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ADVISORY COMMITTEE ON

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THURSDAY MORNING SESSION

March 25, 1954

The meeting of the Advisory Committee on Rules for Civil Procedure reconvened at 9:30 o'clock, William D. Mitchell, Chairman of the Committee, presiding.

CHAIRMAN MITCHELL: Come to order, gentlemen.

JUDGE CLARK: Last night we were discussing Rule 20(a), and as I understand it we had not reached any conclusion. The proposal appearing on my September draft, page 14, provides for a limited further joinder when parties are in, in connection with the same transaction or occurrence or series of transactions or occurrences. In other words, the proposal here does not take out that binding party.

In our discussion the question was raised as to whether it might not be better to take out that tie and expand the joinder somewhat more. I think there is a great deal to be said for that. I gathered there was, however, some feeling that that was going pretty far, and I am inclined not to press for that particularly at this time.

These are all perhaps a matter of growth. Therefore, I suggest as a reasonable step, but not as drastic, the one that is stated here on page 14 of the September draft. I would suggest that we go ahead with that. That makes a lesser change and, as I have just indicated, would be the claims arising out of one general transaction, but it does within that limitation

allow some expansion. That would be my suggestion.

JUDGE DOBIE: What is your suggestion?

JUDGE CLARK: The one contained here. It is moving the "common question of law and fact" to clearly define the parties rather than the claims.

JUDGE DOBIE: That would cut out "common to all of them" and interpolate "common" up there?

JUDGE CLARK: That is correct.

PROFESSOR MOORE: Judge, I just don't believe that is going to change anything.

CHAIRMAN MITCHELL: Have we had any suggestions or demands from judges and the bar for any change in this rule?

JUDGE CLARK: No. Of course, we haven't had very many. There is usually very little demand for either expansion or contraction, except here and there. There may be a little demand for contraction in particular cases.

DEAN MORGAN: What I was wondering, Charlie, was that this might affect the reasoning in the Christianson case, but I do not quite see how it would affect the result. The Christianson case criticizes the thing. He says even though in that case on the two promissory notes there was no common question of law and fact except the application of general commercial law, still he thinks the case was wrong. As far as I can make out from his comment on the case, there wasn't any common question of law or fact between the two. All you had was common

parties or some common parties to both cases.

If it is to overcome the reasoning in the Christianson case, that may be one thing; but to overcome the decision, I don't think that this affects it at all.

JUDGE DOBIE: It doesn't often arise, does it?

JUDGE CLARK: No. What suggestion would you make, if any, Eddie?

DEAN MORGAN: I haven't any. That is my trouble. The whole thing that bothered me when I read the amendment, Charles, was that I do not see that it says anything more than the original, and that the cases, particularly the Christianson case, don't hold anything that would affect this.

JUDGE DOBIE: I am frank to say, unless there is some real demand or a fair share of number of cases, I believe it is best not to tinker with these rules.

CHAIRMAN MITCHELL: My impression about this is that, in the first place, there has been no agitation on the subject and, in the next place, we are in grave doubt whether, if we made this change, we would be affecting the situation at all. Isn't it a good thing to leave alone?

JUDGE DOBIE: I make that motion, that we leave it as it was.

DEAN MORGAN: If you believe that it really clarifies it, I don't see any objection to the amendment. What bothered me was that when I read it I tried to see how it would affect

the situation. I put some hypothetical cases, and I couldn't see that it changed the thing a bit.

MR. LEMANN: I second Judge Dobie's motion.

CHAIRMAN MITCHELL: The question is whether we leave the rule as is. All in favor say "aye"; opposed. It is carried.

JUDGE CLARK: I would like to take up the matters that I discuss at the foot of page 15 of the September draft, on Rules 20(b) and 21. Both of these contain provisions for separate trials, and in other instances where we have had that situation we referred to the final judgment rule, 54(b), which you will recall provides for the entry of final judgment if the judge certifies that it should be done.

We provided in amended Rule 13(i), which deals with counterclaims, that severance there or separate trial of counterclaims should be subject to the provisions of Rule 54(b). That was also recommended back when we were discussing Rule 14(a), the impleader one.

The suggestion has been made later in connection with Rule 42(b).

I should say a consistent step would be to put it in here, and it might help clarify the operation of Rule 54(b).

If the addition were to be made, it would be in the form stated on page 16, put at the end of Rule 20(b):

"and may direct a final judgment upon a claim of or

against one or more parties in accordance with the provisions of Rule 54(b)."

Then at the end of Rule 21:

"and the court may direct a final judgment upon either the main claim or claims or the severed claim alone in accordance with the provisions of Rule 54(b)."

CHAIRMAN MITCHELL: In what respect would that change the rule from what it is today?

JUDGE CLARK: In the case of 20(b), I think rather clearly it would not, because that is a provision only for separate trials. In the case of Rule 21, that is a provision for both separate trials and for severance.

Professor Moore yesterday asked what would be the effect of severance of a case on final judgment. It would be my answer, which I made then and I should think it would follow, that if the case is completely severed it would then be relieved from any operation of 54(b).

There are two possibilities as to the provision here suggested as to 21. It may be that this provision, if added, should not apply to the severed claim. On the other hand, it might add clarity if we definitely cleared up the point with respect to the severed claim and made it subject to this rule.

DEAN MORGAN: This would be interpreted as really making the severance subject to Rule 54(b). It is not as if it were actually a separate and severed claim ordinarily. I don't

know that there is any objection to that, myself.

PROFESSOR MOORE: What have you accomplished by severing the claim, if it is still part of the multiple claim action?

DEAN MORGAN: They go to separate trial on it under those circumstances, except that you get a separate filing in the severance case.

JUDGE CLARK: Yes. I presume you might raise the question, What have you accomplished more than a separate trial? On that basis, I suppose you really haven't accomplished much more. It is not very greatly different than a separate trial. Maybe, however, that is all you should accomplish.

Do you know of any case where it actually has been severed under this rule?

PROFESSOR MOORE: You mean under Rule 54(b)? I think there have been claims severed. I do not think there has been any question raised with 54(b).

CHAIRMAN MITCHELL: Is it your point that as the rule now stands there is doubt when the claim is severed whether 54(b) applies or whether it doesn't? Is that the point?

JUDGE CLARK: There are no cases that I know of that have discussed that particular point.

CHAIRMAN MITCHELL: Then what are we driving at here? If no question has been raised, what is the rule now as it stands? If it is severed, you have this rule about certification by the trial judge. Does the final judgment apply?

JUDGE CLARK: The question is whether it wouldn't be clarifying to put it in.

CHAIRMAN MITCHELL: To clarify what? What is the doubt? I can't understand it.

DEAN MORGAN: The result would be the same, General, it seems to me, as you have in some of these counterclaim cases. A court can hold up the whole business until the counterclaim is settled, even though they are entirely separate claims.

Here when one is severed, if we put this in, it would allow the trial judge to say that a final judgment ought not to be entered on the severed claim until you have the main claim out of the way. Ordinarily if they were severed, there would be no question of staying one or the other, I should suppose. Isn't that right?

CHAIRMAN MITCHELL: The present rule, then, means that if they are severed, you are not bothered with 54(b).

DEAN MORGAN: That is right. I think severance would not be under Rule 54(b) under the present rule. Wouldn't you think that, Bill?

PROFESSOR MOORE: I think so.

DEAN MORGAN: I am not sure that it ought not to be, at all. I think this would make it clear, putting it under 54(b).

PROFESSOR MOORE: I have a little trouble understanding what you would accomplish by severing the claim if immediately

you hooked up again with 54(b).

JUDGE DRIVER: Then you have an identical but separate trial, it would seem to me.

DEAN MORGAN: Practically the same, yes, except for purposes thereafter it is a separate case. For purposes thereafter it is an entirely separate case, with a separate file, and so forth, but for the disposition of the whole case it is just like a separate trial.

MR. DODGE: After severance it would cease to be an instance of more than one claim being presented in the same action.

DEAN MORGAN: That is right.

MR. DODGE: Rule 54(b) is limited to that. Rule 54(b) would cover it before severance, but not after severance, when it would be an independent action and having no relation to it. Isn't that so?

PROFESSOR MOORE: I would think so.

MR. DODGE: I don't see that we need that.

JUDGE CLARK: If we leave out the second one, I suggest then the first. Let me come back to Rule 20(b), which is the first one here. Rule 20(b) now says, "The court may make such orders as will prevent a party from being embarrassed, delayed," and so on,"and may order separate trials or make other orders to prevent delay or prejudice."

I suggest "and may direct a final judgment upon a

claim of or against one or more parties in accordance with the provisions of Rule 54(b)."

My suggestion is that that doesn't change anything but really adds an explicit statement for the sake of clarity.

Back in the amendment that was made in 1946, the counterclaim rule, Rule 13(i), Separate Trials; Separate Judgment, we said there, "If the court orders separate trial as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of 54(b) when the court has jurisdiction so to do," and so on.

MR. DODGE: There, there is no severance.

JUDGE CLARK: That is right, and here there would be no severance.

DEAN MORGAN: In 20 there is no severance.

JUDGE CLARK: I passed up the severance idea, which comes in 21. In Rule 13, the one I just read, and in 20, there is no severance.

CHAIRMAN MITCHELL: If you put this in, you could accompany it with a note saying it is merely a clarifying amendment and doesn't make any change in the rule as it stands today?

JUDGE CLARK: Yes, I think so. We would say this is put in for the sake of consistency to make it like 13(i) and to make clear the court's power. I suggest that it is more than just that. It does do what I have said, but I frankly would

hope that it would make more easy the operation of Rule 54(b).

There has been some tendency, you know, when we get to 54(b), to suggest various limitations which we have discussed. I think if we put in the provision here and really tie it up to 54(b), then any doubts that might arise in the minds of the judges would be resolved that they could use it.

JUDGE DRIVER: There has been considerable confusion, I think, in the bar as to just when 54 applies to the trial of separate issues. Just recently, I think within the last month, I was reversed by the court of appeals because I granted separate trial on a separate issue. Counsel didn't ask for and I did not consider an order to bring it in under Rule 54, that there would be a final judgment as to that issue. Then one of the parties tried to appeal. Of course, the district court has no control over appeal and doesn't even know when the appeal is taken or doesn't pay any attention to it. Of course, the court of appeals sent it back because they hadn't gotten an order that there was final judgment.

What I will do now is to enter the order, and it will go up again on the same briefs and the same record, practically, but it is embarrassing, and the lawyers do not understand it in many instances.

It should be made clear that if they get a separate trial on a separate issue without an order or certificate of the court, it can't be appealed separately.

DEAN MORGAN: Mr. Chairman, I move its adoption.

CHAIRMAN MITCHELL: All those in favor of adopting that amendment say "aye"; opposed. That is agreed to.

JUDGE CLARK: We will make the change in 20(b) only, and no change in 21. The severance rule will stand as it is written without any addition.

The next thing is 23(d). That is the class or representative suits. There has been quite a good deal in the literature that the class suit ought to be made more useful and that it could be done if more emphasis was made on the question of adequate notice and that sort of thing, and less on what might be termed the formal rights involved. Some writers, for example, think that almost anything can be done in the way of suits, provided notice is given and a chance to come in.

The New York Judicial Council has been working for some time on recommending extensions of the rule. This does not go nearly as far as any of these writers, but it does take one step, presumably adding to the usefulness of the rule by providing for the court to inquire into, to make a point, so to speak, of the question of adequate representation, and to go ahead when there is adequate representation, but to stop or do something different when it is felt that some represented parties may not be adequately treated.

This is the language we brought in, coming from the suggestion that has been considered in New York. This is the

language tentatively approved by the Committee last spring along with the addition proposed by Mr. Pryor, but not actually voted on at the time.

The note goes into this somewhat. It suggests the various rules. As we say here, although the addition of this subdivision to Rule 23 does not change the rule as much as some commentators have urged or suggested, it is intended to make the class suit device more flexible and to allow in all kinds of class suits that full and fair protection of the absentees which is said in the Hansberry case to be necessary if the absentees are to be bound by the judgment. So this is a provision for taking care of that.

I think it is a desirable and useful thing.

JUDGE DOBIE: It is always in the discretion of the court.

JUDGE CLARK: Yes. I think, too, it will not go as far as some of these commentators thought the representative rule should go.

JUDGE DOBIE: Do you have many of those representative actions? We have very few except in labor cases.

JUDGE CLARK: We don't have a great total of them, no. Once in a while we have some, and some of them are very interesting. I think the most interesting we had was this Dickinson v. Burnham case which is stated in the middle of page 17. There, there was a fund collected by reason of the

successful suit against past officers who had been claimed to have mulcted the corporation. The case has been going over a good many years. Some of the distributees are dead, missing, and so on. In that case Judge Leibell devised a scheme by which he notified all to come in and make their claims within a certain time. He called it a spurious class suit. On the basis of his label, there has been a little doubt as to whether you could shut out the interests of anybody, even though they were not there.

I think we solved it beautifully for him. We just changed the label. We called it a hybrid class suit and said that what he had done was correct for a hybrid class suit, and didn't decide the spurious thing.

Actually, what happened was very useful, however you look at it. I do not know how they would ever have settled the thing.

The claim on behalf of the officer who had to produce the fund and who still was attacking any liability at all, but as a partial claim if he couldn't get away from that liability, he said he ought to keep anything that they couldn't find possible distributees for. The question was whether to have it paid in to court and passed around, or what-not.

The solution by Judge Leibell, and affirmed by us, was that you distribute a larger dividend to those who put in their claims within the certain period that he gave. They still

weren't paid in full, because the corporation had failed. That seemed to be a very sensible result.

CHAIRMAN MITCHELL: What is your pleasure with that addition to Rule 23(d)?

JUDGE DOBIE: I move it be adopted. It is entirely discretionary with the court, and if there is any question about their powers in these cases, I think their powers should be pretty full. I think this makes it clear that they are. I move its adoption.

PROFESSOR MOORE: Under this, though, if I am involved in a mass tort situation and some lawyer gets hold of another tort claim and brings a class suit, I can be forced to come in and litigate in this class suit, can I not?

JUDGE CLARK: I don't believe you can. That is, the mass tort situation is generally going to be, I suppose, a spurious class suit case; and spurious class suits, according to the doctrine of Moore, who created them, are nothing much more than joinder.

PROFESSOR MOORE: I didn't know I created those.

JUDGE CLARK: We are not changing any of that. A lot of people around the country think we should, but we don't change any of the past rules, that is, the prior sections here, which have those two subdivisions. Again in Mr. Moore's language, the first one is a true class suit, the second a hybrid, and the third spurious; and the spurious suit isn't

very much except joinder. I take it that we really haven't changed that at all.

PROFESSOR MOORE: Judge, under your second sentence here, suppose the federal judge in a class suit sends out a notice to all those who are involved in that mass tort to come in and present claims, what is the effect? I get the notice but I don't want to litigate my claim.

JUDGE CLARK: I should suppose the effect is just the same as it is now. We are not saying that anybody is cut off. Of course, again to quote distinct authorities, it is said of the spurious class suit that in general that is only an invitation to come in. In that regard this would make the invitation perhaps only a little more precise. But there is nothing here and there is nothing in our earlier rules that say the effect of that.

CHAIRMAN MITCHELL: Wouldn't the implication be that if you give the court power to notify everybody to come in and assert a claim if he had one, and he didn't show up, his claim is gone?

JUDGE CLARK: I shouldn't think so.

CHAIRMAN MITCHELL: What is the purpose of serving notice on him, then?

JUDGE CLARK: What is the purpose of having any invitation to come in as you now have it, less precise but in the background? What is the use of the spurious class suit at

all? It has a wide usefulness, but it is a little pushed to have the whole case tried at one time.

I should think it is a definite advantage even in the mass tort case to have them come in, generally speaking. Of course, there might be some question, so you wouldn't say universally that is so, but I think it is generally a good principle that a court should try one series of happenings only once, if he can. Therefore, I should think in the mass tort situation, like others, it is a good thing to have them come in.

JUDGE DOBIE: If adequate notice is given under the Ben Hur case and the judge thinks so, he could make an order which would bind even those who hadn't come in, couldn't he?

JUDGE CLARK: That is the real question that I haven't tackled in the rules, and I am not sure that we should. Originally we put in a provision about the binding effect of the judgment, and we eventually took that out, on the theory that we should not state that.

If you were to ask what the law is going to be on the subject or how the ruling would be, I don't know that I could answer fully. The Hansberry case suggested that that would be due process if they had notice. There would be two questions here involved. The first is that I should suppose you would have to have some definite authorization for that procedure in order to have that proposition in the Hansberry case apply. The second would be whether you could have that kind of

authorization in a rule of procedure, because of course that would be a definite limitation. That is something akin to a statute of limitations or of that order.

Neither of those is being attempted here. We are not making any express rule. We are not saying there is any power.

CHAIRMAN MITCHELL: That is my worry. I do not pretend to understand the subject at all, but when you make a rule and, say, there is a fund to be distributed, and the court then is authorized by rule to cite everybody in and require him to come in and present his claim, with the result, as I understand it, that only those who come in take the whole fund, it being inadequate to pay them in full anyway, that cuts out for keeps the chance of participation by the fellows who don't appear, does it not? It seems to me that is the necessary implication.

As I say, I don't understand the subject at all, so I don't suppose I am right.

JUDGE CLARK: I would like to say a little more, not necessarily as to the result which is reached, but of course as to the nature of the problem. I do think that it rather behooves us to make as much as we can of the thing, and to reach a reasoned judgment so far as we can. I mean by that that in the eyes of everyone who considers this -- and the chief ones who are going immediately to consider it are the scholars -- maybe the lawyers will later -- doing nothing is

as much a judgment against as considering it all and doing it. Therefore, this is one of those situations where, if there is a decision to do nothing, it ought to be on the basis that it is unwise to do anything else, because we will get all the credit or the discredit, if you will.

There is a very considerable movement which I would say is academic, if you want to call it such, on the theory that the class suit is not being made as productive as it should be and, in fact, that it amounts to very little, and that this would be one way of fairly taking up matters where it is difficult or perhaps impossible to get everybody before the court.

As I say, the suggestion I made was a sort of moderate one. I should suppose that the comment on that would be something like this: that this is hopeful, maybe the members of the Advisory Committee are beginning to think about this question, but it is only hopeful and it doesn't go very far. I think perhaps that would be a sound statement of it. Because it does go a little ways perhaps, because it does try to make some suggestions, because it does show some chance of development of the subject, I rather thought it would be worth while.

As I say, if we do nothing, we had better do it quite consciously, because it will be assumed that we did it consciously and that we thought that there should be no loosening of the rules at all or no extension of the use of the class suit.

DEAN MORGAN: Do you remember the case by Judge Biggs on that hairdressing process, the beauty parlor people, where an association or a group of persons purporting to represent all persons who were using the device throughout the country brought an action against the patentee to prevent him from bringing so many suits. Biggs said it started as a spurious class suit, and then he indicated at the end that the judgment would be binding against the defendant in all actions if the defendant did try to bring other actions. Do you remember that case?

JUDGE CLARK: I remember it somewhat. I have forgotten the details. Of course, that is an interesting point anyway.

DEAN MORGAN: That is a mass tort, practically, from the other angle, a whole group of people committing the same kind of wrong, you see.

JUDGE CLARK: But you have that question. We are not touching that one way or the other here. That question exists now. What would be the law as to that?

PROFESSOR MOORE: I think we do touch it, and I am not sure that people know how we have touched it, by your second sentence, "including notice to come in and present claims and defenses." If that doesn't mean that they are barred, what does it mean?

MR. PRYOR: Isn't one of the main purposes of the notice to enable the court to determine whether or not the

class is adequately represented?

PROFESSOR MOORE: Then what is going to happen?

MR. PRYOR: I do not see that there is a necessary implication that they are going to be barred if they do not come in. If nobody comes in, the court would probably reach the conclusion that the class was not adequately represented, and would make his order accordingly.

PROFESSOR MOORE: Let me present to you this case, which involves the Perty Amboy disaster.

DEAN MORGAN: Yes, I remember that.

PROFESSOR MOORE: The Pennsylvania Railroad brought a suit in the nature of a declaratory judgment action against four or five different defendants, picking certain ones out to represent the state property interests that had been damaged, the county, private real property owners, and then individuals to represent tort claimants. They also added the United States.

There had been a number of suits brought in various places in state courts, and so on, but they were trying to get a declaration against these so-called representatives that Pennsylvania had no liability to them, and in addition they wanted to enjoin the various state suits that had been brought against Pennsylvania.

The judge dismissed it. One, he said they couldn't get a declaratory judgment action against the United States; and two, he couldn't enjoin a state court proceeding.

So I guess nothing really came of that, but under this would he have the right to send out notice to the various people who had gotten their suits started that, nevertheless, they must come in and present claims in this action?

JUDGE CLARK: It would seem to me to go back to the questions which are really presented by the class action. I would put it this way: Take the case that I speak of, which is the Dickinson case. I should suppose that if Judge Leibell had been correct in saying that that was a spurious class suit, either with or without this provision, because I don't think this makes a real change, his distribution would have been quite illegal, quite erroneous. I don't believe that there would have been authority for it.

I do think that it was possible, by saying that there was a fund in the court which had been created by the judgment against this officer, that you could make the distribution. I will say that had we had a rule like this, I should have supposed it would have been much clearer. We had no particular precedent for what we had in our Dickinson case.

It may be said that the Supreme Court denied certiorari and maybe you could say it is now established. After all, there was no procedure. The procedure was really worked out in that case.

Bill, I don't know that you need to answer this, but do you think we had any authority for what we did in this case?

PROFESSOR MOORE: I think so. I think the fund cases are a little different from just the personal liability.

JUDGE CLARK: Of course, in a way that is something of a name. When the action starts there is no fund. You enter judgment in this case against Dickinson and tell him he has to pay out of his own pocket for what we call his defalcations, and thereby you get something you label a fund. It is a little process of pulling yourself up.

DEAN MORGAN: The liability is established.

JUDGE CLARK: This insures a method, I think, and doesn't change the rights. Maybe we should change the rights. The strictness with which class suits have been viewed in our rule, as you know, has been quite criticized. There is, of course, one problem about this. Now and then all over, people are going to tinker with the idea of the class suit. We had a case that struck me as having some amusing features, among other things. This is a case which is still pending between the district court and us, and eventually I take it without question it has to go to the Supreme Court, a case where the village of Cedarhurst, near the Idlewild Airfield, has made it a criminal offense for anybody to fly over that village lower than 1,000 feet.

Of course, that has created all sorts of problems for Idlewild. When it first started, eleven commercial airlines, the Port of New York Authority, the Civil Aeronautics

Administrator, and practically everybody they could get in from that side, started an action for an injunction and a declaratory judgment that the ordinance was invalid.

The defendants, who were named as the Village of Cedarhurst and its officers, starting with its mayor and council, then of course answered, denying all that, and then put in a counterclaim for themselves and for all other persons similarly situated as property owners in the village, claiming damage to their property interests from the low flying.

It has been to our court several times. We sustained a temporary injunction, and we upheld the counterclaim on the ground that all those issues had to be decided under the famous chicken case, you know, the Capps case that came up from you people in the Fourth Circuit, I think.

What I thought was a good joke was that the plaintiffs went to Judge Abruzzo and moved that the counterclaim and the answer, too, so far as it concerned the representative defendants, should be stricken out. Damned if he didn't do it.

Then the village and the officers appealed to us, thinking they were very much hurt. Of course, they kept talking about the representative defendants, and we don't know who they are because nobody as yet has shown up as the representative defendants.

As a matter of fact, what we did on that was to say they couldn't appeal because the order didn't amount to anything;

nothing had happened.

JUDGE DOBIE: Is there any difference between these two types of cases in the power of the judge? Where you have a fund, of course if the judge gave it to A, B, C, D and E and that is all the fund, the others are barred. The interests are somewhat hostile. We have had a number of labor cases. We had one the other day about seniority where men go to war. There is no question there. All those men who went to war and then came back have the same interests. Every one of them, of course, wants his seniority. There is no question that anyone who is fighting of course is fighting for that group.

Is there any difference in those cases? Do you see what I mean? You have hostile interests, and if you give it to some and divide the whole fund, that is the end of it.

JUDGE CLARK: Of course there is a difference. In one case there is some money that you have to divide up, and in the other it is just that you make a ruling of law as to seniority. There is that difference.

I still feel a little nervous about what we did there. You see, this is what we do, really: You say this is a fund for A, B, C, D, and E --

JUDGE DOBIE: They are the claimants.

JUDGE CLARK: The difficulty with our case was that D and E just didn't show up and were probably dead, because time had passed. It would be easy enough to divide the fund

into the five parts, but what would we do with those two parts for the two people who weren't around.

JUDGE DOBIE: In the case I spoke of, where the court thought there was adequate representation, he gave the whole fund to A, B and C.

JUDGE CLARK: That is just what we did.

JUDGE DOBIE: What if D and E showed up later and said, "Yes, you did give us notice, and so on, but we are going to attack that judgment."

JUDGE CLARK: What we have done so far is that we have done just that. Judge Leibell did that and we affirmed. We gave the shares of D and E to A, B and C. D and E have not shown up, so we haven't the question of what might happen there.

JUDGE DOBIE: In the labor case, all these men went to war and came back, and we say A, B and C are entitled to seniority, they all get it, and they are all very happy about it. The only conflict of interest there is the people that they jumped over. As I understand it, this doesn't litigate about the power of the court at all.

JUDGE CLARK: I should not think it did. I think this just provides a method whereby, if the court has followed it, you can make the distribution in the fund case of the kind I put. But I don't think that even this rule would settle the question of what might happen when they come back if D and E ever showed up.

JUDGE DOBIE: It just gives the judge more clearly certain powers to set a more or less intermediate or final order. If that is the intent of it, it seems to me if it makes clear what was before unclear, it is a good provision.

My guess is that most of the courts would hold that they had that power without this section, Charlie. Don't you think so?

JUDGE CLARK: I rather think so. Of course, it is the kind of case where a court is going to feel some compulsion. In the case we had, you can conceive some of the alternatives. You would not want to give the shares back to the wrongdoer. He, having stalled the case along for two or three years until people died, should not thereby reduce his obligation, but certainly we ought not to have it paid in to court and the court officials not know what to do with it.

DEAN MORGAN: Mr. Chairman, I move the adoption.

JUDGE DOBIE: I second it.

CHAIRMAN MITCHELL: Any further discussion?

All in favor of adopting the addition of Rule 23(d) say "aye"; opposed.

PROFESSOR MOORE: No. I would like to be counted.

CHAIRMAN MITCHELL: It is carried.

JUDGE CLARK: The next is Rule 25, and that is a very troublesome one as we have seen already. We had a preliminary canter on this, to use the English expression. They refer to

pre-trial and things like that as a preliminary canter." We had one yesterday.

There are two parts to Rule 25. While the over-all question is somewhat similar, they have to be considered separately. The (a) part, which we will take up first, is the case of death of a party and bringing in a personal representative. The other division is the public officer one.

Let's consider first the (a) part. Here the proposal is on page 18 of my September draft. On pages 9 and following of my March draft, I have tried to summarize the result of correspondence, particularly correspondence with the Attorney General. I will take that up more when we get to the second question dealing with public officers, because he had some very definite ideas on that, as I guess everybody does have, although they may not be the same ideas, because it is a troublesome matter.

To return to this question of substitution, we made recommendations before, you will remember, and the Court did not act; then soon decided the case which is cited on page 18, Anderson v. Yungkaw. It may well have been in this case as in the Hickman v. Taylor case and like the question of 50(b). There were cases pending in the Supreme Court in all of those, and they rejected the amendments. It may be just because they did not want to affect the pending case. Of course, it may be that they wanted to do more. I don't know. But that is the

situation.

The Supreme Court said that this provision would operate "both as a statute of limitation upon revivor and as a mandate to the court to dismiss an action not revived within the two-year period." The Court, you see, gave it very effective and, I think, really drastic limitation.

At that time the statute upon which the rule was based was in existence. It was not until 1948 that the statute was repealed, and that is referred to at the very foot of page 18. But the statute was repealed by the Revision Act of 1948 for the stated reason that it was "superseded by Rules 25 and 81 of the Federal Rules of Civil Procedure." Thus the rule now stands as a statute of limitations without support in the statutes.

We suggest certain questions that might come up. There is the question of over-all validity, anyhow. That is, might not the rule be considered invalid if it is a statute of limitations, on the theory that that is not properly a procedural subject. You have some further detailed questions.

One of the most interesting is its effect in diversity cases. Suppose there is a state law definitely providing for substitution. I should expect that generally there would be, because this is an ordinary state question, and they must have some system, whether prescribed by statute or by their own practice. In a diversity case would this provision override? If it were pursuant to a federal statute, clearly yes, because

Erie Railroad v. Tompkins does not override statutes, and if the Congress had provided a limitation but if it remains a rule of court, what would be the situation? That is part of the question that comes up.

I have approached this somewhat, as I indicated. We have glanced at cases, and this rule is now before another panel of my court in the case that I indicated. I should almost think it would be very difficult to say that this is a valid rule of procedure in those consequences.

MR. LEMANN: I don't quite follow your distinction between the efficacy of a federal statute and the efficacy of a rule in so far as Erie Railroad v. Tompkins is concerned. I would think that the rule and the statute would be on the same footing. If you could do it by statute, you could do it by rule. The only question there is whether it is procedural.

MR. PRYOR: That is right.

MR. LEMANN: If it is procedural, I think we can do it by rule. If it is not procedural, you couldn't do it by federal statute. I do not follow your doubt on that point.

JUDGE CLARK: I will put it this way: The power given the Supreme Court under the statute is very definitely limited to procedural matters only, and not affecting matters of jurisdiction and not affecting matters of substance, for that matter. So I think the difference I would make here between a statute and a rule is that the rule can not be as an

Act of Congress. So a rule must be limited to procedural matter. I think that is the real question.

A subordinate part of your question was as to the effect of statutes on Erie Railroad v. Tompkins. Of course that, too, you may not be too sure about, but I had always supposed and still suppose that Congress could set aside Erie Railroad v. Tompkins completely.

It is true that in that famous case Justice Brandeis talked about an unconstitutional course of conduct over the centuries. What he meant has never been solved, so far as I can find out, by anybody. I don't see that you have ever been able to put any meaning in that. Whether he was referring to this sort of thing or not, I do not know. At any rate, for whatever it is worth, I would say it seems to me it must be a part of the function of Congress which can state the jurisdiction of the federal courts and can state what they can hear, and so on. I should think that Congress could constitutionally provide what should be the common law of the United States if they wanted to.

MR. LEMANN: Suppose we adopted your suggestion and, to give color to your fears, a state statute should say you shall never refuse to substitute within ten years, and everybody conceded that ten years was unreasonable, would your new rule stand up then under your doubt?

JUDGE CLARK: This comes back to whether under the

present situation that state provision would govern in the federal courts. We have now passed the point, I take it, that Congress could change it. Certainly I think Congress could change that, as I have indicated, but Congress has not done it. There is question as to the validity of the rule.

Now answering your question, I am afraid I would have to say and hold, much as I dislike to, because I don't like Erie Railroad v. Tompkins -- I think it was a horrible throw-back and have so said often, but we have got it -- I think I would have to say that in a diversity case of the kind you put, a valid state law, even though it seems very unreasonable, must be applied.

MR. LEMANN: On this point.

JUDGE CLARK: Yes. You know where we have gotten under the Erie v. Tompkins rule. Our present bible is Guaranty Trust Co. v. York. That was Justice Frankfurther's bias or edition, or what-not, to the Erie Railroad v. Tompkins case. In that case he said we must get beyond any mere tags like "substance" and "procedure." Those won't do. Those are just misleading. Therefore, we must look and whenever the rule would substantially affect the result, then it must be binding on the federal court.

