P R O C E E D I N G S

ADVISORY COMMITTEE ON

RULES FOR CIVIL PROCEDURE.

Vol. 1

Wednesday, March 24

March 24 - 26, 1954
Supreme Court of the United States Building
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WEDNESDAY MORNING SESSION

March 24, 1954

The meeting of the Advisory Committee on Rules for Civil Procedure convened at 10:00 o'clock in the West Conference Room, Supreme Court of the United States Building, Washington, D. C., William D. Mitchell, Chairman of the Committee, presiding.

... The following members were present:

William D. Mitchell, Chairman

George Wharton Pepper, Vice Chairman *

Charles E. Clark, Reporter

Leland L. Tolman, Secretary

Armistead M. Dobie

Robert G. Dodge

Sam M. Driver

Monte M. Lemann

James Wm. Moore

Edmund M. Morgan

Maynard E. Pirsig

John Carlisle Pryor

... Also present:

Charles Alan Wright,
Assistant to the Reporter

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* Present Wednesday morning, March 24, only.

CHAIRMAN MITCHELL: Gentlemen, we are right on time and we might as well get started.

Edson Sunderland wires that he cannot come. He has been ill. He has been in South Georgia. He says:

"It seems inadvisable to come north at this time. Regret missing the meeting."

Our friend Hildebrand, who never has attended a meeting, indicated a while ago that he would, and then I got a letter from him a few days ago saying he was trying a lawsuit and couldn't come.

There are two matters I would like to take up out of order, if it is agreeable with the Committee, instead of waiting until the rule is reached in consecutive order. One is the note to Rule 8.

SENATOR PEPPER: Mr. Chairman, is there any parliamentary form which a young member of the Committee can follow in the way of suggesting to the Chairman to keep his voice up a little?

CHAIRMAN MITCHELL: Yes. Just shout. I will try to bear in mind that I am not as husky as I used to be.

SENATOR PEPPER: That is all right.

DEAN MORGAN: You have to remember that applies to those on the receiving end, too.

CHAIRMAN MITCHELL: I argued a case in the Supreme Court on October 15, and here it is March, and no opinion.

Every case that was argued before it has been decided and some that were argued afterwards. I am wondering what was the matter with the Court, and I think maybe I was whispering. I should have spoken up. It seemed like a very simple case.

Another thing I wanted to take up out of order, if it is agreeable, is a request from the Judiciary Committee of the House for our report and recommendations about the rule on jury trials in condemnation cases. They have the Senate bill under consideration, and we want to arrange to file a communication with the committee stating our feeling about the rule, our reasons, and so on.

I noticed the Deputy Attorney General has followed the old line of the Lands Division and has come out against our rule. He makes a good many statements that he can't support, and one of them is that the commission system is more expensive. They kicked at one time about high allowances made by judges to commissions. That is a simple thing to correct. All they have to do is to get an appropriation bill and put a clause in that not more than so much per diem shall be allowed for the commission. That is what is done in the TVA. It isn't for us to control that.

The idea that the commission system is more expensive has never been supported by any credible evidence. When you take a jury trial, you have a whole venire sitting around for the trial of one of those cases, and you not only take the time

of the men on the panel of the jury but the whole venire is getting per diem; and the judge, the bailiffs, the court room and everything else are being used.

I think somebody on our Committee ought to sit down and write a letter to the House committee stating what our reasons for this thing were. We probably ought to put Judge Paul's letter in the record and the report of the committee of the Conference of Senior Circuit Judges which was favorable to letting the rule stand, and any material you want to.

Those two things I think it would be advisable to take up, especially the note to Rule 8. I made a stab at it. It wasn't very good, I guess. George Pepper improved it greatly. I am not sure that he can stay for more than a couple of days. I think he said something about a Friday engagement, and I want to have that taken up while you are here.

JUDGE DRIVER: While on that subject, I think an explanation of the attitude of the Department of Justice on the expense matter is that it is largely due to the fact that the Department is primarily concerned with its own budget rather than over all expense to the Government. Under the operation of 71A the Department of Justice has been paying the commissioners, while the jurors are paid for through the budget of the Administrative Office. So what they mean is that it costs the Department of Justice more. It would cost the Government less, I am sure.

MR. TOLMAN: In that connection, Mr. Chairman, I might say the Department of Justice has asked the Administrative Office to take over the budgeting of expense for commissioners in condemnation cases. They don't like that item of expense, and they want us to have it.

CHAIRMAN MITCHELL: When this Committee was organized away back in 1935, Chief Justice Hughes was the head of the Court and he called me down to Washington and asked me to serve as chairman. As a bait he asked me to suggest the names of the Committee. He said he wanted me to have men on the Committee that I could work with, and all that sort of thing, which was very nice of him, and I did take part in selecting the first Committee. No appointment was made by that Court afterwards without consultation between the Court and the Committee.

Chief Justice Vinson came on, and some vacancies occurred and the Court made some appointments without consulting the Committee. A couple of them have been very satisfactory members, but one, for instance, Mr. Hildebrand, has never attended a meeting and has shown no interest in the work at all. I have had the greatest difficulty even getting replies to my telegrams and letters about meetings.

Now we have some vacancies, and I don't want to be the one to suggest the names of new members to the Court. I think the Committee ought to think things over and, from

their own communities or anywhere they choose, suggest to me names that I could give to the Court for acceptable members. It is really important that we do that, I think, because the Court is busy, and we have a better point of view, I think, about qualifications for members than perhaps the Court has.

So I am going to ask you, if you will, in the next couple of months, maybe a little sooner, before the Court adjourns in June, to write to me and give me the names of people whom you think it would be desirable to add to the Committee. Some of us are getting pretty old, and if we don't look out there will be a whole bunch of vacancies come along at once.

JUDGE DOBIE: Do you think we ought to have more lawyers or more teachers or more judges, or do you think it makes any difference?

CHAIRMAN MITCHELL: I wouldn't have any special suggestion about that. Some of our members, good members, are judges and some are just lawyers. I haven't any preconceived ideas about that. It is the quality of the man more than anything else.

DEAN MORGAN: General, should they come from approximately the same part of the country that the man who would retire has come from?

CHAIRMAN MITCHELL: I should think that the bar in the different areas ought to be represented, if we can find a man in that area that is up to the mark. We have to get the

bar interested in this work. For instance, if we have an area which is not represented, they feel neglected.

DEAN MORGAN: That is what I was thinking.

CHAIRMAN MITCHELL: I think there should not be any hard and fast rule about that. When you begin to suggest names, look over the residencies of those who are now on the Committee and the residencies of those who have died or retired, and use your judgment about it.

MR. PRYOR: What are the vacancies other than Mr. Loftin's?

CHAIRMAN MITCHELL: You see, we started out with fifteen members, and we started losing them. George Wickersham I think was the first man we lost. We have never gotten back to the original number. I haven't checked it up lately.

MR. PRYOR: I was thinking with reference to the geographical question which was raised here. If we are going to fill vacancies, it might be well to have that in mind.

CHAIRMAN MITCHELL: If you like, I will have somebody make up a table showing where the different members came from at the start and where the members we have lost came from, which might be helpful to the Committee and avoid confusion.

MR. PRYOR: That would help us in making suggestions.

JUDGE DRIVER: Other things being equal, I feel that consideration should be given to putting another district judge on the Committee because, after all, the district judges have

to work with these rules about as much as the lawyers. When I was appointed the Chief Justice told me in a rather joking way, now that the rules are fairly well established he thought they could safely put on a district judge.

JUDGE CLARK: Mr. Chairman, might I say just one thing about the geographical distribution? It would seem as though the Supreme Court has somewhat tended to follow the same geographical division as the original Committee. I should think, though, that it was a mistake to follow it rigidly. There ought to be a wide distribution.

On the other hand, some of the original distribution was obviously chance. For example, Senator Loftin was put on very obviously because he was president of the Bar Association at the time, and not because he came from Florida. I have an idea that Mr. Monte Lemann was put on because of his ability in the field and not because he came from New Orleans. You could go through other divisions of that kind.

So, whereas the distribution is desirable, yet I don't believe that there ought to be somebody necessarily appointed from Florida just because Senator Loftin came from Florida.

CHAIRMAN MITCHELL: I didn't mean that there should be a rigid rule, but it is a factor we ought to think about. We started out with Judge Olney from California, who was a great man, a great lawyer, and a very valuable man. The only

man we have had from California since is Mr. Hildebrand, isn't he?

JUDGE CLARK: That is right.

CHAIRMAN MITCHELL: We have the Ninth Circuit jumping on our neck about something, and they are not well informed about it. I mean simply it is a factor. I don't mean that we should rigidly adhere to the territorial consideration at all.

JUDGE CLARK: I should think, too, that it would be a good thing to have more district judges. I wrote suggesting some district judges. I think there should be more, at least one, possibly two more. After all, they are the guinea pigs who have to take care of the rules.

CHAIRMAN MITCHELL: The experience we have had with Judge Driver points that way.

JUDGE DOBIE: Donworth was a district judge or a retired one.

JUDGE CLARK: He had retired, I believe. In the original appointments there were no judges, actually. I think we shunned them.

CHAIRMAN MITCHELL: If it is agreeable to you, now we will take up the question of this note to Rule 8.

As I say, I want to be sure that we settle that while Senator Pepper is with us, who was kind enough to make a re-write of my draft. I suppose you have before you the various drafts of the Committee. Eddie Morgan criticized my note as

being altogether too long. When you have the whole bar of the Ninth Circuit hammering at you, I don't know whether you want to do a thorough job or not. I would be inclined to think so.

He also says that in my statement he didn't like the phrase "cause of action", that it didn't mean anything to him and that was not his reason for objecting to the old phrase. He said we spend too much time on the Dioguardi case.

I can't agree with that. I have sat in my office for two years and have been hammered by these Ninth Circuit fellows, and every time I have tried to defend this rule they throw that case at me. The chief reporter states that there is no requirement that the facts be stated in the complaint. I think we have to meet that head-on.

At one meeting we had, I suggested that my interpretation of that case was that what the court meant in that opinion was that the rule didn't use the phrase "facts constituting a cause of action" but used the words "claim on which relief can be granted." The judge was criticizing the district attorney for having made a motion to dismiss on the grounds that it didn't state facts constituting a cause of action. I understood from Judge Clark that that was his idea, but it has been given a broader interpretation.

I cannot escape the conclusion -- and I see that Senator Pepper can't -- that under the present phrase the plaintiff has to state facts, conditions, events, or something

like that of a factual nature on which, if you apply the substantive rule of law, you find the plaintiff is entitled to judgment.

I have never been able to convince myself that a complaint is good which did not state facts, events, circumstances, or conditions of a factual nature which, subjected to the rules of substantive law, would show that the plaintiff was entitled to relief. I can't get away from that. I think a pleading which doesn't state anything in the nature of facts, occurrences or events on which the claim is based, is not worth anything. I don't understand that that part of my note was accepted.

I feel that we have to deal with the Dioguardi case and, if Judge Clark doesn't except to it, we ought to take the position that we construe that opinion that way, just referring to the language of the rule not having been preserved, "facts constituting a cause of action," and in the nature of a criticism of the district attorney for making a motion to dismiss using the old expression instead of the new one.

We have the draft before us. I had a feeling that Senator Pepper's draft didn't develop quite as much as I tried to do in the original draft, with the idea that there are other rules that throw light on it, judgment on the pleadings and that sort of thing, which plainly indicate that there must be a statement of events or circumstances, or whatever you might have called them, which are of a factual nature.

I can understand why you don't like the word "facts" because the courts have muddled around with whether they are ultimate or evidentiary, and all that sort of thing. To say that you have swept aside all requirements about a factual basis for pleading doesn't seem to me is acceptable at all.

How do you want to go at this? We have these drafts here. Who was it who wrote in and made the same suggestion about Senator Pepper's draft that I did?

SENATOR PEPPER: Mr. Chairman, if there was any merit, mine was merely a condensation of what you and Eddie Morgan had said. What I suggested was greatly improved by suggestions from Monte Lemann.

CHAIRMAN MITCHELL: Was it Monte who suggested some further reference to other rules?

DEAN MORGAN: Yes.

MR. PRYOR: I made that suggestion in a letter, and I have the letter here. It wasn't of any great importance, but I said that I liked Senator Pepper's draft and I would not at all object to Judge Clark's proposed insert with reference to rules other than those specifically referred to in Senator Pepper's draft, and I do suggest that a citation of the Dioguardi case be given following the reference to the case in the second line on the second page of Senator Pepper's draft.

MR. LEMANN: My attempt to paint the lily of Senator Pepper's draft -- as I described it I was painting the lily --

was really also a condensation and rearrangement of his condensation, and as far as the references to the rules are concerned, I think I got those from Mr. Pryor and Judge Clark. I think they do cover what you have in mind, Mr. Chairman, because they do make a point of reference to these other rules on the subject.

Personally, I favor the general idea of Senator Pepper's shorter statement, if for no other reason because I think we ought not to labor the point too much. We do refer in the explanation in his condensation to this opinion of Judge Clark's, and we say, as Mr. Morgan suggested, that in that case there were plenty of facts. The man simply hadn't been very well informed in his attempt to present his case, and the court wanted to save it from attack because of poor craftsmanship. I think we don't ignore the case.

As far as the Ninth Circuit is concerned, I suppose nothing we do will satisfy the vocal element in the Ninth Circuit. I imagine there are plenty of people in the Ninth Circuit who really are not disturbed. Besides, we couldn't let the Ninth Circuit control us completely.

CHAIRMAN MITCHELL: I have actually had someone in my office, and they keep harping on this decision in the Second Circuit, throwing it at me. I thought my analysis of it was right.

MR. PRYOR: I do, too, but I think Senator Pepper's

condensation really covers the point pretty well.

CHAIRMAN MITCHELL: I made my stab at it and you have heard what I think about it. I thoroughly agree that Senator Pepper's draft is much better than mine, and mine is open to the criticisms that have been made of it. This is really a one-man job. We can't sit here and work out in the Committee the exact words of this note. We can have a draft made before we adjourn, and the Committee can approve it.

DEAN MORGAN: Mr. Chairman, to get the matter before the Committee, I move that the note as drafted by Mr. Lemann be accepted.

SENATOR PEPPER: I second the motion.

JUDGE CLARK: I was going to say something about that. Let me say that I think that Mr. Lemann's note is very good. It is a step-by-step improvement. Senator Pepper's I like, but Mr. Lemann's is more complete because it does make references to the other rules.

There is one thought that I think ought to be in. I wrote one sentence and sent it on to Monte, and Monte said he felt that was all right. I would like to add that.

CHAIRMAN MITCHELL: So the reporter can have it in the record, read the sentence to which you refer, that you want to add.

JUDGE CLARK: Mr. Lemann's note is in three paragraphs, and the final paragraph is a short statement setting forth the

conclusion of the Advisory Committee that the rule adequately sets forth the characteristics of a good pleading, and so on.

I would suggest putting at the beginning of that paragraph, the final paragraph 3, something like this:

"So far as appears from either the reported cases or the activities of trial courts, the rule is working successfully in practice in accordance with its intent; no substantial difficulties in its operation have appeared or have been shown to the Committee."

Then go on with the rest.

It does seem to me that there ought to be some judgment based on experience, so to speak. I am quite sure that this judgment is wholly sound. In company with others, I have gone over all the reported cases. I have examined the calendars of various courts, including the District Court for the Southern District of California. Of course, the judges there are not all with Judge Hall at all. Judge Yankwich is opposed. Judge Mathes is opposed, and a couple of others. One of the judges -- I don't suppose it is any particular secret it was Judge Mathes -- for some time reviewed all the calendars, including Judge Hall's own calendar, and there is really nothing on the calendars at all that raises any question.

It seems to me whether you should have just the language I used or not, it is up to the Committee to say expressly what it is really saying inferentially by not making

any change, that the experience under the rule is good. It would seem to me better to make a definite statement of that kind.

So that is the only thing that I thought was lacking in Monte's, and I think if you have an addition of that kind it would be desirable.

JUDGE DRIVER: Supplementing what Judge Clark just said, I don't like the reference to this as a Ninth Circuit movement. It isn't. This attack on Rule 8(a) is a California movement. There is opposition to it in the Ninth Circuit Conference. It came primarily from California and the California Bar Association. I think Oregon, at the urging of California, did pass some sort of resolution, but it is mostly confined to California.

CHAIRMAN MITCHELL: It seems to me we have reached the point where we have to ask one of the gentlemen who has been fiddling with this subject to put the thing in final draft form which we can consider before we adjourn, to be sure that everybody's ideas are considered and that we approve it.

Monte, while you are in town for this meeting, would you be willing to take this material and make a clear draft which carries out the suggestions that you made?

MR. LEMANN: Mr. Chairman, I would be glad to do it, because all I would do would be to take my redraft of the material that others had prepared and insert the sentence that

Judge Clark suggested, to which I can see no objection. I think it adds something. That would be easy. Mr. Tolman could have that done in his office with that change, and then we would have it before us. Everybody could read it before we meet tomorrow morning, and we could vote on it.

CHAIRMAN MITCHELL: If it is agreeable to the Committee, then, we will ask Mr. Lemann to see that such a draft is prepared and submitted to us before we adjourn.

Are you going to be here Friday, George?

SENATOR PEPPER: I think Mr. Lemann is exactly right about it. The only question I had in my mind about Judge Clark's suggestion is that where you have a sort of open sore as we have with our friends in the Ninth Circuit, I don't know whether we ease the situation or aggravate it by making a statement to the effect that we are satisfied that things are working all right and that they are wrong about it. Sometimes it is better to go ahead and imply that sort of ruling than it is to state it explicitly. But the judges have had so much more experience than I --

JUDGE CLARK: I can't claim to have that at all. Let me say first that if this language is too abrupt or otherwise, it could be softened. If Monte would take it and soften it, I think it would be all right; but I do think there should be some showing, whether it is put negatively or affirmatively, that we have tried to study the experience, and the experience

also leads us not to change, because that I should think would be the final test. We can't go back to our original completely. We can say this is what we intended, and so on, but if it is working poorly in practice we ought to change it. We don't think it is, and I think there should be some statement, whether mild or otherwise.

Maybe Monte can make it with the proper degree of mildness. I think we should show that.

I am impressed with this, too, because we have to remember that our constituency, so to speak, is much wider than this small group in the Ninth Circuit. It goes all over -- law schools, lawyers, and so on. We have to make a judgment that will go to them. It isn't enough to make an answer to the Ninth Circuit. We have to do something affirmative, so the scholars and all will recognize what we are doing.

That is why it seems to me that we need to make a judgment which is complete.

SENATOR PEPPER: That is all right with me.

JUDGE CLARK: I have no pride of wording. It is just to get in some of this other point of view.

DEAN PIRSIG: Mr. Chairman, along that line I wonder if it would soften the effect of Judge Clark's suggestion if we added a reference to the fact that the States which have adopted rules corresponding to these have generally taken the language as we have it here now.

CHAIRMAN MITCHELL: Didn't I have that in my draft?

DEAN PIRSIG: I don't think it is in the condensed draft.

CHAIRMAN MITCHELL: There are, of course, a number of States which have accepted the rule as we drafted it and find no trouble with it. Minnesota occurs to me right away. They have done a fine job up there on their adaptation of the Federal rules to their local situation, and they took the draft of ours hook, line, and sinker, and found no criticism of it at all.

JUDGE DOBIE: I don't think we have had a case like this in the Fourth Circuit in fourteen years.

MR. LEMANN: I will add that point that you made, Dean Pirsig, to the draft which you will have before you.

CHAIRMAN MITCHELL: We will have it handled in that way, then.

Now we pass on to the question of getting up an answer to the House Judiciary Committee on the condemnation rule.

MR. LEMANN: I move that the Chairman be requested to prepare a statement to be filed with the House committee.

You remember, Mr. Chairman, we had the Department of Justice here on jury trial, and we sent out a draft on that basis and had tremendous opposition from judges all over the country.

CHAIRMAN MITCHELL: You can't get away from the fact

that what we really tried to do in this rule was to provide that in these big projects similar to the TVA, the court might order a commission, with special reasons for it. Maybe we didn't draw the rule and confine it closely enough. We did the best we could in a general way.

There is no escape from the fact that we cannot consistently preserve the TVA system and then order a jury trial in every other kind of big, major project where great quantities of land are involved. You could not defend this rule that we have drafted when the Court put us on the carpet. You remember, George, we went down --

DEAN MORGAN: We had tremendous negotiations.

CHAIRMAN MITCHELL: I think we ought to recite the history of the development of this rule and why it was done the way it was, and rely on the conference report, the opinions of eighteen out of twenty-one Federal judges who have tried TVA cases, the Paul letter, and any material we have along that line.

JUDGE DOBIE: General, I think that Paul letter is an excellent one. Ours are mostly big projects down there, such as the Shenandoah National Park, and in those there is no question about it. I happen to know as a fact that Judge Paul did an excellent job there, and those commissioners did do infinitely better work than you could have had with a jury.

I think putting it in the discretion of the judge,

certainly it has worked well.

CHAIRMAN MITCHELL: The Department is claiming now, because the judges are ordering commissions in too many cases, they have a system --

JUDGE CLARK: I would like to make two suggestions, Mr. Chairman. First, I doubt if they are right on that. I can't tell for sure and one couldn't tell unless one looked up the figures; but so far as I can see from the reported cases, the only basis is one or two cases in the Tenth Circuit. I don't believe that at all.

The second is along the same line -- I am sorry to say, as you indicated, Mr. Rogers I thought was supposed to be quite a lawyer but Mr. Rogers' letter is not only wrong on facts but it is also very wrong on law. I don't know how much discussion you need, but of course all this stuff about reviewing the jury trial is wrong. He has it that you can review a jury trial much more than you can review findings of fact.

CHAIRMAN MITCHELL: It is just the other way around.

JUDGE CLARK: It was a surprisingly poor letter, I thought, to be a considered statement from the Department of Justice, whether I should say that or not.

JUDGE DOBIE: Do you think Rogers wrote it?

JUDGE CLARK: Probably not. If he is a lawyer, I don't believe he did.

CHAIRMAN MITCHELL: I think this originated with some

of the junior attorneys in the Lands Division.

JUDGE DOBIE: That is my guess, too, Senator.

CHAIRMAN MITCHELL: Jury trial for the poor man is a popular idea.

JUDGE CLARK: That is right. There is a Mr. James E. Palmer who has made it a life crusade. He is making this his great activity.

MR. PRYOR: It is the controversy we had before this Committee between the Department of Justice, Lands Department, and the TVA. Isn't it just an extension of that controversy?

CHAIRMAN MITCHELL: Yes.

PROFESSOR MOORE: Mr. Chairman, I note under this Senate bill the United States will get this jury trial in the discretion of the trial court. It gives the defendant a right to demand a jury trial.

MR. LEMANN: The Department of Justice is now urging an amendment on that point, Mr. Tolman just told me. They are alert to that.

JUDGE CLARK: I don't know the history. Leland probably knows it better than I. I heard that somebody who was opposed to the whole thing thought this was a good idea and sold it to Senator Byrd, who thereupon put in the amendment.

MR. TOLMAN: The amendment was made by Senator Byrd at the insistence, I think, of Judge Parker, who pointed out

that the reason for the rule was that the Department of Justice didn't like jury trials and it wasn't for the protection of defendants, really, at all.

CHAIRMAN MITCHELL: The Department's position is so absolutely contrary to my experience. I served eight years in the Department of Justice. I didn't give all my time to condemnation cases, but the principal thing I remember about the Lands Division was that Seth Richardson, who handled it, was in my office about once a month yelling his head off about erratic verdicts. He couldn't get any uniformity in jury verdicts. They went haywire.

I think if the factual basis for the Department's present views is the one that they have expressed, it is just wanting and not there.

JUDGE DRIVER: It is hard to understand the attitude of the Department of Justice. I have a great deal of condemnation work in my district. There are big Government projects there. The way this works out, the condemnation work is done on the Government's side by attorneys who are special assistants in the Lands Division of the Department of Justice. They have instructions in my district to demand a jury trial in every case. The result of that is that the small landowner, who has 15 or 20 acres, and there isn't very much involved, can't get a lawyer to take that on a contingent basis. He isn't able to employ a lawyer or employ expensive experts. As a rule, most

of those small landowners are obliged to take what the Government offers. The only alternative is to be forced into a jury trial.

The big landowners can get lawyers to take cases, usually on the basis of 25 per cent to a third of what they can get over and above what the Government offers. If you get an effective jury lawyer in a big case, like some of those sheep ranchers, they get experts and take the Government for a cleaning. I have had cases where the verdict has been $100,000 to $200,000 above what the Government offered. I have set aside or reduced some of those verdicts or alternatively granted a new trial, but the trouble is that you get a second trial and you have the same lawyers and the same experts and you have practically the same result. The chance for the trial judge to control that is limited.

That is the way it has worked out in my district. I don't hesitate to say that the jury trial is greatly to the advantage of the big landowner who is able to finance a trial of this kind. It is greatly to the disadvantage of the small landowner.

CHAIRMAN MITCHELL: In Judge Paul's letter he points that out.

MR. TOLMAN: Mr. Chairman, I should say, I suppose, that the American Bar Association has taken a position in opposition to this rule.

CHAIRMAN MITCHELL: Yes. They reversed themselves.

MR. TOLMAN: Yes, they reversed themselves several times.

CHAIRMAN MITCHELL: The House of Delegates approved our draft at one time.

MR. TOLMAN: They have now a committee which is supposed to be urging upon Congress the enactment of S. 30. They also want it amended to provide that any party may have a jury trial.

CHAIRMAN MITCHELL: I think they have gone haywire on the subject.

MR. TOLMAN: As far as I am able to figure out, there is a gentleman by the name of Maguire from Oregon, whom you may know. I don't know anything about him as a lawyer, whether he has had a lot of condemnation cases or not. He seems to be sort of spearheading the thing in the Bar Association. I think it is more or less a personal campaign with him. He has gotten it through the House of Delegates of the Association on the general flag-waving theory of jury trials. That is about all there is to it.

JUDGE DRIVER: I think that is inspired by Judge Fee. He has taken violent exception to the condemnation rule with commissioners, and we have had some rather hot battles in the Ninth Circuit conferences about it.

MR. TOLMAN: You think Mr. Maguire is speaking for

Judge Fee?

JUDGE DRIVER: I think so.

JUDGE CLARK: You know, Judge Driver, you scratch a good many things and you find Judge Fee, don't you? That is certainly true of Rule 8(a)(2).

CHAIRMAN MITCHELL: There is one thing, too, that the Department of Justice has ignored, and that is that they have approached this thing on the ground that the Senate bill does nothing but restore the right of jury trial.

It does something more than that. There are fifteen States that haven't any jury trial at all now and have nothing but commission. There are twenty or thirty of them that provide jury trial as a supplement to the commission, the commission first and jury trial second. This bill wipes out the commissions entirely.

JUDGE DRIVER: In the experience under the rule up to date, Judge Clark, there hasn't been any indication that the district judges have been inclined to abuse the privilege that they have of directing the commission method, has there? It has been very sparingly used so far.

CHAIRMAN MITCHELL: The Department of Justice claims that judges are going too far in allowing commissions in too many cases.

JUDGE CLARK: I just don't believe that is so. I would like to see some evidence of it. It certainly doesn't appear

in the printed reports. Would Will have some statistics on that?

MR. TOLMAN: I think they are using it a little more, certainly, than they did under the old conformity scheme. The reason I think that is true is that we get more requests for the appointment of court reporters to serve commissioners. We have to appoint special temporary court reporters to act for these commissioners, and I know we have a good many requests for them. I think they are almost all in cases of a character that the rule intended to have commissions, such as the Aiken hydrogen bomb project, large condemnations. There are a good many of those. Certainly we don't object to their using commissions in those cases, because it expedites the cases.

CHAIRMAN MITCHELL: I have wondered myself whether our rule as drafted makes it reasonably clear that what we are driving at is the use of commissioners in large projects where you have a vast quantity of similar kinds of land and want uniformity and economy for the humble little owners. The rule is pretty loosely drawn. It just mentions quantity of land and things like that as a factor.

I am wondering whether we made it clear enough by our rule that we think the commission part of it was brought about largely by our feeling that it is appropriate in these large projects, like the TVA. That is really it.

MR. TOLMAN: There were two cases in the Tenth Circuit,

one of which I think set aside a reference to commissioners. Isn't that right, Judge Clark?

JUDGE CLARK: I think that is right, yes.

MR. TOLMAN: Because they felt it was an improper situation for the use of commissioners, and such should have been tried by a judge and jury. Those two cases might be helpful.

MR. PRYOR: Do you think a note to the rule would be proper there, Mr. Chairman?

CHAIRMAN MITCHELL: We can add a note stating that that was the main purpose of the rule, and that it ought to be so construed. It is based on information given us by the TVA counsel, by the judges who have tried TVA cases, and by Paul's letter, all on that same theory.

MR. TOLMAN: Mr. Chairman, when the Judicial Conference acted on this they tried to meet that point a little bit by adopting an interpretation. I might read it to you. You will remember Judge Parker was appointed chairman of the committee of the Judicial Conference to look into this problem. The Judicial Conference report on the subject read this way:

"Judge Parker advised that the committee interprets the existing rule as prescribing trial by jury as the usual and customary procedure to be followed, if demanded, in fixing the value of property taken in condemnation proceedings, and as authorizing reference to commissioners only in cases where

the judge in the exercise of a sound discretion, based upon reasons appearing in the case, finds that the interests of justice so require. The committee recommended that the Conference approve of its views and interpretation of the rule. The Conference approved the recommendation of the committee, including its interpretation of the rule, and the Director informed the Congress of this action."

JUDGE DOBIE: Isn't the rule pretty clear on that point, that jury trial is the normal one, and when you have these exceptional circumstances the district judge in his discretion ought to be trusted and have a commission appointed.

CHAIRMAN MITCHELL: I drew that provision, and I got pinned down in the Supreme Court at the time they put me on the carpet and wanted to know why we preserved the TVA system and a different one for other big projects.

