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P R O C E E D I N G S

ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE

Vol. 1

Wednesday, March 9

March 9 - 11, 1955
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WEDNESDAY MORNING SESSION

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March 9, 1955

The Advisory Committee on Rules for Civil Procedure for the United States District Courts convened at 10:10 a.m. in the West Conference Room, United States Supreme Court Building, Washington, D. C., William D. Mitchell, Chairman of the Committee, presiding.

Committee Members present:

William D. Mitchell, Chairman
Charles E. Clark, Reporter
Leland L. Tolman, Secretary
Robert G. Dodge
Sam M. Driver
Monte M. Lemann
James William Moore
Edmund M. Morgan
Maynard E. Pirsig
John C. Pryor

Also present:

Charles Alan Wright, Assistant
to the Reporter

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JUDGE CLARK: Mr. Chairman, I should like to suggest that you might want to have these documents before you: Of course you want to have our little green book, the draft of amendments. I should think then you would be helped to have Professor Wright's draft of comments which was sent to you by Leland under date of February 28. Then I suggest, since I

shall follow that order pretty directly, that you should have before you my comments on the comments and suggestions which I had to send in two different times. The first is my letter of March 1. I don't know what date Leland send it out. I think he sent it out on March 3. And second, I completed that under my date of March 5 and that has been distributed this morning.

To bring you up to date, let me supplement that by saying this: The book of summary by Mr. Wright covered about 340 letters which had been received up to February 11. Since that time there have come in approximately 120 letters. I have looked those over I think pretty thoroughly as they came in, except for one batch which has just now been distributed, dated March 8. Of course Mr. Wright has not been able to summarize those.

I am not sure what we had better do. He could get a summary of some of the late ones done perhaps at night or some other time. I am inclined to think, however, that it would not be worth while to try to do that for this meeting. He knows a good many of them and so do I, and I think we shall have to go ahead the best we can do as to them. Whether it is desirable for him to summarize them and send them to you later, I don't know. That would be somewhat for your later information and perhaps somewhat for the record so everybody would know they had been considered. Possibly on that we can see as we go along whether you would like him to cover that or not.

I may suggest that I do not believe these 120 late letters much change the general picture, with a single exception which I want to speak of in a moment. They do represent the other side of the vote on Rules 33 and 34. We were getting a very heavy vote, I think one might say from the NACCA. We are now getting the heavy countervailing vote from other opposing groups. How many, I don't know, but we may have still more.

I notice, for example, in the Insurance Counsel's Journal for January the faithful there were summoned to write the Advisory Committee at once in opposition, and hence we may have some of that going forward.

I said there was one exception, and that of course is this document from the Department of Justice, which I saw for the first time about five minutes ago. I am sorry that they could not have put in their recommendation before, because I was looking forward to that, but here it is. There is a covering letter from Assistant Attorney General J. Lee Rankin, of the Office of Legal Counsel, in which he states that they have had suggestions from all U. S. Attorneys and then they have consolidated them in the Department. They have done a great deal of work. He starts out by saying:

> "By and large, the proposed amendments are regarded as much needed and desirable improvements. In the instances where we have indicated concern with the change, the objection has been that the amendment failed to take

into account special problems which the Government faces. We have also suggested several non-controversial amendments in addition to those which the Committee proposes and which for the most part are also designed to meet the unique problems of Government litigation."

Then he goes on to make further suggestions.

If you will look at this quite detailed document which was prepared in the office of the Department -- I understand you didn't get it, Mr. Tolman, until --

MR. TOLMAN: It came this morning about ten minutes before I came down here.

JUDGE CLARK: -- you will notice that beginning on page 24 of this substantial document --

CHAIRMAN MITCHELL: It is a hell of a note to dump this stuff on us the morning that we arrive here. It would seem that the Department of Justice could handle things differently.

JUDGE CLARK: You will note that beginning at page 24 and continuing to page 31 are the Department's own suggestions, of which there is a very voluminous one urging trial by jury in condemnation cases, Rule 71A.

I have been looking at all of it hastily, including the part which discusses our amendments, and they have important ideas. Some of them at least, perhaps all of them, are helpful. We shall have to take some note of them. I don't know just how

to approach it. I will consider them as fast as I can and Professor Wright will also, but I guess there is nothing to do but to go ahead. Possibly I may be able to catch up on them a little tonight. I am sorry that we have not had them before us longer.

Before we start on the specific rules, I do think it appropriate to suggest my own reaction, which is as I have thought right along, that these were good and desirable rules and I am more convinced of that than ever. I think they have stood up pretty well under probably the most severe barrage of discussion we have ever had. I think this has been more inclusive and more extensive than comments which we have had in the past.

On the whole I feel somewhat better about the comments than I did when I sent a communication to the Committee two or three weeks ago. At that time I thought these propaganda movements, pro and con, loomed so large as to make it seem as though there was not too much worth while, but underneath and around there is quite a good deal of informed comment. I think the total effect is to show a very considerable interest and, on the whole, to be helpful. As I say, I think they are good amendments. I have given you my comments suggesting changes here and there, but in general I should like to go ahead with the details as we go forward.

PROFESSOR MOORE: Mr. Reporter, may I speak to one

preliminary matter, please? That has to do with when these amendments will become effective. If they are to become effective this year, the Court has to submit them to Congress on May 1. A third of this month, March, has passed. This is not critical of any member of the Committee at all. This comment has come in late. But I think it is a little unfair to the Court to send up a number of amendments in such time that it has only a week or two weeks to act on them. The Reporter will have something of a job to revise the amendments in the light of this meeting. I don't see how he can very well get a draft to the Court before, I should think, the middle of April.

I think we ought to make it clear to the Court that we are not asking them to put these amendments into effect this year. We have studied these now for nearly two years. I don't think it is fair to the Court finally to turn over to them our proposal and give the Court approximately two weeks or three weeks during a session of the Court in which to pass on them.

MR. LEMANN: I should think it would be impossible for the Court to pass on them in that length of time, and I think they probably would resent it. We know that some members of the Court already feel that this is a burden which they ought not to be called upon to carry as far as any real examination of the rules is concerned. They think it is

impossible for them to do it, considering their other duties. If we threw this mass of material at them to be looked at in two or three weeks, with all the other things they have to do, I should think we would be asking them to do the impossible, unless they were going to act only as rubber stamps. They may be only rubber stamps, but it would not be a good idea for them or for the profession to think that.

Unless the Reporter has some good reason to the contrary, I should think it almost unarguable. What do you think about it, Mr. Reporter?

JUDGE CLARK: Certainly I have no desire, for my part, to press them unduly. I have been perfectly ready to take the time. I am frank to say that I think we might stand a better chance with some of the members of the Supreme Court who may have question if we gave them more time, and therefore so far as I am concerned I shall raise no objection. I suppose generally a great many of you, as well as various people around the country, would like to see this revision come to a head. I think that is a position with which I sympathize. It is a job which has been pending a while, and it would be good to have it done. Often we have been wise not to wait.

I remember in 1936 we thought we could not do it but we went ahead and I think it was quite wise then. There may be generally some reason for acting and completing the job, just as there is for a court to make a decision, but at the present

time it has been difficult and all I can say is what I have said, that I shall not push it. I am afraid that unless the Supreme Court studies these amendments, it will not appreciate just how good they are.

CHAIRMAN MITCHELL: Suppose we made a report to the Court -- whether before or after the 1st of May depends on the Reporter's convenience and whether he can accomplish the job in that time -- we could submit a statement with the report that we think they ought to have ample time to examine the amendments and that there is no pressing need for promulgating them this year. The added time before they could be adopted would not disturb us one way or the other, and let them take the added time without feeling that they are being pushed by us.

We have a fairly good case for being late in submitting the amendments because it is obvious that the method we adopted to disseminate the amendments has not worked. That may be partly due to the attitude of the West Publishing Company, which had always taken an active part in distributing them. They balked because the book they published on the rules had not been cited in the notes to their satisfaction. We thought there might be something to that so we asked them to prepare a set of rules to supplement the notes. That brought in a flood of additions, requiring extensions of time to put them in.

The suggestions from the profession operated the same

way.

My idea would be to go ahead and get this thing up regardless of the 1st of May, without any idea that the Court would really attempt to decide on them prior to that time, and let it be known in our report to the Court that we cannot expect them to do it and that we don't see any great harm in letting the thing slide over another year. It is regrettable, of course, but I don't think we are to blame for it and the Court is not to blame. Let it go that way.

PROFESSOR MOORE: Generally the amendments would not be delayed too long. Under the rule-making statute the Court could submit them to Congress at the beginning of the next session and they would go into effect 90 days thereafter. So the rules would become effective about the 1st of April of next year instead of the 1st of August of this year. I don't think that delay is bad at all.

JUDGE DRIVER: One unfortunate consequence of their being too long before the Supreme Court might be a continuation of the propaganda battle in the Court. The Court is easily misled by a well-directed, persuasive letter, as they were by Judge Paul's letter on the condemnation rule. They haven't the background of information that we have and they don't know what we have been doing. They can be very much influenced by propaganda letters without that background. I don't know how that can be avoided, but there is more chance

of it if they have it under consideration for a long period of time.

CHAIRMAN MITCHELL: I think the situation is complicated a little by the rumblings we hear that the Court doesn't like this rule-making business anyway and is not very sympathetic with it. The Court is entirely differently constituted than it was when this work started, and I think we have to take that into account.

JUDGE CLARK: Do you want to take a definite position now? Of course we can have that in mind and consider it again before we adjourn.

CHAIRMAN MITCHELL: I think that would be a good thing to do. I think we all have in mind the same idea which has been expressed here, that it is unfair to the Court to crowd them on the thing and it won't work. They don't have to be crowded, there is no good reason why they should be, and we ought to express that idea in our report in such a way that they won't feel that we are trying to push them or anything of that kind. We can do that in our report. We can let the Reporter go right ahead and get his work done, even though he runs beyond May 1 in doing it.

MR. LEMANN: If we have many suggestions for changes here, either in our own draft or in the new suggestions, I suppose it will go back to the Committee for consideration by mail. I doubt very much that it would be physically possible

to get it done with our staff by May 1. Wouldn't it be best just to adjourn this discussion anyhow until the end of our meeting?

CHAIRMAN MITCHELL: I should think so. We will know a little better then how we can do it.

JUDGE CLARK: All right, are there any further suggestions now? If not, I think we should turn to Rule 4(e), which is the one for service of process, designed mainly to hit two situations. One is the case which is possible in a state court, of a suit started by attachment or garnishment of property within the state, clearly within the power of the court. The other is more particularly to take care of these now practically universal statutes for service of motorists who, according to the scheme of the usual legislation, are held because of driving on the highways of the particular state to constitute some officer of the state, say the secretary of state or his agent, to accept process. I think this amendment was pretty well received.

Professor Wright, do you want to say something on the late letters?

PROFESSOR WRIGHT: The recent comments on this back up the same picture that we had in my summary, that of very strong favor for it. We have gotten eleven more comments on it, ten of them favorable.

Perhaps the most interesting is that of the Department

of Justice which says that it strongly favors this amendment. It says it would greatly ease the job of the government in collecting small claims.

There are perhaps two things which have come in since my summary was prepared which should be mentioned. One is the question of how much you have to conform to the state procedure in detail. Our amendment says that you make service in the state manner, and in the summary I notice some questions which Judge Graven and Judge Riley and certain other people raised about this. The Department of Justice raised the same question. They say that it might be preferable to have a uniform federal rule prescribing exactly the procedure for service on non-residents in in rem actions. They particularly say that now where the government takes advantage of such procedures as this it is sometimes required to put up security for costs or fees. If we adopt the amendment in its present form, they would like to have some language added that the government would not have to put up these cost funds.

On the other hand, we have a letter from Mr. Varnum, of Grand Rapids, Michigan, who says he was using the garnishment there under Rule 64, which also looks to the state procedure, that under Michigan procedure you cannot amend the notice of garnishment. It is very clear, apparently, in Michigan law, but the federal judge held that once the service of the garnishment process had been made pursuant to Michigan

law, thereafter the federal rules applied and you could amend by virtue of Rule 4(e) which allows you to amend. Mr. Varnum thinks if you should conform with state procedure you should conform in all details and not have the liberalizing federal procedure come in.

The other thing in 4(e) which has received it seems to me significant comment is the article in the Catholic University Law Review which I think was sent out to all members of the Committee. I didn't get to read it until sometime after midnight last night, and it may be that some members of the Committee didn't get a chance to see it. Summarizing the three points which it makes:

It is a study of the use in federal courts of these non-resident motorist statutes. It makes three points. First, it says that Rule 4(d)(7) either in its present form or under the proposed amendment is limited by Rule 4(f), which prescribes the territorial limits of service. So the note writer here agrees with the view that Judge Goodrich has taken, that you can never use 4(d)(7) in order to serve outside the state on a non-resident motorist because Rule 4(f) says you can only serve within the state.

The second point it makes I think reflects perhaps inadequate research on the part of the writer. It believes that to permit extraterritorial service in the non-resident motorist actions would violate the enabling act under which

this Committee functions, in that it would alter the substantive rights of litigants.

The third point which is made is that the draftsmanship of the existing rule and of the proposed amendment is bad, that there is ambiguity and duplication, and there is some proposal here by the note writer to combine these points.

JUDGE CLARK: Let me comment on that, too, if I may. You spoke of Judge Goodrich. You meant Judge Maris.

PROFESSOR WRIGHT: Judge Maris.

JUDGE CLARK: In one of the cases which went to the Supreme Court, Judge Maris held that the provision as to service of process could not be used in the case of a nonresident motorist. That was not so held. They didn't have to decide on it, in the Supreme Court consideration of this, which by majority vote did uphold federal requirements of venue in those motorist statutes.

Let me say as to this article I thought it was a very poor job. The young man, who is apparently a student, obviously worked very hard, but he started with very definite prejudices and it seemed to me that he raised problems about the existing rules which were not there. He has gone on the thesis that there is an ambiguity between Rule 4(e), for service of process generally, prescribing how it may be made, and Rule 4(f) as to the extent of the service of process. It seems to me that there is no ambiguity at all. It is perfectly

clear what we were planning to do from the beginning, and it is quite necessary, too, because the manner of service is different from where you can serve. The federal rule was quite clear originally that personal service in the district was necessary. Then our Rule 4(f) advanced that to include the limits of the state. Now also there are various statutes which advance it still more.

It seems to me that all that is premised on the writer's view which is in opposition to the rationale taken in the states and eventually supported by the federal courts and the Supreme Court in upholding the motorist statutes, because he speaks generally about extraterritorial service of process, but of course the thesis upon which those statutes were sustained was that there was none, that is, that there had been consent and a designation of an agent.

You may say that is a strained concept, that it may be a bit of a fiction, and so on, but the law goes by fiction and it has grown in that event. That is all done and settled, and that is the thesis.

Therefore, his fundamental concept I think is incorrect, that there is an ambiguity between the service of process rule and 4(f). I don't see the difficulties raised.

His eventual suggestion is not to do anything on the ground that he thinks that this use of federal jurisdiction is of doubtful validity. He does make an alternative suggestion

which is all in the way of expanding Rule 4(f) and making it all-inclusive, on the theory that that is removing the ambiguity that he is supposed to have found.

MR. PRYOR: Rule 4(e), isn't it?

JUDGE CLARK: I thought he wanted to put it in 4(f).

MR. PRYOR: On page 1.

JUDGE CLARK: Either way. He wishes to put it all together, which I don't think is desirable because I think the matters are separate just as we have separated them. I think his combining them is based on this wrong premise.

MR. LEMANN: Under the proposed amendment to 4(e), as I understand it, there is very little objection to the suggestion that you ought to be permitted to initiate a proceeding by attachment. The only objection is perhaps one of detail as to following the state statute.

MR. PRYOR: In that connection, Judge Riley recommended the approval of 4(e). His only suggestion was a slight change in the other section.

MR. LEMANN: Suppose we stick to 4(e) for the time being. That would open the federal court to attachment proceedings based on non-residence, and also to the non-resident motorist cases. Those are the only two classes of cases that I recall seeing referred to. Am I right about that?

JUDGE CLARK: Yes, I think so.

MR. LEMANN: I have not had an opportunity to read the

comments of this gentleman, but he is particularly opposed to the enlargement of the federal court's right to proceed in a non-resident motorist case. As I understand, we don't propose or think we have authority to change venue, isn't that correct? So if we adopted this, the limitations of venue would still exist. The suit would have to be brought in either the district of the plaintiff's residence or the district of the defendant's residence. But what would happen would be that the plaintiff could go into the federal court in the district of the plaintiff's residence and he could get the defendant in under 4(e) if the state statute so provides. Is that correct?

JUDGE CLARK: That is correct, yes.

MR. PRYOR: His point, I think, was that the rule would not affect the substantive rights of the parties, isn't that right?

PROFESSOR WRIGHT: Yes.

MR. LEMANN: He says that, but of course in a sense every procedural matter affects rights.