Certainly this would substantially affect the result, and therefore it seems to me that under the Guaranty Trust rule this --

MR. LEMANN: When I was teaching conflicts years ago, almost every procedural rule would substantially affect the result and affect the rights of the parties. If you are going in that kind of language, you would wipe out all distinctions between procedure and substance.

JUDGE CLARK: Of course, you say the same thing I have said in my day. It seems to me the situation is really dreadful and very ominous. The only thing we can say is that the atom bomb isn't dropped all the while and it may not come, but it seems to me just as you say.

Let me put it this way: In every case that has gone to the Supreme Court they have upheld the state right. There have been dissents. Justice Rutledge dissented at some length in one of those. There hasn't been one where they have gone away from this. It seems to me once you can get a case up to the Supreme Court, let them settle it.

I have written along this line, and there have been others. A professor at Cornell wrote an article with a very good title, "Weary Erie." I might say that Professor Moore and Judge Parker say we are prophets of doom, Cassandras. They are more hopeful.

All I can say is, if they are optimistic, God bless them. Nevertheless, I think the situation can be potentially very bad.

MR. LEMANN: You have another point apart from power --

the desirability of changing the rule. Is that right?

JUDGE CLARK: What I wanted to do -- this is about all we are doing -- is to try to take the question out of the rules. We are, so to speak, avoiding the main issue a good deal, as I wrote to Mr. Brownell when he wrote back and wanted a change along the line we had done, but he wanted a little more. He wanted to make divisions between classes of suits and one thing and another.

MR. LEMANN: That is the other subdivision, and we are not there yet.

JUDGE CLARK: It is, but I think the question of power is about the same on the two of them. So I suggested to him to have this really done right I think you would need an Act of Congress; an Act of Congress that would cover all these points, including diversity cases or broad enough, whether it specifies directly or not, that it takes the diversity cases with them. I don't think we can do that.

What we have done here is in the main to take out the time limitations.

JUDGE DOBIE: You take out the two years and substitute "a reasonable time."

JUDGE CLARK: Yes.

JUDGE DOBIE: Was that not the basis of the decision in the case of Harrison Williams?

JUDGE CLARK: No, not directly. I think you could

say it was a kind of brooding omnipresence back of it, but the Harrison Williams case was actually a ruling in bankruptcy law. You know, I dissented in that case. I thought, using the bankruptcy doctrine, you didn't need to be bound by Erie Railroad v. Tompkins.

JUDGE DOBIE: These suits were brought against Central States, this corporation that Mr. Harrison Williams used to set up holding companies every Monday, Wednesday, and Friday, and dissolve them every Tuesday, Thursday, and Saturday. When the smoke cleared away from about forty of his holding companies, Mr. Williams had the beans and the other people had the experience. So we authorized a suit to be brought in New York, reversing Judge Pollard, against Mr. Harrison Williams, and we got judgment in the district court for a flock of millions of dollars. Then the Supreme Court reversed it. You all reversed it.

JUDGE DRIVER: Judge Clark, was one of those later gloss on Erie cases that involves the statute of limitations the Guaranty Trust case or one of the others, one of the later cases that held that a state statute of limitations was substantive and not procedural?

JUDGE CLARK: I may be wrong, but I thought that case had never been actually decided by the Supreme Court. It has been decided by the lower courts. It has been decided by the Tenth Circuit, and in every case I know of it has been held

substantive.

JUDGE DRIVER: In three of those later cases, I thought there was one that did involve it.

JUDGE CLARK: There were three later cases, but they involved the service of process -- Merchants Transfer Co. v. Ragan --

JUDGE DRIVER: Under Justice Frankfurther's reasoning, however, a state statute of limitations would substantially affect the result and would be substantive under his general definition, would it not?

JUDGE CLARK: Of course, Guaranty Trust Company itself was a question, as I recall, of laches in so-called equitable suits. The theory of that is certainly just what you say. I don't believe there is any escaping the question of limitations.

DEAN PIRSIG: I myself am not so sure that a limitation on revivor of pending action is equivalent in terms of substantive law to a statute of limitations on the commencement of an action. You do have an action pending which would lead to bringing in another party in the place of someone who has died. I myself would rather not see that question raised.

I couldn't find any cases which held otherwise. There is one state case which says revivor is remedial. I found no other authorities one way or the other on that question. In the meantime, you have had Congress repealing its own Act on

the basis that this rule is valid. You have now also the Supreme Court about to take action on the identical question in its own court.

To raise the question of the validity of this rule would immediately raise thé question of the validity of what the Court itself is undertaking to do. So I would rather by-pass that question and assume that we have the power, and decide whatever we want to do on the terms of limitation.

JUDGE DRIVER: I would make the same distinction that Dean Pirsig has. I think it lies within the powers of the court to require reasonably expeditious prosecution of litigation. I would make that distinction, but the higher courts do not always see eye-to-eye with me. I don't know what the Supreme Court might do, of course.

MR. LEMANN: If this were not so, if the doubt expressed by Judge Clark is substantial, it might even extend to the amendment. That is the point that occurs to me. If you want to press the argument to its logical conclusion, the whole thing is substantive and we ought not to say anything about it. We ought to change the rule anyhow, apart from the question of the power.

JUDGE DOBIE: If we have the power to make it two years, we certainly have the power to change it to a reasonable time.

MR. LEMANN: That is right. If you do not have power

to make it two years, have you got any power?

JUDGE CLARK: I am not quite sure where we have gone. If the suggestion is that we do nothing, I really would be very much upset by that, because this is the situation: This happens to be, so far as I know, the only rule -- and I am now referring particularly to subdivision (d) -- that has been the subject of aspersion. In a newspaper editorial, The Washington Post said if the rule was as dreadful as it appeared to be in the Snyder v. Buck case, something ought to be done about it.

Possibly I should make one emendation of that. I understand that Mr. Westbrook Pegler has said that the Roosevelt Administration created a terrible engine of injustice in discovery provisions that have been misused. That is another story. I am not sure we can consider that an editorial.

MR. LEMANN: What is this case that brought about the editorial in The Washington Post?

MR. TOLMAN: Snyder v. Buck.

JUDGE CLARK: That was the case which was thrown out, you know.

MR. LEMANN: That is not the bank case, the suit against the shareholders of a bank.

JUDGE CLARK: The bank case is the Anderson v. Yungkaw case. The Snyder v. Buck case is given in the discussion on pages 20, 21, and following.

MR. DODGE: We would make two changes here. One is to change two years to a reasonable time, and the other one is to make the dismissal permissive instead of mandatory.

JUDGE CLARK: That is right.

MR. DODGE: I move that those changes be made.

DEAN MORGAN: I second the motion.

JUDGE DOBIE: I second that motion.

CHAIRMAN MITCHELL: And let the Supreme Court wrestle with the question.

JUDGE CLARK: Let me ask one question about that to make sure. As I understand it, Dean Pirsig's suggestion was not an objection to the amendment. It is an objection to saying too much in a note. That is it, isn't it?

DEAN PIRSIG: Yes.

JUDGE CLARK: That is all right.

CHAIRMAN MITCHELL: All in favor of those two changes in this rule say "aye"; opposed. They are agreed to.

It is a queer situation, isn't it. It is a reiteration of a statute. Now the statute is gone, and the rule is still there.

MR. PRYOR: Congress recognizes it as a procedural matter.

CHAIRMAN MITCHELL: Congress did, yes.

JUDGE DRIVER: They can amend the statute in deference to the rule.

JUDGE CLARK: The Court is going to, yes. Leland called attention to the fact that the Supreme Court is in the process of adopting rules. In part of their rules they are following this.

MR. TOLMAN: They are following it in both aspects, aren't they?

CHAIRMAN MITCHELL: In that case, I suggest we had better get up to the Supreme Court before they take action on the thing.

MR. TOLMAN: I don't think we can act before the Supreme Court can act, because they are going to do it next week, I think. The rules have been approved, and they are in final printed form. They will be promulgated next week. It will mean they will have to change their rule again later, because I understand definitely that the reason they have adopted the six-month limitation is because they want to have the same limitations in their rules that apply in the district court.

CHAIRMAN MITCHELL: They will have to change theirs or nullify ours.

MR. TOLMAN: One way or the other.

JUDGE CLARK: Leland, what do you think will be the position of us intermediate inferior courts?

MR. TOLMAN: I would think that you should hurry up and adopt some rules on the subject after they have acted.

JUDGE CLARK: I wonder what the situation would be as to the courts of appeal? That is, the Supreme Court would have a rule, and the district courts will have a rule.

MR. TOLMAN: That would cover the waterfront, wouldn't it, and you would not have to have a statute.

JUDGE CLARK: What authority is there for the courts of appeal to make rules?

MR. TOLMAN: The same authority the Supreme Court has, exactly the same, the same statute.

JUDGE CLARK: Maybe I am wrong and maybe this has to be procedural, because how can the Supreme Court make rules unless it is procedural?

MR. TOLMAN: That is exactly the point.

JUDGE DOBIE: We have passed that, haven't we?

JUDGE CLARK: Yes. I might say the Supreme Court rule, Rule 48, is going to be very direct. This is the last sentence:

"Such substitution, or, in default thereof, such suggestion, must be made within six months after the death of the party, else the case shall abate."

MR. TOLMAN: Judge Clark, I was interested to see that in the form in which that rule went to the Court from the clerk's office, it had a reference to the Snyder v. Buck case in it, and the Court committee which considered the rule struck the reference to the Buck case out. I do not know what they

meant by doing that.

JUDGE CLARK: I think they ought to be ashamed of the Buck case.

PROFESSOR MOORE: The Court has been apprised of the fact that we are considering this, because Mr. Justice Reed sent me those rules and asked for comment. I told him that in my opinion Rule 25, upon which the Court had based their rule, was the worst rule of all the 86 --

MR. TOLMAN: I know they are aware of it.

PROFESSOR MOORE: -- and that the Court should not adopt it. I further told him that I thought it wasn't breaching confidence that the Committee was considering a change of this rule. So they have been put on notice.

MR. TOLMAN: I am sure they are aware of it, because I have talked to them about it, too. I have talked to the clerk's office about it and told them this was very likely to be changed.

JUDGE DOBIE: Now what are we on, Charlie?

JUDGE CLARK: We go to subdivision (d).

Monte, you were suggesting we ought to change "may" to "shall".

MR. LEMANN: I am not pressing it. I said just now to Mr. Dodge, it is getting to be ridiculous. You suppose a judge would say, "You waited an unreasonable time, but I will not dismiss it."

JUDGE CLARK: I don't know. Why not?

MR. LEMANN: I don't think it is very important.

JUDGE CLARK: "Next time you ought to do better. Don't wait so long next time."

Now subdivision (d) is the public officer one. That is on page 20 of the September draft and, if you want to go somewhat into the correspondence with Mr. Brownell, I attempt to summarize it somewhat beginning on pages 11 and following of the March draft.

I want to say that after hearing your suggestions, I did not suggest making any changes. He wants us to do various things which I think could be done better by statute.

Let me go back a little on this, if you haven't it fully in mind.

This rule, like the other rule, has had potentialities of difficulty right along. When it represented a statute of the United States, that was one thing. Of course, that statute itself has a history. I think the statute itself was a modification of an earlier harsh rule. There has been a long history in it.

At any rate, it came up particularly with two cases, of which the Snyder v. Buck case is a good example. The Snyder v. Buck case was decided by Judge Holtzoff, and the Supreme Court reversed and held in that case that by the lack of substitution the case was lost.

Judge Holtzoff then wrote urging a change and saying that this was an impossible situation, and it was in connection with that that The Washington Post carried this editorial that I speak of. Judge Holtzoff wrote the Chief Justice, as I remember it, and it was referred back to us.

We considered this last spring. I was directed to get in touch with Judge Holtzoff after we made the changes and get his reaction, to see if we had satisfied his point. He wrote back most enthusiastically. I put in a quotation at the top of page 21. He said he thought the amendments were splendid. In fact, I am not sure that perhaps he didn't a little overdo it. I am not so sure myself. I think we are helping, but I do not think we are solving this whole matter, because I don't see how a rules committee can. There is a good deal of policy here involved.

Meanwhile, and apparently without knowledge of this background, Attorney General Brownell wrote a long letter to the Chief Justice under date of July 1, which was distributed to the committee, saying that this was a very bad situation and urging that something be done. That was referred to us, and that was one reason I started corresponding.

JUDGE DOBIE: What does he want done? Is he satisfied with this? What you do here is take out the six months as you did the two years, and substitute a reasonable time? Isn't that correct?

JUDGE CLARK: Yes.

JUDGE DOBIE: What else would he do?

JUDGE CLARK: I take it that he is satisfied on this so far as what might be termed its affirmative features are concerned. That is, he is ready to have the change made here and ready to have the suit against the office rather than the person. That is the point that is covered in the last line, and which I might say is already being done regularly in the case of the Commissioner of Internal Revenue. You practically never now, in any of the cases before us or elsewhere, see any name. It is always So-and-So v. Commissioner or against C.I.R., or something of that kind.

A particular point further that Mr. Brownell has made is to raise some question as to the case of liability of an officer for wrongdoing in his personal capacity. He has been a little afraid that we have been broadening the provision unduly. Whenever an officer is sued, whether it is claimed it was some personal malediction in office or whether it is one of these that are just on some governmental right, in either of those cases you could still sue the office and, so to speak, cover up the nature of the action.

CHAIRMAN MITCHELL: If you have a defendant named simply as the Attorney General of the United States, but not by name, and you provide by rule that in case of the death of the incumbent no action may be continued by his successor

without substitution, you certainly couldn't impose on the second fellow the consequences of the previous person's default or malefaction.

MR. DODGE: There cannot be any question of substitution in that case. I think the last two sentences of this amendment are, as Judge Holtzoff says, splendid.

MR. PRYOR: If the action is against the officer individually and not by reason of his office, it would be covered by Rule 25(a), would it not?

JUDGE CLARK: Yes, that is, in case of death. Let me go a little further to be fair to the Attorney General and cover all he had in mind. As I understand it, he takes this completely, except in the one case of a suit against an officer for a claim of misfeasance in office. That could be a good deal. It could be when he sought to misuse powers, and so on, any claim of misuse of powers. It is the Attorney General's point that those cases ought to be taken out of this and that they should be subject to the existing period of limitation and should not be subject to suit by name. It was the Assistant Attorney General who made the report.

CHAIRMAN MITCHELL: What do you mean, should not be subject to suit by name; the name of the man or the name of the office?

JUDGE CLARK: We have it here, "he may be described as a party by his official title and not by name . . ."

The Assistant Attorney General who made the report to Mr. Brownell, which he used in writing back, says this would mean "entirely new and unwarranted duties on the Government to take corrective action," and therefore every case that came in would have to be studied so as to decide whether it was a case against the officer personally or whether it was a suit involving something in his official capacity. He suggests that there ought to be a differentiation which could be made.

I am going to suggest in a minute that I think it would be unfortunate to limit the rule. It would be unfortunate even though the Attorney General has a point. Nevertheless, I think if we were to do it, we would start off something like this at the beginning of the final sentence:

"In any action by or against such officer in his official capacity, regardless of whether he is described by his official title or not . . ."

That tries to differentiate and allow the rule to apply only when he is sued in his official capacity, thereby intending to eliminate suits for malefaction.

CHAIRMAN MITCHELL: You use the phrase "in his official capacity." If you are trying to hold him responsible for some personal act of misconduct, aren't you suing him in his official capacity?

MR. DODGE: He is being sued for something done in his official capacity. This rule doesn't seem to me to require

any explanation of that sort. It is perfectly obvious that if it is a personal wrong of the officer, there is no question of substitution involved. I do not see why we have to spell that out.

MR. PRYOR: I don't see that the Attorney General has any point.

JUDGE CLARK: I don't want to spell it out, so I quite agree with you, but let me at least try to give you a little more about what the Attorney General says. He says they have to study every case and therefore take action. I think that is true, but I think that is an obligation we ought to put on them.

MR. PRYOR: They study every case anyway.

JUDGE DRIVER: I doubt it.

CHAIRMAN MITCHELL: Study the case for what purpose?

JUDGE CLARK: In order to raise the question whether the suit is properly brought against the name of the office and not the person.

DEAN MORGAN: General, you don't understand that since you got out of that office they do not want to do any law work.

CHAIRMAN MITCHELL: I cannot get this. Do you mean that every time a suit is brought against the Attorney General by name or title, they have to examine the substance of the action to find out whether he is being sued for personal

malediction or some official act in which his successor ought to be retained as defendant? Is that it?

JUDGE CLARK: That is it in part. Let me go on and say, in order to see if they should raise objection to the way the action has been brought.

CHAIRMAN MITCHELL: That is what I am talking about.

JUDGE CLARK: Yes, I think that is correct.

CHAIRMAN MITCHELL: If it is personally misconduct which is involved, it would appear on the face of the suit that it is. If they name him simply by the title of his office and then try to obtain a personal misconduct judgment against him, why not? No question comes up until he is out of office and some other fellow takes his place.

JUDGE CLARK: There is a further part to what the Attorney General wants, and that is that he wants, as to that class of cases, to keep the limitation.

MR. PRYOR: I move the approval of the rule as proposed.

DEAN MORGAN: I second the motion.

CHAIRMAN MITCHELL: What is your motion?

MR. PRYOR: Approval of the suggested changes in the rule.

JUDGE DOBIE: I second that motion.

CHAIRMAN MITCHELL: That includes the underlined section on page 20, is that it?

MR. PRYOR: That is right.

JUDGE CLARK: Yes. That would include all of it, including, of course, the last sentence, too.

JUDGE DOBIE: I second that motion.

CHAIRMAN MITCHELL: I was thinking about that last line, "Unless his name is so added, no formal order of substitution is necessary as otherwise required in this subdivision of this rule."

Why would it not be better to say, "the case may be continued against his successor without substitution"? Isn't that what you really mean?

MR. PRYOR: That is right. That is the meaning of this, isn't it?

CHAIRMAN MITCHELL: All right. All in favor of that amendment to Rule 25(d) say "aye"; opposed. It is agreed to.

JUDGE CLARK: May I raise a question that we have raised in the note. If you are responsible for the note, you certainly want to consider this a little. If you will look, please, at page 14 of my March draft on the note: "Thus the amended rule makes appropriate provision for both kinds of cases which it encompasses. Where the action is for personal wrongdoing beyond the official power of the officer, as for misconduct, nuisance, trespass, or enforcement of an unconstitutional statute, it is still necessary to name the officer and to show a substantial need for substitution of his successor.

I take it that is underlying law which we do not change.

"But where the officer is a party in his official capacity, as in mandamus actions, proceedings to obtain judicial review of his orders, etc., and all actions brought by him for the government, he may be described by his official title."

I think that is an accurate statement of the existing situation. I am a little worried myself for fear that that may not be a bit misleading to counsel, because I take it that that is the law and what should be done.

I think there is one additional point: What happens when they haven't done it quite that way? Suppose that there is a suit for personal misconduct, and so on, addressed against, say, the Commissioner of Internal Revenue. I take it that under our rule they can do that. What happens next? The Attorney General or the representative of the defendant, I take it, comes in and says, "This won't do." I think what the remedy is going to be is not dismissal or holding the substitution bad. I think the remedy is going to be putting in the name of the officer. Therefore, we may be stating it a little stronger.

This is a correct statement of the law, but if you don't do it, what is the penalty? What do you say?

MR. DODGE: I do not think there would be substantial need for substitution of his successor. How can there be substantial need for the substitution of his successor where

he is sued for misconduct, trespass, nuisance?

JUDGE DRIVER: He may be trying to enforce what is an unconstitutional statute if his successor is going to threaten to carry out the policy.

MR. DODGE: Yes, where his successor is threatening to carry out the same action, but those first words don't seem to be cases of substitution at all.

JUDGE CLARK: On that point, Mr. Dodge, I say that the question we envisage here or the problem we are bringing up here is, suppose nevertheless the party has sued by the name of the office.

JUDGE DOBIE: For misconduct.

DEAN MORGAN: And it is a personal wrongdoing.

MR. DODGE: That is a case, of course, where the court should order the insertion of his name.

JUDGE CLARK: Yes, I think that is so. Or to put it this way: Looking at our note on page 14, I think if we told the whole story, having said all this, we would then probably add: "The remedy is by substitution of the name."

MR. DODGE: Leaving out that reference to substitution of his successor if he is sued for personal wrongdoing.

CHAIRMAN MITCHELL: You mean insertion of the name?

JUDGE CLARK: That is right. There isn't any name in it. You are right. It would be to put the name in.

What I am now saying is that in this statement of the

law we have here, the penalty is not very severe, which I think is all right, but nevertheless the Attorney General does not like that end of it, you see. The penalty is only to correct it.

CHAIRMAN MITCHELL: What is it the Attorney General wants to do? I don't have that clear.

JUDGE CLARK: The Attorney General would like to do two things which come pretty much together. He would like to take out or separate from our rule the cases of actions for personal misconduct. He would like to keep those subject to a strict limitation of six months.

CHAIRMAN MITCHELL: For substitution in case of death, you mean?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: That is a case of substituting the defendant's executors or administrators, isn't it?

MR. PRYOR: That would come under the previous rule.

JUDGE CLARK: It would in that part. It would not, however, on this question of the title of the office. I think that is where the Attorney General is raising the chief question as to that. He says that that provision is good for the general situation, but in this case of the personal misconduct, then it should not obtain; and then he says they would have the burden of working it out.

MR. PRYOR: If he is sued in his individual capacity

for personal wrongdoing, the addition of the name of the office is just descriptive. It hasn't any particular significance.

JUDGE CLARK: Suppose it hasn't the name of the personal wrongdoer.

MR. PRYOR: I would think it would be by the party who brought the lawsuit.

JUDGE CLARK: Suppose an action is brought against the Secretary of Labor saying that the Department of Labor has pursued an unconstitutional course in some provision, a labor injunction or what-not, and the suit is against the Secretary of Labor, not against any individual. Suppose there is just that situation, what would we do about it? I think what we are doing and what the Attorney General thinks we should do or thinks the court should do -- and he doesn't like that particular feature of it -- is to say that that action will not abate and will not be thrown out and you cannot raise the six-months time limit. All you can do is to put in So-and-So, Secretary of Labor, and go on from that point -- James P. Mitchell, Secretary of Labor.

The Attorney General says two things about that: The first is that the suit should never be brought in that case against the office; and in the second place, that there should be a six-months limitation as it now stands; in other words, that if the matter is personal wrongdoing, you should not be able to substitute if you don't do it promptly.

MR. PRYOR: Personal wrongdoing is a case under the previous rule which we passed a while ago.

JUDGE CLARK: No, Mr. Pryor, that isn't quite sufficient. If everyone crossed their t's and dotted their i's, it would be, but the point is that some lawyer, taking advantage of what he reads in section (d) here, sues not the person but sues the office.

MR. PRYOR: He would soon find out his mistake and get the name of the individual he has to claim against.

JUDGE CLARK: Of course my answer and the answer I have made to date -- and I think it is the answer that has been going around the table -- is "We are sorry, Mr. Attorney General, that is just one of the obligations of your office, and we do not see any desirable way of making that separation until your representatives come in and move to do it. If we are going to have a rule of this kind, we can't expect lawyers to be letter perfect in its application, and it does put a responsibility on your office."

Further, I suppose we are also saying that we are not keeping the six-months rule against that class of cases, because if there is question about it as against any of these, there would be as much question here as elsewhere.

As I say, I answered that to him by saying that I thought there was real doubt about our power, and that in all those it would be much better to have an Act of Congress.

His final letter to me was that there was much to be said for that idea, and was wondering if we would be interested in his sort of working on an Act of Congress.

JUDGE DOBIE: What are we debating now, the note?

JUDGE CLARK: We are debating the note. That is the note on page 14. On that I wanted to have you see what we have been saying in your name, and to see whether you agreed with the statement, and whether you thought it was sufficient. It seems to me that the statement is perfectly correct and states the law. The only thing is that it may be more military than is actually the case, because, as I say, the penalty as we work it out is very slight. The penalty is only the insertion of the actual name.

MR. PRYOR: I think the note is all right, but I doubt its necessity. I think it is perfectly plain without it.

JUDGE CLARK: Maybe, then, we should leave it out on the ground that everybody ought to know it anyway.

PROFESSOR MOORE: Judge, for my own enlightenment, could the Wage and Hour Administrator bring a suit just in that title, Wage and Hour Administrator, Department of Labor?

JUDGE CLARK: I should rather think so. Why not? As a matter of fact, we have had cases a good deal like that. I do not remember particularly as to that office. I know we have had state cases. I remember we have had compensation cases or cases that involved some question like that, as well as taxes,

against the Deputy Commissioners of Labor of New York State.

PROFESSOR MOORE: What about the converse situation?

MR. PRYOR: Aren't those brought in the name of the Secretary of Labor? They used to be.

PROFESSOR MOORE: They are brought in the name of the officer.

MR. PRYOR: That used to be true. I thought lately they had been bringing them in the name of the Secretary of Labor, but I may be mistaken about that.

PROFESSOR MOORE: Maybe they have.

JUDGE DOBIE: There are a great many of them, and they give no trouble at all. Under the Longshoremen's Act, you sue the Deputy Commissioner. That is perfectly official. We have never had any trouble in any of these cases, and I suppose we have had hundreds of them.

JUDGE CLARK: Of course, it is done a great deal now. It is done in all sorts of cases. In that particular case I was speaking of against the New York official, the Deputy Commissioner of Labor in New York State, I thought I would have some fun, so from the bench I said, "I suppose there is some person. Who is it?" The plaintiff said, "I don't know." Then he turned to the defendant representing the state and asked him. I will be damned if the defendant didn't know. We never could get the name of the person. We just went ahead. I thought it was useless to pursue it, and we went ahead and decided the

case, never knowing whether there was any person there or not.

PROFESSOR MOORE: Judge, what about the converse situation where an employer brings a suit against the Wage and Hour Administrator? Under our rule as we have adopted it now, can that be brought just against the office?

JUDGE CLARK: I should think so, yes. I should suppose that is what we are trying to do.

PROFESSOR MOORE: I wish it were, but I have some doubt. You say, "When an officer of the class described herein may sue or be sued in his official capacity . . ." Where do I go to find out whether I can sue the Wage and Hour Administrator in his official capacity?

JUDGE DOBIE: I do not think we have ever had such a suit. They have always named the man, and there never has been any difficulty. Then if it changes, if Tighe Woods gives way as Housing Administrator to Bud Spulkins, he comes in and moves the substitution of that name for the other, and we go gaily along. We never have had a minute's trouble in these cases for fifteen years.

PROFESSOR MOORE: Certainly it has been a lot of trouble in the OPA cases, a tremendous lot of trouble.

JUDGE DOBIE: Not on that point.

PROFESSOR MOORE: Mainly failure of substitution, yes.

JUDGE DOBIE: We haven't had any.

JUDGE CLARK: There has been a lot of trouble with the

OPA cases on the question of substitution. A lot of them failed because they didn't substitute the new people, who changed very often. That is one of the reasons why it is too bad to have those cases fail.

MR. LEMANN: There are a number of cases in which it has been held that in actions by or against the Government or its agency, there is no necessity for naming the individual. In the next paragraph you say that there is a considerable established practice already in the direction of the amendment that you propose.

When I read your cases in the footnote -- and you have quite a lot -- I wonder what makes the OPA any different from the other agencies that are referred to there, including the Division of Labor Law Enforcement, which somebody asked about a while ago. You have a lot of cases there, and apparently the courts have proceeded on the same rule that you are proposing now to legitimize, as it were. Am I right?

JUDGE CLARK: Yes, that is as I had supposed. I had supposed that this was the practice. I don't know of any case where we have objected to it, where judges have objected to it. It has been going on and on. There is some doubt how far it is authorized.

MR. LEMANN: I do not know why the OPA cases should be giving any added difficulty beyond those cases that haven't given any difficulty, to which you refer. What is before us?

Is there any motion or suggestion that we change anything?

JUDGE CLARK: I should think that we have at least settled everything, unless there is some doubt about it. I take it the situation is this: We have passed both (a) and (d). I raised a question as to the note. The question has been answered to date -- no definite vote as such, but I think the answer is probably adequate for my guidance -- saying that the note is all right, but probably unnecessary. That is the way we stood when Mr. Moore wanted to raise some question.

Of course, I think we should stop and listen to his question all right. His question, as I understand it, is on this point of the official capacity, a suit against the official capacity. How do we know it is the official capacity?

DEAN MORGAN: You have that answered.

PROFESSOR MOORE: Where?

DEAN MORGAN: By the substantive law. You have the right there. I do not see what you are talking about. You can't regulate the substantive law.

CHAIRMAN MITCHELL: Do I understand if you sue a man who is in public office for some personal act of misconduct, that you are not suing him in his official capacity?

MR. LEMANN: You would be suing him individually, I would think. You would be alleging that he went beyond what he was authorized to do, and he was acting, therefore, as an individual and became individually responsible. You wouldn't

be suing the agency. You wouldn't be suing the office; you would be suing the man, I would think.

MR. PRYOR: That is right.

JUDGE CLARK: I certainly don't want to shut anybody off, particularly Professor Moore. I would like to ask him directly: Do you think there is some real doubt about it, and can we improve it? There is no question that this is an important rule. It is one that is --

MR. LEMANN: Most convenient.

PROFESSOR MOORE: I am all in favor of what you are trying to do, but I just wonder if a suit is brought to enjoin, say, the Wage and Hour Administrator, suppose the attorney reading the rule thinks now he has a right to sue and name the defendant, name the office as the defendant, can he do that?

DEAN MORGAN: Yes.

MR. LEMANN: Clearly, I would think.

MR. PRYOR: If he has a case.

JUDGE CLARK: I should think he could.

PROFESSOR MOORE: I should think he ought to, but where does a lawyer go to find that out?

DEAN MORGAN: That is substantive law, Bill. Where are you ever going to find the answer?

PROFESSOR MOORE: At the present time he cannot sue the office.

DEAN MORGAN: He can't, but what difference does that

make?

PROFESSOR MOORE: You proceed against him on the theory that he is a tort-feasor. I would like to be able to sue the office, but after I read Rule 25(d), where do I go to find out that I can name the office rather than the individual?

DEAN MORGAN: There is nothing to prevent your naming him if you want to. If you are in doubt you can name the officer. If you are not in doubt you don't have to name him. That is the answer.

PROFESSOR MOORE: Suppose I name the office and the defendant comes in and moves to dismiss?

DEAN MORGAN: On the basis that you haven't stated a cause of action against him?

PROFESSOR MOORE: On the basis that you cannot state a cause of action against the office.

DEAN MORGAN: All right. Judge Clark says if that motion is upheld as a question of law, then you can substitute his name as an individual. I don't get your difficulty, except it is the difficulty we all have if we get a case against a public officer, to know whether we want to stick him personally.

CHAIRMAN MITCHELL: That is in the statute defining his powers and duties. There you find out whether you have a right to proceed.

PROFESSOR MOORE: Aside from the Commissioner of Internal Revenue, there isn't a statute that you can sue the

office and not the individual.

MR. LEMANN: We have cited here McCloskey v. Division of Labor Law Enforcement, U. S. ex rel. v. District Director of Immigration and Naturalization, Wells v. Attorney General, and U. S. ex rel. Carey v. Keeper of Montgomery County Prison. How did they get around your point? How did they find out they could bring the suit that way? Apparently they brought all those suits by naming the office.

As I understand it, your point is that the sentence before the last of the underscored material on page 20 leaves open for decision when it is that you can sue an officer of the class described in his official capacity, because the rule says that when he may sue or be sued in his official capacity, then he may be cited as a party by his official title. Your point is that we are not saying when that can be done, if I get your point.