On the spur of the moment I made that draft, which says "reasons in the interest of justice," which is pretty broad.

I think Mr. Pryor probably has put his finger on it. At this time we could add something to the note to the condemnation rule stating that we were really driving at uniformity and lack of hardship to small owners in these big projects.

JUDGE DRIVER: I have never had occasion to use 71A(h) yet, but I have one big project in which I am contemplating using it. The Atomic Energy Commission is extending

the boundaries of the Hanford Project in the area and taking in about 100,000 additional acres. It is all uniform. It is unimproved and unoccupied. It has special questions that have been raised as to its value. In that case I called in the attorneys for all of the landowners who had appeared and the United States Attorney and the Lands Division attorney from the Department of Justice, and had a special hearing and heard from both of them as to whether this was a proper case for the invocation of 71A(h). I gave them opportunity to be heard and state their objections. I adjourned that hearing and have not yet passed upon it.

That is the approach I have made because I felt that it was to be used only in special cases and where there were special reasons for invoking it.

JUDGE CLARK: Mr. Chairman, may I call attention to some of these decisions which say that, really. Here is United States v. Waymire, Tenth Circuit, 202 Fed. 2nd 550, by Judge Bratton.

"Under such provision in the rule," -- that is this subdivision (h) -- "any party to a condemnation proceeding is ordinarily entitled as a matter of right to trial by jury of the issue of just compensation for the property taken if demand therefor is made within the time fixed in the rule. And where the demand is seasonably made, its denial constitutes error unless, due to the character, location, or quantity of the

property to be condemned, or for some other reason in the interest of justice, the court in the appropriate exercise of its sound judicial discretion appoints a commission."

It cites the case of United States v. Theimer, 199 Fed. 2nd 501, which I think was a reversal, if I remember.

"But in the exceptional case where extraordinary circumstances or conditions exist with respect to the character, location, or quantity of the property to be condemned, or for other reason in the interest of justice, the court may in its discretion appoint a commission to determine the issue of just compensation."

For that it cites United States v. Wallace, another Tenth Circuit case, 201 Fed. 2nd 65, which is a very reasonable decision by Judge Phillips.

That is the way they are going in the Tenth Circuit.

CHAIRMAN MITCHELL: That is pretty nearly a restatement of the rule and the language of the rule. That "other reasons in the interest of justice" is a weak point in our draft, I think, as far as confining the discretionary power to big projects is concerned. I stuck that in there when I drafted it because I didn't want to miss anything.

JUDGE DOBIE: I believe it is desirable, though, General. I think the big project is the normal and natural case where it should be invoked. I don't think it ought to be limited to that. I think it should be left to the discretion

of the judge.

MR. LEMANN: I agree with Judge Dobie. I don't see how you are going to get a hard or fast rule, or that it would be desirable to do that. I think you would agree to that.

MR. PRYOR: I think the rule as stated is all right, but I think perhaps in the note it might be helpful.

MR. LEMANN: In the note you might quote the recommendation adopted by the Judicial Conference as the proper application of the rule, and that might be put in the note. That practically says that.

CHAIRMAN MITCHELL: You see, Seth Richardson was a friend of Senator George Norris. Seth was a so-called liberal Republican, if not radical, and all his friends in the Senate were this bunch of eight or ten Republican Senators who caused trouble in the Party and one thing and another. Norris was responsible for that TVA bill. He called Seth in and asked him to draft a provision about condemnation. Seth's experience with juries in that type of cases influenced him to provide for commissions. You don't have any juries in the TVA. Seth was a bright man, an able fellow, and he had this problem during his four years in the Department.

He was called on to exercise his judgment as a result of experience as to how this thing ought to be run in cases like the TVA. He produced this thing and it has worked. Finally these little fellows in the Lands Division are picking

away at it. I don't understand why. I think they got started on a course and are keeping on with it.

JUDGE CLARK: Would you like to consider the point that has been troubling Mr. Pryor greatly about the State provisions, section (k) of the condemnation rule.

MR. PRYOR: The case is before the Supreme Court, Rock Island v. Stude.

JUDGE CLARK: That is Rule 71A, subdivision (k).

MR. PRYOR: That is where the condemnation comes into the Federal court under diversity.

JUDGE CLARK: That is Chicago, Rock Island and Pacific Railroad Co. v. Stude, which I think I agree is quite a terrible decision and a good dissent.

MR. PRYOR: January 18 of this year. Rock Island brought some of the condemnation matter directly in the Federal court under the diversity clause in Iowa, and others it removed from the State court to the Federal court. They were thrown out on all counts by the district court and by the Supreme Court of the United States.

CHAIRMAN MITCHELL: On what grounds?

MR. PRYOR: It was an interpretation of Rule 71A(k) which provides, you will recall, that where the State practice provides for commission determination or jury determination, or both, of the question of damages --

CHAIRMAN MITCHELL: Under State law?

MR. PRYOR: Yes.

-- that that practice shall be followed. We have this cumbersome system in Iowa of first a determination of damages by a sheriff's jury, and then if an appeal is taken, it is tried all over again by a jury in the court.

There may be some obstacle in the way of it, but it seems to me that if we deleted the words "or commission or both" from that rule, it would fix it all right. The State law gives the power of eminent domain and then proceeds to prescribe the procedure, which procedure is inapplicable in the Federal court.

It seems to me it is competent for the Supreme Court to prescribe the procedure where an action is brought under diversity jurisdiction, and in that event you would eliminate the juries set up under State laws.

CHAIRMAN MITCHELL: Where you have a different system in the Federal and State courts and the case is one in which, at the option of the party, it could be brought into either the State court or the Federal court, aren't you running into trouble if you have one system in the Federal court and a different system in the State courts? That is what we were driving at. We didn't want people shopping around for a favorable system.

MR. PRYOR: The system in the State court is simply a matter of procedure.

CHAIRMAN MITCHELL: It is procedural.

MR. PRYOR: If the action is brought in a Federal court with proper jurisdiction, with proper diversity of citizenship, with the requisite amount involved, can't the Supreme Court promulgate a rule of procedure that would take care of that?

CHAIRMAN MITCHELL: It is the same old diversity problem. The Supreme Court of the United States in recent years has been trying to eliminate shopping around for a jurisdiction which gives the party an advantage or a supposed advantage.

MR. PRYOR: That is the very purpose of jurisdiction, not an advantage, but to take away a disadvantage. The very purpose of the diversity jurisdiction is to give the non-resident an equal position with the resident. That would be done.

JUDGE CLARK: Mr. Pryor, did you think anything of my somewhat limited suggestion?

MR. PRYOR: I think that would be helpful, but I don't think it goes far enough.

JUDGE CLARK: I made an addition which I suggested just quite tentatively, if you want to look at my material which was just sent you on March 15, page 38. I don't know how far we can go. They speak of jurisdiction, and that is taking it out of our hands.

MR. PRYOR: I understand that. We don't help much with our rules in a State like Iowa where we have this cumbersome condemnation procedure, and there are a good many other States that have the same situation.

JUDGE CLARK: Here is the suggestion: that you add at the end of (k): "if an action is begun in or removed to a district court only after administrative proceedings according to State law have been had, such action shall then merely complete the proceedings already had and shall not revoke or supersede any part of them."

That would be helpful in a case that is removed, I suppose.

CHAIRMAN MITCHELL: What do you mean by "administrative proceedings according to State law"?

JUDGE CLARK: As I understand the case -- perhaps I had better hesitate a little about what the case means, but as I understand the case, they called it administrative proceedings.

MR. PRYOR: A sheriff's jury.

JUDGE CLARK: Yes. What happened in Iowa, it was administrative proceedings, and therefore it could not come in the Federal court.

MR. PRYOR: That is right.

PROFESSOR MOORE: The case doesn't hold that if the condemnor started out in the Federal court he couldn't proceed,

does it?

MR. PRYOR: That was one of the cases involved in that.

PROFESSOR MOORE: That doesn't seem to be the one the Supreme Court is talking about, though. It keeps talking about an appeal.

MR. PRYOR: There were two sets of cases involving that litigation. In one set the cases were commenced in the Federal court, as I recall it.

PROFESSOR MOORE: Prior to the sheriff's jury?

MR. PRYOR: No, there had been a sheriff's jury award made.

PROFESSOR MOORE: That, to my mind, was a mistake the condemnor made. If he wanted to go in Federal court he should have started there.

MR. PRYOR: In the face of paragraph (k) which says where the law provides for a commission or jury or both?

PROFESSOR MOORE: Yes, you start your action to condemn by filing your complaint, and then you would have a marshal's jury. The marshal has the powers of sheriff, so I suppose the marshal would summon a jury and that would compare to the sheriff's verdict.

MR. PRYOR: I agree with you it would compare to it, but our rule doesn't spell that out.

PROFESSOR MOORE: The idea is that under (k), as I

understand it, the method of determining compensation is to be essentially the same as if it remained in State court.

MR. PRYOR: That is right. Turn to paragraph (1). It says:

"The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed."

What provision? The state law provision. That doesn't mean a marshal's jury. It means a sheriff's jury in Iowa.

CHAIRMAN MITCHELL: I confess that I have never given this point any attention. I am quite at sea about it. What is your pleasure? Do you want to make any change in Rule 71A(k)?

JUDGE CLARK: I would like to find out just what Mr. Pryor thinks we can do.

MR. PRYOR: I have suggested the only thing that I think of, and that is to omit the words "or commission or both".

JUDGE CLARK: By the way, the petition for rehearing hasn't been decided yet, has it?

MR. PRYOR: No.

JUDGE CLARK: I have watched, and I don't think it

has. There is a petition for rehearing in that case.

MR. PRYOR: Justice Frankfurter and Justice Jackson I believe dissented, and wrote very good dissenting opinions. I think Frankfurter's is the better of the two. I believe you agree with that, don't you, Judge?

JUDGE CLARK: Yes. It is a good opinion.

MR. DODGE: What was the decision of the Court?

MR. PRYOR: They upheld the lower court in throwing the case out, in dismissing the case and remanding those that had been removed.

MR. DODGE: Sending it back to state court?

MR. PRYOR: Yes.

MR. LEMANN: The headnote says, "The federal rules do not authorize an appeal to the federal district court in eminent domain proceedings before a state official under state law." Is that a bad summary of the decision? It states that they did something in the state court first and appealed to the federal court afterward. That would be something different from what we are contemplating, I should think.

MR. PRYOR: They did in one case, and in another case it was started in the federal court, as I recall it. I may have the lower court decision and this decision confused in my mind somewhat.

MR. LEMANN: Justice Black stands up for the railroad. He says, "I think the railroad has a right to have its case

tried in the United States district court." He writes a dissenting opinion.

PROFESSOR MOORE: If I understood the majority, the case had not gotten started in the federal court at the right time.

MR. PRYOR: They do discuss that.

PROFESSOR MOORE: The majority went off on the position that the condemnor having started to use the state procedure, he could not then subsequently shift in to the federal court. He would not have the right of removal because he is the plaintiff. If he starts the suit and files it originally there --

CHAIRMAN MITCHELL: It is in the nature of an appeal instead of a removal.

MR. PRYOR: The statute of Iowa says that the condemnor shall be designated as plaintiff, you see.

PROFESSOR MOORE: So the condemnor can't remove. If he starts off in the federal court after he has been before the sheriff's jury, the majority, as I read their theory, said that plaintiff was trying to take an appeal, which it couldn't do.

CHAIRMAN MITCHELL: Instead of removing.

MR. LEMANN: Apparently it started out in the state court, as they say. They say in the concluding paragraph of the opinion of the majority:

"The Federal Rules of Civil Procedure do have elaborate provisions for procedure in the federal court in condemnation proceedings. It is obvious that the petitioner was not proceeding under these rules. Whether he could proceed in an original action in the United States District Court for the Southern District of Iowa is not before us."

Mr. Chairman, I think we ought to read this opinion before we proceed to vote on whether we would make any change. I haven't read it, and I gather that most of us haven't read it. I hardly see how we can discuss intelligently whether the opinion requires any change in the rule unless we have read it. So I suggest we pass this until tomorrow.

CHAIRMAN MITCHELL: We can pass it and take it up when we reach 71A in the ordinary course.

JUDGE CLARK: May I ask, Mr. Chairman, what decision we have reached? I take it one decision was that you were to draft a letter. Then was there any decision as to whether we would put in a note or not? That was discussed here, but I don't know that any conclusion was reached.

CHAIRMAN MITCHELL: I think the suggestion by Mr. Pryor was that we ought to add something to the note to indicate that our main purpose was to get the commission system going in big projects like the TVA rather than to give general authority to the court in small cases.

JUDGE DOBIE: Of course the TVA have a different rule.

I say this provision doesn't come up. The TVA have their own system.

CHAIRMAN MITCHELL: We preserved it. We could have modified it if we had wanted to, but we expressly preserved it.

JUDGE CLARK: Should we therefore prepare a note, or is that part of the Chairman's activity in drafting the letter? This now goes back to (h). For the moment we have been dealing with (k), and that (k) will be postponed until we reach it in ordinary course.

Going back to (h) --

MR. PRYOR: I thought the Chairman's statement of the intent of the Committee was good enough to go into a note, and I think he could draft such a note very well.

JUDGE CLARK: I should love to have the Chairman draft it. I just wanted to make sure whose baby it was going to be.

CHAIRMAN MITCHELL: I have to draft the answer to the House Judiciary Committee, and in that connection I suppose I could say something about this problem.

MR. TOLMAN: Mr. Chairman, the Judicial Conference has also been asked for an opinion on this.

CHAIRMAN MITCHELL: On what?

MR. TOLMAN: On Bill S. 30. I think the Judicial Conference is meeting on the 15th of April, and they have the matter on their agenda. I think it would be very helpful to the Conference to have the views of the Committee before them

at the time they act. I know the last time the matter was on the agenda they wondered what the Committee thought about the bill in its amended form, and they didn't act on it the last time.

JUDGE DOBIE: That is the Judicial Conference of the United States.

MR. TOLMAN: Yes.

All I wanted to say was that it would be helpful if I could feel free to see that that is presented to the Judicial Conference at the time when they act.

CHAIRMAN MITCHELL: This is the 24th of March. I doubt that I will be able to get it up by April 15.

JUDGE CLARK: Let me ask one question. If we were forced to dreadful alternatives, wouldn't we probably prefer the bill which has passed the Senate to the way the Department of Justice wants it?

MR. TOLMAN: I think that would be the view of the Judicial Conference, as I gathered it the last time they discussed it.

JUDGE DOBIE: I am against it either way. I am for standing on our rule.

MR. TOLMAN: The objectionable thing, it seems to me, is that it interferes with the rule. That is the most objectionable thing.

CHAIRMAN MITCHELL: Doing it by statute instead of by

rule.

JUDGE DOBIE: That is very bad.

CHAIRMAN MITCHELL: Yes.

JUDGE DRIVER: I am afraid that is not going to appeal to the Congress very much, though, not as much as it would to us.

On this subject, Mr. Chairman, for the first time I have read this letter of Mr. Rogers, Deputy Attorney General, to Representative Reed, Chairman of the House Judiciary Committee, of December 8, 1953, and it is very misleading in many respects, and particularly so in the next to the last paragraph where he says that this thing is very harmless, after all, and it would simply mean that where either party -- they recommend it be amended to apply to the United States, too, but where either party asks for jury trial they could have it, and the court otherwise could go on and have commissioners.

I think it ought to be made perfectly clear that if this bill, S. 30, is enacted, it means the end, for all practical purposes, of the commissioner system in condemnation cases, because here is what you have:

It should be applied and ought to be applied only to special projects, large projects where large areas of land are being taken. In such a case as that it is simply impossible to include all that land in one action when it is started. Most of the courts definitely limit, by their local rules, the number of tracts or ownerships that can be included in one case, because

it makes such terrific problems in the clerk's office. In my district I have a rule that no more than ten separate ownerships of property may be included in one condemnation action.

What the Department of Justice does in these big cases, let's say this Hanford case I have, which involves 100,000 acres, roughly speaking, they will start out and file a few cases with ten tracts in each case. Then suppose that the district judge decides that that is a proper case for commissioners, appoints a commissioner and sets up the system and instructs his commissioner to get the machinery all going; then one side or the other will certainly be dissatisfied with the results of the commissioner when the first cases come up and the value is placed. Then somebody in the subsequent cases is going to demand a jury. That would destroy one of the principal purposes of the commissioner system, to have uniformity in these large projects.

What you get is a piecemeal business. You start out with commissioners, and just as sure as you are born somebody demands a jury, and then you have a lot of jury cases. Your juries would award more or less, let's say, than the commissioners, and you would have a group of dissatisfied landowners.

I wouldn't touch the commissioner system if this bill were adopted, and I don't think any other judge would. It would mean choosing between the jury system and the commissioner system in special cases, which the rule provides.

I think it should be made clear that this isn't merely drafting something harmless on our rule. It is changing our rule, definitely.

MR. DODGE: Have the judges in your part of the country very freely exercised their discretion?

JUDGE DRIVER: I don't know of any case in my part of the country where a judge has invoked it. I think I have more condemnation work than almost any district out there in the Ninth Circuit, and I haven't used it. I am contemplating doing it in this big case that I have.

MR. DODGE: It hasn't been done by any of the judges?

JUDGE DRIVER: Not so far as I know. I am sure they haven't in Oregon. Of course, Judge Fee wasn't there. It hasn't been in Idaho and Montana.

MR. PRYOR: You have a practical situation in Oregon.

JUDGE DRIVER: I have, but the reason I haven't used it was because the big projects I had were already under way and there had been some jury determinations, and I didn't want to mix it up. This is the first new big project I have had since the rule was changed.

I did hesitate because there was such a fight in Congress, and I thought I had better wait and see what Congress was going to do before I tried to use it.

JUDGE DOBIE: I don't think it has been used a great

deal in the Fourth Circuit, but where it has been used, as in the case of Judge Paul in the Shenandoah National Park, I live right on the edge of it and I know it has worked like a charm. The landowners were satisfied with the property included, the amounts they got were fair, and there was no dissatisfaction. Comparing the small verdicts to the large verdicts for land, they were practically the same. I think it would be little short of tragic if it were changed.

JUDGE DRIVER: On these giant projects, and we still have many of them, the jury system takes five to eight years to conclude. We are still not through with McNary Dam, and that has been going on for I think five years. The Department of Justice itself can try these cases only about eight or ten a term. You get hundreds and hundreds of them, and they just can't reach them. I have tried to set them faster than the Department of Justice can try them, and they have protested about it. They say, "Our men can't prepare for more than four or five cases." They don't want to hire additional personnel. So you have a matter of years and years that it takes under the jury system.

To say that it is more cumbersome and expensive than the jury system, I can't see that at all.

MR. DODGE: What does the Government claim, that the judges have too freely referred cases to commissions?

CHAIRMAN MITCHELL: They have accused the judges of

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MR. DODGE: What does the Government claim, that the judges have too freely referred cases to commissions?

CHAIRMAN MITCHELL: They have accused the judges of

having a tendency to use commissions too freely.

MR. DODGE: Apparently not in the western part of the country.

MR. LEMANN: If it were worth doing and time permitted, I suppose Mr. Tolman's office could get statistics on that.

MR. TOLMAN: I was going to ask, would you like some of our statistical people to start right now and see if they could find out how many references there have been to commissioners since the rule became effective? They may be able to get it for us. I am not sure.

MR. LEMANN: Also the number of jury cases tried, to put against that.

MR. TOLMAN: I will have them start on that right away.

MR. PRYOR: If you could get a little memorandum as to the thing involved in those commission cases, the area of land and what the project was.

MR. LEMANN: That would take a little longer, I suppose. The clerks could immediately tell you, I should think, how many jury cases you have had and how many commissioner cases you have had since our rule went into effect. You could get that from all the districts and you would find out whether there were any basis factually for the claim that it has been abused.

MR. TOLMAN: I can give you the information now about

cases that have been terminated since the rule went into effect where commissioners have been used.

MR. LEMANN: You can give us that tomorrow, both jury and commission?

MR. TOLMAN: I think so.

MR. LEMANN: That would be interesting to look at, and we could then decide whether there should be any more. Maybe that is enough.

... Discussion off the record ...

CHAIRMAN MITCHELL: I suppose we ought to start in on the rules, one by one, in our usual way.

Charles, you take over the program.

JUDGE CLARK: Let's understand that if the Committee wants to bring up any in between, I would be only too glad to have you do so. Please bring up any of the intermediate rules.

The first suggestion I have is on Rule 4(d). That goes back to a suggestion that was originally made by the Department of Justice formerly. I think it was made by Mr. Perlman.

At the time when we considered this at our last meeting, we didn't recommend it, partly raising the question whether the present Department was interested. I asked the present Attorney General to pass on it. He said that they were, and he wrote a letter, which has been distributed to you. So this is also the suggestion of the Department now.

I am afraid you will have to use two batches of material which I sent you, the one of September 1 and the one of March 15. The March 15 one is the supplement to September 1. The present material I am discussing is in the one of March 15, just sent to you.

If you will look at that provision, it appears on page 1 of the March 15 provisions under Rule 4(d), subdivision (4). The provision is:

"and by either sending a copy of the summons . . . by registered mail to the Attorney General . . .," that being in the present provision, and this is the addition: "or delivering the same to the Attorney General or to an official of the Department of Justice designated by the Attorney General in a writing filed with the Clerk of the United States District Court for the District of Columbia."

You will see in my comment there is a reference to the letter of the Attorney General. Initially, at our meeting last May, a question was raised as to whether this wasn't inconsequential. I do not wish to say from my standpoint that I think it is vital or terrific. I do think it is perhaps a small matter of detail that the Department of Justice wants. For my part I wouldn't see that it does any hurt, and here is a chance to do something for the Department, which we are opposing in other aspects.

They apparently think that this will be of great

assistance to them, I take it, in two ways: One is that it is a more prompt way of getting notice to them, and another is the inconvenience and expense incident to the service by registered mail when service of this kind is convenient and practical.

DEAN MORGAN: What is the expense of registered mail? Twenty cents.

PROFESSOR MOORE: The expense of delivering this, which would have to be done by the marshal, would be two or three dollars, I should think.

DEAN MORGAN: Yes. I don't get the expense of registered mail. It seems to me that that is silly.

CHAIRMAN MITCHELL: The optional way is to write in to the clerk of the United States District Court for the District of Columbia, and try to find out from him who has been designated in the first place. After he gets that information, then if he wants to, he can deliver it to the designated person or send it by registered mail in the first place.

MR. LEMANN: Unless you cause the marshal to deliver it, how would you deliver it?

PROFESSOR MOORE: It would be cheaper to use the mail.

JUDGE CLARK: I take it that what they have in mind chiefly is the suits down here, and there would be people who are in the business, so to speak. This I don't suppose would be some small suit off in some corner of the country. This is a kind of repetitive thing happening here. It would help out.

CHAIRMAN MITCHELL: If the rule limited the privilege to cases arising in the District of Columbia, but it doesn't.

MR. PRYOR: Judge Clark, how would this go in the present Rule 4. At the end?

JUDGE CLARK: It is alternative at the end of one subdivision of Rule 4.

MR. PRYOR: I don't mean Rule 4. I mean in Rule 4(d)(4) as it is now, where would it go?

JUDGE CLARK: Do you have before you my March 15 draft?

MR. PRYOR: Yes.

JUDGE CLARK: The matter that is underlined would be new addition. The matter that is not underlined is the present rule.

MR. PRYOR: Would that come at the end of the present rule?

JUDGE CLARK: Yes.

MR. PRYOR: That is what I wanted to know.

JUDGE DOBIE: In other words, you just add the underlined words.

JUDGE CLARK: That is it.

CHAIRMAN MITCHELL: If I want to bring a suit against the United States, I wouldn't bother to write to the clerk of the District Court in the District of Columbia and ask him who is presently designated to receive service. I would just stick

it in registered mail and mail it to the Attorney General, I don't see that this optional clause is going to compel anybody to comply with it.

MR. LEMANN: As Mr. Moore points out, why would anybody want it? I have made service in a suit against the United States for recovery of income tax, and I mailed a registered letter to the Attorney General, in addition to serving the district attorney. If we had this option in there, of course I could ask who may be appointed. Probably the clerks all through the country would be told whom he had appointed, so I could find out pretty easily whom he had designated, but why would I do it? I would have to get the marshal in New Orleans to write to the marshal in Washington to make this service, and all I have to do is send an office boy up to the post office with a registered letter. So I agree with the Chairman that nobody would ever exercise the option.

MR. PRYOR: The only reason I see for making the change is that the Department wants it. We can still serve in the way we have been serving, I guess.

MR. LEMANN: That is right.

CHAIRMAN MITCHELL: That is why I suggested if there was anything in a system for the mass of litigation in the District. If you provided that in the District, instead of registered mail, you delivered to the designated official, that is one thing, and that would be compulsory and might accommodate

the attorneys to have District of Columbia cases served in that way.

MR. LEMANN: I don't find that letter, Charlie, in which he made this recommendation. I presume it was sent to me.

JUDGE CLARK: Just a minute. I will have it.

DEAN MORGAN: He said they would like it, that is all.

MR. DODGE: Why does he want it?

DEAN MORGAN: He doesn't say.

JUDGE CLARK: This is Brownell. I won't go back to the former one. This is Brownell, August 31. This was distributed to you at that time:

"This is in further reply to your letter of July 9, concerning proposed revisions of the Federal Rules of Civil Procedure.

"As for the contemplated amendment of Rule 4(d)(4), I concur in the view that it would constitute a desirable change in judicial procedure. Such an authorization for effecting personal service of process upon the Attorney General or his designee as an alternative for service by registered mail would tend to give the Department of Justice as prompt notice of the institution of an action against the United States as is possible, and would eliminate the inconvenience and expense incident to service by registered mail when personal service is convenient and practical. Such a change would in no way

affect the time within which the Government must serve responsive pleadings, for such time is computed from the date of service of process upon the United States Attorney for the district in which the action is brought, without regard to the date upon which service is made upon the Attorney General in the District of Columbia."

CHAIRMAN MITCHELL: I would suggest that in our preliminary report that we are getting out, we refer to this request of the Attorney General and quote his proposal here and say that, it being optional, we can't see that anybody would resort to it by hiring the marshal instead of sending a registered letter, and see what his reaction would be. If he comes back and explains to us that this optional rule would be used and claims that it is less expensive, which I can't see, then we can change it in our final report.

MR. LEMANN: As the Reporter read that, I got the impression that this did not originate with the Attorney General, but originated in the agile brain of the Reporter --

JUDGE CLARK: No, no.

MR. LEMANN: -- and the Attorney General was commenting on it. Will you read that first sentence again?

JUDGE CLARK: Let me go on. If we can find the original, this is the way it initially started. I have only a reference to it here. I put it that, "The Department of Justice by letter of May 29, 1952, to the Chief Justice . . ."

If Leland can discover that for us, I think it was Perlman who actually wrote it, but it was to the Chief Justice, "proposed that Rule 4(d)(4) be amended in order to permit service on the Attorney General by delivering a copy of the process to the official of the Department designated by the Attorney General in addition to the present method of using registered mail." This is my memory of the original letter. "The amendment is intended particularly to expedite the service of process in cases originating in the District of Columbia, and it is thought that it would eliminate any delay resulting from the mailing process as well as the expense of registration."

The way it came up this time was that I was taking up for the Attorney General. The present Attorney General wrote the Chief Justice in some detail asking for an improvement or amendment of the substitution rule. I have had quite an extensive correspondence, as you see, with the Attorney General. As a part of that correspondence I asked him what the Department attitude was toward the recommendation of his predecessor. That is how it came up.

CHAIRMAN MITCHELL: It seems to me that, as pointed out in the original letter from the Department, the objective here is to expedite service in cases originating in the District of Columbia. If we did anything here, I would make it "or", the optional alternative method, limited to cases arising in the District of Columbia, if that is what they are driving at.

It seems to me that I would question seriously that it would be used at all in preference to registered mail. We can get a reaction from them.

We have to go on rule by rule here, and arrive at some results. If he comes back after hearing our report on that suggestion, maybe he can prove his case. He hasn't done it now.

DEAN MORGAN: If we pass it in this form, and the people in the District can take advantage of it and it won't require anybody else to take advantage of it, I don't see that it makes much difference. I should dislike very much making it mandatory in the District of Columbia.

CHAIRMAN MITCHELL: I didn't mean mandatory, but limiting the alternative proposal to cases arising in the District.

DEAN MORGAN: Why should you limit it? If somebody outside wants to do it, it wouldn't hurt anything.

JUDGE DRIVER: Mr. Chairman, I don't believe in changing these rules if there is no reason for it, just to please the Department of Justice or anybody else. I don't see any reason for this thing. How about the saving in time? Overnight you can mail by registered mail. The Government has 60 days to appear. What is a few hours in a case where they have 60 days to make an appearance? I don't see that it would serve any useful purpose in saving either time or expense.

CHAIRMAN MITCHELL: Let's report that and see what the Department's reaction is. If they come back with a further demand and reason, we can change it before the final draft.

JUDGE DRIVER: I would keep an open mind if they show cause, but I don't think they have shown any reason for it so far.

CHAIRMAN MITCHELL: As I take it, if there is no objection, in our coming report on the proposed amendment we will give our reasons for not adopting this, and see what the reaction of the Department is. Is there any objection to that? (No response.)

Charles, go on to your next rule.

JUDGE CLARK: The next one is 4(e), and of course that is fairly important.

CHAIRMAN MITCHELL: On what page is that?

JUDGE CLARK: For that I think you want to go back to my September 1 draft, and that is on page 1. We have added additional comment on this, but we stick to the form of the amendment.

There are further cases, particularly a Supreme Court case, the Olberding case, on the question of the service upon the secretary of state as the residence of a nonresident motorist.

CHAIRMAN MITCHELL: I have a page 1, not numbered, of your September 1 draft.

JUDGE CLARK: It is at the foot of the page, Rule (4)(e). The underlined matter is the suggested amendment, and where there are brackets there are presented to you two alternatives for your choice.

