this note here I say that the judges have been conjuring up imaginary trouble concerning

what the district judges do with this stuff. I think your amendment makes it perfectly clear that they can either receive it or reject it and, if they reject it, they have to stick to the allegations of the pleading; if they admit it, then it is automatically a summary judgment conversion and it just saves the rigmarole of dismissing this motion and making another one on the next day in summary judgment form. That is all it amounts to. The judge says, "I will allow you to switch over like this instead of going back to your office and drawing up a new paper." I don't see any objection to it.

MR. LEMANN: After all, what is the difference between an affidavit and a petition? What is the difference between an amended petition and an affidavit? It is a matter of wording. You could just as well call that affidavit an amended petition. If a guy, instead of amending a petition, wants to file an affidavit, why not treat it as an amendment to the petition, which is what this would permit in effect, tying up then the showing of facts.

JUDGE DOBIE: Monte, I think your suggestion partly answers the question that I put. It seems to me that it is quite important that this judge should know what he is doing, and I think your wording puts it up to him so that if this is presented and is not refused by him, then he is in the summary judgment field and knows it.

MR. LEMANN: It also helps in the case where he

doesn't know what he is doing, which I am told often happens in the District of New York, where they seem to have district judges who are not up to the Louisiana federal judges' level.

MR. DODGE: Then, with that amendment made, the defendant says, "Of course, I don't want to ask for summary judgment," because obviously there is a question of fact there if he amends his complaint in that way. Is he obliged to press a motion for summary judgment?

THE CHAIRMAN: He can dismiss it if he wants to.

MR. DODGE: He can withdraw the motion?

THE CHAIRMAN: Yes. He can make a new one on any day he wants to. I don't know of any rule that forbids one to make more than one motion for summary judgment.

JUDGE DONWORTH: It seems to me Mr. Lemann's motion could be made more plain by changing the language in this way. I am reading now what is in italics beginning with line 59. I leave it as it is until I am notified that I should change it.

"If, on a motion under (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to the court, the court in its discretion may receive and consider such matters, in which case the motion shall be treated", and so forth.

THE CHAIRMAN: That is a good rule, except that there are cases where the court makes no ruling on it one way or another. There is no objection made to it; it just goes into

the record and you can't tell whether he has considered it or not.

MR. LEMANN: It was because you pointed that out that I suggested this other language.

THE CHAIRMAN: That is why Monte's provision covers a case where there is silence all around and you can't tell just what happened. As a matter of fact, that is what most of the cases are in the district courts.

JUDGE CLARK: It is, yes.

JUDGE DONWORTH: That means that in every case, then, it is converted. Is that the idea?

THE CHAIRMAN: It is converted unless the court excludes the stuff, if it is presented to him and received by the court, if it goes into the record as part of the papers upon which the case is decided, and that is the case that goes to the C.C.A.

JUDGE DONWORTH: Judge Clark would still find the same difficulty as to whether it was considered by the court or not, because the court was silent on the subject.

JUDGE CLARK: Of course, as I said, Monte's suggestion would not be my first suggestion, but Monte's suggestion is one that I am willing to accept as the natural development and one that accords a good deal with the cases. The others, I think, would be a very distinct retrogression, but I think Monte's is helpful. Did you get it?

DEAN MORGAN: Yes, I got it; "and not excluded" instead of "and received".

JUDGE CLARK: I think that is a helpful development along the line of what is taking place.

JUDGE DOBIE: Somebody made the point here about allowing amendment, and so forth. I think the general attitude in the federal courts is to be just as generous and liberal as they can be. You cite in there, Charlie, the case of Tahir Erk v. Glenn L. Martin Co. I happen to have written the opinion in that case. In that case the question came up whether they ought to allow an amendment. I asked the lawyers in the circuit court of appeals what the amendment was, and they drew it in the court and we allowed it.

JUDGE CLARK: You allowed it in the circuit court?

JUDGE DOBIE: Yes, we allowed it in the circuit court of appeals. They said, "If you will take a recess for ten minutes, we will prepare it," and they did.

JUDGE CLARK: That is an interesting thing. I don't know that there is general power to do that in the federal court.

JUDGE DOBIE: We did it.

JUDGE CLARK: I wouldn't object to it, but I don't know that it is definitely authorized.

THE CHAIRMAN: Mr. Lemann has made a motion that in Rule 12(b), lines 62 and 73, the word "received" be stricken out and that in place thereof there be inserted the words

"not excluded".

MR. LEMANN: And similarly in line 73.

THE CHAIRMAN: And a similar alteration in subdivision (c), relating to motion for judgment on the pleadings. Do you want to vote on that?

DEAN MORGAN: Yes.

[The motion was put to a vote and carried.]

JUDGE CLARK: I think that takes us down to (d). There is nothing I have to bring up on (d). I think it takes us down to (e).

DEAN MORGAN: It is certainly not worth considering that old objection that we have had right along.

THE CHAIRMAN: We are down to (e), Motion for More Definite Statement. Is there anything new on that?

JUDGE DONWORTH: The New York Bar Association is very strong against abolishing the motion for a bill of particulars.

THE CHAIRMAN: The state bar?

JUDGE DONWORTH: Yes.

JUDGE CLARK: No. Excuse me. Isn't that the Association of the Bar.

JUDGE DONWORTH: Perhaps you are right. I will read this heading. "Report of the Committee on the Federal Courts on Second Preliminary Draft of Proposed Amendments to the Rules of Civil Procedure for the District Courts of the United States." It is the New York County Lawyers' Association.

THE CHAIRMAN: Not the Association of the Bar.

JUDGE DONWORTH: You are right. I didn't notice that distinction. This is the Committee on the Federal Courts of the New York County Lawyers' Association.

THE CHAIRMAN: That wouldn't mean much to me, Judge. I know that Association. It has a small committee, and this is the review of a half dozen lawyers. I don't know of any of these rules which has been more grossly abused than this rule for motion for more definite statement. It is really shocking.

JUDGE DONWORTH: No doubt it is true that when the lawyer gets into a conglomeration, he says, "Let's make a motion to make more definite." That is what he does, and that gets him more time. I have no doubt it is abused.

JUDGE CLARK: Mr. Chairman, I know something more about this New York County Lawyers' Association report. That report is the world of Mr. Harold Harper. If you know him, you know he is a very nice gentleman, but he says that one of the glories of the New York Civil Practice Act is that it tried to abolish the demurrer and didn't succeed. He said that very directly. I have appeared before the Bar Association of New York and argued these matters with Mr. Harper, and he is a good lawyer of that school of thought. I don't want to say anything against him, but he certainly is a technical fellow, and the work is his. I know because I have talked with other members. For instance, Professor John Finn, who is a pretty

able fellow, was on the committee. I asked him, "What happened? How did you come to be on this?" He said, "Harper wrote this out at length, and I didn't get in when it was considered." That is the way those things go, as we know, in bar association reports. One man takes an active point of view. It should be considered, but it is more Mr. Harold Harper of New York City than it is an overwhelming demand from the New York County Lawyers' Association.

JUDGE DONWORTH: I thought well of Mr. Harper because he was chosen as the Chairman of the Symposium Committee when we made our talks there in 1938.

JUDGE CLARK: That is true. There is no doubt about it. He presided, and presided with great dignity.

JUDGE DOBIE: Do the New York lawyers want to leave everything just as it is, only putting the bill of particulars back?

DEAN MORGAN: That is what they want. This isn't a new draft now, is it?

JUDGE CLARK: I don't think that they made much fuss in their last report.

DEAN MORGAN: Yes, they made a fuss.

JUDGE CLARK: Did they the last time? It is only logical that they would, but it is the same group, really.

JUDGE DOBIE: If they wanted to change some of these things here about the motion, I would be glad to listen to what

they said, but my objection to the bill of particulars and the reason I enthusiastically recommended that we strike it out was that it gave a terrific lot of trouble to the courts to try to make a distinction between a motion for a bill of particulars and a motion to make more definite and certain. Some of them took the old technical stand that the bill of particulars was for purposes of trial only and that the motion to make more definite and certain was for pleading. There were a great many cases, I know, and I have read a lot of those, in which it messed the judges up pretty badly. I am frank to say I think we confuse it. As I remember Morgan's talk on it, he said that he agreed with that and thought if they wanted it for trial they could do that by the provisions in here for discovery. Is that correct?

DEAN MORGAN: Yes. Rule 33. You can get everything you want and a lot more by a bill of particulars out of Rule 33.

THE CHAIRMAN: I don't think anything has arisen since our last meeting relating to subdivision (e).

JUDGE DOBIE: I move that the bill of particulars still be killed.

THE CHAIRMAN: Unless there is a motion to change the draft, we just assume it is killed. You have nothing on (f), have you?

JUDGE CLARK: I don't think there is anything on (f). Somebody has made a suggestion.

DEAN MORGAN: Motion after motion to strike. That is nonsense. That was suggested by Saussy.

THE CHAIRMAN: Is there anything on (g), Consolidation of Defenses?

DEAN MORGAN: Nothing new on it.

JUDGE CLARK: I think Ed is correct. There are several suggestions, but it seems to me it is the kind of thing that we have considered before.

THE CHAIRMAN: Nothing new?

JUDGE CLARK: No.

MR. DODGE: Isn't there something new? Why did we strike out the last four lines, (1) to (5)?

JUDGE CLARK: That, as I remember, was the preliminary motion.

THE CHAIRMAN: That divided the preliminary motions into two groups, and now we have made them one.

JUDGE CLARK: That is it.

MR. LEMANN: May I ask if stylistically in lines 128 to 132 we should not put in "save as provided in subdivision (h)", because you do permit, don't you, in subdivision (h), a man to bring in jurisdiction and failure to join an indispensable party?

JUDGE CLARK: I think technically we are correct. We say, "he shall not thereafter make a motion based on any of the defenses or objections so omitted." In (h) he doesn't make

a motion.

MR. LEMANN: You say "by motion" in line 142.

JUDGE DOBIE: "or by motion for judgment on the pleadings".

MR. LEMANN: It is just a stylistic point. I don't think it will mislead anybody, but it is a little inconsistent to say absolutely that he shall not do it and then in the very next subdivision to say that in these instances he can do it.

THE CHAIRMAN: I don't think I quite get that.

MR. LEMANN: You see, line 126 says, "he shall not thereafter make a motion based on any of the defenses or objections so omitted."

THE CHAIRMAN: That is, he can raise them by answer, but not by motion.

MR. LEMANN: Yes.

THE CHAIRMAN: Now what?

JUDGE DOBIE: Line 142 says "or by motion for judgment on the pleadings" he can raise them.

MR. LEMANN: He can raise these particular ones, namely, in line 137, "failure to state a claim upon which relief can be granted"; line 139, "defense of failure to join an indispensable party"; and line 140, "the objection of failure to state a legal defense may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings".

JUDGE CLARK: I still think it technically accurate. Where is the motion for judgment on the pleadings? A motion for judgment on the pleadings is up in subdivision (c). That is permitted, and you can make your motion under (c).

MR. LEMANN: I see.

JUDGE CLARK: But if you don't make a motion under this rule, don't make it. I mean, (g) is geared to making a motion under this rule. What you have just now quoted from (h) relates specifically to a motion under this rule.

MR. LEMANN: This rule takes in (c), doesn't it? (c) as as much a part of the rule as (g) is.

JUDGE CLARK: Yes. You see, (g) goes back. It is geared to this: "If a party makes a motion under this rule and does not include therein all defenses and objections", and so on. Make your motion under (c) when you are making a motion for judgment on the pleadings.

THE CHAIRMAN: "this rule" doesn't mean (g); it means the whole of 12, doesn't it?

JUDGE CLARK: Yes. Specifically it must mean all of 12 because, you see, the first line says, "A party who makes a motion under this rule may join", and so on. Of course, I don't see that there is any great objection if you think it adds something.

MR. LEMANN: I suggested it for you to think over and see how it strikes the other members. If nobody thinks it is

worth making, it isn't worth arguing.

THE CHAIRMAN: Then, as I understand it, if you make a motion under this rule and don't join with it a motion for judgment on the pleadings, you can't make a motion for judgment on the pleadings thereafter. You can raise the point only by answer. Is that right?

MR. LEMANN: That is not right, because line 142 says you can do it by motion for judgment on the pleadings in these particular cases. I am talking only about these three special defenses that we are all agreed a fellow would have a right to bring up at almost any time; namely, failure to state a claim upon which relief can be granted, failure to join an indispensable party, and failure to state a legal defense. There are really only two of them, because the last is just stating it the other way about. In (h) we have said that you can bring those in at later stages, and I just raise the point whether (g) doesn't seem to intimate the contrary. If so, I think any judge would say that (h) controlled (g). It is just a stylistic point.