Then I say to myself, how could we say when that could be done without perhaps going contrary to some statute or beyond our authority? Could we frame a rule saying, "Unless the statute creating the office otherwise provides, all suits involving a public officer may be brought against the office"?

PROFESSOR MOORE: I wish we could say that.

MR. LEMANN: You don't think we could? If we can't, there is no use discussing it. If we can, maybe it is worth

discussing.

JUDGE DRIVER: You have a matter of substantive law. You couldn't sue the office unless you have a claim against the office. We cannot say what constitutes a claim against the office. That is substantive law.

CHAIRMAN MITCHELL: Of course, you can sue without having a good claim.

MR. PRYOR: That is a matter of substantive law. Heretofore under the rule you had to sue the officer by name.

PROFESSOR MOORE: On the theory he is a tort-feasor.

MR. PRYOR: Here under this new rule you can sue the office if you have a right of action, and whether you have a right of action cannot be determined by our rule.

MR. LEMANN: I don't think that quite hits it, Mr. Pryor, because while it is a rule of substantive law whether there is a cause of action, the question of how you assert your right, as to how you bring the suit, is a procedural point. Whether your suit can be maintained involves a question of substantive law, but how you present the matter to a court is a procedural point. We are talking about the title of the suit here, how you get in to court.

MR. PRYOR: It might be clarified by adopting the suggestion you made a moment ago, that where there is no statute providing for contrary action, the action may be brought against the office.

MR. LEMANN: Could we suggest that that be worked on and discuss it at another session?

JUDGE CLARK: I want to make a couple of suggestions here. The first is that it seems to me that Mr. Moore's point comes to this: There may be a lurking ambiguity in the rule, and I think that is true. I don't believe we can possibly cover and foresee everything. It seems to me that it is comparatively small, and a kind of consideration we must take.

Let's go back now. The lawyer wants to start suit. He thinks it would be somewhat easier to name the office alone. Then he is stopped by this provision that it must be in his official capacity. What the cautious lawyer then is going to do is to say, "I don't believe it is safe for me to take this privilege, and I will sue in the name of the person."

Then it is all covered. It is only in the case of the bold, rash lawyer who says, "I will take a chance and sue the office." He sues the office. The matter then comes before the district judge on some proceeding by the defendant. Then I think the only risk that we have gone wrong is in what the district judge does. If the district judge says, quite naturally, "Let's correct this by sticking in the name of the person," everything has happened all right. The only possibility is that the district judge might get a little rough and say, "I don't believe the rule would govern this at all, and therefore I will throw him out of court."

I think that is possible, and Mr. Moore is right about that, but what can we possibly do about it? I should think that the chances of remedying that completely, because it is a good deal a question of substantive law, were not very good. I don't believe quite that we ought to say in any case when you are suing with reference to a government official that you can sue the office alone. That is, I don't know that we ought to make the broad authorization. Possibly we should. I don't know.

JUDGE DOBIE: I don't think so.

JUDGE CLARK: We would have to make that invitation, you see, unless we put in some limitation. So that is the problem which Mr. Moore has presented, and that is what I have to say about it.

The answer that Monte is making, the suggestion that we put in this provision with reference to substantive law, to a statute, and so on, I don't like very much, because I am afraid I don't understand what it means. In the first place, I do not know any statute that really prevents such a suit. If you are saying it doesn't authorize it, there are very few that do authorize such a suit. The only one I know of is possibly this one against the Commissioner of Internal Revenue, and I think the authorization there is somewhat backhanded, to tell the truth.

To come back to what you say, I don't believe that is

going to do anything for us. I don't think the statute will do anything for us. It seems to me it will only confuse.

MR. LEMANN: You know, in these tax cases you never sue the man who happens to be Commissioner. Most people don't know who is the individual. You sue the Commissioner of Internal Revenue or the Collector of Internal Revenue, and that is a convenience.

JUDGE DOBIE: We have had at least fifty of those against the Commissioner of Internal Revenue, without naming him, and there never has been any question.

MR. LEMANN: What I had in mind, which is very rough, would be something like this as a separate paragraph in this rule:

"Unless a statute otherwise provides, a claim asserted against a public officer by reason of acts done in his official capacity may be presented by a suit against the office as such without naming the individual."

Then, if you wish, append a note saying, "Of course, this does not undertake to state any substantive law as to whether any right of action exists against the office, nor does it cover a case where the claim asserted is against the individual because he has gone beyond the law which clothes him with authority to act."

MR. PRYOR: That is right.

MR. DODGE: I don't think it is necessary to add

anything to the rule as now adopted.

DEAN MORGAN: Neither do I.

MR. DODGE: It is perfectly plain if it is an action against him for wrongdoing, not the enforcement of an unconstitutional statute which is to be continued in practice, that is against him in his individual capacity; but if it is for some specific act of wrongdoing on his part, this rule doesn't apply to him at all and there is no question of substitution of parties there.

PROFESSOR MOORE: Take this Snyder v. Buck case, which is a horrible case. The plaintiff brought a suit against a naval paymaster, and he went out of office. Under our rule, could the plaintiff bring the action just against the office of naval paymaster?

DEAN MORGAN: He may. He doesn't have to. He may under the rule.

PROFESSOR MOORE: It would be very advisable for him to do it if he can, because he avoids substitution later on. In Snyder v. Buck, the plaintiff lost the judgment solely because there was a change which nobody caught on to for a while. That was true of one of these suits against Acheson.

I don't know where you would find any authorization -- I wish there were -- I don't know where you would go to find any authorization to sue the Office of Naval Paymaster, as such.

DEAN MORGAN: This gives it to you.

PROFESSOR MOORE: I wish it did.

DEAN MORGAN: Sure.

Mr. Chairman, it seems to me that when you once admit that the real party in interest is the Government that is back of this particular office, what you are fighting over now is just the old common law fight on misnomer of parties. It seems to me you are just going into a lot of nonsense about this particular thing. Everybody agrees that in a case of this kind it is the Government that is back of him that is responsible, and he is just a figurehead, the name of the party. The real party is always back of that. It seems to me you are just wasting time over what the common law used to do with the old plea in abatement for misnomer. One of the very first things they abolished was the plea in abatement for misnomer.

JUDGE DOBIE: Eddie, you have a number of those cases, and the question is whether or not it is a suit against the United States.

DEAN MORGAN: Of course, they have come to the point where they are recognizing that the real party you are suing is the Government back of him. This is just a question of how you are going to name it, nothing more, in my opinion.

JUDGE DOBIE: I think this is all right, and I move we adopt it and go on.

MR. DODGE: I second the motion. It has been adopted already.

CHAIRMAN MITCHELL: Is there any further discussion?

MR. PRYOR: It has already been adopted.

CHAIRMAN MITCHELL: It is moved and seconded that Rule 25(d) be accepted in the form presented by the Reporter. All in favor of that say "aye"; opposed. It is agreed to.

JUDGE CLARK: If we go on from here, we go into the deposition and discovery matter, and there are some questions coming up under that. I think the best thing to do is to take them in order.

Take page 24 of my September draft. The first one is this provision as to regulating the order to take deposition. Page 24, Rule 30(a), add at the end of the rule, the rule which deals with notice of examination and time and place:

"The court may regulate at its discretion the time and order of taking depositions as shall best serve the convenience of the parties and witnesses and the interests of justice."

This was adopted by us before.

If you will look in the note you will see that there has been some variation. While the courts have more or less assumed this power, often they admit it to be a race only.

I would say this rule is desirable. The only thing is that conceivably judges still may not do much about it. I suppose, having the power, they may not just because it is a nuisance and they don't know until the matter is brought before them.

I would say you might find it very interesting to note that in New York they have just now, March 10, adopted rules to go into effect April 1 which are the most complete regulation of all this. It is an attempt to state the priority. Without going into a great deal of detail, I can't tell you all the details. They say here:

"Unless an adversary, in the opinion of the court, with respect thereto has been lax in seeking an examination of the opposing party, the mere priority of institution of the proceedings shall not entitle the noticing or moving party to priority."

Then they provide that in general you cannot have it until you have had an answer in, and then they provide provisions of this kind:

"In actions in which contract and tort issues are mixed, plaintiff shall generally be entitled to priority of examination, except that if damages are also sought for injuries to the physical person, including indirect mental injuries, then the defendant shall be entitled to priority of examination."

I can see one reason for it. In New York it has been a mad scramble and they are going to regulate it, provide game rules or ground rules. The purpose seems to me to be entirely praiseworthy.

On the other hand, to have rules of that length and intricacy for this is a good deal difficult. I am inclined to

think that we are doing the best we can, even though I think it may not be effective.

JUDGE DOBIE: Leave it to the discretion of the court.

JUDGE CLARK: Yes. The great difficulty, as I suggest, is that the court won't exercise its discretion, except now and then, unless he is Judge Fee. Judge Fee would exercise a lot of discretion, but I think in New York in general the reaction would be to say, "Don't bother with us. Go ahead and do it yourself."

JUDGE DOBIE: Don't you think the judge would have the power without this addition?

DEAN MORGAN: I move the adoption.

JUDGE DOBIE: The judge has this power, and this just makes it clear.

You move its adoption, Mr. Morgan?

DEAN MORGAN: Yes.

JUDGE DOBIE: I second that motion.

CHAIRMAN MITCHELL: All in favor of this --

DEAN PIRSIG: Mr. Chairman, there is a minor matter I would like to raise. If this is added to the end of Rule 30(a), would that mean that the court is to act only on motions of any party upon whom the notice is served, or should it not be on the motion of either party?

JUDGE DOBIE: I think he could do it without any motion at all.

DEAN PIRSIG: Or without any motion at all. I am not clear what the effect of it would be.

JUDGE DOBIE: That just gives the power to the court, if that is all you think you need. Usually it would be brought to his attention by motion. He ordinarily would know about it. If by any chance he is a frivolous judge and reads the record before the trial, as we always do, I think he could do it himself.

The normal procedure, I would say, would be to send it to the lawyers, don't you think so, and say, "Look here, Mr. Bowser, and look here, Mr. Blitz, it seems to me that this case could be very readily disposed of by taking the deposition of Stripling first and Gukiben second."

JUDGE CLARK: I think it would be a good idea not to put in very much of a description. While it is true that a judge ordinarily is not going to act unless he is pushed, unless his arm is twisted a little, there is an occasion when the matter is already before him. Of course, you are not going to have it before the judge unless there is some motion, but suppose somebody has appeared to request something about the depositions and the judge wants to regularize the procedure and do a little more than perhaps the immediate motion before him. I think it would be a good thing to have the judge have the full power to do it.

DEAN PIRSIG: I am agreeable with that. I am just

somewhat concerned that that would be the effect.

JUDGE DOBIE: I think it will. I have seconded Mr. Morgan's motion that we adopt it.

CHAIRMAN MITCHELL: All in favor of the adoption of this amendment to Rule 30(a) say "aye"; opposed. It is agreed to.

JUDGE CLARK: Now we come to Rule 30(b), which of course is the famous one with the long history. You will find discussion in my memorandum of September on page 26.

There are some small changes at the beginning. That is, in about the fifth line we put in a provision that the order may say that it shall be taken only at some designated time or place. We add "time" to make that clear.

Then down in the last line before the additions we put in the words that the order may be made to save the parties from "undue expense."

Then at the very end there comes the long substitution, which of course comes from our discussion at the time of the Hickman v. Taylor case. We made a recommendation along this general line, and it was not adopted in the Hickman v. Taylor case at that time. Then the decision on Hickman v. Taylor came down and the Hickman v. Taylor case covered a great deal of this. That is the situation to date.

We rather thought that we ought to go back to our old recommendation. I want to raise the question, and I think it

is a serious question of policy, whether we ought to do it. I think it comes to the merits of the proposal.

So far as the Supreme Court is concerned, I do not see any reason why we should not do it. They rejected it then presumably for another reason, of a pending case before it. I don't think there is any limitation on that.

My question is this: Is it desirable to make so restricted a provision here, and is it particularly desirable to reopen these burning issues of some years ago that seem to have settled down and nobody is raising any question. The matter comes down mainly to this: Shouldn't this remain a limitation to the attorney, and not be extended to other subordinate figures?

My statement on that you will find on page 27, the last paragraph, going over the page.

Among other things, as a matter of detail, I raise the question whether if you put experts in this class you are not here stating a somewhat different approach than you have had in other references to experts in the rule. It is a small thing, of course. The main thing is the question of policy.

If you were to agree with me that we had better not extend this matter, I would then say that if you omitted from this rule the addition of other persons beyond attorneys, you would have in mind what I think is appropriate. That would mean that we could put in quite properly to cover the Hickman

rule -- it would be only a restatement of it, as a matter of fact -- that "The court shall not order the production or inspection of any writing obtained or prepared by the adverse party or his attorney," and leave out the words "surety, indemnitor, or agent," and so forth, and the reference to expert witnesses.

We have often referred to the question of whether there is a demand for a change. In other connections I have said that perhaps we should be ahead of the demand, and so on. I haven't pressed that unduly. I do think we should somewhat originate demands for things for which there has been no demand. Still, this is a matter which has been greatly agitated and, so far as I know, there is no demand now. People are accepting it.

There has been some question in the cases. The point hasn't been entirely clear in the cases, but as for whether the labor unions or the insurance people or other people are really demanding this, so far as I can now discover there isn't any real demand for it.

It would seem to me that it makes a very serious restriction.

CHAIRMAN MITCHELL: What makes the restriction, the proposed rule?

JUDGE CLARK: Our proposed amendment makes a restriction on discovery, an extensive restriction on discovery.

JUDGE DRIVER: It puts claims adjusters and insurance representatives within the privileged class along with the lawyer's work product, does it not? The suggested amendment would do so.

MR. PRYOR: Yes.

JUDGE CLARK: Yes.

DEAN MORGAN: There are some cases, of course, that put them in that class.

MR. PRYOR: I like the suggested amendment as it is, in view of the fact that it is only where the court determines in its discretion --

JUDGE CLARK: What is that, Mr. Pryor?

MR. PRYOR: It is only in a case where the court determines that the other party will be unfairly prejudiced by not requiring it. It seems to me that is a sufficient safeguard. I believe the way you have proposed it includes all those people.

CHAIRMAN MITCHELL: I remember that fracas at the time of the Hickman case very well. I think I wrote a letter to the Court stating the attitude of the Committee on the subject and what we tried to do by the rule. As I read the opinion afterwards, I felt the Court had practically accepted the view of the Committee as to what the law ought to be on the subject. The bar accepted it and has not raised any question about it.

Anything we put in the rule that isn't in the exact

language of the Supreme Court of the United States in the Hickman case is going to stir up animus. I really don't see why we should muss up that situation. If any lawyer wants to know about whether his papers can be examined by the other side, all he has to do is to lift up Hickman v. Taylor and read it. It is perfectly clear. It is practically what we said in our draft at that time.

I just cannot see any sense in sticking our necks out at this stage of the game with any rule on the subject. The bar and the bench don't seem to be having any trouble.

JUDGE DOBIE: Do you think if we adopted a rule, General, that would be in the teeth of the Hickman case, the Supreme Court would stand for it?

CHAIRMAN MITCHELL: You mean allowing --

JUDGE DOBIE: To extend greatly the power to get those papers.

CHAIRMAN MITCHELL: I don't think the Court would stand for it or the bar would stand for it, either.

JUDGE CLARK: I don't quite understand you, Armistead. You said to extend greatly the power to get these. This would restrict greatly the power. You meant "restrict," did you not?

JUDGE DOBIE: No. I am saying, suppose we thought -- I am not saying we do -- that Hickman v. Taylor went too far, and that we ought to extend the power of discovery and extend the right to get those documents beyond what was said in the

Hickman case, would the Supreme Court stand for it?

CHAIRMAN MITCHELL: I don't think they would accept it.

JUDGE CLARK: Then I suppose the next question is, but if we go the other way, will they accept it, because this is going the other way if this provision is adopted.

I want to add, though, because I want to be fair about this, of course I agree exactly with what the Chairman has said, but I do think it must be said that this is true: There has been some question as to how far the Hickman case went. As I understand it, there have been some rulings that these persons were really included in the spirit of the Hickman case.

If you took that point of view, of course that would, I suppose, destroy somewhat --

JUDGE DOBIE: Is the Hickman case limited to attorney?

JUDGE CLARK: Yes. That is what it was all about, you know. That is what the discussion was about. At the bottom of page 30 and the top of page 31: The Hickman decision protected from discovery only statements obtained by an attorney; the amendment broadens the scope of this protection. Thus discovery will not normally be allowed of writings obtained by a claim agent, though the cases have been the other way.

There are a couple of cases over the page which hold the contrary.

JUDGE DRIVER: Under the rule as it stands now, Judge Clark, suppose a plaintiff who is in an automobile case,

we will say, is sued for personal injury. He gives a statement to his insurance adjuster. He doesn't remember what it is, and he doesn't get a copy. Under the present rule can his lawyer get a copy of that statement from the defendant?

JUDGE CLARK: Under the majority rule, yes. Under those cases that construe the Hickman case just as written, if it was given to a claim agent, you can get it. If it was given to an attorney, then you could only on a showing of good cause. On a showing of good cause there has been a good deal of difference among the cases. Some courts are much stricter than others on that.

Can you tell me how they have gone on that in your own state?

PROFESSOR WRIGHT: These cases are on page 31 in that long paragraph there. We have about six cases in which they have said that you cannot get a copy of your own statement under any circumstances, and then a larger group of cases in which they have allowed getting the statement, but there is a lot of talk about what good cause was in different circumstances.

Professor Moore has argued in his book that you should be allowed to get a copy of your own statement, and the Third Circuit district judges particularly have taken that view, reversed by the Third Circuit in the famous Altman case.

JUDGE DRIVER: It seems to me it should be made clear that a party has a right to get his own statement. The

lawyer doesn't realize that his client has made damaging admissions which may be contrary to the testimony of other witnesses. He should know about it in advance.

JUDGE CLARK: If you go back to the italicized section on page 26, we say "except that a party shall always be granted production or inspection of any statement or writing concerning the action or its subject matter which he has previously given."

JUDGE DRIVER: That is in your amendment?

JUDGE CLARK: That is in the proposed amendment.

JUDGE DOBIE: You wouldn't have to show good ground there.

JUDGE CLARK: Yes.

JUDGE DOBIE: That seems fair to me. I happen to have had right much experience in that field. I know sometimes those statements are taken from a man in a hospital when he is racked with pain or something like that. The fellow doesn't know what he does. Normally the way those things are done, he is asked questions and then the agent or adjuster prepares a statement and says to the fellow, "Is this what you said?" and he signs it. Sometimes he hasn't a very clear idea of what he signed, and it is all done by the claim agent in the interest of the insurance company.

CHAIRMAN MITCHELL: You say you have done it?

JUDGE DOBIE: Yes.

CHAIRMAN MITCHELL: We haven't adopted this amendment,

and there is a lot of other stuff which relates to something else. If you are going to do that alone, you ought to cut it out.

JUDGE CLARK: That is right. I just want to give a fair statement of what is there.

Let me add one thing more in background. In the states which have followed the rule, there has been some tendency to adopt the new amendment that was not passed. That has been done in several of the states which are cited on page 29 of my September draft. Certain states have not done so. It is quite obvious, too, that states that have not adopted your amendments haven't done it. Our amendments did not contain this, and therefore those states would not have them.

So there is that much. Some states have done it. I think the numerical majority have not because our rules do not contain it.

Mr. Wright tells me that in the Minnesota rule, in a provision which did adopt it, they just stated the decision by the Supreme Court dealing with the claim agent situation, and he says the result is very amusing. Do you want to say anything about it?

PROFESSOR WRIGHT: The problem is not actually a claim agent. It is an agent -- period. The streetcar company has a fixed rule that whenever there is an accident, the conductor of the motor vehicle must make a report to his foreman

which he turns in about the accident. In litigation the district court allowed production of this statement. It was taken to appeal on the ground that this was obtained by an agent in preparation for litigation, and therefore it is privileged or immune from discovery under the Minnesota rule which adopted our proposed 1946 amendment. The court had a terrible time with it. It had two arguments on the case, and finally came down with an opinion which manages to leave the whole question very neatly muddied by saying, "In this case you can have the statement because they didn't make a sufficient showing that the real purpose of this statement was in preparation for litigation," but leaving a hint that next time it happens, maybe you will have to do it differently.

The reaction to this, interestingly, is that the streetcar companies have taken all their forms in their carbarns and taken a rubber stamp and stamped them at the top, "This is in preparation for litigation." (Laughter)

MR. DODGE: What is the Massachusetts statute referred to in the third line on page 32?

PROFESSOR WRIGHT: That is a statute, Mr. Dodge, which allows you in certain circumstances -- and I can't give you the detail of the circumstances offhand -- to get a copy of your own statement. Most of these -- and I think the Massachusetts statute is in this form -- provide if you make a statement generally within two weeks after the accident, you

shall have a right to get that statement. There are quite a number of statutes passed recently. In some states they make it a misdemeanor to refuse to give you a copy of a statement which you yourself made within a given period after an accident.

MR. PRYOR: To get the matter before the committee, I move the adoption of the proposed amendment.

MR. DODGE: I second the motion.

CHAIRMAN MITCHELL: Do you mean all that proposal on page 26?

MR. PRYOR: To 30(b).

CHAIRMAN MITCHELL: That was an attempt to restate the rule of Hickman v. Taylor.

MR. PRYOR: As I understand it, the Hickman case dealt only with attorneys, as far as that is concerned, and this may go further than that.

MR. LEMANN: If I understand it, under the Hickman case the court may order a statement made by an attorney if they find that it is in the interest of justice or that its denial would unfairly prejudice the other party. But if you make the statement to the claim agent instead of to the attorney, then some of the courts have said you could never get that under any conditions. Am I right about that?

JUDGE CLARK: No, I do not think that is correct. I think some courts have said that the claim agent is just the same as the attorney; isn't that correct?

PROFESSOR WRIGHT: Yes. Most courts have said that.

MR. LEMANN: You can get it under some circumstances?

JUDGE CLARK: You can get it if you make a showing which is variously denominated "good cause," and so on.

MR. LEMANN: Other courts have held you can get it without that showing, is that correct?

JUDGE CLARK: That is right.

PROFESSOR WRIGHT: They say the protection given in Hickman was strictly for attorneys and not for other persons who don't stand in the attorney position.

MR. DODGE: Isn't it a fact that this amendment not only states the substance of the Hickman decision, but goes somewhat beyond it and attempts to clear up some of the points which are left open?

JUDGE CLARK: It goes beyond it, yes. There isn't any doubt about it.

JUDGE DOBIE: It extends it to more people.

JUDGE CLARK: I suppose it should be considered to clear up some doubts, but I think it adds new ones.

MR. LEMANN: The Hickman decision went on the theory that these were the attorney's work papers. That is the most commonly quoted expression.

JUDGE CLARK: That is right.

MR. LEMANN: A statement to a claim agent or to an insurance adjuster -- is that a part of an attorney's work

papers? And, if it isn't, why should it not be treated in the same way anyhow, because it is going to find its way to the attorney. It is not his own direct work product, but it is done really for his assistance. I suppose that is the theory on which it would be included in this amendment. Is that correct?

JUDGE DOBIE: Of course, it is not always for the attorney. I was a claim adjuster for some of these employer's liability companies before we had a Workmen's Compensation Act, and I had authority, for example, to settle any claim just by myself, up to a thousand dollars. So frequently I would send a man out and he made a report to me, and I would settle it.

Of course, the report was made primarily for settlement, but if there was not a settlement, of course it would go to a lawyer.

JUDGE CLARK: In connection with Mr. Pryor's motion, I should like to have the issue clearly made. I am not sure that the motion would do it, because that covers a lot of other things. On the policy issue, for my part I would like to have it appear that I think the question of the lawyer's work papers should be restricted to the lawyer. It might come up this way, of course: On my suggestion that, however this amendment be worded, it not extend to sureties, indemnitors, agents, or experts. I think that is a rather important and serious question of policy, and I think it would be a good idea to vote on that separately.

JUDGE DOBIE: Don't you think the expert is in a class by himself? These men know something about the accident and they are around there and they have statements from them. The statement of an expert is to a scientific conclusion. Here is the case of Clark v. Dobie, and I go out and hire a very well known expert and pay him a large sum of money for certain scientific conclusions. Do you think you ought to have access to that?

JUDGE CLARK: If he is going to be produced at the trial, why not? What is the argument against it? I should think the argument against it must come just to this, that you want to surprise the other side at the trial. That comes back to the old question of whether surprise is a good element of litigation or not.

MR. PRYOR: There is the additional argument, Judge, that I have paid this man a large sum of money for doing this work. Is it fair to me to have the other fellow take advantage of that?

CHAIRMAN MITCHELL: You can make that argument against half the stuff you have in about producing the names of witnesses and all that sort of thing.

MR. PRYOR: I suppose you could to a certain extent.

DEAN MORGAN: You can get the names of witnesses. Charles' notion that you are going to surprise the other fellow with the expert testimony doesn't appeal to me, because you can

get the names of the witnesses that they intend to call. You get this list of witnesses and you have some experts there. If he has access to that, I am inclined to agree with Judge Dobie and Mr. Pryor that you have to put experts in a separate class. I think you have an entirely different question there when you are trying to get information which is based on the skill of the particular expert, and so forth. You pay him for making your investigation. He would be unable to testify to most of the things on which he based his opinion, and so forth.

JUDGE DRIVER: An expert's conclusions, an honest expert's -- and there are a good many of them -- may in certain phases be favorable to the other party, and if he could get discovery, the other party could use the expert that you had employed, affirmatively in his own behalf, in his own case.

JUDGE CLARK: Let me make a further suggestion along this line: I think there is a great deal to be said for something special as to experts. Our Rule 16, which is the pre-trial rule, which says that limitations can be made on the use of experts, and so on, would so indicate.

MR. LEMANN: On the number of experts?

JUDGE CLARK: I might say that Professor Moore in his book proposes that normally one party should not be able to get at the work of the adversary's expert, but that the court should have discretion to order discovery upon condition that the moving party pay a reasonable proportion of the fees of the expert.

There is a possibility of doing various things in connection with the expert.

What we are doing here is just to lump him in with the attorney, and it seems to me there is a problem there. In fact, I think that the one difficulty with the new amendment is that it is a kind of blunderbuss thing that extends the attorney category very markedly.

DEAN MORGAN: I suppose any facts concerning which the expert could testify could be brought out by subpoenaing him as a witness, is that right? You can't get his expert opinion, maybe, without paying for it.

MR. LEMANN: By deposition you could examine him until it got to the point of an expert opinion, and then he could decline unless you paid him.

JUDGE DOBIE: There is something in the point made over there. We have a very large number of patent cases because I think the opinion has gotten around among the patent lawyers that we are more favorable to the patentee than the United States Supreme Court is. In fact, we have been told that.

Here is a man who hires an expert. He goes into the scientific conclusions. It doesn't follow at all, as he said over there, that he is going to use that. The conclusion of that expert may be entirely hostile to the patentee who employs him. So in that case he doesn't use him, of course, and he

gets another one.

Judge Coleman has a very good idea in Baltimore. In these patent cases he very frequently will appoint an impartial expert from a list prepared by the parties, and his fee is paid as a part of the costs of the court.

I have no very strong feeling either way. I wanted really to raise that question.

JUDGE CLARK: I don't want to inject myself into this or to push it unduly, but I wonder if this would not be one way of raising the issue, because it seems to me very clear. I would suggest an amendment to Mr. Pryor's motion, that we omit the references to surety, indemnitor, or agent.

I might say that I would propose then to make a second amendment, a separate one, that we omit the references to expert, on the idea that we should have a separate provision as to experts, giving certain powers to the court to control the experts, treating them sui generis, so to speak.

First off, I would suggest the omission of these additional persons -- surety, indemnitor, or agent.

JUDGE DOBIE: In that connection, Charlie, I think it only fair to bring this forward. We all know, and juries know, too, that in at least nine-tenths of the cases of automobile injuries, which form a great factor in Virginia, these men going north and south, east and west, running over people in Virginia, normally the first investigation is conducted by the

insurance company, by the adjuster. Isn't that true in the vast majority of cases? A man has an accident. He is insured. He immediately reports, of course, to the insurance agent, and then the insurance company gets busy and usually sends one of these adjusters, who may not have legal training.

JUDGE CLARK: I think that is true. If it is a big company, a traction company or something of that kind, it is their own claim agent.

JUDGE DOBIE: Yes. Ordinarily it is an insurance company.

JUDGE CLARK: If it is a private automobile, it is an insurance adjuster, yes, that is true. That is mainly what we are talking about, of course.

MR. LEMANN: I want to ask, if we adopted your two amendments, to what extent would the language which remains be identical with the proposal we made to the Supreme Court which it did not adopt?

JUDGE CLARK: I would say two things on that: First, I should think it would be identical. Second, I should think then it would be actually a restatement of the Hickman case.

MR. LEMANN: Would that mean that the Hickman case was exactly what we recommended and that they did not adopt?
I don't believe it was exactly. Maybe it was. I am going to look at it. I have the bible in front of me, and I think it ought to be in this bible.

JUDGE CLARK: I am not sure that I am with you, Monte. Is it your suggestion that there wouldn't be enough left to make an amendment?

MR. LEMANN: I am only asking for information at this point. I would like to know, if we adopted the amendment that you are proposing and the one that you said you were going to propose, to what extent would what is left in this amendment depart or differ from the amendment that we submitted to the Supreme Court which it did not adopt?

JUDGE CLARK: As I said before, I think it would be different, because it makes these omissions that we recommended before. There is no doubt about that. But the difference is more identical with the Hickman case.

I should say then that that part of the rule would be identical with the Hickman case. As a matter of fact, so far as I can see, about the only difference, the only addition, would be that "except" clause about the statement.

I am not sure what you are asking. Perhaps you are asking if the ideas I have in mind prevail, if there is enough left to amend. I will answer you frankly on that. I have come to the conclusion, after some consideration, that I would rather have no amendment than the amendment we recommended. Yes, I would say that. But I still think if you didn't want to make changes, there might be a question whether there would be some clarifying help. It would be mainly only clarifying. There

isn't any doubt that I am directly and intentionally suggesting that the far-reaching scope of our proposal in 1946 and 1947 is undesirable.

JUDGE DOBIE: You say, "except as provided in Rule 35, the conclusions of an expert." Does that mean for all practical purposes the expert is ruled out?

JUDGE CLARK: I am not sure what your question means. On the basis of the proposal here, it is not ruled out. I am suggesting that it should be ruled out, so I guess I will have to say that on the main proposal here, it would not be ruled out.

JUDGE DOBIE: I think the attorney's mental impressions, conclusions, opinions, or legal theories, the other man ought not to have a right to. Do you think so?

JUDGE CLARK: Of course, he does not get them under the Hickman case. That is just a restatement of the Hickman case.

JUDGE DOBIE: Then you say, "or, except as provided in Rule 35 . . ." Where are the exceptions in Rule 35? I don't know whether I want to rule the expert out in every case, but I am rather inclined to think in the case I have stated, there would have to be a pretty strong showing by the other side to get the conclusions of the expert that I hadn't introduced as a witness, you understand, but had hired to give me an opinion.

JUDGE CLARK: If you look forward to Rule 35,

Physical and Mental Examination of Persons, subdivision (a) is Order for Examination and subdivision (b) is extensive, in two parts, Report of Findings. There are extensive provisions.

JUDGE DOBIE: It would be mainly doctors, perhaps only doctors. It isn't said to be doctors, but that is what it is. "If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed report," and so on.

I should suppose you would have to take that out in broadening the Hickman rule, because that has special provisions here.

MR. LEMANN: It is just the same, if I read it correctly, as what we proposed. The way it is now, on page 26 of your material, is exactly word-for-word what we put up to the Supreme Court.