The first question comes up as to the addition of the words, "whenever a statute of the United States or Rule 71A(d) of these rules" -- or as an alternative, "or any of these rules" -- ". . . provides for service of a summons, . . . service shall be made under the circumstances and in the manner prescribed by the statute, rule or order."

That is the first suggestion, and that was adopted tentatively at our last meeting. The reason for that is that Rule 71A(d) does provide for the use of some of these orders of service by publication. Therefore, it was not complete when we said, "Whenever a statute of the United States" makes the provision. Our rules, namely, Rule 71A(d), made the addition.

The alternative is not to limit it to 71A(d), but to make it general, "or any of these rules." While I think 71A(d) is the particular provision, it would seem to me that in the rules it would be better to have it general. Therefore, I have recommended the second of those two alternatives.

CHAIRMAN MITCHELL: I am confused. I don't quite get what you are driving at here. What is wrong with the rule as it stands?

JUDGE CLARK: I haven't yet taken up the provision

at the end, which is the more important and the more far-reaching, which you will probably want to discuss more. The provision which occurs in the second line of Rule 4(e) is a small one made mainly to make our own rules consistent.

You see, we now provide that "Whenever a statute of the United States," and there is a general statute as to service by publication in lien matters, foreclosure of a lien, and we also provide whenever a statute or order of court provides for service of a summons by publication -- the situation we are dealing with mainly is where they can't make service by publication -- service shall be made as so prescribed.

We came along adding the condemnation rule, and that condemnation rule in subdivision (d) has some reference to orders of service by publication. In order to make our rules consistent, it seems desirable, therefore, to put in this little addition.

A further question is as to form, whether there should be a particular reference to the condemnation rule, or whether it should be general as provided by the second provision in brackets.

CHAIRMAN MITCHELL: Is there any other case in which 71A would be applicable?

JUDGE CLARK: I don't know of any.

DEAN MORGAN: There will be if you adopt the latter part of this rule.

JUDGE CLARK: That is right.

DEAN MORGAN: That is the point. They are tied up together, Mr. Chairman.

JUDGE CLARK: That is true.

MR. PRYOR: What about the effect of this on a non-resident motorist case?

JUDGE CLARK: Do you want to take up the second provision?

DEAN MORGAN: I think you had better do that first.

JUDGE CLARK: There are some suggestions of style. Mr. Lemann has an extensive one. I think before we get to questions of style we need to consider the question of substance.

This came up on a suggestion from lawyers as appearing on page 2, as to whether this rule ought not to be extended to make clear that whenever you could have some form of service on property alone when the person was out of the district, it should be covered. That has quite a little history, as I tried to suggest in my original report to the Committee last spring and also later. There have been Law Review comments and other discussions which have held that the provisions of Rule 64, which is a later provision for following the state law of attachments, provisional remedies, and so on, already provided for federal action, starting a suit by attachment of property, and so on. The thought was that we should clarify

that and cover it specifically in the rule.

The original rule and the first alternative are along the line of suggestions made by lawyers that all we needed to do was to incorporate in this rule the provisions of Rule 64. I don't think that is adequate, because Rule 64 is a little blind on the subject and, whether or not it supports the deductions made as to this power, I think it would be much better to spell it out.

Therefore, it does seem to me that this is a matter of some confusion and some doubt, and it would be desirable to make a clear provision; and further, it seems, I think, on the whole rather desirable that in this kind of situation the jurisdiction of the court be ceded and the form of service be made quite clear.

So the alternative provision, subject to questions of improvement of the language, would provide that "whenever a statute or rule of court of the state in which the service is made or the district court is held provides for service by way of notice or publication upon a party not an inhabitant of or found within the state, or for notice to such party to appear and respond or defend in an action by reason of the attachment or garnishment of his property located within the state, it will be sufficient if service is made or the party is brought before the court under the circumstances and in the manner prescribed in the state statute or rule."

If you will go on in the suggested note here, this has a fairly complete statement of the background. If you go over, for example, to page 3, which is a part of the proposed note, at the middle of the page: It has been thought by some that Rule 64, which authorizes attachment, garnishment, and other similar provisional remedies when they are available by the law of the state in which the district court is held, has supplied that lack, namely, a provision bringing in to court people in that situation, that is, notably nonresidents whose property is attached or garnished within the state.

Courts which have passed on the question have held to the contrary.

Then we go over the page and discuss this somewhat further.

Among situations which would normally be included and made clear here are, of course, the very important one under present law of the suit against the nonresident motorist. In the latest case in the Supreme Court, which is discussed in my comments that appear in the March 15 draft, Olberding v. Illinois Central Railroad Co., 346 U.S. 338, the Court held, against dissent, that the venue provisions in a suit of that kind would still apply, and there was no waiver of venue by virtue of the nonresident motorist coming in to the state and thereby making the secretary of state or other statutorily designated officials his representative to accept process.

The Court, however, did not consider this question of service. That was considered in the case below, and the court below somewhat divided, Judge Maris holding the service ineffectual, and the other either not discussing it or apparently assuming otherwise. I take it the Court at least is providing no obstacles to that use of the state statutory method.

I suggest that it may now be the law, but both for the sake of clarification and because of the policy involved, it ought to be possible to sue in the federal court in diversity jurisdiction, making use of the state method of service on the nonresident.

If in the diversity cases, as the Supreme Court now emphasizes, the courts are to be considered as practically another arm of the state court, so to speak, I should think that they ought to be assimilated as closely as may be.

MR. DODGE: How would service of process in any way involve the defendant in a waiver of questions of venue?

DEAN MORGAN: It couldn't.

JUDGE CLARK: The Supreme Court held against it, you know, so that is settled. The point was made by the dissenting judges and in the lower court, which is somewhat divided, but the majority have gone the other way.

The point was made mainly on the basis of the Neirbo case, which was a case where, in the corporation situation some years ago, the Court through Mr. Justice Frankfurter --

reversing, I might say, the Second Circuit, Clark, J. -- had held that there was a waiver.

MR. DODGE: By service of process on him?

JUDGE CLARK: No, by designating an agent in the state. They held it in a corporation case.

MR. LEMANN: That was the case of a nonresident plaintiff suing a nonresident corporation which had filed a power of attorney for the service of process. They held under those circumstances the corporation had waived its right to be sued in the state of its incorporation. Is that right?

JUDGE CLARK: That is right.

JUDGE DOBIE: The question in the Olberding case was, do you, Monte, if you drive through Virginia waive the venue when you run over a man in Virginia? The Supreme Court said, no, you did not waive the venue. If you sue in Virginia it has to be in the district of either the plaintiff or the defendant.

MR. LEMANN: But if the plaintiff has been arrested in Virginia, he would have been entitled to maintain the suit, is that correct?

JUDGE DOBIE: That is correct. Then the venue would be correct because it is the district of the plaintiff.

MR. LEMANN: That is right.

JUDGE DOBIE: But they held that merely operating an automobile in the state was not the equivalent of doing

business in the state and designating the secretary so as to waive venue. The decision had nothing whatever to do with service of process, isn't that true?

MR. LEMANN: Charlie's point is that if I am motoring through Virginia and I have a collision with him, and he gets away, I cannot sue him in Virginia because I am not a resident of Virginia and he is not a resident of Virginia. He says we should do something about that because, he says, the logical place to bring the suit is where the accident happened, because that is where all the other motorists were along and the eye witnesses. Is that right, Charlie?

JUDGE DOBIE: You are not trying to change the venue, are you?

JUDGE CLARK: No, that isn't completely right. In the first place, I am not touching venue. The Supreme Court settled that. While I might like to overturn them sometimes, I am not suggesting that. Venue is settled.

MR. LEMANN: I thought you were.

JUDGE CLARK: No, no. It is only service of process. I am saying that in that case --

MR. LEMANN: You are saying that in that case Judge Maris' opinion throws some doubt on the question of whether, even if the plaintiff had been a resident of the district, the suit could have been maintained.

JUDGE CLARK: Judge Maris held in that case that even

though there was a state statute in Virginia, as I suppose there is because those are very general now, providing that you could serve process for the state court on the secretary of state, who would send a copy by registered mail, that that would not be good in federal service. That is what Judge Maris held in concurring in that case where Judge Goodrich wrote the opinion and did not so hold. The Supreme Court has passed on the question of venue. There is nothing, however, on the service of process, which is a different point.

JUDGE DOBIE: If the case came up where a man could waive venue and if he waived venue, then there would have to be service of process.

JUDGE CLARK: Also a case where venue might be appropriate, because in diversity cases you can have venue in either the district of the plaintiff or the defendant.

JUDGE DOBIE: That is right.

MR. LEMANN: That is the only case in which we have authority to speak, isn't it, where it is in the plaintiff's state, because the other question of venue we have no control over.

JUDGE CLARK: That is right.

MR. LEMANN: Really what you are saying is that we ought to make it clear that Judge Maris was wrong.

DEAN MORGAN: That is right.

JUDGE CLARK: That is right. That is what I have

tried to do in the note. We discuss that quite at length.

MR. LEMANN: Isn't that sufficient? You don't make it clear in the note. I thought you could improve on the language of your note.

DEAN MORGAN: If you allow a quasi in rem action to be begun --

MR. LEMANN: That is another point. We will come to that later. That is not the same point as this.

DEAN MORGAN: Yes, it is.

MR. LEMANN: He is talking about it, but he is talking about two things, as I understand it.

DEAN MORGAN: No. If you look at the second amendment which he is talking about now, it all goes back to that.

MR. LEMANN: It is covered by that. I agree with you about that, Eddie. But the factual point involved is different.

DEAN MORGAN: Surely.

JUDGE CLARK: It would seem to me the policy is the same. You say that they are two things. Aren't you saying they are two things because you give one a name and the other you leave nameless. You call one quasi in rem, and the other one you haven't named yet. I think they are substantially the same policy, so I put them all together.

DEAN MORGAN: I think they are quite different questions of policy.

MR. LEMANN: I was brought up to think that a suit you bring by attachment of property is a different legal situation from a suit which you bring against a nonresident who is required to designate someone to represent him.

JUDGE DOBIE: It is purely in personam.

MR. LEMANN: They are truly two different legal situations, and it may well be that they should both be governed by the same rule.

JUDGE CLARK: I don't mean to say you should not divide up my rule. I was talking about the rule, which attempts to cover both branches. If you want to take one out, that is all right.

MR. LEMANN: No, I am not suggesting that it be subdivided. All I was saying was that I thought we were talking about these nonresident motorist situations, and I thought we ought to get through with that and then talk about the other situation. Perhaps we are through with the first.

JUDGE CLARK: If you look at the top of page 2 of the original statement, the underlined material, maybe I am not a good one to do so, but as I interpret the language the first part would cover this nonresident matter, and about the third line would cover the attachment and garnishment matter.

MR. LEMANN: I think you would cover them both, but I think you might discuss them separately.

PROFESSOR MOORE: I don't believe that the nonresident

motorist case should be covered under subdivision (e). Subdivision (d) deals with personal service. Subdivision (e) deals with other service. In the nonresident motorist case you get personal service, in personam suits.

JUDGE DOBIE: It is the same as an in personam judgment. It is purely an in personam proceeding. You don't go against his property. You have to get an in personam judgment against him.

MR. LEMANN: In proceeding against property, all you can hold is the property. You can't get a judgment for anything more than the property. If you get a judgment it is limited to the property. But if you sue one of these nonresident motorists you can get as a judgment anything the jury will give you, and hold it against him and enforce it anyway. That is what I had in mind by saying they are two different situations.

PROFESSOR MOORE: I had supposed, if you wanted to make it clear, Judge, it would go in 4(d)(7).

DEAN MORGAN: Oh, no.

PROFESSOR MOORE: Or as a separate provision under (d). But it is personal service.

MR. PRYOR: Rule 4(d)(8), perhaps.

PROFESSOR MOORE: Yes.

PROFESSOR WRIGHT: On the question of where it should go, Maris says in his concurring opinion that the real service

of process is not service on the secretary of state at all. He says it is the mailing of the notice to the nonresident which constitutes the process which brings him before the court. So as to him it is not personal service.

PROFESSOR MOORE: But the service takes place in the state where the action is brought. That is the theory of it.

DEAN MORGAN: Oh, no.

PROFESSOR MOORE: One state can't send process --

DEAN MORGAN: That is just talk, that is all. You know that is only talk. The Olberding case showed it was only talk, because if you didn't have a provision for sending it on to the other party, there is no use talking about secretary of state as really being the agent. That is nonsense.

PROFESSOR MOORE: Some other notice than serving the secretary of state. The theory is that the process is served within the state.

DEAN MORGAN: The activity within the state is what gave power to give him notice outside the state. That is what the answer is.

JUDGE CLARK: This seems to me a question of detail and of form. It is not unimportant, of course. It is one that we have to decide the policy initially. The main question at the moment that is raised here is whether we would treat this branch as under (d) which is headed "Summons: Personal Service," or under (e) which is headed "Same: Other Service." To my

mind it would be other service, because I think it is just a kind of assimilated thing, really. As Eddie says, it is not really personal service. We know it is not personal service in the jurisdiction. It is service through the mail to a non-resident. But as I say, that seems to me the question. Where we finally put it will have to await somewhat on what we decide we want to do first.

JUDGE DOBIE: Where you put it I don't think is vital, and I leave that to you, but if we do anything on the service, in the motorist case, I think we ought to make the service good. I am against Maris on that.

JUDGE CLARK: I ought to say generally I think it was Dean Pirsig who wrote in and raised some question about any of this as to whether they ought not to have to go in the state courts, and so on.

I would like to say two things in general on it. The first is the confusion and ambiguity, which is an important thing. You see, there are quite a few who think we have already done this by a provision which seems to me wholly blind as here applied, namely, Rule 64. It would seem to me that there is some obligation, if we can, to clarify that.

Second, I do think that so long as we have diversity jurisdiction we ought to make it fairly coextensive with what the states do. Therefore, I think that we ought to include it.

MR. LEMANN: I agree with Dean Pirsig it is quite an

innovation, but upon reflection I don't know any fair objection to it. Of course, in practice my limited observation has been that what happens in these attachment suits is that there are very few people who would prefer to institute them in the state court. The defendant usually removes them to the federal court. In practice they end up in the federal court. They end up there because the person attached wants to get into the federal court.

I doubt if in practical result there would be many cases where the plaintiff would start out by preference in the federal court in an attachment proceeding. He is suing a nonresident, you see, because otherwise he wouldn't be attaching. It is pretty risky to attach on any grounds except nonresidence. So he is suing a nonresident, and if he is suing a nonresident why does he want to do it in the federal court? If there is anything in the idea of prejudice, he would rather stay in the state court. But the defendant is the guy who wants to get in the federal court. He takes it there.

DEAN PIRSIG: What would you see, then, as the purpose of this rule?

MR. LEMANN: The purpose, as the Reporter stated, is to put access to the federal court jurisdictionally on about the same basis as you would access to the state court as far as process is concerned. If the presence of property justifies it in the state court proceeding, why not justify it in a federal court proceeding?

I really don't see any substantial basis for objecting. It is, I think, a marked innovation in the present procedural law.

DEAN MORGAN: It gives the plaintiff a choice that the defendant now has.

JUDGE DRIVER: I want to say it is being done now. Even in my small district, I have had two of those cases in the last year where they have been brought and service has been made on the secretary of state for a nonresident in an automobile collision case.

MR. LEMANN: At the moment we are talking about attachments. We sort of moved from one to the other. For the moment we are talking about attachments. As Professor Morgan says, this would simply put the plaintiff on the same basis as the defendant now is. That is another argument for it.

MR. PRYOR: That would be true as to the nonresident motorist, too.

MR. LEMANN: Yes. I guess we had better stick to this quasi in rem property attachment for the moment.

DEAN PIRSIG: Isn't it a little counter to the trend of keeping state litigation out of the federal courts? I think the general discussion has been opposed to extending diversity jurisdiction, and in the direction of limiting it, really. The statistics now seem to show that a very large amount of personal injury litigation is coming in to the federal courts,

which really, I would think, ought to stay in the state court, based strictly on diversity of citizenship.

This tends to endorse the notion that you want to make diversity complete in all respects. I have some doubt whether that is desirable, reversing the trend in the other direction of limiting the diversity, and limiting state jurisdiction.

JUDGE CLARK: Of course there is a great deal of argument made over and over again about cutting down on diversity. There are various proposals. Some are for abolishing it altogether, and others for raising the jurisdictional limits, and so on. That is a question of policy that I am not getting into here. It seems to me that one doesn't need to get into that.

I think, though, that the way to do that is by some direct action and not by some truncated half-and-half or one-quarter and three-quarters proposition. For example, suppose that you have a substantial three-cornered or four-cornered motor vehicle accident, of which you have a good many. In fact, even a two-car accident may turn out, what with the drivers and the passengers, and so on, as raising that. It does seem to be unfortunate to have a situation where some of them can separate their case by going into the federal court and the others cannot, or others may by various ways. If they are defendants they may; if they are plaintiffs they may not. It seems to me that when a part of a total situation can go in

the federal court, it all ought then to go of right. If you want to come down on diversity of jurisdiction, you want to cover the whole situation and not this matter of dividing up the case and making two or three suits spring up where one ought to do it.

JUDGE DOBIE: We can't do anything about that, can we, Charlie?

JUDGE CLARK: There are lots of things we can't do about it, yes, I agree with you, but in this case it seems to me we very directly can.

MR. FRYOR: Mr. Chairman, I move the Committee approve the amendment to the rule and leave it to the Reporter as to what place it goes in Rule 4.

MR. DODGE: I second the motion. We are simply asking the question why it isn't covered by old paragraph (7).

DEAN MORGAN: The motorist case is certainly covered by that.

MR. DODGE: Paragraph (7) of the rule as it stands applies to service in any manner prescribed by state law.

DEAN MORGAN: If it isn't personal service, this would cover it. Isn't that right?

JUDGE CLARK: I suggest that you might like to vote on this motion, and then should this pass, I would then ask you if you want a little more discussion about form and where it goes. This of course brings up the policy. We really don't

need to discuss form unless this is going to pass. If this passes, then we might have a little more discussion of what to do about it.

MR. DODGE: Why isn't this covered by the last part of paragraph (7) of 4(d)?

DEAN MORGAN: It most certainly is, Charles, if it is personal service.

JUDGE CLARK: Judge Maris has written a very long opinion saying it isn't.

DEAN MORGAN: He stands alone, doesn't he? He didn't get away with it.

MR. PRYOR: I think the suggested rule clarifies the situation. Paragraph (7) deals with personal service, and this is not strictly personal service.

MR. DODGE: It is service of an authorized agent. It is personal service.

DEAN MORGAN: If it is authorized.

MR. LEMANN: It is at least an argument to look at 4(e). There is some overlapping. When you look at 4(e) it refers to "an order in lieu of summons upon a party not an inhabitant of or found within the state." That covers this kind of situation, because this is a defendant who is not an inhabitant and he is not found within the state. So you could make an argument that this is covered by 4(e); and 4(e) as now written does not cover it because it doesn't refer to the

law of the state. It refers only to a statute of the United States or order of court.

MR. DODGE: If there is any doubt about it, I think it should be changed.

CHAIRMAN MITCHELL: Do you understand the motion, if carried? Will it be clear in your mind what you are to do?

JUDGE CLARK: If the motion is carried, then I do want to ask one or two questions as to carrying it out. Is the motion carried?

CHAIRMAN MITCHELL: It hasn't been voted on.

JUDGE DRIVER: I am not clear whether we are talking about attachment --

DEAN MORGAN: The whole rule.

MR. PRYOR: The whole amendment, both features of it.

JUDGE CLARK: This is on the policy, not on the wording, at the moment, as I understand it, because then I am going to ask some questions about wording.

CHAIRMAN MITCHELL: If you are ready to vote, all in favor of the motion say "aye"; opposed. It is carried.

Now shoot your questions.

JUDGE CLARK: The question I want is a little suggestion from you, particularly on a point raised by Professor Moore. The provision I have given you covers these two ideas, coming from different backgrounds, there is no doubt about it. One of them is the one that Monte calls quasi in rem. That is the one

where you get your jurisdiction by having property in the jurisdiction. The other is this service on the statutorily named agent. I have covered them here. I would like a little more suggestion. I think it was more or less left to me, but I don't know that I can decide that.

I can easily do two different things. I can put in a little broadening of (d)(7), personal service, to make sure that the statutorily designated agent is covered, and then make a separate provision in (e) to cover the quasi in rem; or I can follow somewhat the line I was doing, which was to put them in one sentence, because they did seem to me practically a good deal connected.

MR. PRYOR: I like your present proposal, that it be a redraft of (e).

JUDGE CLARK: Of course, I like it myself.

DEAN MORGAN: Why don't you add a note to (7) saying we mean what we say. That is practically all you can do there.

MR. LEMANN: You could put a note under (7), and then would (7) cover --

DEAN MORGAN: It won't cover quasi in rem.

MR. LEMANN: That is what I was thinking. It wouldn't cover quasi in rem. You would have to put a note to (7) and also amend (e).

DEAN MORGAN: That is it.

MR. LEMANN: It is a question of your taste as to

whether you want to amend (e) as Charlie proposes, or limit the amendment of (e) to cover quasi in rem and put a note to (7).

CHAIRMAN MITCHELL: Which do you prefer?

JUDGE CLARK: I would agree with Mr. Pryor, if I may do so. I would put it here. I mean I would put the main provision here. I have no objection --

CHAIRMAN MITCHELL: That doesn't mean anything in the reporter's record. Put it where?

JUDGE CLARK: I would continue to have the main amendment in Rule 4(e) as stated on pages 1 and 2 of the draft of September 1. I see no objection to adding a note under 4(d)(7), if it is thought desirable.

MR. LEMANN: You could put it in a note to (e) in which you could say that we disagree with Judge Maris' opinion and that we don't think there was any limitation on (7) as he thought by (f), but we have made it plain by this amendment to (e).

MR. PRYOR: To get the matter before the Committee, I move that the policy just adopted be incorporated in Rule 4(e) with such note as the Reporter may draft explaining the thought of the Committee.

CHAIRMAN MITCHELL: Is that all right?

SENATOR PEPPER: I second the motion.

JUDGE CLARK: That is all right, but I may say that

my note is already before you, if you will look on the March 15 draft, pages 4, 5, and 6. It is perhaps a little too windy, but it is all there.

MR. LEMANN: Do you want to get to stylistic suggestions now?

JUDGE CLARK: Maybe we had better pass Mr. Pryor's motion and then come back to style. I don't know.

MR. PRYOR: You can condense that note, can't you?

JUDGE CLARK: I beg your pardon?

MR. PRYOR: You can condense that note somewhat and use it.

JUDGE CLARK: We wanted to tell the whole story and be sure it was there. When we come back to it, Mr. Lemann had some good suggestions as to the rearrangement of the wording of that amendment. I want to make sure we have covered the policy first. If Mr. Pryor's motion is carried, then we are up to the question of detail. Is it carried?

CHAIRMAN MITCHELL: It hasn't been voted on. I want to be sure we know what we are voting on. Do you understand what the effect would be if it is carried?

JUDGE CLARK: Yes, I think I understand it.

CHAIRMAN MITCHELL: All in favor of Mr. Pryor's motion say "aye"; opposed. It is carried.

What more do you want?

JUDGE CLARK: I might say as I understand it, he is

all for the way I have done it here. So am I. So if Mr. Pryor and I understand it, that is at least a beginning on a proper approach.

That brings us then to the question of detail of wording of this last provision, and Mr. Lemann makes some rearrangement. This again is at the bottom of pages 1 and 2 of the September 1 draft.

The way I have it there it starts out, "It shall also be sufficient . . ." He suggests putting that statement in the middle and starting out -- I think I am stating this correctly, and you can break in if I am not -- "Save when a statute or rule of court of the state in which the service is made or the district court is held provides for service of a summons," and so on, "it shall be sufficient if service is made or the party is brought before the court under the circumstances or in the manner provided in the state statute or rule."

Have I stated that correctly?

MR. LEMANN: My first suggestion is that we adopt the second bracket at the bottom of page 1, because we first have to vote on that. We have two alternatives. I think you favored the second. It seems to me the second is preferable. My first suggestion is that we adopt the second in substance.

MR. DODGE: We have done that.

DEAN MORGAN: We did that by the prior motion.

MR. LEMANN: Then we take out the first five words in

the second line from the bottom of page 1 and put them in the fourth line of page 2 after the word "state". I would change "it shall be sufficient" to "it is also sufficient" because I think that is the style that you have used, and you want to be uniform. I think you have said usually "it is sufficient," not "it shall be sufficient."

MR. PRYOR: That is right.

PROFESSOR MOORE: May I ask why you have the alternative, "whenever a statute or rule of court of the state in which the service is made or the district court is held"?

JUDGE CLARK: These things escape me sometimes. I remember we had a long discussion about that. If there is service of the notice by publication coupled with sending copies to somebody, say, in New York, where is the service? The service then would be made in New York, I should suppose, and the court is held in Connecticut. This was to cover the widest alternative, really.

PROFESSOR MOORE: Service would have to be made pursuant to Connecticut law, wouldn't it?

MR. LEMANN: If the suit is instituted in Connecticut -- let's first talk about the quasi in rem suit -- you certainly would have to have the service authorized by that, I should think. That would be true in the motorist case, too, wouldn't it?

JUDGE DRIVER: You have a proposal here someplace

later on, haven't you, Judge Clark, permitting service of process within 100 miles of the place where the court is held, even outside of the state where the court is held. You have a provision of that sort.

What would be the result if an action of this kind was brought in another district 100 miles from the place of holding court? Which state law would govern then? I am 20 miles from the Idaho line. Suppose somebody starts an action and I serve process in Idaho under this rule that permits service within 100 miles of the court. Then which state law would govern under this rule?

MR. LEMANN: In that respect wouldn't the language of the first bracket be better on that point, "Whenever the law of the state in which the district court is held," instead of "in which the service is made"?

JUDGE CLARK: I think it well might be.

MR. LEMANN: That would cover your point, wouldn't it, Professor Moore?

PROFESSOR MOORE: I think so.

MR. LEMANN: I move that in the last two lines on page 1 ---

CHAIRMAN MITCHELL: You are talking about the September report, are you?

MR. LEMANN: Yes, September 1 report. I move that we change the language to read, "Whenever a statute or rule of

court of the state in which the district court is held provides for service of a summons or of a notice," and so on.

JUDGE CLARK: All right.

MR. LEMANN: I think the note is too long. I am not sure how much of this is note and how much is comment. I realize that comment can be long because we are all being educated, but where does this note on page 2 --

DEAN MORGAN: It is in the March draft.

MR. LEMANN: I am looking at the September draft now. It is marked "note."

DEAN MORGAN: The first two paragraphs are comment and the third paragraph begins the note.

MR. LEMANN: That is what I thought. All of page 3 is a note, all of page 4 is a note, and all of page 5 is a note. That is where my blood ran cold.

JUDGE CLARK: That is right. If you will look at the suggested changes on page 4 of my March draft, I have made some additions.

MR. LEMANN: You have made it even longer?

JUDGE CLARK: Yes. I would like to say a little more generally about these notes. In quite a few cases last May, members of the Committee raised the point that there didn't seem to be too much reason for certain of the suggestions. Perhaps one court had gone wrong, but there wasn't any adequate showing of the picture.

Of course, Professor Wright drafted the detail of these notes. What we tried to do was to give you the whole story this time so you could see how the cases ran and have the full information. Having worked up the full information, query: If that would not be useful to the bar?

That is a matter to be decided. The main reason that these notes are full is to have the full background as we discuss them. Possibly that might be of some use, if this is going to be published and go out to the country. If you would like to have the notes reduced once you realize what the background is, because that is what you were craving before and thought you didn't have, then we can begin to cut them down.

CHAIRMAN MITCHELL: It doesn't strike me that you are going to lose anything by explaining your proposed draft with full freedom. This thing is going to pass the scrutiny of the bar and bench of the country, and I can't see any fault in making your note complete.

JUDGE CLARK: Of course, we were actually losing a great deal here with this Committee by not having the material before you in May, and because we were losing with the Committee, losing just in lack of knowledge -- of course I am not suggesting that in any way as a criticism, but it seems quite natural. You didn't have the information before you. Therefore, that taught us the lesson that we ought to have the information completely before you.

It may be that the members of the bar and bench of this country are like the members of this Committee. They might like to have the material before them. But that is a question of style as to the notes. It comes up not only in this note but in a lot of the others.

MR. LEMANN: That is right. I can see that we on the Committee might have to be specially educated because, after all, we have the responsibility for proposing the changes. But if you made a statement of what the cases are as, for instance, on page 3, "It has been thought by some that Rule 64, which authorizes attachment," and then cite two cases, and "Courts have held to the contrary," and cite Moore's Federal Rules or the equivalent, that would be enough, because you can go to Moore's Federal Rules and see all the cases or the supplements to them or to some other Law Review articles, not just put in so many citations.

JUDGE DRIVER: It seems to me that citing so many cases makes the notes unduly voluminous. I doubt, as far as the district court judges are concerned, that they are much interested except in the Committee's statement of their reasons for changing the rules. I think that citations are helpful only where they aid in the interpretation of the rules. I don't think that large numbers of cases should be cited to bolster up our reasons. I think it is sufficient to state our reasons, and perhaps cite characteristic decisions or United States

Supreme Court decisions, certainly not so many district court decisions, because you can get almost any holding in district courts if you want to look long enough.

CHAIRMAN MITCHELL: Are you ready to close the discussion and vote on something? Do you want another vote, Charlie?

JUDGE CLARK: I think we have this alternative of Mr. Lemann's. I think everybody has agreed to it. I don't know whether you need any formal vote or not. I take it everybody likes that general language. That covers it, doesn't it, Monte?

MR. LEMANN: You are talking about the citations, the extent of the note? I understood we had voted on the other. Maybe we haven't. I thought we had voted on the change in the language of the rule. If not, I think we should. We got on to a discussion of the length of the note.