JUDGE CLARK: They are not inconsistent, I believe. All this really says, if you make a motion for judgment on the pleadings and then don't include it, you can't make another motion, which would presumably be another motion for judgment on the pleadings. That is all it says. The provision in (g) is that if a party makes a motion under this rule and does not

include therein all defenses and objections then available to him, and so on, he is going to use (c).

MR. LEMANN: Suppose I come in under (c) and make a motion based upon improper venue, and I am overruled. Then I file an answer. Later on, I find that the fellow didn't state a cause of action or that he didn't join an indispensable party. As I understand it, under (h) I can come in and bring those points up. Yet, as I read (g), I have forfeited my right to bring them up.

THE CHAIRMAN: I think that to make it correct you would have to say after the words "so omitted", "except as provided in subdivision (h)."

MR. LEMANN: That would meet the point.

JUDGE CLARK: I didn't get that.

THE CHAIRMAN: After the words "so omitted" in line 128 insert "except as provided in subdivision (h) of this rule."

JUDGE CLARK: I don't believe there is any objection to that. What do you say about that, Bill?

JUDGE DOBIE: I think that would clarify it a little.

JUDGE CLARK: I think that is all right.

THE CHAIRMAN: It meets your point, doesn't it?

MR. LEMANN: Yes, it does.

JUDGE CLARK: All right.

THE CHAIRMAN: Put it in and chew it over. If you find it is wrong, communicate with Monte and persuade him.

MR. DODGE: Some objection has been made to joining (6) with all of the other preceding lines which relate to jurisdiction over the person and over the subject matter. They raise the point that jurisdiction of the parties should be disposed of first, even though the defendant may have in mind to raise a point under (6), because if you join (6) there you have to file a brief with your motion in support of it---

DEAN MORGAN: That is the Chicago Bar Association.

MR. DODGE: ---where your main defense is improper venue or something that goes right to the jurisdiction over the person. I raised the point because I didn't remember why we struck out the last four lines of (g).

JUDGE CLARK: This is the same thesis that we have been trying to work on. How many chances for preliminary battles are you going to allow? Shouldn't you have one general preliminary battle, if you are going to have one, and fight it out, and should you be able to try seriatim? Should you have one bite at the cherry now and, when you lose, have another bite at the cherry, and keep going that way?

MR. DODGE: You have admitted it by allowing it to be stated in the answer, but you don't permit it to be raised by motion.

JUDGE CLARK: If the court has no jurisdiction of the subject matter, it is true that is going to be thrown out whenever it appears, even in the appellate court. We can't do

anything about that. We are not even trying to. However, we are saying that if you ask the court to hold up everything for a hearing, you are to present in general the claims you have. It will operate somewhat to push a fellow on into making his general points at one time. It won't be complete.

Of course, on your question of defense of failure to state a claim, we now have it pretty clear that you raise it by summary judgment. As a matter of fact, we haven't tied up the summary judgment at all. I did suggest at one time that you should not have too many chances to move for summary judgment. That was voted down. As I take it, theoretically, now you could raise practically all these points by making a summary judgment motion once a week right along. So, I will confess that this isn't absolute.

THE CHAIRMAN: The point is that nobody has thought to do that; no lawyer has yet discovered that he can make a summary judgment motion every week.

MR. LEMANN: If he made that motion every week, that wouldn't suspend the running of the time against him for filing his answer, would it?

JUDGE CLARK: I wonder if I couldn't get some lawyer to do it sometime, and maybe then I could make the suggestion to limit that. That is perhaps an idea. No, they haven't done it, it is true.

MR. LEMANN: I think we debated this and said this

was a compromise the way we have it now on what the Reporter wanted us to do, to which I think there are some objections. As Mr. Dodge pointed out, I think it is a little tough on me if a fellow sues my client and plainly I think there is no jurisdiction, that I can't raise the question of jurisdiction unless I also throw in all the other points that also appear on the basis of the paper. I have to put them all in, or else I put them all in my answer. I console myself by saying that I will plead to the jurisdiction, if I think it is very plain, and if I lose on that, I am not entirely out because I can raise all these other questions in my answer.

THE CHAIRMAN: Then you can make a motion for summary judgment on the pleadings.

MR. LEMANN: That is right.

JUDGE CLARK: That is true.

MR. LEMANN: I think we debated it very fully.

DEAN MORGAN: I know we did. I almost wept over your plight.

JUDGE CLARK: I think you have too many chances now.

MR. LEMANN: I believe I sort of fought for this compromise finally.

JUDGE CLARK: You suggested it, Monte.

THE CHAIRMAN: Have any new things which we have not considered before come up on this section?

DEAN MORGAN: Mr. Chairman, I think I wrote you after

this was put in print that the Chicago Bar Association raises the same point, that for failure to join an indispensable party you have a mandatory dismissal here. It seems to me that that is absurd if the party can be brought in without depriving the court of jurisdiction. You may have an indispensable party who can be served, and it won't deprive the court of jurisdiction, and under those circumstances he ought to be added and the action should not be dismissed. I think it would be absurd to dismiss the action.

JUDGE CLARK: Eddie, I would like to ask someone about that. As a matter of fact, we worried over that a good deal in a case we had. There are other provisions in the rule that direct the party to bring in an indispensable party if he can. That is in the rule.

DEAN MORGAN: I know that.

JUDGE CLARK: That is in the rule on parties, Rule 19. So, a person who is going to be harmed by having a dismissal has a chance to correct, if he will. We had a case where he hadn't done anything, and what was the court to do? Assume the premise of an indispensable party who is not joined and--

DEAN MORGAN [Interposing]: I will grant that. Why don't you just order him to be joined?

JUDGE CLARK: Of course, there, too, a good deal of the time you don't know what is going on. The court really wouldn't know. Is the court then to stop and say, "I want to

make sure that we can't get him, that he isn't in the jurisdiction, and so on"?

MR. LEMANN: Why couldn't he do it under this rule? Why does subdivision (h) say that the case has to be dismissed?

DEAN MORGAN: It says so flatly. "whenever it appears ... that there has been a failure to join an indispensable party, the court shall dismiss the action." It is just exactly as if the court lacked jurisdiction of the subject matter.

JUDGE CLARK: As a matter of fact, we had a case on appeal that bothered me a great deal about this point. It was the Safeway Trails case. In that case the court ruled there was an indispensable party and then was going to dismiss and did dismiss, and no steps were taken to bring him in. It got up to us on appeal, and the person who secured the dismissal said, "It isn't up to me." We said, "Why wasn't he brought in?" The fellow who had won pleaded entire lack of knowledge. He said, "I don't know. It isn't my doing. They had the opportunity, and here we are."

DEAN MORGAN: It should say the party shall be brought in or the case dismissed within a certain length of time if he is not brought in, but certainly the court hasn't the slightest discretion in this particular case. If it appears that there is an indispensable party, out goes the case just as if there were lack of jurisdiction of the subject

matter, and it seems to me that is just about as absurd a rule as you could get.

JUDGE DONWORTH: What rule is that?

THE CHAIRMAN: Top of page 12 of our printed draft.

JUDGE DOBIE: Take a case like this. The defendant moves, and the plaintiff says, "Your Honor, I am very sorry. That was a little oversight on my part. I realize now that he is an indispensable party, and I admit him. I happen to know that he lives right around the corner here, and I can serve process on him and get him in. Won't you let me do that?" Do you mean the court has to say there, "No, you didn't join him, and it has been brought to our attention."

DEAN MORGAN: That is what the rule says.

PROFESSOR SUNDERLAND: It would never be construed that way.

JUDGE CLARK: No, I don't think so.

PROFESSOR CHERRY: Why should we say it?

DEAN MORGAN: If they don't construe it that way, they are going right in the teeth of the rule. That is all I say.

THE CHAIRMAN: What is the objection to saying that the court should grant a reasonable time to bring in and join the party and serve him? Why should we object to that?

MR. LEMANN: Why couldn't you put in line 148, after "party", "who cannot be joined"?

JUDGE CLARK: I don't know that it would be erroneous to put something in here, but I take it that all our rules are subject to the general proposition of Rule 15, which is the rule on amendment, and to Rules 19 and 20, which are the rules as to parties.

DEAN MORGAN: I shouldn't suppose so.

JUDGE CLARK: I didn't suppose that you had to put in a protestation in these cases.

DEAN MORGAN: When you say that order must follow, I don't see how you can get away from it.

PROFESSOR CHERRY: But the same "shall" applies to jurisdiction, where no other rule applies, where it is mandatory.

DEAN MORGAN: Yes. You have it in the same class.

JUDGE CLARK: Look at the last sentence. Maybe the last sentence of (h) isn't broad enough. I should think the last sentence by implication brought in the others.

DEAN MORGAN: I don't think you can deal with jurisdiction of the subject matter and lack of an indispensable party in the same terms.

PROFESSOR CHERRY: How about adding after the word "failure", "after reasonable opportunity"? It is the failure after reasonable opportunity to join an indispensable party.

JUDGE DONWORTH: How would it do to say "refusal to comply with a court order to join an indispensable party"?

PROFESSOR CHERRY: He isn't refusing. He is failing. I would suggest, Mr. Chairman, adding after "failure to join", "after reasonable opportunity".

THE CHAIRMAN: How would you word that to get it?

PROFESSOR CHERRY: Just as it is now, "or that there has been a failure [adding] after reasonable opportunity to join an indispensable party".

JUDGE DONWORTH: You must have more than the opportunity. You must have a requirement, a court ruling, before this drastic action of dismissal is taken.

JUDGE CLARK: There is nothing said about dismissal as to this provision.

DEAN MORGAN: It says flatly the court shall dismiss.

JUDGE CLARK: I am looking at it. You will see it is definitely connected with (2); "except (1) that" so and so may be made in such and such ways, "at the trial on the merits, and except (2) that" when there is lack of jurisdiction the action shall be dismissed.

MR. LEMANN: Read on.

JUDGE CLARK: I am. I am stating now that dismissing applies only to (2).

THE CHAIRMAN: Line 147 is a part of (2).

DEAN MORGAN: The part on page 12.

JUDGE DOBIE: "whenever it appears by suggestion of the parties or otherwise ... that there has been a failure to

join an indispensable party, the court shall dismiss the action."

DEAN MORGAN: You can't get away from a mandatory thing like that.

JUDGE DOBIE: That is pretty drastic.

MR. DODGE: The Chicago Bar Association says, "as is pointed out in the authorities, dismissal is an appropriate remedy only if the missing party cannot be served with effective process or cannot be joined without ousting the court of jurisdiction."

JUDGE CLARK: I guess I will have to apologize. I was wrong. Why not take it out of 147 and 148 and leave it in above?

JUDGE DOBIE: Just cut out the italicized part?

JUDGE CLARK: Down there, but not in 139. Leave it in 139.

DEAN MORGAN: Leave it in 139 and strike it out here? I would have no objection to that at all.

MR. LEMANN: The only thing you have added by putting it in 147 and 148 is that the court may do it without the parties. It was the purpose of your (2), wasn't it, to let the court take notice? Otherwise, you wouldn't have needed (2) at all. I guess the point was that the court ought to be permitted to take notice of the fact that there was an indispensable party when the other parties hadn't said anything about it.

Why wouldn't Mr. Cherry's suggestion cover it, "after reasonable opportunity" in line 147?

JUDGE DONWORTH: You always have a reasonable opportunity. The trouble is, you want a court order here calling your attention to the requirement.

THE CHAIRMAN: You have had a reasonable opportunity, but you have overlooked it, and now you are caught without an indispensable party and the court slams you out of court. What you mean is that after you are brought up by an order saying he is going to dismiss unless you do join the party, you have a reasonable opportunity to do it.

JUDGE DONWORTH: I would make that read "failure to obey a court order for joining an indispensable party".

PROFESSOR MOORE: Why don't we leave out what the court should do there? In the first "except" clause there is no statement as to what the court is to do. It can dismiss the action if the party is indispensable and isn't brought in. It can dismiss the action if a claim has not been stated, unless the party amends.

THE CHAIRMAN: That is right.

JUDGE DONWORTH: The mere failure to join him can lead to dismissal. Mustn't there be a court ruling before dismissal takes effect?

PROFESSOR MOORE: We don't say what the court is to do in the cases of defenses raised in the first "except"

clause. I don't see why we should state it in the second "except" clause.

PROFESSOR SUNDERLAND: If we don't say what the court does in the second "except" clause, what does that mean? There is no verb in the sentence then.

PROFESSOR MOORE: We state that these defenses are still open at the trial.

THE CHAIRMAN: The whole of subdivision (2) would have to be reconstructed. "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction". You would have to reconstruct that.

DEAN MORGAN: Mr. Chairman, may I ask whether the intention here is to have the court on its own motion notice that there was an indispensable party lacking?

THE CHAIRMAN: The point we really have in mind is that when a party hasn't got an indispensable party in, and he is brought up and told, "You haven't got him in," he ought not to be thrown out of court without having an opportunity.