MR. PRYOR: Of course. I don't agree with him.

MR. LEMANN: I hardly think he could support that contention, do you?

MR. PRYOR: No, I don't.

MR. LEMANN: I should think the first thing to consider, if everybody is pretty well agreed on the attachment thing, is whether there is any reason to limit this to the

attachment situation. I suppose we could limit it to the attachment situation and exclude the non-resident motorist. Is there any sound basis to do that?

PROFESSOR MOORE: I should think it more important the other way, to clear up the service in the non-resident motorist cases, because in a number of courts today, service is made in federal court in non-resident motorist cases pursuant to state law and it has been sustained.

On the attachment, if we still include that, it seems to me one or two technical matters will have to be taken care of. One is on the time to defend, and the second is the possibility of reopening a default judgment where the defendant has not been personally notified, because in some states in quasi in rem suits, just as in your in rem suits in the federal court, if the defendant is not personally notified he can come in within a certain time and reopen it.

JUDGE DRIVER: Most of the state statutes give a longer time than 20 days, do they not, Professor Moore? It is 60 days in our case.

DEAN MORGAN: They give an automatic right within a certain time to come in, and then with a good showing a still longer time, don't they?

PROFESSOR MOORE: They vary a lot.

DEAN MORGAN: I know. Some of them say you have a year to come in, and you can appear a year afterward.

MR. LEMANN: Do these statutes provide for service on the secretary of state or some state official who is required to follow the summons? Perhaps you don't know where this person is.

PROFESSOR MOORE: In the non-resident motorist cases they usually do, because --

MR. LEMANN: They have the license number and can trace it.

PROFESSOR MOORE: -- as a result of an accident there has been a report made.

MR. LEMANN: You have to find out who the fellow is or you couldn't sue him. Do you sue through the secretary of state or do you make service by publication under these state statutes?

PROFESSOR MOORE: Most of the non-resident motorist statutes require service upon the secretary of state or the commissioner of motor vehicles, coupled with either actual service outside upon the defendant or sending it by registered mail or perhaps even through ordinary mail. They have two, service on the secretary of state or the commissioner of motor vehicles, and then some sort of actual personal notification upon the defendant.

DEAN MORGAN: Not by publication?

PROFESSOR MOORE: That is right.

DEAN MORGAN: I have never seen one which provides

for service by publication.

MR. LEMANN: If we try to spell this out, we will have to go into some detail, but we would get uniformity. The simplest thing to meet the state statutes is what we have done, and that is objected to as not being consistent and uniform. But we have some other situations where we have preserved conformity instead of uniformity. Do you think we ought to try to provide a uniform method in this situation?

PROFESSOR MOORE: The non-resident motorist or the attachment?

MR. LEMANN: Both.

PROFESSOR MOORE: On the attachment, I believe I tend to leave it alone, not to provide for original quasi in rem jurisdiction, because I think you would have to provide an additional time to come in and defend and an additional provision somewhere, perhaps in Rule 60, to reopen the judgment. I don't think the quasi in rem jurisdiction is important enough for that.

MR. LEMANN: You would not permit it, then? You would just leave that out of this amendment entirely?

PROFESSOR MOORE: I would personally, yes. The United States has its own statutes which permit it to attach in delinquent postmaster cases, and so on.

MR. LEMANN: They seem to say here that they think this is a very good change for them. That is what I noted in

their comment.

JUDGE DRIVER: I think perhaps what they have in mind is the security they get on all these lending agencies. They get chattel mortgages and obligations such as that, small claims.

MR. LEMANN: Can't they proceed under the statute which permits you to proceed against the property in rem where you have a lien?

JUDGE DRIVER: They can under state statutes, but what they want is this.

MR. LEMANN: Is there a federal statute?

JUDGE DRIVER: I don't think so. As to most of the lending agencies, I don't think they have any statute.

MR. LEMANN: I thought that statute applied to me, for example, to any person; that if I had a mortgage on a piece of property of a non-resident, I could proceed --

JUDGE DRIVER: Under state law, yes.

MR. LEMANN: I thought the federal statute permitted that.

JUDGE DRIVER: No. It could on removal.

JUDGE CLARK: I should think it better to retreat from including the attachment and garnishment situation. There has been quite a little view that that was already covered. It is a question which is confused and in doubt.

You will notice among other things that Professor

Joiner of Michigan wrote in and said that he thought that part was already covered, and he recommended the amendment quite strongly because it clarifies the matter. He said -- and this is on page 5 of Mr. Wright's summary -- he believes that cases holding that the federal courts do not already have such power are wrongly decided and that "if the case were squarely presented and forcibly argued, the same result would be reached without such an amendatory rule." But he finds the authorities to the contrary sufficiently numerous that he thinks the amendment wise.

On the matter of opening any default, I should wonder if we really needed anything more precise than we already have in the rule on defaults. There is a general admonition about opening defaults in Rule 55(c), setting aside a default for good cause shown.

PROFESSOR MOORE: I am not talking about setting aside the default but setting aside the default judgment, which Rule 55(c) says throws you over to Rule 60(b), on setting aside a default judgment. In 60(b) we have a provision that 60(b) doesn't limit the power of the court to set aside a judgment where the defendant was not actually personally notified as provided in 28 U.S.C. 1655, which is the in rem federal statute.

Correspondingly, if we are going to open default judgments in quasi in rem suits, it seems to me we need some

comparable provision in 60(b).

JUDGE CLARK: If it is felt necessary, it would be very easy to expand the reference in 60(b). That is stated as a non-limiting provision, anyway. I am not sure how necessary that would be, but that would be a simple matter which could be taken up in connection with 60(b).

MR. PRYOR: On the question of non-resident motorist cases, it seems to me the rule as we propose it is all right. I am quite sure that the statute in Iowa providing for service on the secretary of state, which was recently amended, provides for service on the head of the motor vehicle department, the superintendent of the public safety department. I think it might be different in different states, but we have covered it here when we say "if service is made or the party is brought before the court under the circumstances and in the manner prescribed in the state statute or rule."

I would not want to specify in the rule how the service should be made, because it might be different in different states, and it should be different.

JUDGE CLARK: It would seem that the questions here presented are: First, whether we want to adopt this rule in its general form covering both these major items; second, whether we want to follow the order of the rule here stated or perhaps make a little rearrangement of it as is suggested on that same page of the summary; and third, whether we want

to take steps either to emphasize the state procedure or to emphasize the federal procedure after jurisdiction is acquired.

In my comment I suggested the latter, that is, that it be clear that after jurisdiction was acquired, these rules apply as to the time for answer, and so on. That may not be the most desirable. Possibly it may be more desirable to follow the state statutes throughout and not have that much uniformity. But it seems to me that is the question which comes after the initial decision.

CHAIRMAN MITCHELL: Is this subject going to drag us into the problem as to diversity of citizenship? I think Justice Frankfurter wrote an opinion not long ago in which he deplored the tendency in personal injury or other litigation of that sort --

MR. LEMANN: That is an old passion of his, very old, long before he went on the Court, deploring the diversity of citizenship basis.

CHAIRMAN MITCHELL: He had it in the opinion, and in a note on the opinion he added a reference to something which happened when I was Attorney General. I felt the diversity of citizenship rule was passe to some extent and was dragging the federal courts into a mass of litigation that they ought not to handle. My remedy for it was perfected in a bill I proposed to the Senate, and Justice Frankfurter referred to the hearings on that bill which I had sent to Senator Norris. Senator Norris

wanted to abolish completely diversity of citizenship in federal jurisdiction, and my proposal was merely to provide that for diversity purposes a corporation should be considered a citizen of a state where it was doing business with respect to all business transacted in that state, which limited the diversity of jurisdiction very considerably.

Is this proposal of ours going to enlarge it?

MR. LEMANN: I don't think it will affect it. It would simply emphasize Justice Frankfurter's long-standing objection to diversity of citizenship. I think he would pretty nearly agree with Norris, but he certainly thinks it has already been carried too far. I don't know whether we could carry it further by opening the federal courts to non-resident motorist cases, and thereby additionally offend him, when they can't get in today. I guess that is true, isn't it, Professor Moore?

MR. PRYOR: They are already open to that.

MR. LEMANN: They are not open, as I understand it, without this rule. This rule will open them more, as I understand it.

CHAIRMAN MITCHELL: That is what I thought.

MR. LEMANN: This rule would open them more, and to that extent would irritate Justice Frankfurter. His outburst -- I also was favored with a copy of his opinion, which I thought was written with great saltiness -- was provoked by the

situation, the results of the Louisiana direct action statute against an insurance company in an automobile accident. The result is you couldn't sue me, for example, in the federal court in Louisiana if you were a Louisiana citizen, but you can sue my insurer, which is usually a foreign insurance company. That means clogging up the federal courts with that many more damage suits. He concurred in the opinion that the Louisiana statute is valid, but he took the occasion to express himself again with vigor on his original position.

I guess he would feel that this was going further in opening the door of the federal court.

DEAN MORGAN: I don't suppose it would in the motorist case, would it, because if the plaintiff wanted to, he could always bring it in a state court and then the defendant, if he wanted to, could remove it to the federal court.

MR. PRYOR: That is done in a number of instances.

DEAN MORGAN: It could be brought in the plaintiff's district. Then for convenience of witnesses, and so forth, under 1404(a) of the Code, it could be removed wherever the witnesses are.

MR. LEMANN: Still in the federal court.

DEAN MORGAN: Yes, still in the federal court.

MR. LEMANN: With us, many plaintiffs prefer to proceed in the federal court and not leave it to the defendant.

This would permit him to get in there. That is what I had in mind. I think Mr. Mitchell is right.

JUDGE CLARK: This rule does not in terms, of course, do anything to diversity of citizenship. It leaves it as it is. It possibly may have the effect of bringing somewhat more cases in the federal court. I don't know how we can be sure about that.

Really, in one sense I think that is the reason for the rule, because now there are a great many of these accident cases in the federal courts. I suppose that is one of the worst loads the federal courts have to carry. But all the courts have to carry them. That is the load everywhere. In New York City, in the Southern District, for example, the jury calendar covering this type of case is four years behind. Justice Peck of the state court announced with some pride that, with the efficient work of the state judges, they have it down to three years in the state courts. He says now litigants are going in to the federal courts to get delay, or vice versa, depending upon whether they want the delay or not.

I don't believe now that Justice Frankfurter could really succeed in getting diversity jurisdiction wiped out in view of the problem of the congested docket, which has grown to be terrific. But if, as is the case, we have all these automobile accident cases in the federal courts now, it seems to me a bit questionable whether this smallish part,

so to speak, should be carved out. If the general accident case comes in to federal court freely within the limits of federal jurisdiction, I should think from the standpoint of general fairness, this ought to, too. The attempt to exclude it within somewhat narrow limits raises problems of confusion in the disposition of these cases.

So I say, even though this probably will increase the burden a little, it is a burden we have to accept under the general situation. It seems to me the general trend would require that this go along with the rest, because this form of action is now so general around the country.

Would you like to take up the matters in the order I suggested; that is, first decide on the general rule, whether you want to approve an amendment covering these matters, and then take up the details I have suggested?

Does anyone want to move that the amendment to Rule 4(e) be approved in substance, the further details to be considered after we have passed the main motion? All those in favor say "aye"; those opposed.

PROFESSOR MOORE: No.

JUDGE CLARK: The motion is carried.

MR. LEMANN: Do you wish to offer a substitute, Professor Moore, just to test the Committee's reaction? You want to accept 4(e) in part for the non-resident motorist case but not for the foreign attachment cases, is that right,

or do you want to junk it entirely?

PROFESSOR MOORE: I think I would junk it entirely. I agree with what Judge Clark said about the general desirability of allowing these non-resident motorist cases to be brought in the federal court just as any other if diversity exists, but actually they are being brought in Iowa, for instance, and in the case which the Judge cites, Giffin v. Ensign, from Pennsylvania, Judge Maris said they couldn't and the service was being made under 4(d)(7). I would be inclined not to arouse Justice Frankfurther's ire, and just let it alone.

As for the quasi in rem, I don't see any great need for providing for original quasi in rem jurisdiction. If it be just a default case, the plaintiff can get his default in the state court. If it is to be contested, the plaintiff is usually a local citizen and he would be suing in his own court, and the defendant can remove if he wants to.

My view is that this just isn't sufficiently important to put it in here. We would have also to take up another point or two about the time to defend and for reopening the default judgment.

JUDGE DRIVER: Mr. Reporter, it seems to me, in view of what Professor Moore said, that it is desirable to try to get uniformity and to try to avoid or head off, if we can, the conflict between jurisdiction as to whether the action should be brought originally in federal court in these non-resident

motorist cases. It seems to me definitely unfair to allow federal jurisdiction at the instance of one party and not of the other. In both quasi in rem and the non-resident motorist cases, you have a choice of forum on the part of the defendant only, as to whether it shall be in state or federal court. I see nothing fair about that. I think if the defendant has the right to remove these cases to federal court, the plaintiff should have the right to bring them there in the first place, giving both parties the choice of forum.

MR. LEMANN: It occurs to me it might also be pointed out to Justice Frankfurter that perhaps one way to get rid of this diversity jurisdiction is to make it increasingly a burden, and the greater the burden becomes, maybe ultimately the better chance he and his followers might have to get it abrogated. Logically I should not think there was much reason to exclude the federal courts from this jurisdiction.

CHAIRMAN MITCHELL: I just wonder whether you were stirring up the animus unnecessarily. He patted me on the back for trying to qualify the diversity jurisdiction by special statutory incorporation. In his opinion he mentioned me by name and patted me on the back and he wrote on the opinion, "Dear Bill: You were right in 1930 and you are still right." He will think I am wrong this time.

JUDGE CLARK: I had the honor of supporting the then Attorney General, and I was glad to do it and would do it

again. Let me suggest that I don't believe we can do very much if we are going to make our decision because we are afraid of what somebody will do. I don't believe we can count on the distinguished gentleman whom we are discussing to vote the other way when we want him to. It seems to me that that basis is a very uncertain one. He does not believe in rule-making by the Supreme Court.

I should think, if we were going to try to prophesy, that this therefore will have little to do either way in that regard.

MR. LEMANN: It would just twist his tail a little bit more.

JUDGE CLARK: That may be. I don't believe we can properly make our amendments in the light of what somebody is going to do to us or to them. I hope we don't go on that basis too much, because I am afraid that would be paralyzing all of our work.

I wonder if there is any more comment. I would put it that the vote would be in favor, with Professor Moore dissenting. Is there anything further?

Let's go, then, to details.

I suggest two matters to consider. First, I think the proposal of Professor Joiner of Michigan on page 6 of the summary, to reverse the order, is desirable, and I will take that up first. Then I want to take up next after that the

question of whether we follow state forms or federal forms. We have not come to that yet.

Turning to the suggestion of reversing the order, on page 6 of Professor Wright's summary, if we were to reverse, Professor Joiner thinks that would be desirable because that makes it clearer that there are these two parts to the provision. Hence, this would take away any possibility that the provision relating to attachment and garnishment may modify all the rest. Reversing the order makes it clear. So on page 6 of Professor Wright's summary you have this wording:

> "Whenever a statute or rule of court of the state in which the district court is held provides for notice to such a party to appear and respond or to defend in an action by reason of the attachment or garnishment of his property located within the state, or for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, it shall also be sufficient if service is made or the party is brought before the court under the circumstances and in the manner prescribed in the state statute or rule."

This, you see, puts the clause dealing with the attachment or garnishment default before the clause dealing with the notice.

MR. LEMANN: May I ask what you gain by repeating the

words "or of" in the seventh or eighth line, and whether you couldn't simply make it read, "or for service of a summons, notice, or order in lieu of summons"?

JUDGE CLARK: What do you think of that, Professor Wright?

MR. LEMANN: It makes it less clumsy, eliminates repetition of the words "or of" in two places, and eliminates some commas.

JUDGE CLARK: I should think that was all right. It would shorten it somewhat.

MR. LEMANN: It doesn't change it.

JUDGE CLARK: How about the general suggestion? Do you want to approve it or not?

MR. TOLMAN: I move the adoption of that provision.

PROFESSOR MOORE: May I ask a question for information. Some judges in Iowa pointed up the fact that the notice out there was signed by the attorney. Does that mean that the notice under this is to be signed by the plaintiff's attorney?

JUDGE CLARK: That is over on page 7. The reference to what the Iowa judges said appears on the next page of the summary. As it now stands, you would have to follow the state practice quite definitely.

PROFESSOR MOORE: And for the time, also?

JUDGE CLARK: On that I was going to suggest that it be the federal time, but I am not sure that will be taken up.

I think that comes up in connection with the further step that we may want to take about this. I had suggested adding at the end:

> "When service is thus made or the party thus brought before the court, further pleadings shall be as provided by these rules and he shall be so informed in any notice to defend which may be given him."