JUDGE CLARK: I should assume, whether there was a formal vote or not, it was understood that Monte's redraft of this second alternative of the addition to 4(e) was accepted.

CHAIRMAN MITCHELL: Is there any dissent on that? (No response).

You are right.

JUDGE CLARK: We can go on to the next, but do you want to formalize your suggestions as to the notes? Would you like to have us go through and abbreviate the notes, or would

you like to have them reasonably complete, or what?

Of course, not only to be convinced are the members of this Committee primarily; in the second place there is the Supreme Court, which comes right in the middle here, too, and then finally, perhaps in a lesser degree, the bench and the bar of the country, including also the Ninth Circuit.

CHAIRMAN MITCHELL: Is there any question in your mind as to the validity of what we are doing?

JUDGE CLARK: No, not here, but I think you have to explain it.

CHAIRMAN MITCHELL: I think we should leave it to the Reporter to do the best he can.

DEAN MORGAN: Mr. Chairman, when you are talking about "It has been thought by some," and so forth, that particular paragraph could be abbreviated. If he just gave a couple of references, I think that would be enough, and let it go at that.

Of course, you are cutting out this on page 4, the conflicting cases, because of the Olberding case, aren't you?

JUDGE CLARK: Yes. Of course, the advice that is being given is a little diverse, as might be expected.

JUDGE DRIVER: May I ask this question, Mr. Chairman? Will the members of the Committee receive the final draft of this before it is submitted to the Supreme Court? Will what we are doing now come to us again? Will we have an opportunity

to have our say again, or is this the last chance?

CHAIRMAN MITCHELL: No. We are going to print a draft of the notes as we propose them to the Supreme Court, and distribute them to the bench and bar. I had hoped that once we could complete our work with this meeting and ask for an appropriation on that basis --

JUDGE DRIVER: At least so far as we are concerned, what we are doing now should be our final statement?

CHAIRMAN MITCHELL: No. If we get a reaction from the bar --

MR. LEMANN: He means as far as the Committee is concerned. He wants to know, if the notes are redrafted, will we have an opportunity to look at them before they go to the bench and bar. I would think we wouldn't want another meeting of the Committee before that, but it might be possible to send proofs out or drafts of them and let anybody who cares to, write in a suggestion to the Chairman and the Reporter.

CHAIRMAN MITCHELL: We will draft it as a result of your work at this meeting and distribute it to the Committee and call for criticisms, and then that can come back to the Reporter and he can act accordingly.

MR. LEMANN: I think we ought to leave it to the Chairman and the Reporter, then, to put it in final form after we have all had a chance to comment. That is what you meant?

JUDGE DRIVER: Yes. I have in mind several instances

already where we have directed the Reporter to use his own language in drafting these notes, and while I have every confidence in the Reporter, I think we ought to have another look at it.

CHAIRMAN MITCHELL: Let it be understood that his report in the form in which he proposes printing it will be mimeographed and distributed to the Committee, and we will give you a reasonable time to come in with your suggestions and criticisms.

JUDGE DRIVER: It should be in the nature of proofreading rather than change in substance, but we should be permitted to proofread it before it goes to the printer.

MR. LEMANN: I would want that if I were the Reporter, myself, because it is so easy to overlook something.

CHAIRMAN MITCHELL: It would be in mimeographed form, because there is no use spending money printing things for the use of this Committee.

MR. LEMANN: For the Reporter's guidance, I would like to offer a motion, which may not be accepted, that it is the sense of the Committee that the Reporter be requested to abbreviate the citations in the notes and to some extent the language of the notes.

CHAIRMAN MITCHELL: Is there any objection to that?

JUDGE CLARK: I wouldn't want it passed by default. Why not ask how many would like to have that done.

CHAIRMAN MITCHELL: Will those in favor of the motion say "aye"; opposed. There is none opposed.

DEAN MORGAN: I think some of the citations could be abbreviated without any harm, but a lot of them I think help out a lot.

MR. TOLMAN: Mr. Chairman, is there a possibility that a style committee would be helpful on this note proposition?

CHAIRMAN MITCHELL: I don't think --

MR. TOLMAN: It seems to me, as Mr. Morgan says, some of the notes can be longer and some of them can be shortened.

CHAIRMAN MITCHELL: When the Reporter does the best he can, he understands the sense of the Committee now, when it is mimeographed and sent out, then you all have a chance to come back on it. When your suggestions come in to him, I think we have to leave it to the Reporter as to how much change he makes in the mimeographed report when he comes to print it for distribution to the bar and bench generally.

JUDGE CLARK: I will do the best I can. As I get the directive, I must cut them decisively, but not too much.

MR. LEMANN: An emendation by the Reporter.

CHAIRMAN MITCHELL: We will go on, Charlie.

JUDGE CLARK: I think that takes us up to Rule 4(f). Rule 4(f) has a fairly important provision.

CHAIRMAN MITCHELL: That is page 5 of your September report?

JUDGE CLARK: That is page 5 of the September report. Mr. Pryor sent in some changes in language, slight ones, that I thought were pretty good.

CHAIRMAN MITCHELL: That is on page 6 of the March report?

JUDGE CLARK: That is right.

CHAIRMAN MITCHELL: We want to know where you are.

JUDGE CLARK: I think, therefore, that I would make the suggestion in the form on page 6 of the March report as a matter of wording.

The main provision is "and at all places without the district that are within one hundred miles of the place or places designated by law for the holding of the district court," and some minor changes in language to carry out that idea.

Let me give you a little of the history. I understand that Monte is sharpening the old knife. This came up as a result of various suggestions, possibly the most direct of which was from Judge Holtzoff as to the case he had which is stated in my report to you a year ago last May. The case was Graber v. Graber, 93 F. Supp. 281. It is also stated on page 6 of this September draft. You will see it at the middle of the page. That is a shorter statement. Although perhaps not yet

short enough, it is a shorter statement than my one of last May.

MR. LEMANN: That was the contempt case?

JUDGE CLARK: Yes, that is it.

CHAIRMAN MITCHELL: The problem we are dealing with now raises the question of whether by procedural rule we can enlarge the jurisdiction of the federal court as to service of process which the statutes now prescribe. That is the problem that we had there. We were worried about it, but the Court didn't have any trouble with it, apparently.

JUDGE CLARK: That is absolutely correct.

MR. LEMANN: You see, you expressed a doubt originally as to what we did in saying that you could serve outside the district within the state.

CHAIRMAN MITCHELL: Yes.

MR. LEMANN: The courts seem to have had no trouble. Now these gentlemen, the Reporter and his assistant, calmly assert that the decision which said that that was all right, which shows that this is all right, you see, they now want to carry it to the point where everybody living in New York within 100 miles of Connecticut can be sued in Connecticut, I can be sued in Mississippi, my friends in Shreveport can be sued in Arkansas, Judge Driver can be sued in Idaho, and so on, without limitation.

As far as I know, there has been no clamor, unless it is the sole voice of Judge Holtzoff, who couldn't get a guy

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As far as I know, there has been no clamor, unless it is the sole voice of Judge Holtzoff, who couldn't get a guy

for contempt. Unless that is a clamor, I don't know any clamor for it. But I do think if I explained to my bar and other bars what the proposal would do, there would be a great deal of clamor.

CHAIRMAN MITCHELL: Wouldn't there be trouble in Congress about that, too?

MR. LEMANN: I would think so, if they understood it properly.

CHAIRMAN MITCHELL: And maybe in the Supreme Court. I think we got by on default on the validity of our original extension of jurisdiction. It always seemed to me that that was purely a jurisdictional problem, and if we could enlarge the area that process would run in to include the whole state, we could enlarge it to include the whole United States and drag people in to federal court across the continent.

I never could see any distinction between enlarging the state limit and enlarging it for the whole country, but the Court didn't seem to worry over that the least bit.

MR. LEMANN: I must say when the Wickersham committee was constituted, Dean Pound at the organization meeting announced his view that everybody should be subject to suit in a court in the United States anywhere. I said to him, "I don't think that could be done, could it, Dean?" He said, "That shows that you don't know what you are talking about and, what is more, you don't want to know." That was a little rough,

but that is what he told me. So we might get that far.

CHAIRMAN MITCHELL: Don't you think we can dispense with raising another hornet's nest here about enlarging jurisdiction?

JUDGE CLARK: I am afraid I am about to be submerged before I can even get my mouth open.

CHAIRMAN MITCHELL: Maybe that is the best result.

JUDGE DOBIE: It just touches service of process; it doesn't touch jurisdiction, isn't that right, Charlie?

JUDGE CLARK: I would like to say something, if I may, because I think this is a damned good provision. I don't want it to go, so to speak, by default. We voted for it before. That doesn't mean that we can't vote against it now, but it does mean that the Committee was convinced before. Not all of them. I think there were certain members who raised question, which was to be expected. But let's consider it a little more.

In the first place, I don't see how there can be any further question about our power. The analysis made by Justice Stone in the Mississippi Publishing Corp. v. Murphree took the very point that members of this Committee had urged, to wit, the very great distinction, the complete distinction between service of process, which is the way of adequate notice to the defendant, as compared to two other ideas. One is jurisdiction, the fundamental jurisdiction granted to the court, and the other is venue, which is a matter of some convenience to the particular

defendant as to the court where he will be. Justice Stone went into that and cited, among other things, the persuasive suggestions of members of the Advisory Committee made at the Institute.

I don't see any escape from that argument now. Either his argument was sound then and sound now, or it wasn't. It seems to me that none of the Court raised any question about it. They all seemed to accept it.

Turning to the matter of policy, Judge Holtzoff's case seemed to be a little striking case, but it seems to me it is the kind of thing that we get a great deal of. One of the most usual, where we have seen it a great deal, is in connection with third party practice. Our third party practice is a very useful thing, generally. That is the impleader, you know. That is very much restricted by the problems of federal jurisdiction.

We cut down our impleader rule somewhat because of that. There are certain things, of course, in the line of federal jurisdiction that we cannot and ought not to change -- diversity, venue, and so on. But where we can make provision for completeness of a single case, as we can here, not in every case, I don't put this up as covering all sorts of things, but as being useful in a fairly narrow territory.

A case that we had turned out to affect a great man. I didn't realize how great he was when we were dealing with it at

the time. It was Mr. Guy Gabrielson, who was later Chairman of the Republican National Committee. He was greatly involved when they tried to bring him in as a third party defendant in a case before us. I can't remember whether we brought him in or not, but that is the kind of issue you get where you can have a full settlement of a case which is already in the federal court.

JUDGE DOBIE: You could serve him within 100 miles but not in the district?

JUDGE CLARK: In that case we didn't have provision for that. He was in New Jersey. He was nearer than 100 miles.

MR. LEMANN: Why don't you go to 200 miles or 300 miles? If you want to get completeness of treatment, why stop at 100 miles? That is only historical. That is an old moss-backed idea.

JUDGE CLARK: My mouth is getting closed already, and I am getting submerged again.

I go back: The original suggestion we made was that you could serve in any contiguous district, and there is something to be said for that. This provision for 100 miles was a kind of suitable compromise, and it did have the analogy that Armistead speaks of, of the subpoena provision, which is old. That is all I have to say for 100 miles.

If Monte really were arguing in good faith, I would say let's extend it a little because, after all, I have a sort of idea that we all belong to one country and that these

divisions of lines that I go over many times a month between, say, Greenwich and Port Chester, really don't mean anything. They are historical. They go back to the Declaration of Independence, and so on. But on matters of making court business operate in this day of the automobile age, I can't see any real meaning of saying that now you can drag a person from your Texas line, any part in that magnificent state, anywhere there, but you can't drag him a mile if you go over the line into Louisiana. I say I don't think that makes sense. If it hadn't been that lawyers thought of this in the historical past, everybody would say it was ridiculous.

MR. LEMANN: That argument about dragging people from Texas to Louisiana can be made about many other things besides suits, but still people in Texas think of themselves as governed in many respects by the fact that they are in Texas.

If we are going to drag this down, I suppose everybody in Baltimore could be sued in Washington, and everybody in Philadelphia could be sued in New York, and what did you tell me about your panhandle of Idaho?

JUDGE CLARK: It is not true in a great many cases. Of course, in antitrust cases and things of that kind, you have process running throughout the country.

CHAIRMAN MITCHELL: By statute.

JUDGE CLARK: Yes. I am referring to that to say that that is something --

JUDGE DOBIE: As applying to witnesses, too.

MR. LEMANN: In government cases, yes.

CHAIRMAN MITCHELL: The thing that has always sort of gagged me about it --

DEAN MORGAN: This is the distance in which the subpoena will run, isn't it?

JUDGE CLARK: Yes. That is an old rule for subpoena. We took it over.

CHAIRMAN MITCHELL: It is a statutory rule.

JUDGE CLARK: It was a statutory rule originally, and has been taken over by the rule.

CHAIRMAN MITCHELL: I admit that this decision of the Supreme Court sustaining our rule that process could go outside the district within the limits of the state gave me a jolt because logically, if that is a valid rule, we can make the process run to California from New York, but the practical side of the thing is that we have always had a feeling that people ought not to be dragged from California to New York in a federal suit. I am surprised that Congress didn't raise a row about our rule and that the Court found it so easy to sustain it. I must admit that, having sustained a rule that extends the jurisdiction for service of process within the limits of the state, I haven't much of an argument against a rule that you can sue in New York and then serve him in California and make him come to New York and hire a lawyer and defend the case.

Logically I don't think there is any difference.

There is something more to it than just comfortable litigation in the federal court and getting all the issues of the case and all the parties involved, and all that, present. It is this idea that you can take a man and drag him across the country in private litigation. The statutes of the United States have never done it.

As I say, I don't know what argument we can make against it now, their having sustained the rule we did make.

MR. PRYOR: As I understand it, this proposed rule wouldn't affect at all the statute with reference to jurisdiction or venue.

JUDGE DOBIE: That is right, just service of process.

MR. PRYOR: This is just service of process.

JUDGE DOBIE: And on parties, not witnesses.

MR. PRYOR: I had a third party case like the one you suggested, where the action was in Council Bluffs and they wanted to get a third party in Omaha across the river and couldn't get him in.

JUDGE DRIVER: Indirectly, it would affect venue as a practical matter. I have had several cases where a plaintiff residing in Spokane wishes to sue a defendant residing in Idaho. He can get venue because the plaintiff lives in Spokane, but unless he can inveigle the Idaho resident into Spokane to get service on him, he can't get jurisdiction of his person.

Under this amendment a resident of Spokane could sue a resident of Idaho within 100 miles of the court and get personal service on him. That is true, isn't it? Under the old rule he couldn't.

CHAIRMAN MITCHELL: That is right.

MR. LEMANN: Of course, you would have to employ a lawyer, even if it was within 100 miles. I couldn't try a case in Mississippi without a Mississippi lawyer.

CHAIRMAN MITCHELL: As I said, I don't see how we could gag at the thing because of the power of a procedural rule as long as they have sustained the rule we have made.

MR. LEMANN: I don't think that necessarily follows. I think certainly there is a big difference in degree. There is a sharp difference in the Supreme Court to this extent, and they might even gag at what we have done. I am really not putting it solely on the question of power, although I have doubt about the power. I am putting it on the desirability of the change.

DEAN PIRSIG: I am confused, myself, on why the venue provisions don't take care of your problem.

MR. LEMANN: No, because if the plaintiff resides in Mississippi, in my case, for example, within 100 miles of Louisiana, you have venue whether I am there or not, if he could get hold of me, and in this way he can get hold of me without my ever being in Mississippi.

JUDGE CLARK: That has been a decision made by Congress of very long standing.

MR. LEMANN: On the venue point, yes.

JUDGE CLARK: The venue of either should govern.

CHAIRMAN MITCHELL: I don't deny the power of Congress to provide that if a plaintiff lives in New York he can sue a resident of California and serve him out there and force him to respond in New York and come across the country to do that. I don't question the power of Congress. They can make the United States one district if they please. It is a sentimental distinction. I have always wondered why the Court didn't have more trouble with our rule as we have it about process running outside the district as long as it is within the state.

DEAN MORGAN: If we don't interfere with the state's rights article.

CHAIRMAN MITCHELL: We made the break in that case, and that is what I thought about the decision: It opened the doors to this Committee's providing a practice rule enabling a fellow to be hauled across the country to defend a federal suit.

JUDGE DOBIE: It wouldn't make any difference. If you say it is 100 miles of any district court, then that is all right under your rule; isn't that right, Charlie?

JUDGE CLARK: Yes.

JUDGE DOBIE: Whereas the witness rule is limited to

100 miles from the place where the suit is brought.

I had exactly that case. A man sued in Danville in the Western District of Virginia, rather than in Lynchburg, because he had to get his witnesses from Reidsville, North Carolina, which was within 100 miles of Danville but not of Lynchburg. As I understand, here it doesn't make any difference whether it is in the district if it is within 100 miles of where the district court is designated to sit.

JUDGE CLARK: We made it that way, trying to make clear any question of that kind.

MR. DODGE: The advantage of the rule is suggested in the note. The advantages are limited to a very few classes of cases. There is that contempt case of Judge Holtzoff, there is the case where an indispensable party in existing litigation lives outside the state, and the case of third party practice where the defendant wants to bring in a nonresident of the state.

I don't find any argument suggested in the note which would lead to the advisability of permitting me to be sued in Maine, New Hampshire, Rhode Island, or Connecticut, as I should be under this rule. What is the advantage in permitting a nonresident of four different states to have a right to sue a resident of Boston in his own state?

CHAIRMAN MITCHELL: Why don't you let the plaintiff go to the other fellow's state?

MR. DODGE: It is for the benefit of the other fellow. The man who starts the litigation is the one who ought to travel.

MR. LEMANN: If you are going to limit this to third party practice, I can see some argument for it, as Mr. Dodge has just suggested. Of course, I learned years ago that ancillary proceedings may permit you to bring people in to the federal court that you could not have brought in originally. For instance, if you get a receiver, I found years ago in the federal court that a receiver who is a resident of the state can bring in another resident of the state. He can sue another resident of the same state in the federal court and collect a claim through the receivership.

I can see that in this question of ancillary proceedings you might make some argument that permitted a court to get everybody that you had to have. I am just wondering, as the discussion goes on, whether we could permit this to be done in a third party proceeding or perhaps also in the case of an indispensable party, and not otherwise. That would restrict it certainly to a relatively small number of cases.

What do you think of that, Mr. Moore?

PROFESSOR MOORE: I think that is a pretty good compromise.

CHAIRMAN MITCHELL: It isn't such a glaring proposition.

MR. LEMANN: No. The practical results are not very

serious. After all, if you get mixed up in a controversy with other people, you might make more of an argument that you ought to be brought in to get rid of it, although I think even that is arguable.

JUDGE CLARK: There is another thought that might come out at this time: whether perhaps here, and possibly elsewhere, we should make different suggestions in this publication, which will be for the bench and bar. We could do it. We have done it before. This obviously is a matter about which members of the Committee have differences of view, as is only natural. Might not something be said for presenting alternatives for discussion?

I think there might be a danger -- I don't know how it would come out, but there might be a danger if we do very little, and then have publication to the bench and bar, that it might seem as though we were making a lot of fuss over some very small things. It is a part of our job, I think, to initiate, so to speak, to suggest ideas, to discuss ideas with others, and so on.

Might there not be something to be said perhaps in this rule, and in other rules, too, where we have quite a difference of view and don't need to make a final decision now, to suggest alternatives and get reactions from the bench and bar.

CHAIRMAN MITCHELL: I think it would be just stirring

up the animal if you put this problem up to the bar in the alternative, whether you could or couldn't bring a federal action in New York and serve good process on a defendant in California. I think you would get an awful squawk. I think Congress itself might well rebel at that.

This other thing slipped through because it seemed so appropriate to give a federal court sitting in any state jurisdiction to serve process anywhere in the state. That seemed all right.

MR. LEMANN: You could change the districts in the state very easily.

CHAIRMAN MITCHELL: Do you have many states in which they have one district? The federal court process runs anywhere in the state. I am speaking of Minnesota, which is one federal district. There you have it. Why raise a row about making New York one district as far as process is concerned?

MR. DODGE: I have not heard any argument in favor of giving the general right to a citizen of one state, in litigation fomented by him, to drag a resident of another state in to his state. I can see the argument in favor of some of these specialized cases where the matter is incidental to existing litigation, but what is the argument for permitting a resident of Augusta, Maine, to drag a citizen of Massachusetts down to Maine for his own pleasure and satisfaction?

JUDGE CLARK: It does seem to me that there is more

reason for it than here suggested, whatever might be the distance. The particular case of Judge Holtzoff's we don't need to overemphasize, but nevertheless that presents a little of the kind of picture. That was a fellow who couldn't be reached by contempt in a matrimonial action because he went over the line into Virginia.

It seems to me that that illustrates somewhat the point of view. What is Washington, D. C., now? It seems to me it is very difficult to say that Washington, D. C., is just the District of Columbia, the way things are going. Washington, D. C., from the standpoint of even an automobile accident or any of the numerous things that may come up in court, is likely to include all the people who live in Virginia, Fairfax and along through there, down in Alexandria, and in Maryland it is Silver Spring and those various places.

It does seem, I suggest, a little unfortunate that you might have an automobile accident in one of these metropolitan areas and you find that one of them sleeps at night at a little distance, and therefore he is entirely out of the picture so far as the federal court is concerned. It seems to me to make justice rather lopsided as a practical matter.

It is somewhat along the line I was trying to suggest before. If you have diversity jurisdiction, diversity jurisdiction ought to correspond to the kind of relief you can get in state courts. The way our communities develop, our communities

are metropolitan and they don't take note of state lines. New York is an excellent example.

CHAIRMAN MITCHELL: Why should the plaintiff have the right to drag a defendant across the nation to respond in a federal suit? It is a question of convenience and hardship. Why should not the plaintiff be required to go where the defendant is and sue? Why place all the inconvenience and hardship on the defendant?

It is like in the old days when I was in Washington and the lawyers around the Department of Justice, when they had a case against somebody, a conspiracy case, hunted around for some state in which one of the alleged conspirators had written a letter, something like that, because any act in furtherance of the conspiracy gave the court in which the act was committed jurisdiction. They would drag people in to the District of Columbia, and the subordinate lawyers in the Department were using that situation to try to pick a jurisdiction where the defendant was at a dimadvantage and where the judge was supposed to be amenable to the influence of the Department of Justice.

I put a stop to it. I said, "If you can't convict a fellow in his own home state, don't drag him up to the District of Columbia or Massachusetts simply because some fellow that he was supposed to have conspired with has written a letter in furtherance of the conspiracy."

I don't know whether they follow that advice up there

now.

JUDGE DOBIE: Sometimes that has a desirable effect. We had one little case, a counterfeiting conspiracy. All the hot shops were in Chicago. One of the acts in the conspiracy was in West Virginia. After we decided the case, I asked the district attorney, "Why did you try that case in West Virginia?" He said, "I will tell you very simply: The five witnesses we had said they would never go to Chicago, that if they did go to Chicago they wouldn't live two days out there. They would do anything in the world, go to jail anywhere in the East, but they would not go to Chicago."

CHAIRMAN MITCHELL: That has been abused by the Department of Justice. I am talking about cases where they used that rule to hornswoggle a fellow into a jurisdiction where he is at a disadvantage.

MR. DODGE: Would Judge Holtzoff's case be taken care of if you had a provision allowing process in connection with an attempt to enforce an existing judgment over the state line?

JUDGE CLARK: I don't know. It is possible to conceive that by a series of separate provisions you could cover it, but it seems to me there would have to be a series of separate provisions.

It is suggested here that the third party situation is an appealing one. You would have to have, if you are going to do it, a series of small, separate provisions. It seems to

me that all these sort of negate the principle that we have tried to carry out except when it hits cases of this kind, and that is against fragmentizing justice, breaking all these cases up into small parts, and this is a part of it. We have gotten away from it in a good many respects.

CHAIRMAN MITCHELL: We provided in the rules that when judgment was rendered in the federal court you could take a transcript of that judgment and record it in the court of any other jurisdiction and proceed to issue execution on it there. We raised the question in the rule ourselves, and mentioned the question of the power to make such a rule. The Court rejected that. It must have been on the ground that it didn't believe in the power by a practice rule to take the judgment of one court and file it in another district.

DEAN MORGAN: The revision to the Code, the present Federal Code allows it now.

JUDGE CLARK: It is now the law of the land, and it is working very well as far as I can see.

CHAIRMAN MITCHELL: Of course, it is the right thing to have it that way by statute, but the Court wouldn't allow you to do it on rule.

DEAN MORGAN: If the opponents had been awake on the Code, it never would have gone through there, either, for that matter.

CHAIRMAN MITCHELL: I don't know.

MR. DODGE: There won't be any objection to letting that suit on a judgment rendered in one state be enforceable within these limits by a new suit in another state, but there are very limited classes of cases where you really need this, and you are adopting a remedy for those few cases by a very broad rule which goes far beyond what it seems to me we ought to adopt.

DEAN MORGAN: You do have a lot of trouble with indispensable party cases, where they are on different sides of a state line and nothing can be done.

MR. PRYOR: In third party procedures, too.

CHAIRMAN MITCHELL: You wouldn't consider making a rule to have process run outside the state limited to cases like third party cases and indispensable parties, something like that?

MR. DODGE: Incidental to existing litigation or the enforcement of its judgments.

CHAIRMAN MITCHELL: The proposal here would go away beyond that.

MR. DODGE: Yes.

CHAIRMAN MITCHELL: It is one o'clock. Suppose we go down to lunch.

... The meeting was recessed at one o'clock p.m. ...

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WEDNESDAY AFTERNOON SESSION

March 24, 1954

The meeting of the Advisory Committee on Rules for Civil Procedure reconvened at 2:00 o'clock, William D. Mitchell, Chairman of the Committee, presiding.

CHAIRMAN MITCHELL: When we adjourned we were talking about enlarging the power of the federal court to serve process throughout the nation. I don't think we came to any conclusion about it. I was asking if a rule of that kind should be limited to incidental attributes of ordinary litigation. As applied to indispensable party or something of that kind, you might get by with it, but my feeling is that it is a risky business to take one big jump and give the federal court unlimited power to drag people all over the United States to answer lawsuits in other parts of the country.

I think that is about where we quit. Is there anything more to be said about it?

JUDGE DOBIE: I believe it is a good rule. I can see a lot of theoretical objections to it and I know a lot of people are going to kick on it in the big states if they have to go. It seems to me that 100 miles, if it coordinated with the witness proposition, is a good rule. I would like to try it.

I believe it is only fair to say it is going to meet with a tremendous lot of opposition from the bar and probably from Congress, too.

CHAIRMAN MITCHELL: Do you mean the rule would not be limited?

JUDGE DOBIE: Just the way it is drawn.

JUDGE CLARK: I do think the way to test whether it is going to draw opposition is to put it out tentatively and see. The suggestion was made that the original (f), the territorial limits rule, was going to start a great deal of trouble, and the Chairman opposed it and in effect stated so in a letter to the Supreme Court. Everybody was put on notice of the very definite question. That distinctly did not raise the question.

CHAIRMAN MITCHELL: I didn't write a letter to the Court. There appeared in a note some question of the power. It was stated in a note.

JUDGE CLARK: I think it was in the letter of submission. I think you will find it at the head. It was published in the preliminary draft, showing very distinctly that many members of the Committee thought that was invalid.

It seems to me the way to test this would be to put it out with a fair statement, and let's see if there will be great opposition.

CHAIRMAN MITCHELL: Just what form does your rule take now? I had the idea it was limited to certain types of cases. Am I wrong about that?

JUDGE CLARK: No, it is not. That is a suggestion that has come up in this morning's discussion.

CHAIRMAN MITCHELL: How does the rule read as you have drafted it?

JUDGE CLARK: The final form the way I would present it is on page 6:

"All process other than subpoena may be served anywhere within the territorial limits of the state in which the district court is held and at all places without the district that are within one hundred miles of the place or places designated by law for the holding of the district court and, when a statute of the United States so provides, within the territorial limits provided in such statute."

That is to cover the cases of nationwide service which is permitted in several instances, including antitrust cases, impleader, and so on.

That is the suggestion.

CHAIRMAN MITCHELL: You can't serve a subpoena more than 100 miles from the place of trial, can you?

JUDGE DOBIE: That is right.

MR. LEMANN: In civil antitrust cases, to what extent can you sue people away from their residence?

JUDGE CLARK: What cases now?

MR. LEMANN: Antitrust cases, civil.

JUDGE CLARK: Civil antitrust cases and interpleader cases -- I think there are more. Bill, what others? Those cover nationwide running of service.

PROFESSOR MOORE: There is some provision in certain suits to compel the issuance of a patent. There aren't too many situations where service runs nationwide. There are a few.

MR. DODGE: Treble damage suits can be brought wherever the defendant can be found or wherever the defendant is doing business. Isn't that so?

MR. LEMANN: We usually get personal service on him there. That wouldn't be analogous to this 100 miles from where you live.

MR. DODGE: No.

JUDGE DOBIE: A patent suit, of course, can be brought anywhere that there has been an act of infringement and where the man has a place of business. There is a tremendous amount of shopping around for those. We know that.

MR. LEMANN: The only thing that troubles me about the Reporter's suggestion to throw this out to the bar is that, unless we state to the contrary, the bar would have the right to assume that the Committee favored it. I am sure the Committee does not unanimously favor it. I am not sure whether the majority favor it.

If we are going to throw it out to the bar, I personally think I would like it to be noted that at least one member of the Committee is doubtful about it.

JUDGE CLARK: I see no reason why you shouldn't state just how the committee stands.

CHAIRMAN MITCHELL: You don't need to count noses. You can state that on this proposition the Committee was divided, something like that.

MR. LEMANN: Yes.

CHAIRMAN MITCHELL: What is your pleasure?

JUDGE DOBIE: I move that we submit it and get the reaction of the bench and bar of the country.