DEAN MORGAN: Even if nobody objects?

THE CHAIRMAN: That wasn't what we were talking about. Maybe the point is there.

DEAN MORGAN: You see, if you had a proper motion, of course we take care of that under the other section, but this puts it in the same situation as lack of jurisdiction of the subject matter, where the court notices it of its own motion.

THE CHAIRMAN: It says expressly that the court may.

DEAN MORGAN: I know, but I was wondering if you were trying to protect the interest of the indispensable party who was not joined. Is that it, or what is the purpose of having the court notice it of its own motion? That is what I want to know.

THE CHAIRMAN: What about that, Mr. Moore?

DEAN MORGAN: If it isn't, you can strike out these words at the top.

THE CHAIRMAN: If there is an indispensable party and nobody notices it or pays any attention to it, what is the harm?

PROFESSOR MOORE: The theory is that the court can't render a just decree.

THE CHAIRMAN: But nobody says he can't.

DEAN MORGAN: If nobody objects to it, what? You are trying to protect the indispensable party? Is that what you are trying to do?

SENATOR PEPPER: Aren't you trying to protect the integrity of the proceeding? Suppose no account is taken of the fact that an indispensable party is not joined, and the court proceeds to a decree. Subsequently, a motion can be made or some appropriate step taken to treat the decree as a nullity, to open it and set it aside because of the absence of an indispensable party.

DEAN MORGAN: A nullity?

SENATOR PEPPER: As I understand it, an indispensable party is one in whose absence the court can't make a comprehensive decree.

DEAN MORGAN: That is right, but it doesn't mean he hasn't jurisdiction to do it. He can commit error in that respect the same as anybody else, and an indispensable party will not be bound by it because he is not a party to the action.

SENATOR PEPPER: And the parties for whose benefit the judgment is rendered may be deprived of the advantage of the judgment.

MR. LEMANN: As I understand it, if I sue a tenant to evict him, the owner, the landlord, is an indispensable party. You can't pass on the title without the owner being there. If nobody says anything about it, I am stupid and my adversary is stupid, and I get a judgment, can't the point be raised on appeal? Can't one of the judges of the supreme court say, "Where is the owner? How did you fellows do this?"

DEAN MORGAN: Who is going to appeal?

MR. LEMANN: I win the case, and the other fellow appeals it. The defendant appeals it. When the case is called for argument in the appellate court, Judge Morgan, one of the judges of the appellate court, may say, "How did you boys do this without the owner of the land?" We have never thought of that.

DEAN MORGAN: That is what I want to know.

MR. LEMANN: The whole case is thrown out, but you might say that what you have here wouldn't prevent that, would it?

JUDGE DOBIE: Monte, an even stronger case is the one that the books give of an indispensable party, a fund in the hands of the court. I claim it all, and George Wharton Pepper claims it all. If they give it all to me, they have decided his claim. You see, that is a judgment against him. It is equivalent to saying he has nothing.

MR. LEMANN: Anybody can raise that point.

JUDGE DOBIE: I must confess I think Cherry's suggestion takes care of it pretty well.

MR. LEMANN: What is the objection to this suggestion?

JUDGE DONWORTH: The whole litigation may have to go de novo.

DEAN MORGAN: I don't see any objection to it, but I was just wondering what the object was to having this on the same basis as lack of jurisdiction. Your argument would apply to almost anything, wouldn't it, to any error that appeared that they hadn't taken advantage of?

PROFESSOR CHERRY: You could waive some.

DEAN MORGAN: You could waive them.

MR. LEMANN: The lack of a proper party could be

waived, for example.

JUDGE DOBIE: I think in the case I put, if he had to come in and didn't---

DEAN MORGAN: Oh, yes, that is a different thing.

JUDGE DOBIE: ---then it would be all right.

THE CHAIRMAN: This is like the question of a moot case, isn't it? Any court can throw it out and say that even though the parties don't raise the point, we want to go on and say this is a moot case. Isn't it moot just as much where they can't render a judgment affecting one of the parties in interest as to say that the occasion has gone by when we can render an effective judgment? That is the principle, isn't it?

DEAN MORGAN: Take Monte's case. The plaintiff sues, and the landlord won't be bound by this anyhow if he wants to fight it out with the tenant.

MR. LEMANN: I don't believe the courts have held that is the answer. I believe the case has to go out.

DEAN MORGAN: How do you answer that?

MR. LEMANN: It is true that he wouldn't be bound.

DEAN MORGAN: Surely. You would settle all the rights but the landlord's rights. They raise that of their own motion.

PROFESSOR CHERRY: And one can make one more supposition, and that is that the court is stupid, too. Suppose the court is stupid, too.

MR. LEMANN: I move that we adopt Mr. Cherry's suggestion and state in line 147 after the word "failure", "after reasonable opportunity".

JUDGE DOBIE: I second that.

JUDGE DONWORTH: That doesn't reach the point. You always have an opportunity. The whole world is before you.

DEAN MORGAN: Suppose he is so dumb that the court must tell him.

JUDGE DONWORTH: You want a court ruling before this penalty of dismissal can take effect.

THE CHAIRMAN: We are all agreed that it ought to be changed in some way in the paragraph.

MR. LEMANN: You can cover it by adding in line 148, "provided that the court shall not dismiss the action for failure to join an indispensable party without first affording opportunity to join him."

JUDGE DOBIE: That is the same thing, practically, in a little more roundabout manner. I think Cherry takes care of it.

JUDGE DONWORTH: I don't think "reasonable opportunity" meets the point at all.

MR. DODGE: I don't, either. This motion is presumably brought up ordinarily at the beginning of the case for the first time.

THE CHAIRMAN: Someone suggest another form of amendment

that satisfies everybody. We have tried one that isn't agreeable. Let somebody who objects try it.

DEAN MORGAN: You are trying to be too brief in your expression here. That is all.

THE CHAIRMAN: What is your suggestion, Monte, for a change that satisfies everybody about a fellow's having an opportunity after notice?

MR. LEMANN: You mean the second suggestion I made a minute ago to add at the end of 148, "provided that the action shall not be dismissed for failure to join an indispensable party until the plaintiff has been afforded opportunity to make such joinder without ousting the court of jurisdiction." That spells it out, if you have to have it spelled out. I believe that spells it out.

THE CHAIRMAN: I don't see that that is greatly different from "there has been a failure after reasonable opportunity".

MR. LEMANN: I don't, either.

THE CHAIRMAN: I don't believe you are meeting Judge Donworth's point.

MR. LEMANN: Wouldn't the second suggestion meet your difficulty, Judge Donworth?

JUDGE DONWORTH: I think that, dismissal being so serious a penalty, it should follow only after a court ruling deciding that the party is indispensable.

SENATOR PEPPER: Would it meet the difficulty to say "failure to join a party adjudged to be indispensable without reasonable opportunity"? Your thought is that there ought to be a preceding judicial recognition of his indispensability.

JUDGE DONWORTH: I think "adjudged" is too strong. I think that goes too far. The court ruling is my point.

SENATOR PEPPER: "determined to be". All I meant was an expression of judicial opinion.

JUDGE DONWORTH: That is it.

SENATOR PEPPER: Isn't that really what we want?

JUDGE DONWORTH: That is the idea.

MR. LEMANN: "Or that there has been a failure after reasonable opportunity to join a party held to be indispensable".

JUDGE DONWORTH: That is it.

SENATOR PEPPER: That is right. It seems to me that is all we need.

THE CHAIRMAN: I don't believe it means a single thing different in the eyes of the court, but if it satisfies everybody, let's adopt it.

MR. DODGE: Isn't that all spelled out by the decided cases? Is it necessary to put those italicized words into the rule?

JUDGE CLARK: As a matter of fact, I have battled with Mr. Moore. I wanted to leave it out.

THE CHAIRMAN: To leave what out?

JUDGE CLARK: All the italicized, but there is a technical point there. I don't know. I always felt a little bad about making so much fuss about indispensable parties, anyway.

DEAN MORGAN: So do I.

THE CHAIRMAN: The point is that now if you strike out the words "or that there has been a failure to join an indispensable party," in lines 146 to 148, and let the clause "the court shall dismiss the action" apply only to lack of jurisdiction of the subject matter, even though you do that, you have left 139, "the defense of failure to join an indispensable party". That defense can be availed of in such a way as the court wants to apply it.

DEAN MORGAN: Leave something to the imagination of the court, as Judge Cardozo used to say.

THE CHAIRMAN: There are a lot of other defenses that do not state what is going to happen to you if your defense is sustained.

DEAN MORGAN: I move that we strike out the italicized words in lines 148 to 148, inclusive.

PROFESSOR SUNDERLAND: I second the motion.

THE CHAIRMAN: Is there any objection to that?

[The motion was put to a vote and carried.]

THE CHAIRMAN: So, we will leave the rule so that the

court is going to state what he can do in the case. Is there anything else in (h)?

JUDGE CLARK: I think that covers everything now. There is really nothing important on Rule 13.

THE CHAIRMAN: Neither the Reporter nor anybody else so far has any suggestion to make as to Rule 13.

DEAN MORGAN: No comment.

JUDGE CLARK: The comment was Longsdorf's, nothing in particular. He just asks a question.

THE CHAIRMAN: The Reporter has no suggestion to make as to Rule 13. Has any member anything he wants to raise? That was all chewed over, and there doesn't seem to be anything very new in the comment. If not, we will proceed to Rule 14.

JUDGE CLARK: You may remember that we decided to take out the references to advance notice to the plaintiff. It is interesting to see there are quite a few people who don't want us to do it.

THE CHAIRMAN: They don't realize why, though, do they?

JUDGE CLARK: I don't think they really do. I want to say that I struggled with this once more in that Friend case, the case of Friend v. Middle Atlantic Transportation Co., where the District Court of Connecticut had held that you could bring in the husband to answer to the wife in Connecticut in a

personal injury action, and the plaintiff there amended. So, you had the perfect setup if it worked. I wrote the opinion, and I hated to do it. I felt like stabbing a friend. As a matter of fact, the attorney came around afterward and said, "The worst thing of all was that you wrote the opinion." We held that you couldn't change jurisdiction. He says he is going to ask for a writ of certiorari, and I hope he does.

JUDGE DOBIE: I would say that that Saunders case, which is cited above there, is before us, so I am very glad to get any light I can on this problem. Changing the rule now won't affect our decision, of course.

JUDGE CLARK: I feel a little sad about it. I hated to do it, but there it is. If we are going to say that there is not jurisdiction in these cases, then of course there might be occasionally something left of the rule, but the rule is rather an invitation to do something that most of the time is not going to bring any result.

THE CHAIRMAN: As I understand it, Charlie, in those cases between the third party and the plaintiff, if there is no diversity of citizenship or no federal question involved, you can't force the litigation. Is that it?

JUDGE CLARK: That is what we held there.

THE CHAIRMAN: If there is jurisdiction, if there is diversity or a federal question, can you compel the plaintiff to sue a defendant he doesn't want to sue?

JUDGE CLARK: In the Friend case it was a little more than that, because in the Friend case the plaintiff actually amended.

JUDGE DOBIE: Without any pressure?

JUDGE CLARK: The lawyer said to us, "What was I going to do?" and so on. Obviously there was pressure underneath, but there wasn't anything showed in the record as to there being pressure. All that appeared was that he did it voluntarily. The plaintiff Friend was the wife of the driver of one car which had a collision with a truck in Connecticut. They are all Connecticut people. Friend, the wife, sued the truck, of New York, and the truck driver, who was of some other place. The attorney for the defendants moved to bring in the husband, who of course lived with his wife.

JUDGE DOBIE: There is no contribution between joint tort feasors?

JUDGE CLARK: There is no contribution in Connecticut. That is very well settled. The judge ordered the husband brought in. Then the attorney for the wife (who really was representing some insurance company, but actually was informed) amended the complaint and set up a claim against the husband also, and the judge still refused to dismiss. It went to the jury, and the jury gave verdict for the plaintiff--that is, for the wife--for $15,000 or $25,000, something like that, against all of them together. It came up on appeal in the name of the

husband, and we reversed as much of it as concerned the judgment against the husband, on the theory that they were citizens of the same state.

THE CHAIRMAN: I understand that, but in cases where jurisdiction is not involved, even then can you force the plaintiff to sue the third party or to frame a complaint against him?

JUDGE CLARK: Armistead is correct. I think there are a few district court cases. This has practically been only in the district court on this aspect. Judge Porterie, as I remember, and Judge Deaver have held that you could force the plaintiff to accept the party, but in most of the cases it says no. If the plaintiff says, "I don't want a man," he doesn't have to.

DEAN MORGAN: You reversed on the ground of lack of jurisdiction?

JUDGE CLARK: That is it.

DEAN MORGAN: On diversity of citizenship.