I will add that I don't think that is a necessary way of doing it. I think there it is a choice whether you follow the state form throughout and get a good deal of disuniformity, or whether you try to do what I was suggesting here and follow the federal rules once the state statute has been applied to get jurisdiction.

JUDGE DRIVER: I think the way it is suggested that it be worded on page 6 of the summary, which you just read, what you say there is that the party shall be brought before the court in the manner provided by the state statute. He is not constructively brought before the court until the 60 days have expired, I should think, if the state gives him 60 days. You can't bring him before the court in 20 days if the statute gives him 60 days to appear. So the way this is worded, I think the state time would apply. That might be questionable, but that is the way I would rule on it, certainly, if I were doing it.

MR. LEMANN: It ought not to be left obscure.

JUDGE DRIVER: That is correct.

MR. LEMANN: Then they will be coming back with an amendment shortly to clear up the obscurity.

MR. PRYOR: Judge Clark, what do you think of the proposed suggestion with reference to Rule 4(b) on page 7 of the summary, the suggestion made by the Iowa federal judges? That deals with the question you are discussing right now, it seems to me.

MR. LEMANN: That would remove the obscurity.

JUDGE CLARK: Do you all have that last point which Mr. Pryor is bringing up? The suggestion was made by the Iowa judges that the following language should be added to Rule 4(b):

> "Where under Rule 4(e) service of a summons or of a notice is made under a state statute or state rule of court, the summons or notice may be in the form required by such statute or rule and the time for the defendant to defend or respond shall be as provided in such statute or rule."

MR. PRYOR: I think that clears up the confusion there. Rule 4(b) is the one which requires that the summons be signed by the clerk, and this would bring into play the Iowa procedure in a case of that kind.

JUDGE CLARK: I take it that the general or at least the vocal expression of view here is to follow the state procedure in this regard. I certainly don't object to that.

MR. LEMANN: We have pending the motion by Mr. Tolman which I don't think we voted on, to adopt Professor Joiner's suggestion as to the arrangement of these clauses.

MR. PRYOR: Mr. Lemann suggested to me a while ago that in voting we raise our hands so we can have a more definite expression. I think that is a very good suggestion.

JUDGE CLARK: I think that is a good idea.

MR. LEMANN: The reporter should perhaps note for his information what that raising of hands shows. Otherwise, the showing of hands won't be reflected in the transcript. I particularly noticed on the previous resolution there were only two or three audible votes, and to me it would be a circumstance which weighs somewhat in the final conclusion, even if I were one of the three, if nobody else voted. Maybe this isn't important enough to do.

JUDGE CLARK: Do you want to go back and do the other vote by a show of hands?

MR. LEMANN: I wouldn't bother with that now, but just in the future.

JUDGE CLARK: On this motion, Mr. Tolman's motion, which is to follow Professor Joiner's suggestion of reversing the order, all those in favor will raise their hands: Judge Driver, Mr. Pryor, Mr. Lemann, Mr. Dodge, Mr. Morgan, Mr. Tolman, Dean Pirsig, and myself. All those opposed. Then it is carried.

All right, Mr. Pryor.

MR. PRYOR: I move the approval of the suggested addition to Rule 4(b) on page 7 of the summary.

JUDGE CLARK: That is the one I read, which definitely provides that where the service is made under 4(e), it shall follow the state form. Do you want me to read it again? It appears on page 7 of the summary. Is there any further discussion on that?

JUDGE DRIVER: Before you proceed, Judge Clark, I think what Mr. Lemann had in mind was that in raising our hands the record should show how many voted in favor or how many against. It is going to take a lot of time to name each one every time. I don't think that is necessary. If anyone wishes the record to show how he votes, he can request it. Otherwise, simply show the number, and that will save some time.

JUDGE CLARK: All right.

Mr. Pryor has moved that the material read be added to Rule 4(b). All those in favor will raise their hands. Seven. All those opposed. It is carried.

I take it that action approves this rule and that we do not need any further vote, or do we? Unless there is further question, we will take it that this particular amendment is approved.

MR. TOLMAN: Judge Clark, I notice a suggestion from the Department of Justice which seems to me to have some merit,

that the "Requirements of state law as to security for damages or costs or the payment of fees and costs shall not apply to the United States unless expressly permitted by the law." I know the Department feels rather strongly they should not be subjected to those cost requirements. I wonder if we should not consider that. We have other similar exceptions throughout the rules for the United States.

PROFESSOR MOORE: There is a general statute exempting the Federal Government from security for costs. Why doesn't that apply?

MR. TOLMAN: Do you think it covers it sufficiently? I had not considered this at all until this came in this morning. I didn't think we ought to forget it.

MR. LEMANN: The government itself at the top of page 2 says, "28 U.S.C. Sections 2408 and 2412(a) respectively provide that the United States is not required to post security for damages and costs nor is it liable for fees and costs unless expressly provided for by Act of Congress."

MR. TOLMAN: Yes.

MR. LEMANN: Then they go on to say, however, "To remove any doubt which might arise," and so forth. I would not really think there was much doubt, would you, in view of the federal statute.

MR. DODGE: No.

MR. TOLMAN: I agree with you.

JUDGE CLARK: I should think this was covered, then. Is there any objection?

Professor Morgan, what was it you started to say?

DEAN MORGAN: I was just asking about Bill's suggestion as to reopening, and so forth. This last suggestion which was adopted would not cover that, Charles.

JUDGE CLARK: It doesn't cover it in so many words, but don't you think we have done all we should do?

DEAN MORGAN: In this particular place, but I wonder if you are going to make a provision for reopening a default judgment in these in rem or quasi in rem actions where there is no appearance, where the defendant hasn't received notice actually.

JUDGE CLARK: First, the provision we have adopted for Rule 4(b) will give the length of time to answer, if there is one.

DEAN MORGAN: Yes.

JUDGE CLARK: Second, I should think if we were going to do anything there, we should modify slightly 60(b). In Rule 60(b), after the main enacting part of that rule, it is provided:

> "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as

provided in Title 28, U. S. C., Section 1655, or to set aside a judgment for fraud upon the court."

I should say that after "1655" there might be inserted "or in Rule 4(e)".

MR. LEMANN: Where would you insert that?

JUDGE DRIVER: I didn't get that, either.

MR. LEMANN: You mean after "Title 28, U. S. C., Section 1655"?

JUDGE CLARK: Do you have 60(b) before you?

MR. LEMANN: That is right. Where is the reference to 1655 that you just threw at us?

MR. PRYOR: In line 36.

JUDGE CLARK: Add after "1655" the phrase "or in Rule 4(e)".

DEAN MORGAN: Yes.

JUDGE CLARK: Would that do it?

DEAN MORGAN: Yes.

PROFESSOR MOORE: I don't think 4(e) tells you within what time you can reopen, though; and 1655, you see, does cover it for the federal in rem. It tells you you can reopen within a year. I don't think a reference back to 4(e) would quite do it.

JUDGE CLARK: Does anyone have any suggestions? I suppose it is really both technically 4(e) and 4(b).

DEAN PIRSIG: Wouldn't that be the kind of question

that should be left to the state procedure?

PROFESSOR MOORE: Sir? I didn't hear that.

DEAN PIRSIG: Isn't that the kind of question for which we could refer to the state law? That is the way this question was raised to begin with. We have adopted the time interval for appearing.

MR. PRYOR: In Iowa it is two years where they are served by publication. I should think that an amendment to 60(b) as you suggest, Judge, would be sufficient.

JUDGE CLARK: Here is another alternative, Mr. Pryor. I wonder if it would not be sufficient, instead of what I gave you, next after the citation of 1655 to insert this, "or in state statutes made applicable under Rules 4(b) and (e)".

DEAN MORGAN: Yes.

MR. PRYOR: That is all right.

MR. LEMANN: In state statutes?

MR. PRYOR: Yes.

MR. TOLMAN: What was that suggestion, Judge?

JUDGE CLARK: You see, that comes after "as provided in Title 28, U. S. C., Section 1655".

MR. LEMANN: Is that enough? Line 31 of 60(b) says, "This rule does not limit the power of a court". That isn't equal to a mandate to the court, which I understand is what the state statutes provide, or do they so provide? I don't know. Are they simply permissive?

DEAN PIRSIG: I am not sure whether state statutes should govern in a case like this. This is not at the beginning of the action. You have your jurisdiction completed, and the defendant is asking for leave to come in and defend when the time has expired. There is a good deal of desirability that that be uniform in all federal courts, and that it appear in the rules governing that particular action.

I understand that 1655 provides a one-year time in which you can appear in an in rem action, did you say, Bill?

PROFESSOR MOORE: Yes, sir.

DEAN PIRSIG: Why should not a similar time period be incorporated right here in the rule and be made uniform for all the states.

JUDGE DRIVER: One thing that concerns me a little is that we are creeping little by little toward the old conformity which these rules were primarily designed to avoid. I have no objection to it in the matter of service in quasi in rem actions, but I think it should be limited as much as possible to service and not get more and more into conformity with the state practice.

MR. LEMANN: What is meant by "This rule does not limit the power of a court"? Does that leave it unlimited as to any time?

JUDGE CLARK: In Rule 60(b) you have what was originally a new procedure by motion. It has now been pretty well

settled, so we don't realize that it was an additional way of bringing this up. Therefore, you may go after the judgment as provided in the earlier part here.

Then from the beginning we have had a provision that you still could have the independent action bill for relief against a judgment in the old way. That has never been limited.

MR. LEMANN: You talk about a motion under 60(b).

JUDGE CLARK: Yes.

MR. LEMANN: Under 60(b), line 20, "The motion shall be made within a reasonable time, and for reasons (1), (2), (3), and (6) not more than one year . . ." No. (6) is "any other reason justifying relief from the operation of the judgment", which would ordinarily, I imagine, cover the non-resident motorist case which we are talking about.

Then you come along in line 31 and say the rule doesn't limit the power of the court in certain cases in which you are now going to throw in these non-resident motorist cases. Then you would have no limit of time for that. Am I off the track?

DEAN MORGAN: A non-resident motorist case is regarded as giving personal service. They are the equivalent of personal service.

MR. LEMANN: They all provide, as I get it, for a way to come in and get more time.

DEAN MORGAN: They don't provide the way to get more

time after judgment.

MR. LEMANN: When do you get the time?

DEAN MORGAN: They tell you how long on the substituted service of that kind the defendant has to answer.

MR. LEMANN: Somebody talked about two years. They wouldn't give them two years to start with.

DEAN MORGAN: That is in the quasi in rem cases. I have never seen any non-resident motorist statute which gives that.

MR. PRYOR: In our state, where the service is by publication only, there is a default.

DEAN MORGAN: But you don't publish in most cases.

MR. PRYOR: I understand.

JUDGE CLARK: How necessary do you think any addition is here? You have the whole force of Rule 60(b), and I should think you do not need any specification here.

MR. LEMANN: Rule 60(b), line 19, certainly gives you the right to proceed up to a year under the next section.

MR. PRYOR: Is what you are trying to reach under lines 34 and 35 of Rule 60(b) the default case? If that is right, there ought to be something said there about not actually personally notified and who has not appeared, because he might have given jurisdiction to the court by appearing, even though he wasn't notified in the way the statute provided.

MR. LEMANN: Is there such a limitation in Title 28,

Section 1655? Do we have that here?

PROFESSOR WRIGHT: That is in this volume.

MR. DODGE: I have it right here. Section 1655 deals only with lien enforcement upon property. It provides that if an absent defendant doesn't appear or plead, there may be a judgment by default against the property.

MR. LEMANN: Or plead. That covers the point.

MR. PRYOR: It would not cover the other point.

MR. DODGE: It doesn't provide for any independent action by the non-resident defendant.

> "Any defendant not so personally notified may, at any time within one year after final judgment, enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just."

That has nothing to do with an independent action.

JUDGE CLARK: I suggest that we don't need anything more here under either 55(b) or 60(b) and, furthermore, we have now given a longer time to answer according to state procedure. I should think the power to reopen was certainly full and complete.

MR. LEMANN: There would be a certain logic, I should think, in extending lines 35 and 36 to this situation. We have gone out of our way to refer to Title 28, 1655, and that is a very analogous situation.

MR. DODGE: But that has nothing to do with an independent action to set aside a judgment.

MR. LEMANN: But it contains a provision for setting aside the judgment. It says so in the last paragraph.

MR. DODGE: This is a provision for setting aside the judgment and allowing the defendant to enter a belated appearance and have a trial on the merits.

MR. LEMANN: That is right. If we thought it important to preserve a reference to that privilege by referring to Title 28, 1655, why isn't it equally logical --

MR. DODGE: This language in 60(b) sounds as if it were limited to an independent action for relief from a judgment, and there is nothing in Section 1655 that I can see which relates to such an independent action.

MR. LEMANN: Line 33, Bob, says "or to grant relief".

MR. PRYOR: It is correlative.

MR. LEMANN: The first part does speak of the entertainment of an independent action, but line 33 brings in "or to grant relief". It seems to me that really that does give us a patent to adopt the suggestion which has been made.

MR. DODGE: Yes. You might tie it in with that last clause here, grant relief.

MR. LEMANN: That is right.

JUDGE CLARK: Does anybody wish to make a motion? I have given you three different suggestions.

MR. PRYOR: I would like to hear the chairman make a motion.

JUDGE CLARK: One of those suggestions was that we add nothing, which is the one I think I would recommend. Then the other two -- the first one was that we insert a reference to the rules after Section 1655, and the third one was that we insert a reference to state statutes.

MR. LEMANN: I move we adopt the Reporter's second suggestion, which I understand would mean that you would add appropriate language in line 36 of Rule 60(b) following the reference to 28 U. S. C. 1655.

MR. PRYOR: I think you would have to incorporate in that the idea that it applies to a case where there had been no appearance.

MR. LEMANN: I said appropriate language. I think he would have to, because that is in 1655, too, in the last paragraph.

JUDGE DRIVER: I must confess I am not clear as to what your suggestion was, Judge Clark, as to references to Rule 4(b) and (e).

JUDGE CLARK: In the light of the way we have voted to amend those, 4(b) is to contain an additional sentence incorporating the provisions on page 7 of the summary.

JUDGE DRIVER: I have that in mind.

JUDGE CLARK: Then in 4(e) we voted the general

provision for notice in the case of the garnishment as well as the non-resident motorist. This would bring in references over here.

I should think, if we were going to expand this, after the reference to 1655 in Rule 60(b) we would have to say something like this: "or to a defendant not actually personally notified and not appearing when summoned under the provisions of Rules 4(b) and (e)".

JUDGE DRIVER: As I get Professor Moore's point, if you do that you would not have specified the time limit within which he could appear, because 28 U.S.C. 1655 prescribes one year, doesn't it, and if you simply make a reference to 4(b) and 4(e) you would not have any time specified. Isn't that the point you made in the first place, Professor Moore?

PROFESSOR MOORE: Yes.

DEAN PIRSIG: What you need is a grant of power. The sentence as it now reads refers to grant of power from other sources.

JUDGE CLARK: Going back to what we added to 4(b), we put in "the time for the defendant to defend or respond shall be as provided in such statute or rule." When we pick that reference up here again, I should think it would pretty much point to the state procedure.

JUDGE DRIVER: Do you think it would cover an application to reopen a default judgment?

JUDGE CLARK: I should think so. What else would be the reference here? It is the reference which incorporates the other rule.

JUDGE DRIVER: You would be surprised how easily judges can go astray if it isn't spelled out for them.

DEAN PIRSIG: Why can't we defer this until we get to 60(b), and in the meantime ask the Reporter to consider it.

JUDGE CLARK: Here is another possibility. Professor Wright suggests that we try to do this to Rule 4(b) itself. You remember the last line that I read you, "and the time for the defendant to defend or respond shall be as provided in such statute or rule." You might make that read, "and the time for the defendant to defend or respond or" --

PROFESSOR WRIGHT: "or reopen as of right a default judgment".

JUDGE CLARK: --"or to reopen as of right a default judgment shall be as provided in such statute or rule."

MR. PRYOR: I think more logically it should go in 60(b).

MR. LEMANN: You could also put it in 60(b), as Mr. Pryor suggests, by putting another clause in line 36 after 1655, "or to grant relief in accordance with the provisions of applicable state statutes to a defendant who has not been notified and has not appeared in proceedings brought under Rule 4(e)".

MR. PRYOR: I think if you are going to put it in 60(b), it would be better to put in an entire new sentence.

JUDGE CLARK: Will somebody make a motion? I have given you now four suggestions.

MR. TOLMAN: As far as time is concerned, that throws us right back to the state law, doesn't it?

JUDGE CLARK: Yes.

MR. TOLMAN: Do we want to do that? Are we sure we want to be governed by state law in this situation? I was impressed by Dean Pirsig's statement that we ought to get away from conformity in this situation after the court has already acquired jurisdiction.

JUDGE CLARK: What do you say to Mr. Tolman's suggestion that there ought to be a state provision.

DEAN PIRSIG: I should like to suggest that we defer consideration of that point until we get to 60(b). In the meantime, possibly you can work up something, Mr. Reporter.