PROFESSOR MOORE: Wouldn't it be well to submit another alternative? You may have an overwhelming number of the bar who may uphold this, but still a great majority of them who would be willing to support a rule providing for extraterritorial service of process relative to third-party practice and indispensable parties.

MR. LEMANN: I think that ought to be submitted alternatively.

JUDGE DRIVER: I think they should be permitted to express a choice and not have an "iron curtain" election where they say either "yes" or "no."

JUDGE CLARK: I should favor that.

CHAIRMAN MITCHELL: All in favor of submitting the rule in two alternatives, one the process and the other limited to three special types of cases, say "aye"; opposed. It is carried.

PROFESSOR WRIGHT: What were the three special classes?

JUDGE CLARK: Indispensable parties, third-party

practice, execution of judgments.

PROFESSOR MOORE: I don't know that we need that, Judge.

JUDGE CLARK: I am not sure we do, either. The rule is intended to hit Judge Holtzoff's case. I am afraid that language would not hit it. I don't know quite how to word it.

CHAIRMAN MITCHELL: Your execution of judgment you say now is taken care of by the Judicial Code, is that right?

DEAN MORGAN: That is right, isn't it, Bill? If it is just registered in the district, then you can take out execution on it. It is just the thing we tried to put over in the rule, isn't it, Bill?

PROFESSOR MOORE: Yes.

DEAN MORGAN: That is exactly the rule that we suggested.

CHAIRMAN MITCHELL: I see no harm in naming things.

DEAN MORGAN: That is why it is well to have a friend or a draftsman in the Code Commission.

JUDGE CLARK: Was that how the cause of action got back into the Code?

PROFESSOR MOORE: The Code provides for registration of a judgment for money or property. If you want to hit a case where the judge has issued an injunction --

DEAN MORGAN: That is ancillary. The punishment is ancillary to that, anyway.

MR. LEMANN: That is in your class of cases, isn't it? Contempt?

PROFESSOR MOORE: If he gets out of the jurisdiction, you can't get him for contempt.

DEAN MORGAN: You can with the alternative here, can't you, in any ancillary proceeding? Contempt is an ancillary proceeding. You could get him on that, all right.

PROFESSOR MOORE: That would be your third category.

MR. LEMANN: What are you going to say when you send this out, that the Committee is divided on one or both of these propositions? I suppose you will say they are divided on both, won't you?

CHAIRMAN MITCHELL: I wouldn't be registered as opposed to it.

MR. LEMANN: I am not so sure that I am, but I get the impression that some are. I think perhaps we ought to find out if we are going to make a statement of how we stand.

CHAIRMAN MITCHELL: I wouldn't oppose it in a draft or name myself as opposed to it. I am simply afraid of it.

All those who don't want to be registered as favoring the proposal say "aye" --

MR. DODGE: Which proposal?

CHAIRMAN MITCHELL: The proposal to put three alternatives --

MR. LEMANN: I don't object to putting the alternative

there.

CHAIRMAN MITCHELL: We have two propositions to put up. One is the broader one and the other is limited.

MR. LEMANN: That is right.

CHAIRMAN MITCHELL: The question is whether you are opposed to the broader one and want to be so counted.

MR. LEMANN: I don't want my name mentioned, but I would think that in stating the broader one it would be appropriate to note, as you have suggested, that the Committee was divided, if it be divided. I am not sure.

CHAIRMAN MITCHELL: I don't want to be counted as against it. I am not sure we are divided.

DEAN MORGAN: I should say it was not unanimous, rather than is divided, when there are only one or two against it.

MR. PRYOR: Why not have a showing of hands on both propositions?

MR. DODGE: I think there are more than one or two against it.

DEAN MORGAN: Three.

CHAIRMAN MITCHELL: Those who want to be registered against it, raise their hands, against the broader one. There are three.

Those who want to be registered against the limited one? None.

JUDGE DOBIE: I favor the broad one, but if I can't get that I will take the next best thing.

CHAIRMAN MITCHELL: I guess you can go on to the next proposal, Charlie.

JUDGE CLARK: All right. My next one is in Rule 6. That appears in my September draft, page 7. That is a small one which depends upon the changes we are advocating in Rule 25. Rule 25 is the substitution of parties rule. When we get there you will see that we have suggested taking out the six months' time limitation. If we do that, then we ought to strike out the reference in 6(b) which makes 25 an untouchable time. All this would do would be to strike out Rule 25.

CHAIRMAN MITCHELL: When you say "to conform to the changes made in Rules 25(a) and (d)," you are talking about changes which you propose?

JUDGE CLARK: That is right. We will have to have quite a discussion of those.

CHAIRMAN MITCHELL: I know, but we can't understand this 6(b), Enlargement, unless we have before us your draft of amended Rules 25(a) and (d).

JUDGE CLARK: If you will look ahead at page 18 of the September draft, it appears right on the face of it. Look down to the first striking out, the first that is drawn through, and you will see there some cases where we are striking out the time limitations in (a). The same thing is true over on page 20

in subdivision (d) of the same rule. You will see there we are striking out a six months' limitation.

DEAN MORGAN: Which one of these are you talking about?

JUDGE CLARK: In 6(b) it is provided that there are certain rules listed there by name which can not be enlarged, in which no change can be made. We are taking out the drastic limitations on time in Rule 25. Therefore, we ought to take "25" out of here.

CHAIRMAN MITCHELL: Let me ask you this: I have been under the impression that the reason the Court struck out the proposed amendment to Rule 25 before was because they thought it was a statute of limitations. What other reason did they have for not accepting our view that there was no time limit on the substitution?

JUDGE CLARK: That is a reasonable inference. Let me say directly that, of course, if we decide not to make any changes in Rule 25, we won't make the change here. This change is dependent upon 25.

CHAIRMAN MITCHELL: I know.

JUDGE CLARK: When we get to Rule 25, we would have a major discussion, I should think. That is the one where I have had various correspondence with the Attorney General, and so on.

Why the Court struck out our previous recommendation may not be too clear. It is the fact that in all the cases they

struck out, there were cases pending before them. That was the time of Hickman v. Taylor.

CHAIRMAN MITCHELL: Was the validity of that rule before them in that case?

JUDGE CLARK: Yes. I don't know whether it was the validity. It was more the meaning of the rule. That was before them in the Anderson v. Yungkaw case at the very time. I suppose one can prove simply that they didn't want to seem to decide pending cases in passing on the rule. On the other hand, it may have been that they wanted to be more drastic, and they certainly have applied this rule with this provision in a very drastic way.

The original provisions of Rule 25(a) and (d) were incorporated in the statute, and what we did was to state in the rule here the time limitations of the statute so the lawyers wouldn't have to look at two places.

What the Supreme Court was actually doing in the cases, therefore, was carrying out an Act of Congress, the policy of Congress. The difficulty is that when the Judicial Code was enacted, they left out the statute. The revisers' note said they left it out because it was covered by a rule, but the revisers' note is not law, and sometimes I don't think it is even sense, but that is what they said.

The current situation is that there is no Act of Congress that touches the matter, and in our rules we make these

very drastic limitations.

I must say that this is a matter that is troubling us judges right along. Maybe you could tell us what we should do.

We had a case the other day in which Mr. Brownell, who is asking for a change, moved that he be dismissed because in that case he had been negotiating with the parties and they signed a stipulation, but they didn't file it in the court until about six months and three days. He said he thought he ought to bring it to the court because it was a matter of jurisdiction. We swallowed hard and said that since the Treasurer of the United States was in anyhow, we guessed we wouldn't decide this point, which I must say was a palpable evasion on our part, but I don't know what to do with that.

Here is another case that involves (a). Rule 25(d) is the public officer substitution; (a) is the case of the executor. A case came up from the District Court of Connecticut which happened to be a case where I sat as district judge. I was a little interested in it, but this point didn't involve my decision. As a matter of fact, I ordered an accounting against Remington Rand on the question of patent royalty rights, and while the accounting was going on -- it has been going on for the last twelve years -- the widow of the inventor died and some leading counsel from Hartford, Bob Bentler's firm, either didn't know this rule or didn't think about it and didn't move for execution within six months. They have now

recovered a judgment of a million and a quarter, I think it is, something like that, not all of which depends on this point, but quite a little of it does.

That case is now pending before another panel of our court. In view of the difficulties of the case and in view, I assume, of course, of the persuasive character of the lower court's decision, Remington Rand superseded ordinary counsel, Covington and Lockwood, and employed Mr. John W. Davis, who argued this point before our court. My colleagues are considering it, including this one aspect.

Should that judgment be gone now because there was no substitution moved for, and can a rule of court do things as drastic as all that?

That is part of the question to come up on (a) and (d).

CHAIRMAN MITCHELL: As long as there is now no statute that fixes a statute of limitations, our power to make it a reasonable time instead of a fixed time is as near as is being allowed, isn't that true?

JUDGE CLARK: Yes, I guess so. I should think there is a very distinct question of our power. As a matter of fact, in this case we had just now, when I speak of the Attorney General moving to dismiss and our evading answering it because the Treasurer was still in the case, I should suppose if we had to decide directly this question of the validity of the rule --

CHAIRMAN MITCHELL: The validity of our rule as it stands, in the absence of a statute.

JUDGE CLARK: That is it.

MR. TOLMAN: I might say, Mr. Chairman, the Supreme Court is adopting a revision of its rules and is going to adopt our rule as it now stands for Supreme Court substitution.

JUDGE CLARK: You mean in the present form and not our change?

MR. TOLMAN: Without the change, with the limitation.

MR. LEMANN: I understood you made two arguments. One was the question of our power, and the other was what we have under the rule, is that right? Is that a correct statement of your position?

JUDGE CLARK: Yes, I think there is a serious question of our power. That is one. Second, the rule is no good anyhow.

MR. LEMANN: That is right. That is what I understood you to say. If we have no power, do we have power to say "reasonable time"? Isn't that a statute of limitations?

JUDGE CLARK: You mean we can't even change our own rule?

MR. LEMANN: I am asking if there is anything in your power, whether a statute that says an action must be brought within a reasonable time is a statute of limitations?

JUDGE CLARK: I should think we could make our rule correct and valid if it were incorrect and invalid, couldn't we?

JUDGE DRIVER: The court undoubtedly has a right to clear its docket of stale cases, and if cases aren't prosecuted within a reasonable time, provision can be made by rule to dismiss them. There isn't any question about that, is there?

JUDGE CLARK: Yes, but that is general power. That is covered by the rules generally. That is Rule 55, on default. You get a default for lack of prosecution, and so on.

JUDGE DRIVER: Is that any different in principle from this situation, if the party responsible doesn't make his substitution within a reasonable time he isn't prosecuting it and the court should be able to say if he doesn't do it within a reasonable time that it can't be done at all.

JUDGE CLARK: You are arguing that we can make the new rule --

JUDGE DRIVER: Yes.

JUDGE CLARK: You are not arguing, I think, necessarily for the existing rule.

JUDGE DRIVER: I am arguing that we have the power to make a new rule to specify that it must be done within a reasonable time.

MR. LEMANN: The Supreme Court seems to think we can make the present rule.

MR. TOLMAN: I think they were trying merely to conform to the practice in the district courts. I have talked to the clerk about it, and that is what he told me.

JUDGE DRIVER: They are doing something without anything.

MR. TOLMAN: I do think they went into this question, though. I am pretty sure. They had a committee of the Court. The rules have not been promulgated yet, but they will by probably the first of the month. A committee of the Court approved of this. It was presented to them in the draft.

CHAIRMAN MITCHELL: If they make any change in our rule, we ought to get word to them pretty fast, then.

MR. TOLMAN: That is correct. I talked to the clerk about it, and he told me the only reason they were following exactly our rule was because they thought the practice should be the same in both courts, district and Supreme.

JUDGE DRIVER: How about the ten circuit courts?

MR. TOLMAN: If we changed ours, they would want to change theirs.

JUDGE DRIVER: There are ten circuit courts that have the same problem of substitution, and we can't control them.

MR. LEMANN: What do they do?

MR. TOLMAN: I don't think there is any circuit court that has a rule on the subject. Does yours, Judge Dobie?

JUDGE DOBIE: Not that I know of.

JUDGE CLARK: I don't think this is a circuit court rule. The circuit courts tend in this regard to try to follow district court rules. Of course, that is another question about

all this, because officially it applies only in the district court.

MR. LEMANN: If the Supreme Court thinks it proper to have a rule on the subject, why shouldn't your court have one?

MR. TOLMAN: That is the reason why I mentioned it.

JUDGE CLARK: There are two or three reasons which I think of, and the chiefest one of all is that this is distinctly a hot potato and I, for one, as a circuit judge don't want to pick it up.

CHAIRMAN MITCHELL: I don't think it is quite as hot as the question that we just passed on, serving subpoena and process all over the United States. I call that a hot potato.

JUDGE CLARK: In my capacity as a member of the Rules Committee, I am quite ready to tackle all these things. I was just talking about it as a circuit judge. I am very careful and restrained there, and I was in the Dioguardi case. I just gave the fellow the law as it was written.

CHAIRMAN MITCHELL: In order to make progress, suppose we vote on the proposed amendment to 6(b) on the theory that we are going to strike out the time limit in Rule 25. All in favor of the proposal on 6(b) on that ground say "aye"; opposed. It is carried.

JUDGE CLARK: All right, shall I go to the next one?

CHAIRMAN MITCHELL: The next one.

JUDGE CLARK: I am sorry to have to make you go back and forth, but time went on after our meeting and things happened. The next one is on page 6 of my March suggestion. That is a small correction which is needed in Rule 7(a).

You will see that that is a list of the pleadings. We have there "third-party complaint, if leave is given under Rule 14 to summon," and so forth. One of the proposed rules that we voted tentatively, as you will see as you look ahead a little under 4(d), was to take out that requirement of original permission for third-party complaint. Now no permission is sought initially. You can move to strike out the third-party complaint, and so on, but you don't get it in advance.

MR. LEMANN: I wondered as I read it, as a matter of English, why in the first line of (a) did we put in the original rule "and there shall be"? What does that phrase add?

JUDGE CLARK: I will have to go back over that.

MR. LEMANN: That is historical. That has always been in the rule.

JUDGE CLARK: That is the way it has been.

MR. LEMANN: I was wondering why. If we were going to amend it, you would paint the lily by taking those words out.

JUDGE CLARK: We have had to correct this once before. I will have to think back to get it right in mind, but as I remember it, before we had it, "and there shall be a reply if there is a counterclaim in the answer," and then there was a

lot of question as to whether, if the counterclaim was in the answer but the reply was not to the counterclaim, it was required. So we doctored it up in this fashion.

MR. LEMANN: These four words don't add anything, but they may have gotten in in the course of the debate, because you have a semicolon in the third line and a semicolon in the line before the last. I wondered why you weren't content with the semicolon in the first line and take out those four words.

JUDGE CLARK: Take out which words?

MR. LEMANN: The words "and there shall be" in line 1.

JUDGE CLARK: I see what you mean now. I suspect that when we made this change of the kind I put in, we were making it emphatic. I should think grammatically you are correct. I don't see any particular reason for it now. I just recall we did have to doctor this up once before.

MR. LEMANN: Yes, I remember that.

JUDGE CLARK: I don't see any reason why we should not take out "and there shall be" in the first line.

CHAIRMAN MITCHELL: You mean at the bottom of page 6?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: There are no such words.

JUDGE CLARK: Do you have page 6 of the March document? Monte thinks that is superfluous.

MR. LEMANN: It is hardly worth any more time, I should think.

DEAN MORGAN: I don't see any use in changing the rhetoric of the language of rules that are already here.

MR. LEMANN: I wouldn't think of doing it, but we are going to change the rule anyhow. I wouldn't stop on it.

JUDGE CLARK: This change depends upon the change proposed to Rule 14. If the change to Rule 14 stands up, this ought to be made.

JUDGE DOBIE: Do you want to take Rule 14 first? If we pass 14, this goes out mechanically, doesn't it?

JUDGE CLARK: That is on page 8.

CHAIRMAN MITCHELL: What is our problem here now?

JUDGE CLARK: In Rule 7 this was geared to the older practice of third-party complaint if leave is given under Rule 14 to summon. We are now taking out the initial requirement of leave, and therefore we ought to make this read as we have it here, "third-party complaint."

JUDGE DOBIE: If a person is not an original party.

MR. LEMANN: You have to make this change if you adopt the change in Rule 14(a).

JUDGE CLARK: Yes.

MR. LEMANN: I move we adopt this change.

MR. PRYOR: I second the motion.

CHAIRMAN MITCHELL: All in favor say "aye"; opposed. That is agreed to.

JUDGE CLARK: Rule 8(a)(2) is the note one, and we

took care of that by our previous discussion. Mr. Lemann is presumably to take care of that.

The next provision that I have for discussion is Rule 14. I think perhaps I ought to make a reference to Rule 11.

Mr. Tolman just a day or two ago sent around a letter from a New York lawyer about signing. Rule 11 is the one about signing by a lawyer, thereby guaranteeing that the pleading is filed in good faith, and so on. This lawyer wrote in and said he didn't see why associate counsel couldn't be allowed to sign.

CHAIRMAN MITCHELL: You don't need any rule for that, do you?

JUDGE CLARK: I was going to say I don't quite get the man. I don't know why he is as excited as he is.

CHAIRMAN MITCHELL: Half the pleadings in our office are signed by associate counsel.

JUDGE DOBIE: The firm is counsel for "X" corporation and now they want one of their counsel who is not a counsel of record, who is also an attorney for the corporation, to sign the papers.

JUDGE CLARK: It seems to me that, in the first place, he ought to be a member of the district court bar before he does any signing, anyhow.

PROFESSOR WRIGHT: This fellow stipulates that.

JUDGE CLARK: Second, why can't they take care of that themselves?

JUDGE DOBIE: The general counsel would sign this thing as attorney of record, and then he would go down to Florida and something comes up and he has turned the case over to one of his associates.

JUDGE CLARK: Why don't they both enter their appearance, then?

CHAIRMAN MITCHELL: Any member of my firm can sign a pleading on behalf of the firm when the firm appears as counsel. I don't see why we need any rule about the authority of lawyers.

JUDGE DOBIE: Brown, Jones, White, and Case, by J. W. Jones.

JUDGE CLARK: In these Department of Justice cases they have a dozen names.

JUDGE DOBIE: I don't think that is very vital, myself.

DEAN MORGAN: I don't think it is worth bothering about.

JUDGE DOBIE: I move we pass that by.

JUDGE CLARK: I didn't see much reason for it, but it came in.

JUDGE DOBIE: I am glad you brought it up.

JUDGE CLARK: You all saw it, probably.

CHAIRMAN MITCHELL: Yes.

JUDGE CLARK: I think that was the last thing that was sent out from Leland's office.

JUDGE DOBIE: That is right.

JUDGE CLARK: The next thing we come to is Rule 14. There are some nice questions of taste and choice there.

CHAIRMAN MITCHELL: That is on page 8 of your September report, is it?

JUDGE CLARK: Yes. Then we made some redraft on page 8 of my March draft, too.

CHAIRMAN MITCHELL: Which one do you want us to consider?

JUDGE CLARK: As a matter of fact, really I think I would rather have the shortest of all, which is the first alternative on page 8.

CHAIRMAN MITCHELL: They are both page 8. It happens that the same rule is dealt with on page 8 of the September report and page 8 of the March report. Which do you want us to follow?

JUDGE CLARK: There is a suggestion at the beginning. Mr. Pryor, you made a suggestion which I think I accepted. What was the question at the beginning, the first part of it?

MR. PRYOR: A change in language which doesn't change the rule. I thought you could improve the language of it by saying, "If at any time after service of process upon him, the defendant as a third-party plaintiff may cause to be served a summons of complaint upon a person not a party to the action who is or may be liable to such third-party plaintiff for all

or part of the plaintiff's claim against him . . ."

JUDGE CLARK: There is a further question that we get to below, which I think is a more extensive question. This question is the language with which we start out here. As I get the difference, I say here originally "At any time after service of process upon him a defendant may serve a summons and complaint . . ." I think the chief difficulty is you say the defendant "may cause to be served a summons and complaint," and so forth. Isn't that the difference in the beginning?

MR. PRYOR: Yes, that is at the beginning.

PROFESSOR MOORE: I should think it would be better to provide "At any time after commencement of the action" rather than "service of process," because you might have two or three defendants, one of them served, but all of them might want to join in a third-party complaint against "X".

CHAIRMAN MITCHELL: The one who filed the complaint should do it whether he served anybody or not.

PROFESSOR MOORE: If the defendant wanted to he would thereby enter his appearance, and the plaintiff wouldn't have to bother serving him.

JUDGE DOBIE: Entering an appearance would have the same effect as service of process.

PROFESSOR MOORE: It has the same effect, yes.

JUDGE DOBIE: Do you think that ought to be put in?

DEAN MORGAN: The action is commenced under these

rules by the filing of the complaint.

JUDGE DOBIE: As we have it now it is "At any time after service of process . . ." You can't file this thing until process has been served on the man.

MR. LEMANN: The point is, why not permit it to be done sooner if the defendant wants to do it? Why not let him do it any time after commencement of the action? I move that Professor Moore's suggestion be adopted.

JUDGE DOBIE: What is the suggestion?

PROFESSOR MOORE: "At any time after commencement of the action" instead of "At any time after service of process".

JUDGE DOBIE: Would that be a general appearance? There is a defendant who hasn't been served. He is not in the case for purposes of entering a judgment against him. If he comes in and files a third-party complaint, that would be a general appearance, wouldn't it?

JUDGE CLARK: I would think so.

PROFESSOR MOORE: If he didn't do anything more, I would think so.

JUDGE CLARK: That is all right. Why shouldn't it be?

JUDGE DOBIE: I think that is the way it should be.

JUDGE CLARK: I think it might be a good thing to make this "after commencement of the action." A good deal of the time it might not make much difference, but it might occasionally when there are multiple parties.

JUDGE DOBIE: One might be served and the other one not. It would be an anomalous sort of situation. He sues Professor Moore and me. He serves Professor Moore and not me. Moore can file a third-party complaint and I can't.

CHAIRMAN MITCHELL: I take it the sense of the Committee is that Rule 14 be initially amended by saying, "At any time after commencement of the action a defendant may serve a summons and complaint as a third-party plaintiff," and so on. Is that agreeable? Is there any objection?

That is agreed to, Charlie.

JUDGE CLARK: How about the other language in this? Mr. Pryor suggested "may cause to be served" rather than "serve".

MR. LEMANN: I don't think he made a point of that.

MR. PRYOR: I was just transposing some of the language there: "as a third-party plaintiff may cause to be served," rather than "serve a summons and complaint as a third-party plaintiff."

MR. LEMANN: I think "serve" would be better than "cause to be served." Isn't that more consistent with what we have done in other places?

MR. PRYOR: I wasn't making a point of that.

MR. LEMANN: I didn't think you had that in mind.

JUDGE CLARK: You want, Mr. Pryor, to move up the "third-party"?

MR. PRYOR: That is the subject. "As a third-party plaintiff may serve a summons and complaint."

JUDGE CLARK: I think that is all right.

CHAIRMAN MITCHELL: What about the next paragraph?

JUDGE CLARK: The other paragraph is fairly important.

CHAIRMAN MITCHELL: You mean the one which reads, "Add before the last sentence of Rule 14(a)," on page 8 of the September report?

JUDGE CLARK: Yes. I have given two alternatives. The first one is the fairly simple one which provides to put in before the last sentence of 14(a) simply this:

"Any party may move for severance or separate trial of the third-party claim in accordance with the provisions of Rules 21 and 42(b); and the court may direct a final judgment upon either the original claim or the third-party claim alone in accordance with the provisions of Rule 54(b)."

That is a sort of general enabling provision. I should think on the whole that that might be implied, anyway, but it ought to be made clear so there could be no doubt about it.

Then it will be followed by the last sentence of the existing rule, which is that, "A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant."

The alternative is to make a considerable specification as is done in Rule 14(c). That is a language which was taken from the New York Civil Practice Act, the new rule there. As I say here, this was tentatively adopted with the understanding that at the next meeting the committee will take another look at it to consider whether any language is needed at all, and if so, whether the language of Mr. Mitchell might be sufficient. The title has been added, and so forth.

Then I say here: Further study has led the Reporter to propose and urge the first alternative here set forth as more concise and better adapted to our purpose. It follows the form of the amended rule as to counterclaims, and so on, rather than this longer protestation, so to speak, of what the court may do.

Mr. Pryor has suggested a modified form.

CHAIRMAN MITCHELL: Are you talking about the September report now?

JUDGE CLARK: I have been talking about the September report up to this moment. This is page 8. I am now about to shift to the March report by bringing in Mr. Pryor's suggestion, which is contained in the March report. You will see it given on page 8. That is the inclusion of another sentence in addition to this proposal that I made. That other sentence appearing on page 8 of the March report is this:

"A motion to dismiss a third-party complaint, without prejudice to the bringing of another action, may be made after

the third-party defendant has appeared in the action by the plaintiff or the third-party defendant upon notice to all the parties who have appeared."

JUDGE DOBIE: That is not entirely clear to me, Charlie. ". . . may be made after the third-party defendant has appeared in the action by the plaintiff . . ." Does "by the plaintiff" qualify the "action"?

JUDGE CLARK: The motion.

JUDGE DOBIE: The motion by the plaintiff?

JUDGE CLARK: The plaintiff or the third-party defendant may move to dismiss.

Mr. Lemann, as I understand it, has suggested that this might all be covered by putting this in the original sentence, subject to the provisions of Rule 12, I think it was, which contains the motion to dismiss, and so on.

I am inclined to suggest that I wonder if either one of these is really necessary. It seems to me it would be a bit cumbersome, and so on. I should suppose that motions to dismiss are well known anyway, and it wouldn't be necessary.

I take it there are literally about four proposals of form. They are all intended to reach the same result, but there are literally four proposals of form.

The first is the one that I am inclined to suggest, myself, on the ground that nothing more is necessary and the lily need not be gilded. It would be simply that one sentence

on page 8 of the September draft.

The second is a suggestion of Mr. Lemann's which would insert a provision subject to the provisions of Rule 12 -- I am not sure I am quoting you correctly because I don't have your letters on the table here and it isn't ingrained in my vision at the moment. It is to include a short modifying clause.

MR. LEMANN: I was addressing my suggestion to the possibility of adopting the second alternative. If we adopt the first alternative in the September draft, page 8, and adopt the amendment suggested by Mr. Pryor, on page 8 of the later draft, that would cover my point, because he covered a motion to dismiss. What was troubling me with your longer alternative at the bottom of page 8 was that I did not think it covered the situation of a motion to dismiss.

JUDGE CLARK: I see. I was going to say other alternatives are Mr. Pryor's suggestion, which is to cover this by a sentence, and finally the one which was brought up before, this long, somewhat involved thing from New York.

Possibly since I don't urge that, and I guess no one else does, we could eliminate the long New York one, because I think that is too much and perhaps too little, too. In any event, it is more protestation than we need. Possibly we could sharpen the issue by having it come down to the point, do you think that Mr. Pryor's language here is necessary? I am not quite sure it is.

MR. LEMANN: It really is now suggested that either we adopt our language on page 8 as sufficient, the first language --

PROFESSOR MOORE: Of what draft?

CHAIRMAN MITCHELL: You keep referring to page 8, and there are two drafts. I have to go from one to the other, and I can't tell which one you refer to.

MR. LEMANN: The original draft, page 8. That is your language to cover it by adding before the last sentence of Rule 14(a) the language that you propose at the middle of the page. Is that right?

JUDGE CLARK: That is right.

MR. LEMANN: Mr. Pryor suggests in your second summary, March, that you use that but add a sentence covering motion to dismiss.

MR. PRYOR: At the end of 14(a).

MR. LEMANN: His language would go in 14(a), too.

MR. PRYOR: No.

JUDGE CLARK: Yes, I think that covers it.

MR. LEMANN: You don't think the addition suggested by Mr. Pryor is necessary?

JUDGE CLARK: Yes, that is it. I haven't any great objection to it. If it is thought that it would add much, I certainly should not object, because we are headed for the same thing, but I query if it isn't all understood anyway and

covered by the other rules, if we need to have it in, and if it doesn't add a certain amount of complexity to the whole thing.

PROFESSOR MOORE: You wouldn't have any provision for the plaintiff moving to dismiss the third-party complaint under your proposal, would you, Judge?

JUDGE CLARK: I didn't have it in so many words. You don't think he could? Why not? Can't anybody move to dismiss?

PROFESSOR WRIGHT: The plaintiff can't move to dismiss a claim against somebody else. I don't think he should be.

JUDGE CLARK: Of course, that is another answer; Can't he always move in any case where he ought to, and he ought not to be able to move when it doesn't affect him.

MR. LEMANN: If you stopped with your language in your September draft, is there anything to point up the right to move to dismiss?

JUDGE CLARK: Is there any reason --

MR. LEMANN: Is there any language that brings out to the bar the fact that a motion to dismiss is made? You have eliminated the necessity of getting an order to bring in a third party. One reason you have eliminated it, you say, is that it can always be dismissed. Am I right about this?

JUDGE CLARK: Yes, I think so. There isn't anything that tells the members of the bar to look over to Rule 12 and you read about motion to dismiss.

PROFESSOR MOORE: Rule 12 wouldn't authorize the

plaintiff to move to dismiss a third-party complaint.

DEAN PIRSIG: Doesn't Rule 21 --

CHAIRMAN MITCHELL: Rule 21 says, "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action . . ."

JUDGE CLARK: To raise the point directly, let me suggest that I do not believe that the plaintiff ought to have free right to move to dismiss. I don't see any objection to that general provision of adding or dropping parties which Mr. Mitchell was referring to. That is a matter of discretion of the court, anyway. The plaintiff might suggest to the court, "Don't you think it might be wise to drop," and so on. Why should a plaintiff out of hand, so to speak, be entitled to move to dismiss?

MR. LEMANN: What harm does it do? He won't get dismissal until the court passes on it.

JUDGE DOBIE: There would be confusion.

JUDGE CLARK: This motion is really like the old demurrer. It is Rule 12(b), you know.