JUDGE CLARK: That is it.

DEAN MORGAN: If there had been diversity there, then the whole question would have been the power to compel amendment, wouldn't it?

THE CHAIRMAN: Yes.

JUDGE CLARK: No. In our case that question would not have come up, because they had actually amended.

DEAN MORGAN: I know, but suppose he had refused to amend and you had diversity.

JUDGE CLARK: Of course, I don't know what we would have decided. I think we probably would have enforced it. There was a case I wrote sometime ago, an earlier case, Bates against somebody, in which case there was diversity and the plaintiff amended, and we let that go through.

DEAN MORGAN: Of course, after you had actually tried it out, there was no sense in upsetting it.

JUDGE CLARK: The plaintiff had accepted, and they went ahead.

THE CHAIRMAN: If he had actually been willing to do it, it is just as if we had done it in the first place, but if he doesn't, it is a futile thing, I suppose.

DEAN MORGAN: We debated this pretty strongly last time, as I remember.

THE CHAIRMAN: Unless some member of the Committee has--

JUDGE DOBIE [Interposing]: I would like to hear from some of them. It is a very important question. Some of them have taken the viewpoint that the way the rule is worded now, it isn't up to the plaintiff to amend; that with the rule this way, when the plaintiff brings the action, he subjects himself to all the pains and penalties of the rules, and that apart from the jurisdictional problem, the diversity of citizenship,

if the defendant insists on these parties being brought in and the court thinks that it is proper, he can try the case that way.

THE CHAIRMAN: Doesn't he have to put some allegation in the complaint as to whether they were guilty of negligence or something?

JUDGE DOBIE: The defendant who seeks to bring them in as the third party alleges what the acts of negligence are. Of course, I suppose the plaintiff would be permitted to amend if he didn't like that statement of the case, but he doesn't have to.

JUDGE CLARK: Mr. Dodge, your friend up in Boston, the admiralty man, has written, and he is very sorry about it. What is his name?

MR. DODGE: Fitz-Henry Smith.

JUDGE CLARK: And the Maritime Law Association views the thing with some regret, but there is a difference there. There is contribution in admiralty.

DEAN MORGAN: Yes.

MR. LEMANN: Have many cases supported the jurisdiction of the court to bring in the third party against whom the defendant has a claim in the district, on the ground of ancillary proceeding?

JUDGE CLARK: When the rule first started, the district judges viewed it as a great help, and they went quite a

way in trying to find jurisdiction. The usual way of finding jurisdiction was that the claim was ancillary. I think you can do business in an appropriate case on that. In our case we took great pains to say that if you could find an ancillary ground, that was one thing. I think if there were contribution that would perhaps be a good basis.

MR. LEMANN: Suppose in the case you put, instead of the husband's being directly responsible to the wife, he had been responsible over; suppose he had been driving another vehicle and the defendant had been responsible to the wife, but the husband had been responsible over to the defendant.

JUDGE CLARK: That might come up on the question of a separable controversy. That was argued to us, that is, that there was concurrent negligence. If he were answerable over, you might claim it was a separable controversy, and if a separable controversy or part of it is well within the federal jurisdiction, you can bring all in. That was the argument made to us. We sidestepped that. We discussed it a great deal, and I think we would have a good deal of doubt whether you should use the separable controversy to bring in people who were not diverse citizens. I don't know of anything which definitely answers it.

THE CHAIRMAN: Has the Supreme Court had any case before it on that?

JUDGE CLARK: No.

[Brief recess.]

THE CHAIRMAN: When we adjourned we were discussing Rule 14, Third-Party Practice, and the Reporter had finished his statement showing how the courts had held that you can lead a horse to water but you can't make him drink, or words to that effect. Has anybody any suggestion now on Rule 14? The Reporter has none to recommend.

JUDGE DOBIE: What you have done, Charlie, is just to rule out of it the power of the defendant to implead a party whom merely the plaintiff has a claim against but against whom the defendant has no claim. Isn't that the idea?

JUDGE CLARK: That is correct.

JUDGE DOBIE: It certainly would simplify the rule a good deal.

THE CHAIRMAN: Then, we will pass on to Rule 17. Is that the next that you want to take up?

JUDGE CLARK: I have a comment on 17.

THE CHAIRMAN: But there is nothing on 15 or 16 that you want to deal with?

JUDGE CLARK: No, and really nothing on 17 for that matter.

THE CHAIRMAN: Does anybody on the Committee have any further suggestion to make on Rule 17(b) as it stands here? If not, we will pass on.

JUDGE CLARK: Apparently there has been no question

on the party rules in general, which is interesting because originally they went quite far. They seem to have worked pretty well.

Rule 23, our old friend, the stockholders' suit. The Chicago Bar Association says that "if the Rule deals with a matter of substantive right, it should not be amended, but should be eliminated from the Rules."

DEAN MORGAN: You wouldn't debate that, would you?

THE CHAIRMAN: We are all agreed, I think, that that has to rest and take its chances with the Supreme Court. We are not going to tamper with it. I got a burst from a group in New York which shows you how sometimes these proposals from lawyers are really not well considered. It came from John Davis' office, Ralph Hart and all those fellows. They spent a lot of time on these rules. They came back and just raised hell with the Committee because we didn't have guts enough to come out in the rules and say whether it was substantive or not. I wrote back and said, "If we hold that it is and eliminate it, that is all right; but suppose we hold that it isn't and leave it in there, how does that settle anything? What is to prevent somebody from litigating the question in the Supreme Court, and can the Court lift itself over the fence by its own bootstraps?" They promptly subsided.

I haven't heard any objection from anybody except on this business of leaving it to the court to settle. Since they

have held that it isn't a jurisdictional matter to extend summons outside the statutory limits, I am beginning to hope that they will sustain this Hawes v. Oakland rule as not a substantive right. It is a thing that is worth your thinking about. If you read Hawes v. Oakland, you find the real reason that we adopted the equitable rule that a man should not maintain a suit unless he had a right at the time the transaction took place. The really fundamental reason we adopted that was that we wanted to stop cheating in getting into the federal courts on diversity of jurisdiction. It was a device that they adopted as an equitable principle to prevent corporations, that could not maintain a suit because they didn't have diversity, from getting hold of some stockholder who had and who could go in.

SENATOR PEPPER: They decided in Dodge v. Woolsey that the stockholder might sue. That was a case where the directors didn't want to antagonize the local taxing authorities, so they said they were ready and willing to pay the tax, and they left it to a stockholder to go into a federal court and have the tax adjudicated invalid. Then there was such a flood of litigation that in Hawes v. Oakland they advocated the adoption of the rule.

THE CHAIRMAN: If they wanted to twist and turn, they might still sustain this rule in the federal courts, not on the ground of its being substantive or procedural, but on the

ground that it is a necessary principle to protect the federal courts against fraudulent infringement on the jurisdiction. They could do it if they wanted to, but I don't believe they will.

Let's go on to 24.

JUDGE CLARK: Rule 24, particularly (b), Permissive Intervention, our provision adding something so that the agencies might come in, lines 19 to 26. There has been some objection to that from lawyers, and I think, after all, we should expect that to be rather natural. I don't know that there has been too much in numbers. The committee of the Bar Association of the City of New York made that objection. Again I shall have to say that, in spite of the fact that these are great associations, the report was never voted on by any of Association as such, which I took pains to find out. The chairman of that is a young Mr. Wood of the Root, Clark, Buckner & Ballantine firm. I think it is John E. F. Wood. I was surprised that I didn't recognize any of the rest of the members of the committee as federal practitioners. They were younger men in the Association, and they made this report. It was not a matter of Association vote.

MR. DODGE: Which rule are you on now?

JUDGE CLARK: Rule 24. I was going on to the third paragraph, which is that Mr. Berger, who has written on this, and whose original suggestion, I think, pretty much prompted

the addition--

THE CHAIRMAN [Interposing]: The third paragraph of what?

JUDGE CLARK: The third paragraph of our summary, page 26. He objects that the proposed amendment doesn't go far enough. He thinks that there should be intervention as of right and that the words "claim or defense" in Rule 24(b)(2) are not sufficiently clear. He has a substitute, which you will see beginning at the bottom of the page: "When an applicant's pecuniary or other interest may be adversely affected by a determination of a question of law or fact in the main action."

He seems to feel--and I think he may be right about it--that he has the Chief Justice's moral support. He says he has submitted this proposal to the Chief Justice. That is what he did before, and the Chief Justice suggested that they be passed on to us. He submitted these suggestions and thinks that he has the Chief Justice's moral support. There it is.

JUDGE DOBIE: Where is this rule?

JUDGE CLARK: The Reporter's summary, the original one sent out in January, pages 26 and 27.

I think personally I might have some sympathy with Mr. Berger's position, but since what we have done has raised some question, we thought we were going quite a way. I think we ought certainly to go as far as we have gone, but perhaps that is enough.

DEAN MORGAN: You mean that is for the government agency proposition. You don't mean the other.

PROFESSOR SUNDERLAND: He hasn't suggested that there has been any trouble experienced. It is a sort of abstract proposition with him, isn't it?

JUDGE CLARK: No, it is a little more than that. There has been quite a little litigation about it. The chief case is Securities and Exchange Commission v. United States Realty & Improvement Co., in which the Supreme Court held that the SEC could intervene, and it was because of that question that the case had to go to the Supreme Court for determination.

THE CHAIRMAN: You mean they had a right under our rule as it stands?

JUDGE CLARK: That is what the Court finally held.

MR. DODGE: Permissive intervention was upheld.

THE CHAIRMAN: Mr. Raoul Berger says that where a matter affects any statute or executive order administered by a federal or state agency or any regulation, order, requirement, or agreement, he wants it transferred from the permissive side to a right. I can't see any basis for that. It may be just an unnecessary interference with a lawsuit. The permissive right gives the court power to let them in, and you can bet your boots they will let them in if there is any reason for it at all. They will not turn down a public agency without good reason. So, I don't think we need spend much time on that, do

we?

DEAN MORGAN: His other suggestion, Charles, was altogether too indefinite, wasn't it? "When an applicant's pecuniary or other interest may be adversely affected by a determination of a question of law or fact in the main action".

JUDGE CLARK: Yes.

DEAN MORGAN: It seems to me that is going wide.

JUDGE CLARK: That is very extensive.

THE CHAIRMAN: Is there any suggestion from the Reporter that we make any change in our present proposal?

JUDGE CLARK: No, I haven't any suggestion to make. I think you will find this coming back. He is a very persistent gentleman, and a very able fellow, for that matter.

THE CHAIRMAN: He won't come back to us after we get through with this report. If he has the Chief Justice's support, maybe he can get the Court to change it. I have an idea that the Chief Justice was trying to get rid of him and told him to take it to the people who were working on the job.

We pass on, then, to Rule 26?

JUDGE CLARK: There is something on 25, if we are through with that.

SENATOR PEPPER: On 24, may I ask whether what has been said disposes of Mr. Berger's suggestion about the final addition of the words, "and whether the applicant has another remedy"? He has suggested that on your page 27, Mr. Reporter.

JUDGE CLARK: Of course, if we don't make it intervention as of right, I don't think we should add this. If it is discretionary, I think the judge can take into consideration whether he has another remedy or not.

SENATOR PEPPER: I guess that is right.

JUDGE CLARK: On Rule 25(d), in my latter summary, page 10, is a suggestion from the Department of Justice that it be changed to eliminate any requirement for substitution of successor public officer as a party in an action to which his predecessor officer was a party. He asserts the present rule serves no useful purpose and entails unnecessary work whenever there is a change in office of Price Administrator, Wage and Hour Administrator, or Alien Property Custodian.

THE CHAIRMAN: What does he want?

DEAN MORGAN: He wants to go right on against the original officer.

THE CHAIRMAN: Suppose it is an injunction or order or something like that. What does he do to people like that? Doesn't he even name the fellow?

JUDGE DOBIE: Usually there is no objection in these cases, is there? We had a case last week in which Porter had succeeded Bowles as OPA Administrator. The counsel for the government just said, "Bowles is out, and Porter is in. Would you mind writing Porter's name in there?" There wasn't any objection, and we did it.

THE CHAIRMAN: This proposal, however, abolishes the need for doing that. You could go right on suing Bowles and ordering injunctions against him and everything with no substitutions at all, as I understand it. Isn't that it?

JUDGE CLARK: Yes. I suppose it is a terrible proposition. They change these names around a good deal. There is a terrific number of suits involving the OPA. I think there are 6000 or 7000 a year, and that far overshadows all other grounds of federal jurisdiction at the present time. It is true that most of the cases are not tried, so it doesn't mean there is much in terms of trial, but the bulk of the cases is terrific. Every time they shift an officer, they have to have all these orders for substitution.