If we had had our way, they would have taken it then, and they did not accept it. But in that draft we also put in the insurance adjuster and the claim agent. We also provided for the protection of the expert witness.

So if we adopt this, we will just be throwing back at the Supreme Court what we proposed to them originally, which they did not accept. But if we go into the shorter one, we are practically saying we have changed our minds and we don't think we should protect the claim agent and adjuster, although we did think so when we made the recommendation to you originally. We

don't think we ought to protect the expert, although we did think that, too. So if we adopt this, we are consistent with ourselves, at least; and if we don't adopt this, we are just showing that we have grown wiser or more timid or less wise, as you may conclude.

JUDGE CLARK: I take off my hat to you. That seems to me the damnedest Philadelphia lawyer's argument I ever saw. Here I am arguing for the Hickman rule, and you have me so twisted that somehow I am kicking it over.

All I can say is, you are still spinning, and I say to hell with it.

The point is that I think we have gone ahead. We have had seven years of experience, and the experience has been instructive; and the experience, I should say, should tell us not to open this Pandora's box again or wider. If I am getting in a position where I seem to be going against Hickman, I take my stand.

MR. LEMANN: My boy, what you are saying now is that Hickman is wiser than we were. We wanted to adopt something that would have gone beyond what the Supreme Court in its wisdom did. If we think the Supreme Court has handled it well, let's leave it alone.

I understand that is what you are now saying. You are not repudiating Hickman, you like Hickman, because I think that really Hickman is narrower than what we propose.

JUDGE CLARK: That is right.

MR. DODGE: Didn't the Court possibly reject this amendment because the Hickman case was then pending?

DEAN MORGAN: That was the theory.

JUDGE DOBIE: That unquestionably had something to do with it.

CHAIRMAN MITCHELL: It was in a group of cases. There were one or two other cases pending on different aspects of the rule. Any amendment we proposed to the rules which related to any one of those cases --

MR. LEMANN: It is also to be observed that when they decided the Hickman case, they could not have dealt with the insurance agent or the adjuster or the expert witness, because it wasn't before them.

MR. PRYOR: That is right.

MR. LEMANN: So when they decided the Hickman case, they did not have any occasion to take up these other points that we in our then wisdom thought ought to be included.

JUDGE CLARK: That is all true, and I don't contest it at all, but I do think you need to have this other point in mind: that the entire rationalization of the Hickman case is a development from the lawyer's privilege originally, and the Court said, "We are not going to uphold a lawyer's privilege that broadly, but the lawyer's work product is of importance." They developed it in that background.

Of course, what they might have done in another background, it is true we don't need to say. But affirmatively, it is only developed in the lawyer background. The rest we do not know.

JUDGE DOBIE: I am frank to say I like this the way it is down here. Claim agents and all, I think ought to be in the same category. You have the restriction here that in a case of very great hardship, in the discretion of the judge he can always open it up. I think that is desirable.

MR. LEMANN: It seems foolish to me, really, to say if I send a young man in my office out to get a statement, it is protected, but if my client has a claim agent that gets the statement, then it is not protected.

DEAN MORGAN: Charles, this would mean practically in all the liability insurance cases, would it not, that all the statements of witnesses would come under the usual rule, and you would not have to show any hardship?

JUDGE CLARK: That is right.

DEAN MORGAN: Because, as a matter of fact, the attorney who represents the defendant on the record never makes the investigation.

JUDGE CLARK: Yes, that is right. I ask you, don't you think it is working pretty well now?

DEAN MORGAN: It is the agent of the insurance company who makes the investigation, and he turns it in.

JUDGE CLARK: Don't you think it is working pretty well now? The insurance companies are not --

DEAN MORGAN: I am simply saying that if you do this, cut out the claim agent, indemnitor, and so forth, there won't be any necessity of showing hardship in order to get the particular discovery. If you show hardship you can get the discovery anyhow, but unless it is a communication to the attorney by the client, unless it is within the common law privilege --

JUDGE CLARK: I was not contesting that. I was just raising a little question about the way you put it up. You say if we do this, as though we were making a great change. I said that is the present rule, and isn't it working well?

DEAN MORGAN: I don't believe that is the rule in the Hickman case.

JUDGE CLARK: Look at the cases. There is some division in the cases, but most of them so hold.

DEAN MORGAN: The cases go both ways, as a matter of fact.

MR. LEMANN: You remember we had the insurance people when we drafted this amendment. They sent a delegation to appear before us. They wanted us to go further than we then went. We left the door open to the Court.

In my district, our district judges are turning over these work papers, because they are usually finding that it

would prejudice the other fellow if he didn't get them, but that is up to the individual judge. I can understand that in some districts they would be a little bit more hesitant about doing it. With our district judges it is pretty hard to keep anything from the other fellow, even if it is within the Hickman case.

MR. PRYOR: The only instance that I know of of compulsory production in our district is the case of the statement of the party himself, and that has been done. That is taken care of in this rule.

I might say, too, that I think Iowa is not alone in having what is called a compulsory financial law, and in practically all automobile accidents the investigation is all done by the insurance company. Everybody is insured and has to be insured. It is all done by the insurance company's agent.

JUDGE DOBIE: I suppose if we included "in anticipation of litigation," practically every statement made by an insurance agent would be in anticipation of litigation, wouldn't it?

MR. PRYOR: Surely.

JUDGE DOBIE: Sometimes they hope for a settlement to stave off litigation, but of course the litigation is the ultimate thing they are going to look to if they cannot settle.

DEAN MORGAN: What the insurance people wanted was the Illinois rule, that it was all not subject to discovery. Anything that was in preparation for trial or for litigation

was not subject to discovery at all, under the Illinois rule, and that is what the insurance people wanted. That is what they were arguing here when they appeared before us.

We made a compromise and said none of this is actually privileged, but it can be produced if hardship is shown without its production. Of course, I don't like these privileges at all. I don't like the common law cases that have been extending the privilege of attorney and client to statements made to the attorney by claim agents, and so forth, but there are a number of cases that hold that way.

Haven't you got a case in Minnesota that way on privilege, to the effect that a report of an investigation made by a claim agent to the attorney is privileged?

PROFESSOR WRIGHT: We have a case that says that it is unless it is made in the usual course of business.

DEAN MORGAN: It indicates that it is within the common law privilege of attorney and client. That is my recollection. There are a number of cases that hold that way, but I am hoping it won't spread.

MR. LEMANN: That is a statement by the party to his own attorney?

DEAN MORGAN: That is within the common law privilege.

What is the Minnesota rule now on the subject? They have a rule of court, haven't they? What is their rule?

PROFESSOR WRIGHT: They have adopted the amendment we

proposed in 1946, except that they have gone further. They have said that you cannot get it under any circumstances, regardless of any showing of prejudice or anything else.

MR. LEMANN: So in the case that has just been decided, they had to get away from it by saying it wasn't in preparation for trial, but we had an "unless" clause, and you have an "unless" clause, is that right?

PROFESSOR WRIGHT: That is right.

MR. LEMANN: As Mr. Morgan says, we threw in that "unless" clause over the objection of the insurance people, but Minnesota yielded to the insurance agents.

DEAN MORGAN: They followed the Illinois rule.

DEAN PIRSIG: "Yielded" is the right word.

JUDGE DOBIE: If you are through, I have another question.

JUDGE CLARK: I don't know. Before you settle this, I want to be recorded against it. I don't know whether I am all alone or not. I think it ought to be made clear how the Committee stands.

JUDGE DOBIE: Does that include a statement a man makes to his own attorney, or would that be privileged under the common law rule?

JUDGE CLARK: It would not be privileged here.

MR. DODGE: What is your motion, Judge?

JUDGE DOBIE: If a man makes a statement in writing,

a possible plaintiff who is injured, can the other side get that? I am the plaintiff. I am injured. I make a written statement to my attorney. Can the other side get that?

PROFESSOR WRIGHT: No.

DEAN MORGAN: That wasn't in the original amendment that I remember.

MR. LEMANN: I wouldn't think it would come. Our amendment is word-for-word, I believe, what is just in front of you, except about the party's own statement. I should think a statement "obtained or prepared by the adverse party, his attorney," et cetera, would not include a statement made by the adverse party to his attorney. I wouldn't think so. I wouldn't think a court would so construe it.

JUDGE DOBIE: It wouldn't come under the party's getting a copy of his own statement.

MR. LEMANN: No.

JUDGE DOBIE: But could the other side get a copy of it?

MR. LEMANN: I wouldn't think so, myself. I think this really contemplates statements gotten by the attorney from the witnesses of the other side or the other party, not from his own client.

CHAIRMAN MITCHELL: My recollection is that there is a motion before the Committee to adopt this provision, Rule 30(b), which appears in the Reporter's September report on

page 26.

DEAN PIRSIG: I understood there was an amendment to that.

CHAIRMAN MITCHELL: I haven't finished my statement.

Judge Clark came along and objected to his own draft here, and thought we ought to strike out the words "attorney, surety, indemnitor, or agent."

JUDGE CLARK: Not "attorney," of course.

CHAIRMAN MITCHELL: I mean "surety, indemnitor, or agent."

JUDGE CLARK: That is right.

MR. DODGE: You wouldn't strike out the words "or agent," would you?

JUDGE CLARK: "Surety, indemnitor, or agent." Those are the three I wanted to take out. Then, as I suggested, I would want to do something separate on "experts."

CHAIRMAN MITCHELL: Then you wanted a special provision about experts that we do not have drafted before us.

JUDGE CLARK: That is right.

CHAIRMAN MITCHELL: I am wondering whether we are in a position to act on this thing without having the Reporter make a draft of his alterations in this proposal.

MR. DODGE: Surety and indemnitor are really parties defendant. They are the real parties in interest in the action. Why should they be treated differently from the principal party?

JUDGE DOBIE: They are practically the only ones, if it comes within the provisions of the policy. If you are insured for $10,000, for example, and here is a suit against you for $6,000, and you are within the policy, you are more or less indifferent. Very frequently you might want the thing to go against you because you are sorry for the man who is hurt. It is not going to cost you a nickel. In other words, the insurance company is the real party in interest if it is within the policy, and they are going to pay it all.

MR. DODGE: It ought to be treated as the party.

JUDGE DOBIE: Yes.

MR. LEMANN: Under our statute, you can sue the insurance company direct and it would become the party. You can bring a suit against them direct.

JUDGE DOBIE: In Virginia you cannot do that, but you can sue the insured and if the judgment against the insured is returned nulla bona, then you can bring a direct suit against the insurance company. Of course, their only defense is that it is not within the policy.

MR. PRYOR: Mr. Chairman, I think we could have a vote on Judge Clark's amendment as to the elimination of those words, "surety, indemnitor, or agent," without waiting for a draft.

DEAN MORGAN: The "expert" business and its effect on Rule 35 I think is something that ought to be considered.

MR. LEMANN: Let's leave "experts" out for the moment, and let's vote on the narrow point. Then we will take up the "experts" when he comes along with another motion.

JUDGE DOBIE: I move that those words be left in.

MR. LEMANN: We have a motion by Judge Clark to take them out.

DEAN MORGAN: Has anybody seconded that motion yet?

PROFESSOR MOORE: I will second Judge Clark's motion.

CHAIRMAN MITCHELL: There is a motion before the house that this addition to Rule 30(b) with reference to "surety, indemnitor, or agent" be stricken out. All in favor of that say "aye"; opposed, "no." (Division.)

All in favor of striking it out raise their hands. All those in favor of leaving it in. It is stricken out.

MR. LEMANN: I thought it was five each way.

CHAIRMAN MITCHELL: Somebody put up a hand after I counted, then, because I saw three over there and one over here.

All in favor of striking out the reference to "surety, indemnitor, or agent" from this draft raise their hands. Five.

Now those in favor of leaving it in raise their right hands. Five.

I have the deciding vote.

DEAN MORGAN: It is up to you.

CHAIRMAN MITCHELL: I vote to strike it out. The motion is carried.

JUDGE CLARK: I would say while of course I am on the winning side as it turns out, on these close questions, again, might it not be well perhaps to let the public in on this, the bench and bar?

DEAN MORGAN: I wouldn't fight and die to have it stay.

JUDGE CLARK: I was going to say, of course our present step is partly educational. We are not going in to the Court yet. On things we are not too sure about -- and of course there is obviously a pretty close division in the Committee -- if it is thought desirable, I would be glad to work up something and indicate that we haven't taken final action.

CHAIRMAN MITCHELL: Your suggestion would mean that we submit the rule to the bench and bar and bar associations for criticism, leaving the words in there?

JUDGE CLARK: No, I would do it with two alternatives, the first with it stricken out because that was the vote, and the second one with it in. We have offered alternatives before.

Please don't do it on my say-so. I am trying to be generous. It is appropriate and fair. If there is a division, maybe it should be discussed.

CHAIRMAN MITCHELL: I don't know what we are talking about now. We have a motion to adopt the alterations in Rule 30(b) except as just modified by the vote which struck out the reference to "surety, indemnitor, or agent."

JUDGE DOBIE: Do you want to vote on "experts"

separately?

JUDGE CLARK: We haven't done anything about "experts" yet, but it seems to me that we ought to leave out the experts for special treatment.

MR. LEMANN: If we adopt that, too, I think we should revert to a consideration of your original suggestion to do nothing, because when you do that you just stand on the Hickman case. Why do anything, is your suggestion. I think you are a little apprehensive. You might be in the minority on the point on which you were in the majority.

JUDGE CLARK: I would say that I think there might be a great deal to be said for that, that is, leaving out any change here and letting the matter be very quiet.

Of course, I would like to put in a provision as to the statements of the parties, but maybe as the price of silence we should let that go, too. I would say, outside of its being declaratory, I don't think that is necessarily important. It might help somewhat if some of these things were declaratory. We will let that go. The only thing I would really like to see in is the production of the party's own statement, but maybe the wisest thing to do would be to forget it entirely. There is a good deal to be said for that.

JUDGE DRIVER: I have difficulty, and perhaps some others have, too, in voting to leave out "experts" here for further treatment, unless we have some idea of what the further

treatment is to be.

DEAN MORGAN: I think we have to leave it in.

JUDGE DRIVER: I can't vote intelligently unless I know what the further treatment will likely be. Is it your idea, Judge Clark, to have the party obtaining discovery pay part of the cost of the expert's fee?

JUDGE CLARK: That is my idea.

MR. PRYOR: With the consent of the second to my motion, if there was a second, I would like to withdraw my motion for the present, until a draft is presented with reference to experts.

CHAIRMAN MITCHELL: I cannot understand how you are going to prepare an amendment to 30(b) that this is limited to a provision requiring production of any statement or writing which a party has given, because if you adopt that and do not say anything else about the question of lawyer's papers, and all that, you are leaving the thing right up in the air, aren't you? You are not adopting the Hickman v. Taylor rule in express words. You are amending this rule without embodying in the amendment the up-to-date declarations of the Supreme Court. I am wondering how that is going to be understood or misunderstood.

JUDGE CLARK: I suggest, therefore, for the consideration of the Committee that we leave out any amendment here except those small ones in the body; that is, leave out all

the underlined material.

MR. LEMANN: And make a note saying the Committee makes no recommendation because the Supreme Court has taken care of the matter.

CHAIRMAN MITCHELL: That is really our reason.

MR. LEMANN: Which is really not entirely a sufficient reason, because you have some differences of opinion in the trial courts about the agent that you are not really clarifying. You are really saying, "Boys, settle that among yourselves."

JUDGE DOBIE: Do you think the Court would hold a man is entitled to a copy of his own statement if you leave this out? I feel very strongly on that subject. I think a man who gives a statement to a claim agent or anybody else like that, particularly very shortly after the accident, which he usually does, ought to be entitled to have a copy of that statement.

CHAIRMAN MITCHELL: What would you say about the weight of authority on that in the lower courts, Charlie?

JUDGE DOBIE: I believe most courts would do it without a provision. I certainly would. I wouldn't hesitate a second.

CHAIRMAN MITCHELL: I am wondering what the weight of authority in the decided cases is.

JUDGE CLARK: There seems to be a pretty direct split. If you will look at page 31 --

CHAIRMAN MITCHELL: What do you mean by direct? An equal split?

JUDGE CLARK: That is what I meant. If you will look at the cases on page 31, the second paragraph, I think perhaps if you count noses here there are more noses on the second subdivision, which is to allow the statement. There has been another recent one that we were going to add, from Pennsylvania, Burns v. Philadelphia Transportation Co., 113 F. Supp. 48. That makes the numerical number a little greater for allowing it.

CHAIRMAN MITCHELL: Why doesn't someone take some of these cases to the Supreme Court? There is a direct conflict in circuit decisions, too.

MR. LEMANN: They are mostly interlocutory. I do not know how you would get it up. They are all district court rulings prior to trial.

MR. TOLMAN: Some of them have been to the circuit court. I notice the first one, Safeway Stores v. Reynolds.

MR. LEMANN: There is a district court citation. That is the District of Columbia.

MR. TOLMAN: Yes.

CHAIRMAN MITCHELL: Is there a motion to dispense with any amendment to Rule 30(b)? Did I understand you to move that?

JUDGE DOBIE: Including the party's own statement?

MR. LEMANN: I didn't make that. I think that was

the Judge's suggestion. I don't know that I would oppose it, but I am not very sure which way I will jump at the moment.

JUDGE DOBIE: Don't you think a man is always entitled to a copy of his own statement?

MR. LEMANN: Yes, but of course some of the courts are giving it to him now, Armistead, and some are not. The main reason for putting it in, I should think, is that we are making some other relatively minor changes. Here we have a sharp difference of opinion, and I should not think we ought to leave it unnoticed if there is such a difference of opinion. The next question would be, should he always get it or should he not get it unless he makes a showing such as we have in the "unless" clause, which, I take it, is the view some of the courts have taken, or should he always get it?

I think we ought to do something about the party's statement, in view of the conflict in the courts.

CHAIRMAN MITCHELL: My point about it was this: You have a whole lot of material in this draft here about lawyer's work and all that sort of thing. If you amend Rule 30(b) and the only amendment you make to it is to say that a party shall always be entitled to receive a copy of his own statement previously made and given to the other side, or what-not, you raise a question then why you eliminate from the amendment the substance of the Hickman case.

MR. LEMANN: You would append a note saying that you

make this amendment because there is a sharp division in the reported decisions, and the Committee feels he ought always to get his statement. You are not making any other amendment because you think the Supreme Court has adequately stated the rule in the Hickman case. I suppose that is what you would do.

PROFESSOR MOORE: Couldn't that be met by covering it in the paragraph which is now in the rule by just adding another "or" clause?

MR. LEMANN: Yes.

PROFESSOR MOORE: " . . . or that a party shall not be granted production and inspection of his statement," something to that effect. That would indicate that as a general proposition he is to have it.

CHAIRMAN MITCHELL: I think probably this proposal could be handled by a note to meet that point. Do we have a motion? Did you withdraw your motion to adopt it?

MR. PRYOR: I attempted to.

CHAIRMAN MITCHELL: What motion have we pending?

MR. LEMANN: The motion would be Professor Moore's suggestion that we insert his amendment to this rule in the "or" clauses. I do not know just where it would go in.

CHAIRMAN MITCHELL: Somebody says he wants to see a draft of the proposed provision about "experts" before he votes at all.

MR. LEMANN: I think that would be appropriate.

CHAIRMAN MITCHELL: Then hadn't we better submit it to the Reporter with the request that he redraft his proposed Rule 30(b)?

JUDGE CLARK: Let me say this: If the whole provision goes out, I do not know that we need to worry any more about experts. That is gone with the other.

JUDGE DRIVER: I thought what we were talking about was to forget everything except the statement that the party makes to the adverse party. Wasn't that your idea, Judge Dobie?

JUDGE DOBIE: Yes.

MR. DODGE: There are two very minor amendments in the part above.

JUDGE CLARK: I wanted to bring those up.

CHAIRMAN MITCHELL: Undue expense is a proper amendment. You all agree on that.

JUDGE DOBIE: And the insertion of the word "time."

CHAIRMAN MITCHELL: Where is that?

JUDGE DOBIE: In the fifth line, "at some designated time or place." We agree on that.

CHAIRMAN MITCHELL: Yes, we agree on that, and the "undue expense."

JUDGE DOBIE: I make a motion, if it is in order, that we leave all this out, the expert to be taken up later, except the provision that a party shall always be granted the production or inspection of his own statement or writing.

MR. DODGE: And adopt the two small amendments.

JUDGE DOBIE: Yes, related to "time" and "undue expense."

DEAN PIRSIG: I wonder, since this was stated here as an exception to a general rule, and we have now only the exception, whether it might not come more appropriately under Rule 33, at least as an addition to Rule 33 as it appears on page 34.

CHAIRMAN MITCHELL: I was interrupted there. What is your suggestion, that we not vote on this thing?

JUDGE CLARK: That we make this exception provision come under Rule 33.

CHAIRMAN MITCHELL: What is the exception provision referred to?

JUDGE CLARK: About requiring always the statement of the party.

CHAIRMAN MITCHELL: That isn't an exception, is it?

DEAN PIRSIG: It is as it is worded here. When you take out the general rule which you are proposing, then it seems to me that it is more appropriate to provide for the production of the party's own statement in Rule 33, which provides for interrogatories and attach thereto papers, documents, letters, photographs, and so on.

JUDGE CLARK: I should think that is a good suggestion.

CHAIRMAN MITCHELL: That avoids one of the criticisms

we have made of putting it in the other rule.

JUDGE DOBIE: That is all right with me.

CHAIRMAN MITCHELL: All in favor of leaving 30(b) stand as it is, except that we keep the amendments about "time" and "undue expense," say "aye"; opposed. It is agreed to.

While we are at it, can we agree that a provision showing that a party's own statement is always open to him for examination be added to Rule 33?

MR. DODGE: That rule relates to written interrogatories?

CHAIRMAN MITCHELL: That is under interrogatories.

JUDGE DRIVER: The attachment of documents.

JUDGE CLARK: I should suggest putting it right in at the end of that first provision of Rule 33. We say add at the end of this rule the following: "A party may require that there be attached," and so on. "A party may also require that there be attached a copy of any statement or writing concerning the action which he has previously given."

JUDGE DOBIE: It is practically adopting this language.

CHAIRMAN MITCHELL: You can frame that.

MR. LEMANN: How about putting it in Rule 34?

JUDGE DRIVER: The discovery and production of documents.

MR. LEMANN: It says there you can ask for a copy. That might be a more logical place to put it.

JUDGE CLARK: We are trying to make Rule 34, which requires a court order, apply to more important, bigger things, like going on the land, and so on.

MR. LEMANN: You have documents and papers in there, and I would think logically that is the place to get a court order for the party's statement.

JUDGE CLARK: Rule 33 we have expanded to cover a portion of what was formerly Rule 34. That was done with malice aforethought. You see, there was before some apparent conflict between 34 and other provisions. Rule 34 required a court order, and the others did not. We first had a discussion that we wanted to do away with the requirement of a court order on most of these things, including written interrogatories. We then had a question whether we wouldn't do away with 34 as unnecessary. Then the question was, when you want inspection of, say, the premises, going onto another man's land, and so on, there still would be an occasion for having it. So Rule 34 as now conceived is the unusual matter.

MR. LEMANN: I see now at the top of page 34 of your September material you suggest an insertion in Rule 33 about papers. Wouldn't that be where you would cover this statement by the party himself?

CHAIRMAN MITCHELL: That is what he suggested a minute ago.

JUDGE CLARK: That is it.

CHAIRMAN MITCHELL: All in favor of adding that to Rule 33 say "aye"; opposed. That is agreed to.

JUDGE CLARK: The next is 30(c), on page 32 of the September draft. This is an attempt to cover the question of making orders covering the transcript, a thing which has given some trouble. The party taking the deposition may not like it and he may not get any transcript taken, but then he can be largely forced to do it now, and that is a pretty heavy expense when he doesn't want to use it.

What we put here is to try to give the court rather complete power. We say here:

"The testimony shall be taken stenographically and transcribed unless the parties agree or the court orders otherwise . . ."

Initially last spring, we inserted those underlined words, "or the court orders," with the idea of giving the court rather complete discretion. My suggestion now is that that isn't clear in itself. What it does is all right, but whether it covers all this or not might be doubtful, and I suggest the addition also of the words in brackets, which may be gilding the lily, but is doing it for good purpose, I think, by making this beyond question. The words in brackets are, "in any event the court may order the cost of transcription paid by one or more of, or apportioned among, the parties."

DEAN MORGAN: Do you want to force the party who won't

agree to this particular thing? Can a court order that a deposition be not transcribed when one of the parties insists that it shall be?

JUDGE CLARK: Yes.

DEAN MORGAN: Why? If he could order the cost of transcription paid by one or more of them, if a party is willing to pay the cost of transcription, it seems to me that he ought to be able to have it transcribed, whether the court thinks it ought to be or not in this particular case. Is the court going to judge as to the value of the deposition of the party? It seems to me impossible.

JUDGE CLARK: Of course, the intent is not to tie the hands of the party. As you put up the case, "A" is taking the deposition, and he now doesn't want to pay for it. "B" says, "I want the deposition, and I will pay for it."

DEAN MORGAN: Yes.

JUDGE CLARK: Could the court then still not order it?

DEAN MORGAN: No, I think the court ought to have to order it then. I think if one of the parties insists on having a deposition, then the court's sole power should be to determine who should pay the expense of it.

CHAIRMAN MITCHELL: Suppose the party that takes the deposition gets stung and doesn't want the testimony.

DEAN MORGAN: I know he doesn't want it. Suppose he doesn't, but I want it because I am there and I have cross-

examination in there.

CHAIRMAN MITCHELL: My point is this: If the other party wants it, if the adversary party says, "I like that deposition and I want a copy of it," all right, this clause will allow the court to order somebody who didn't want any part of these depositions to pay the cost of it, will it not?

DEAN MORGAN: It shall be taken unless the parties agree, and the court may order the transcription in case they don't agree. The court may order the cost of transcription paid by one or the other. The idea is that the court can otherwise order a deposition not taken even if the adverse party wants to pay for it.

CHAIRMAN MITCHELL: You haven't got my point yet. Under your draft as you propose it, the court could order some party to pay the cost of transcription who did not want any part of it.

DEAN MORGAN: It might very well be that he ought to have to because of the expense he put the other party to to come and have it taken, and so forth. The other party wants it now. If you have taken a deposition and you have material there and you don't want it, and I want that to go in taken from your witness on my cross-examination, I don't think a court should have the power or authority to provide that it should not be transcribed unless both parties agree. All he should do is be able to put a condition on who should pay for

it if they don't both agree. That seems to be the sensible way to do it.

JUDGE CLARK: How would it be, Eddie, to leave in "or the court orders" here and not put in the bracketed material but turn over to page 33 and put in an additional provision, a new subdivision (r):

"The court may direct that the deposition, or any part thereof, be not transcribed or filed" -- and you might want to say "unless paid for" -- "and may make such orders as are equitable, adjusting or apportioning among the parties the cost of transcribing it."

In other words, trying to spell this out somewhat more. Is that your idea?

DEAN MORGAN: I hadn't thought about it that way, Charles. My point is simply the one I have made, that if you force me to attend the taking of a deposition, I think the court ought not to be permitted to say that, unless I agree with you, the deposition shall not be transcribed. I think the court could say it won't be transcribed unless I, who want it, pay all or a part of it. I think in some cases he ought not to make me pay it all, even under those circumstances.

JUDGE DOBIE: How would the court know whether it should be transcribed without the transcription, have the stenographer or somebody tell him about it?

DEAN MORGAN: I don't know how he can.

JUDGE DOBIE: A deposition ordinarily is not taken before the judge. It is before some third party. You come before the judge and say, "Judge Driver, I don't want that thing transcribed." Judge Driver has to know what is in it or take the party's statement, or something like that, or have the stenographer tell him.

MR. TOLMAN: Tape recording is being used in some cases. He might listen to the tape.

JUDGE CLARK: Of course, in some cases it is going to be dreadfully hard. Suppose you have a personal injury case and you have a long deposition taken. Suppose he did make a mistake when he asked for a deposition. The other side jumps in and has a gala day, a hell of a good time. Then the other side says, "You have to have the deposition transcribed." He says, "My God, I didn't know what I was going to get into. That transcription is going to cost $3,000, and I haven't a cent to my name."

DEAN MORGAN: You will get a later motion. The whole business would have to be put up to the court, wouldn't it? He isn't going to make a provision in the beginning that it shall not be transcribed. It isn't worth taking if it is not going to be worth transcribing, prima facie.

MR. DODGE: Your motion is that that sentence be left just as it is in Rule 30(c): "The testimony shall be taken stenographically and transcribed unless the parties agree

otherwise."

DEAN MORGAN: That is right.

MR. DODGE: As the Reporter says, the question of costs is dealt with at the end of (d) and should be dealt with there.

DEAN MORGAN: It seems to me that is the way it ought to be done.

JUDGE DRIVER: I don't know when this "or the court orders" would ever come in practical use. As Judge Dobie pointed out, I don't know how a judge would decide whether a deposition should be transcribed until it had been transcribed. He would have to look at it.

MR. TOLMAN: Suppose you did tape recordings, and I know it is being used.

JUDGE DRIVER: It could be done in that instance, it is true.

MR. TOLMAN: That would save money for both parties.

DEAN PIRSIG: Couldn't the stenographer certify or testify to the approximate length and the approximate cost?

JUDGE DOBIE: He could tell the judge, I suppose.

CHAIRMAN MITCHELL: He could read his notes to the judge, even if he didn't transcribe it.

JUDGE CLARK: I think it is a little harsh to give power to one of the parties to require an expensive deposition to be transcribed. It seems to me that is rather drastic.

I think the judge ought to have the power to say no. Obviously he won't use it much. Maybe the mere fact that he has that power is going to prevent some exorbitant demands.

Of course, in the fight on depositions -- and there is quite a little here and there -- one of the great points made is the inordinate expense. I don't think that is true. Surveys we have had do not indicate that. There happens to be in my State of Connecticut now a terrific battle over this very question because the state bar association is asking the judges, who have now rule-making power, to adopt the discovery rules. The negligence bar sitting at Bridgeport is making a terrific drive on it. They are trying to get help from elsewhere. The chief elements of the drive are two: One of them is delay, that all of this is to delay the case terribly; and the other, probably the one with the greatest appeal, is the great expense.

JUDGE DOBIE: Sometimes it doesn't delay; it speeds it up.

JUDGE CLARK: I know. The answer is made, on the other hand, that they have a long letter from Chief Justice Vanderbilt saying that actually the effect is the other way, and the proponents are using that all they can. They are quite at issue on whether it does or does not delay.

Then, as I say, the additional point is on expense. You can make an appealing statement on the great cost of stenographic help and all that.

MR. TOLMAN: That was part of Westbrook Pegler's argument, as I remember it.

JUDGE CLARK: Yes, quite so.

MR. TOLMAN: It was based on expense partly.

JUDGE CLARK: Yes, that this New Deal idea of discovery was expensive.

JUDGE DOBIE: I don't object to its going in, but I believe it would be rarely used.

JUDGE DRIVER: It was Fulton Lewis, Jr., wasn't it, who said that the discovery abuses here were a sin of the Roosevelt Administration.

MR. TOLMAN: That was Pegler.

JUDGE DRIVER: I thought we should introduce him to our Chairman and Senator Pepper, who certainly were not forwarding the New Deal in any way when the rules were adopted.

MR. LEMANN: Is there any objection to this suggested insert? I was looking at something else and didn't keep up with all of the discussion.

JUDGE CLARK: Mr. Morgan says that if the parties agree, that is all right; but if they do not agree, one party ought to be able to require the transcription of the deposition; that is, the judge ought not to have the power to forbid it.