JUDGE CLARK: Is there objection to deferring final consideration of this particular point until we get to 60(b)? In the meanwhile, Leland is drafting a proposal.

MR. LEMANN: You could cover it, Leland, by putting in another clause, (7), in lines 19 and 20, which would be limited to this case, and then make your one-year period in line 22 apply to the new (7) situation. That would give you uniformity.

MR. TOLMAN: That is the clearest way to do it, I think.

JUDGE CLARK: Then we will pass that for the time being, and we will go now to Rule 4(f) and the proposed amendment.

MR. DODGE: How did we leave this, Judge? We are going to follow the rule as it is with these two or three additions, without any attempt at uniformity?

JUDGE CLARK: Yes, that is it. It is thrown back to state law very definitely in the addition to 4(b) which was voted, but I understood that is what you wanted. It is certainly a very definite solution, which of course is desirable.

Professor Wright, was there anything in particular in the late letters on Rule 4(f) that you want to refer to?

PROFESSOR WRIGHT: No. The late letters on Rule 4(f) have made no new suggestions on draftsmanship other than changes I have already noted in the summary at page 12. They show probably the same kinds of preference which the earlier letters did and which I have recited in the summary.

We now have, including the late letters, altogether 47 comments on the merits of the amendment to Rule 4(f), with 37 of them being favorable, and of the 37, 21 favor the first alternative. Probably the only thing which should be especially noted is that the Department of Justice memorandum this morning

comes out in favor of the first alternative, which would make the 100-mile limit apply in all situations as contrasted with the more limited second alternative which allows 100-mile extraterritorial service only in certain specified cases.

MR. LEMANN: You say the count is slightly in favor of the first alternative?

PROFESSOR WRIGHT: Yes. I can give you the total count, Mr. Lemann. It is 21 for the first, 13 for the second alternative, 3 who say we should amend the rule but don't express a preference, and 10 who are opposed to either of the alternatives.

MR. LEMANN: It is not too significant. If you added the 10 to the 13, you would have a majority against the first alternative, to which I am opposed.

PROFESSOR WRIGHT: I think not. I think then you would have, sir, 24 for the first alternative and 23 for the second.

MR. LEMANN: Then I fall back on the alternative argument which was in my mind, that I would have to evaluate the votes cast by some knowledge of the competency and authority of the people who cast them.

MR. DODGE: The object of this rule, as amended, is to allow a citizen of Maine or New Hampshire or parts of Vermont and Connecticut and all of Rhode Island to drag a defendant in to his state for the trial of a case. In the

letters in favor of it, I have not seen just what the argument is in favor of that extension.

I can see entirely the pertinence of the second alternative, but just what is the reason for allowing a man in all those states to go in to a federal court where he couldn't go in to his state court, and sue a resident of Boston in that court?

MR. LEMANN: I move we adopt the second alternative.

MR. DODGE: I second the motion.

PROFESSOR MOORE: Mr. Chairman, I don't like to be in the role of a dissenter all the time --

MR. LEMANN: Why not?

JUDGE DRIVER: We like that.

PROFESSOR MOORE: Either alternative to 4(f) raises some complications which can be met, of course, as we have met the ones in 4(e). Both of them refer to all process. That includes writs of garnishment, attachment, execution, and so on.

The thing that I think brought this into being in the main was to get service of summons. You now have rules that are running all your process outside the district. That certainly would run into an anomalous situation on running your writs of attachment and of garnishment out; for instance, in Connecticut you can attach or garnish in practically every money suit. If you brought that suit in Connecticut you could

run your writ of attachment in to New York City, theoretically, and attach, although if you brought your suit there you could not.

MR. PRYOR: Shouldn't it be limited to summons?

PROFESSOR MOORE: The Reporter has a good point in his alternative which was prompted by a problem which came out of the District of Columbia, for the enforcement of the court's orders and judgments, but that had to do, I think, with a support money or alimony case. While there was merit to that point that the court ought to be able to enforce that judgment against the defendant who was just across the line in Virginia, theoretically, as it is drafted here, if the suit were brought here in the District of Columbia you could run a writ of execution either into Virginia or Maryland.

MR. LEMANN: But how would that be likely to happen under the second alternative, beginning in line 33. That would only apply to persons made parties pursuant to Rule 13(h), Rule 14, or who are indispensable or required to respond to proceedings for the enforcement of the court's orders and judgments.

Do you think your garnishment, attachment, and execution cases could be brought within that language ordinarily?

PROFESSOR MOORE: I don't think your attachment and garnishment would normally fit within the second alternative.

MR. LEMANN: That is why I would not think your

difficulty would arise if we supported the second alternative.

PROFESSOR MOORE: What about the enforcement of the court's orders and judgments? Once you have that party, can you get judgment against him and take out a writ of execution against him and run it into another state?

DEAN MORGAN: All that would be doing, Bill, would be allowing execution there instead of requiring the judgment to be filed in the district court there. You now have a provision under the Code where you can take a judgment from one district and file it in the other district and take out execution. So it seems to me the execution of the judgment that you are talking about is not objectionable under this. You have just cut out that additional step. Isn't that right, Bill? He could bring some action to stop it or make some motion to stop it, and so on, just as he could attack any writ of execution, couldn't he?

MR. DODGE: Where is that about filing in another state?

DEAN MORGAN: That is in the revised Code. Before that, you had to bring an action on it, but now you can register it. Isn't that right, Bill? You were on that commission.

CHAIRMAN MITCHELL: In our original rules we had a rule to that effect, and the Court threw it out because it thought it was enlarging and changing the jurisdiction.

DEAN MORGAN: We tried to get it done by rule here, and the Court turned us down.

CHAIRMAN MITCHELL: That is right.

DEAN MORGAN: Then there was an amendment to the Code which allowed it, you see.

PROFESSOR MOORE: You have this difference, though: If you get a judgment in federal court in one state and register it in a federal court in another state, and then you take out execution in the second state, Rule 69 makes the practice and procedure which govern the execution in the second state.

DEAN MORGAN: That is all right for judgment. I am inclined to agree with you. I certainly agree with you on the notion that you ought not to use the Massachusetts and Connecticut notion of attaching whenever an action is brought; that you bring an action in Massachusetts, for example, and the attachment goes right along without any showing of the necessity. Is that Connecticut law, too?

PROFESSOR MOORE: Yes.

DEAN MORGAN: I thought Connecticut was more civilized than that.

JUDGE CLARK: We have definite provisions when you exercise these extraordinary remedies. Rule 64, for example, provides definitely for attachment and for that sort of thing. I don't see how the problem arises. Rule 64 states they are "available under the circumstances and in the manner provided

by the laws of the state in which the district court is held".

To take the example given, I don't see how you could use the Connecticut attachment statute to attach property in downtown New York. Of course you can under the Connecticut law. I should think that the rule of authorization there would carry its own limitation.

Rule 69 is execution, and that again makes it conform with the practice and procedure of the state in which the district court is held.

If it were necessary to make a further protest in one of these rules, possibly it should be done, but it seems to me it is in a way a disclaimer of what I should think is already covered by the rules. I should hope the question of the merits, so to speak, would not be lost sight of in these matters of detail.

DEAN MORGAN: Charles, take an attachment for the purpose of getting jurisdiction in quasi in rem, would you allow the Connecticut district court to get jurisdiction in a quasi in rem action by attaching property in New York?

JUDGE CLARK: No.

DEAN MORGAN: No? It seems to me that this first alternative would. That would be process, wouldn't it?

JUDGE CLARK: How could it?

DEAN MORGAN: It is process, isn't it? Suppose we attached according to the New York statute, the method of

attaching, and so on and so forth, you could get jurisdiction in Connecticut, then, if that is process, and I should suppose it would be.

JUDGE CLARK: The grant of power to make attachment we cover in Rule 64. It doesn't seem to me that this in intent, certainly, or even in wording, is an attempt to expand Rule 64. That is what I said. If it were necessary to add some disclaimers, one could, but it seems to me it is more a question of saying that Rule 64 applies, whatever we may have said in other rules.

MR. LEMANN: The adoption of the second alternative, Eddie, would eliminate this difficulty.

DEAN MORGAN: The term process, yes.

MR. LEMANN: The adoption of the second alternative would eliminate the bugaboo, as I recall it, that Professor Moore uses to chill our spines.

PROFESSOR MOORE: You could still attach or garnish, under your second alternative, the defendant in New York if he fit within Rule 13(h) or Rule 14, couldn't you?

MR. LEMANN: Fit within what language?

PROFESSOR MOORE: The second alternative authorizes process other than subpoena to be served upon persons who are made parties pursuant to Rule 13(h) or Rule 14. Let's take the problem of a suit pending in the federal court in Connecticut, and the defendant wants a third party in, a defendant in

New York, under Rule 14. Certainly this would enable him to serve a summons on that defendant in New York City.

DEAN MORGAN: That is right.

PROFESSOR MOORE: Would it not also allow him to attach or garnish?

MR. PRYOR: Rule 64 would govern that, wouldn't it?

PROFESSOR MOORE: Rule 64 throws him back to the state law where the suit is pending, which is Connecticut.

MR. PRYOR: That is right.

PROFESSOR MOORE: Connecticut law would permit you to attach in any type of suit for money judgment.

MR. PRYOR: Not outside the state, though.

JUDGE CLARK: No.

PROFESSOR MOORE: It doesn't have anything to do with how far. Naturally, effective service of Connecticut process is limited within Connecticut, but here we are providing that the effective service of federal process will run out.

MR. PRYOR: If you follow the state law as required by Rule 64, the attachment would have to be made in Connecticut, wouldn't it?

PROFESSOR MOORE: If you were in the state court it would, yes.

MR. PRYOR: Rule 64 is for the federal court, applicable in federal courts.

MR. LEMANN: I would agree, Mr. Moore, that in cases

under Rule 13(h) and Rule 14 the possibility that you suggest might happen. In my mind it is just a question of balancing the objection to that result against the desirability of bringing in within this limited classification, people within 100 miles where their presence is important to dispose of the controversy.

I remember years ago I was astounded to find that if I had a receiver in the federal court in equity, I could sue a person anywhere because it was an ancillary proceeding. If I had a receiver appointed in the Eastern District of Louisiana and he had a claim against a man in New York, the United States District Court for the Eastern District of Louisiana could bring him in because it was an ancillary proceeding.

It seems to me this second alternative is a sort of related situation, and not so revolutionary in view of that long established practice to which I referred, in equity. I can see a good deal of merit in the idea that if a person is within 100 miles you ought to be permitted to bring him in, and even if it meant that you could run attachments and garnishments in that very limited class of cases. We have to put one thing against another and see if the good you are going to do by adopting this is enough to compensate for the possible abuse that you suggest.

PROFESSOR MOORE: You really want, though, to provide for service of summons rather than of process generally, don't you?

MR. LEMANN: I should think that would be the ordinary case.

PROFESSOR MOORE: Until you got down possibly to provisions for enforcing the court's judgment.

JUDGE DRIVER: If you say summons, you leave out notice in the initial process which starts the action, which is labeled "summons." It seems to me it is fair to construe certainly the second alternative as limited to service of the process. It seems to me that that would not authorize the execution of extraordinary writs. You cannot garnish or attach or carry through execution merely by service of process on a defendant. The garnishment, as I understand it, is merely the attachment of a bank account. You would have to serve something on the bank. You would have actually to have the sheriff seize the attached property.

I don't see by what construction you could say that the authorization to serve process out of the state would authorize you to execute an extraordinary writ, such as garnishment, attachment, or a levy of execution.

MR. DODGE: That seems very plain to me. You can't attach property in New York on a process issued in Connecticut.

JUDGE DRIVER: And served only on the defendant.

PROFESSOR MOORE: There is a case where there was an informer suit and judgment obtained in Pennsylvania, and the provision for the United States running a writ of execution out,

and that writ was run out and served in the informer suit on banks in New York City. It was held that, although under New York law the banks could not be reached in that type of proceeding, that you would have to bring an equitable creditor's bill, Rule 69 makes state law, to wit, Pennsylvania law, applicable.

That may be a rather ridiculous decision, but we do have that decision.

JUDGE CLARK: As it stands, we have a motion to adopt the second alternative. It appears to me there probably is not much chance to do anything about the first, but I want to go according to my beliefs, and it seems to me the first is desirable and more desirable, and I want merely to say so.

MR. LEMANN: Why don't you offer a substitute so we can adopt the first alternative.

JUDGE CLARK: No, I don't think that would get anywhere particularly. It does seem to me that the idea of having small differences of imaginary lines which have come down in our history to affect and hold back our endorsement of rights is very undesirable. That, of course, has been the response generally. There has been a very good response to this. There has been a reference, for example, by the Taft firm in Cincinnati to the difficulty of people in their neighborhood just going across the river in Kentucky. It seems to me that we are preserving what are really in many ways fictions

to make impossible the adjudication of various rights. It seems to me that we made a desirable step in advance in our original Rule 4(f) which, once it was thoroughly established by the Supreme Court, as it was, has given well nigh universal satisfaction.

It seems to me the somewhat moderate step made by the first alternative is just a step in this general direction which is appreciated by a great many. We had some recommendations here that we ought to go much further. One, not suggested here by any of us or by the Committee, was to provide that process run generally throughout the United States, as is now provided by quite a few statutes in important matters, such as in the antitrust cases.

We are not suggesting that. We are suggesting only a very, very moderate step.

MR. PRYOR: I am in favor of the first alternative, but I think it might be well to insert after the word "served" in line 22 the same words that you have in lines 34 and 35, that is, "served upon persons who are made parties to the action".

DEAN PIRSIG: I would like to have a vote on the substance involved in the two alternatives, and up to this point, until I hear Mr. Lemann's views against it, I am inclined to favor the first alternative on the principle of the thing.

I should like to offer at this time, just to bring the matter before us, a substitute motion that we endorse in principle, subject to such changes as may be made in detail, the first alternative.

JUDGE CLARK: Shall we then vote on that?

MR. LEMANN: I was comforted to find that so impartial an authority -- a man not liable to be sued within 100 miles, except I see he lives in Detroit -- as Professor Joiner favors the second alternative. He is quoted in Professor Wright's summary on page 10. He says, ". . . it is wise, I think, to require the plaintiff to go to the defendant's residence rather than requiring the defendant to go to the plaintiff's residence."

Dean Pound said to me 25 years ago that he thought process should run all over the United States and that one ought to be susceptible to suit in Boston and in California if the plaintiff lived there. I was unconvinced then, and after 25 years I am still unconvinced.

DEAN MORGAN: I think you have very much less injustice done now since you have a provision for a change of venue in these cases. I don't think it makes so much difference when you start the case in a particular place and can have it moved for the convenience of witnesses, and so forth.

MR. DODGE: That is very hard to accomplish.

DEAN MORGAN: Not too very hard.

MR. DODGE: Unless the rule specifically authorizes

the court won't shift it back on account of any ordinary reason.

DEAN MORGAN: They shift it back for the convenience of witnesses frequently, and it has worked for a great deal of change of venue with corporations where the venue of a corporation is wherever it is doing business, and so forth. It isn't anything like it was before.

MR. LEMANN: I agree with that comment, Eddie, but if you permitted service all over the United States, I think the result would be that you would flood the courts with motions for change of venue.

DEAN MORGAN: I am sure you would, if you live in a state where you can serve that way. For instance, I lived in a state where you could serve any place and could go from the northeast to the southwest part of that state.

MR. LEMANN: That is one thing. Today the state limits are very narrow, with automobiles and roads, much narrower than they were many years ago. There is relatively no hardship, but still some hardship. We wouldn't try a case even today in a rural county or parish without local counsel.

MR. DODGE: Why should the plaintiff have the right to put the defendant to the expense of getting additional counsel and of subjecting himself in many respects to the law of the plaintiff's state? When he couldn't do it in a state court, what is the argument for allowing him to do it in the federal court? State lines may be imaginary, but there is

different law across the border in many respects. You have to have local lawyers besides your own lawyers.

The plaintiff, if he wants to sue the defendant, should go into the defendant's jurisdiction rather than hauling the defendant in to the plaintiff's jurisdiction.

CHAIRMAN MITCHELL: I was surprised when the Supreme Court sustained our rule that jurisdiction of summons extended beyond the district anywhere within the state. I thought that was a jurisdictional matter which the rules couldn't touch, but they didn't have any trouble with that. I don't know why.

JUDGE CLARK: In response to what Mr. Dodge suggested, I think the idea is that, after all, in modern life our communities are not divided in the way indicated. It is conceivable, of course, that we cover too much ground in making this 100 miles, I don't know. But the original example came up from Washington, D. C., and to consider that Washington, D. C., is an entirely foreign jurisdiction to Virginia, where so many of the government employees live, or as compared to Maryland, is just not real at all.

The same situation would obtain in many other places, of which Cincinnati is a good example, because that was brought in here. I don't believe the differences in state law are enough to prevent a firm such as the Taft firm from having to look after the rights of people who do move over into Kentucky.