MR. LEMANN: It is a damned nuisance, isn't it. There ought to be a way to sue the administrator, whoever he is, without mentioning any name.

JUDGE CLARK: The curious thing is that once in a while we get a case of that kind. We have quite a few cases in which the party is named as the Collector of Internal Revenue, just like that. We had a case involving the State Tax Administrator of New York, and they just had him down as State Tax Administrator. It came up on appeal, nobody having raised the question below, and I asked, "Who is he? Isn't there a man here involved?" Everybody looked puzzled, and nobody could tell me his name.

MR. LEMANN: It would have been smart if, instead of calling it the Collector of Revenue, they had called it the Department of Revenue. We sue the Department of Revenue.

JUDGE DOBIE: We have had a number of those cases. If you look in the book, you will see Mitchell v. Collector of Internval Revenue, without any name whatever.

JUDGE CLARK: I am not sure but that we have been amending this rule without admitting it. Everybody seems to be satisfied. That was a state case. I finally wrote the opinion, and I never did know who the party was. I think we affirmed it.

MR. LEMANN: What difference does it make? He is nothing but a nominal party.

MR. DODGE: All the Tax Court cases are against the Commissioner of Internal Revenue. Don't those continue although the individual may change?

MR. LEMANN: Oh, yes. I don't think you name him at all in the Tax Court. You just say Robert G. Dodge v. Commissioner of Internal Revenue.

THE CHAIRMAN: What happens if he is dead?

MR. LEMANN: The Commissioner? It makes no difference.

JUDGE DOBIE: He never dies.

MR. LEMANN: We are only talking about the procedure in the Tax Court.

THE CHAIRMAN: I didn't hear you.

DEAN MORGAN: You have to sue the Collector who collected.

MR. LEMANN: Or you can sue the United States in certain cases.

THE CHAIRMAN: What about it? Can we make any procedural rule that you can sue the Bureau or the administrative office?

MR. LEMANN: It would be a good thing if we could.

THE CHAIRMAN: Without naming him personally. No substitution would be necessary because a new fellow would correspond to the description.

MR. LEMANN: You can sue the Secretary of War---

THE CHAIRMAN: That is an interesting suggestion.

MR. LEMANN: ---and you can sue the Secretary of the Treasury without naming them. It really would be a great reform and would save a lot of nuisance, but it would take some careful draftsmanship and, I guess, would be quite an innovation.

THE CHAIRMAN: You would have to study a whole lot of laws. It seems that if we were looking for work to do hereafter, there is a constructive piece of work that we could look into and see whether we can't do something about it.

MR. LEMANN: It might be done perhaps by a simple act of Congress, if this Committee had passed out of activity.

THE CHAIRMAN: If it is a procedural matter, we don't

want Congress fooling with it. We don't want to set up a bad precedent.

MR. LEMANN: I meant after we had ceased to function.

JUDGE CLARK: There is a Judicial Code in the making, you know. Mr. Moore is a sort of consultant representing the West Company, I think. Are you coming down next week?

PROFESSOR MOORE: Yes.

JUDGE CLARK: They were to have a meeting here in this room today, but we got in first.

THE CHAIRMAN: They were put off until next week.

JUDGE CLARK: I wonder if that is likely to pass, in view of what Senator Pepper has said about the difficulty of getting a code passed and in view of the fact that quite a few very extensive things are proposed, perhaps more extensive than the law will authorize. For one thing, they make a corporation a resident of the district where it does business.

DEAN MORGAN: They do?

JUDGE DOBIE: For purposes of jurisdiction?

JUDGE CLARK: I think it is for venue only, although the language is very broad. It is in the venue section. They provide all sorts of nice little things.

MR. LEMANN: On whose say?

JUDGE CLARK: The people who are working on it.

MR. LEMANN: Who are they?

JUDGE CLARK: It is the congressional committee

headed by Congressman Keogh of New York. It is the Committee on the Revision of the Laws. Then they have a staff. Mr. William W. Barron is the major consultant, isn't he? Mr. Moore knows more about it than I do, because I know only what I read, so to speak. The West Company and the Edward Thompson Company are doing a lot of it. There is a committee of judges. Judge Maris and Judge Galston are on it.

PROFESSOR MOORE: Smith from New Jersey.

JUDGE CLARK: Who is doing the work?

PROFESSOR MOORE: Barron.

MR. DODGE: Did they make a corporation a citizen of every state where it has a place of business?

JUDGE CLARK: A resident of every district where it is doing business.

THE CHAIRMAN: I tried to pass a statute to do that some years ago. It provided that a corporation for purposes of citizenship jurisdiction should be considered a resident of the place where it was doing business, but only in respect to business done in that locality with citizens of that locality. In other words, if a corporation had a shoe factory in Minnesota, had its business there but was organized under the laws of Delaware, had to deal with the citizens of Minnesota, if it got into a lawsuit the corporation could not remove that action in the federal courts on the ground of diversity of citizenship because the business arose in Minnesota with a

citizen thereof. But if you make it a resident of Minnesota, where they do business, with respect to all plaintiffs and business done anywhere, then that isn't quite right, either. The loss of the right of removal ought to be limited to cases like that where there is no local prejudice because a company has its factory there, all its employees and officers are resident there, they live in Minnesota, and all that sort of thing. The idea of there being prejudice against that company simply because it has a charter under the Delaware law is a fiction. This goes beyond that.

JUDGE CLARK: I really think this was intended to deal only with venue, so in one sense it might not go quite so far.

THE CHAIRMAN: Venue?

JUDGE CLARK: Yes. I might say that your proposition has been up again somewhat. Judge Denman, of the Ninth Circuit, has been working to abolish the diversity of jurisdiction generally. The Ninth Circuit judges voted, I think, unanimously, and Judge Denman has been in Washington and supported the legislation. There have been votes taken by various organizations. I have been on two bodies that have voted on it. One was the Judicature Society, and the other was the Committee on Jurisprudence and Law Reform of the American Bar Association, in which I found myself again, after fifteen years, dealing with the same question, apparently. On that, Mr. John Buchanan, of Pittsburgh, wrote a report condemning everything. I put in

a dissent arguing for your bill, Mr. Mitchell, and Judge Wilkin and Mr. Frank Winnel have agreed to that, but I think that is as far as it has gone.

THE CHAIRMAN: I put in that bill before as a backfire against a bill that looked dangerous, if it passed Congress, abolishing the diversity of citizenship entirely, on the theory that if you cured an obvious defect in the system, you strengthened the system and made it more invulnerable to complete abolition. Senator Norris defeated my bill on the ground that it was unfair to corporations, that it discriminated against corporations in favor of individuals who did business in a state. If they were residents of other states they retained their right, and the poor corporations were discriminated against.

JUDGE DOBIE: I never knew Norris was a champion of corporations.

THE CHAIRMAN: There was a lot of laughter in the committee room, but Norris got away with it. He wanted his own bill passed, which abolished jurisdiction entirely. Every time there is danger of it, some measure like that that really removes a serious defect in the law always comes to the front.

We are through, then, with Rule 24, are we, Charlie?

JUDGE CLARK: No, we are talking about 25.

THE CHAIRMAN: Yes.

JUDGE CLARK: This problem about the successors of

public officers.

THE CHAIRMAN: We decided to do nothing with (d). We deliberately omitted any reference to transfer of interest to public officers and made our change only in case of death. So, I think we are through with 25.

JUDGE CLARK: When we come to 26, we come on to lots of things. I don't know quite how we should take this up.

THE CHAIRMAN: That is the question of privilege.

JUDGE CLARK: I was going to say that directly involves Rule 30, I suppose.

THE CHAIRMAN: Let's take it up in order here. On Rule 26, in the first place we have the question of whether we are going to stick to this proposed amendment, whether leave of court has to be obtained or not. Isn't that the logical way to do it? Let's face the investigation file business when we really get to it.

JUDGE CLARK: All right. You can see views both ways on this. The first one we have on our summary, the old summary on page 28, is from an Oklahoma City man who thinks it is a nuisance and argues quite strongly for it.

THE CHAIRMAN: What is the nuisance?

JUDGE CLARK: Mr. Cantrell, of Oklahoma City, disapproves of the proposed change in so far as it requires leave of court for the taking of a deposition within 20 days.

THE CHAIRMAN: He doesn't like the original rule,

either, does he? He wants to abolish all leave?

JUDGE CLARK: Yes, he wants to abolish all requirements of leave.

MR. LEMANN: He thinks that you should be permitted to take a deposition at any time after commencement of the action. We discussed that last time, and we decided that that really would force you to file your answer right away. Plaintiff could go in and give notice of the taking of a deposition as soon as he brought suit, and that was rather hard on the defendant.

THE CHAIRMAN: I have a point to raise about the italicized material on page 32.

JUDGE CLARK: The California State Bar Committee took the same view--that is, they think it is a nuisance--one member dissenting.

THE CHAIRMAN: "A deposition may be taken after commencement of the action and without leave of court, except that if notice of the taking is served within 20 days after such commencement leave of court granted with or without notice must first be obtained."

I make the point on that that the draftsman was visualizing a deposition taken by the plaintiff when he provided that "if notice of the taking is served within 20 days after such commencement leave of court granted with or without notice must first be obtained." That is on the theory that the

plaintiff, having a lawyer, goes into court and brings his suit and he ought not to require the defendant to respond with a deposition until he has had 20 days to hire a lawyer. The clause as it is worded completely loses sight of the fact that if it is the defendant who wants to take the deposition, why the devil should he have to wait until 20 days after suit was brought before he can take a deposition? The other fellow, the plaintiff, who has a lawyer, is fully informed about the case, has drawn up the complaint, has brought the suit. If the defendant has a witness who is going to leave the jurisdiction, why should he have to go to court for leave to take it? I think the clause is faulty in that, as I said, it visualizes a limitation which really has reason back of it only as applied to a deposition taken by the plaintiff, and we have to do something so that the defendant is not subject to it. If he wants to take a deposition 2 days after the suit was started, and the other fellow has a lawyer, why shouldn't he be allowed to do it? Isn't that so?

JUDGE CLARK: I should think so, yes.

THE CHAIRMAN: How would you do that?

MR. LEMANN: Why not put in "by the plaintiff" in line 18?

THE CHAIRMAN: "that if notice of the taking is served by a plaintiff within 20 days after the commencement, leave of court with or without notice first must be obtained."

That is the general idea, isn't it?

JUDGE DONWORTH: Is it fair to have a rule applicable to one party and not to the other?

THE CHAIRMAN: Absolutely, if there is a reason for it.

JUDGE DONWORTH: I understand your reason, but the circumstances might well be such that the defendant would want to take a deposition, as well as the plaintiff.

THE CHAIRMAN: That is my point. He might want to, and he ought not to have to wait 20 days to do it.

MR. LEMANN: He ought not to have to get leave of court to do it because the plaintiff has had all his time to bring the suit. He has no kick if the defendant wants to take a deposition the next day. But it would be different if it were the plaintiff who wanted to take a deposition, because that is the first notice the defendant has had of the plaintiff's claim.

PROFESSOR SUNDERLAND: The defendant might be a plaintiff in a counterclaim.

THE CHAIRMAN: Instead of "plaintiff," you can say in the appropriate phrase, "a person asserting a claim", or something like that. However, this deals with answer.

MR. LEMANN: Couldn't we leave this to the Reporter to draft the language instead of stopping now, because I think the point is undoubtedly right.

THE CHAIRMAN: If we agree on the principle, and I

am not sure that we have. As against a plaintiff and a defendant, leaving out other complications, we certainly want to have the defendant able to take a deposition at any time.

MR. LEMANN: I move that the Chairman's suggestion be adopted, that the limitation for leave of court shall apply only where it is the party asserting the claim who wants to take the deposition and that the defendant in the claim can take the deposition at any time without leave of court.

DEAN MORGAN: On a counterclaim you wouldn't, would you?

MR. LEMANN: I said the party against whom the claim is asserted.

THE CHAIRMAN: Why can't you go further and simply strike out the limitation entirely? There are a great many cases where the plaintiff is put to it to get the deposition of a witness--

MR. LEMANN [Interposing]: He can get an order of court if he shows the necessity. It is rather hard on the defendant, as we pointed out last time, if he has to face a deposition the day after the suit is brought.

DEAN MORGAN: California has had that right along, he says, and it doesn't work badly there. They can take a deposition at any time in California.

MR. LEMANN: We really haven't had much trouble, except to get the order of court, as it is. I think the judges

have been quite free to give them.

JUDGE CLARK: We had several objections. I ran into the case of a lawyer in Connecticut who wanted to take the deposition of a fellow taking a vessel in Seattle to go off to Australia. They had a great fight over that. As I recall, they never did get the deposition taken. It was a question of which judge was to grant leave, whether it would be the Connecticut judge where the action was or whether they had to go to a Seattle judge, and so on. By the time they could get the thing settled, the boat had sailed.