CHAIRMAN MITCHELL: But we have a general rule about dismissals. Where is that?

PROFESSOR MOORE: Rule 41.

DEAN MORGAN: If the plaintiff can get a motion granted for separate trial or something of that sort, he won't have any interest in getting the third-party complaint dismissed,

will he?

JUDGE CLARK: Yes. Or at least he ought not to have any interest.

DEAN MORGAN: Don't you want a motion for a separate trial, or something of that sort?

JUDGE CLARK: If he has some interest, it is probably only a nuisance value.

DEAN MORGAN: If you didn't do that, otherwise he ought to have a right on the basis that it might tie up or delay the main demand.

MR. LEMANN: If you don't put it in plainly that the plaintiff may move to dismiss, somebody might think that only the third-party defendant could move to dismiss. I think it ought to be plain that the plaintiff could move to dismiss for the reasons that Eddie gives. Perhaps there are other reasons. That would have been explicit if we had taken 14(c) at the bottom of page 8 of your September draft, because it is very, very elaborately spelled out there.

Mr. Pryor's suggestion would really embody what is necessary out of that 14(c) and your proposed amendment to 14(a), and then you wouldn't need your 14(c), as I understand it.

MR. PRYOR: It seems to me it more logically should go in 14(a).

MR. LEMANN: I had one other suggestion as to whether the motion to dismiss might not be made at any time before the

third-party defendant has appeared in the action. The language of the proposal now says that you can move to dismiss after the third-party defendant has appeared. Why shouldn't you make it before? Why should you wait until he has appeared to make a motion to dismiss? That motion, if it is made by the plaintiff, is really almost directed against the original defendant who has made the third-party proceeding.

JUDGE CLARK: Let's go back a little and think about how we got where we are and possibly some of the policy involved.

This third-party practice was one of the good things that was done here and one of the new advances. We were going somewhat step by step. So we provided originally that you had to ask the court for permission, and it has been ruled in the cases that it was a matter of discretion in the courts. That is why at that time the third-party defendant, the man to be brought in, wasn't in the picture at all. The defendant would in effect ask the judge, "I want to cite in so-and-so," and the issue then would be between the plaintiff and the defendant. When we came to consider changes, I think we were going on the basis of two thoughts: First, to eliminate some extra formality along the line we have generally done, which is not to have this preliminary application to the court but to let the parties do what they want, and then it is only when somebody is harmed that they come in. It seems to me that we were going a little

beyond that and could properly go somewhat beyond it and say that this is not properly a matter that the plaintiff is vitally interested in, and that therefore the plaintiff well should not have these rights, that is, he should not be able to come in and say to the judge, "Don't consider this issue, no matter how real it is."

"Why?"

"Because I don't want it in."

Isn't his only interest just what he is saying? "I don't want it in because the trial is delayed." We are saying that he can ask for a separate trial. He can take care of any proper objections of that kind.

Shouldn't it therefore be shown that by and large the plaintiff ought not to have any say here except one that would see that his trial goes on?

MR. LEMANN: If you don't want a motion to dismiss, say so. Otherwise, nobody will know. Your last argument would lead to the conclusion that he should not have a right to make a motion to dismiss --

JUDGE CLARK: That is right.

MR. LEMANN: -- that he should be content with a separate trial. I think it ought to be made plain, either in the rule or in a note, that he is not to have any right to make a motion to dismiss. Otherwise, somebody is certainly going to try to move to dismiss, I think.

JUDGE DOBIE: It seems to me when bringing in the third party is obviously bad and improper, the plaintiff ought to have the right to bring it to the attention of the court. He has to give some reasons.

JUDGE CLARK: When would it be obviously bad?

JUDGE DOBIE: I will give you a little case I had in St. Louis. A big department store painted a big Baldwin sign on Washington Avenue. They hired an independent contractor to do it and the painter fell off the ladder and injured my client very severely as he was walking in the street. I could have sued both of them. I was pretty sure I would get a recovery. So I sued the department store, on the idea it was so dangerous that they could not escape liability by the independent contractor, and I got a recovery. I didn't want the contractors in there at all.

Of course, that is selfish in trial tactics, and the court could overrule it. I knew if I sued both of them they would give me a judgment against the contractors, who had nothing.

JUDGE CLARK: What argument would you make to the court, however? You could say, "I don't want this fellow in because it would be bad atmosphere," and so on, but I don't see that you have any real legal argument to give the judge.

JUDGE DOBIE: I don't think the judge would sustain it. Suppose it is obviously improper on its face, it shows

there is nothing to it, it is confusing the trial and adding issues, and there is no chance whatever of anything being done that will affect the third party, why shouldn't the plaintiff have a right to bring it to the attention of the court?

In the case I put, as you said, the court very properly overruled it and said, "We are not running this case for you."

JUDGE CLARK: That seems to me to be a very sound deduction.

PROFESSOR MOORE: Suppose the defendant waits until the eve of trial and then brings in a third party, I think the plaintiff ought to have a right to move for dismissal. The severance and separate trial is not quite the same. After the judge tries the plaintiff's claim, unless he issues a certificate, if the plaintiff loses, he cannot appeal. He is stuck until the third-party complaint is settled.

MR. LEMANN: It is the plaintiff's lawsuit, and I think he should have a chance to be heard about who is going to be in it. I grant you the judge may refuse the motion, but why not let the guy make a motion to dismiss?

JUDGE CLARK: Maybe this isn't too important. I just have the feeling that that gives a handle to a plaintiff a good share of the time to say he doesn't want these other fellows in.

JUDGE DOBIE: If he doesn't have a good reason, the judge will deny it.

JUDGE CLARK: That is another round of shadow-boxing and delay that goes on the motion calendar, and that postpones trial in New York two or three years.

Of course we have here, you see, that you can sever. You not only have separate trial but you can move for severance. If the plaintiff feels terribly upset about it, he will move to sever the whole thing and have two cases go forward from then on.

MR. LEMANN: I move we adopt the suggestion in the March draft, page 8, in the middle, to add before the last sentence of Rule 14(a): Strike out the words "after the third-party defendant has appeared in the action," so that that sentence will read:

"A motion to dismiss a third-party complaint, without prejudice to the bringing of another action, may be made by the plaintiff or the third-party defendant upon notice to all the parties who have appeared."

CHAIRMAN MITCHELL: Any further discussion?

PROFESSOR MOORE: There is an implication that the third-party defendant can't move to dismiss with prejudice. You don't want that in there.

DEAN MORGAN: I don't see why you shouldn't provide that the third-party defendant may move for dismissal under Rulr 41 and quit.

MR. LEMANN: I think you should say "by the plaintiff

or the third-party defendant."

DEAN MORGAN: The plaintiff or third-party defendant. That is all you need.

MR. DODGE: The plaintiff or third-party defendant may file a motion to dismiss under Rule 41. Is that your idea?

MR. LEMANN: We are talking about the original plaintiff. The original plaintiff may file a motion.

DEAN MORGAN: Sure. Why don't you say "any party may move for dismissal under Rule 41," and quit?

CHAIRMAN MITCHELL: Rule 41 talks about failure to comply with the rules.

MR. TOLMAN: Rule 41 already says the rule applies to the dismissal of a counterclaim or third-party claim.

MR. LEMANN: You could put that last sentence in a note referring to Rule 41. That might help it. Of course, the third-party plaintiff will hardly make a motion to dismiss his own third-party complaint. The only people who would make the motion, I would think, would be the original plaintiff or the third-party defendant.

MR. PRYOR: Rule 41(c) takes care of that. In view of what is said in 41(c), why do you need to say anything more?

DEAN PIRSIG: That deals with a different situation. We have been talking about the motion to dismiss under Rule 12 for insufficiency of the third-party complaint. Rule 41 deals with other matters than that. What is suggested here doesn't

seem to indicate which it is or whether it is both.

PROFESSOR MOORE: I don't think Rule 41 covers the case we have here.

CHAIRMAN MITCHELL: It says for failure to comply with the rules.

JUDGE DRIVER: Rule 41 applies to motions for dismissal by a defendant. I do not know whether that would cover third-party action or not.

JUDGE CLARK: I should think, if you really want to cover this, that that last sentence should be limited to the plaintiff like this:

"A motion to dismiss a third-party complaint, without prejudice to the bringing of another action, may be made by the plaintiff upon notice to all the parties who have appeared."

I suppose it would always be clear that the new defendant, the third-party defendant, can defend under these rules completely, anything, including Rule 12(b). You want to make sure that the plaintiff has this special right. Therefore, all you need to talk about here is the plaintiff, as I have just indicated by the phrasing I gave you.

Why do you need to say anything about the third-party defendant? If you start talking about him, ought you not to say that he can do all sorts of things? He could move under 12(b), he could move under 56, and he could do all these other various things, too. I suppose that would be clear. He always

can do that. He is in there, and he has to defend as best he can.

MR. LEMANN: How would it do, then, to adopt the language on page 8, the middle of page 8 of the March draft, but just changing the last sentence to read, "The plaintiff may file a motion to dismiss the third party complaint pursuant to the provisions of Rule 41," and add in a note that of course the third-party defendant has all the defenses and procedure open to him.

PROFESSOR MOORE: Mr. Lemann, I don't think Rule 41 hits all these things.

MR. PRYOR: Rule 41(c)?

PROFESSOR MOORE: Rule 41(c) merely refers you to other provisions. You look at 41(b), involuntary dismissal, and that will not hit the case.

CHAIRMAN MITCHELL: That is failure to comply with the rules.

MR. LEMANN: Then cut out the reference to 41, if that will save the discussion.

JUDGE CLARK: Let me add one further thought, Monte. Your care for the third-party defendant I think is already taken care of in the rule itself, because we are leaving the provision now in the rule which goes something like this: "If the summons and complaint are served," and so on,"the person who is served, hereinafter called the third-party defendant,

shall make its defenses to the third-party plaintiff's claim as provided in Rule 12 and its counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has," and so on. Doesn't that fully take care --

MR. LEMANN: I suggested lastly that I didn't think we needed to put anything in this rule about the third party defendant. I only suggested maybe in a note you could call attention to what you have just read. If we limit this rule to what the plaintiff claims, I was thinking that other parts of Rule 41, not (c), might cover it, but why not omit any reference to 41 and say the plaintiff may file a motion to dismiss the third-party complaint, and then in a note say that of course the third-party defendant can do it, because he can do a lot of things.

JUDGE CLARK: I do think that is all that is necessary. If you want to make it clear that the original plaintiff can drop a monkey wrench in the proceedings, just put in Monte's sentence. I think that is all you need, the final sentence, the one he just gave you.

MR. LEMANN: I would personally be disposed to use the balance of the material appearing in the middle of page 8, which I understand is Mr. Pryor's suggestion.

JUDGE CLARK: I am sorry, I didn't get what you said.

MR. LEMANN: To use the other material appearing in the middle of page 8 of the March draft, which is perhaps unnecessary but it makes it plain to the profession.

JUDGE DRIVER: On this motion to dismiss by the plaintiff, why not just say in the last paragraph of this underlined material on page 8 of the March 15 draft, "A motion to dismiss a third-party complaint may be made by the plaintiff."

MR. LEMANN: That is right.

DEAN PIRSIG: Would that include all the grounds of 12(b), namely, lack of jurisdiction over the subject matter, lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, failure to state a claim, failure to join an indispensable party? It seems to me that to enable the plaintiff to bring all those grounds up with respect to a claim between a defendant and a third-party defendant is going to get us in all kinds of trouble.

JUDGE DOBIE: Why not leave that to the court? If the ground is something that has no basis, no substantial reason, the court of course would deny it.

DEAN PIRSIG: If you are going to give him this new right, it seems to me you ought to specify the grounds on which he can bring his motion. Those grounds are designed to be raised by a defendant with respect to a complaint that has been asserted against him. Now you are dealing with a plaintiff who is not a party, really, to this claim and its answer, but who

may be affected, presumably, one way or the other by the presence of that claim.

It seems to me you have to start from the beginning and decide what grounds you are going to give the plaintiff in order to interfere. I don't think you can use the grounds that are specified in 12(b).

MR. LEMANN: The proposal does not refer to any particular rule and leave that open. The way the thing now stands, I take it, if a defendant wants to bring in a third-party defendant, he has to go to court with a motion. The plaintiff has to be notified.

JUDGE CLARK: That is right.

MR. LEMANN: The plaintiff can say, "You shouldn't do it." He gets a chance to be heard. Now we are cutting that out. We are saying that the defendant can bring in a third-party defendant without asking leave and without the plaintiff having anything to say about it. I take it that everybody, including the Reporter, thinks the plaintiff ought to have an opportunity, if he has any good grounds, to come in and say, "Set it aside. Don't bring this fellow in."

All we are trying to do is to find a way to make it plain that he has that right. I understood the Reporter to think it was plain enough that we need not say anything about it. The plaintiff should have a chance to come in and by motion make the same kind of objections that he could under

our present rule make to begin with before the order is sent out.

MR. PRYOR: He would have to make the same kind of showing that would have to be made before in order to prevent the court from granting the motion.

MR. LEMANN: That is right. We haven't spelled it out now, and I wouldn't think we would have to spell it out in the amendment if we made it plain that he had a right to move to dismiss.

JUDGE CLARK: I don't want to be pernickety about this, but when you said "including the Reporter," I am afraid you didn't get my thought. You would have to take that out.

MR. LEMANN: Strike it out.

JUDGE CLARK: I will stick by the question that I put on page 8 of the March draft. I said what purpose can be served by dismissal without prejudice that is not served equally by severance or order for a separate trial? I think Dean Pirsig had a little malice here. If he didn't have, he should have had, because when he was asking you to specify the grounds, I concurred with him, because as soon as you start specifying the grounds it seems to me you will see you have none.

PROFESSOR MOORE: We have one.

MR. LEMANN: That leads to the conclusion the plaintiff would never have a ground.

JUDGE CLARK: The only one you suggested was delaying

the trial. It seems to me that severance or separate trial is a perfect answer in that case, and that is the only one which is possibly suggested here.

PROFESSOR MOORE: Does 54(b) apply to the severed claim?

JUDGE CLARK: Why not?

PROFESSOR MOORE: If it does, then I think the plaintiff has a right to say, "I don't want a third-party defendant brought in here on the eve of trial," and have to depend upon discretion of the court as to whether he would issue the certificate for appeal.

JUDGE CLARK: Of course, Judge Dobie suggested another reason, and that is that the plaintiff may be harmed by the atmosphere, but that is not a rule that you can put down.

JUDGE DOBIE: I don't think that is a good ground. In Missouri where they brought that suit, they didn't have third-party practice. They never heard of it there. It might confuse the issues and not accomplish any purpose. If it doesn't accomplish any purpose he just confuses the issue. Why shouldn't the plaintiff have a right to bring it to the attention of the court? I think the grounds would be very few and it won't be very often that it will come up. I still think he ought to have the power.

DEAN PIRSIG: It seems to me all those considerations would be relevant to a motion to sever, and if it were a case

where a plaintiff would be prejudiced by delay incident to the bringing in of a third party, appealing, and so on, under 54(b), that again could be addressed to the discretion of the judge. I understand a certificate would be made by the judge which would permit an appeal.

PROFESSOR MOORE: Suppose he will not make it, though.

DEAN PIRSIG: I don't think you can provide by rule for all the arbitrary judges.

PROFESSOR MOORE: Does 54(b) apply to the severed claim?

JUDGE CLARK: I syould say yes.

CHAIRMAN MITCHELL: You mean the one for multiple judgment?

PROFESSOR MOORE: Yes.

DEAN MORGAN: Why not say, "The motion to dismiss the third-party claim may be made by any party to the action," and let it go at that?

JUDGE CLARK: On any ground.

MR. DODGE: What was the question you put?

PROFESSOR MOORE: I have been wondering whether, if a claim is severed, 54(b) applies to it, so if the judge renders a judgment which is otherwise final as to one claim, whether that is appealable without the certificate.

JUDGE CLARK: I was going to say, Bill, I am not sure that I answered your question correctly. I think after you have

severed the claim, then I would admit that 54(b) doesn't cover. After the severance has been granted, yes, because then I take it you have two actions. I take it that is what severance means. You now have split the case off and you really have two actions. Then I would say on that specific point that thereafter they go as separate cases. I guess that is what "severance" means, isn't it?

PROFESSOR MOORE: I would think so. If the court gave a severance, then I suppose the plaintiff would have a very hard time to show any prejudice from delay, but he might well have if all the court did was order separate trial.

JUDGE CLARK: Is that anything more than that the judge has made a mistake or has abused his discretion or has just been damned harsh? It seems to me that should be coming up under these rules. If he doesn't do the right thing, what are courts of appeal for, if anything?

PROFESSOR MOORE: When you have an express provision saying that a plaintiff may move to have a third-party complaint dismissed, then that doesn't direct the court's attention to the fact that once the motion is made, perhaps in this case there is going to be undue delay and prejudice, the third-party complaint being filed very late in the action, the judge would then dismiss it.

JUDGE CLARK: It seems to me that that is practically an open invitation to the judge, therefore, to be unduly

plaintiff-minded.

PROFESSOR MOORE: I think he would be a little plaintiff-minded if the defendant sits by until just on the eve of trial to bring in a third-party defendant, except where there is some good reason that he can put his finger on.

MR. PRYOR: The rule isn't limited to that case, though, on the eve of trial.

DEAN MORGAN: Your contention is just what I said, a motion to dismiss, with or without prejudice, could be made by any party to the action to dismiss the third-party complaint.

PROFESSOR MOORE: I think the plaintiff ought to be able to move to have the third-party complaint dismissed with prejudice.

DEAN MORGAN: With or without prejudice?

PROFESSOR MOORE: Without, yes.

DEAN MORGAN: With or without prejudice. Just put it on the same basis as any other motion to dismiss, and say so, and quit.

CHAIRMAN MITCHELL: I wonder how the plaintiff would show a prejudice --

DEAN MORGAN: Take Bill's motion. This third-party fellow comes in very late, and the plaintiff says, "I want the whole thing thrown out."

CHAIRMAN MITCHELL: That doesn't mean with prejudice. Even though he is improperly in the case, and he gets thrown

out, he will never bring another one against anybody.

DEAN MORGAN: He may be thrown out without prejudice.

CHAIRMAN MITCHELL: It also gives the court power to dismiss with prejudice.

DEAN MORGAN: A motion to dismiss, with or without prejudice, may be made by any party." That is what I suggest.

MR. DODGE: The question is how the plaintiff can move.

DEAN MORGAN: He can move it. He can get turned down. There is nothing to prevent the court from turning him down if he says this is a foolish motion or there really isn't any reason. "I don't want this thing messed up at all at this late date." That is practically what he is saying.

Under our old practice the judge would not let him mess it up that way, probably, on a motion to be allowed to file a third-party claim.

CHAIRMAN MITCHELL: It doesn't hurt the plaintiff any if a third-party action is dismissed without prejudice.

DEAN MORGAN: Why not? Haven't you ever had that sort of thing done to you when you moved for directed verdict? I have. The judge will say, "I am not going to direct a verdict here, but I will dismiss without prejudice on your motion." I say, "I will take that instead."

CHAIRMAN MITCHELL: A motion to dismiss?

DEAN MORGAN: Instead of going on with this trial.

There is nothing to prevent it, is there, particularly if the rule specifically allows it?

CHAIRMAN MITCHELL: With prejudice?

DEAN MORGAN: In a case of that kind it would be an abuse of discretion to dismiss it with prejudice on a motion of the plaintiff.

CHAIRMAN MITCHELL: I cannot understand what possible ground the plaintiff would have for claiming dismissal with prejudice. What the devil does he care whether the suit is brought again?

DEAN MORGAN: I suppose the plaintiff would have an awfully hard time to show any grounds for dismissing with prejudice.

CHAIRMAN MITCHELL: If you say in the rule he can do it with prejudice, you are still leaving the court the discretion.

DEAN MORGAN: Then that is an abuse of discretion.

MR. LEMANN: How can you say any party can move to dismiss? How can the defendant, who has filed the third-party complaint, move to dismiss his own complaint? I suppose he could if he wanted to quit.

DEAN MORGAN: Why not?

MR. LEMANN: It doesn't make much sense.

DEAN MORGAN: I have heard a federal judge before these rules say, "If you want to dismiss with prejudice, all

right, but I won't dismiss it without prejudice." I don't see that this is anything beyond the power of the court, and if you want to put this so the court can do whatever ought to be done under the circumstances on a motion for dismissal, I don't see why you shouldn't say so.

I don't see why you ought to try to spell out the kind of decision a trial judge ought to make in situations that we cannot anticipate. Bill here has been bringing up one after another.

PROFESSOR MOORE: I think they all come down to undue delay and prejudice.

DEAN MORGAN: It may, and dismissal may get it out of the way.

CHAIRMAN MITCHELL: Why do you have to say anything about prejudice in this?

DEAN MORGAN: I suggest it is all taken care of by the severance, and you say, no, it isn't. I say if it isn't, here is a very short sentence that will take care of the whole works.

JUDGE DOBIE: Give it to any party?

DEAN PIRSIG: The severance doesn't do it only because of 54(b). It seems to me the problem there is no different than any other problem under 54(b). You are appealing to the judge for a certificate.

DEAN MORGAN: It isn't a complaint you are dismissing;

it is a claim. I suppose, isn't it?

DEAN PIRSIG: You might have a claim here which ought very much to be tried, and yet ought not to stay in the action. Severance would take care of that.

JUDGE CLARK: Of course, if you said nothing here at all, I think the district judges, since they have plenty of power, would do whatever is necessary. I think by putting in this protestation of one kind or another, you are making an invitation that for the most part can never amount to anything. I don't see why it wouldn't be better to leave it out and let the general rules take their course.

MR. DODGE: You propose to put in your clause on the middle of page 8 of the September draft, don't you?

JUDGE CLARK: In any event, yes. I think that is all agreed.

MR. DODGE: You put in the words "for dismissal or" in that sentence; "for dismissal or for separate trial in accordance with the provisions of Rule 42(b)."

JUDGE CLARK: That is, of course, if you want to have any power to do it.

MR. LEMANN: Does the judge have the power or not? Do you want to have the judges stew over it? Do you want them to have the power or not? Stand up and vote. If you just say, "Leave it to the judge," you may give him the power or may not. Do you want him to have the power or don't you?

JUDGE CLARK: I don't want the district judge to have the power to dismiss merely on the say-so of the plaintiff. I am willing to have him sever or order separate trials, and so forth, but --

MR. LEMANN: You want him to have power to dismiss it on motion for failure to state grounds that satisfy the judge it is well taken.

JUDGE CLARK: O.K.

JUDGE DOBIE: I think it should be couched in general terms, or leave it out with the idea that if it is left out, normally the judge would have that power. The situations in which it would be granted at the instance of the plaintiff are very rare. The judge would just deny it.

MR. LEMANN: How would it do to take Mr. Dodge's suggestion and make a slight change? I go back to the draft of September. This is the Reporter's language in the middle of the page: "Any party may move for severance or separate trial," and then insert "or dismissal," "of the third-party claim in accordance with the provisions of Rules 21 and 42," leave out the "(b)", and then go on to the end.

PROFESSOR MOORE: Do you think Rule 21 hits that?

MR. DODGE: I don't think 21 has anything to do with this.

MR. LEMANN: You think 21 ought to be out altogether? I hadn't thought of that.

DEAN MORGAN: Why do you need the "in accordance with"?

MR. LEMANN: Take out "in accordance with". It is superfluous. Make it: "Any party may move for severance or separate trial or dismissal of the third-party claim; and the court may direct a final judgment upon either the original claim or the third-party claim alone in accordance with the provisions of Rule 54(b)."

If you move it, I will second it.

DEAN MORGAN: I move it.

JUDGE DOBIE: I second it.

CHAIRMAN MITCHELL: What is the motion now.

MR. LEMANN: You have language in the September draft at the middle of the page. We would adopt that as an addition in the last sentence of Rule 14(a) in the following language:

"Any party may move for severance or separate trial or dismissal of the third-party claim; and the court may direct a final judgment upon either the original claim or the third-party claim alone in accordance with the provisions of Rule 54(b)."

CHAIRMAN MITCHELL: All in favor of that say "aye"; opposed. It is agreed to.

JUDGE CLARK: I think that covers 14, doesn't it, unless somebody has something more. That means automatically that the longer suggestion for (c) is out, and this is the provision.

If there is no further question, we will go on to Rule 15(d) at the top of page 11 of the September draft, Supplemental Pleadings.

This is to insert the words about filing a supplemental pleading, "whether or not the original pleading is defective in its statement of the claim for relief." This language, which was developed by Professor Morgan, Judge Dobie, and Mr. Pryor, seems not to have been voted upon explicitly, although it appears later to have been accepted, at least in substance.

The background of that is indicated in the note. It was presented to the Committee by my May report, which discussed these various cases. There has grown some view, which it seems to me is a gloss upon the rule, to the effect that a supplemental complaint is proper only where the original complaint stated a claim upon which relief could be granted. Thus, where parties were before the court on a defective complaint, it has been held necessary to dismiss their action and make them start all over again, even though events occurring after commencement of the action have made clear the right to judicial relief.

In that first case, Bonner v. Elizabeth Arden, Inc., there was an action for declaratory judgment of patent infringement. That was a suit, not by the patent owner, but by the opposite party to have it declared that the patent was not

valid and there could be no claim made under it.

That was thrown out on the ground that there had been no claims made and therefore the case was not right for declaratory judgment. Actually it appeared that after the action was brought, claims were made extensively in the trade. My colleagues held there that there should have been enough ground to have held the declaratory judgment action correct, but they went on to say that the grounds had to exist at the beginning of the suit.

That case has gone back and the district court has made a ruling which appears in the Federal Rules Service, saying that he will now have an inquiry as to the nature of the demands made before the action was brought, to determine whether they are sufficient to support the declaratory judgment.

I don't know how long they will keep it up on that basis, and I suggest the whole thing is very silly because of the fact, admittedly at the present time, that the defendant has made all the demands necessary to sustain the jurisdiction. They are back, so to speak, shadowboxing about a state of affairs that has not completely changed. There seems to be no basis.

I may say that I got the wrong case. I said it was the Bonner case. It is not. It is Technical Tape Corp. v. Minnesota Mining.

As I suggest here, such a distinction and the rule-

gloss from which it stems have been criticized by commentators, 3 Moore's Federal Practice, a commentary in the Federal Rules Service, and so on.

I said, seemingly it is not followed by other courts. The difficulty about these later cases, however, is that there is no clear discussion. In actions they seem not to have followed it, but there hasn't been any very definite ruling.

JUDGE DOBIE: If you do not have it, the man will have to dismiss and start all over again. That is not desirable, is it?

JUDGE CLARK: That is the whole thing.

CHAIRMAN MITCHELL: Why? Suppose you have a supplemental complaint in a case where the original complaint fails to state a claim upon which relief can be granted, is the supplemental complaint any different, really, than a supplemental amendment to the original?

JUDGE DOBIE: The only difference is that usually supplemental is something happening after the cause of action has commenced. If a man gets up a supplemental complaint, why throw it out and make him start all over again?

CHAIRMAN MITCHELL: He doesn't get the benefit that the statute of limitations may run against him, if he has to start all over again.

JUDGE CLARK: I see that in this situation under our original rule, where you have a pending suit and there isn't

any question about the pending suit, then you can supplement it by any new material. Thus, for example, I should assume that if you stated in your original suit two causes of action, one good and one bad, later on you could supplement either one of the causes of action because it was still pending.

This is a limitation which says that if they are all bad you cannot supplement. It seems to me there is no reason for that, and that it takes away a good measure of the intent of the rule, which is to take care of later developments.

MR. DODGE: Is the reason for it that the amendment or supplemental pleading does not cure the defect?

JUDGE CLARK: That isn't the point made in these cases.

MR. DODGE: These are all cases where the new pleading did cure the defect?

JUDGE DOBIE: That is right.

JUDGE CLARK: This goes somewhat on the basis that you cannot amend zero. That is, the original action is zero, and you can't amend zero.

JUDGE DOBIE: You can add to zero, though.

JUDGE CLARK: Yes, exactly. That states it completely. That is the whole thing in a nut shell. That is why I think that limitation is erroneous, because you can add to zero even if you cannot amend zero.

JUDGE DOBIE: I move that the words be added.

MR. DODGE: That wouldn't mean that the court could

not throw it out completely if the supplemental pleading had no bearing upon the original difficulty.

JUDGE CLARK: That is right.

Is that accepted?

MR. PRYOR: The language of the proposed rule itself does not have that effect.

MR. DODGE: It says the court may permit him.

MR. PRYOR: Yes.

JUDGE DOBIE: There is nothing compulsory about it. It just removes that restriction on the power of the judge.

CHAIRMAN MITCHELL: Do you get any kind of final result respecting the statute of limitations by this amendment?

JUDGE DOBIE: I think so.

DEAN PIRSIG: I recall having read cases which hold that a supplemental complaint will run from the date of the filing of the supplemental complaint or the service of the supplemental complaint as far as the statute of limitations is concerned. So you would not have it dating back to the original complaint for that purpose. It would be different from an amended complaint. Even an amended complaint has held that.

CHAIRMAN MITCHELL: It is the same action which has been pending since the time that the original complaint, defective or not, was filed. The fact that you didn't have a good case stated --

DEAN PIRSIG: It is considered from the point of the service of the supplemental complaint. That is when your cause of action begins to be complete. They have held that in a good many states with respect to amended complaints. If you amend after the statute of limitations has run, it will not date back, but there is conflict on that.

CHAIRMAN MITCHELL: I see.

JUDGE CLARK: You will notice what we say in the proposed note here. Maybe this note is too long, I don't know, but you see what we say in the proposed note on page 12. That is all note, you see. The last sentence:

"The claim stated in such a supplemental complaint may be met by all defenses to which it would have been subject if pleaded as an original complaint in a new action, and thus such substantive matters as that the claim stated in the supplemental pleading is barred by the statute of limitations are not affected by the amendment to the rule."