MR. LEMANN: Why not? I didn't get his point. Why not trust the judge not to abuse that power? I can understand I might take a lot of testimony which didn't do me any good

because it turned out the fellow didn't know anything, and it might not do the other fellow any good particularly.

DEAN MORGAN: If you agree, that is one thing. But if you force me to appear at a deposition and I get material in there that I want, for example, and then you say, "I don't want it transcribed," and the judge says, "It need not be transcribed," I object to that strenuously.

MR. LEMANN: Why would the judge say so?

DEAN MORGAN: I don't know why he would say so. I do not want him to say so.

MR. DODGE: It has no place in the rule, it seems to me. One fellow wants it.

DEAN MORGAN: He can make me pay for it, but I want that to go in as a deposition noticed by this particular person.

MR. LEMANN: Make who pay for it?

MR. DODGE: Why not give the judge full control?

MR. LEMANN: As I understand now, your idea is that if I give you notice to take a deposition and you attend, and the witness talks for an hour or two and I say this isn't worth the cost --

DEAN MORGAN: Not to you, yes.

MR. LEMANN: You say, "I don't agree, and I want it." As it now stands, you can force me to pay the cost.

MR. DODGE: No, it has nothing to do with payment.

DEAN MORGAN: We are not talking about that.

MR. DODGE: All that is involved here is getting it transcribed.

MR. LEMANN: The reporter isn't going to transcribe it unless he is paid.

DEAN MORGAN: The judge can make an order that I pay the expense or a part of the expense. You dragged me down there, and I won't get all my expenses back on that.

MR. LEMANN: You are willing to retain the latter part of it?

DEAN MORGAN: Yes. I want that retained, certainly; but I don't want the court to have the power to say it is not going to be transcribed at all.

MR. LEMANN: But what about this part: "in any event the court may order the cost of transcription . . ."

DEAN MORGAN: That is all right.

MR. DODGE: The question is whether it goes there or in the other paragraph later relating to costs.

CHAIRMAN MITCHELL: You want it so the court can order some party who doesn't want the deposition to pay a part of the cost or all of the cost of transcribing it?

MR. LEMANN: They are willing to agree to that, as I understand.

DEAN MORGAN: That is all right. The court can make me pay for it. I have no objection to the latter part of this.

What I object to is the statement that the court can order that it not be transcribed. To say it shall not be transcribed unless I pay for it is all right.

MR. LEMANN: Mr. Morgan and Mr. Dodge are willing to agree that if the guy wants it transcribed, O.K., he pays for it.

MR. DODGE: Certainly.

DEAN MORGAN: Certainly.

MR. LEMANN: Then I don't really see any problem, if he is willing to pay for it, except that it is going to be taxed as costs, but that is part of the general problem of the costs of the trial. If you are willing to let the judge direct that the fellow who wants it should pay for it --

DEAN MORGAN: Certainly that is all right.

MR. LEMANN: Would that be true without an amendment, perhaps?

DEAN MORGAN: I say it will not. I don't know.

CHAIRMAN MITCHELL: My point is that I object to giving the judge power to compel a man who doesn't want it. He said the fellow who does not want it can be ordered by the court to pay.

MR. LEMANN: Suppose I have taken the deposition, and after I have listened to the fellow whom I myself had summoned, I say, "Well, it isn't worth the cost. It isn't worth it, and I don't want it." My opponent says, "I don't agree." We go to

the judge, and the judge says to my opponent, "If you want it, pay for it."

DEAN MORGAN: O.K.

MR. LEMANN: Or the judge may say, "I think it ought to be transcribed, and Lemann should pay for it." It is up to the judge. The judge has that control over the expense.

I hardly think it is worth spending much time on this other suggestion that he may order it not transcribed, because the power to determine the power of taxation will cover it.

MR. DODGE: It is only to give him the power to order it transcribed regardless of cost.

CHAIRMAN MITCHELL: In long antitrust cases, the Government has taken hundreds and thousands of pages of depositions which may never become usable because the witness may be available, and you cannot use the deposition if the witness is amenable and available. What happens in a case like that when the Government forced the defendant in that case to put up part of the money for taking the deposition?

MR. LEMANN: If the judge says so, yes. Of course, the deposition might be used even if the witness is available, to impeach him, to contradict him. So maybe there would be something in it you would like to have. That is up to the judge. If the judge says you must pay for it, you have to, or he can divide it.

CHAIRMAN MITCHELL: In other words, this rule is all

right if we have sensible district judges.

MR. LEMANN: That is right. Most of the rules are like that.

MR. DODGE: That is taken care of by the amendment at the middle of page 32: "The testimony shall be taken stenographically and transcribed unless the parties agree otherwise; in any event the court may order the costs to be paid by one or more of, or apportioned among, the parties." That covers it, doesn't it? Taking out the words "or the court orders" would cover it.

MR. LEMANN: How about taking out the words "in any event"?

DEAN MORGAN: There is no reason for that.

MR. LEMANN: I think you could take it out if you take out the preceding part.

CHAIRMAN MITCHELL: Have you agreed on the form of it?

MR. DODGE: Semicolon, "the court may order" and so forth.

MR. LEMANN: You are putting in one sentence in your amendment. That sentence would read: "The court may order the cost of transcript paid by one or more of, or apportioned among, the parties."

DEAN MORGAN: That is right.

CHAIRMAN MITCHELL: All in favor of that provision in 30(c) say "aye"; opposed. It is agreed to.

JUDGE CLARK: That takes us to the interrogatories section on page 34 of my September draft.

MR. LEMANN: I think if you put in the enumeration there "statements of the parties," that would be the shortest way to get it in without another sentence, Mr. Reporter.

DEAN MORGAN: But you want to make it mandatory.

MR. LEMANN: "A party may require . . ."

CHAIRMAN MITCHELL: You mean that provision for producing a copy of a man's own statement?

MR. LEMANN: Yes, just include it in the enumeration.

CHAIRMAN MITCHELL: Can we leave it to the Reporter to put that in there?

JUDGE CLARK: I think that could be done.

CHAIRMAN MITCHELL: We can't settle all questions of draftsmanship here.

JUDGE CLARK: Yes. After "copies", we put in "of statements previously given by him and such other documents," and so on.

CHAIRMAN MITCHELL: What is next?

JUDGE CLARK: Both of these suggestions are agreed to?

CHAIRMAN MITCHELL: About Rule 33?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: As I understand, we are agreeable to both of them with the addition about a man's own statement.

JUDGE CLARK: I was a little mixed myself. I am

sorry. These are alternatives, and I have expressed a preference for the second. The first alternative, in substance, is what the Committee approved, although there is some confusion as to details. I suggest some questions about confusion. So the Reporter has suggested the second alternative, which seems to him clearer, more concise, fully adequate, and better positioned.

So I am wrong when I say I have covered both of them. These are our choices. The first one was suggested to come at the end of the whole rule. This is to put this in as the second sentence of the second paragraph. The second paragraph of the rule as it now reads goes this way:

"Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party."

Then I suggest you put right in there:

"Interrogatories may require that there be attached to the answers copies of" -- and here we would put in "copies of statements previously given by the party concerning the case, as well as copies of such documents, papers, books, accounts," and so on, "as are relevant to the answers required, or that opportunity for their examination be afforded."

CHAIRMAN MITCHELL: All those in favor of that second alternative to Rule 33 --

MR. LEMANN: I would like to know why he wants to take out "not privileged", because that is in the other rules. I asked you about that. I would like you to straighten me out. "Not privileged" is in your first proposal, and it is bracketed in the second proposal.

Personally, I am inclined to the first alternative, myself. I like the first better. If you put the motion on the second, I probably would vote against it for the moment, as I prefer the first. The first has "not privileged" in it. The second seems to have it in it and out of it.

JUDGE CLARK: This is what I say on that. It seems to me it has some elements of soundness. In the second alternative and in the next rule, Rule 34, the words "not privileged" have been bracketed, and it is now recommended that they be eliminated. They first came into Rule 34 before that rule, and in fact all the discovery rules beyond 26, was closely integrated with the protective features of Rule 30(b).

I hope you follow me. That is, originally 30(b) was directed really to the deposition by oral testimony. In 1946, with our changes there, we tied the other discovery provisions, interrogatories, and so on, back to that general provision of 26(b), the broad provision.

Now I say the necessary protection is more accurately given by Rule 30, and the continued use of these words may be productive of confusion and possible conflict.

MR. LEMANN: I don't quite follow you. They still remain in 26(b). You say at the bottom of page 34, "Moreover, there is a suggestion of inconsistency with other of the discovery rules which do not include it," but 26(b) does include it and you haven't moved to take it out.

JUDGE CLARK: I haven't suggested it because that is the broad, over-all thing. I wouldn't suggest taking it out. Further, let me add, I don't know that this is over-all greatly important, but I should think that if you were going to be consistent and have it in certain places, you would need it in 31, it is in 34, you would have it in 33, and I wonder if you wouldn't have it in 36. Is it in 36 now? I don't think so.

DEAN MORGAN: If you take it out now, somebody will wonder why you did take it out.

MR. LEMANN: That is right, and I think you ought to take it out of all of them. If you say 30 is enough, O.K. Otherwise, I think you confuse the bar, especially since it is in there now.

JUDGE DOBIE: I would leave it in.

MR. LEMANN: I move we accept the first proposal on page 34.

DEAN MORGAN: I second the motion.

JUDGE CLARK: Of course, that is a question of choice, and you ought to consider it. Again, before you go ahead and

do it, I would like to ask a little why, because it seems to me this is making a very important provision tacked at the end as a kind of afterthought. It seems to me it does integrate more closely, really, with the subject matter of the interrogatories, because you start out that interrogatories may relate to certain matters. Then you say that when you are doing it you can require also statements along with it.

If you look at Rule 33, you will see that that trails off into things that I think are a little different. We say the number of interrogatories is not limited, and so on. The final provision is "The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule." Then you go ahead and say the kind of thing you can get on interrogatories shall also include what we have said here.

MR. LEMANN: Why not put it at the beginning of the second paragraph of 33? Put the language that you have at the top of page 34 at the beginning of the second paragraph of Rule 33.

JUDGE CLARK: It is a matter of choice. I do not want to lead too far. Again, it seems to me that the way to start the paragraph is to say in general what you may have by interrogatories. Interrogatories may relate to all the kinds of things that you have discovery for.

MR. DODGE: I think the second sentence is better.

JUDGE DRIVER: And leave in the "not privileged".

JUDGE DOBIE: Why not leave that to the Reporter?

CHAIRMAN MITCHELL: It seems to me that we are spending so much time on the wording of these things, we are not going to get through by the end of this week.

MR. LEMANN: I like "A party may require," myself, rather than "Interrogatories may require."

JUDGE CLARK: What is that? I can't hear.

JUDGE DRIVER: He likes "A party may require" rather than "Interrogatories may require."

MR. LEMANN: It is not important. I think we should leave this to the Reporter as long as he leaves in the words "not privileged."

JUDGE DOBIE: Don't you think we had better go to lunch?

JUDGE CLARK: Just one second more, because I think we can then call this done.

We are suggesting that you put in the word "undue" before "expense," which appears in the next to the last sentence of the rule. You see, we used the words "undue expense" in the change made in Rule 30(b), and that makes this one like it. The sentence of Rule 33 as it now reads is, "The number of interrogatories or sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression."

This would make it "undue expense," just as we did in 30(b).

JUDGE DOBIE: I move that be done.

CHAIRMAN MITCHELL: Without objection, that is agreed to.

JUDGE CLARK: I think that brings me to 34, and if you want to stop --

DEAN MORGAN: May I ask you this, Charles. In 33, do you think the opportunity for examination and copying ought to be included, or that opportunity for their examination and copying be afforded?

JUDGE CLARK: I guess there is no objection to it. It is a little hard for me to think of an examination that would stop copying. It seems a little like gilding the lily.

MR. DODGE: It is all right the way it is.

JUDGE DOBIE: If you have "examine and copy" in one, why do you leave it out in the other?

JUDGE CLARK: Because I thought it included it, but I don't care, if anybody wants it.

MR. LEMANN: The first thing you know, if you leave out copying, some lawyer will come along and say that by analogy the rule says you cannot take copies; that you can come and look at them but you cannot take copies, because it was in the rule before.

JUDGE CLARK: No, it wasn't in the rule before. This is something we are putting in anew.

JUDGE DOBIE: I am for putting it in.

CHAIRMAN MITCHELL: If there is no objection, we will adjourn until 2:00 o'clock.

... The meeting adjourned at 1:00 o'clock p.m. ...

Dudley
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THURSDAY AFTERNOON SESSION

March 25, 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: Gentlemen, can we get started.

JUDGE CLARK: It is my impression that we have covered everything on Rule 33, and we are up to Rule 34. That being so, I will now turn to 34. That is page 37 of my September draft.

You see, there has been some conflict on the surface between this rule and some others. This happened to be one of the subjects that was discussed a great deal in Hickman v. Taylor as to whether the procedure to get documents must not be under this alone, and the requirement then here was to get a court order upon a showing of good cause. In other words, this rule was restricted, whereas the others were not.

We concluded that this rule had some uses, but that it should be made clear that this was a supplemental rule and not be as restrictive as it was.

So you see that the previous requirement of good cause was taken out. This is said to be directly supplementary. We say here:

"In addition to the right to obtain the production of any document or thing for inspection in connection with an examination under Rule 26 or interrogatories under Rule 33, any

party may move the court, subject to the provisions of Rule 30(b), for an order upon another party . . ."

Then we go along substantially as before.

I have suggested that the words "not privileged" be taken out here, but I guess that is water over the dam here, so I won't say any more about that.

This is substantially what we approved last spring when we were considering this. What we have done is to provide for what might be termed unusual circumstances where you want to get a special court order for production. That is for the making of entry upon designated land, the photographing of property, and so on.

JUDGE DOBIE: That which is lined through is what you have stricken out, and what is underlined is added?

JUDGE CLARK: That is it.

DEAN MORGAN: You just strike out the "for good cause shown".

JUDGE CLARK: We are striking that out.

CHAIRMAN MITCHELL: He says you do that and nothing else.

JUDGE CLARK: Oh. Yes, that is in in substance. Yes, that is right.

CHAIRMAN MITCHELL: Is there any objection to that draft? If not, it is agreed to.

JUDGE DOBIE: I move that we adopt it.

DEAN MORGAN: Second.

CHAIRMAN MITCHELL: Charlie, what is the next one?

JUDGE CLARK: We will have to change the note a little.

CHAIRMAN MITCHELL: You mean on page 38 of the draft?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: Can't you do that?

JUDGE CLARK: Yes, we will take care of that. In view of some of the things we have not done under 30(b), we will have to change it a little, but I won't go into that now unless there is some desire to.

Coming to Rule 35 --

CHAIRMAN MITCHELL: On page 39 of the September draft.

JUDGE CLARK: That is right.

CHAIRMAN MITCHELL: You are trying to bring this rule into operation to cover blood tests for parentage.

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: Have you looked at the Minnesota rule on that? I had some correspondence with Aaron Youngquest about it, and pointed out to him that question had been raised whether you could demand a blood test in parentage issues; that we had not expressly provided for that, but I was inclined to think our rule was broad enough to cover it.

The Minnesota committee produced a draft on that, and I wondered if you had looked at it.

JUDGE CLARK: This is the Minnesota rule, slightly

amplified.

CHAIRMAN MITCHELL: All right. What is it?

JUDGE CLARK: This is Minnesota Rule 35.01, slightly amplified, adopted by the Committee. We say again over in a note on the next page, page 40, that the amendment adopts the language of the Minnesota rule with some amplification. We go on to say it makes clear the right to require a blood test in an action in which blood relationship is in controversy.

There are certain problems which do come up. As we suggest here, there still seems to lurk ambiguity in the phrase "legal control," that is, under the legal control of the party, its specific content not being entirely clear.

It seems, although not beyond dispute, that this would not reach the Colorado state case before the Committee, Kell v. Denver Tramway Corp., where examination of the eyes of a bus driver was refused as unpermissible in an action against the bus company. So I am again suggesting adding after the words "legal control" the words "or an agent."

The objections which were made before as to sanctions against presumably an agent, on the ground, how could you do things to the agent who wasn't a party, we are suggesting we don't think are a complete answer. It would seem that the court could use such of the sanctions of Rule 27(b) as it considered appropriate and legal. The expansion of this rule would not be properly read as authorizing a sanction which is

illegal, and all others should be usable.

JUDGE DOBIE: Taking what you have there, you want a blood test of a party or a person under the custody of an agent or a party; is that it, Charlie?

JUDGE CLARK: We think this covers a blood test, you see. We have here "blood relationship." We want to add after the word "legal control" the words "or an agent."

Mr. Pryor has a suggestion on that. Mr. Pryor suggests a statement that the party could obviate the imposition of such sanctions by a proper showing of inability to produce the person for examination. Though this may be encompassed within the existing provision of Rule 37(b), that only those sanctions are to be applied which "are just," there could be no harm in spelling out in the note to Rule 37(b) such a limitation on sanctions.

A suitable amendment to the note appears under Rule 37(b), to wit, on page 18 of the March draft. That language is this over in the 37(b) rule:

"The existing provision that only such sanctions are to be applied as 'are just' safeguards the party who makes a proper showing that he is in good faith unable to produce his ward or agent for physical examination."

So we come back to the suggestion on Rule 35 here, this amendment with the addition of the words "or an agent" after "legal control."

MR. LEMANN: It would read "a person in the custody or under the legal control or an agent"? Is that the way it would read?

JUDGE DOBIE: It just adds agents. As the rule is now drawn, it permits these examinations only to be made of parties. In this Kell case, it involved a bus driver, and they wanted to examine his eyes. The bus driver was not a party. I believe it is a good thing to add the agent. It is still in the discretion of the court, isn't it, Charlie?

DEAN MORGAN: I wonder about that. Does that mean an agent at the time, or an agent at the time of the trial, or what? Why should the mere fact that he is an agent be used in this particular case? If he is under the control of a party, whether it is legal or not legal, then we have accomplished what we desire under Rule 35. But suppose he isn't under the control of the party, actual or legal, the only way I can think of is that you would subpoena him and then order him to submit; and if he didn't, then punish him for contempt. I wonder if you can do it.

CHAIRMAN MITCHELL: No. A case came up in the Supreme Court of the United States about the validity of our present rule on the subject. In that particular case a party refused to submit to an examination, and the Court decided they should be punished for contempt, and the rule didn't provide for contempt. You couldn't punish him for contempt. All you could

do was impose penalties on him in connection with the lawsuit, rights or privileges or striking out his answer, or something.

I made up my mind then that the rule would not be sustained if it were construed to authorize a contempt proceeding to force examination. In the only case we ever had, we filed a brief amicus in the Supreme Court. I tried to get the parties to call to the attention of the Supreme Court the fact that contempt as a means of enforcement of the physical examination rule was not authorized by the rules, and they wouldn't do it. So I thought they ought to know. In the brief amicus which we filed, we called attention to the fact that the Committee had never asserted that the court could punish a man for contempt to force him to submit to the physical examination, except by a penalty or some disqualification in the lawsuit.

DEAN MORGAN: Then you certainly couldn't punish the party because the agent refused to, unless he was under the actual control of the party, could you?

CHAIRMAN MITCHELL: The question you asked was whether you could use some contempt proceedings to enforce it, and I said no, I didn't think you could. I hark back to that case where I was convinced that the rule wouldn't sustain it.

DEAN MORGAN: A fortiori you couldn't do it for the party if you couldn't do it for the witness. If you couldn't do it for the witness and the witness wasn't under the actual control of the party, you couldn't punish the party.

CHAIRMAN MITCHELL: You couldn't visit any disqualification or encumbrance upon the party, is that it?

DEAN MORGAN: You couldn't give a judgment against him as for default or you couldn't dismiss the action if he were the plaintiff.

MR. LEMANN: I am wondering about this language. Who would this order run to? Would it run to the plaintiff ordering this person to submit? Would it run to the person himself, which is ordinarily what you would think? Could a court enter an order directed to someone who was not a party himself but who was a person in the custody or legal control of a party or an agent of a party? Could the court enter an order directed to such person, or would the order have to run to the party?

MR. PRYOR: I think it would.

MR. LEMANN: In order to tie up with your penalty? That, it seems to me, would require some rewording of the English of this statement of the proposed amendment to the rule.

JUDGE CLARK: This is a matter which of course has troubled us somewhat. We discussed it a good deal before. It seemed to us if we were going to make any effect at all, we had to put some provision in, and that this was, after all, mild with the qualifications we suggest and the qualifications contained in 37(b), anyway.

That provides that you cannot have contempt under

situations where --

MR. LEMANN: How would the order run? I have a case coming up now under 35(a). I have this bus driver case. Would the order that I would submit to the judge read, "It is ordered that the 'X' Bus Company have its driver submit to an oculist for an eye examination, and if they don't have him submit for an eye examination, judge will run against them"? How would the order read?

CHAIRMAN MITCHELL: As they have it drafted here, the order runs not to the employer but to the bus driver.

MR. LEMANN: He is not even before the court, though. His employer is. He is not there.

CHAIRMAN MITCHELL: I don't think there is any objection to making an order to any witness, but the question is whether you are going to have any right to enforce the order by contempt.

MR. LEMANN: I understand everybody agrees, no.

CHAIRMAN MITCHELL: What does the draft say about that?

DEAN MORGAN: The draft says he cannot put any illegal punishment on it. That is all it says.

JUDGE DRIVER: Even if the order ran directly to the bus driver, you would have to give the defendant, the party, some opportunity to produce him if you are going to apply sanctions to the party.

DEAN MORGAN: You can't apply sanctions to the party.

JUDGE DRIVER: You can if he is under the control of the party and fails to do so.

DEAN MORGAN: That is right. That is what I say.

CHAIRMAN MITCHELL: What do you provide about that?

MR. LEMANN: Suppose the bus driver says, "I am not going to the oculist," do you tell the fellow, "You must fire him"? That wouldn't help any. Some people don't like to go to doctors.

CHAIRMAN MITCHELL: Where is your draft?

JUDGE CLARK: Rule 35(a) is on page 39.

CHAIRMAN MITCHELL: You have stars and then don't complete it.

JUDGE CLARK: The rest of the rule is just the same as it is now. Ig goes on as you have it. The rest of it is, "The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

If you turn in the present rules then to Rule 37, Failure to Comply, you will see (1) Contempt, is practically out. This isn't a refusal of the party to answer, and so on.

Then Other Consequences, and such of those as may be considered just, which might include, of course, refusing to

allow the designated claim or defense to be made. But there cannot be an order of submission to physical or mental examination because, if you look down in that same subdivision to (iv), "In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination."

So under that you cannot have the order of arrest.

CHAIRMAN MITCHELL: Where in 37 is there anything which imposes penalties on the party for failure to submit to examination or failure to order his agent to do so? Where is there anything?

JUDGE CLARK: We didn't put in any special provision to amplify it because we felt that these general provisions would cover it.

DEAN MORGAN: But all these provisions are directed toward the party.

JUDGE DOBIE: Suppose the company sends for the bus driver and says, "All right, we want you to submit to this examination," and the bus driver just says, "No, I won't do it," what can the court do?

JUDGE CLARK: It can make some order against the bus company with respect to questions of proof, and so on.

CHAIRMAN MITCHELL: When the employee refuses to submit, they cannot put anybody in jail or put anybody in

contempt, but they could impose some kind of disqualification or disadvantage upon the party who doesn't act in good faith and try to submit to examination.

JUDGE CLARK: That was the idea.

CHAIRMAN MITCHELL: Where is there anything in Rule 37 that deals with that under "Other Consequences"?

Subdivision (2) of section (b) says, "If any party or officer or managing agent of a party refuses to obey an order . . . made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:"

JUDGE CLARK: If you will look at the same September draft, on page 42 at the foot of the page, going over to the next page, is the same provision which you have been referring to, "Other Consequences."

JUDGE DRIVER: Judge Clark, have you heard from anybody on the West Coast with regard to the Chinese citizenship cases in connection with this problem of physical examination? There are hundreds of cases pending, I think about 700 in the Northern District of California, and all up and down the coast, involving the claimed citizenship of Chinese, mostly boys, minors, brought by their parents, as their next friend or guardian at litem. The father claims that on some trip to China he sired this boy in a remote village of China now under

Communist control, and the State Department cannot get any adverse testimony or evidence. There are hundreds of cases where they claim these people are American citizens because they were born abroad of an American citizen father.

In a good many of those cases an effort has been made to get a blood test of the mother and father and child. Under certain circumstances you can prove negatively they could not have been the child's parents. In other cases the blood test shows nothing.

I have had several of those cases, and I ordered a blood test and they refused to submit. I have just been holding it up waiting for a clarifying decision by the Ninth Circuit Court of Appeals, which has not come out yet. Of course, the law has been amended now so you won't get so many of those cases in the future.

CHAIRMAN MITCHELL: Charlie, what I have in mind is this: The rule is all right without penalties as far as the party is concerned. If he is the one to be examined and won't submit, then that is all right. But suppose the fellow is an employee of his, like the bus driver, who is under his legal control in a sense. I don't believe that legal control would be broad enough to allow him to force the employee.

MR. LEMANN: That is why he wants to put "agent" there, because he shares your doubt about "legal control."

CHAIRMAN MITCHELL: In short, my point is that this

Rule 37 about penalties for disobedience is all right as it is where the party himself is disobedient; but where he doesn't in good faith use what power he has to force the employee to submit to examination, ought there not to be similar disadvantages imposed upon him, such as those which are listed here about not being allowed to defend and stuff of that kind? The only penalties we have on the party are penalties which hamper him in the defense or prosecution of his case, but it is not working so that it would apply in a case where it is not the party who is to be examined, but some agent of his, and the party refuses to try to bring about the examination in good faith. There isn't anything of that kind in there, is there?

JUDGE CLARK: There isn't specifically.

CHAIRMAN MITCHELL: There isn't at all, is there?

JUDGE CLARK: No, not in so many words, but there is the provision that these penalties, only those that are just, shall apply, and I should think that anything of that kind would not come within the idea of an unjust ruling. If you wanted to spell it out, I don't believe we can do it by any more insertion. I should rather think that next after (iv) here as it appearsin Rule 37, and also on page 43 of my draft, you would want to put in another provision (v) something like this:

"Where the order is directed to a person under the custody or legal control or an agent of a party, these penalties

shall not apply if the party shows that he in good faith has endeavored to produce the witness."

CHAIRMAN MITCHELL: You could make it the other way around. They shall apply if he doesn't use good faith, something like that.

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: I think if you stuck that in there --

MR. PRYOR: For the first part of that I think it would be better if he said, "Where the order requires a party to produce an agent or employee or a person otherwise under his control and he fails to do so . . ."

CHAIRMAN MITCHELL: Produce him for physical examination.

MR. PRYORL Produce him for physical examination, yes.

CHAIRMAN MITCHELL: I think we can leave it to the Reporter to draft that, but I think this thing is being broadened out to include people under legal control and agents.

JUDGE DOBIE: He would still be helpless if he exerted all powers if the employee said, "Discharge me or whatever you want to, but I am not going to submit."

CHAIRMAN MITCHELL: I know, but my point is that the party can be disadvantaged if he fails to participate in the effort to get the fellow to submit.

JUDGE DOBIE: That is right. I think that is all

right.

CHAIRMAN MITCHELL: I think we would agree to the amendment to the rule that you propose, with the understanding that in an appropriate place in Rule 37 you cover that situation. Let us not attempt here to fritter away our time on details of the draft. Is that agreeable? Is there any objection to it? It is agreed to.

MR. LEMANN: I think this amendment on page 39 should be rephrased to improve the English of it and make it clear to whom the order is to be directed.

DEAN MORGAN: I should think that Rule 35 is the place to put it.

CHAIRMAN MITCHELL: Can't we leave that to the Reporter? We are not going to get through tomorrow night if we argue here about details of the draftsmanship. I really do not think we can get anywhere. I think we have to move along and trust the Reporter to put appropriate language in there to cover the point.

DEAN MORGAN: My point is that this ought not to be covered in a punishment or sanction clause, but ought to be covered in Rule 35 itself.

CHAIRMAN MITCHELL: That is a detail we can leave to the Reporter, isn't it?

DEAN MORGAN: I know, but I think the Reporter's idea is that you leave it this way, and then just provide for

JUDGE CLARK: I think that Mr. Morgan's statement is fairly clear, but I take it what you want is really an amplification of 35(a) on page 39 --

DEAN MORGAN: Yes.

JUDGE CLARK: -- to provide that the court in which the action is pending may order the party himself to submit to a physical or mental or blood examination by a physician, or where the order is directed to a person under his control --

CHAIRMAN MITCHELL: Where the examination is to be made of a person under his control.

MR. PRYOR: An order to submit or produce a person under his legal control or an agent for examination.

MR. LEMANN: You could it it easily, Charlie, by changing your fourth line on 35(a) to read, "may order the party to submit to a physical or mental or blood examination by a physician or to produce for such examination a person in his custody or under his legal control or his agent."

DEAN MORGAN: That is all right with me. That is exactly what I had reference to.

JUDGE CLARK: All right. It is understood, too, that we insert the agent, as suggested.

DEAN MORGAN: That is right.

MR. LEMANN: Yes.

JUDGE CLARK: All right. I think we have that now.

CHAIRMAN MITCHELL: Hold on. I suggested further that

in Rule 37 --

MR. LEMANN: We are coming to 37 a little later.

DEAN MORGAN: We will come to that later.

CHAIRMAN MITCHELL: It is on the same subject, while we are at it.

MR. PRYOR: I should think in the same rule, Rule 35, you could provide that the sanctions imposed, maybe under another section, upon the party for failure to comply with this provision may be obviated by a proper showing of inability to produce the person. It seems to me that is the proper place to put that.

CHAIRMAN MITCHELL: Rule 37 is the one that provides for the sanctions and penalties.

DEAN MORGAN: Rule 37 provides for sanctions for all of them.

MR. PRYOR: Yes.

CHAIRMAN MITCHELL: If there is any need for elaborating that to fit in agent or person under his legal control, it can be done in 37, because that is where all the sanctions are listed.

MR. PRYOR: All right.

CHAIRMAN MITCHELL: Where are we now, Charlie?

JUDGE CLARK: Rule 35(b), which appears on page 40. This is the question of the Report of Findings. We have here the language:

"If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions, together with like reports of all earlier examinations of the same mental or physical condition."

This is language approved by the Committee, which is perfectly good, but what happens if the defendant, who has induced the plaintiff voluntarily to submit to an examination before suit was brought, then no longer needs an examination under Rule 35? Under the rules as they now exist, this problem has come up in five reported cases, and all five have held that the plaintiff is entitled to a copy of the report, even though examination was not under the rule.

CHAIRMAN MITCHELL: The first thing you have to do is to change 35(b). In a case where the person examined is not the party, but a person under his legal control, the request would be made, not by the person examined, but by the person in legal control. You have to vary that phraseology. Do you see what I mean?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: That can be done. You can work that out.

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: What else was your point there?

JUDGE CLARK: I think probably this is broad enough now. We were raising some question about earlier examinations by permission, but we have taken out the prohibition on the report of experts. There is no prohibition in 30(b), and I think this is probably sufficient. So I recommend the wording that we have here, "to gether with like reports of all earlier examinations of the same mental or physical condition."

PROFESSOR MOORE: You will have to have something in there with reference to blood examination.

PROFESSOR WRIGHT: That is quite true.

CHAIRMAN MITCHELL: A physical condition is a blood examination.

PROFESSOR MOORE: He is putting in "earlier," though.

DEAN MORGAN: He is putting in the special blood examination.

JUDGE CLARK: The same mental or physical condition, and then what would you put?