It seems to me that this is to cover metropolitan

communities, really, where it is so hard to work out the differences. In New York City, for example, we not only have those differences of the people who live across the Hudson, we have separate differences with the people living across the East River in Brooklyn, which is another separation which causes some difficulty, as for example, in the prosecution of criminal cases.

This is a rather moderate attempt to consider metropolitan areas as being metropolitan and as being the units that they really are so far as everything else is concerned.

MR. DODGE: I read all the letters on this subject which were sent in. I fail to find sufficient argument to satisfy me that there is any particular value in giving the plaintiff the right to haul the defendant over a state line in to federal court where he couldn't do it in his state court. What is the advantage of it?

JUDGE CLARK: Suppose we take some votes, if we can. Dean Pirsig has moved a substitute motion to approve the substance of the first alternative. All those in favor will raise their hands on that. Four. This is important. I think we had better state the names. Messrs. Pryor, Driver, Pirsig, and Clark voted for that.

All those opposed. Messrs. Moore, Morgan, Dodge, Lemann, and Tolman. That would make it five-to-four. That is lost.

JUDGE DRIVER: The Supreme Court should respect that sort of division.

JUDGE CLARK: What did you say, Judge Driver?

PROFESSOR WRIGHT: The Supreme Court should respect that kind of division.

JUDGE CLARK: I take it the vote will now recur to the second alternative. All those in favor of that will raise their hands. Messrs. Morgan, Dodge, Lemann, Pryor, Driver, Tolman, Pirsig, and I guess I will reluctantly have to vote for that.

CHAIRMAN MITCHELL: Would you mind stating for the record what the second alternative is.

JUDGE CLARK: The second alternative is the more limited one, appearing in brackets as our proposed amendment to Rule 4(f) beginning on page 1 of our preliminary draft and going over to page 2.

All those opposed?

MR. DODGE: What is the motion?

JUDGE CLARK: This is the motion for the second alternative.

JUDGE DRIVER: I thought we voted on that.

CHAIRMAN MITCHELL: You voted the ayes, but you didn't vote the noes.

JUDGE DRIVER: Oh.

JUDGE CLARK: Mr. Chairman, you haven't voted. I want

to make clear that I have included everyone. Professor Moore is against. It is eight-to-one.

That covers that, except that was a vote in substance. Now we have to go to details.

PROFESSOR WRIGHT: Since the merits and substance have been decided, there is one thing the Committee ought to hear about. The only amusing thing in all these 460 letters to me was a lawyer from South Carolina who said, "If you people can adopt this, you will amend it next time to bring people in 1500 miles. This will mean a resident of South Carolina can be sued in New York, and everyone knows that no one from South Carolina will get a fair trial from a jury in Harlem." (Laughter)

JUDGE CLARK: I think I should rise to a point of order and say that we give justice to Southerners equally with those from our own bailiwick.

I don't know how far you want to make changes. I have two minor ones. They may not be so minor, but I think they are desirable. Then if any of the rest of you have any you may bring them up.

Now our attention will be centered on the second alternative on pages 1 and 2. In the 32nd line after the words "a statute of the United States", I think we should insert "or these rules so provide", to cover some of the things we have already voted earlier as to (e).

The other is a suggestion which I think is mainly textual but will make it clearer. In line 40 substitute "state" for "district", "and at all places without the state that are within 100 miles".

JUDGE DRIVER: In line 24 you substitute "state" for "district"?

JUDGE CLARK: No. I have given up on that. It is line 40. I have had to give up line 24.

JUDGE DRIVER: That is the first alternative, isn't it? Yes, that is right.

MR. PRYOR: You are substituting "state" for "district" in line 40.

JUDGE CLARK: Yes. Are those suggestions acceptable? Hearing no objection, we will insert those.

Does anyone want to do anything more?

PROFESSOR MOORE: Judge, there is a technical matter which has occurred to me. You say "where the action is to be or has been tried." At the commencement of the case you don't always know where the action is to be tried. For instance, court may be held in two or three places within the district. There may be ready provisions for transfer under the court's rule for trial from, say, New Haven to Hartford, Connecticut. I think it is bad to have the reference to "where the action is to be . . . tried."

MR. PRYOR: Say "where it has been instituted."

PROFESSOR MOORE: I think that is better.

JUDGE CLARK: It would be possible here to go back to the provision in the first alternative, "within 100 miles of the place or places designated by law for the holding of the district court".

MR. LEMANN: It would be "any of the places" then.

JUDGE CLARK: Yes, "any of the places".

MR. LEMANN: Why wouldn't it be preferable and simpler to say "where the action has been commenced"?

MR. PRYOR: I should think that would be better, because the thing Professor Moore suggests does happen right along. An action is brought in one division and then is transferred to another division for trial.

MR. DODGE: Why isn't that covered by this?

MR. LEMANN: You don't know where it is to be tried.

MR. DODGE: You know it is going to be tried in the case, anywhere within the state.

MR. LEMANN: But 100 miles from point A might be different from 100 miles from point B. One hundred miles from Baton Rouge, Louisiana, is 80 miles from New Orleans. If you start your 100-mile calculation from Baton Rouge you will get a good deal further than if you start it from New Orleans. That happens in many other cases, I am sure.

JUDGE DRIVER: It very often happens, as in my district, that there is more than one place of holding court

within a division of the district; and the court, without any consent of the parties, may move the place of the trial of an action from one place within the division to another place within the division, and does do it sometimes for convenience.

JUDGE CLARK: I suggest that we make it "at all places without the state that are within 100 miles of the place or places designated by law for the holding of the district court."

MR. LEMANN: Any of the places.

JUDGE CLARK: This is only where they get outside the state by going 100 miles.

MR. PRYOR: I don't think that is definite enough.

MR. TOLMAN: How does the subpoena rule work?

PROFESSOR MOORE: This can't tie in innocent parties.

MR. PRYOR: There are six places within our district where court is held. One hundred miles from which place?

MR. LEMANN: It would be the furthest place. You would have to throw that in. Not the closest. You would have to say whichever is furthest.

CHAIRMAN MITCHELL: You would have to take a pair of dividers and set them at 100 and go around in circles on your map and find out where you wound up.

MR. LEMANN: I move we use the language "where the action has been commenced." in line 40.

JUDGE CLARK: All right. You have heard that proposal. That would read then "at all places without the

state that are within 100 miles of the place where the action has been commenced."

CHAIRMAN MITCHELL: Why not leave in "or has been tried"? If the action has been tried you have the place located definitely.

JUDGE CLARK: All right: "has been commenced or has been tried."

MR. LEMANN: How would you bring a fellow in? The action has been tried. You are going to bring him in when you are finished with the trial?

PROFESSOR MOORE: For the judgment.

JUDGE DRIVER: Citation for contempt.

PROFESSOR MOORE: Now you can run an execution outside the state into the other state.

MR. LEMANN: Within the limited classes of cases we have discussed, governed by this second category, such as Judge Holtzoff's case.

PROFESSOR MOORE: No, this doesn't hit Judge Holtzoff's case, I think. That one involved an original defendant.

MR. LEMANN: Isn't that lines 37 and 38?

PROFESSOR MOORE: As I remember his, it was a case where they got service on the defendant all right, and they had a good in personam judgment. You would not need this alternative rule up to that point. Then the defendant moved over to Virginia. What about that? Can you enforce that

judgment against him under this alternative?

MR. LEMANN: I would say yes, under lines 37 and 38. I thought lines 37, 38, and 39 meant to cover that.

PROFESSOR MOORE: Then you can run the execution over into Virginia.

MR. LEMANN: Yes. I conceded that and I said when you put one thing against another in the limited class of cases, I didn't think the objection was too serious in that limited class of cases.

JUDGE CLARK: As I understand, the motion now before us is for the words "is to be or has been tried" to be changed to read "has been commenced or tried."

MR. LEMANN: I would stick to "has been commenced" myself.

JUDGE CLARK: What did you say?

MR. LEMANN: I would still stick to "where the action has been commenced."

DEAN MORGAN: You mean the place where the action has been commenced, not the state?

MR. LEMANN: The place where the action has been commenced. All I am saying is that I would not add the words "or has been tried".

MR. DODGE: Has been set for trial. Suppose when you begin the action there has been an order of the court that all trials shall be held in Peoria, not in Springfield.

MR. LEMANN: You can't cover every case. There is something to be said for simplicity.

JUDGE CLARK: Do you want to make the motion? I don't know who made the original motion. I thought you did.

CHAIRMAN MITCHELL: I made the suggestion, but I withdraw it.

DEAN MORGAN: You have already said you are going to say "without the state".

MR. LEMANN: We have agreed to that.

JUDGE CLARK: Will someone make a motion, then? We have nothing before us at the moment.

MR. PRYOR: Mr. Lemann made the motion that the words "has been commenced" be inserted in lieu of "is to be or has been tried."

MR. LEMANN: That is right, in line 41.

DEAN MORGAN: Has been commenced. Suppose it is moved to a place farther away for trial.

MR. PRYOR: You would still have the place where it was commenced as the point from which you count the 100 miles. That gives something definite about it.

MR. LEMANN: It might limit the 100 miles, but, on the other hand, it might enlarge it because you might conceivably move it --

DEAN MORGAN: You would be within the state.

MR. LEMANN: It might, you see. I don't think this

is important enough in its practical result to worry us as against the advantage of simplicity.

DEAN MORGAN: You could say "has been commenced or has been tried."

MR. LEMANN: If it has been tried you are through. That is my objection to "has been tried."

JUDGE DRIVER: When you get a case transferred now under the statutory forum non conveniens, the action may have been commenced in Iowa and it is moved out to my district and finished there.

CHAIRMAN MITCHELL: Suppose there has been a default, what happens then?

MR. LEMANN: It has been assigned for trial. Maybe Mr. Dodge's suggestion would cover your point, Judge Driver. "where the action has been commenced or has been assigned for trial."

DEAN MORGAN: That is all right.

JUDGE DRIVER: I see no objection to that.

JUDGE CLARK: I think we ought to take care of the possibility Judge Driver suggests, because a great many cases are transferred now. I think we ought to have some provision to cover it. Did you have something on that, Mr. Dodge?

MR. DODGE: I suggest "where the case has been begun or the case has been assigned for trial."

JUDGE CLARK: Is that all right? All those in favor

of Mr. Dodge's suggestion raise their hands. Nine. All those opposed. Nine to nothing. That is carried.

I think we have covered that, have we not, Professor Wright?

PROFESSOR WRIGHT: I believe so.

JUDGE CLARK: The next rules, 6(b), 7(a), and our Committee note to 8(a), I think present no question or no independent question. Rule 6(b) rests on action to be taken in connection with Rule 25. Rule 7(a) depends on action to be taken under 14.

I suggest, unless there is exception, that we consider those as adopted, subject, of course, to possible modification if we take some other course as to the rules that govern. Is there any objection to that?

If not, let us think of Rule 8(a) for a moment. That is the one where we drew a note with a good deal of care covering the question of the complaint. I think that has stood the test pretty well and I think we ought to let that stay about as it is.

I note that the Department of Justice says as to that:

"Our experience does not indicate any need for a change in Rule 8(a)(2) and as practitioners become more familiar with it, the criticism should subside.

"Accordingly, for the reasons set forth in the

Committee's note, we agree that no amendment is necessary at this time."

CHAIRMAN MITCHELL: What has happened to the bar of the Ninth Circuit since they have read this?

JUDGE CLARK: They hold their position somewhat, but I don't think they have been very strenuous about it. They have stuck to their point a little.

JUDGE DRIVER: I was just saying to Mr. Pryor that I think that was largely inspired and sparked by Professor McCaskill and it died down considerably with his death. You don't hear much about it any more since Professor McCaskill died.

JUDGE CLARK: I think there was one group in Los Angeles which wrote still regretting no change was made.

MR. TOLMAN: I think the Los Angeles people didn't mention it. The San Francisco people did say that.

JUDGE CLARK: Are they the ones?

JUDGE DRIVER: I didn't see it in the Los Angeles comments.

MR. TOLMAN: No. There was no reference to it from Los Angeles.

CHAIRMAN MITCHELL: The reference in the note says the rule does require a statement of events and occurrences to justify the relief. We sort of blasted them out, didn't we?

JUDGE CLARK: I think so, yes.

Unless there is objection, therefore, we will consider that the note to Rule 8(a)(2) is approved and no other action will be taken as to that.

MR. TOLMAN: We didn't hear anything from Judge Hall at all, did we?

JUDGE DRIVER: I went through it pretty thoroughly, and I didn't see anything.

CHAIRMAN MITCHELL: I would like to ask one thing about that note. I made the original draft. I tried to explain what the court meant in Dioguardi v. Durning in the Second Circuit, and I thought that explanation met with the approval of the author of the opinion. Very little is said about it in this note. I have been battered by letters, a whole file of them, in which they keep referring to that opinion and say, "Your Reporter says thus and so about it." I felt maybe I wasn't so far off in the explanation of what the court really did mean by that statement.

I am wondering whether anything more ought to be said about that case. I have been battered with references to that opinion ever since. I have defended it manfully because I interpreted it differently from what the Ninth Circuit did. I thought the court was merely referring to the fact that the fellow who made the motion to dismiss was remiss in not knowing that the language of the rule had been changed, that he was referring to facts stating the cause of

action rather than a claim for relief, and that he didn't intend to say there was nothing in the rule which required any statement of events or occurrences to which if he applied substantive rules of law he was entitled to relief, because that is what the rule does do. I am not at all sure. That is why I asked about reactions from the Ninth Circuit. I have heard nothing from them since this thing went out.

It may be there is nothing more to be said about it. This draft of note very definitely eliminates the explanation that I tried to make of that case.

DEAN MORGAN: There are two or three letters from California which said that notwithstanding the note, they thought the suggestion of the cause of action ought to be used, but of those that I read there were only three which talked about that. Did you find many?

PROFESSOR WRIGHT: I think the total count altogether, Mr. Morgan, is that there were eight letters which regretted that we weren't demanding more particularity, and there were ten letters which said we were very wise not to tamper with the rule. Most people ignored it.

DEAN MORGAN: I noticed two or three from California. You can't get a man from Los Angeles to change his opinion.

PROFESSOR WRIGHT: The Los Angeles Bar Association, as I remember, does not comment on it in detail.

DEAN MORGAN: The Los Angeles bar is against any

change which liberalizes anything unless it is against a criminal.

JUDGE CLARK: I should rather hope that we could let this stand. It always seemed to me that that little case wasn't really important, and certainly I don't think we intended to lay down the law of the Medes and Persians. We were trying to take care of a rather small issue. I think that was picked up by a few people and a great deal made of it.

If we were going to go into an extensive discussion it would be desirable to go into other cases, some of which, as from the Third Circuit I can recall one, the last count I made, actually have been cited more than this. It seems to me that this properly pushes it a little to one side, which is what I think ought to have been done.

MR. DODGE: Is there any difference between the meaning of the words "a claim entitling the plaintiff to relief" and the words "a cause of action"?

JUDGE CLARK: I think the claim for relief covers the ground of a cause of action, but I hope that there is some difference in the sense that the claim for relief is not limited to all the old views of cause of action. We used that as a more adequate statement of what might have been a limited thing in the old days.

CHAIRMAN MITCHELL: I remember when we had it up at the last meeting, I had been bombarded with reference to this

particular decision which laid stress on it because it was written by a member of this Committee, the Reporter, and I was manfully defending it as not having the meaning that had been ascribed to it.

When I stated what I thought the court was really driving at, in my original draft, I remember Judge Clark agreed with me thoroughly that that was exactly what the court meant and nothing more.

Since I have been the target of so many letters throwing that opinion in my face, I may be exaggerating the importance of making any explanation. I am satisfied to let it go to the Court as it is.

JUDGE DRIVER: I think one thing which was in back of this or had something to do with this whole controversy is that in the Western code states which make up the Ninth Circuit there hasn't been the difficulty under the code system of pleadings in the courts in Washington, California, and Montana, about the cause of action and facts as distinguished from conclusions of law, which they had in some of the Eastern jurisdictions. Those lawyers who worked with the cause of action, with facts in their pleadings, in the state courts, cannot see any reason in the world why we should not use it in the rule. They do not have in mind the difficulty and confusion which resulted in some of the jurisdictions over definition of those terms.

DEAN MORGAN: If they construed it the way the trial courts did in Minnesota, it wouldn't make any difference at all.

CHAIRMAN MITCHELL: It is Tweedledum and Tweedledee.

DEAN MORGAN: When Judge Bell was on the district bench, a fellow had a complaint on paper this size (indicating) about three pages single-spaced, and he wanted $50,000. Judge Bell went through it and said he tried to state five or six causes of action but there was a statement in there which showed that the defendant had interfered with the plaintiff's tools, and under the statute that was a cause of action and he overruled the demurrer. I suppose the fellow could have gotten $1.50 in damages, or something of that sort.