I was against this restriction. I don't know that we discussed it so thoroughly. Maybe we don't want to make any change, but I think it too bad to put the restriction on.

DEAN MORGAN: Don't the California Bar people want that 20-day period omitted?

JUDGE CLARK: Yes.

DEAN MORGAN: They have had this practice for a long time, and they say it has been satisfactory.

THE CHAIRMAN: You mean they have had the practice of taking in the state, in the state law.

DEAN MORGAN: Of taking a deposition any time after commencement of the action, yes.

JUDGE CLARK: Their statement is in there on page 28.

DEAN MORGAN: That is what they say.

MR. LEMANN: On the other hand, Armstrong says we

ought to change it to make the 20-day period run from the time of serving the complaint, rather than from time of commencement of the action.

DEAN MORGAN: I think that is your object anyhow, isn't it?

MR. LEMANN: I suppose logically that would be right.

DEAN MORGAN: That is what your object is.

MR. LEMANN: There is a practical question there.

DEAN MORGAN: The practical question is giving the defendant notice, and he doesn't get notice until he has been served. It seems to me if that is the object you want to accomplish, Armstrong is dead right.

SENATOR PEPPER: That is, it ought to be 20 days after service instead of after commencement.

DEAN MORGAN: Yes, but, on the other hand, you have the California people who have had the other system, and they say it works well, and what is the use of changing it?

SENATOR PEPPER: Isn't it quite thinkable that an action may be begun, defendant doesn't know what it is all about, doesn't know the nature of the claim against him, and within 20 days he will have to find out as best he can what the suit is all about and get together whatever data he needs before his deposition is taken? Otherwise, he is haled before a commissioner or a notary and examined at large in the matter of which he really has no knowledge. No complaint has been

filed.

DEAN MORGAN: How much notice does he have to have on a deposition?

MR. LEMANN: Forty-eight hours, I suppose.

THE CHAIRMAN: A reasonable time.

MR. LEMANN: A reasonable time. I think our idea in fixing this 20-day limit is that if a man sues you today and then gives notice that he is going to examine a witness in forty-eight hours, you have hardly time to get a lawyer.

DEAN MORGAN: Is that a reasonable time, then?

MR. LEMANN: If you segregated the idea of reasonable time for notice, forty-eight hours would ordinarily be considered sufficient. If you don't put the time limit in, if you rely on a reasonable time, I guess you just have to go to the judge and say, "Judge, I need a week or two. I don't even know what this case is about. I haven't had time to get a lawyer yet. I will have to hurry around."

DEAN MORGAN: Wouldn't that be a good reason for getting an extension?

PROFESSOR SUNDERLAND: As a matter of fact, the defendant might not know he was sued. He might get his first notice that he was being sued by a notice to take a deposition.

MR. LEMANN: If we put "served" in here, we would take care of that.

PROFESSOR SUNDERLAND: Yes, if you put that in, but

as it reads now they wouldn't even have jurisdiction over him when he was served with notice.

MR. LEMANN: How is it in your state? When can you take them? Any time?

PROFESSOR SUNDERLAND: I don't think I remember.

MR. LEMANN: That is consoling.

PROFESSOR SUNDERLAND: We have very restricted discovery, anyway.

SENATOR PEPPER: Isn't there a good deal to be said in favor of Armstrong's suggestion?

THE CHAIRMAN: I agree to that. I think it should be. It ought to be within 20 days after service of the summons.

SENATOR PEPPER: To bring it up, I will make a motion to that effect.

MR. LEMANN: That carries with it, if we vote on that, the idea that we are going to keep in this time limit.

DEAN MORGAN: Yes.

THE CHAIRMAN: Suppose we make the change and then consider whether we like it after we change it, to get rid of one discussion; that is, if we are going to make it. All in favor of that alteration in lines 17 and 18 say "aye"--

DEAN MORGAN [Interposing]: Wait a minute. May I ask what a vote on that will mean? A vote on that means that we vote not to consider the California position?

THE CHAIRMAN: No. We have just stated that we were

going to make the change, but whether we are going to accept the rule as changed remains to be decided.

SENATOR PEPPER: If we have any rule, the 20-day period is to run from service rather than from commencement.

JUDGE CLARK: If you are going to do that, you will have to specify the defendant, won't you?

MR. LEMANN: We have to make other changes to cover Mr. Mitchell's part. As I get it, we have had three thoughts about this. One is Armstrong's thought, one is the Chairman's thought, and the third is the California thought.

THE CHAIRMAN: We are proposing to dispose of my thought by having agreed that the Reporter will alter this so that the exception of time, 20 days, applies only to a deposition taken on behalf of the claimant.

JUDGE CLARK: And what would be the situation in the case of multiple defendants?

DEAN MORGAN: It isn't service. You don't want to say "service of the summons". Are you going to give the plaintiff 20 days to meet the counterclaim? Remember, we have counterclaims in here, with the sky the limit.

MR. LEMANN: You can always get leave of court, of course. I would say that logic would dictate that it would apply to anybody against whom the plaintiff has asserted, that he would have 20 days from the time he was served before the plaintiff could take a deposition affecting him without leave

of court.

DEAN MORGAN: Service of the claim, you mean?

MR. LEMANN: Yes, whatever is the appropriate language.

JUDGE CLARK: Why do you need that? That is still more extensive. The plaintiff has brought the suit. If he knows anything about our rules, the plaintiff knows that he can have a complete counterclaim. He has a lawyer to bring the suit. He is all there. I shouldn't think you needed it there very much.

MR. LEMANN: Shouldn't we postpone the details of this discussion? If the majority of the Committee are going to vote for the California idea, we are wasting time on this.

JUDGE CLARK: You may be right about this, but I wanted to bring up the question of multiple defendants.

THE CHAIRMAN: That is a detail that he says will be wiped out if we adopt the California system.

JUDGE CLARK: That is true; it would be.

THE CHAIRMAN: We don't need to discuss that.

MR. LEMANN: At least until we vote the other way, if we are going to permit the depositions to be taken any time.

JUDGE DOBIE: Doesn't California require leave of court?

THE CHAIRMAN: Any party, plaintiff or anybody else, can proceed to take a deposition either of the defendant or any

other witness to the case any time after the suit is commenced by filing a complaint, without service on anybody.

DEAN MORGAN: In California, I think, a suit is not commenced by filing a complaint, though. It is by service of a summons, isn't it, the same as in New York?

MR. LEMANN: Any time after service. I should think this is a pretty far-reaching change to make, Mr. Mitchell, without telling the bar about it. We started out with a rule which said that you had to get leave of court to do it. Then we said that was a lot of trouble to give the judges and that we would let them do it any time, but they must wait 20 days. Now, if we cut that out, it seems to me that is a rather far-reaching change, without telling the lawyers we are going to do it.

JUDGE CLARK: That has been on the docket. You may remember that that was in our yellow draft. We have shifted back and forth. Can't we shift back and forth between things that we have considered?

MR. LEMANN: It is a point to consider, I think.

JUDGE CLARK: That was in our May 1944 draft.

THE CHAIRMAN: Wasn't there a lot of protest against that change?

JUDGE CLARK: Maybe I am a little prejudiced in saying so, but I would say there was the usual protest. Of course any of these things have had some protest. There is no question

about it. There was protest. I will get you our summary in just a minute.

THE CHAIRMAN: The truth is that the protests are not overwhelming in character either way. I think we will just have to make up our minds from our experience what is the best thing to do.

JUDGE CLARK: Quite a few approved specifically, and we say: "In addition to those generally approving all the changes in Rule 26, listed supra, the following specifically approve the proposed amendment of Rule 26(a): The California State Bar Committee, the Los Angeles Bar Committee, and the Cleveland Bar Association Committee. The Grand Rapids Bar Association Committee remarks that securing leave of court prior to answer entails unnecessary work on the part of the court and attorneys."

I can keep on. I have given you the affirmative. That was quite a bunch, you see, in the affirmative. There were dissenters.

MR. LEMANN: There were dissenters. Do you suppress the dissenters?

JUDGE CLARK: Do you want me to go into those, too?

THE CHAIRMAN: Suppose you have a case where suit was brought, and a couple of days afterward the plaintiff served notice of the taking of depositions.

SENATOR PEPPER: Defendant or plaintiff?

THE CHAIRMAN: Plaintiff. The deposition is taken, and the defendant hasn't a lawyer and doesn't appear. It is an ex parte deposition. Then what? That testimony can be offered in evidence, and there has been no right of cross-examination, nothing to show that he should not have had it, no proof at all that the man's witness was going to disappear and go abroad or die or anything. Why, in a case like that, shouldn't the plaintiff be required to ask leave and tell the court, "The defendant has just been served, and he hasn't a lawyer. I haven't seen any sign of him and don't even know where he is, but I want to take this deposition"? Ought he not to be required to go to court and say, "I have a reason for it"? I don't see any objection to that.

SENATOR PEPPER: I notice that the Bar Association of the City of New York takes that view. It "will be more orderly and efficient and ultimately less wasteful of time if depositions be not permitted prior to answer, except for some good cause satisfactory to the court."

MR. DODGE: That is substantially the way we had it in our first draft.

THE CHAIRMAN: Yes, except that there again in our very first rule we overlooked the fact that the purpose of delaying the taking of the deposition for a time was the protection of the defendant and the party who had not had time to get a lawyer. I make the point now that the defendant ought not

to be restricted.

JUDGE DOBIE: How about leaving the 20-day rule in and, as you say, make it apply only to the plaintiff?

THE CHAIRMAN: The question is whether we want to adopt the California system, which wipes this restriction out entirely and allows deposition by either plaintiff or defendant immediately after the starting of the suit without any leave of the court. Monte wants that question decided before we discuss the details.

JUDGE DOBIE: All right.

THE CHAIRMAN: Do you make a motion, Monte, to adopt the California system?

MR. LEMANN: No, I do not.

DEAN MORGAN: I will make the motion. Judge Donworth, do you have that practice in Washington, too?

JUDGE DONWORTH: It has been a long time since I was concerned in taking a deposition. My impression is that our practice is the same as you state for California.

PROFESSOR SUNDERLAND: They say in their report that the practice in that state is to take a deposition as soon as the complaint is filed. They don't even have service. As soon as the complaint is filed you can take your deposition.

MR. LEMANN: You can serve the complaint and give notice simultaneously--not to a lawyer, because at that moment there is no lawyer on the other side--that you are going to take

a deposition. Then Mr. Morgan says that the defendant gets a lawyer, and the lawyer goes around to the judge and says, "Judge, it is a hell of a note to make me take a deposition. I haven't had a chance to read the complaint. I don't know anything about it. I want some time."

The judge will say, "How much time do you want, Mr. Lemann?"

Lemann will say, "I think I ought to have 10 days anyhow, Judge."

You have to bother the judge. The judge might have to send for the other fellow and ask, "What's the rush?"

Mr. Morgan says, "Well, you will be protected. The judge will give you time, so why get excited?"

Isn't that right?

DEAN MORGAN: I wouldn't swear about what you did, of course.

JUDGE CLARK: I will second Mr. Morgan's motion.

SENATOR PEPPER: I should think that the burden of getting judicial action should rest upon the man who is taking what is supposed to be an emergency deposition. I don't see why he should put the other fellow in the position of having to fly to the court for protection. There is no reason given why the deposition has to be taken in such a hurry. I should think that if we kept what is suggested here in italics, lines 17 to 20, we would do well. "if notice of the taking is served

within 20 days after service of the summons, leave of court granted with or without notice must first be obtained."

MR. DODGE: Shouldn't it be grantable without notice?

SENATOR PEPPER: No, I don't think it should be. I should think it should be with notice, granted with notice.

JUDGE DONWORTH: That would mean you would have to give 3 days' notice.

SENATOR PEPPER: I think so, yes, or forty-eight hours.

DEAN MORGAN: That would spoil an emergency taking as far as a fellow who is going to leave right away.

THE CHAIRMAN: Yes. Leave can be granted without notice if the court finds that the witness is going to take a steamer that night for Europe.

MR. LEMANN: I wonder if it would help any to cut the time limit from 20 to 10 days or whether that would be confusing; instead of 20 days, 10 days after service. That at least would give you a chance to get yourself a lawyer and find out something about the case, in the normal case. Of course, we took the 20 days because that is the time to answer, but maybe 10 days would be not confusing and all right for this.

JUDGE DONWORTH: There is nothing here as yet about service. It is the commencement of the action.

MR. LEMANN: Yes, but I think we all have in our heads that if we are not going to the California system, we will adopt service.

JUDGE DONWORTH: Of course, the whole thing is open to objection. On the other hand, what we are aiming at is to give the party who has a witness an opportunity to preserve the evidence which that witness might give before he gets away. I feel inclined to support the California practice.