CHAIRMAN MITCHELL: I don't see why that isn't covered. Physical condition includes the state of a man's blood.

PROFESSOR MOORE: You ought to strike it out in (a), then.

JUDGE CLARK: Maybe we ought to stop with "examinations"; "together with like reports of all earlier examinations." Is that agreed to?

PROFESSOR WRIGHT: We don't want to do that. That is too broad. You aren't eneitled to get every physical examination separately made of a person. If he has a broken back you don't want to see what happened to his legs 20 years before.

MR. TOLMAN: Just cut out "mental and physical."

PROFESSOR WRIGHT: Yes.

JUDGE CLARK: " . . . all other examinations of the same condition."

CHAIRMAN MITCHELL: I guess we understand that.

JUDGE CLARK: Now we go to 36, beginning on page 41, but really on page 42 of my September draft. We suggest putting at the end of (a), which is a provision for admission generally, a clause:

"If a request is refused because of lack of information or knowledge upon the part of the party to whom the request is directed, he shall also show in his sworn statement that the means of securing the information or knowledge are not reasonably within his power."

JUDGE DOBIE: In other words, he can't decline because he doesn't know, because the means of acquiring the knowledge is right there?

JUDGE CLARK: That is right. There have been some questions in the decisions about that. Some decisions have held that a party may not be required to admit or deny facts which

are not within his knowledge, although the means of acquiring the knowledge are readily at hand. The better view has been, consistent with the purpose of Rule 36, that a party must answer a request for admission, even though he has no personal knowledge, if the means of information are reasonably within his power.

JUDGE DRIVER: I think that is a good amendment.

MR. PRYOR: I move the amendment be approved.

JUDGE DOBIE: I second that.

CHAIRMAN MITCHELL: Is there any objection? That is agreed to.

JUDGE CLARK: The next is Rule 37(b), and Rule 37 we have tried to broaden by covering this question of orders made under Rule 35 requiring him or a person under his custody or legal control or his agent to submit to a physical or mental or blood examination. Here is where we will now have to put in a new provision (v).

JUDGE DOBIE: Where the man refuses to take reasonable steps.

CHAIRMAN MITCHELL: Where the party doesn't collaborate. That is the gist of it.

JUDGE DOBIE: That is right. I think we can leave that to the Reporter.

DEAN MORGAN: You can change that by saying "requiring the submission by him."

CHAIRMAN MITCHELL: What is that?

DEAN MORGAN: In Rule 35 it says "requiring him or a person under his custody or legal control or his agent to submit." You have changed it now that you don't require the agent to do it; you require the production. You want to change the phrasing there in the fourth line.

JUDGE CLARK: In the fourth line.

MR. DODGE: Would it be enough merely to refer to an order made under Rule 35, without describing again the different classes?

JUDGE CLARK: Yes, I should think so.

MR. LEMANN: That shortens it.

JUDGE CLARK: Then in (v) we pick it up anyway, you see.

CHAIRMAN MITCHELL: Are we down to Rule 38, Jury Trial of Right?

JUDGE CLARK: Yes, Rule 38. The question which has come up a good deal in the cases is one to the effect of whether there is a waiver when the claim has not been made in time but there is some shift in the legal position of one of the parties. The usual case is by amendment which refers to the same subject matter or, to use the old phrase, the same cause of action, but involves a small difference in legal theory or something of the kind.

Last May when this matter came up, I brought up

something of the kind, but I hadn't documented it very much. At that time I suggested that perhaps the place to put it was up earlier, under subdivision (b), which has to do with the demand. It was thought at that time that the cases which stated the proposition were obviously wrong, and nothing needed to be done about it. I thought that now I had some additional ideas.

In the first place, I had not collected the cases, and it seemed to me that it was desirable to have them before you. One reason that there are so many cases here is because I failed to show the existence of much of a problem by not including the cases. That is why I tried to make the documentation more adequate.

Some of you now have raised the question as to whether there are not too many cases in the footnote. They were put in for the very sake of completeness, being incomplete before.

Second, it seems to me that the idea is a matter of waiver and that, if it is to be considered at all, it should come in (d) dealing with waiver, and that a proper approach is the language we have used elsewhere in the rules, notably in Rule 15(c) on the question of amendment stating a change in the cause of action.

It would seem to me that this ought to be the law in the sense that that is what we have intended, and that is what the cases ought to hold and what, as I read them, the majority

do hold.

There are several divergencies from that, however. The question is apparently one of a good deal of pressing interest because we, for example, are getting two and three cases a year which are brought to us, usually by process of mandamus, about which there may be some doubt as to whether mandamus should be available or not. That is one of the issues that comes up in these cases by seeking enforcement by the trial court of trial by jury. As a matter of fact, this last week in our court we had another time a shift in the legal theory involved, and the judge who was hearing the case refused to allow the amendment. He allowed the amendment, and then later on said that he had done it intending that the case would keep its place on the calendar for the April term of court. The claim for a jury trial being then inserted would have put it off, of course. It would have delayed the matter about two years, in view of the delay in jury trials in the Southern District.

So they came to us for mandamus, and that happens to be another case where we held that the right had been originally waived and was not revived.

JUDGE DOBIE: What is the idea? The defendant waives a trial by jury, and then the plaintiff amends his complaint and the fellow says, "I wouldn't have waived it if I had known that is what he was going to allege." Is that the idea?

JUDGE CLARK: That isn't all of it. It may come up in that way, but the more natural case is where the plaintiff, having brought his pleading originally and thinking then, for whatever reasons may have affected him, that he didn't need to claim a trial by jury or didn't want to, lets the time go by. Then in order to get back his claim he starts changing the legal theory of his case, still the same case. He comes up with some new concpetion of one kind or another. He gets that in. He gets the court to allow him to do it, often on the basis, "What difference does it make? This is just another little theory," and then he makes the claim for trial by jury, thus getting back again under the wire.

The trial judges quite naturally don't like to do that. It is a little unfair to allow that means of reviving a waiver which has already taken place. It is often very prejudicial practically, in the kind of cases I referred to, as to delaying trial. So there has been some tendency to deny it, and I should think quite properly.

Then the next step is that the party then rushes to the upper court asking for a mandamus against the judge to force him to do it. They have gotten mandamus in some cases, as indicated by my statement here. It does seem to me as though those cases were improper and rather unfair in allowing this method of getting under the wire. Other cases do not.

There is, as indicated, a good deal of litigation on

this point. It seems to me that this is a case where an amendment trying to point the correct way and giving a guidepost, so to speak, was desirable because of the amount of litigation, and not too difficult to work out.

That is the background, and that is the reason for the suggestion. The suggestion is along the lines of our rule.

JUDGE DOBIE: The amendment doesn't have any effect. Having waived it once, they have waived it for good.

JUDGE CLARK: That is it.

CHAIRMAN MITCHELL: That appears on page 44 of your earlier draft.

MR. PRYOR: I think the amendment is all right. I might say I had a case like the one you discussed a moment ago in the Eighth Circuit, and the Eighth Circuit said they could not issue a writ of mandamus to control the district court judge, but they went on to suggest that he might enlarge the time for their filing an amendment, which he promptly did.

PROFESSOR WRIGHT: Did that case involve removal, Mr. Pryor?

PROFESSOR MOORE: I feel there is a certain amount of unfairness here. You start out with the lead case, Bereslavsky v. Caffey. That was a suit brought to enjoin the infringement of a patent, and there was no right of jury trial by either the plaintiff or the defendant. Due to military secrets being involved, the case was held for some time and not tried. Then

by the time the war was over the patent had expired. The plaintiff then decided he would like to have a jury trial on the issue of damages.

DEAN MORGAN: He could not have had it in the first place because it was in equity.

PROFESSOR MOORE: That is true, but the basis for any equitable relief had gone. So he asked leave and invoked the discretion of the district court to permit him to amend, claiming nothing but damages, which the district court did. He claimed the right to jury trial. On that statement of the claim, the Second Circuit held he was entitled to it. I don't see the unfairness of that.

DEAN MORGAN: I think that was perfectly all right. I agree with that. But don't we have a provision anyhow that the judge may grant jury trial even though the parties have failed to demand it?

JUDGE CLARK: There is a provision that the judge may.

DEAN MORGAN: That is what I thought.

JUDGE DRIVER: That is a very common situation where attorneys fail, through inadvertence or unfamiliarity with the rules, to make demand for jury trial in time. I rather think that my procedure is typical. I am reluctant to deny a party the right of trial by jury if he desires it, and I always allow the jury demand that comes in late unless it results in substantially delaying the trial. If I have my calendar set up

and the case is all ready for trial and it would result in making it go over for a long time, I sometimes deny it. Otherwise, I always grant them.

In most jurisdictions I think they would have no difficulty in a situation such as Professor Moore described here. I would have no hesitancy at all in allowing a jury demand that came in late in a case of that kind.

DEAN MORGAN: Under 39(b).

DEAN PIRSIG: I am under the impression that in a case where equitable remedy fails and you have already started an equitable action, before you get into these constitutional provisions which keeps the right to jury trial inviolate, the equity court would retain the case and grant equitable relief, namely, damages. If such were the case, then there would not be any occasion for jury trial. It would still be in an equity court.

I have another difficulty with the rule as drawn here. I think what was intended was to cover a case where you have a single claim in substance and you have an alternative possible variety of relief, some legal, some equitable, and he amends to get into a legal relief situation and thereby revives his right to jury trial.

As this is drawn, it seems to me to be a little broader than that and to cover a different type of situation, since the amendment may include not the same claim but other

and independent claims, still arising out of conduct, transaction or occurrence, which he now introduces by an amendment and with respect to which he has not yet had an opportunity to demand a jury trial. If this went in, it would waive the jury trial not only as to the claim that he started out with, but as to other claims which arose out of the same transaction or occurrence.

DEAN MORGAN: Do you think that would not be taken care of by the judge's ruling under (b), which would allow him to grant it even though it were late?

PROFESSOR MOORE: What about the defendant there, though?

DEAN MORGAN: The defendant, too.

PROFESSOR MOORE: The plaintiff injects this new claim for the first time, it is legal, and the defendant says, "I should not be put to the discretion of the court. This is the first time I have had a chance to demand a jury trial."

JUDGE CLARK: Let me add a little more to this. You have to take into consideration in all of this the provisions that we use as to the demand for judgment, and so on. It is well settled that where the parties have appeared, there is no limitation on the relief to be granted by the form of the demand for judgment. Therefore, in a case where one incidentally, so to speak, uses a term instead of "cause of action" which means cause of action, but one set of happenings

that is brought to the court is set up, the plaintiff must know so far as he is concerned, and the defendant must know, too, that when that matter is heard it is the duty of the judge to give the relief that the situation calls for without any limitation.

So, to refer particularly to the question suggested about the defendant, it seems to me that the defendant can not count on the claim not being varied that way. Once you have the factual situation put up to the court, he is required by virtue of that other rule on the demand for judgment, which is 54(c), the one providing that the relief is not limited, to know that that may be entered against him.

So it seems to me that the situation there is that the defendant is on as much notice as the plaintiff, and the defendant must make his claim, which can easily be done, of course. It is a very easy thing to make the claim.

I do want to say a little more about a case such as the Bereslavsky case, because I think that does somewhat indicate the point.

As you know, one of the statutes provides that you can get equitable relief and the other provides for trial by jury. That is provided by statute. You can get a trial by jury, if you seek it, in a patent case. That is the law. In the particular case here involved, the plaintiff asked for the usual relief in a patent infringement action, which was for an

injunction against infringement, plus an accounting for the profits under the patent. It is true that time ran along, which is, I should say, one reason for not allowing too much to one who lets the time run along, but what actually happened in this case was that the plaintiff made a motion in effect striking out the relief he claimed and asking for new relief by way of damages. That amendment, I think, was really inappropriate. I think some decisions have said so. It was inappropriate because the motion to amend the demand for judgment is not in point. The demand for judgment not being binding on you, there isn't anything to amend. You haven't done anything by the amendment. The factual allegations were kept the same. That is what the judge said in passing on it.

Then it came to a trial judge, and that was in a reported decision, the decision below in Bereslavsky v. Socony-Vacuum Oil Co., 7 F.R.D. 447. Plaintiff at that time appealed for the amendment, and there was some objection made there on the ground that it was going to be used for a jury trial. The judge, being sort of softhearted, said, "This amendment is entirely unnecessary, but it would seem it should do no harm, and therefore there doesn't seem to be any reason why it should not be granted."

Having granted it, as I say, unnecessarily -- I think he was quite right when he said that -- the plaintiff then puts in its claim for jury trial. That came before Judge Caffey. He

considered that at great length, and there are two rulings he made. The first was more or less postponing it for further consideration, and the second was Bereslavsky v. Socony-Vacuum Oil Co., 7 F.D.R. 447. He said that the amendment was just being used as an exduse to get jury trial, and refused to permit it. That was the order that was reversed on mandamus.

It seems to me that, taking the background and all, there was a good deal of meaning in that. The claim was inherent in the case from the beginning if the parties wanted to make it. No amendment was necessary. The amendment was used as a stepping stone to this sort of change.

As I suggest, we are now getting quite a flux of these cases, and there have been various ways to meet it. Since that decision, as a matter of fact, on one ground or another, it seems to have been possible to deny the later claims, but I think the denials have raised a great deal of question, too.

One case where the denial was made is a case up in the Northern District of New York, where the trial judge had said, "This amendment is unnecessary and it should not be used to revive trial by jury. Therefore, I will allow it only on condition that there be a trial to the court."

The inevitable mandamus followed, and it was ruled by some of my colleagues -- I wasn't sitting -- that without considering the questions the judge went on as to whether there

was waiver or whether there could be the claim, nevertheless it would be held that the judge could condition his order that way.

I must say that it does seem to me in that case perhaps the cure is worse than the disease. I suggest that for this reason: If a party, a plaintiff, has a good claim that he should put in by amendment and if that does properly raise the trial by jury, it seems to me very doubtful to say that the trial judge in granting the amendment can condition it upon his not getting trial by jury.

That is why I say that that sort of way of getting at it seems to me very doubtful. If you hold as the trial judge did in that case, which is one of these cited here, Parissi v. Foley, two grounds, first, that the right, if any, was waived, second, that he didn't think a jury trial could be claimed in any event, those are both perfectly sound reasons; but to reject both of those and say that he has the power to make the condition, as I say, I think that makes it very doubtful.

Against this background you see a great deal of indefiniteness. It seems to me it would be sound to make a clarifying rule.

I want to refer particularly to Dean Pirsig's point, which I have covered somewhat already, but I want to say this: It seems to me we have the situation which I have indicated. If you have the factual situation presented to the court, any

claim of relief out of that is inherent in the situation and should be awarded, whether demanded or not. There it seems to me that both sides, plaintiff and defendant, knowing the law, would have to expect that it will be granted, and I don't think they can say, "I thought you were going to get only an accounting. I didn't know you were going to get damages alone." I don't think they can say that, because they have been on notice from the beginning that that was a real possibility from the beginning.

That is a part of the whole scheme of not only our rules but, as a matter of fact, the code pleading itself, where the demand for judgment no longer is of importance except in the default cases.

That is my submission, so to speak.

DEAN PIRSIG: I was thinking of this kind of case: The plaintiff has sold some property to the defendant and received three separate notes. As to one of them he claims that there was a mistake made on the amount. He brings suit only to reform that one note. In the course of the litigation he decides to abandon that and he moves to amend to include not only that note but the other two. He asks for a jury trial.

I can see where possibly he might ask for an amendment and he might lose his jury trial as to that one, although I have doubts about that; but that he should lose it as to all his causes of action that arise out of that transaction bothers

me. He had a right to leave out those two, as a matter of fact, and not assert them at all. There is nothing in the rule that would require him to bring in the other two. If he brought an independent action on the remaining two, he would have a jury trial.

CHAIRMAN MITCHELL: Let me ask you this, Charlie. Suppose a man brings an action in the federal court and makes a case to enjoin an infringement of patent and, incidentally, to recover damages. If he demands a jury trial he cannot get it, can he, on that action?

JUDGE CLARK: I think he can.

CHAIRMAN MITCHELL: How?

JUDGE CLARK: You have in there two issues. This is a matter that has caused some difficulty in other connections. I don't know that in the patent case it has quite come up. You have there two claims for relief; not two causes of action, two claims for relief. One is basically the validity of the patent, and the other is for equitable relief upon it.

The question has been raised, what would be done in a situation of the kind where there are two different claims, one legal and one equitable? The general way of approaching it has been ot say that you will apply the test which has been termed the basic issue test, and that one claim can be made basic and the other less basic. Then you decide as to the basic issue whether there should be a jury or not.

It seems to me that in this case it is perfectly proper for a litigant to say, "I want my question of patent validity decided by a jury, that being the basic issue; and then if it is decided the way I think it should be, I want extra or ancillary relief."

Of course, as a matter of fact, he can do that, and you can't stop him, by not showing his hand, if he wishes.

For example, suppose he brought only an action claiming monetary damages, and that was tried to the jury, and the jury found in his favor; and he thereafter asked for additional relief -- perhaps "ancillary" isn't the best word for it -- additional relief on the basis of the judgment he had gotten. It seems to me without question that the court would and should order it.

CHAIRMAN MITCHELL: Are there patent cases where an action was brought for an injunction and damages for infringement where the court has granted a jury trial at the request of the plaintiff?

JUDGE CLARK: There are certainly cases where we have had the case of a patent tried to the jury. You are asking if there has been a definite ruling on the question of a doublebarreled claim for relief, whether that would prevent it or not. I don't recall any patent case presenting that angle.

CHAIRMAN MITCHELL: You see, what I am driving at is

that your basic idea is that there has been a waiver of trial by jury.

JUDGE CLARK: That is right.

CHAIRMAN MITCHELL: If a man brought his action to enjoin infringement and incidentally for damages, and he cannot get a jury, he hasn't waived it, has he?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: You have to start with the proposition that he would have a right to jury trial and has lost it.

JUDGE CLARK: That is right.

CHAIRMAN MITCHELL: I don't know much about patent law, although I have had a good many patent cases, but I never had any idea that in a patent suit for injunction against infringement plus a claim for damages, a man had any right to a jury trial.

JUDGE CLARK: I think he has.

CHAIRMAN MITCHELL: It is a novel idea to me. I never heard of it.

JUDGE DOBIE: It is inherently ridiculous to ask a jury to pass on the validity of a patent.

JUDGE CLARK: You can't make the law that way. We had something of a rash of jury trials claimed that way when the feeling was that the court was pretty strict against patents. You simply cannot change that. We have had quite a few cases

of actual jury trial. As a matter of fact, it turned out that the jury wasn't as favorable to the patents as was hoped, and I think we are not getting as many of those as we had. There was, however, one very good law firm in New York that was bringing all its patent cases to a jury.

There isn't any question about that feature of it. That is well settled -- not only well settled, it is absolutely provided by the statute. It may be too bad, but there it is.

On this further question about the basic issue, I do not know of any particular discussion exactly in a patent case, but I am quite sure it is sound. It has come up in other cases. It has come up in the property cases. As a matter of fact, I had it myself in a decision I wrote in the antitrust cases, the case of Ring v. Spencer, 156 F. 2d 546. The holding of the case was that plaintiff is entitled to a jury trial in an action which is basically one for exact legal damages in violation of the Antitrust Act, despite the presence of additional demands for injunctive relief on matters of detail, and so on.

It seems to me that that is the kind of approach that we need to make and that we do make in these present cases. What is the basic issue? The basic issue in the patent case is the validity of the patent. In that case, by the statutes and the law of the land, you can have a jury trial if you properly claim it.

Let me come back to Dean Pirsig's suggestion.

JUDGE DOBIE: What do you want to do? Where the man has waived it, by amendment, without going into any details -- equitable, legal, counterclaims, or anything -- he is out of the picture?

JUDGE CLARK: Unless he brings in a new factual set-up, yes, it seems to me that is the result.

I was going to say with respect to Dean Pirsig's suggestion that it seems to me that that is just the point that would govern in his case. The language that is suggested here is taken from the amendment beyond the statute of limitations case. It comes up, too, on such questions as splitting a cause of action, and so on.

I should suppose in his very case of different promissory notes that you could not bring in a new note and sue on it. That is the application of Rule 15(c) against the amendment there. I would say that it does not apply here. It seems to me that that is a good illustration. As I understood the case, these other notes would be new matters as to which you could properly make a claim, but on the first one, as he suggested, the idea would be that you ought not now to have a revival as to that.

CHAIRMAN MITCHELL: It seems to me there is an inconsistency on the face of this thing. You say a waiver of trial by jury is not revoked by an amendment of a pleading asserting no new claim or defense arising out of the same

transaction as the original pleading. According to your theory, you have a right to jury trial on the damage question even if you bring an action like that.

JUDGE CLARK: I am not sure that I followed to see where the inconsistency is. I don't believe there is an inconsistency there. I thought you were raising a little question as to whether or not I was correct about there being an initial trial by jury.

CHAIRMAN MITCHELL: I think the point is this: You say "A waiver is not revoked by an amendment of a pleading asserting only a claim or defense arising out of the conduct, transaction, or occurrence set forth . . . in the original pleading." According to your statement, the original pleading contains two claims for relief, and by amending your claim for relief you are back where you were at the start. Is that your theory?

JUDGE CLARK: I certainly must reiterate that I do not see any inconsistency there whatsoever. It seems to me that what I have said here is that if there is a basic legal issue and the claim for jury trial was not made, you waive later a jury trial on that basic legal issue.

CHAIRMAN MITCHELL: You waive it by its not being made in time?

JUDGE CLARK: That is it. You have waived it by not making it within the time provided by the rules, which is

substantially any time up until ten days after the answer.

Of course in one sense, if I am wrong in what I say as to the basic legal issue, if our decision, say, in Ring v. Spencer was wrong, in a way that is self-executing; and you are quite right, Mr. Mitchell, if you say there was no claim of trial by jury and therefore there was no waiver, I agree with you. So in a way, I haven't done any damage if my reasoning is wrong. The rule then just does nothing.

But where my reasoning is correct, then you prevent this jockeying for position and, among other things, getting trial postponed in a district like New York two to three or four years because of the state of the calendar.

CHAIRMAN MITCHELL: Getting back to Professor Moore, he says on the set of circumstances as exist in this case, he doesn't think there was any jockeying. The fellow's case was postponed because of the war. War secrets were involved in the patent somehow, and he couldn't help himself. When the war was over and there was no chance to get any injunction any more, what is the use of having that demand in the complaint? You cannot blame him very much for throwing it out the window and saying, "All I have left is the damage claim anyway, so I want a jury trial on it."

If all we have are cases like that Bereslavsky case, it does not seem to me that there is any jockeying. The fellow certainly wasn't jockeying around to delay his case. The war

did that for him. It is a question of fair treatment.

DEAN PIRSIG: Do I understand he would have been entitled to a jury trial when the injunction was being asked for?

CHAIRMAN MITCHELL: That is the statement that is made here. In a patent case if you have a double demand, one for an injunction against infringement and one for damages, you always have a right to jury trial for damages.

PROFESSOR MOORE: That isn't my understanding.

CHAIRMAN MITCHELL: I had never heard it before.

MR. PRYOR: Is there any reason why the court could not grant a jury trial under 39(b)?

CHAIRMAN MITCHELL: The court would have discretion, even if the parties didn't demand it, to order a trial by jury, but that is another question, of course.

PROFESSOR MOORE: The plaintiff sometimes has a choice between remedies. As I have always understood the patent case, he has a choice to go into a court of equity to sue for an injunction and for damages incidentally, or to go into a court of law and just sue for damages, the old trespass on the case. Now that you have the two procedures united, he still has a choice of remedies. If he pleads in his complaint a suit for injunction, where the damages are incidental, I do not see how either one of them can get a jury trial by demanding it, the way the pleadings are then set up.

CHAIRMAN MITCHELL: It is not an action in law as the

Constitution defines it.

PROFESSOR MOORE: No.

CHAIRMAN MITCHELL: The right to jury trial as a matter of right only exists in an action in law. It is an equity case as equity is known.

DEAN MORGAN: Rule 38 is drafted in a different way, Mr. Mitchell, and I think that is why the Reporter is distinguishing between general relief and issues. In his demand he may specify the issues which he wishes so tried. His basic issue here is one which ordinarily would be for a jury. Of course, I noticed Judge Clark in one of his opinions disagreed with the rule in New York, where if you ask for both legal and equitable relief you are not entitled to a jury at all.

JUDGE CLARK: That is right.

DEAN MORGAN: You waive your jury by asking for double relief, even if it is on the same claim; or if you join a couple of claims, one legal and one equitable, you waive it in New York.

I remember very well his disapproval of one of Cardozo's opinions with reference to that.

CHAIRMAN MITCHELL: The waiver in this case is not, as I asked a minute ago, a waiver for not demanding in time; it is because of the form the action has taken that he does not have the right in the first place.

DEAN MORGAN: Yes. He could demand a jury trial in

New York in a case for an injunction where you would determine that he had legal title to property, as in the City of Syracuse case. The defendant there had blocked a highway and the plaintiff brought an action in New York for an injunction to compel him to remove the obstruction. He claimed a jury trial on the ground that he had gotten title by adverse possession, that it was his property, and so forth. The majority of the court said there that at common law that involved ejectment, because under the New York rule where a city took property they got title in fee, and this was an action for the recovery of possession of real property with this incidental relief of getting the stuff removed.

Cardozo wanted to hold it as an equitable action. The New York case said it was tried to a jury on the question of the right to immediate possession, which meant right to title to the property, practically.

CHAIRMAN MITCHELL: Is the result of this that we are to conclude --

DEAN MORGAN: I don't know whether that applies here.

CHAIRMAN MITCHELL: In any equitable case, not a patent case, but suppose this continuing course of infringement, and he wanted to enjoin the fellow from keeping up this nefarious practice of his and he wanted damages as far as he has gone with it. It is not a patent case but a general suit in equity. Can it be that the law is that you have a right to

demand a jury trial for the damages side of it in such a case?

DEAN MORGAN: I do not know. I just do not know. I just know that in some of the federal cases they have pointed out particularly that Rule 38 applies not to the whole case, and so forth, but it applies in specific cases, the demand for trial by jury on specific issues. That does not necessarily mean the constitutional right to it, does it?

JUDGE CLARK: I make this suggestion in all good fellowship, so to speak. I know that Professor Moore in the patent cases has taken the position that he is now suggesting. It seems to me that that is inconsistent with his discussion of other matters -- for example, his criticism of a New York case, Jackson v. Strong, which was an accounting of a partnership on a claim or breach of contract.

I think also he expressed approval of this case I spoke of, the antitrust case, Ring v. Spencer; also the Rand cases, the Hull v. Sugo case, which involved that same sort of thing. That is one thing, I must say, that I have not fully understood in that great treatise, Moore on Federal Practice. It seems to me that there is a very definite shift in these cases from some of the other cases.

He is entitled to make a different approach, but it does seem to me that on his own analysis, this basic issue idea I think is distinctly from Moore. When I used it, as I did in some of these cases, and quoted it, I used that as my authority.

CHAIRMAN MITCHELL: We have spent over an hour on this one rule.

MR. LEMANN: On 38(b), you wouldn't get a jury trial by demanding it unless you had a constitutional right to it.

CHAIRMAN MITCHELL: That is right.

MR. LEMANN: You come in and demand a jury and the other fellow says, "You are not entitled to it under the Constitution," and you wouldn't get it unless the court ordered it.

CHAIRMAN MITCHELL: That is right. Your demand has to be based on the constitutional right.

MR. LEMANN: That is what I understood.

CHAIRMAN MITCHELL: I am not so sure I am right about that. Suppose the Legislature passed a statute saying that in certain transactions you get a jury trial.

MR. LEMANN: You do not say "Constitution." "Triable as of right" is the language used in the rule. That usually means a constitutional right, I think.

CHAIRMAN MITCHELL: Generally; not always.

MR. LEMANN: Not necessarily.

CHAIRMAN MITCHELL: What is your pleasure with this? Has the patent bar had a shot at this proposal? Do they have anything to say about it?

MR. LEMANN: This is to cut off the right to jury trial, and it is a retrogressive attitude on the part of our

Reporter which astounds me, but I cannot resist welcoming the sinner to the retrogressive fold.

If the court could always give you the jury trial anyhow, I really do not know why we should try to reconvert the Reporter.

CHAIRMAN MITCHELL: They are not very apt to do so. It is a matter of discretion in a case like that, where neither party demands it or has a right to demand it.

MR. LEMANN: The importance is in New York particularly, because your jury calendar is so congested.

JUDGE CLARK: That makes it very striking.

MR. LEMANN: Your desire to expedite the administration of justice prevails in considering motions. You want to cut this down and say that he cannot extend his time to get it.

CHAIRMAN MITCHELL: I shall advise the people in my office whenever they bring a suit now which calls for injunctive or equitable relief plus recovery of damages, that they should demand a jury trial right away, because if they let time go by and drop the injunction feature of it, they cannot get it.

MR. LEMANN: In such a case we do have a constitutional right to trial by jury? Has that been settled?

CHAIRMAN MITCHELL: I had supposed not.

MR. LEMANN: It is on the equitable side ordinarily.

CHAIRMAN MITCHELL: It is a straight action at law

from the start. An action for an injunction is not an action at common law.

MR. LEMANN: To put it in your original pleading demanding it would not necessarily get it.

CHAIRMAN MITCHELL: According to our Reporter, you would be entitled to get it.

MR. LEMANN: Why? It is not under 38(b), is it?

CHAIRMAN MITCHELL: You could take it up to the court of appeals and get it. (Laughter)

JUDGE CLARK: You see, you instinctively make certain assumptions along the line of our old idea, which is not unnatural. You say, here is an action in which damages are claimed, and that means an action at law. O.K. Then you say here is an action in which injunction is claimed, and that means necessarily an action in equity. It isn't as simple as that. You don't know whether it is law or equity until you put more mental effort on it, because you have a combined situation here.

CHAIRMAN MITCHELL: You have to take the old distinction between actions in law and suits in equity in order to determine the constitutional right to jury. You cannot escape that, because you have but one form of action any more.

MR. LEMANN: In 38(b) you cannot run away from it. The only way you can run away from it is to give jury right in every case.

CHAIRMAN MITCHELL: I think you have really given this rule an inordinate amount of time, having been over an hour on it now. The question is whether we approve the amendment to Rule 38 which contains the new clause:

"A waiver of trial by jury is not revoked by an amendment of a pleading asserting only a claim or defense arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

JUDGE DOBIE: There are repercussions, it is a difficult question, and all kinds of things like that, but I am inclined to think we might go along with the Reporter. I move that we adopt it.

MR. TOLMAN: I second it.

CHAIRMAN MITCHELL: Any further discussion?

MR. DODGE: What was that?

CHAIRMAN MITCHELL: It has been moved we adopt the Reporter's draft and his theory about it. All in favor of that say "aye"; opposed.

PROFESSOR MOORE: No.

CHAIRMAN MITCHELL: It is carried.

JUDGE CLARK: The next question is on dismissal of actions. This is on Rule 41. It appears on page 46 near the bottom of the page. The suggestion here is that we put in:

"Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal

not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits."

CHAIRMAN MITCHELL: The change there is "for lack of an indispensable party."

JUDGE CLARK: Yes. This would correspond to what we already have in by amendment in Rule 12(h). Rule 12(h) is the waiver provision by not making it a pleading, and to be consistent this ought to go along, too. That is the waiver of defenses. "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to draw in an indispensable party . . ."

I may add that that we added in 1946, about indispensable party.

DEAN MORGAN: I move the adoption.

JUDGE DOBIE: I second that.

CHAIRMAN MITCHELL: Any objection to that? That amendment to Rule 41 is agreed to.