JUDGE CLARK: I hope we don't gild the lily any more. This is good. I don't want to go into any defenses of my life more than I have to. This takes care of me.

If you once got me started, I don't know, really. It would be a lengthy thing if I have to defend myself.

CHAIRMAN MITCHELL: I think the note has been generally read and the reaction evidently has been good. So why bother with it.

JUDGE CLARK: I would say that I think there is a misprint in our reference here. The reference there after the citation of the case says "to which proponents of an amendment to Rule 8(c) have especially referred". That should be 8(a).

CHAIRMAN MITCHELL: We will make that change.

JUDGE DRIVER: That should be corrected.

JUDGE CLARK: That should be Rule 8(a) instead of Rule 8(c).

That brings us down to Rule 14(a). Professor Wright?

PROFESSOR WRIGHT: There is one thing that I think may be of some importance in the recent letters about Rule 14. Generally they are very heavily in favor of the change. In fact, I think "enthusiastic" is a fair term to describe it.

There is repeated expression of concern, as some people have already brought up and discussed in the summary, about whether there should be a limit on the time in which you can implead, something to which I know Judge Clark will address himself.

One thing which is new, which no one has mentioned before, is from the Law Committee of the Michigan Railroad Association. They say this is a good amendment but doesn't go far enough. They say they have the experience there with judges who are very unsympathetic to impleader, who will do their best to try to discourage it, particularly in a situation which Professor Moore in his treatise calls the obvious case for impleader, where the third party has a contract to indemnify the original defendant.

They apparently have come across some judges who do not like to have impleader in that case. So they are

worried about the fact that our language towards the end of Rule 14, in lines 33 to 38, says that "Any party may move for severance, separate trial, or dismissal of the third-party claim".

It is a point I have wondered about a bit and discussed in my Vanderbilt article. The point is what we mean when we say any party can do this. Just how does the plaintiff move for dismissal of a third-party claim? Does this give a broad power to the court merely to throw out the third-party claim on the instance of the plaintiff? What rule does he proceed under if he is going to move for dismissal?

The Michigan Railroad Association would like to have it restricted so that the court is not given that plenary power to throw the third-party claim out, and be confined to bringing a separate trial.

MR. DODGE: What has been the effect of this rule on bringing in the defendant's insurance company?

PROFESSOR WRIGHT: I can tell you quite a bit about that, Mr. Dodge. I wrote an article on that question. Every single case in the country, except for two trial court opinions in New York which were later repudiated, has held that the defendant can bring in his insurance company under Rule 14, but only under one circumstance, and that is where the insurance company has refused to defend under the policy. If the insurance company is conducting the defense, of course

the problem doesn't come up; but if the insurance company says, "We are not liable under the policy and we won't defend," the courts have held without exception that the defendant can bring in the insurance company.

MR. DODGE: If the insurance company is denying liability?

PROFESSOR WRIGHT: Yes.

MR. DODGE: Only in that case?

PROFESSOR WRIGHT: Only in that situation.

MR. PRYOR: Is the question which you raised a minute ago whether or not the right to move for dismissal should be limited to the third-party defendant?

PROFESSOR WRIGHT: Yes. In other words, by dismissal here, do we mean the third-party defendant can move to dismiss for failure to state a claim or for improper service, the usual reasons, or do we mean to say that the plaintiff also can move and say, "I don't want him here. There should be a separate trial. I want you to dismiss this claim as between the defendant and the third party." There is some fear that by saying "any party may move for dismissal," we would be allowing the plaintiff to do that.

MR. PRYOR: I would be inclined to limit it to the third-party defendant.

MR. LEMANN: Have there been any abuses or have there been any cases where the plaintiff has moved to dismiss?

DEAN PIRSIG: This is a new proposal which hasn't been in the rule before.

MR. LEMANN: You mean the proposal for motion to dismiss. We had a provision before that you had to show cause.

DEAN PIRSIG: Yes.

MR. LEMANN: Wasn't it sort of implied in the earlier rule that the plaintiff might object or that anybody might object?

CHAIRMAN MITCHELL: It seems to me that it doesn't imply that if the plaintiff makes a motion, it necessarily has to be granted. He has to show good grounds for it. So I think it is all right as it is.

JUDGE CLARK: Let me recount a little what this amendment does. The main thing the amendment does and what it was intended to do was to take away the formalism of applying to the court for an order.

MR. PRYOR: There is no question about that, is there? Everybody approves that, doesn't he?

JUDGE CLARK: Yes, I think that was generally approved. That means that instead of going to the court in the first instance, the objectors then go to the court. So I think the main part which appears right at the beginning ought to be approved.

As Professor Wright says, there have been several suggestions of a fear of delay, and some people have suggested

that we put in "Within a reasonable time" instead of the words here, "At any time after commencement of the action". Frankly, I hope that will not be done because that brings in, I think, a great source of ambiguity without any particular gain.

The fear as expressed is that the defendant may injure the plaintiff by bringing in somebody at a late date and postpone the trial. That does not need to work that way and I don't see any reason why it should. The trial may be entirely separate, and I think that is more a fear than an actuality.

The language "At any time", which we have had, does not seem to have presented this issue, and it would seem too bad to bring in that kind of ambiguity which I think, if it happens at all, will be the kind of thing that the judge can easily take care of.

I should say by and large, too, that almost any time when the claim is offered, it ought to be considered. The court is now considering this matter. If there is a proper claim over which will mean another suit, it should be brought in; and I should say even if it is suggested at the trial, that does not need to postpone the trial at all. If it is suggested at the trial, the judge, instead of saying "Go away and go home," can well say "We will accept that claim and when we get through our present work here between the plaintiff and the defendant, then we will take it up." That is my suggestion on that time

limitation.

On the particular one that is here referred to, as the Chairman suggests, it seems to me this is an authorizing provision. I should not think that this stated that the court must dismiss when there is no real ground for dismissal. This suggests that it is a discretionary matter for the court. I should suppose all this says is that you may present the legal grounds you have and not a statement of mere desire, and so on.

So my own feeling is that the suggested restrictions on this rule ought not to be put in.

Are there any suggestions or comments?

DEAN PIRSIG: You are addressing that to the point which was raised of whether the plaintiff should have the power to move for dismissal of the third-party claim.

JUDGE CLARK: Just a minute. Dean Pirsig has the floor. Go ahead.

DEAN PIRSIG: I am merely raising the point Mr. Lemann raised about whether the plaintiff should have the right. Objection was made that it should be restricted because that was the practice in Michigan, I understand. Under the old rule the motion was addressed to the plaintiff, and I suppose he might have some ground for objecting to a third-party claim. So probably we should leave it as it is. Any party, including the --

MR. DODGE: I should think so.

JUDGE CLARK: Does anyone want to move the approval of the amendment?

MR. PRYOR: I move the approval of Rule 14 as proposed to be amended.

DEAN PIRSIG: I second the motion.

MR. LEMANN: Is there any question here about service? I think I saw that referred to in Mr. Wright's summary on page 16, as to a difference in Minnesota. Ought that to be discussed before we vote on approval of the amendment?

CHAIRMAN MITCHELL: I am wondering, Charlie, if that word "and" ought to be there. It looks as if the court may direct final judgment upon original claim only if there is a motion made by some party for dismissal. Following the semicolon it reads, "and the court may direct a final judgment". You are hooking up the "and" with the first phrase, which deals with the third-party claim.

JUDGE CLARK: I should rather think that is right. In line 35 we should strike out the word "and".

There is a further question which I think we can pass for the moment, and that is as to whether the third-party defendant would serve the papers on the plaintiff, would serve his answer. But let us pass that for the moment and vote on the original motion of approval.

PROFESSOR MOORE: Judge, just a minute. Do you really

need that provision about the reference to Rule 54(b)? You have it here and you have it in 20(b). It seems to me that 54(b) clearly applies in both cases. I should think, if there need be any reference, it should be just a reference in the note.

CHAIRMAN MITCHELL: The notes won't be published in some editions of the rules.

PROFESSOR MOORE: Rule 54(b), though, General, clearly applies here.

CHAIRMAN MITCHELL: I see your point here, but it seems to me the reiteration doesn't do any harm.

JUDGE CLARK: It seems to me desirable to have this in as lending emphasis. I may say, and I will be perfectly frank in so saying, that I would rather have it in 20 than elsewhere; and putting it in 20, it seemed logical also to put it in here. Rule 20 I think helps to make it clear that it was the Committee's hope that this would apply to the question of multiple parties. I shall have something to say about that when we get to 54(b).

If you will look ahead in my comments which reached you this morning, I was discussing a case by the Ninth Circuit panel which has held to the contrary on that question. These provisions of themselves do not change 54(b), but I think they help to emphasize the Committee's general position as to the purpose of 54(b).

I don't want to conceal anything. That is one reason why I like to have them in. The more, the better.

CHAIRMAN MITCHELL: I suggest we adjourn for lunch.

JUDGE CLARK: Do you suppose we could put the motion on this, or do we have some amendments?

All those in favor of adopting the amendments with respect to 14(a) raise their hands. Nine. Everybody, I guess.

All those opposed. None, and it is so voted.

When we come back we have the question of this matter of service of the answer which I will bring up in connection with this rule. We are adjourned until two, or a quarter to two?

CHAIRMAN MITCHELL: What is your pleasure?

MR. LEMANN: Whenever we get through lunch, don't you think? Nobody has any other place to go.

JUDGE CLARK: Not later than two.

... The meeting adjourned at 12:55 o'clock p.m. ...

Dudley
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WEDNESDAY AFTERNOON SESSION

March 9, 1955

The Advisory Committee on Rules for Civil Procedure for the United States District Courts reconvened at 1:55 p.m., William D. Mitchell, Chairman of the Committee, presiding.

JUDGE CLARK: This is a question of detail under Rule 14(a), which we approved just before lunch. This is the question about service of papers of the third-party defendant, whether they go back to the plaintiff or not.

I think I would like to have Professor Wright speak about this because, as you see, I have dragged my feet a little.

PROFESSOR WRIGHT: This point is raised by Professor Joiner. I quote his letter at page 15 of the summary.

CHAIRMAN MITCHELL: Let me get the summary straight.

PROFESSOR WRIGHT: The summary is the 60-page document of mine. Page 15, at the bottom of the page, is Professor Joiner's comment. Then at the top of page 16, I point up some experience we have had in Minnesota under identical rules with the same question.

The question is, What is the status as between the third-party defendant and the original plaintiff? It has at least two important implications. Does the third-party defendant have to serve a copy of his answer on the original plaintiff, and may the third-party defendant serve an interrogatory on the original plaintiff or vice versa?

The rule on the service of papers, Rule 5(a), says you serve them on every person affected thereby, and we never spell out whether the original plaintiff is a person affected by the third-party answer.

The rule on interrogatories, Rule 33, says they can serve written interrogatories on any adverse party, and again there is no authoritative answer whether the original plaintiff and the third-party defendant are adverse parties.

This has caused a good deal of confusion in Minnesota. This is one of the questions which has been most frequently raised by the bar there in our various institutes on the rules, and I think we must resolve that.

I have taken the position in my book on the Minnesota rules that these people are adverse parties and that they do have to serve their papers back and forth so that everybody who is in the lawsuit knows what is happening in the whole lawsuit. We make this less clear by our proposed amendments than it might have been before, because in Form 22, which is the form for bringing in a third party, it used to say you had to serve a copy of your answer on the original plaintiff, and we are now striking that out for reasons that I don't think are connected with the question I have now brought up.

JUDGE CLARK: If you want to look at the form, it is on page 59 of that book. You will see the provision as to the answer is stricken. That is the form as we now have it.

Let me suggest what has been troubling me somewhat about this. Of course I don't particularly oppose this. It might be a desirable thing. But you want to recall a little of the history which has occurred here.

First off, our rule was much broader and provided for the third-party defendant to be in opposition to the plaintiff. We got into a considerable amount of difficulty as to questions of federal jurisdiction, and there was quite a history of confusion. There were various decisions holding that this rule could not extend federal jurisdiction and that therefore --

CHAIRMAN MITCHELL: They had to be citizens of different states.

JUDGE CLARK: Yes, that is it. So in our revision which became effective in 1948 we took out all of that and cut it back to make it definitely a controversy between the original defendant and this new defendant.

Various people have felt that was too bad, and I think myself, as a theoretical matter, that it is too bad. I thought we had to do it because of federal jurisdiction. I think it would be better if you could cover all these things, and that is why I think it would be desirable to have the broader rule that we had originally.

Our rule was a good deal modeled on the provision in admiralty which is far-reaching, more far-reaching than this, but nevertheless in admiralty you don't have these particular

questions of federal jurisdiction or, to put it another way, by premise if it is a maritime matter the federal court has jurisdiction.

By restoring some of these provisions do we again raise these difficulties of jurisdiction we were running into before, or do we suggest that we are doing it? That is, do we promote confusion by so doing? That is a little concern I have about it. I don't want to get back into all that discussion that we had to have there.

CHAIRMAN MITCHELL: As the rule now stands, does the federal rule say there has to be diversity of citizenship between two parties who are opposed to each other?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: You can't interplead or bring a third party in unless there is the requisite diversity of citizenship between him and the man who brings him in?

JUDGE CLARK: That is correct. The defendant brings him in and they have to have diversity.

PROFESSOR WRIGHT: I thought this was considered ancillary and that there was no need for diversity.

MR. LEMANN: That was my understanding, and I thought our amendment in 1948 was solely in connection with the original proposal that the defendant might bring in somebody and say to the plaintiff, "Sue this fellow, not that I have a claim over against him myself, but you sued the wrong man. You sued me.

You should have sued X."

My recollection was that many courts held you couldn't force the plaintiff to sue somebody he didn't want to sue. We made the amendment to remove that. That had some jurisdictional problems incident to it, but I was always under the impression that this was not an interference with the rules of jurisdiction if the third party impleaded happened to be a citizen of the same state. It is like the ancillary receivership claim that I spoke about this morning. Isn't that right, Professor Moore?

PROFESSOR MOORE: That is my understanding.

JUDGE CLARK: I think that is right. I stated it a little incorrectly when I first answered the Chairman.

MR. PRYOR: I may be all wrong, but it seems to me that the approach here is wrong. That is, why should the third party be notified by the defendant that he should serve the plaintiff? Why not just provide that the third-party defendant shall serve upon the plaintiff a copy of his answer.

CHAIRMAN MITCHELL: And all other parties to the case.

MR. PRYOR: Yes. I don't see any reason for providing that he shall be notified to do so-and-so. That is what our form did provide.

JUDGE CLARK: I think that is all right. I certainly raise no question about that.

Let me ask, Mr. Pryor, what would you do as to the other point, interrogatories to the adverse party? May the third-party defendant serve interrogatories on the plaintiff?

MR. PRYOR: I think he ought to have a right to, yes.

DEAN PIRSIG: Shouldn't those questions be treated separately? As I understand third-party procedure, the plaintiff does have a right to interpose a claim against the third-party defendant. If he has that right, he ought to have the papers on which he can base the decision whether he should interpose that or not. Until there is an issue between the plaintiff and the defendant you might not want to permit interrogatories to be interposed by the third-party defendant against the plaintiff or by the plaintiff against the third-party defendant. It seems to me that is a different question from the one I first raised.

In other words, you want the plaintiff to know what is going on in the lawsuit in order to permit him to do what the rules says he can do, that is, interpose a claim against the new party who is now in the action, the third party. If he does not interpose any pleading, then I assume there is no issue between the plaintiff and the third-party defendant, and you might in that case properly say that for purposes of interrogatories they shall not be treated as adverse parties.

PROFESSOR WRIGHT: May I tell the Committee of a situation which some lawyers raised with me in Minnesota which

I think casts doubt on the answer Dean Pirsig just suggests. This is the kind of situation Mr. Dodge asked about this morning. Where an insurance company disclaimed liability and refused to defend, the defendant impleaded the insurance company, and this was held to be proper impleader. Then under our existing rules, both Minnesota and federal, the third party, if it wants to, may plead any defenses which the original defendant has against the original plaintiff. The attorney for the insurance company came to me about this case, where they had some feeling that the original defendant might not make the best defense on the merits that they could make if they were defending for him, and they said, "Can we serve interrogatories on the plaintiff before we serve our third-party answer? We want to see if we can find some good defenses to raise for the original defendant that he himself is not raising, since if we are subsequently held liable by the policy coverage we will be bound by the judgment against the original defendant."

I said they could. I said that under the rules it is possible that the third-party defendant will plead defenses which the original defendant has or it can counterclaim, or the original plaintiff can state a claim against the third party. There are so many possibilities for an issue to develop that I think you should regard them as adverse parties.

MR. PRYOR: Shouldn't this discussion be deferred until we get to interrogatories, and deal right now with this

particular question about whom the third-party defendant should serve papers on? I think he ought to serve papers on all other parties to the action.

MR. LEMANN: There is nothing in the body of the rule now about service, is there?

PROFESSOR WRIGHT: There is nothing in 14 itself. Rule 5(a) governs service.