Is that too long a note, Monte?

MR. LEMANN: Are you going to cut out all the preceding part, all the cases cited? I should think you could do without those cases. I think if you contented yourself with what you just read, I would be happy, and I might concede to you a few lines from the preceding page.

CHAIRMAN MITCHELL: Charlie, you may proceed.

JUDGE CLARK: I think that is adopted, and we go on

to Rule 16, the next one, on page 12.

CHAIRMAN MITCHELL: That is in the fall report?

JUDGE CLARK: Yes.

This particular point came up originally in connection with the discovery rule. Under those you will see there has been quite a split in the cases as to whether you can get discovery of a list of witnesses. You can, as is directly provided in the rule, get discovery from the other side of names they have of people who know about the happening.

The distinction here is proposed witnesses at the trial. Some courts have said that that is asking too much, and other courts have said that it should be allowed.

Do you have immediately, Charlie, where we give the cases on that?

When we discussed it, the suggestion was made that this was the kind of thing that, instead of trying to treat it separately under discovery, we could treat here as a matter of settlement at pre-trial. Therefore, at that time we tentatively moved to expand subdivision (4), which now provides as one of the matters to be considered at pre-trial "The limitation of the number of expert witnesses."

Here are two alternatives that might cover this. The first is "The disclosure of the identity of witnesses expected to be called at the trial," and the other is "The exchange of lists of witnesses expected to be called at the trial."

I should think the first is preferable, and I understand that Mr. Pryor in his discussion supported that. As a matter of fact, the cases dealing with discovery are given in the note over on page 13.

CHAIRMAN MITCHELL: As I get it, the question is whether the party should be required to disclose only the names of material witnesses or whether he should go further and say in advance which ones of them he intends to call at the trial. Is that the point?

JUDGE CLARK: It is the latter. You can ask at least at pre-trial for the witnesses that you intend to call. The court may require the parties to exchange the names of witnesses they are going to call.

MR. LEMANN: I raise two questions. First, we require it by the language in the note, and we sort of take it back in the second case. You say, reading from your note on page 12, "It has been argued that a party should be allowed to find out from his opponent the names and addresses of witnesses . . ." That sounds as if you think it is only an argument and you don't have the right, although on the next page you say some courts have already said you have the right. I didn't think you wanted that implication.

The next question I raise is, if you should have the right, and some courts have held you have the right, why restrict it to pre-trial? Otherwise you would have to change some of

your language on discovery if you want to make it plain. You are going to change some of them, anyhow. That is not a very conclusive objection.

I can't see much point in restricting this only to pre-trial hearings if you are entitled to it.

MR. PRYOR: I thought we decided that at the last meeting.

JUDGE CLARK: Let me make several answers. First, on Monte's point about the note, I think there is a good deal in what he says. I am afraid we are carrying water on two shoulders and one foot. I think perhaps there is a little conflict in what we said. The fact of the matter is that that note correctly reflected an inner conflict, I am afraid. We weren't quite sure where the Committee was landing anyway.

I should say that the note ought to be shifted around to take one definite position. I am frank to say, as I urged when this came up, I think the power of discovery ought to apply there.

JUDGE DOBIE: It is discretionary with the judge, isn't it?

JUDGE CLARK: Yes. Initially we had some provision in with reference to discovery. In a moment, if necessary, I can look back to where we suggested it. It is somewhere in these papers before me. Without trying to stop, it would be that we were suggesting that it be definitely specified in one

of the discovery rules that you could get discovery of witnesses, in order to clear up this conflict which is certainly troubling the district courts.

As I understand the discussion, there was some division in the Committee and a good deal of what might be termed concern as to whether that might not be going too far, even though Committee Member Moore has urged it in his treatise. At any rate, it seemed perhaps a good middle ground, if I might say so, to put it in here and to put it in the power of the judge at pre-trial. I think that is the course it took.

My original suggestion, as I say, was that it be stated definitely in the discovery section, and then it came back.

MR. LEMANN: Suppose we promulgate this amendment, what is going to happen? Is somebody going to try to get it by discovery? Then is he going to be met with the statement, "Oh, no, you can get it from now on at pre-trial." Some district courts are going to say you can get it before pre-trial and some are going to say you can't.

MR. DODGE: It is a question of discovery, not of pre-trial. The pre-trial isn't an occasion for discovery. It is an occasion when the parties deal with the case as each one knows it, and the court tries to simplify the issues, limit the number of experts, and determine various other matters with reference to trial. But there is nothing about discovery in

Rule 16 as it now stands.

MR. PRYOR: On the contrary, in my experience the pre-trial conferences that I have been in in federal court resulted in the production of plats and photographs, for instance, which each party was going to introduce, and it seems to me that is wholly consonant with the idea of giving the names of witnesses that are to be used. It is right along the same line.

MR. LEMANN: In my district the judge will not hear of pre-trial unless they have had discovery before. They ask, "Have you used discovery? If not, go use it, and then we will have pre-trial."

MR. PRYOR: Meaning that we won't have any trial without pre-trial.

MR. LEMANN: We have it, too, but they want it preceded by discovery. We have the pre-trial after we have had discovery and the issues have been pretty well developed between the parties by the discovery procedure.

CHAIRMAN MITCHELL: Monte, is one question here whether one party should have the right to be told by the other what witnesses he is going to bring?

MR. LEMANN: That is the fundamental question. As I understand it, there are three schools of thought that can be stated. One is that you should not have that right -- period. That is sort of like a trade secret, the lawyer's work papers.

Two, he should have that right and he should be

entitled to get it by discovery.

Three, he shouldn't have the right to get it by discovery, but he should have the right to get it at a pre-trial conference, if the judge orders it.

Those are the three possibilities that, as I see it, are presented.

CHAIRMAN MITCHELL: If you do not get it, you find out from the other side who his witnesses are, who the people are, the names of those who know about the case. You are entitled to that.

MR. LEMANN: You are entitled to that now.

CHAIRMAN MITCHELL: If he isn't ordered to tell you which ones he is going to call, you ask to subpoena the whole lot yourself; is that it?

MR. LEMANN: The way it stands now, as I understand, by discovery you can ask the other fellow, "Who knows about this? Who were the witnesses to the accident?" I would assume that he wouldn't have any other witnesses unless he had somebody he found out about afterwards.

CHAIRMAN MITCHELL: I know, but the only way you can assure the attendance of the other fellow's witnesses is to subpoena them yourself.

MR. LEMANN: That is right.

CHAIRMAN MITCHELL: If you get an order requiring him to tell you who the witnesses are that he will produce, then

you are relieved from the subpoena. What happens if he tells you he is going to produce a fellow and he doesn't? Do you have to specify some penalty for that in the rule?

MR. LEMANN: I suppose that there are penalties that ‹ ld be invoked if he gave you false information in reply to the discovery.

CHAIRMAN MITCHELL: Not intentionally false. That would be fraud. But suppose he just simply isn't able to produce the man.

MR. LEMANN: If he doesn't produce them and you figure you have to have them, I suppose at the trial you could ask for a postponement and say, "I would have gotten this fellow, but he told me he was going to have him. So, Judge, I want to postpone this until I can get him." I would imagine that is what you would do.

MR. DODGE: Why isn't it enough to provide for this matter in the discovery provision? I never heard it suggested that you ought to get this kind of discovery in a pre-trial conference.

JUDGE CLARK: May I go back again into a little history. At our May meeting I recommended this as an addition to Rule 33. Rule 33 is the interrogatories section. You may ask for various things. The rule, you know, tells you when you may file them, and so on. I suggested that at the end of the rule we add this:

"A party may inquire as to the names of witnesses whom the adverse party plans to call at the trial, may also require that there be attached to the answer such of the documents specified in Rule 34," and so on.

That latter part, you see, we retained about attached documents, and so forth. The provision that I just read you, about inquiring as to the names of witnesses whom the adverse party plans to call at the trial, at that time we took out of there and suggested that it might go back to the pre-trial section.

Let me say that personally I think it is better in the discovery provision, and I myself would like to see it there. I suppose, however, there is something to be said for having it at pre-trial, the main idea there being, I suppose, that the judge has both parties before him and is going to treat them quite alike. Every question at pre-trial is that way. Therefore, you wouldn't run into the situation where one party is demanding a list of names and the other is hesitant to ask for it and may not have time to get it, and so forth. I presume having it in Rule 16 may lead to better equality.

To go back to the original proposition, it does seem to me that it is advantageous to ask the other fellow what he is going to do. It is no more than other parts of your getting his trial strategy. That is what you are getting. That is a

good share of the modern purpose of discovery, isn't it?

It seems to me that it is probably more important beyond the case of whether he is going to call witnesses and you won't have to. That is one part, but I don't believe that is the most important part. I believe the most important part is actually what it reveals of the strategy.

"Are you going to call Witness So-and-So to go into a whole line of attack on, say, hospital records or something of that kind?"

"No, I am not going to."

That goes out of the case. I don't think he needs that.

If, however, you are going to call such-and-such witness, if I have prepared my case, it shows that I have to meet your witness with some of my own. I expect, from the standpoint of trial tactics, that is really why you want to know.

MR. PRYOR: I thought this matter was fully discussed and decided at the last meeting. It may be that I am influenced somewhat by our Iowa practice. In Iowa we have very much the same rules as the federal rules. Our rule with reference to interrogatories expressly provides that the person answering interrogatories can not be required to give the names of witnesses. However, our practice in pre-trial procedure under a rule which is just like this, providing such other matters

as may aid in the disposition of the action, the court generally does ask about the witnesses. That is brought out, and I think it is better from the standpoint that Judge Clark has pointed out, because it is a matter that can be administered fairly as between the parties before the trial judge.

I am very much in favor of leaving it in the pre-trial procedure.

JUDGE DRIVER: Mr. Chairman, I think perhaps it should be considered that there are many districts where pre-trial conference is used. In many districts it is used only in some cases, selected cases. Of course, the answer to that might be that the judges should use it. In districts where a judge has to travel to hold court in different places widely scattered, and the lawyers sometimes come from a long distance, it isn't practical to make two trips to a place of holding court and to bring lawyers from a long distance to have pre-trial conference, and we dispense with it in many cases.

Under this rule, in order to get the names of witnesses there would have to be a pre-trial conference.

CHAIRMAN MITCHELL: You could make it in the alternative, couldn't you, stating that you can get the list of proposed witnesses by interrogatories or at the pre-trial conference, whichever they use? The fact that they did not have a pre-trial conference would be taken care of then by giving them the privilege of asking for this list in oral discovery

deposition or in interrogatories.

JUDGE DRIVER: I suppose one solution might be that there could be a pre-trial conference ordered for the sole purpose of disclosing witnesses, and that would be a very simple matter, but there is that situation. Mr. Tolman could give more information on that than I could, but there are a good many districts where pre-trial conferences are not used very much.

MR. TOLMAN: That is right. In some of the metropolitan districts, as a matter of fact, the judges just don't want to hold pre-trial conferences.

MR. LEMANN: Even in metropolitan districts? Of course, it is very difficult in rural districts.

MR. TOLMAN: In Baltimore, for instance, they never hold pre-trial at all.

JUDGE CLARK: Mr. Pryor, would you be willing to have them in both places, 33 and here?

MR. PRYOR: No, I don't want them in 33. I want them right where they are.

CHAIRMAN MITCHELL: Which is 33?

JUDGE CLARK: That is the interrogatories section.

JUDGE DRIVER: I haven't any objection to it under pre-trial, because I use pre-trial in most of my cases. Where the lawyers ask for it, I always grant it.

CHAIRMAN MITCHELL: You have to have it in interrogatories or discovery, or you don't get it. In a district like

Baltimore you wouldn't get it at all.

JUDGE DRIVER: It has just been assumed that it could not be done, and nobody has asked for it.

CHAIRMAN MITCHELL: The pre-trial conference usually takes place fairly near the trial, doesn't it, as against the deposition or interrogatories which might be submitted a year before? Don't you get more up-to-date information at the pre-trial conference than you would by interrogatories or depositions?

MR. TOLMAN: I think that varies, Mr. Mitchell. I think some pre-trials are held very close to the time of trial, and some of them are quite some period before.

CHAIRMAN MITCHELL: There are so many judges who do not hold them at all. It seems to me that once you admit that you are entitled to a list of the witnesses the other fellow proposes to produce as a vital matter to be settled, then you have to allow him to get that information by interrogatories or discovery depositions, unless you have pre-trial.

JUDGE DOBIE: I think it would be very unfortunate to take pre-trial away from the judge. As Mr. Dodge says, usually pre-trial is to shorten the issues, to narrow them, and things of that kind; but sometimes it does come up, and certainly I do not think you ought to take the power away from him. If there is any question about his having that power, I think he ought to have it. Of course, it is always discretionary.

CHAIRMAN MITCHELL: He ought to have it, because how can you really settle the issues without sort of settling who is going to be called as a witness.

JUDGE DOBIE: I happened to have read a paper before your conference on "Distinctive Aspects of Pre-Trial Conferences in Rural Districts." The United States District Court for the Western District of Virginia sits in seven different places, and sometimes the judge comes over there just shortly before the docket starts. He doesn't want to have to come over there to hear pre-trials. Then they very frequently are very close to the case.

I certainly think he ought to have the power. If there is any lack of clarity in the rule, I would give it to him.

MR. DODGE: This doesn't make it mandatory.

JUDGE DOBIE: It is always discretionary.

MR. DODGE: It is for consideration of limiting the number of expert witnesses and exchanging the list of witnesses.

MR. LEMANN: If we adopt this rule as now proposed and we don't say anything about items of discovery, what is the legal situation? Has he a right by discovery? The courts are divided. Have we by adoption of this amendment to the pre-trial rule said that we do not think he should have it by discovery, or have we indicated this is an additional remedy he should have, or where do we leave it? If a lawyer asks me

to deliver a lecture on this rule, what am I going to tell him?

CHAIRMAN MITCHELL: I think you will tell him the only way to deal with it intelligently is to make the rule so he can get it either way, in the discretion of the court.

JUDGE DOBIE. That is the way I think it ought to be.

JUDGE DRIVER: The language which is proposed on page 12 of the first draft, September draft, simply states, as an additional purpose for the calling of a pre-trial conference, the matter of disclosure of the identity of witnesses. It does not say that they must be disclosed or that they shall be, but the court would have power to, certainly. It is just another purpose for calling a conference.

MR. LEMANN: Then you have a note, Judge Driver, that says the courts are divided as to whether you can get it by discovery. You leave that up in the air if you don't do anything more. You do not tell the courts what to do. You don't say whether you are with the courts saying you can get it or whether you are with the courts that say you don't get it.

JUDGE DRIVER: That should be clarified.

MR. LEMANN: I think we ought to stand up and be counted if we are to help the bar and the courts.

CHAIRMAN MITCHELL: I don't see any reason at all for not having it so you could get it either way, in the discretion of the court in the circumstances of the case, whatever they are. If you can get it by pre-trial, certainly you ought

to be able to get it the other way if you want it. What is the difference?

MR. LEMANN: I think you ought to get it either way or not at all. If you are entitled to get it one way, you should be entitled to get it both ways or either way. The court could always control the right to get it by discovery by the rule against abuse.

CHAIRMAN MITCHELL: You have to adopt the witness and go into court, contempt proceedings, and what-not, and get the issue up that way.

JUDGE CLARK: I will say that it would seem to me that as now written, this probably does prevent any discovery. It makes it all pre-trial.

CHAIRMAN MITCHELL: Why?

JUDGE CLARK: Our note was a good deal geared that way because, after all, I am afraid that is what the Committee then was thinking. I do not think it should be done, but I am saying what was done and what the note means. It seems to me that the note is saying that and, unfortunately, that is what was meant then.

CHAIRMAN MITCHELL: You will entertain a motion to change both rules to make it clear you can get it either way, by discovery or pre-trial?

JUDGE CLARK: In the judge's discretion.

CHAIRMAN MITCHELL: Yes.

MR. LEMANN: I so move.

JUDGE DOBIE: I second that.

JUDGE CLARK: I think that is correct. I approve of that.

Let me say that the place where the others should come, I take it, is probably in Rule 33, which is covered by our page 34 of my September draft.

CHAIRMAN MITCHELL: It seems to me that we are not particularly interested in using the deposition discovery business for this purpose, because you have witnesses there. You do not care whether you have a witness or not. If you serve an interrogatory, it goes to the party and the party answers it.

Why can't you confine your thing to the interrogatories?

JUDGE CLARK: That is what I am doing. Page 34 deals only with Rule 33, which is Interrogatories. That is what I was intending to do.

JUDGE DRIVER: If it is to be available by discovery within the discretion of the court, how and when is the court to exercise his discretion? When you start to take a party's deposition and he refuses to answer, then they have to run back to the court and have the court pass upon the question of whether witnesses should be disclosed, and the same way with interrogatories. Under those rules there is no discretion. Unless there is abuse, it doesn't come before the court.

JUDGE CLARK: Judge Driver, I agree in general with that, but it is a question of what is the way to put this in without raising too much change in language, and so on.

MR. DODGE: I should like to be recorded against putting it into Rule 16.

CHAIRMAN MITCHELL: Pre-trial?

MR. DODGE: I don't think that is a discovery proposition at all there.

CHAIRMAN MITCHELL: I don't understand that, because you are producing documents, you are agreeing on them, and all that sort of thing. Isn't that discovery?

MR. DODGE: There is nothing in the rule about producing documents. You can get admissions of facts or documents. That is a different thing. I do not think discovery is contemplated by that rule at all. We have ample provisions elsewhere for regulating discovery.

MR. LEMANN: I agree with Mr. Dodge on that.

CHAIRMAN MITCHELL: Suppose you ask a fellow in a deposition or interrogatories, months before the trial, "What witnesses do you expect to produce?" and he tells you. Then weeks and months go by and there is a change of circumstances, or he changes his mind about his issues, or some of his witnesses are dead. What can you do about that?

MR. DODGE: The same situation often exists on pre-trials. Some of them are a long way in advance of the actual

trial.

CHAIRMAN MITCHELL: I suppose the first thing to do is to entertain a motion as to whether it is proper to get that information by either method, by both methods.

MR. DODGE: There are a lot of other controverted matters as to the extent to which discovery can go, confidential papers, and all that sort of thing. We are referring here to nothing at all of that character, except this one. I don't see why this one matter of the names of witnesses should be brought into the pre-trial rule.

CHAIRMAN MITCHELL: You would vote against it. What is the vote of the Committee? All those in favor of having the pre-trial system include answers with respect to the names of witnesses, raise their hands. That seems to be agreed to.

JUDGE CLARK: Of course, this may be a little premature, but since we are on this, can't we consider now what we would do as to discovery?

CHAIRMAN MITCHELL: Discovery of the names of proposed witnesses?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: That covers it. We just agreed to that. You have the rule, so you can get it either way.

JUDGE DOBIE: You have it both times.

JUDGE CLARK: May I ask which way either way, and may I present, therefore, two alternatives. One would be an

amendment to 26(b), and another would be an amendment to 33. Or, if you want, I will postpone it until we get to those rules, but we are talking about it.

MR. PRYOR: I think if you put the provision in the discovery rules, the question raised by Judge Driver as to when and how the court is to exercise his discretion should be worked out some way in the rule.

JUDGE CLARK: Let me indicate how I think the issue would come up, then. I suggested before as a part of Rule 33 a provision at the end of 33 which is nor practically covered by the addition that is suggested. On page 34 of my September draft, there at the end you see it says, "Interrogatories may require that there be attached to the answer copies," and so forth. You can add a provision there, "and lists of prospective witnesses at the trial." That is one possibility.

Judge Driver suggested that he thought it would be too bad to limit it, as I understood it, to just that provision. If it were going to be more general, it would seem to me it would have to come in 26(b), which is the part which deals with the scope of examination. That is a general provision that you probably all remember, that you can have discovery "whether it relates to the claim or defense of the examining party," and so on, "including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons

having knowledge of relevant facts." I should suppose if you were going to add that, you would do it right here: "and lists of prospective witnesses at the trial."

It seems to me that that is probably the issue if we are going to cover it in discovery. Would you put it generally in 26(b), or would you put it in interrogatories? I have no final or conclusive view on it. I thought that by putting it in interrogatories we would there put it in probably the most useful general way, and if it were in the interrogatories section and it ever did come up in 26(b), I don't suppose the judge then would refuse it. That is, I think that wherever we put it, if we put it in any discovery section, it is going to resolve the conflict in the district courts.

CHAIRMAN MITCHELL: Why couldn't you put it in both 26 and 33? They both cover in other respects much the same material already. You have a repetition.

JUDGE CLARK: That is all right. It could be done. The only possibility is that that might be making too much of a comparatively small thing.

CHAIRMAN MITCHELL: I think that is vital.

JUDGE DRIVER: I think you should bear in mind that in taking your deposition you are taking a deposition of a party or officer of the party, and not the attorney. Very often your party will not know who all is going to be called as witnesses. He would not be in a position to know. He might know who has

knowledge, but he wouldn't know who his attorney was going to call as witnesses when his deposition was taken.

CHAIRMAN MITCHELL: That is an argument in favor of putting it in pre-trial.

MR. LEMANN: It might be sufficient to put it in interrogatories. You can get it very easily with interrogatories and would not need to put it in 26(b). That would answer the Reporter's point not to make too much to-do about it by putting it in interrogatories, which was his original suggestion.

CHAIRMAN MITCHELL: According to Judge Driver's suggestion, it is obvious that interrogatories would be the appropriate place for it, because the deposition might be of a witness who didn't know anything about it.

I am wondering, while we are on this subject of pre-trial, not to divert you from your thought, do you have anything in the pre-trial provisions or elsewhere, that reflects in any way the treatment of these long-winded antitrust and patent cases? The thought I have in mind is that I read the report of the Prettyman Committee, and I got the impression that the probabilities are that a judge under our present rules would have authority to carry out practically everything they recommended.

On the other hand, my reaction was that maybe someone wouldn't think so. Are we contemplating putting something in

the pre-trial rule which will make it clear or suggest to the court at least that he has power to make all kinds of rules for simplification, limitation of documents, the extent of depositions, and anything he wants to which has to do with the interminable length of these Government cases and patent cases, too? Do you have anything of that kind?

JUDGE CLARK: There is nothing in now.

CHAIRMAN MITCHELL: I didn't mean to put you on the carpet as to what it was. I just wondered if you were going to take that up, because we are talking about pre-trial now.

JUDGE CLARK: We voted it down in May.

CHAIRMAN MITCHELL: We did, did we?

JUDGE CLARK: Yes. At the May meeting I recommended a new subdivision to be added to the initial ones, that is, 26(g). Rule 26 is this broad one at the beginning. This is what I suggested then:

"(g) Depositions and Discovery in Protracted Litigation. After the commencement of an action wherein the pre-trial and trial proceedings seem likely to be of a protracted nature, the presiding judge may enter an order for the direction and disposition of all matters therein requiring judicial action by and before a single designated judge. Thereafter the judge so designated shall hear and determine all issues requiring judicial action, including those arising on preliminary motions or at pre-trial conferences, and no proceedings under Rule 16

or 26 to 35, inclusive, shall be had except as he shall direct and permit."

As I understand it, I think we have the discussions, haven't we, of the May meeting here somewhere. Without going back to that, I think that the general line of discussion was that their power was already quite clear, and that it was undesirable on the whole to put in this definite specification.

CHAIRMAN MITCHELL: Then as an alternative to putting it in, you probably would add a note to the pre-trial rule stating that we did consider the subject and concluded that the courts now had authority under the existing rules to act on all the suggestions in the Prettyman Report, for example.

JUDGE CLARK: I guess we haven't covered that definitely.

CHAIRMAN MITCHELL: I didn't mean to interrupt the proceedings, but I was curious about it.

Let's pass on to the next rule.

JUDGE CLARK: I will say the fact that it was turned down last spring doesn't mean anything. We can bring it up again. I just wanted us to have in mind that it was considered then, and that is what we did about it.

DEAN PIRSIG: Mr. Chairman, Judge Clark's reading of that rule does suggest the possibility of adding a section to the pre-trial rule, Rule 16, authority to assign a case to a particular judge with appropriate provisions giving him the

authority to handle all matters subsequent thereto. That isn't spelled out in Rule 16. The language of Rule 16 does not contemplate that kind of problem, and it has to come under (6), I would suppose, "Such other matters as may aid in the disposition of the action."

If there were specific provision authorizing the assignment of a case to a particular judge, that is what you have in mind in your rule, is it not?

JUDGE CLARK: That is right. It is true that I did not bring it up in connection with pre-trial. I brought it up in connection with Rule 26.

CHAIRMAN MITCHELL: Let's go on in the regular order here.

JUDGE CLARK: This would properly come up here. If you want a provision in Rule 16, we should consider it now. It is worth considering, I think, without any question.

DEAN PIRSIG: It is very important.

CHAIRMAN MITCHELL: Do you think it would be desirable?

JUDGE DOBIE: The particular thing about your provision is that you designate a special judge, before you know which one is going to try it, to handle these pre-trial things.

JUDGE CLARK: You have to designate a judge to try it at the beginning so he can handle all that.

JUDGE DOBIE: The same judge?

JUDGE CLARK: Yes, the same judge. In fact, I take it that is the substantial basis of the Prettyman recommendations.

MR. TOLMAN: The Prettyman recommendation was that all antitrust cases, particularly in a multiple judge court, should be handled by one judge and not go through a calendar system which allows a motion here and there and pre-trial by somebody else.

MR. LEMANN: Is that within our purview?

MR. TOLMAN: I syould think so, although they didn't recommend any amendment to the rule. It was simply a recommendation to the judges, as I recall it.

MR. LEMANN: Hasn't the court in New York its own elaborate rules, and also the District of Columbia courts?

MR. TOLMAN: The District of Columbia and the Southern District of New York are the two rules where that peculiar breaking up of the case is possible because they have a central calendar system with various parties, trial parties and motion parties. A motion can come before one judge, and another judge, an entirely different judge, will handle another motion two weeks from then. So the case doesn't have any cohesion. It isn't handled all together.

JUDGE DOBIE: It wasn't limited to three-judge cases, was it?

MR. TOLMAN: No.

MR. LEMANN: Can we enter into that without getting

into their general organization?

CHAIRMAN MITCHELL: We don't have to interfere with it. We cannot prohibit or compel it, but we can at least state that he shall have power. I am speaking about this antitrust business and patent cases.

As I read the Prettyman Report, there were a lot of things there that I think on studying it you would agree the court can probably do already, but it stimulates them to do them if you say in a rule somewhere that he can do them.

Take our pre-trial rule. We didn't force that on any judge, and look at the way they have grabbed hold of it and are using it all over the country. There are other things that we have done in the rules that do not compel them to do things, but it suggests and stimulates them to do it.

I think it is a pity to have reports like the Prettyman Report put on the shelf and sort of forgotten, without saying something in the rule to stimulate the lower courts to do things along that line. That is my idea about it. I think I would agree that a court can do almost everything the Prettyman Committee suggested under the present rules.

Our time is slipping away from us, and I think we ought to go on.

DEAN PIRSIG: Mr. Chairman, to bring that matter to a head, I would like to move that a subdivision be added to Rule 16 preceding subdivision (6), in substance incorporating

the recommendations that have been read to us dealing with the assignment of cases to a particular judge, and that a note be added referring in appropriate manner to the Prettyman Report.

CHAIRMAN MITCHELL: Do you want to vote on that? I didn't mean to bring it up out of order.

MR. PRYOR: Will you read again, Judge Clark, your recommended addition to the rule?

JUDGE CLARK: I should think if we are going to put it in 16, we would want to shorten it a great deal. Nevertheless, this is the way I had it. Add a new subdivision (g) to Rule 26:

"Depositions and Discovery in Protracted Litigation. After the commencement of an action wherein the pre-trial and trial proceedings seem likely to be of a protracted nature, the presiding judge may enter an order for the direction and disposition of all matters therein requiring judicial action by and before a single designated judge. Thereafter the judge so designated shall hear and determine all issues requiring judicial action, including those arising on preliminary motions or at pre-trial conferences, and no proceedings under Rule 16 or 26 to 35, inclusive, shall be had except as he shall direct and permit."

MR. PRYOR: That would be to meet the motion of Dean Pirsig to be added as another thing to be considered at pre-trial.

JUDGE CLARK: That would be substantially (6), with the present (6) becoming (7). I should think it would be something like this:

"The designation of a single judge ot hear all pretrial and trial proceedings in cases which are likely to be of a protracted nature, with power thereafter to determine all issues requiring judicial action and to forbid any proceedings for discovery except as he shall direct and permit."

MR. PRYOR: I am persuaded by the statement of the Chairman to support that motion. I think we should give some attention to that report.

CHAIRMAN MITCHELL: I rather hesitate about putting anything in which is compulsory, that they must comply with it, because then if they don't, you get an error on appeal or something.

My idea is that we put it more gently, that the court has power to make all orders and take all actions that he thinks will lead to the expeditious disposition of those cases, and has power to direct that that action shall be handled by one judge.

MR. PRYOR: If it goes into Rule 16 and that rule starts out, "In any action, the court may in its discretion," and so forth, I think that will take care of it.

CHAIRMAN MITCHELL: I just remembered what he said about it. It sounded to me that if the judge didn't do exactly

what that rule said was required, then somebody would have an error on appeal.

PROFESSOR MOORE: Suppose you had a specially constituted district court, which you would have if the Attorney General filed a certificate of public importance.

CHAIRMAN MITCHELL: What about it? The pre-trial rule could be applied to that, couldn't it?

PROFESSOR MOORE: I am not sure that we can by rule provide for one judge handling all these matters.

CHAIRMAN MITCHELL: I see your point.

JUDGE DRIVER: You mean a three-judge court?

JUDGE DOBIE: You mean you think the statute requires three judges sitting?

PROFESSOR MOORE: The Code has a provision on that. It has some provision whereby a single judge can do certain things.

JUDGE DOBIE: And there are certain things he cannot do.

PROFESSOR MOORE: Yes.