JUDGE CLARK: The next is Rule 42. This is a question like the one that I brought up as to 21. It is a question whether we ought not to tie up these provisions for separate trials with a provision for judgment, the certificate of the

judge of finality, and so on.

The suggestion is contained in the last underlined provision here under Separate Trials:

"The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim," and so on, "and may direct a final judgment upon any part thereof in accordance with the provisions of Rule 54(b)."

This complements suggestions made earlier. See Comments to Rules 14, 20(b), 21, and 54(b). It would seem that when Rule 13(i), dealing with the separate trial of counterclaims, was amended in 1948 along this line, a definite gap was left in this rule which should be closed. Moreover, the addition should clarify the interpretation of Rule 54(b).

You will recall that we adopted the rule as to 20(b), and I am not sure as to what we finally did as to Rule 14, because that is subject to rewording. That is the provision for third parties. We decided as to Rule 21 to do nothing, because that was a further idea of severance. So we left it out as to 21.

But in accordance with Rule 20(b), this would be consistent with what we voted there.

DEAN MORGAN: I move the adoption.

PROFESSOR MOORE: I think maybe there is an ambiguity there, Judge. ". . .judgment upon any part thereof" could be

construed to relate to both claims and issues.

JUDGE CLARK: I guess you are right.

JUDGE DOBIE: Issue thereof.

PROFESSOR MOORE: On any claim.

JUDGE CLARK: I think that is probably correct.

CHAIRMAN MITCHELL: Strike out "part thereof" and insert "claim".

JUDGE CLARK: Either insert "claim" or maybe you could leave it out. I don't know. We might say, "and may direct a final judgment in accordance with the provisions of Rule 54(b)." Why don't we do it that way?

CHAIRMAN MITCHELL: All right. Is there any objection to that amendment to Rule 42? That is agreed to.

JUDGE CLARK: Rule 45. I do not have this in my September draft, but in the March draft I have a question, and it is a question presented by the material which went to the Chairman of the Judiciary Committee and was by him referred back.

You will see that I do not favor the suggestion made, but I think since it has come under those auspices we should give some attention to it. That is this Mr. George Grau thing about which you were speaking to me this noon, Mr. Mitchell.

I say this would come up under this subpoena duces tecum proposition. Secretary Tolman distributed to the Committee the suggestion of Mr. George Grau, Assistant Attorney

General of New York, transmitted through Chairman Reed of the Judiciary Committee of the House, for an amendment providing a procedure to secure a subpoena duces tecum for the production of books and papers by public officers only by court order on motion and at least one day's notice, as provided in New York Civil Practice Rule 162. That is the New York civil practice rule. You have to get a court order on one day's notice.

That is Mr. Grau's suggestion made to Congress, that there be this kind of provision like the New York one.

The next is my answer, if you are interested in it.

Our present practice follows the usual course under the Rules (presently to be extended if the proposed amendment to Rule 14 is adopted) of allowing first steps to be made by the parties without appeal to the court until opposing parties ask relief to prevent abuse. So the second clause of this rule now provides a specific procedure for the quashing of such a subpoena; this would not require special designation, such as, after the word "oppressive" of (1), some such language as "or violative of a governmental privilege," to reach the case here suggested. By amendment, effective in 1948, upon our recommendation the Supreme Court made Rule 45(d)(1) Subpoena for Taking Deposition; Place of Examination to conform with this rule by taking out the provision there originally contained for an initial court order.

That was in the subpoena duces tecum in deposition

case. We originally had a requirement for court order there. We took that out.

Privilege is an acknowledged ground for the quashing of such a subpoena, and the cases cited in Note 7 of the annotations to this rule.

The Reporter therefore opposes the proposed amendment. It is perhaps regrettable that the proponent sought legislative action rather than an amendment of the rules. But to take advantage of the opportunity afforded by Chairman Reed's admirable course in referring the proposal to this Committee, it is suggested that the Committee action, whatever it may be, be reported personally to the proponent, with some explanation of our reasons and with a copy to Congressman Reed.

Leland, do you know anything more about this than is indicated on the surface?

Mr. Tolman. I had a telephone conversation with the counsel of the committee, who said that this had come to them from New York and Mr. Reed thought there was something to it, and wondered if the Advisory Committee had ever considered it. I told him I was sure the Advisory Committee had not considered the question specifically, and I asked him to send it over and I would send it around.

CHAIRMAN MITCHELL: What is your objection, Charlie?

JUDGE CLARK: This is a requirement for preliminary court order. It is the kind of thing that we have been getting

away from more and more. You have to go to the court.

DEAN MORGAN: Do you have to give notice in this particular case?

JUDGE CLARK: Yes.

DEAN MORGAN: It is just a question of whether you have to go there first or they have to go first.

MR. TOLMAN: That is right. They point out that a good many of the records are confidential. They mention particularly the New York State records under the state unemployment insurance law which are made by law confidential. They say that those could not be produced. If there is a motion to quash, it would have to be granted. Therefore, it is useless to issue such a subpoena, because it puts them to a lot of extra trouble.

JUDGE CLARK: This is not an unusual case. The governmental agency says, "We could save ourselves a lot of trouble by nipping this in the bud." That is really what they want. From their point of view, of course, something is to be said for it. If they could get these things originally before the judge, then they would stop it there.

I think from the standpoint of a general rule there are certain things to be said about that. First, that the general rule is desirable. You should not have special exceptions, even for the government, unless there is a necessary and unusual reason for it. I think it is a little too bad to

seem to be giving special favors to the government.

MR. DODGE: Would there be many of these books and papers that would be privileged or nonproducible?

JUDGE CLARK: They assert, and I guess probably correctly, that in certain departments they would be perhaps substantially all confidential. Yes, there would be. As a matter of fact, in the federal law the Supreme Court has stated, over some objection, that there are certain privileges as to Navy documents and things of that kind.

MR. TOLMAN: Judge Medina ruled that our documents were confidential. I went down there with a great big briefcase of papers in that Communist trial.

MR. DODGE: Of all public books and papers that would naturally normally be summoned, isn't there a small percentage that would be free from compulsory production?

JUDGE CLARK: I should think so.

CHAIRMAN MITCHELL: The point is that they want to get into court by resisting the issuance instead of getting into court on a motion to quash. It sounds like Tweedledum and Tweedledee to me.

JUDGE DOBIE: I move that the rule be kept as it is, and that a very kindly letter be written to Chairman Reed explaining the reason for it.

DEAN MORGAN: I second the motion.

JUDGE DOBIE: Thank him for bringing it to our

attention.

CHAIRMAN MITCHELL: If there is no objection, that is agreed to.

JUDGE CLARK: Mr. Mitchell, are you to take over the writing of the kindly letter? I think you had better do that.

CHAIRMAN MITCHELL: No. You are the official of this Committee. You have more prestige than the Chairman has when it comes to the rules.

JUDGE CLARK: I am not sure.

JUDGE DOBIE: Just let him know we considered it.

MR. TOLMAN: I think all they will want is a note that you have considered it. I do not think they will press it.

CHAIRMAN MITCHELL: The Reporter suggests that a letter be written to the man in New York, a nice letter. We can give him our reasons, and send a copy of it to Chairman Reed. When these rules are submitted to Congress, we do not want Reed yammering around that this is a perfectly good suggestion that we wouldn't pay any attention to -- if you want his vote.

JUDGE CLARK: If you want me to. Monte suggests I am too vigorous.

MR. LEMANN: I think it ought to come from the Chairman. Maybe the Reporter should write it and the Chairman should sign it.

CHAIRMAN MITCHELL: I will sign it if Charlie will

write it.

MR. LEMANN: I think that would be the happy solution. I think it would dignify the Committee more to have it come from the Chairman of the Committee, distinguished as the Reporter is.

CHAIRMAN MITCHELL: Charlie, I want to be sure it is written by a fellow who knows what he is talking about.

JUDGE CLARK: I don't know quite what to say about that, whether I know about it or not. I will just rely on the Fifth Amendment and won't make it specific.

CHAIRMAN MITCHELL: You are expelled!

JUDGE CLARK: I have nothing to recommend on Rule 49, but there is another plea from some distinguished persons for compulsory special verdict, if you will look at my report of March 15, page 20, and so on.

DEAN MORGAN: I move that it be received and filed without reading.

CHAIRMAN MITCHELL: It seems to me that that is one of those things that seeks to control litigation. It is within the discretion of the trial judge to require the jury to return a special verdict. The proposal would produce an awkward result.

DEAN MORGAN: It always has been within the discretion of the judge.

CHAIRMAN MITCHELL: I think the judges are pretty free

in requiring special verdicts.

MR. PRYOR: Under our court rule, the court must submit a special verdict if the party demands it.

JUDGE DOBIE: I don't agree on that. I think it ought to be discretionary with the court.

MR. PRYOR: I am not arguing for it. I am just saying that is our rule.

MR. LEMANN: The motion is to pass it. I second the motion.

CHAIRMAN MITCHELL: Is there any objection to passing it? That is agreed to.

JUDGE CLARK: Is anybody going to write Mr. Treffinger a kindly letter?

CHAIRMAN MITCHELL: To whom was his letter addressed?

MR. LEMANN: I don't think he rates the Chairman, however. I think the Reporter should write this one.

JUDGE CLARK: I think we are now up to Rule 50, are we not, on page 48. This is an important rule and an important series of amendments that we have struggled with before.

You may remember the history of this. This is one of the amendments, one of the three that the Court did not adopt, having then another case before it. That was at the same time as the Hickman v. Taylor thing.

What we are now doing in this case is recommending in substance what we recommended then for the clarification of

this procedure.

CHAIRMAN MITCHELL: Roberts wrote an opinion on this, and I always thought he got tangled up on it.

JUDGE CLARK: It seems to me they are tangled worse than ever now. Of course, Justice Roberts is retired. The latest case of all is that Johnson case. That is the case in which Justice Frankfurter dissented. Justice Frankfurter is getting to be our chief supporter on rule-making and various things.

CHAIRMAN MITCHELL: The question that Roberts dealt with was whether you had to make a motion for judgment, notwithstanding the verdict, within ten days after the verdict in order to bring into play the rules.

JUDGE CLARK: The Johnson case is the one stated in the footnote beginning at page 49.

MR. DODGE: It isn't stated. It is just referred to.

JUDGE CLARK: That is the case where it is said that there was no formal motion for a directed verdict and, there being none, there would have to be an order for new trial.

It seems that the counsel for the New Haven Railroad had done everything except write it out. The court was going a long ways in holding that there was none. Justice Frankfurter's dissent was that it was a return to formalism requiring that much formality when everybody knew what the counsel was doing.

DEAN MORGAN: He also used the regular formula that New York lawyers may use for moving to set aside the verdict or for judgment notwithstanding or for new trial, and he argued them both afterwards. It was because he did not say it in so many magic words.

JUDGE CLARK: I will have to say, Mr. Dodge, I think I didn't quite state it accurately. There was a motion for directed verdict before the verdict. That was clear.

The point the Court makes is that there was not a specific motion for judgment notwithstanding the verdict, although everybody knew what they were doing. That is what Mr. Morgan was talking about.

MR. DODGE: What did they come on, to be heard on after the verdict?

DEAN MORGAN: Just as soon as the verdict came in, he made the usual New York motion. He had already made a motion for directed verdict. When the verdict came in he made the usual New York motion orally, and then later the judge was hearing that motion ten days afterwards. They argued for a motion for judgment notwithstanding the verdict and for new trial, and the court granted the motion for judgment notwithstanding the verdict, and they upset it. They didn't use the term "judgment."

CHAIRMAN MITCHELL: It seems to me that Roberts held that the court of appeals could not grant judgment notwithstand-

ing the verdict.

DEAN MORGAN: Our rules say the court is deemed to hold that motion back for decision after the verdict. The judge said, "I am now passing on that."

MR. DODGE: You say, "The making of a motion for judgment in conformity with the motion for directed verdict shall not be necessary for the purpose of raising on review ..." In that case the Court decided that, there being no motion, there could not be a judgment notwithstanding the verdict.

JUDGE CLARK: That is correct. Or to put it this way: What we are trying to do is to regularize and make clear the procedure, and among other things we would hold differently than the Johnson case.

I think Dean Pirsig was very pessimistic as to whether the Supreme Court will take this. I cannot say they would. It depends on how much they believe in the Johnson case.

MR. LEMANN: The Johnson case was five-to-four, and one of the five is gone. We have a new fellow. I think it would not be beyond an optimistic expectation that the new guy will go along with the four. I am a little surprised at Mr. Justice Black, except that the defendant was a railroad. We have on the minority side Frankfurter, who wrote the opinion, Jackson, Burton, and Minton. I don't even know that Clark was there at that time. Was he there in 1952?

MR. TOLMAN: Justice Black is a great believer in the right of trial by jury.

MR. DODGE: Why shouldn't there be a motion for judgment notwithstanding the verdict?

CHAIRMAN MITCHELL: Let me ask a question there. I remember this practice about motion for judgment notwithstanding the verdict was our rule. I had to do with the drafting of it originally, and it was supposed to follow the Minnesota practice. I am very clear about that.

I had always supposed that it was necessary to make a motion for judgment notwithstanding the verdict before you could go to the court of appeals and get them to grant judgment, but Roberts I think held you did not, didn't he, in that case?

DEAN MORGAN: Give them a chance for a new trial, because our rule says on a motion for judgment notwithstanding the verdict the court may grant a new trial.

CHAIRMAN MITCHELL: What I am trying to get at is just what Roberts did to our rule. I had the feeling at the time that he was trying to work out the practice and he missed the boat.

DEAN MORGAN: Work out the practice when there was an alternative motion.

JUDGE CLARK: The case was Montgomery Ward & Co. v. Duncan, 311 U.S. 243. That was the first instance upholding the procedure. So they did give some validation of the

procedure. Then they ruled, and the Supreme Court followed that in two or three other cases, that the upper court could not grant the judgment out of hand without giving the lower court a chance to decide whether, of the alternatives, one of them might not be a new trial.

That is the point that Roberts brought up, and that the Court has rather insisted on.

CHAIRMAN MITCHELL: What did he hold, that the upper court could not grant judgment without giving the lower court an opportunity to consider the point on a motion for judgment n.o.v.?

JUDGE CLARK: Or new trial. You see, what happened was that this was a case that comes up because the trial judge has taken one position, the upper court is going to take another position, and the trial judge is wrong. The question is how far you can save the case or how far you have to have a new trial.

The conception in the background of this was to say that if the upper court thinks there should be no recovery, then it should be entitled to give a definite and final judgment for the other side, the opposite from the one that had the jury verdict. The Supreme Court, as we know, has been very tender about juries and about depriving them of jury.

So I think it is a part of that reaction that they hold that where the upper court now says the trial judge was

wrong in what he did, going that way, that you cannot go the opposite way; that you cannot give judgment the opposite way until you know whether the trial court would grant a new trial or not, because the trial court, having the choice, might say this isn't going to be a case for final judgment but is a case for having another trial.

JUDGE DOBIE: What is your proposal, Charlie?

JUDGE CLARK: Our proposal I don't think changes many of those things. Our proposal tries to shorten the proceedings.

In the first place, there is one change near the beginning of Rule 50(b) where we take out the protestation that all this is deemed to have been submitted, and so on. That isn't terrifically important in itself except from the standpoint of honesty. I think that has served its function, because that was the roundabout language that the court needed to use.

So by those changes we take out the deeming and say directly what we are doing.

The addition in the first paragraph is to say:

"The making of a motion for judgment in conformity with the motion for a directed verdict shall not be necessary for the purpose of raising on review the question whether the verdict should have been directed or whether judgment in conformity with the motion for a directed verdict should be

entered."

MR. DODGE: What would the record be that came up to the court of appeals if there wasn't any motion raising the question that the court of appeals is to pass upon?

DEAN MORGAN: He did it on a motion for directed verdict. It came up that way.

MR. DODGE: The motion for directed verdict is past and gone. It has been denied.

DEAN MORGAN: You take an exception to that ruling and you go up on that exception, practically.

MR. DODGE: This is a different question.

DEAN MORGAN: No, it isn't. This is the same thing. You had to have a motion for directed verdict.

MR. DODGE: This gives an opportunity to the trial judge to rectify his error.

MR. LEMANN: To what extent does this differ from the rule we submitted in 1946? I have it before me, but I am unable to check it precisely. I have our suggestion which they refused to accept. We might conceivably retender it with a note saying the fact that the Court was so closely divided in the New Haven case encourages the Committee to resubmit it because we think this is a move toward the elimination of undesirable technicalities. I would personally rather be disposed to favor our doing that.

Then I wonder, have you made any substantial change

in the draft that we thought was good in 1946?

You can't answer that offhand, I suspect.

JUDGE CLARK: I can't answer it offhand because I would have to get the materials before me. Actually what we have done here is to follow more closely the new Kentucky rule. Kentucky last summer adopted the federal rules. They took all the material we had on this and restudied it.

Let me say that the substance and the intent is the same as our amendment. It is a question of better wording and clarity.

MR. LEMANN: Kentucky improved on what we had proposed.

JUDGE CLARK: Yes. The actual improvement was done by the Kentucky draftsmen, and I thought they did a good job of improving it. We have accepted that almost fully. I would have to take the Kentucky rule and go back and see just the differences.

MR. LEMANN: It might be that we would gain something, if we resubmitted it, by having also the authority of the Kentucky rules behind it, showing that we were so modest as ourselves to accept improvement.

PROFESSOR WRIGHT: It would be interesting to know what they did in Minnesota. They adopted essentially our 1946 proposal. Then after they adopted the rules, the question came up, can the Minnesota Supreme Court direct judgment, the same

kind of question we have here, where there hasn't been a proper motion below.

This hasn't been raised to the court yet, but inquiries were made by Mr. Youngquest, the chairman of the advisory committee. Mr. Youngquist wrote a letter to a number of people in the state who are interested in procedure, and he says the Johnson case settles this. The United States Supreme Court has held that the appellate court does not have this power, even though Minnesota has a different rule in an injunction case.

MR. DODGE: Does the Kentucky rule provide that there need be no motion?

JUDGE CLARK: There has to be a motion. I think this is the question you were referring to. There must be a motion for judgment notwithstanding the verdict. That comes in (c). Look at the bottom of page 48.

"(c) Joining Motion for Judgment Notwithstanding Verdict with Motion for New Trial: Effect.

"(1) A motion for a new trial may be joined with a motion for judgment, or a new trial may be prayed for in the alternative."

You can join the two together, but you still have to make it.

MR. LEMANN: What has been done by Utah, Florida, and the other states that have adopted rules? Have they adopted

our original proposal or have they followed Kentucky? In Minnesota apparently our original proposal has been considered no good, because the consensus of opinion is that the Johnson case controls, notwithstanding the fact that Minnesota has in its rules what the Supreme Court declined to put in the federal rules. How about the other states?

JUDGE CLARK: It is my understanding -- and I guess you can correct me, Professor Wright -- that they usually adopted our old rule.

MR. LEMANN: The one we proposed?

JUDGE CLARK: No, our original rule.

CHAIRMAN MITCHELL: Minnesota or Kentucky?

PROFESSOR WRIGHT: I don't have any material on that, Judge. I don't know offhand.

JUDGE CLARK: We referred to it at the bottom of page 50 and the top of page 51. The rule has been a popular reform. In addition to the dozen jurisdictions which have adopted the federal rules in full, it has been specially adopted in states such as New York, Connecticut, California, and Nebraska, with special provisions authorizing the appellate court to direct judgment in favor of the party entitled to it, approved in a note which you see as preferable to the present federal practice. Then there is a reference to Kentucky.

I deduce from what we say here, as well as from my independent recollection, that usually the states adopted our

original 50(b). I think that is what Connecticut did and what New York did.

DEAN PIRSIG: Minnesota leaving out a requirement for a motion for a directed verdict as a condition for a motion for judgment notwithstanding.

JUDGE CLARK: Is that what happened?

MR. DODGE: We provide here whenever a motion for directed verdict is not granted, afterwards there can be filed in the trial court a motion to have the judgment set aside and judgment entered in accordance with the motion for directed verdict.

Then we go on to say that the making of such a motion is not necessary to raise the question on appeal. Then we go on to say the motion for new trial may be joined with a motion for judgment, which would mean assuming that there was a motion for judgment.

I do not understand the reason for not requiring a proper motion to be filed and a record made on which the case can go up. You do not say anywhere that a motion for new trial need not be made.

JUDGE CLARK: You want to go back up earlier. "Whenever a motion for directed verdict . . . is denied or . . . not granted," and so on, "the moving party may again move within ten days after reception of the verdict to have the verdict and any judgment entered thereon set aside and to have judgment

entered in accordance with his motion for a directed verdict; or if a verdict was not returned . . ., may move for a judgment in accordance with his motion for a directed verdict."

When you take that course you do not need to make any additional motion. That is what we are attempting to say here. But you do have to do what has been done up earlier. You have to go through all that process.

CHAIRMAN MITCHELL: Why did you strike out in the first paragraph the provision that a motion for a new trial may be joined with a motion for judgment or you may pray for it in the alternative? You put that again down below.

JUDGE CLARK: We did that because we were trying to state it 1, 2, 3, the way it happens. Originally we had no (c). Subdivision (c) comes from Kentucky, and is a more detailed spelling out.

MR. DODGE: The Supreme Court has just given significance in that Johnson case to the absence of any motion for judgment notwithstanding the verdict. Why should we reestablish the right to make a motion and then not make one?

JUDGE CLARK: They have to make it up above, you see.

DEAN MORGAN: You would not be required to make the motion for judgment notwithstanding in order to raise the question on appeal if this last sentence is put in. This allows the court to do what they would not let it do before. If you remember, the appellate court said that if you struck out the

inadmissible evidence, there was nothing on which the jury could find for the plaintiff, I believe it was, and they ordered judgment notwithstanding; they entered judgment below. The Court said that you had to have a motion for judgment notwithstanding the verdict in the lower court before you can do that, as I remember, and that that was necessary because we have here in the previous sentence, "If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed."

In other words, if I make a motion for judgment notwithstanding before the trial court, it has the option even if I do not make a motion for a new trial; it may grant the motion, it may deny the motion and grant a new trial, or it may just deny the motion flatly. That is what the first part says.

Now you come along with a notion that the record will show the motion for directed verdict, and if there was error in that, the appellate court may cure it by granting the judgment which ought to have been granted.

There are lots of statutes in states that provide that the appellate court shall enter the judgment which the trial court should have entered.

MR. LEMANN: What happened in the Johnson case, as I see it from a quick reading, is that the defendant moved for a directed verdict and the judge said, "I will take it under

consideration." Then the jury brings in a verdict for the plaintiff. Then the defendant moves for a new trial.

DEAN PIRSIG: To set aside the verdict.

DEAN MORGAN: He moved for both.

MR. LEMANN: In this case within ten days after the verdict the railroad moved to have the verdict set aside. He didn't renew his motion for judgment on the ground that the verdict should have been directed. Then when they declined to set aside the verdict, which would in effect have been a new trial, wouldn't it, if they had set it aside, then the railroad appealed and the court of appeals held that the judge who had held that motion for directed verdict in his bosom should have granted it, and that they should grant it in effect, and therefore they said in effect judgment for the railroad.

MR. DODGE: Even without a motion?

MR. LEMANN: Without a motion. The Supreme Court set that aside, and Frankfurter in his dissent says this:

"If on that fateful Friday, the 13th, in April 1951, sometime shortly after 10:30 in the morning when the jury's verdict was opened, the defendant had prefaced his argument by saying, 'Your Honor, before addressing myself to my pending motion for directed verdict, on which Your Honor reserved decision, and which of course now necessarily is a motion for judgment notwithstanding the verdict, I first want to renew that motion,' he would then have avoided today's decision

against him, although he would not have added one jot of information to that of counsel for the plaintiff or of the judge regarding the issues before the court for decision."

DEAN MORGAN: Justice Black was relying upon a previous case in which they said that they had to have that kind of motion, and the appellate court could not upset it. This is what he recommended, and that previous case knocked this out.

MR. LEMANN: Black said, "You fellows are asking us to do indirectly what we refused to do when we refused to amend the rule."

MR. DODGE: I don't see the appropriateness in this one case, where in our rules we deal with various kinds of questions that may be raised by motion, of providing for a particular motion to insert a clause that such a motion need not be filed. What do we gain by that?

DEAN MORGAN: For purposes of review, he said. This is practically saying that the appellate court can order the judgment which the trial court ought to have ordered. It can correct the order refusing to direct the verdict by ordering judgment notwithstanding. That kind of thing is by statute in a number of states. It cannot be done here. This is a qualification, in my opinion, of the previous one. There is no way around it.

MR. LEMANN: Of the previous what, Eddie?

JUDGE CLARK: You will see in our comment on page 49

that we put this in for the purpose of negativing the Johnson case. We say that this is the Kentucky rule with one exception, and that exception is the addition of the last sentence above to subdivision (b), taken directly from our recommended rule of 1946.

Strictly, this may not be necessary, since the limitation of (3) in subdivision (c) would seem rather clear. But in view of past vicissitudes, it is believed that the rule should be, if anything, overprecise in disclosing intent.

Since the Supreme Court decisions, cited in the note, appear to stress not only the wording of the rule, but also the majority's ideas of general fairness, the Court may not wish to adopt this rule. Note the Johnson case:

"We did not adopt the amendment then. No sufficiently persuasive reasons are presented why we should do so now under the guise of interpretation."

But since the present rule, as construed, deifies the most extreme formalism, which seems at variance with the spirit of the rules and undesirable even to promote jury trials, there seems no reason why an attempt at improvement should not be made.

That is repeated a little in the next paragraph dealing with the note.

JUDGE DOBIE: What that sentence really does is precisely what I did in the Cone case in my opinion which the

Supreme Court held was wrong, isn't that correct?

JUDGE CLARK: I think so, yes.

JUDGE DOBIE: I move its adoption.

DEAN PIRSIG: Before that is done, I would like to present a thought that I raised in the letter that was distributed. Maybe there is nothing to it. But it might be a possible way out of this impasse with the Court. There have been three decisions, all by Black, the Johnson case being the latest one, and even in that dissent by Justice Frankfurther he doesn't propose departing from the basic concept of the earlier cases, which is that the trial judge shall have the opportunity to determine in the light of the trial that he has heard whether there should be a judgment notwithstanding or a new trial. They have insisted on that all through the opinion, that the trial judge is in a better position, in view of his observation of the trial, to pass on that question than is an appellate court.

CHAIRMAN MITCHELL: You mean to pass on the choice between the judgment notwithstanding and the new trial?

DEAN PIRSIG: That is right. That is what they have insisted on all along.

CHAIRMAN MITCHELL: Roberts felt that the trial judge ought to rule on both those motions; that if he did not grant the judgment he ought to rule on the motion for new trial and deny it.

DEAN PIRSIG: That is right. This very same amendment which appears at the end of subdivision (b) has been before the Court and turned down. These opinions, if you read them together, seem to indicate an endorsement of the basic principle that the trial judge must pass on this alternative first.

That suggested to some of us in our discussion locally that we could provide a rule which would express what certainly every lawyer intends when he makes a motion to set aside or for a new trial, that, if he can get it, he will want judgment notwithstanding. The failure is in the terminology in which he puts his request.

If the rule could provide, then that if such a motion would automatically include a motion for judgment notwithstanding, it is then before the trial judge. At least it cannot be said that it is not. The rule says that it is. You would then have a record at least upon which the appellate court could act without violating the basic assumption of the Supreme Court.

I have worked on a draft. I am not sure whether it meets the situation completely, but if this should meet with the favor of the Committee, this might be done in subdivision (b) of Rule 50. Professor Wright suggests that it precede the second sentence from the bottom of (b), just before the words "If a verdict was returned." It would read as follows:

"A motion for a new trial may be joined with this

motion, or a new trial may be prayed for in the alternative."

MR. LEMANN: That is restoring the words that are now stricken on page 48.

DEAN PIRSIG: Yes. Then continuing with this new language:

"A motion for a new trial or a motion to set aside or otherwise nullify the verdict shall be deemed to include as an alternative a motion for judgment notwithstanding the verdict, and the court shall rule thereon accordingly."

Then continuing as the balance of that subdivision reads now.

MR. LEMANN: Would you take in all the balance of it?

DEAN PIRSIG: Then we would strike the underscored part in the proposed amendment. We would leave (c) in, which would have no bearing on this particular question.

MR. DODGE: I think that would cover it. I do not see any particular reason for not making the simple requirement that there should be a motion for judgment notwithstanding the verdict.

MR. LEMANN: You mean like the Johnson case held should have been done.

MR. DODGE: There would naturally be an appeal, and I do not know of any other case in the rules where we have provided that the appellate court jurisdiction shall not be affected by the fact that there wasn't any motion.

MR. LEMANN: You think he ought to be required to renew his motion?

MR. DODGE: It is a new motion for the entry of judgment notwithstanding the verdict because of an erroneous ruling on the earlier motion.

MR. LEMANN: You think the Johnson case is right?

MR. DODGE: I haven't read the Johnson case, but I do not approve of the words at the end of this.

MR. LEMANN: I am just trying to understand the situation. If I followed what you said, if I understand it, you think that when the verdict is brought in for the plaintiff, the defendant's lawyer ought not merely to say, "I move to set aside the verdict," or move for new trial, but if he wants to protect himself he should in exact words move for judgment notwithstanding the verdict.

MR. DODGE: Not in exact words, but in substance.

MR. LEMANN: Isn't that what the Johnson case held he should have done, because he did not do it?

MR. DODGE: I should say it is different from taking the case up on exceptions for failure to direct a verdict. He is invoking again the action of the trial court, giving him a chance to review what he has done, and he does that by the motion, which we provide for, for the entry of judgment notwithstanding the verdict. Then you have a proper record to go up to the appellate court on.

I do not see any reason for saying that he need not make that motion.

MR. LEMANN: Then it seems to me as I follow you, you would not favor any change in the rules. You would just leave it as it is, and that would reach the result the Supreme Court reached in the Johnson case; and the carefully, well advised lawyer who knew the case or ought to know it, would always make a separate motion.

DEAN MORGAN: The answer is that Felix said he made the motion.

MR. LEMANN: But he was in the minority. He said that in effect he made the motion.

DEAN MORGAN: Bob Dodge would never interpret that language as not a motion for judgment.

MR. DODGE: What he said orally.

MR. LEMANN: According to the statement of the case, all Felix was saying was that it amounted to the same thing.

DEAN MORGAN: He quotes him, doesn't he?

MR. LEMANN: No, he doesn't. Black said this: "When the evidence was all in, the railroad asked for a directed verdict. The trial court reserved decision on the motion and submitted the case to the jury. A verdict for $20,000 was returned for the plaintiff, and judgment was entered on the verdict. Within ten days after reception of the verdict the railroad moved to have the verdict set aside on the ground it

was excessive and contrary to the law and the evidence. More than two months later this motion was denied. In the same order denying that motion the court also denied the pre-verdict motion for dismissal and for a directed verdict on which action had been reserved. Holding that the motion for directed verdict should have been granted, the court of appeals reversed. Then both parties agreed that this reversal required the district court to enter judgment for the railroad notwithstanding the verdict, thereby depriving petitioner of another trial. Whether the court of appeals could direct such a judgment consistently with Rule 50(b) is the single question that we granted certiorari to review."

DEAN MORGAN: Now read Felix' from the beginning.

MR. DODGE: Is that the opinion of the Court?

MR. LEMANN: That is the opinion of the Court.

DEAN MORGAN: Now read Frankfurter's.

MR. LEMANN: Frankfurter, dissenting, said what I read before. Shall I read it again, or shall I read a little more?

DEAN MORGAN: That was a motion for judgment.