MR. LEMANN: This point about whom he shall serve the papers on is not governed by this rule. As I got it from a quick reading, the only reason why the point was thought to be confused was because we amended the form, Form 22, on page 59, and in amending it we took out the express language that we previously had in it requiring service. Is that right? I wonder, would it be sufficient if we voted to restore Form 22 to its prior form? Would that cover the situation on this question of service?

JUDGE CLARK: You mean, don't you, Mr. Lemann, that you would change the form only?

MR. LEMANN: Yes. I meant if we changed the form only, would that cover the situation, or should we go further and insert some further language? I should think we ought to change the form if we all feel that these notices should be served. I should think the plaintiff ought to be informed. I should think it quite normal that the third-party defendant would try to defeat the plaintiff's claim. I could hardly

imagine that you could say to him, "You can't defeat the plaintiff's claim. You are just stuck in here and you can't do anything except fight it out with the defendant as to whether you are responsible to him if he is responsible to the plaintiff." I would have thought he was entitled to resist the plaintiff's claim. If so, I would think the plaintiff ought certainly to know all about this third-party defendant.

DEAN PIRSIG: He can do two things, I suppose, and probably normally would do them. First, he can say, "I am under no obligation, as a third-party defendant, to the main defendant," and deny there is insurance or a contract of indemnity. The plaintiff has no concern with that issue.

Then he has the further right, assuming that he is liable, of asserting the defenses that the defendant himself might assert. In that second case the plaintiff obviously is very much concerned with those issues.

JUDGE CLARK: When you look back at Rule 5(a) on the service of pleadings generally, you will see that the papers must be served upon "each of the parties affected thereby". Is the plaintiff affected?

MR. PRYOR: Rule 14 is entitled "Third-Party Practice," and I should think it would be entirely proper to put in there and I think it would clarify the whole situation as far as the obligation of the third-party defendant is concerned, to put in there a provision that the third-party defendant shall

serve a copy of his answer on all the other parties in the case.

JUDGE CLARK: Would you limit that, Mr. Pryor, to this rule, Rule 14(a), or would you want to change Rule 5(a)?

MR. PRYOR: I wouldn't change 5(a).

PROFESSOR MOORE: Mr. Pryor, if you put that in, shouldn't the third-party plaintiff, who is the original defendant, have to serve the third-party complaint on the plaintiff? He ought to let the plaintiff know that he is third-partying a defendant in.

MR. PRYOR: Perhaps so.

CHAIRMAN MITCHELL: Why not? The phrase "parties affected thereby" is the weakness of that rule. It ought to be the other parties, whether there is a showing that they are affected or not.

MR. PRYOR: If you had the requirement that they have to move in order to bring in a third party, everybody who was a party to the case would be apprised of the situation. That is what you have in mind.

PROFESSOR MOORE: Yes.

JUDGE CLARK: How would it do to go back to 5(a) and provide there that the papers shall be served upon all parties to the action.

CHAIRMAN MITCHELL: Strike out "affected thereby"?

JUDGE CLARK: Yes.

DEAN PIRSIG: That goes much beyond the third-party

procedure.

JUDGE CLARK: It might, yes, potentially at least.

MR. PRYOR: That is all right, if you want to put it in 5(a). That would be sufficient, I think.

JUDGE CLARK: What kind of paper under 5(a) would you not want to serve on all parties to the action?

MR. LEMANN: The argument would be that 5(a) is enough now. If you got away from the contrary implication which arises from our amendment to Form 22, I think you might argue that 5(a) now covers it and requires that service.

JUDGE CLARK: I take it that is what Professor Wright and others have argued in Minnesota.

PROFESSOR WRIGHT: Yes. It would not cover Mr. Moore's point, though.

MR. LEMANN: But the amendment to Form 22 that we propose I think leaves that argument in doubt, and we ought to eliminate that. The only question would be whether, if we amend Form 22, we have not done enough without being called upon to do more.

I have the general feeling if we can avoid bringing in more amendments now to rules that we were not amending before, that would be the preferable practice. Otherwise, we may wind up with a number of other amendments as we go along. Generally speaking, I would prefer not to have them, unless they are very important.

JUDGE CLARK: Would you then think it would be enough, without touching either 5 or 14(a), and looking now at our summons on page 59 of the green book, Form 22, to restore the second and third lines, which are stricken, and nothing more? That would leave the second striking out as is. The second striking out is down in lines 7 and 8.

PROFESSOR MOORE: I don't get that, Judge. What is to be done?

JUDGE CLARK: Then you would have to serve the answer to the third-party complaint upon the plaintiff's attorney and upon the defendant, that is, the third-party plaintiff. It would not under that suggestion go back and require that you serve separately in answer to the complaint.

MR. LEMANN: Is there any necessity that he answer the complaint?

JUDGE CLARK: I shouldn't think so, no.

MR. LEMANN: If he wants to raise any issues, I suppose he would raise them in his answer to the third-party plaintiff, to the defendant. That would be the answer that he would be called upon to serve in line 5. We would leave that in. It is in there now, except that we made the trouble by taking out plaintiff's attorney on this point in the second line.

DEAN PIRSIG: It is a little awkward. The third-party complaint would be alleging only the basis of the claim

against the third party for indemnity or contribution. The third party would want to answer that issue.

MR. LEMANN: Yes. That I think we would require and should require.

DEAN PIRSIG: He may also want to raise defenses against the claim which appears in the plaintiff's complaint, which would be clearer if he directed those defenses to that complaint rather than to the complaint of the third-party plaintiff.

MR. LEMANN: Wouldn't he raise them by his answer to the third-party complaint?

DEAN PIRSIG: It could be done that way.

MR. LEMANN: I should think that would be the normal way he would do it, whereas if we leave in the language in the 7th or 8th line, it would mean he would always have to answer the complaint. He would have to draw two answers, one answer to the third-party complaint and another answer to the original complaint. Why make him do that? If he wants to raise any issue about the plaintiff's rights, I should think he could do it under his answer to the third-party complaint.

PROFESSOR MOORE: I wouldn't think so, Mr. Lemann --

MR. LEMANN: You wouldn't think so?

PROFESSOR MOORE: -- in drawing up your answer denying certain paragraphs of the third-party plaintiff's complaint. If the third-party defendant is going to answer the

plaintiff's complaint, it seems to me mechanically it is much clearer if he also serves an answer.

MR. LEMANN: Do you think he ought to be required to serve one?

PROFESSOR MOORE: Not unless he wants to answer.

MR. LEMANN: If you leave in these words, he has to do it. We are talking about the language which is in the form now. The question is whether we should withdraw it, because that is mandatory.

You can put in "If you so desire, you may answer the complaint."

PROFESSOR MOORE: I agree with you on that.

JUDGE CLARK: That is all right in the form.

MR. LEMANN: No. It would be if we restored the form to the way it was before we were tinkering with it.

JUDGE CLARK: Look at the last sentence of the form.

MR. LEMANN: We are adding that now. It wasn't in the original. We threw that in to take the place of what was taken out.

JUDGE CLARK: That is right.

MR. LEMANN: If we are going to leave that in, we should say, "in which event you must serve a copy of your answer on the plaintiff." if we want to make it fairly complete. As long as we have some other things above, might it not be a better way to handle it by restoring the language in the middle

of this form and then adding, "If you so desire you may answer the complaint of the plaintiff, a copy of which is served upon you." Then take out the last sentence which is in italics.

CHAIRMAN MITCHELL: Would we accomplish the right result by providing that he shall serve on the original plaintiff a copy of any paper that he must serve on the defendant, and that he may serve an answer to the plaintiff's complaint?

MR. LEMANN: And if he desires to file an answer to the complaint, a copy of which is served upon him, such answer -- you see, the way it is drawn, the new sentence in there doesn't say he must do it in 20 days, although you have 20 days above in the body of the rule as to the other, which is not very artistic. I am quite sure he would have to do it in 20 days, but it is not very well gotten up.

Can't we leave this, Mr. Mitchell, perhaps to be disposed of by the Reporter and his assistant, with a motion that it is our sense that the third-party defendant has the option to file an answer to the plaintiff's complaint and that if he does file such answer, he must serve it within the same period as he must file and serve his answer to the third-party complaint.

CHAIRMAN MITCHELL: You mean instruct the Reporter to draw a rule that anything he is now required to serve upon the defendant he must serve on the plaintiff; and he may also,

if he desires, serve an answer to the original complaint?

MR. LEMANN: If he wants to do it.

CHAIRMAN MITCHELL: That is the thing you are trying to bring about, is it not?

MR. LEMANN: Yes. If he desires to serve an answer to the original complaint, he must serve that on the plaintiff.

CHAIRMAN MITCHELL: On all parties to the action.

MR. LEMANN: Yes, as provided by Rule 5, a reference to which you might throw in.

CHAIRMAN MITCHELL: If you understand that, Charlie.

JUDGE CLARK: Yes. I want to bring up one or two things to make it clear.

Under that we will then not touch either Rule 5(a) or Rule 14(a) directly on these points. That is your idea, isn't it?

MR. LEMANN: Yes.

MR. DODGE: That leaves it optional.

MR. LEMANN: The idea would be to handle it in the form and to put in the form a reference to 5(a), if you wish. I would not tinker with 5(a), myself.

JUDGE CLARK: That does not do one thing that Professor Moore suggested. That as yet shows no requirement on the original defendant, becoming a third-party plaintiff, to serve his complaint on the plaintiff. Maybe that isn't too necessary, because I think by the time the third-party defendant

has heard from him, the plaintiff would know about it, but that does not in terms as yet cover that.

MR. LEMANN: I see that.

MR. DODGE: Why should not the third-party defendant always serve his pleadings upon the plaintiff? The plaintiff has a right to assert claims against the new defendant.

JUDGE CLARK: It may be, and apparently some cases so construe that, that is, construing the persons affected under Rule 5(a), who have to be served with papers, as including the plaintiff. But that is not absolutely clear, you see. Should we put in some provision to make that clear?

MR. LEMANN: In 14(a), yes.

MR. DODGE: Why not simply provide that he shall always serve his answer on the plaintiff? The plaintiff is interested in it.

MR. LEMANN: We are talking about the third-party complaint.

MR. DODGE: The third-party complaint ought to be served on him.

MR. LEMANN: I think we all agree, yes. It is just a question of how and where we should put in the requirement.

PROFESSOR MOORE: I hate to see us keep amending different rules, because I do not want to hand up a report with too many amendments. But aside from that, I think technically it would be better if we went back and amended

Rule 5, among other things, "similar paper shall be served on each of the parties," and strike out "affected thereby", which was General Mitchell's point.

MR. LEMANN: I think it is arguable. It is just a question of policy. There is some advantage, Bill, in having this in 14(a), which is the rule that people are going to look at.

CHAIRMAN MITCHELL: They don't look at these forms all the time.

MR. LEMANN: No. They will look at Rule 14(a) more than an amendment to 5(a).

Of course, we could put a note in 5(a) to cover the amendments to 14(a). It isn't very important whether you put it in 5(a) or 14(a). It is a matter of taste.

CHAIRMAN MITCHELL: The important thing is whether our instructions to the Reporter cover the ground that you want to cover and that he understands it.

MR. LEMANN: That is right. It may be we should vote whether to put it in 5(a) or 14(a). It ought to be in one or the other.

PROFESSOR MOORE: As long as we are amending 14, why couldn't we add a sentence and cover this matter of service.

MR. LEMANN: In 14?

PROFESSOR MOORE: Perhaps just another sentence at the

end of 14(a).

MR. LEMANN: Yes, that would be my idea. Put another sentence in 14(a) and leave 5(a) alone.

CHAIRMAN MITCHELL: And you can state in the note to 5(a): "As to persons affected thereby see Rule 14."

MR. LEMANN: Persons affected thereby will include all persons who are covered by Rule 14 or who may assert rights under Rule 14. I would construe "affected thereby" to mean that, anyhow, especially if you put a sentence in 14(a) as Professor Moore suggests. I don't think we would have to add anything to Rule 5(a), do you?

PROFESSOR MOORE: No.

CHAIRMAN MITCHELL: Charlie, do you understand what is wanted?

JUDGE CLARK: I think so, but I want to bring it up specifically so as to make it clear.

I take it now that the suggestion would be to add in Rule 14(a) in line 42 something like this: "The third-party complaint and the third-party answer shall be served upon the plaintiff." Does that do it? How about it, Mr. Lemann?

MR. LEMANN: Will you read that again?

JUDGE CLARK: At the very end of Rule 14(a) in line 42 add: "The third-party complaint and the third-party answer shall be served upon the plaintiff."

MR. LEMANN: I think it could be expanded a little more; that it has to be served on other people, too.

JUDGE CLARK: Here is another alternative: "All pleadings pursuant to this rule shall be served upon all parties to the action."

MR. PRYOR: That is better.

PROFESSOR MOORE: Or "All pleadings, motions, and other papers in the action shall be served on all parties to the action."

JUDGE CLARK: That is all right, only that seems to be a good deal.

MR. LEMANN: How about this: "The provisions of Rule 5(a) shall apply as to all pleadings, motions, and other papers filed under this rule."

MR. DODGE: There you have the question of whether they are parties affected thereby.

MR. LEMANN: No, I am getting over that by expressly saying that 5(a) shall apply.

MR. DODGE: Rule 5(a) applies, but it applies only insofar as they are parties affected thereby.

CHAIRMAN MITCHELL: We can strike that out.

MR. LEMANN: That would be extending it, I should think.

MR. PRYOR: You are saying the parties affected by Rule 14(a).

MR. DODGE: Why not say so directly, that they shall be served on all parties?

JUDGE CLARK: Isn't the better way to go back to 5(a) and strike out the "affected thereby"?

MR. LEMANN: It may be.

JUDGE CLARK: Do you so move, or do you move something?

CHAIRMAN MITCHELL: What you want is that the rule shall make clear that all pleadings shall be served on all parties to the action.

MR. DODGE: I should think that was the best way to do it.

MR. LEMANN: We can make sure by both amending 5(a) to substitute the words "parties to the action" and by adding to 14(a) that "The provisions of Rule 5(a) shall apply as to all pleadings and papers required pursuant to this Rule 14(a)."

CHAIRMAN MITCHELL: That would apply to a summary judgment motion, wouldn't it?

MR. LEMANN: We could repeat the reference to that.

JUDGE CLARK: Why wouldn't it be better if you did it in 5(a)? You could put a footnote that 5(a) covers it or you could put it in a note to the form that 5(a) requires service.

CHAIRMAN MITCHELL: You are departing from our objective. You are now discussing the terminology which you are

going to add. We were trying to pass the buck to you on that by stating the result which we wanted and let you decide what rule it should be in and how.

Can't you state, Monte, what the result is which you want?

MR. LEMANN: I thought we had stated that.

CHAIRMAN MITCHELL: I don't know. Maybe we have, but we have been involved in discussions about particular rules.

MR. LEMANN: The Committee is of the view that it should be made plain that all papers, including judgments, pleadings, et cetera, which may be filed pursuant to the provisions of Rule 14(a), shall be served upon all parties to the action, and if to accomplish that result it is deemed advisable to amend Rule 5(a) to take out the words "affected thereby" and substitute "all parties to the action", so be it.

Is that plain?

JUDGE CLARK: That is all right. I am perfectly willing to accept it. Unless I get a new brainstorm, I should think the way to do it as at present advised would be to change 5(a) as indicated by substituting for the words "affected thereby" the words "to the action", and then to make no further change in 14(a) and to make a change in our projected form in this fashion: Restore the part stricken in lines 2 and 3, leave the part stricken as still stricken in lines 7 and 8, and leave in the italics at the end.

I think that will do it.

CHAIRMAN MITCHELL: You might want some addition to your note somewhere, might you not?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: All right. Do you understand that?

MR. LEMANN: In that form, if you leave in that last sentence, I think you ought to expand it a little bit so as to say when he must do it and that he must serve it.

MR. PRYOR: I hate to make any more suggestions, but I have one in mind: Leaving in the "affected thereby" in Rule 5(a) and inserting following that "and parties to third-party practice pursuant to Rule 14", or "third-party procedure".

MR. LEMANN: If we were going to amend 5(a) as we would have to do under your suggestion, I think it would be worth while to change "affected thereby" to "all parties to the action", and then say "including all parties to third-party procedure pursuant to 14(a)". Even a dumbbell ought to be able to understand that.

CHAIRMAN MITCHELL: I think the Reporter ought to be left free to change any rule or any note or to add anything to any rule or any note that carries out your purpose, whatever your purpose is.

MR. LEMANN: That is right.

CHAIRMAN MITCHELL: If you state your purpose, he will

do the rest.

JUDGE CLARK: I take it there is no dissent in the Committee from --

MR. TOLMAN: I am a little bit worried about taking out "affected thereby". I wish you to consider that. I think we may be doing more than we intend to do there, because that rule applies to the service of all papers in all kinds of actions. I remember that we put those words in originally with a good deal of thought. I can not think of any specific situation where it might cause trouble except perhaps in class actions.