PROFESSOR SUNDERLAND: If you use service as the test, that would be service upon whom? When you have a lot of defendants, would that be service on the first one?

MR. LEMANN: All of them.

PROFESSOR SUNDERLAND: You might not ever be able to serve some of them. Commencement is a very definite act. Service is something that may string along and even fail.

THE CHAIRMAN: Even if you leave it as it is, served within 20 days after commencement, you have to give notice of the taking of the deposition to all the defendants against whom it is going to be used, and that notice gives them 2 or 3 days' notice of the taking, doesn't it?

DEAN MORGAN: It gives them reasonable notice.

THE CHAIRMAN: So, even though they haven't been served with a summons, they are bound to be served by the notice, I think. There is some reason, therefore, for leaving it 20 days after commencement of the action or filing of the complaint. You do have to serve notice on the defendant of the taking of the deposition even though he hasn't yet been served with a summons.

MR. LEMANN: I really suppose this is a case of upon whom you are going to put the burden of going to the judge.

DEAN MORGAN: That is right.

MR. LEMANN: If you say, as Judge Donworth just remarked, that you want to give this plaintiff a chance to get that important testimony, the answer is, Go to the judge and get the order. Easy. On the other hand, if you look at it from the other point of view, you don't require the plaintiff to go to the judge but make the defendant go to the judge if he needs more time. So, it is really a question of whom you are going to put the burden on.

SENATOR PEPPER: That is it.

THE CHAIRMAN: We have been thinking in terms of testimony to be offered in evidence at the trial. Bear in mind that what you are dealing with here is also a discovery deposition, and if you adopt the California rule, you can file your complaint and then start rambling around with discovery depositions, dragging the defendant himself in and razzing him, and dragging in all his employees and everybody else, within twenty-four hours. I think that is an argument in favor of the limitation on the claimant, allowing the other fellow some time for preparation and getting a lawyer to guard him and protect him, unless the court steps in and says this is an emergency matter to preserve this evidence because the witness is dying or leaving or whatnot.

JUDGE DOBIE: Isn't Senator Pepper's suggestion sound? These very rapid depositions are usually emergency, and why not put the burden on the man who alleges the emergency rather than on the other man? He has an emergency situation which is unusual, and it is a hardship on the other man normally. It seems to me it is fairer to make him go to the court and get an order than it is to have the California system and summon this man right away to take depositions, making him grab a lawyer and go to the judge and get him to extend the time.

THE CHAIRMAN: Does the California system allow discovery the way we do?

JUDGE DOBIE: That I don't know.

THE CHAIRMAN: Does it allow a man to drag his opponent in and drill him about things that are not evidence at all, on a fishing expedition?

JUDGE DONWORTH: I don't know what the recent rulings are, but the former rulings were that you could dig up only your own case and not the defense of the other fellow.

DEAN MORGAN: Not under depositions.

JUDGE DONWORTH: I couldn't say about the recent ones.

THE CHAIRMAN: We have a motion here, as I understand it. We will take a vote on it.

JUDGE DONWORTH: What is the motion?

THE CHAIRMAN: The motion is to provide that either

party may take a deposition any time after the action is commenced without any limitation of time on anybody or without applying in the first instance to the court for leave.

[The motion was put to a vote and was lost.]

DEAN MORGAN: I am astonished!

THE CHAIRMAN: Now we get down to the restrictive system and limitations for that. I think we first would agree that the delay of 20 days after commencement does not apply to the defendant, only to the claimant, and that appropriate alteration of the rule should be made to carry that out, having due regard for cross-claims, counterclaims, third parties, and all the rest of them.

SENATOR PEPPER: It is clear here that notice of the taking of the deposition has to be given to the defendant, is it? It doesn't say so specifically. It might be just notice to the witness.

THE CHAIRMAN: What rule?

JUDGE DONWORTH: The other section covers that.

SENATOR PEPPER: Does it?

THE CHAIRMAN: Let's read it to be sure what we are doing.

SENATOR PEPPER: I was a little puzzled about it.

THE CHAIRMAN: Rule 30(a).

SENATOR PEPPER: Rule 30(a) covers it?

THE CHAIRMAN: Look at it and see if it doesn't.

DEAN MORGAN: You have to give reasonable notice in writing to every other party to the action. That is the first sentence of 30(a).

PROFESSOR SUNDERLAND: You can hold your witness, though, with a subpoena while you are giving notice to all these other parties.

DEAN MORGAN: You can subpoena the witness, surely, unless he appears voluntarily.

PROFESSOR SUNDERLAND: If you were afraid he was going to get away and it would take time to serve all your parties, you could hold him by subpoena.

PROFESSOR MOORE: Under Rule 45(d) you can't get a subpoena until you have given proof of service of notice to take a deposition.

SENATOR PEPPER: The answer to my question, then, is that notice to the defendant is sufficiently clear.

JUDGE CLARK: More than sufficiently clear.

SENATOR PEPPER: If it is sufficiently clear, I guess that means clear, doesn't it?

JUDGE CLARK: I don't think you will find that the defendants are harshly treated under these rules.

THE CHAIRMAN: Let's go back, then, to Rule 26. We have agreed, as I have stated it, that the restriction of 20 days shall not apply to the defendant, but only to a claimant. It has no reason to apply to the defendant.

The next question is whether it is 20 days after the commencement of the suit or 20 days after the service of summons, having in mind that the notice of the taking of the deposition has to be served on the party even though the summons has not been, in order to take a deposition. Considering that factor, he is bound to have notice of taking served on him, even if it is shorter notice than 20 days. You are getting into hot water if you change the 20-day limit to run from the date of service of summons rather than from the commencement, because the commencement as to all parties is fixed by filing the complaint. You don't have to bother with whether it is only 20 days after the last man has been served or 20 days after the first man has been served, or what.

SENATOR PEPPER: Walter Armstrong says the new proposal may result "occasionally ... in an inequality of operation", as where a defendant, without fault, is not served until after the expiration of 20 days and, not knowing of the pendency of the suit, is then faced with a deposition.

THE CHAIRMAN: Unless he has reasonable notice.

SENATOR PEPPER: He gets his notice of the taking of the deposition, but he hasn't yet--

THE CHAIRMAN [Interposing]: That is the first news he has had of the case.

SENATOR PEPPER: Yes.

MR. LEMANN: I suppose it would be an abnormal case,

in which they could not go to the judge then and say, "Judge, they gave me 48 hours' or 3 days' notice, which normally would be enough, but I have just been served and my lawyer hasn't had a chance to familiarize himself with the case." Don't you think the judge would give him more time?

JUDGE CLARK: Let me make a suggestion or ask a question. Would you like to gear this a little differently in terms of persons who have or have not appeared? That might make it easier to cover this question of multiple defendants. In my rule I didn't push it too far either way, but I will throw it out to see what you think. A deposition may be taken after commencement of the action without leave of court, except as against defendants who have not appeared, and then you have to get permission of the court.

PROFESSOR SUNDERLAND: There might be a question as to whom this deposition is against.

THE CHAIRMAN: Yes. That is a phrase that is new to the law.

JUDGE DOBIE: That would make it too complicated, I think.

JUDGE CLARK: You certainly have got it now, unless you are going to provide that you can't get any deposition until you have served all the defendants, which means that in some cases you won't get depositions at all. I suggest that you have the problem where there are multiple defendants.

MR. LEMANN: When you say commencement, you don't have the problem.

THE CHAIRMAN: You mean if you have several defendants and you want to take a deposition in a hurry, if you serve notice of taking the deposition on one of the defendants but not on the others, you can go ahead and take it and that deposition cannot be offered in evidence against the defendants who did not have notice but it may be offered in evidence against the fellow who did have notice. Is that the way it works?

PROFESSOR MOORE: That is right.

THE CHAIRMAN: He says you have that situation with multiple defendants any way you look at it.

JUDGE DOBIE: Of course, if we have a jury, we just say, "Gentlemen, you know this fact, but you can use it only against A. Forget it as to B and C."

JUDGE CLARK: Yes, but it is a little more than that here, Armistead. It is how you are going to get the permission to take the deposition against these multiple defendants. I think that none of us wants to stop getting the deposition. We just want to make it so that it can't be gotten too unfairly. Even as against a defendant who never appears, don't we want the possibility of a deposition there? I should suppose we did.

JUDGE DONWORTH: We may dismiss as to that man if we find it is difficult to reach him, and so forth.

MR. LEMANN: Doesn't the use of the words "commencement of the action" obviate your difficulty about the multiple defendants?

THE CHAIRMAN: Yes.

DEAN MORGAN: Yes, it does, but not about the provision that notice must be served upon every other party to the action for taking a deposition.

MR. LEMANN: That wouldn't come up at this point, if it be a difficulty.

DEAN MORGAN: No, it comes up later, in Rule 28, which we haven't fooled with, I think.

MR. LEMANN: I don't think you can cover all the possible difficulties.

DEAN MORGAN: It comes up under 30(a).

PROFESSOR CHERRY: Mr. Chairman, isn't the Reporter's suggestion really aimed at the deposition as evidence, not as to deposition as discovery? You can use what you get as discovery against everybody. That is what you are getting it for. It doesn't do any good to say that you can't offer it in evidence, because we are providing that you go away beyond evidence. Why isn't every defendant entitled to notice so that, if he wants to, he can be there and take part in that and raise his objection to the scope of it and whatnot?

THE CHAIRMAN: Do you want to change the rule about notice to say that no deposition may be taken unless every

defendant--

PROFESSOR CHERRY [Interposing]: No, but the Reporter was reading us something that said you didn't have to give notice to non-appearing defendants. In the first place, you would have to define them as people who have had a chance to appear, and that would postpone it longer than any of us have been suggesting, it seems to me, because you would have to wait until the last one was served.

JUDGE CLARK: I don't think yet, Wilbur, that I created the problem. I think the problem of multiple defendants is there.

PROFESSOR CHERRY: I am speaking to the suggestion that you offered, and it seems to me it is no solution where the primary purpose certainly may be not to get evidence but to discover.

JUDGE CLARK: All right, maybe not. I don't have any particular pride about it. What is your solution of the case of multiple defendants?

PROFESSOR CHERRY: Just notice.

MR. LEMANN: To as many as you can give.

JUDGE CLARK: You have to have notice. Forget this question that we are dealing with at the moment. Rule 26(d) says it can be used only against those who have notice, and 30(a) says that you have to have notice, and so on. So, the question of notice is taken care of in our rules as they now

stand. This is a little additional thing that within the 20-day period you have to get permission from the court as against those who are served. What do you mean by "served" there in the case of many defendants?

MR. LEMANN: You haven't put "served" in there.

PROFESSOR CHERRY: "served" isn't in here.

MR. LEMANN: I would be rather inclined to the notion that we aren't going to put "served" in. At least, that is the drift of the debate.

JUDGE CLARK: I will take that all back. I thought it was a general statement that everybody had agreed on "served." I am perfectly happy if you are going to leave it out. Of course, my suggestion isn't necessary at all if it says "after the commencement of the action".

DEAN MORGAN: Yours is directed only to Armstrong's suggestion.

JUDGE CLARK: Yes. It seemed to me a minute ago everybody was saying how fine that was.

THE CHAIRMAN: No. I suggested that we leave the 20 days after commencement, having in mind that that party would certainly get a short notice of the taking of the deposition anyway and would have a little time to rush around with a lawyer and find out what it was all about.

JUDGE CLARK: I am sorry, then. I take it all back. I am away behind. I haven't caught up yet.

THE CHAIRMAN: We haven't decided it. What is your pleasure, then? The next question is whether you want line 18 to stand as it is, 20 days after commencement of the action, or whether you want it 20 days after the service of the summons on the party in order to make him a person against whom the deposition can be used. What is your pleasure on that?

SENATOR PEPPER: I move that the rule be so framed as to include the italicized matter from lines 11 to 20, inclusive.

JUDGE DONWORTH: As here now?

SENATOR PEPPER: Yes, sir.

JUDGE DONWORTH: Without change?

SENATOR PEPPER: Yes. I think we have sort of gravitated to the conclusion that we are going to leave commencement of the action instead of service, and I understand that the vote taken a little while ago settled that the "except" provision shall stand; that is, "except that if notice of the taking is served within 20 days after such commencement leave of court granted with or without notice must first be obtained." Therefore, my motion was intended to be comprehensive and to include the italicized matter just as the Reporter has it.

THE CHAIRMAN: The trouble is, we have already adopted the principle and he has been told to put in here that the "except" provision shall not apply to the defendant, but it is the plaintiff who is bound by that, and that alteration should be made.

SENATOR PEPPER: That slipped my memory; that the italicized matter stand as the statement of the rule after it has been perfected by the amendment respecting the defendant.

THE CHAIRMAN: All right, do you want to vote on that?

JUDGE DONWORTH: That will permit a defendant, then, to take a deposition immediately.