MR. LEMANN: He said, "I submit the difference between the two motions is nil. One was written and formally labeled and detailed, while the other was oral, it was cast in form familiar to New York practitioners, and its meaning was no less clear. The district judge's action demonstrates this. But

under the Court's ruling it is no longer sufficient to move for a directed verdict and then within the time provided by the rule ask the trial judge either to grant judgment or a new trial. The Court so holds, even though the trial judge has already expressly stated he has reserved for his consideration at that time (after verdict) the very issue which a motion for judgment n.o.v. would appeal. The obvious, which is left unsaid in colloquies between counsel and the court, must now be spoken."

I can read that over again, but that is only his demonstration of what he thought was the ridiculous character of the majority opinion. But if I followed Mr. Dodge, he would say there wasn't anything so ridiculous about that majority opinion; that the fellow should have repeated his motion. Am I quoting you right?

MR. DODGE: We are not dealing here with a case where a judge has reserved his decision, whatever that amounts to. He lets the case go to the jury and reserves decision. We are dealing with the general case where a judge has declined a motion to direct the verdict, and there is a verdict for the plaintiff. In those cases there must obviously be a motion in the form suggested by Dean Pirsig where there would be an implied motion to change his ruling and enter judgment for the defendant, and there you have a proper record to go up to the court on.

JUDGE DRIVER: Dean Pirsig's suggestion would meet the problem, I believe.

DEAN MORGAN: Here is what he said:

"'Your Honor, before addressing myself to my pending motion for directed verdict, on which Your Honor reserved decision, and which of course now necessarily is a motion for judgment n.o.v., I want first to renew that motion ---'"

When they come to argue that afterwards, you tell me that isn't a motion for judgment n.o.v. under those circumstances?

MR. DODGE: It shows the difficulties you get into if you are going to rely on implied oral motion.

MR. LEMANN: Under Dean Pirsig's suggestion, you would have a written motion, and that written motion would be deemed to be double-barreled or triple-barreled and would cover every possibility. Is that right? What does the judge do to it? He denies the motion. When he denies it, he denies both barrels, all barrels. That is right.

JUDGE CLARK: I think Dean Pirsig's suggestion is rather good. I think it is a good idea. It does have one advantage. It seems to tell the Supreme Court we have something new; that we are not just telling them they are wrong. We have the same purpose but we are following it in a different way.

Let me say generally with respect to what Mr. Dodge

says, it seems to me that really the great trouble here is that it is unreal for the lawyer to do all these things. I suppose if a lawyer knew everything that was going on, if he was pernickety and technical, he would do all this, probably making the trial judge very angry when he did it. The trial judge would say, "Why do you put up all these things? You don't want them. You only want them in case I don't decide in your favor, and I am going to decide in your favor."

It seems to me that it is not natural for the lawyer or the judge to think about all these things at the time, except, on the other hand, it is a fact, as Justice Frankfurter said, that the man making the motion, if he doesn't get one thing, would be glad to settle for the other.

CHAIRMAN MITCHELL: Your rule, as I understand it, your draft of amendment, means this --

DEAN MORGAN: The only thing I have to submit about this last sentence is that it would be just slapping Mr. Justice Black right in the face for the second time. It is the crux of his objection to the whole situation.

MR. DODGE: It is the opinion of the Court.

DEAN MORGAN: It seems to me it is bad, particularly if you are going on with the second amendment, (c). If you pass (3), "Any party who fails to make a motion for new trial as provided in sections (1) and (2) of this subdivision shall be deemed to have waived the right to apply for a new trial,"

and get that in, that accomplishes the same object in a different way.

MR. DODGE: We are very familiar with this practice in Massachusetts and have had it for a long time. They go through the form really of getting the judge to reserve the question, but it is always necessary to file a motion in order to get further action by the trial court and to get a right of appeal to the Supreme Court.

JUDGE DOBIE: I still stick by the Cone case, but I am inclined to think there is something in Dean Pirsig's motion. It is something new. If we say this motion shall be deemed to be a motion for judgment n.o.v., that may satisfy Mr. Justice Black. I don't care how you do it.

JUDGE CLARK: I think, frankly, it would be very difficult to satisfy Justice Black. He does not make any bones about it. Last night I saw him at dinner, and he wanted to know what I am down here on. I said, "On rules." He said, "What in the world can you be doing with rules any more? I do not think much of them anyway."

There was another visitor there, and we started to talk about the criminal rules and how poor they were. I was almost ready to jump in and agree on that. Then I found that the lady, who was a lawyer, was objecting to the requirement in the criminal rules that not the defendant alone would waive, but you also have to have the prosecuting attorney; whereupon

Justice Black replied to that that he thought at least they ought to have that, but he didn't think there ought to be any waiver at all.

MR. DODGE: I have had this in mind at all times: Aren't you trying here to get the Court to change its view as indicated by the decision of the Court? What is the sense of putting in what seems to me an entirely unnecessary provision when it flies right in the face of that decision.

JUDGE DOBIE: The trouble, Mr. Dodge, frankly, is this. It came up in the Cone case. It is the ignorance of the provision or the negligence of the lawyer. The Cone case was a very big ejectment suit. It involved thousands of acres of land and it was very important that it be settled. When they refused the motion for directed verdict in favor of the defendant, we held that they did not have to go through the motion for judgment n.o.v., and we entered judgment in favor of the defendant.

Then the Supreme Court reversed that, and it went back a second time, and of course the same result was reached. The company won out.

JUDGE CLARK: Let me say that if we wanted to put up the thing quite clearly and not have it too hard to understand, we could quite easily take Dean Pirsig's suggestion all alone, and leave out all the rest. I think that would be the most essential part. The rest of it is more making sure that the

procedure is covered; it is more clarification. I should say that Dean Pirsig's statement would be the guts of the thing.

The advantage of spelling it out the way I have done here, the way Kentucky does, is that every lawyer would know what to do. The disadvantage is, of course, that it looks rather formidable.

DEAN MORGAN: I did not hear Dean Pirsig's motion. I got the notion that he was saying that every motion for judgment notwithstanding should be deemed to include a motion for new trial.

DEAN PIRSIG: The other way.

DEAN MORGAN: Does that mean motion for new trial on the ground of insufficient evidence?

PROFESSOR WRIGHT: It is, "A motion for new trial or a motion to set aside or otherwise nullify the verdict shall be deemed to include as an alternative a motion for judgment notwithstanding the verdict, and the court shall rule thereon accordingly."

JUDGE DOBIE: I move the adoption of that.

CHAIRMAN MITCHELL: I have listened to this discussion, and I am trying to get my mind clear about it. The original draft of the original rule on the subject was prepared on the basis of the Minnesota statute with this double motion, for judgment notwithstanding the verdict or, in the alternative, if the court would not grant that, for a new trial. We always

understood out there that a lawyer had to make the motion for judgment n.o.v. or he would not be in a position to claim an error in the court of appeals.

The point that I am puzzled about now is this: I have the vague idea in my head that Roberts and some of these other fellows who have written opinions on the subject had in mind that when you make a motion for judgment notwithstanding the verdict, coupled with a motion in the alternative for a new trial if he won't grant the other, the district court ought to have opportunity to say at least a new trial if he is not going to vacate the judgment and grant judgment n.o.v.

The whole thing was that under the double motion in the alternative, if the court of appeals set aside the verdict and ordered judgment notwithstanding the verdict and remanded the case without saying it is subject to the right of the district court to pick up this motion for new trial which he never did dispose of, there is something faulty in the practice. I did not see anything about that in your discussion of the thing at all, and yet to my mind that is what Roberts was tearing his hair about in that early case.

In other words, if you make a motion in the alternative --

DEAN MORGAN: That is the next amendment. He has the Roberts thing spelled out in (c).

CHAIRMAN MITCHELL: What did anybody say in this

discussion about this? If you made the motion in the alternative and the district court granted the judgment n.o.v., and the case went up --

DEAN MORGAN: And didn't do anything on the motion for new trial?

CHAIRMAN MITCHELL: -- and did not do anything about the motion for new trial, what becomes of it?

MR. PRYOR: It ought to be deemed denied by the granting of the motion for judgment.

CHAIRMAN MITCHELL: I think Roberts suggested that when he ruled on a motion in the alternative for judgment n.o.v. or for new trial, the trial court ought to decide both motions. He ought to decide, "I do grant judgment notwithstanding the verdict, but if that does not satisfy the court of appeals, then I think the defendant is entitled at least to a new trial." My idea is that that was what he was shooting at all the time, and wanted to have this motion for new trial in the alternative given some function in the case if the judgment notwithstanding the verdict was not going to stand.

I always thought that was wrong, because it called upon the district court to decide a motion for new trial after he had already made up his mind to grant a judgment notwithstanding the verdict, and it was a useless and futile effort to assign reasons for granting a new trial, errors, and all that sort of thing, when he really thought that the defendant was

entitled to judgment. None of you said anything about that.

MR. DODGE: What would be the basis for a new trial other than erroneous ruling on the motion for directed verdict?

DEAN MORGAN: The motion for new trial might also have a lot of rulings on evidence and other things. If you will notice, General, at the bottom of page 48:

"If the motion for judgment is granted, the court shall rule on the motion for new trial by determining whether it should be granted if the judgment is thereafter vacated or reversed. If the motion for new trial is thus conditionally granted, the court shall specify the grounds therefor, and such an order does not affect the finality of the judgment. In case the motion for new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed," and so forth. "In case the motion for new trial has been conditionally denied and the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court." That is exactly Roberts' position. "An appeal from a judgment granted on a motion for judgment notwithstanding the verdict shall of itself, without the necessity of a cross-appeal, bring up for review the ruling of the trial court on such motion for new trial."

That is the procedure which the Montgomery Ward case set out, only it set it out a little more clearly, I think.

MR. LEMANN: If you adopted Dean Pirsig's suggestion,

the Reporter suggests that we cut out everything, as I understand it, which would follow on page 48 after (b).

JUDGE CLARK: I don't necessarily suggest that.

MR. LEMANN: I was wondering if you wouldn't have to. If these changes were retained, I wonder whether his suggestion would be entirely consistent with some of the provisions that now appear in (c). I don't know. Without Dean Pirsig's text right before me and threading my way through what seems to be a very formidable and complicated set of provisions, I do not know whether it would be necessary to change it or not.

If we followed the Reporter's last suggestion, you would avoid that inquiry, because you would omit (c). Am I right? You would omit (c), Mr. Reporter.

JUDGE CLARK: I think it is possible to omit (c). You would, of course, want to restore (b) to what it was. That is, you would want to put in "A motion for new trial may be joined with this motion, or a new trial may be prayed for in the alternative."

I think you could omit (c) on the ground that it is procedure and that it is stated and more or less understood now, as by Montgomery Ward v. Duncan.

I do think there is something to what Mr. Morgan suggested, that this is a clearer statement than you get in the cases. Nevertheless, it is a question: Should you sacrifice a clear statement of what can happen in order to get a shorter

and perhaps more understandable change? That is about it.

I am not sure which is the wiser way. I think it is a question at the moment of what you think is the sounder tactics for the Supreme Court.

Dean Pirsig, what is your view on that? Did you want definitely to keep (c), or would you --

DEAN PIRSIG: I do not think it bears on whether what I suggested goes in or out, except from the standpoint of strategy.

DEAN MORGAN: You would want to keep (c), wouldn't you, if you got your alternative motion?

DEAN PIRSIG: The first sentence would go back in.

DEAN MORGAN: But you have all your motions right there in one on the deeming, and then (c) directs the action on it.

DEAN PIRSIG: On that and on an explicit motion, also.

MR. LEMANN: You would take out the first sentence of (c)(1) if you adopted Dean Pirsig's language.

DEAN MORGAN: I omitted that in the part I read.

CHAIRMAN MITCHELL: I understand your suggestion to provide that if you make a motion for a new trial in the trial court, the presumption is that you have included in your action a motion for judgment n.o.v.

DEAN PIRSIG: Yes.

CHAIRMAN MITCHELL: Why should you not be obliged to

state it? I don't quite understand what the effect of that is.

DEAN PIRSIG: Judge Dobie stated it very well. We are trying to take care of the careless or incompetent lawyer. They just don't make these.

CHAIRMAN MITCHELL: Who fails to make a motion for judgment n.o.v.?

DEAN PIRSIG: That is right.

CHAIRMAN MITCHELL: You have done that already when you say, "The making of a motion for judgment in conformity with a motion for a directed verdict shall not be necessary . . ."

JUDGE CLARK: His is a substitute. It is better language. It is a substitute provision for that last which you read.

JUDGE DOBIE: I would prefer it as the Reporter has it here if we could get it by the Supreme Court, but I doubt very much that we can. As somebody said over there, we have tried it and it has been slapped back. I would prefer that, but I think there is a great deal in what has been said that the chances are the Supreme Court won't stand for that.

So in the light of that, accomplishing practically the same purpose in an indirect way, I made the motion that we accept Dean Pirsig's substitute.

JUDGE DRIVER: I second the motion.

MR. DODGE: The party who moves for judgment notwithstanding the verdict may not want to ask for new trial. He

may have no exceptions whatever to evidence or no ground whatever for anything except reliance upon the validity of his motion for directed verdict.

CHAIRMAN MITCHELL: He may be afraid of a new trial. He may be afraid he will get stuck worse than ever.

DEAN MORGAN: But if he makes it, the court can grant a new trial.

MR. DODGE: Yes.

MR. LEMANN: I was wondering what happens under (c)(1) if the district court does not do anything about conditionally granting or refusing a new trial. This says he shall conditionally grant it or he shall conditionally refuse it. Suppose he doesn't.

DEAN MORGAN: It says he shall rule on it. This rule is directory or mandatory, really. He is bound to rule on it.

MR. LEMANN: If he doesn't, if he just enters a judgment --

DEAN MORGAN: If he is just stubborn, he won't, that is all.

CHAIRMAN MITCHELL: Dean Pirsig, before the new Minnesota rules went into effect and you were operating under the old code, this clause about judgment notwithstanding the verdict and, in the alternative, a motion for new trial, was in the code. How did that work under the code?

DEAN PIRSIG: I didn't hear any difficulties on it.

CHAIRMAN MITCHELL: How did it work? Did you have to make a motion for judgment notwithstanding the verdict?

DEAN PIRSIG: Or, in the alternative, for a new trial.

CHAIRMAN MITCHELL: I mean for the Supreme Court, to make a record, did you have to make that ten-day motion?

DEAN PIRSIG: I don't think so. Do you remember?

PROFESSOR WRIGHT: I don't know the cases. Mr. Youngquist and Mr. Clark, the chairmen of our two rules committees, both agree that under the code in Minnesota you do not have to make the motion in order to raise the question on appeal.

MR. LEMANN: Under your amendment, Dean Pirsig, would you be compelled always to have your motion understood as being in part a motion for new trial? Would that be the necessary result?

DEAN PIRSIG: No.

PROFESSOR WRIGHT: This is the other way.

DEAN PIRSIG: It is the other way around. If you made a motion for judgment notwithstanding, it would be limited to that relief.

MR. DODGE: The defendant may couple with it a motion for new trial.

DEAN PIRSIG: That is right.

MR. DODGE: I think that is the way it should be stated.

JUDGE DRIVER: Is there anything in your suggestion,

Dean Pirsig, which would prevent a lawyer from saying, "I limit my motion to a motion for directed verdict. I don't want a new trial. Let the record show that." He can do that if that is what he has in mind, and save his record. He does not have to have a new trial foisted on him if he doesn't want it. It is only to take care of a person who doesn't couch his motion in the right language.

MR. DODGE: As to the party who has moved for the directed verdict, I think it should be expressly optional with him whether to couple with it a motion for new trial or not.

JUDGE DOBIE: What you gentlemen say is unquestionably true. We have had it again and again. Sometimes we ask counsel, "Would you like us to send this back for new trial?" And the losing counsel, usually the defendant, says, "No, we want it either reversed or affirmed. If it is reheard, we are afraid the damages may go up," and they usually do on second trial.

MR. PRYOR: I had that very experience. I made a motion for judgment notwithstanding the verdict, and the court asked me if I wanted a new trial. I said, "No. I haven't moved for a new trial." The reason was that the verdict was less than I had offered the plaintiff in the first place. (Laughter)

DEAN PIRSIG: That would be taken care of explicitly by the earlier language of 50(b), which is untouched by my suggestion.

MR. DODGE: "A motion for new trial may be joined with this motion," the words that were struck out?

PROFESSOR WRIGHT: Yes.

CHAIRMAN MITCHELL: Does your suggestion conform with the two decisions of the Supreme Court that the appellate court can only grant judgment notwithstanding the verdict where the lower court reserved the question?

DEAN PIRSIG: We left in the earlier part.

MR. DODGE: The whole thing would be cured by restoring those words, "A motion for new trial may be joined with this motion," and starting your (c) with "If the motion for judgment is granted and if there is a motion for new trial, the court shall rule," and so forth.

CHAIRMAN MITCHELL: You said to keep in everything that was in 50(b). That includes the stricken out material in lines 3, 4, and 5?

DEAN PIRSIG: I understand that is not intended to change any substance. You strike out the words, "the court is deemed to have submitted the action to a jury subject to a later determination," and substitute the other language for that.

JUDGE CLARK: That is not essential either way. That is striking out the legal fictions that we had before, on the theory that they are now grown up. It is a separate question whether you want to do that or not. That does not touch the

question we are now discussing.

CHAIRMAN MITCHELL: I see.

JUDGE CLARK: You can do it or not, as seems to be fitting.

CHAIRMAN MITCHELL: Are you ready to vote? There is a motion before us to adopt Dean Pirsig's recommendation.

MR. DODGE: As modified by his later acceptance of the suggestion that the motion be a motion for judgment notwithstanding the verdict, and it may be coupled with a motion for new trial.

DEAN MORGAN: No.

CHAIRMAN MITCHELL: I said the "proposition." I did not say the "draft."

DEAN MORGAN: The motion for new trial includes a motion for judgment notwithstanding.

MR. DODGE: He may not want a new trial.

DEAN MORGAN: Why not say that. Later a motion for judgment or for new trial, in the alternative, may be made.

JUDGE CLARK: I thought Dean Pirsig's motion was always a motion for new trial. Therefore, it isn't correct to state it the other way around. That reverses it.

MR. DODGE: I think it ought to be the other way around.

DEAN MORGAN: No.

MR. LEMANN: Will you read it again, Dean Pirsig?

DEAN PIRSIG: Mr. Wright has that language.

PROFESSOR WRIGHT: "A motion for a new trial or a motion to set aside or otherwise nullify the verdict shall be deemed to include as an alternative a motion for judgment notwithstanding the verdict, and the court shall rule thereon accordingly."

MR. DODGE: That doesn't leave it optional with the defendant.

MR. LEMANN: He cannot rely on this sentence. He has to file a motion for judgment notwithstanding the verdict, which he would do now without any change in the rule. So where do we get if we adopt this?

DEAN PIRSIG: The earlier part of the rule provides that "Whenever a motion for directed verdict is made . . ., the moving party may move within ten days after the reception of a verdict to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict . . ." He can make that motion and not include in it a request for a new trial.

MR. PRYOR: You are not changing that.

DEAN PIRSIG: Not changing that at all. That is the intent.

MR. PRYOR: That is all right.

CHAIRMAN MITCHELL: Do we understand what we are voting on? All in favor of Dean Pirsig's proposal say "aye";

opposed. That is agreed to.

JUDGE CLARK: May I ask two different questions flowing out from this.

PROFESSOR MOORE: Before you go on, may I suggest that as long as we are changing (b), we change that ten-day period, "within ten days after the reception of a verdict," to "not later than ten days after the entry of the judgment." That is the time period for new trial. You will then have it correlated correctly.

JUDGE CLARK: I should think that is all right.

JUDGE DOBIE: I think that is all right.

MR. PRYOR: What is the language of that?

CHAIRMAN MITCHELL: You mean on the supposition that judgment has been entered on the verdict?

PROFESSOR MOORE: It can be under 50(a).

CHAIRMAN MITCHELL: Then you are moving to set aside the verdict and grant judgment for the other side.

PROFESSOR MOORE: Yes.

CHAIRMAN MITCHELL: Within twenty days after the verdict or ten days after the judgment.

PROFESSOR MOORE: Not later than ten days after the entry of the judgment, which is the time that you have to move for a new trial.

JUDGE CLARK: Is that going to cover all the provisions there? For example, the first ten days is that the moving party

may move. The second one is, if a verdict was not returned, within ten days after the jury has been discharged.

PROFESSOR MOORE: That is all right, because you would never move for a new trial there.

JUDGE CLARK: That has to stay as is.

PROFESSOR MOORE: That stays.

CHAIRMAN MITCHELL: You never move for a new trial when the jury has been discharged.

PROFESSOR MOORE: Automatically the case is set for new trial.

CHAIRMAN MITCHELL: You get it without moving for it. What is your pleasure about that proposal? As a matter of fact, the ten-day requirement is pretty general, is it not? There is a ten-day time for motion for judgment notwithstanding the verdict. It is in the Minnesota system. It is in their new rules and everything else. I think it is the old code rule.

MR. PRYOR: I don't know that I understand what Professor Moore proposes.

CHAIRMAN MITCHELL: That a motion notwithstanding the verdict shall be made within ten days after entry of judgment.

MR. PRYOR: Then you will have to change the language. It says now, "within ten days after the reception of a verdict, to have the verdict and any judgment entered thereon set aside." That contemplates you might have a situation where there wasn't

any judgment.

PROFESSOR MOORE: That is all right. Under the new trial rule, the time is "not later than ten days after the entry of judgment," but the cases have held that you can move for new trial prior to the entry of judgment. All I wanted to do here was to get the same time period, because Dean Pirsig's motion which was carried now makes a motion for new trial always include a motion for judgment n.o.v.

JUDGE DRIVER: It should correspond to the other.

MR. PRYOR: I think it should, too, but my question dealt with the language there, "any judgment." The "any" should come out, that is all.

PROFESSOR MOORE: Not later than ten days after the entry of judgment.

MR. PRYOR: Yes.

MR. DODGE: The rule as it stands now says, "to have the verdict and any judgment entered . . ."

JUDGE DRIVER: If you deleted "any," it would be all right; "to have the verdict and judgment entered thereon set aside . . ."

MR. DODGE: It should be ten days after the verdict.

MR. LEMANN: Suppose there has been no judgment. Strike out the words "any any judgment entered thereon," and make it read, "have the verdict set aside . . ."

MR. PRYOR: That would be better.

MR. LEMANN: Take out the words "and any judgment entered thereon." Would that meet your point, Mr. Moore?

MR. PRYOR: You are asking for judgment.

MR. LEMANN: It would not be a judgment on the verdict if you are moving to set aside the verdict.

MR. PRYOR: That is true.

MR. LEMANN: You could not say "judgment entered thereon." I think the motion that you have in mind by the language at that point is a motion for judgment setting aside the verdict. Then it would not be a judgment entered on the verdict, because you are asking that the verdict be set aside.

MR. PRYOR: It would be judgment entered notwithstanding the verdict.

JUDGE DRIVER: I think Professor Moore's suggestion is merely a time limit as to the maximum time limit. The motion might be made before the judgment. There is nothing to prevent the motion before the judgment is entered. So, as you say, there could be a motion before any judgment had been entered.

MR. LEMANN: Could you make a motion to set aside the verdict after judgment has been entered on the verdict?

JUDGE DRIVER: Yes, within ten days.

JUDGE CLARK: Under Rule 50(a), in the normal case the clerk would enter judgment at once, but the court may hold it up. In any event, whichever has been done, whether the

judgment has been entered or not, you have ten days to move to set it aside.

I rather think Professor Moore's suggestion is good in tying up this motion to set aside with the rehearing motion. Isn't that it?

PROFESSOR MOORE: Rule 59(b), "A motion for new trial shall be served not later than ten days after the entry of the judgment."

JUDGE DRIVER: The judgment is entered on the general verdict immediately, unless the court directs otherwise. On a special verdict, it is not entered until the court directs formally that it shall be entered.

JUDGE CLARK: That is right.

MR. DODGE: I should think this language is all right.

MR. LEMANN: What is the motion? Are you making any motion?

CHAIRMAN MITCHELL: Somebody has written in and says he wants the rules changed so that if there is default you can get judgment entered at once. You do not have to wait ten days. How is that?

JUDGE CLARK: That is right. Somebody wrote in that way. When you get to Rule 55 --

MR. TOLMAN: That is a stay of execution, isn't it?

CHAIRMAN MITCHELL: That is right. I am wrong about that. It is on the stay of execution.

MR. LEMANN: You made a motion, Mr. Moore, to make some change. Can we get that before us?

PROFESSOR MOORE: Yes. I don't know that I have precise language, but inasmuch as Dean Pirsig's motion, which was carried, has a motion for new trial automatically include a motion for judgment n.o.v., and since the time for motion for new trial is geared to the entry of judgment, not later than ten days after the entry of judgment, I think we ought to have the same length of time.

CHAIRMAN MITCHELL: To prepare and make the motion.

MR. DODGE: I think Dean Pirsig is willing to grant the defendant an option not to file a motion for new trial.

PROFESSOR MOORE: He doesn't have to, but if he does, he has ten days from the entry of judgment.

JUDGE DOBIE: You can file a motion n.o.v. without a new trial.

PROFESSOR MOORE: Exactly.

JUDGE DRIVER: If I get what Professor Moore is talking about, if you do not make this change, a motion for new trial might be made within ten days after judgment, which would be more than ten days after the reception of the verdict, and therefore this section would not apply.

PROFESSOR MOORE: That is right.

JUDGE DRIVER: They should be meshed together. They should be the same time, in each instance ten days after

judgment. Is that correct?

PROFESSOR MOORE: Yes, sir.

DEAN MORGAN: The rule requires the clerk to enter the judgment on a verdict immediately.

JUDGE DRIVER: Unless the court directs otherwise. On your special verdicts, they are not entered immediately.

CHAIRMAN MITCHELL: All in favor of that proposal say "aye"; opposed. It is agreed to.

MR. LEMANN: What happens to the Reporter's suggestion that we might drop out the rest of the suggested amendment? Has that been voted down?

DEAN MORGAN: I object to that very strongly.

JUDGE CLARK: I want to get definite instructions now on two further points. One of them is whether we shall take that changed language at the beginning of (b), leaving out the "deemed" and all that, and saying what we mean in plain English; the other is the point on which Professor Moore has suddenly given a definite opinion, whether we keep in (c) or not. If you will, instruct me on both of those separately.

MR. LEMANN: I move that we instruct the Reporter to delete the words that he has deleted on page 48 of his material, in lines 3, 4, and 5.

JUDGE DOBIE: And include "A motion for new trial may be joined with this motion, or a new trial may be prayed for in the alternative"? Leave that?

JUDGE CLARK: That is the next question.

MR. LEMANN: Did that cover your first inquiry, Mr. Reporter?

JUDGE CLARK: That covers my first question. Mr. Lemann's motion makes that very clear.

MR. PRYOR: I second the motion.

CHAIRMAN MITCHELL: That only involves striking out three lines.

JUDGE CLARK: Yes, and substituting a little.

CHAIRMAN MITCHELL: I see.

All in favor of that say "aye"; opposed. That is agreed to.

What is the next question?

JUDGE CLARK: The next question is whether we continue the rather precise statements of (c). The advantage of doing it, of course, is that it is very muddy under the Duncan case and others. This is precise and tells everybody what to do. From that end I think it is quite desirable.

I think the real reason against it is that it seems very formidable, it is hard to understand, and if they have some doubt about the whole thing before the Supreme Court, it may help if we have a short, succinct proposal. I think that winds up the argument.

DEAN MORGAN: I certainly move the adoption of (c) as is.

MR. PRYOR: I second the motion.

DEAN MORGAN: It may very well be that cases coming up in the Second Circuit indicate this sort of thing, but I am quite sure that in some of the places in Tennessee, for example, it would not be done without this.

CHAIRMAN MITCHELL: Eddie, if you adopt (c), you would leave in the two lines that are stricken out which say, "A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative." That would go out, would it not?

MR. LEMANN: It would go out in (c)(1), because we restored it up in the middle of page 48, as I understand.

DEAN MORGAN: I do not know about that.

JUDGE CLARK: I am not sure where it should be, and that was a further question I was going to ask. I will ask Dean Pirsig on that. This sentence should be in somewhere. Where do you prefer it? Up where it was originally?

DEAN PIRSIG: I think it gives more point to 50(b), and (c)(1) might be rephrased, "if a motion is in the alternative," then these things follow.

JUDGE CLARK: Yes. I think that is all right. I think that is correct. That would mean we put it back.

CHAIRMAN MITCHELL: Put it back in the upper part of 50 and make it an "if" proposition in subdivision (c)(1), "If a motion for new trial is joined . . ."

Is there anything further, Charlie, that you want specific instructions on?

JUDGE CLARK: I take it that the instructions are to keep this, then.

CHAIRMAN MITCHELL: Yes.

PROFESSOR MOORE: I have a question on the last sentence of this one:

"An appeal from a judgment granted on a motion for judgment notwithstanding the verdict shall of itself, without the necessity of a cross-appeal, bring up for review the ruling of the trial court on such motion for new trial."

Ordinarily in federal cases a party cannot get appellate review of an order granting or denying a new trial. He can only do it --

DEAN MORGAN: But on the judgment he can assign as error anything that he has taken exception to during the trial, and you do not need an exception under the rules. Here you have a judgment, practically, haven't you, anyhow, in the court below before you go up.

PROFESSOR MOORE: Yes.

DEAN MORGAN: All right. Then on the motion for new trial, if you made a motion for a new trial, you can assign as error these various things. Then when you appeal from the judgment, you can use those assignments of error in the appellate court. That isn't appealing from the order for a

new trial at all. That is not what this means, either.

PROFESSOR MOORE: Ordinarily, though, you cannot get review of the trial court's denial or grant of a motion.

DEAN MORGAN: I will grant you that, but you can get a review of the errors on which they refused to grant a new trial.

PROFESSOR MOORE: Those are limited solely to the question where there was lack of power to rule.

DEAN MORGAN: No, not at all.

PROFESSOR MOORE: Abuse of discretion.

DEAN MORGAN: I object to the introduction of evidence, and the court overrules me. Before they rule I take an exception. Do you mean to tell me when judgment is entered against me I cannot have it reviewed? Of course I can.

PROFESSOR MOORE: Of course you can.

DEAN MORGAN: That is all you will get here. It is the same error.

PROFESSOR MOORE: Suppose the motion for new trial was denied, and the ground was that it was against the weight of the evidence.

DEAN MORGAN: That is a different proposition.

CHAIRMAN MITCHELL: If this is a cross-appeal and you have an order from the upper court granting final judgment, That of itself automatically wipes out the motion for new trial and order for new trial and every other thing.

PROFESSOR MOORE: I think so.

CHAIRMAN MITCHELL: So you do not have to have that in there. In other words, an appeal from judgment granted on motion for judgment notwithstanding the verdict shall of itself bring up for review the ruling of the trial court. I do not see that there is any occasion to have cross-appeal in particular.

JUDGE DRIVER: I think some of us younger members get fatigued after such long sessions and lose our efficiency, or our efficiency is diminished quite a bit. I think we would make more headway if we adjourned and came back fresh in the morning.

CHAIRMAN MITCHELL: I was hoping we would get this thing in the waste basket before we had another session, and start fresh in the morning.

Is there anything left on this thing? I would like a minute or two to see if we can dispose of it.

I will pass it over by referring it to the Reporter to bring in another draft, and we will take a look at it.

PROFESSOR MOORE: In (2) in the second line, where it reads "ten days after notice," you want "ten days after entry of the order," don't you?

DEAN MORGAN: Yes. You would have to have the same thing.

JUDGE CLARK: All right.

CHAIRMAN MITCHELL: If there is no objection, we will stand adjourned.

... The meeting adjourned at 5:05 o'clock p.m. ...