JUDGE DOBIE: I know in connection with setting aside orders of the Interstate Commerce Commission -- I have sat in quite a flock of those -- temporary injunctions cannot be issued by one judge. All of them have to join in, and you may remember, Professor Moore, that they also have to state in great detail their reasons for it.

PROFESSOR MOORE: If one of them dies, you have to have a re-trial.

JUDGE DOBIE: That is right.

MR. LEMANN: You have to have three judges to enjoin a state statute. That is very common. We have three-judge courts I guess half a dozen times a year.

JUDGE CLARK: All you need on that is some apologizing words, "except as otherwise provided by statute," or something to that general effect.

MR. LEMANN: Would a note cover your point, Mr. Mitchell?

CHAIRMAN MITCHELL: I think it probably would. I think we ought to pay some attention to it. My files are full of communications from lawyers all over the country about this horrible waste of time in antitrust cases, thousands of exhibits, thousands of pages of depositions, and delay, and recommendations by the hundreds for altering the system. You could write a whole Code on the basis of the stuff I have in my office as to how to handle these cases.

It seems to me that it would be sufficient and very much better, instead of trying to tie him down, just to prod him a little and say, "You can do a lot of these things, if you want to, to reduce the time, labor, expense, and all that."

JUDGE DRIVER: I wouldn't want to state it positively, but certainly it is my impression that a single judge may hold

a pre-trial conference in a three-judge case. In the pre-trial conference the judge doesn't pass on any question of the merits or the demerits of any issue except upon voluntary agreement of the parties. So I think a single judge could hold a pre-trial conference.

I think that should be checked carefully, however, if no reservation is made.

MR. LEMANN: How would it do, is it worth considering, addressing a communication from the Committee to the Conference of Senior Circuit Judges, referring to the Prettyman Report, saying that it appears to us that most of these recommendations could be implemented under the present rule, and suggesting to the Conference that they initiate steps through their machinery to call that to the attention of the rule-making body.

CHAIRMAN MITCHELL: If we get this draft printed and distributed to all the judges, we can include a note, if you like, stating our idea is to stimulate the courts to take measures against this sort of thing, and get their reaction to that. We can get an answer in that way.

MR. TOLMAN: The Prettyman Committee was a committee of the Judicial Conference.

MR. LEMANN: What is the Judicial Conference doing about it, nothing?

MR. TOLMAN: The report is in two parts. One part of it dealt with the machinery of the court. The other part

dealt with procedure in administrative agencies. The part dealing with court procedure was approved by the Conference and ordered distributed to all the district judges and generally to the bar, with the idea that the suggestions which it contained should be followed in the conduct of a protracted case in court.

The other part of the report was made the subject of a special Presidential Commission of which Judge Prettyman is now chairman and which is now acting. I believe it has issued a preliminary report.

MR. LEMANN: I should think that this Prettyman Report, from what the Chairman has just said, is a matter that ought to come before these conferences that are held in each circuit throughout the country where the circuit judges get together with their district judges.

MR. TOLMAN: I believe it has been brought to the attention of all of them.

MR. LEMANN: They are the fellows who could implement it.

MR. TOLMAN: I think it has been called to the attention of all the conferences. I am almost certain it has. That was the direction of the Conference.

DEAN PIRSIG: If we should follow that effort up with a specific provision in our rule authorizing them to proceed in this manner, it seems to me that would be most desirable on the part of the total effort here. A note on the subject

doesn't have quite the same stature or impact on the judge. I would like to see it as part of the rule, myself. It could be softened, possibly.

MR. TOLMAN: I think the point about the three-judge court could be met, as Judge Clark said, by some reservation in language perhaps referring to the specific statute providing for three-judge courts.

JUDGE CLARK: I should like to raise one question about the notes. The notes may well over the years have changed their function and become more powerful. Perhaps there is a question still how much we should really legislate through court notes.

You may remember in the original production of the rules the Committee disclaimed all responsibility whatsoever for the notes. It said in effect they were the figment of the imagination of the Reporter, and they were put out in the hope that they might help somebody, but God knows if they didn't, it wasn't anything that was the responsibility of the Committee. I don't know whether anybody paid too much attention to that.

Of course, the Supreme Court came along and cited the notes, and a lot of other people have. I suppose officially the notes, unless power has accrued to them, so to speak, have never officially been made anything more than that. It is a development that we want to have in mind. I think as yet it is ambiguous as to how much power they do have.

CHAIRMAN MITCHELL: They are an argument in favor of a certain interpretation of the rule.

MR. TOLMAN: They are printed in the official edition of the United States Code as Advisory Committee notes.

JUDGE DRIVER: I think the average district judge takes them as part of the Gospel. They are a very powerful factor in decisions on interpretations of the rules. If he gets an argument on both sides he takes a look at it, and what the note indicates is the view of the Committee will usually prevail.

JUDGE CLARK: Far be it from me to decry my own notes, so to speak. Do you have that initial statement? That was in the report in 1937. Certainly there is that disclaimer which is still a matter of record.

CHAIRMAN MITCHELL: As I recollect it, it was a disclaimer relieving the Supreme Court of responsibility for the notes to the rules.

JUDGE CLARK: Yes, I think that is true.

CHAIRMAN MITCHELL: And the adoption of the rules by the Supreme Court didn't involve the adoption of the notes. That is my idea about it. It has been many years since I looked at it.

MR. TOLMAN: Mr. Mitchell wrote the introductory statement.

CHAIRMAN MITCHELL: I plead not guilty.

"The notes in their revised form are now published

by the Committee in order to preserve for the use of the profession material which the Reporter has so industriously gathered during the two and a half years of the Committee's service. The notes show the background in federal or state statutes and judicial decisions, in federal equity rules, or in the British system, of the procedure recommended by the Advisory Committee.

"Statements in the notes about the present state of the law, or the extent to which existing statutes have been superseded by or incorporated in the rules, should be taken only as suggestions and guides to source material. Such statements, and any other statements in the notes as to the purpose or effect of the rules, can have no greater force than the reasons which may be adduced to support them. The notes are not part of the rules, and the Supreme Court" -- this is what I was leading up to -- "has not approved or otherwise assumed responsibility for them. They have no official sanction, and can have no controlling weight with the courts, when applying the rules in litigated cases."

I do not apologize for that.

MR. LEMANN: That is the remarks of the Chairman at the Institute in New York. That didn't go out in our distribution, or did it?

MR. TOLMAN: Yes, that went out with the official edition.

CHAIRMAN MITCHELL: We are not making much progress.

JUDGE CLARK: Mr. Wright has called my attention to the fact that in some opinion I said that the notes showed the views of the Committee.

CHAIRMAN MITCHELL: That is all right, just so they don't necessarily represent the views of the Supreme Court and are not controlling on the judges, either.

JUDGE CLARK: Maybe I can make them as long as I want, Monte.

CHAIRMAN MITCHELL: Shall we go on with the next rule in order?

JUDGE CLARK: I want to check up what we have done.

CHAIRMAN MITCHELL: We haven't done anything. I was foolish enough to ask whether we were going to say anything about the Prettyman Report. I tried half a dozen times to get you back on to the rules and pass that up until we get to it, but without success. We are not making progress. If you want to get through by Friday afternoon, we will have to make progress.

DEAN PIRSIG: I think there is a motion pending.

JUDGE CLARK: That is what I thought. Dean Pirsig made a motion.

CHAIRMAN MITCHELL: It is a motion to stir the judges up about this Prettyman Report, isn't it?

DEAN PIRSIG: More than that. I was suggesting the incorporation of a subdivision in Rule 16.

CHAIRMAN MITCHELL: You see, I have been trying to put this thing off. I am not ready to vote on it. I would like to think about it. I just brought it up so we could think about it overnight.

Suppose we lay the motion over until tomorrow.

DEAN PIRSIG: Might I suggest, if the Reporter has time in the meantime, he might redraft that provision.

CHAIRMAN MITCHELL: You will have no chance to go to sleep tonight, Charlie.

JUDGE CLARK: I don't know. Dean Pirsig and Professor Wright might like to redraft it.

CHAIRMAN MITCHELL: All I think is that we ought to give the judge a kick in the pants so he will do something.

JUDGE CLARK: All right, we will try to do something on that. I don't know what we can do in the time available. We will have that in mind. That is otherwise laid on the table and not brought up further.

I do want to go back, if I may, to what you may have decided, but I am not quite sure. You see, when we go over these transcripts we want to know what we have to do. Was it the suggestion on this list of witnesses that I work out provisions adding it to both 26(b) and 33? That is the point.

CHAIRMAN MITCHELL: We voted "aye" on that. There were three dissents.

JUDGE CLARK: On both those?

MR. LEMANN: I think the final conclusion was to put it in 33 on the ground suggested by Judge Driver, that the parties examined orally ordinarily would not know the names of the witnesses, and therefore it wouldn't serve much purpose to put it in 26(b). The Chairman, as I understood, was persuaded by that suggestion to restrict it to 33.

CHAIRMAN MITCHELL: I think the resolution that I put was that there be a provision in the interrogatories and in the pre-trial provision so that either recourse was open.

MR. LEMANN: That is right. That was carried with three dissents.

JUDGE CLARK: But not in 26?

CHAIRMAN MITCHELL: In interrogatories and pre-trial.

JUDGE CLARK: I just wanted that for our information. I wasn't sure just what had happened.

Shall we go on?

CHAIRMAN MITCHELL: I think we ought to go on, really.

JUDGE CLARK: I think we are not making bad progress.

CHAIRMAN MITCHELL: All right, but let's keep going.

JUDGE CLARK: I would like to have the Committee discuss these things.

CHAIRMAN MITCHELL: I won't interrupt the continuity again, I will tell you that.

JUDGE CLARK: I think it is really fine. I would like to have the discussion. I have been afraid some of these things

are not having enough discussion. I think it is fine.

The next I have is Rule 20. Rule 20 is the main permissive joinder section. I am now referring to page 14 of my September draft. This is a provision which we approved in principle, and this is carrying it out, leaving to the Reporter the preparing of appropriate language.

If you will look in the rule, this is the rather famous provision originally coming from English source, and it has now been adopted at other places, in New York and so on. Originally this made the test, "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence," and so forth, "and if any" -- this is the original -- "if any question of law or fact common to all of them will arise in the action."

I don't think there can be any doubt, considering the history, where this came from, in England and so on, that the idea was if there was any question that was common to the plaintiffs, that is, if all these various people joined had, so to speak, the same interest, had some question of law or fact they wanted solved. The decisions, however, have referred this common question thing to the occurrence or in effect back to the claim. Therefore, they have restricted this meaning quite curiously, I really think, and in a certain sense have restricted it, not in so many words, but a good deal back to

somewhat the idea of the same cause of action thing. It is that kind of restriction.

The case particularly is cited in the note on that same page, page 14 going over on 15. Where there has been joinder of multiple claims and multiple parties, some courts have read the requirements of Rule 20(a) that "all persons may join . . . if any question of law or fact common to all of them will arise in the action" as meaning that there must be a question common to all of the claims joined rather than common to the parties joined.

The same authorities have said that, in accordance with the other test stated in Rule 20(a) for joinder of parties, the claims joined must arise out of the same transaction, occurrence, or series of transactions or occurrences.

The effect of these readings has been to place a limitation on joinder of claims which the rule on the subject of joinder of claims does not itself contain. The amendment to Rule 20(a) will make it clear that joinder of multiple claims for or against multiple parties is proper so long as there is any common question of law or fact in which the parties are interested, and so long as there is some right to relief urged for or against all the parties arising out of the same transaction or occurrence.

Then there are certain comments on that.

To go back, you will see the change that we have made

in an endeavor to carry out that idea. We have shifted the "common" and tried to make it now apply to the persons rather than the claims. So the suggestion is, "and if any common question of law or fact in which such persons are interested will arise in the action."

The same idea is carried out in the next sentence with reference to the defendant.

MR. LEMANN: It is a little difficult for me to see just what it does. I have no objection to it. It seems to me the common question would have to be a common question of law and fact. I should have read the cases, so I haven't done my homework.

JUDGE DOBIE: Monte, it seems to restrict that not only to the persons but to the transactions and the occurrences. The question of law or fact must be common to the parties; it need not be common to all the transactions.

JUDGE CLARK: If we had the facts in the Christianson case, that might clarify that. Mr. Wright has that at hand.

PROFESSOR WRIGHT: The Christianson case was a suit by the plaintiff on two notes. On one of the notes three persons were joint makers. On the other note two of these same three people were makers of the note, but the notes were not made at the same time. Two of them made a note; and sometime later three people, including the same two, made another note.

Hincks held that you could not join your suit

on these two notes because, he says, there are two separate claims, the claim on each note, and there is no question of law or fact which is common to both notes, even though all the questions on the notes which the three people made were common to all the parties who were joined as defendants. He said these two claims did not arise out of the same transaction, although the rule, as we thought it was originally and as this amended would make it, says that the claims don't have to arise out of the same transaction; that all that is needed is that some one claim arises out of one transaction or occurrence or series as to which all persons are parties.

Under the amendment it would be clear that joinder would be proper in that situation where Judge Hincks held it was improper.

That is the leading case. The other cases cited are very much of that same type.

JUDGE DOBIE: I move the adoption.

DEAN MORGAN: Mr. Wright, may I ask this question. Suppose on your first note, the obligees or payees were A, B, C, and D, and on the second note A and B, and on the first note D and E were defendants and on the second note only E was a defendant.

PROFESSOR WRIGHT: I would think in that case it would not be proper. There has to be some claim stated against all of them as long as the notes arose out of different transactions.

DEAN MORGAN: If you have a series of claims, in other words, on one side or the other, there would have to be identity of parties. Isn't that right?

PROFESSOR WRIGHT: There has to be some one claim as to which all of them are parties.

DEAN MORGAN: That is what I was thinking, on one side or the other.

PROFESSOR WRIGHT: On both sides.

DEAN MORGAN: On both sides.

JUDGE CLARK: I should not think that really ought to be too necessary, if I might say so. It would be an unusual case where that wasn't so.

DEAN MORGAN: That is what I was wondering. If what Mr. Wright said isn't so, then your amendment doesn't cure it and doesn't help anything.

JUDGE CLARK: Perhaps it isn't broad enough. Let me state a situation of this kind. Suppose, to keep to our note case, we have notes against D and E, and others against E and F, and others against F and G. The question as to all of them was what statute of limitations applied.

DEAN MORGAN: That is what I was thinking about. That is just exactly the point.

JUDGE CLARK: Whether it was a six-year statute in New York.

DEAN MORGAN: There may be a common question of law

in those cases where they have no connection.

JUDGE CLARK: I should think the joinder ought to cover this, whether we have done it or not.

PROFESSOR WRIGHT: That would meet half the test. There you have the common question of law or fact, a question common to all the parties; but it would not meet the other part of the test, that there must be asserted against them a right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions, unless in fact the notes did arise out of the same transaction, in which case then the joinder would be proper.

DEAN MORGAN: They would all have to arise out of the same transaction even though there was a common question of law?

PROFESSOR WRIGHT: Yes, or a series of transactions.

JUDGE CLARK: I am not sure but that the whole rule that we got from England was too narrow.

PROFESSOR WRIGHT: Dean Pirsig says leave it to separate trials.

DEAN PIRSIG: I think you cannot by general rules comprehend all possible types of joinder. The question you want to decide is whether it is convenient to try those cases together. That is a question of separate trial.

DEAN MORGAN: I realize that, but of course sometimes I have tried to explain some of these things to lawyers and

they want to know why in the world you have any such joinder, because you are never going to have the same trial. You are always going to have separation.

DEAN PIRSIG: We have gone a long way already in the rule in that direction. When we have a single plaintiff and a single defendant, you can join anything. You are not going much further when you have multiple parties as long as you have the power to separate the cases.

JUDGE DOBIE: Of course, joinder in the pleadings and in separate trial are utterly different questions. In other words, you can join a lot of claims and it would be perfectly proper to join them. On a certificate by one of the lawyers he may demand a separate trial.

DEAN PIRSIG: You cannot foresee what is going to happen at the trial and define in the pleading stage what the rule should be.

DEAN MORGAN: It adds to the convenience of trial. Really that is the germ of the rule.

JUDGE CLARK: I suppose the question immediately is this: Will we correct small parts of the rule, or is it time for a new look, so to speak. This, of course, developed historically, starting in England. The English rules were narrow to begin with. They expanded them somewhat, but they didn't expand them further than this.

The question is whether we need any restriction in

the same transaction or occurrence.

DEAN MORGAN: When you have the same parties on both sides, the sky is the limit on joinder. You can bring in anything at all. As soon as you have multiple parties on both sides, then you look to trial convenience rather than just to the mere fact that you gather it all in one set of records.

JUDGE CLARK: Dean Pirsig, would you want to move to leave out some of this referring to the same transaction, occurrence, and so on?

DEAN PIRSIG: I haven't gotten to that stage in formulating a specific rule. I think we ought to settle first the question of policy. If the Committee is agreed on that, we can work out the rule.

CHAIRMAN MITCHELL: There is a draft of revised Rule 20(a) on page 14 of the draft. I think there is a motion pending to adopt it.

MR. DODGE: I don't understand this point here. On what ground did the court say in the Christianson case that the question must be common to all the claims joined rather than common to all the parties joined? Didn't both the parties and the claims involve the same question of law and fact?

PROFESSOR WRIGHT: The court said that they didn't.

MR. DODGE: What kind of a case was it?

PROFESSOR WRIGHT: I think the court's decision even on that is questionable. The court doesn't actually state the

facts as to what the issues of law and fact are with regard to the separate notes. It merely points out that they were made on different days. It seems, therefore, it can not be that these present common questions of law or fact. It has really some quite broad language.

CHAIRMAN MITCHELL: If you have a lot of parties and the question is common to all parties, how can it fail to be common to all the claims?

MR. LEMANN: That is what worries me. This mixes me up. I don't get anything out of this.

CHAIRMAN MITCHELL: If it is common as to all the claims, why isn't it common to all the parties? I don't see where you get any distinction.

DEAN MORGAN: If you had A and B in the second claim and then C and D in the first claim, A and B would have no interest in the first claim.

MR. DODGE: That doesn't make any difference.

DEAN MORGAN: I know it doesn't.

MR. DODGE: Five individuals might be sued on five different claims arising out of the same event. The common question of law or fact involving those parties must also be common to all the claims.

CHAIRMAN MITCHELL: How can it be common to all the parties unless it is common to all the claims?

JUDGE CLARK: You see, in Rule 20 as it now stands,

there is a very definite restriction that it must arise out of the same transaction, occurrence, or series of transactions. It ties it down to one happening. You can't have a situation where there might be a question of importance to all the parties but applying to different affairs. The case that I put earlier, of suits on entirely different notes but raising the same question as to what statute of limitation governed, might be such a case.

MR. DODGE: Notes arising out of the same transaction or occurrence.

JUDGE CLARK: You could have the same question of law if they didn't arise out of the same transaction or occurrence.

DEAN MORGAN: That is what I was talking about.

CHAIRMAN MITCHELL: There you would have a question common to all the claims and common to all the parties.

DEAN MORGAN: It must arise out of the same transaction or series of transactions. Suppose you have entirely independent notes, not the same transaction or connected with this series of transactions. A, B, C and D are on one, C and D on another. The only question is the statute of limitations.

CHAIRMAN MITCHELL: That is a question common to all the claims.

DEAN MORGAN: It is a common question of law with reference to all the parties.

CHAIRMAN MITCHELL: And to all the claims.

DEAN MORGAN: But they don't arise out of the same transaction.

CHAIRMAN MITCHELL: I know.

MR. DODGE: Then they don't come within the rule.

DEAN MORGAN: The question is that then they don't come within this rule, I should say.

CHAIRMAN MITCHELL: No, because the rule expressly says they must arise out of the same transaction or occurrence. I see your point.

DEAN MORGAN: If you have the same parties on both sides, it doesn't make any difference whether it is the same transaction or not, as in the ejectment action or alienation of affection of your wife.

PROFESSOR MOORE: I don't think it is very important. In this very case the judge didn't dismiss the suit. He just ordered the two claims severed.

DEAN MORGAN: Not only separate trials, but severance of claims. That is all he did.

CHAIRMAN MITCHELL: Do I understand that you do not want to adopt this rule?

DEAN MORGAN: I didn't say that. I was just wondering if it cured anything.

MR. LEMANN: That is my difficulty.

PROFESSOR MOORE: If you were going to make any change, I think you have to take out "in respect of or arising out of

the same transaction, occurrence, or series of transactions or occurrences".

DEAN MORGAN: That is what bothered me, Bill. That is what I was thinking. I thought Charlie's argument was largely to the effect that they ought not to have to be tied up in the same transaction.

JUDGE CLARK: They are.

DEAN MORGAN: Isn't that what it comes down to, Charlie?

JUDGE CLARK: Yes. I think Professor Moore's suggestion is a good one. Why don't we leave that out? Why not leave out the words "in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences"?

JUDGE DOBIE: And require only that they present a common question of law.

JUDGE CLARK: Yes, or fact.

MR. LEMANN: If you did that, you would really make a change, but as you have it now I have been scratching my head as to whether it means a change. I can't see that it makes any change. If you do what you last proposed, then you would be making a change.

CHAIRMAN MITCHELL: Strike out in your draft the words "or in the alternative"?

MR. LEMANN: No, you wouldn't strike out those words.

JUDGE CLARK: Strike out "in respect of or arising out --"

CHAIRMAN MITCHELL: No, you wouldn't.

MR. LEMANN: You would say "right to relief jointly, severally, or in the alternative . . ."

DEAN PIRSIG: I think that clause has been used in England for a good many years, hasn't it?

JUDGE CLARK: That is where it came from, of course.

DEAN PIRSIG: New York has it in its statute, or some aspect of it, has it not?

JUDGE CLARK: New York did have exactly the English rule, and then shifted over and has now copied the federal rule.

CHAIRMAN MITCHELL: Do you mean "or in the alternative" relates back to "jointly and severally"? I don't understand that.

MR. LEMANN: The change as now suggested for consideration would make a substantive change which would go beyond the New York and English rules, as I gathered your last statement.

JUDGE CLARK: That is right.

MR. LEMANN: It would be taking a more advanced ground. As it stands now, I cannot see that it makes any change if all you are talking about is a couple of cases you cite in your note, one in 1939, fifteen years ago, and the other case I just looked at doesn't give you any trouble.

Professor Moore says Judge Hincks decided it right, as I have his treatise before me. It was a single action against a debtor whose obligation arose out of promissory notes, upon the theory that a common question of commercial law was involved.

Would you want to go so far as to say that you and I could be sued in one case on separate notes that we made at different times at the same bank, on the theory that you would have the same kind of defense that I would have, so he sues us both in the same suit because the same question of law would determine our obligation, although our transactions were entirely different and we might not have anything to do with each other?

JUDGE CLARK: Of course, you have very broad provisions as to joinder of claims when you have claims, that is --

JUDGE DOBIE: Between the same parties.

JUDGE CLARK: Between the same parties, yes. Also, you have some sort of connection here if you have these parties on one note.

MR. LEMANN: That is clear.

JUDGE CLARK: Why does that make a difference?

MR. LEMANN: I think it makes a lot of difference. If the Chairman and I signed the same note, we could be sued in the same proceeding then; but if he borrowed money at the "X" bank on the 1st of January and I come in and borrow on the 1st of July and I never heard of him and he never heard of me,

to say the bank could sue us both in the same proceeding because it presents a question of law which would be applicable to both of us, makes me shiver.

JUDGE CLARK: You don't quite have the point I was trying to suggest. If you have one note against A, B, C, D, and E, and you got them all in, then you could put in that suit any sort of combination you want. You have them all in on one note. Then you can sue against C and D or any one of those that are already in. You can sue on a strange note or something else.

I suggest, why is that particularly different? You happen to have the chance of getting them in on one note, but you bring in all these claims that have nothing to do with him.

DEAN MORGAN: You can accomplish the same thing by having them all assigned to one assignee.

PROFESSOR WRIGHT: Mr. Lemann, I argued a case just last week that involves this very directly. I had a case in which I sued a contractor in the city for declaratory judgment because the contract was invalid. I added to this a second claim against the city requiring them to submit to an election an initiative petition to make perfectly sure that the contract was invalid.

Here the initiative thing and the contract are separate transactions. There is no common question of law or fact as between the initiative petition and the contract. Yet

it all arises out of one controversy, and it seems the normal and natural thing when you have both parties in one lawsuit to add a second claim in that one lawsuit. If Federal Housing Administrator v. Christianson is right, the joinder is improper.

MR. LEMANN: In your case you had only one controversy and you had only one party. In the case of these notes there is nothing to connect them except that the same rule of law might apply to both of them. Do you think that ought to be permitted?

PROFESSOR WRIGHT: No. I think under our proposed amendment the important thing is that you have one claim against all your people. You cannot have one note against A and one against B normally. If you have one note which A and B made, then you can add a second note which A made. They have to be connected in that way. That would be the law if this amendment is adopted.

JUDGE DOBIE: You have all the parties before the court.

PROFESSOR WRIGHT: You have all the parties before the court and then you add some other claims that you have against individuals.

JUDGE DOBIE: In the case Mr. Lemann gave you had just one party before the court, and then later another one comes along and you add the other, and they have no relation whatever except it is clear that both of these cases involve the validity,

for example, of a note given for immoral purposes, or something like that.

JUDGE CLARK: There are two parts to this, of course. What Professor Wright is talking about is the changes that would be made by this language. Mr. Lemann, you suggested you didn't think it would make any change. Of course, if it means what we think we are saying, it does make a partial change and a change of some importance. It does make a change that where you have them in already, you then can put in any claims against those that you have in already.

MR. LEMANN: You then can do what?

JUDGE CLARK: You then can make any claim, whether it arises out of the same transaction or not, so long as it is a common question of fact against any part of those who are in.

MR. LEMANN: In other words, I can bring a suit on a promissory note against A and B, and then I can join in that same suit a claim against A for running into B with an automobile?

JUDGE CLARK: Yes.

MR. LEMANN: I hadn't realized that. I don't realize all I have sat here and helped do.

MR. DODGE: What is the common question of law and fact in that situation?

MR. LEMANN: You were in with me on a note, so you have to stay in with me when a fellow brings a suit against me for running over him with an automobile?

MR. DODGE: Where is the common question of law and fact?

MR. LEMANN: He was in there to begin with on the note and, after you get that in, everything else is ancillary and built up on it. You could bring in half a dozen other claims, such as breach of contract.

DEAN PIRSIG: My suggestion that you eliminate all this argument about fine distinctions and terminology is not as radical as it seems, because you are really bringing in completely irrelevant claims. You can have a lawsuit on a personal injury claim against three defendants, and you can bring a contract action against one of them. There is nothing you can do about getting it out. You can sever it. I am only carrying that to the full conclusion --

CHAIRMAN MITCHELL: Where is the common question of law and fact in that example?

DEAN PIRSIG: It is in the personal injury suit. It is a common question of who is liable, who is negligent.

MR. LEMANN: Do you think you could do that today? To begin with, do you think that I could bring one suit against A, B and C and D, and say A and B signed a note together, and B was also in an automobile accident with C?

DEAN PIRSIG: That is the point of it.

MR. LEMANN: A made a contract to build a house, and as they both were ill-advised enough to sign a note they can

be sued not only on that note but they can be sued on entirely separate transactions? I never thought we were doing that.

CHAIRMAN MITCHELL: You mean that would be the law if you struck out this phrase "in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences"?

MR. LEMANN: I understand that would be the law then. As I understand, they are telling us we have made it the law already that you can bring them in; that if you have them in the original suit, it is already the law. Am I stating it correctly? Is that the present law?

JUDGE CLARK: I am sorry to say I don't have your case completely. If Dean Pirsig says it is the law now, it is. That is all I will say.

Of course, it is true that joinder is much more extensive than sometimes you think is the case. Joinder is pretty extensive now, and that is a part of the argument that I was suggesting.

CHAIRMAN MITCHELL: What is the object in producing this? Why do we think it is a good result?

MR. LEMANN: You are not asking me, are you?

CHAIRMAN MITCHELL: Yes.

MR. LEMANN: I don't think it was a good result. I am horrified. These gentlemen think it is a good result. Ask them. I didn't father that. Professor Moore fathered that.

All I said was, if you do that, at least I thought you were making a change. I am not too sure, from what I have heard, that I am making any change, but I did think you would be making a change, whereas I did not think that the draft submitted to us made any change very intelligible to me. The more I listen, the more I think I really don't know what the present rule produces.

JUDGE CLARK: I was suggesting that there are two propositions involved here. The suggestion here does make a change. It may be a limited one, but it does make a change. It takes away some restrictions when there is a common question of fact and you have the same transaction or series of transactions. It does make some loosening.

If you have a suit against A, B, C, D, and E, already in, it provides that you can pick out A and B on another part of it when they are tied only by virtue of common question of law or fact. It does not cover the further case where you have not come in and you want to sue A, B, C, D and E, where A and B may be together, and then C separately, and then D, and there is only a common question of law or fact. That is not covered and would not be covered unless you struck out the restriction relating to transaction or occurrence.

I suggest there are the two matters involved. The more extensive one would be to strike out that reference to the series of transactions. The proposal here is less extensive

but does have an area of operation.

CHAIRMAN MITCHELL: I think a lawyer would be a novice if he sued on a promissory note and an automobile accident personal injury in the same case.

MR. LEMANN: Against different people.

CHAIRMAN MITCHELL: Against different people, just because --

MR. LEMANN: That is worse than bringing it against the same man, which I could understand.

CHAIRMAN MITCHELL: Gentlemen, I don't know how you feel. Do you want to adjourn now until in the morning?

JUDGE DOBIE: What time do you want to start in the morning?

CHAIRMAN MITCHELL: Would 9:30 be all right?

DEAN MORGAN: I think we ought to start at least as early as that.

CHAIRMAN MITCHELL: We can start earlier if you wish. Nine-thirty?

... The meeting was adjourned at 5:00 o'clock p.m. ...