SENATOR PEPPER: There is no hardship in that.

JUDGE DONWORTH: But it will not permit the plaintiff.

THE CHAIRMAN: That is right.

JUDGE DONWORTH: Rather than delay discussion, I vote for that, although I am not quite clear that one should have the privilege and not the other.

SENATOR PEPPER: You see, the plaintiff knows what it is all about. He is the actor. He has brought the suit.

JUDGE DONWORTH: I won't argue the matter. Of course the defendant usually knows when he is going to be sued. There is not very much surprise, as a rule. Anyhow, I vote for the motion.

MR. DODGE: Shouldn't the words "in case of emergency" be used to modify the provision "without notice"?

THE CHAIRMAN: You have to leave a little to the discretion of the court.

MR. DODGE: "in case of emergency without notice".

MR. LEMANN: That doesn't mean without notice of taking deposition, but you can get leave of the court without

notice. Isn't that right?

SENATOR PEPPER: Yes.

MR. LEMANN: Don't you think you can trust the judge that he isn't going to do it ordinarily?

MR. DODGE: I think the defendant ought to have a chance to be heard. The speeding up of depositions where there is no emergency may impose a tremendous burden on the defendant. If it is a complicated and difficult case and the lawyer has some other things to do and is suddenly confronted with this, he ought to be given a little time to prepare himself to take the depositions. It is a great waste of expense, a waste of time, and it doesn't ultimately speed up the litigation. He ought to have a chance to be heard on the question of whether he is to be compelled to take a deposition not in case of an emergency within so short a period as this from the beginning of the action. He hasn't even filed his answer, and the issues are not clarified, and in a complicated case he is confronted with great difficulties. Give him a chance to be heard before the court.

MR. LEMANN: Couldn't you answer that by saying that if notice is entered ex parte in a hard case, you could go around to the judge and say, "Judge, you signed this order. I want to ask you to modify it. Here are the facts." That would be your protection.

THE CHAIRMAN: We have had a rule, in force here since

1939, that expressly says that the court may grant leave after jurisdiction has been obtained and must grant leave in order to take a deposition before the answer is before him. Therefore, all these seven years we have had discretion in the court to grant leave and didn't even say with or without notice.

MR. DODGE: It seems to me it is a good deal fairer for the plaintiff to give notice to the counsel on the other side if he is going to ask for such a speedy deposition where there is no emergency.

DEAN MORGAN: How much notice has he got to give?

THE CHAIRMAN: I would rely on the judge not to grant it. Where the rule plainly says that a deposition may not be taken by plaintiff until 20 days after the action is started, unless the court with or without notice grants leave, isn't that notice to the court that he is supposed to give an emergency order on notice, but if the emergency is great and time is limited and he thinks there is reasonable ground for it, he can do it without notice? I don't think you need to tell the court that he ought not to do it without notice unless there is some kind of showing.

MR. DODGE: Perhaps not, but I would like to give the defendant a little more protection by giving him notice of that motion, because of the difficulties which I see would be presented in any difficult case.

THE CHAIRMAN: Nobody has suffered for eight years

under this.

MR. DODGE: A lot of the comments of the bar associations and others criticize this speeding up of depositions as not likely to accomplish justice and involving waste of time.

PROFESSOR SUNDERLAND: In the case of a large number of defendants, you would have a delay which might be very serious. If you had to give notice to a number of defendants, you might have a great delay there.

MR. DODGE: The notice can be readily given.

PROFESSOR SUNDERLAND: The defendants might not be available to give notice to.

MR. DODGE: The deposition can't be used against anybody who didn't have notice of it.

PROFESSOR SUNDERLAND: Not as evidence. For discovery it might be very important to get it. It might take you weeks to get service on the whole group of defendants.

THE CHAIRMAN: You see, Robert, if the court grants leave to take it within the 20 days, that doesn't relieve the moving party from the duty of serving notice of the taking of deposition. He still gives that much notice. It isn't as if the court were relieving him of serving notice of taking the deposition. It is only relieving him of the 20-day limit. He still has to serve every party whom he wants bound by the deposition with a notice of the taking of it. We thought a few minutes ago that even though the fellow didn't know the

complaint had been filed and the action thus commenced, if he actually got a notice of the taking of the deposition, which at least would have to give him twenty-four or forty-eight hours' notice, that would give him a chance to get a lawyer and find out what he was going to do about it.

MR. DODGE: Your suggestion is that the defendant have the burden of going to the court, because there would be many cases where the defendant's lawyer would be put in the position of extreme difficulty to do justice by his client and know how to handle the matter.

THE CHAIRMAN: My point is that the plaintiff would have to go to the court and get an order to take the deposition if the deposition was to be taken within 20 days. I am not suggesting that the defendant has to be--

MR. DODGE [Interposing]: The plaintiff has to get an order, but he may get it without notice, and to give the defendant his chance to be heard on that, if he wants it, I feel that he ought to have notice of that application, except in cases of emergency.

THE CHAIRMAN: The difference between you and me is that I think the court will construe the rule so that he should not give a peremptory order without notice unless there is some good reason for it, and you think it isn't safe to rely on the judge. There is the issue. I don't object to putting the words in.

SENATOR PEPPER: How would you phrase it, Robert?

MR. DODGE: Just put in the words, "in case of emergency without notice".

JUDGE CLARK: What is an emergency? That is a new word in anything connected with any of this.

THE CHAIRMAN: What you mean by emergency is a hurry so great that you haven't got time to serve a fellow with notice and have a hearing after notice. That is what you mean, isn't it? It must be a condition that makes the serving of notice of a hearing impracticable. That is what you mean.

MR. DODGE: If there is no emergency, why isn't it entirely practicable?

THE CHAIRMAN: I am asking you what you mean by "emergency," "except in emergency." I say that the only emergency that justifies an order without notice to the party is a condition of fact which makes necessity of giving notice to the party destroy the right. In other words, suppose a man has a ticket to leave on a steamer the next day at nine o'clock in the morning. If you are going to give the other side notice of the application to take a deposition, you lose the opportunity to take the deposition. You wouldn't ask the other side to come in on notice at midnight. The court in that case would grant the order without notice.

MR. DODGE: That is plainly a case of emergency, which I should cover by the rule.

THE CHAIRMAN: I think that is covered anyway. Somebody challenged your word and said there is no definition of what conditions you would call an emergency.

Let's have a vote on the question. The question is whether we will put in lines 18 and 19 a provision the effect of which, without fixing the exact words of it unless you are ready to do that, would be that leave of court should not be granted without notice except in case of emergency. Is there a second to that motion?

JUDGE DONWORTH: I sympathize with Mr. Dodge's point of view heartily, but it seems to me that it will produce difficulties, and I think that the adverse party will be reasonably protected by the fact that there is a court order. This rule, reading as the proposal now is here in italics, does not make it an absolute right on the part of the party to take a deposition. He must have a court order, and therefore the court reserves the right to vacate that order on application, and so forth. In other words, it is not a positive right. It is conditional upon court action, which is always subject to re-investigation and change.

SENATOR PEPPER: I suppose, as a practical matter, when a man applies to the court for an order to take a deposition, it is almost certain the court will ask, "Have you given notice to the other side?" in which case the response is, "No, it is a hurry-up case." I think the court could be trusted to

ask, "What kind of hurry-up case? What is the hurry?"

MR. DODGE: I think that is true. The court in all probability would decline to act on it without notice unless it was a case of emergency.

SENATOR PEPPER: I should think so.

MR. DODGE: Perhaps that may protect it. All this speeding up of depositions where there is no emergency presents grave dangers of abuse and waste of time.

JUDGE CLARK: It seems to me one difficulty of this is that it puts the premium on the negligent lawyers who are willing to make the necessary allegations to the court. I mean this is an attempt somewhat to take away the discretion from the court, and that means that you have to have formality. I think I am not being harsh when I say that some of the New York lawyers would always be able to get a showing of emergency, not construing their obligation too harshly, so that the court would act, whereas the higher grade lawyers would be rather hampered by this, how far they could honestly tell the court they are worried because they think the witness is going to go when they don't know for sure. It just puts a premium on the fellow who is easygoing in his representations.

THE CHAIRMAN: You mean the provision for granting leave to take a deposition within that 20 days without notice of the application for leave? Is that what you are talking about?

JUDGE CLARK: No. If you put in this provision as to emergency, some lawyers will always be able to find an emergency very easily and put it up to the judge.

THE CHAIRMAN: They have to do it now. Our argument against Bob is that the court would not grant leave without notice except in emergency.

JUDGE CLARK: I think there is a difference in having an absolute and arbitrary rule. I think now a court, as a rule has discretion, having in mind the caliber of the lawyers before him.

MR. DODGE: I withdraw the motion.

SENATOR PEPPER: Then, the thing stands with my motion to adopt the italicized matter as is after it has been perfected by the change that we agreed to make the exception inapplicable to the defendant.

THE CHAIRMAN: Are you prepared to vote on that?

[The question was called for, and the motion was put to a vote and carried.]

JUDGE CLARK: May I ask just one question of interpretation of this? Monte at one time suggested that notice given by the plaintiff should be by any person making a claim. I infer now that this means strictly that the plaintiff gives notice.

DEAN MORGAN: Oh, yes.

JUDGE CLARK: I just wanted to make sure. My inference

is that it is limited to that.

THE CHAIRMAN: What is limited to what? The exception is limited?

JUDGE CLARK: Yes. The addition that we are to put in here, "A deposition may be taken after commencement of the action and without leave of court, except that if notice of the taking is served by a plaintiff within 20 days". That is your idea.

THE CHAIRMAN: That is it.

PROFESSOR MOORE: With a third-party plaintiff you have the same problem.

JUDGE CLARK: No.

THE CHAIRMAN: No.

JUDGE CLARK: He has a lawyer.

PROFESSOR MOORE: Not as against the third-party defendant.

DEAN MORGAN: That third party is coming in.

JUDGE CLARK: I see; a new defendant, yes.

THE CHAIRMAN: We left it to you, as I stated the thing, to figure out all these cross-claims and third parties and to be sure we have the principle applied, the exception being only to protect a fellow who hasn't yet got a lawyer. If a fellow who hasn't got a lawyer himself wants to take the deposition, then the limitation doesn't apply.

JUDGE CLARK: I think they have that now.

End.

THE CHAIRMAN: Is there anything under 26(b)?

JUDGE CLARK: Under (b) there are quite a few who object to lines 39 to 42. On the other hand, there were quite a few who approved. We made the comment that those who object to 39 to 42 are those who really are opposed to extensive discovery, and I shouldn't think you would want to change this unless you at least wanted to restrict discovery a great deal. We have discussed this.

THE CHAIRMAN: I think the objection to lines 39 to 42 is based upon a misconception of what we mean by "inadmissible."

JUDGE CLARK: Yes, I think so.

THE CHAIRMAN: They think it is some matter that hasn't anything to do with the case and in relation to which no evidence can be offered. What it really means is that the evidence is inadmissible because it is hearsay, there is no foundation laid, it is not the best evidence, and a lot of technical rules of that kind. Once you understand that that is what "inadmissible" means, the objection to the rule fades out. I don't know that there is anything we can do about that except to state in a note that when we say "inadmissible," that is what we mean by it.

SENATOR PEPPER: I have some observations to make on the whole subject of discovery in connection with the Hickman case, and so on.

DEAN MORGAN: It will take us an hour to discuss that.

SENATOR PEPPER: It will take quite some time. If we find that the action that we take on 30(b) requires a reconsideration of 26(b), that will be time enough to deal with that.

THE CHAIRMAN: Yes. Anything we do with other rules is subject to what we do when we get to the investigation file provisions.

SENATOR PEPPER: Yes.

JUDGE DONWORTH: Senator, would you tell us what your point of view is as between the Circuit Court of Appeals of the Third Circuit and the district courts?

SENATOR PEPPER: It didn't seem to me that the decision in the Hickman case as rendered by the Circuit Court of Appeals was very clear thinking. It didn't seem to me to leave the situation clarified. I was going to make a fairly revolutionary proposal which has at least the merit of clarity, and I will state it now if that is the desire. I don't want to give the Reporter an uncomfortable night. [Laughter]

JUDGE DONWORTH: Don't let me interfere.

JUDGE DOBIE: Senator, I don't want you to be interrupted. It is five minutes to six. Don't you think we had better put that off until tomorrow?

SENATOR PEPPER: Yes.

JUDGE CLARK: I will say I think I know what the Senator's proposal is, and it isn't going to make my night any

more or less uncomfortable.

PROFESSOR SUNDERLAND: I would like to hear it now and think about it overnight.

SENATOR PEPPER: Don't you think we had really better take it up afresh in the morning?

THE CHAIRMAN: If there is no objection, then, we will adjourn until nine-thirty.

[The meeting adjourned at five-fifty-five o'clock.]