MR. LEMANN: Why not have the Reporter examine the transcript of the discussion on 5(a) and see if it suggests any reason why we might get in trouble. He can look at the original discussion.

MR. TOLMAN: That is all I intended to do, Mr. Lemann, to put a caveat that I think we ought to be careful about it.

MR. LEMANN: That is desirable. My guess is that these clerks now serve everything on everybody.

MR. TOLMAN: I think maybe they do. I am not sure.

MR. LEMANN: Just as a matter of procedure, I think they have a standing rule that everybody in the action gets them.

JUDGE CLARK: All right. Then we will pass to the next rule, which is 15(d). Mr. Wright, we have had some further

comments on 15(d).

DEAN PIRSIG: Mr. Chairman, before we leave the other rule, there was one additional point raised which we have not discussed.

JUDGE CLARK: What was that, Dean Pirsig?

DEAN PIRSIG: The right to interpose interrogatories as between the plaintiff and the third party. We have not gone into that at all. Do you intend to defer that until we come to the interrogatories rule?

MR. PRYOR: Rule 33.

JUDGE CLARK: We might as well talk about that, at any rate. I was thinking if we changed 5(a), it would cover that. Possibly it won't.

MR. LEMANN: Look at Rule 33. "Any party may serve upon any adverse party written interrogatories". When the third-party defendant comes in, isn't the plaintiff an adverse party? If he wants to interrogate him, he would be an adverse party. I should think the language now appearing in Rule 33 would cover that, would it not?

PROFESSOR WRIGHT: The cases have been divided, but there are not very many of them. There have been cases both ways whether or not the original plaintiff is an adverse party for purposes of interrogatories, but only a small handful of cases either way actually.

DEAN PIRSIG: There is one other situation where I

presume it comes up, and that is on the right to cross-examine an adverse party. Has it come up in the cases at all in that connection?

PROFESSOR WRIGHT: I don't know.

DEAN PIRSIG: Those are the only two instances where I can see that there might be some doubt.

JUDGE CLARK: You can be thinking that over some more, but at present there is no motion that we want to make a further change.

MR. LEMANN: Let's flag it right now. It will be in the transcript. When we come to Rule 33 we may take a look at that handful of cases. I am one of those who believe we cannot protect all the judges against all errors.

JUDGE CLARK: All right, 15(d).

JUDGE DRIVER: You wouldn't want to do that. You would have to abolish the appellate courts.

JUDGE CLARK: Rule 15(d).

PROFESSOR WRIGHT: The additional comments we have received have been very heavily favorable. I think there is only one new argument which I will mention. We have had some 10 more favorable comments on the amendment and two critical comments.

The one argument that had not been mentioned before, which is raised by the committee of the lawyers of Topeka, Kansas, is that they believe the amendment is objectionable

because, they say, a person could file a supplemental pleading after the statute of limitations had run as to the acts that he sets out in the supplemental pleading, and this would be good because it relates back.

It seems to me this criticism is erroneous in a number of particulars. In fact, we anticipated it in the note to the amendment where we stated what I should think would be the law, that the supplemental complaint has to be tested on its own merits and would be subject to limitations of the statute of limitations as to it.

MR. PRYOR: It doesn't relate back.

PROFESSOR WRIGHT: No. Only an amended complaint relates back.

MR. PRYOR: What about the situation where the original complaint is defective in its statement of a claim for relief, and then a supplemental pleading sets up a claim for relief but it is one over which the court would not have jurisdiction? Does the court have jurisdiction of the case then? Suppose there isn't a sufficient amount in controversy raised by the supplemental pleading?

JUDGE CLARK: I don't know that I have in mind the case that you have. What would be the case?

MR. PRYOR: Suppose the original complaint is defective for failing to state a cause or ground for relief, would the court have jurisdiction because of diversity of citizenship

and the amount claimed? A supplemental pleading is filed which is good in stating a proper claim for relief but there is not a sufficient amount in controversy to give the court jurisdiction. Does the court lose jurisdiction of the case? That is the question I have.

JUDGE CLARK: I am not quite sure that I can see an issue where that would come up. If there is anything in the original complaint, that is, if there was an assertion of jurisdiction then, of course it still carries over. The supplemental complaint is not a substitute. It is an addition. If the supplemental complaint supplies defects of jurisdiction, that is always permissible now.

I don't believe I can visualize quite how the problem is going to come up as affecting this. I presume possibly you might take a situation where there was not diversity of citizenship originally and there may be diversity of citizenship now.

DEAN MORGAN: That is where you might have it, if a person moved to another state in the meantime.

MR. PRYOR: I was going to raise that question, too.

JUDGE CLARK: On that I don't know. I should think it desirable there that we uphold it, because this is to try to do away with the formalism of starting the suit again. In your situation that is what is required by your premise.

I should say that the answer ought to be, yes, it

is all right there. I put it a little subjunctively because I am not sure that our amendment would necessarily convince all courts. Some courts might say that it does not supply that type of jurisdiction, but I should think it ought to be held that it did.

DEAN MORGAN: I gather from one of the letters that the person had in mind that when you brought your action without diversity of citizenship you had tolled the statute of limitations, and in the meantime the statute had run and then you wanted to amend so as to get jurisdiction. If you did that, you would be beating the statute of limitations by having it relate back.

I had difficulty at first seeing why anybody was talking about a statute of limitations in something which had happened after the event, after your pleading, unless you were going to wait five or six years in order to move to amend. But I can see this other thing. I think it takes some imagination to imagine a court allowing a supplemental pleading in a case of that kind.

CHAIRMAN MITCHELL: If the suit is brought in federal court with the proper diversity of citizenship and then during the pendency of the case the defendant moves to another state, it divests the court of jurisdiction. My point is that it doesn't test what the citizenship was when the suit was brought. Can a man evade jurisdiction or change it by moving after the

suit is brought?

DEAN MORGAN: It is partly that, yes.

CHAIRMAN MITCHELL: Can he do that?

DEAN MORGAN: I don't suppose he can evade jurisdiction, but could he supply jurisdiction, because if you don't allow this suit to continue, all it will mean is that, if he wants, he can dismiss and then bring another action, because if the suit is out for lack of jurisdiction, it is not going to be res judicata except on the jurisdictional point. So he can just withdraw and then start an action over again after the defendant had got into the other state.

CHAIRMAN MITCHELL: That is my point. The defendant cannot alter the existing jurisdiction by moving, can he?

DEAN MORGAN: He couldn't ordinarily do it, I am sure of that.

CHAIRMAN MITCHELL: Then what are we talking about?

DEAN MORGAN: Under supplemental pleadings generally you don't have the question of jurisdiction. If the court is going to hold that the pleading was absolutely no good for lack of jurisdiction, that might be true, but if he stated a perfectly good cause of action and all he has done is to omit the allegation of diversity of citizenship, cases have gone up to the Supreme Court where there was nothing in the record to show diversity of citizenship, and both parties tried it out. Then the question was whether the judgment was

absolutely void for lack of subject matter, and the Supreme Court of the United States has held two or three times that it is not void; that although the district court of the United States is a court of limited jurisdiction, still it is not as limited as the judtices of the peace or anything of that sort, and consequently the only way you could get after that judgment would be by a direct attack. You could not say that it was absolutely void.

MR. LEMANN: I thought the only point in this amendment, as I read the note to it originally and followed the discussion, was that the courts were drawing a distinction based solely upon whether the original petition stated a cause of action. If it stated a cause of action but it was defective in its jurisdictional allegation, you could amend it because it stated a cause of action. You could amend your hold on jurisdiction and amend your hold on other points, provided there was enough to show a cause of action to begin with. But if it failed to show a cause of action, then you were sunk and you would have to start all over again; and if you started all over again, maybe the statute has run meanwhile in a state where the filing of the original suit didn't interrupt it.

We don't undertake to discuss the consequences of a supplemental complaint.

DEAN MORGAN: That isn't a supplemental pleading you are thinking about. That is an amended pleading.

MR. LEMANN: Reading now an old note here, the whole raison d'etre for this change is the distinction between a supplemental pleading and an amended pleading since an amendment to cure a defective complaint is, of course, accepted practice.

DEAN MORGAN: Sure.

MR. LEMANN: Then reading the first part, I ask, what is the difference between a supplemental pleading and an amended pleading? Then I see at the beginning of the note the statement that this is a gloss on the original rule to the effect that a supplemental complaint is proper only where there is a complaint which states a claim on which relief can be granted.

JUDGE CLARK: I thought myself what Mr. Lemann was stating was just what we were doing. That is why, when I got a chance, which I hope I have in a moment, I was going to say I don't see how any of these questions really do come up under this.

The suggested addition is whether or not the original pleading is defective in a statement of a claim for relief. We are not here touching matters of jurisdiction at all. Matters of jurisdiction are covered otherwise, as we know.

For example, there is an existing rule that you can make such amendments or corrections to state the jurisdiction which exists. If you visualize a case where at the time of the original complaint there was no jurisdiction for some solid ground of lack of federal jurisdiction, and there has been

jurisdiction acquired later on, as, for example, a change in the citizenship, I don't take it that this would hit that.

DEAN MORGAN: Why not?

JUDGE CLARK: Perhaps it should, but I don't take it that it would.

DEAN MORGAN: I know, but suppose you used a motion to dismiss on the ground the complaint didn't state a claim for relief and you showed lack of jurisdiction, they would throw it out, wouldn't they, on that demurrer or on the substitute for a demurrer?

JUDGE CLARK: You are raising the question that the court had no jurisdiction.

DEAN MORGAN: Exactly.

JUDGE CLARK: The court still has no jurisdiction so far as this is concerned.

DEAN MORGAN: Certainly I could amend under the ordinary cases, but if, as you suggest, there is a change of citizenship afterward, that would be supplemental. It would not be an amended pleading; it would be a supplemental pleading.

It seems to me that you fail to state a claim for relief in a federal court if you don't state the jurisdictional point.

DEAN PIRSIG: Doesn't Rule 12(e) break those two objections up into different grounds? This is in terms of failure to state a claim. That is a different objection than

want of jurisdiction. I understood this applied only to failure to state a claim. If the needed fact occurred before the action commenced, you proceeded by amendment, and that could be done under the present rules. If the needed fact occurred after the action was commenced, you could not have that, according to some of these decisions, if your complaint failed to state a cause of action in the beginning.

This is designed merely to conform a supplemental pleading to the amended pleading.

MR. LEMANN: The jurisdictional point would be no more a precedent in one than in the other.

JUDGE CLARK: As I understood it, I agree with Dean Pirsig and Mr. Lemann on that.

MR. PRYOR: I may say the only reason I raised this question was because it was suggested by the Iowa committee.

DEAN MORGAN: I think our position on this is clear. Any of the arguments against it seemed to me to be perfectly silly.

PROFESSOR MOORE: I think the idea is good, but I wonder how necessary it is. I wonder whether we ought to try to cure every ill-considered decision.

DEAN MORGAN: It costs a lot of money to go to the Supreme Court.

MR. LEMANN: I don't think you made this point as much as I did when we discussed it before, Bill, but now we

have put it out, I should think it would be a little bit difficult now to come back and say, "We have not heard much objection to it, but we think we will withdraw it." It seems to me the day is past to do that.

I took the view -- and I think Mr. Mitchell took the same view you expressed on many of these amendments -- that we cannot keep the courts from making every possible mistake. They are going to keep on making mistakes. They are going to make some mistakes under our amendments.

Having gone so far as to throw this out, I hardly see how we can now very consistently say we think we should not have suggested it to begin with.

JUDGE CLARK: It does seem to me that we ought not to state any hard and fast rule that you cannot make any amendments until we are quite sure the situation has reached the crisis stage. It seems to me, as I tried to say in some material on the general idea of rule-making which I sent to you a couple of weeks ago, that the proper function of a rule-making committee is to attempt to give certain directions to keep the pleading going along proper lines.

Of course, I admit and have never denied that this is a question of degree. I don't think every year we should make every change that we can think of, but it does seem to me that we ought to make some corrective changes which we can make.

Here is a case which it did seem to me was important

enough to make a change when we were considering it before. I think I am right that every case which has that long discussion, which really isolates the matter and discusses it, has gone the wrong way. There are certain other cases which have more or less accepted the opposite view, possibly merely because they didn't dream there was any question, and perhaps they are all the stronger for it.

It is the same thing I have stated so often about pleading, it is the squawking duck who makes the noise here, of course. Two or three quiet decisions which are all right are never talked about, whereas the others set the thing right up and they are quoted, and there you have it.

Here it seems to me, as I originally suggested, it was desirable to make this somewhat simple change, as I view it. Now it seems to me to have become yet more desirable because (a) we have very good, substantial professional support. I might say that in this long document of the Department of Justice they support it. They say it "is a desirable change that adopts the prevailing and better-reasoned interpretation of the rule as originally written."

If we now take it all back in the light of this considerable support, then what is the situation? I should think it could be thought all the more that this has then failed because the opposite, restrictive view was the correct one. This seems to me a desirable change to make.

MR. PRYOR: I move the approval of the amendment.

DEAN MORGAN: I second it.

PROFESSOR MOORE: Just a minute, if you please.

MR. DODGE: May I ask a question before the vote?

JUDGE CLARK: Let me get these things straight. We have a motion to approve by Mr. Pryor, seconded by Mr. Morgan.

Mr. Moore, did you make an amendment, or what was it? I didn't hear what you said.

PROFESSOR MOORE: I just wanted to ask Mr. Pryor if he would be willing to accept after the words "statement of claim for relief" the words "or defense."

JUDGE CLARK: I think that should go in.

MR. PRYOR: Yes.

JUDGE CLARK: That is in my comment. I was going to bring that up. I think that certainly should go in. I think everybody would suppose that was in, anyway. I see no reason why we should not put it in directly.

MR. DODGE: To what extent is a supplemental answer necessary to set up facts occurring after the filing of a suit?

JUDGE CLARK: Was your question when would it be necessary?

MR. DODGE: In what circumstances is it necessary to file a supplemental answer?

JUDGE CLARK: I must confess it is very difficult for me to think of any, practically. I suppose theoretically

it might happen.

DEAN MORGAN: Suppose the time for an injunction has gone by.

JUDGE CLARK: It could be something of that kind.

DEAN MORGAN: There are cases of that kind.

JUDGE CLARK: I think it is theoretically possible, yes.

DEAN MORGAN: The Department of Justice asked or the Judge Advocate General in the Department of Defense asked that the case be put off because it involved rights to patents, and so forth. The plaintiff had asked for damages and an injunction, and the case couldn't be heard until after the patent had expired.

MR. DODGE: That could be put up in the answer.

DEAN MORGAN: In a supplemental answer, surely.

MR. DODGE: In an old equity case you can ask for an injunction.

DEAN MORGAN: That is done quite often.

JUDGE CLARK: I suppose it would be understood, but I think it is just as well to have it clear. You might have a case which was becoming moot, for example, or certain other things, some sort of estoppel in pais having developed.

MR. DODGE: Amendment of the answer would do in those cases. However, it is all right to put it in.

JUDGE CLARK: You have heard the motion. All those

in favor raise their hands. Those opposed. Nine to nothing in favor.

MR. LEMANN: May I go back to ask you something about the preceding rule about third-party practice? I see in Mr. Wright's digest that the point was made that there ought to be some time prescribed for the filing of these third party complaints.

JUDGE CLARK: I brought that up and I thought we covered it. Mr. Wright and others raised the question. I spoke against it, you remember.

MR. LEMANN: Did we vote on it?

JUDGE CLARK: I don't think we should put in any such ambiguous phrase as "within a reasonable time". I think this has caused no real difficulty, and there is no reason in the rules that it should cause difficulty, because the third-party issue can so easily be separately tried. To put in that sort of ambiguity I think is unfortunate.

JUDGE DRIVER: I suppose the objection is that the third party might be brought in too late and it might cause a delay in the main trial. The trial judge has complete control of that situation.

I had a case within the past six months where a third party was brought in, and I said, "All right, I am going to go ahead and try the main action separately, and then afterward we will try the issue as it applies to the third party."

The case was never tried because they settled it, but that is the way I handled the situation, as it can be by any trial judge.

JUDGE CLARK: Is there anything more, Monte? Does that call for more discussion, or shall we pass on?

All right, now we come to Rule 16, the pre-trial rule. We have there two amendments. One deals with the question of listing the names of witnesses, and that also is involved in a different way under Rule 33. Do you want to consider that now, or then, or separately?

MR. PRYOR: Let's consider them together, I would suggest.

JUDGE DRIVER: I should think that they should be considered in connection with the consideration of Rule 33, because I think you have a stronger case for putting it in 16 than you have in 33. Rule 33 comes so early that there is legitimate objection to being required to disclose the names of witnesses. It could be considered almost immediately after the case is instituted.

JUDGE CLARK: Then if there is no objection, we will postpone the consideration of the proposed amendment to Rule 16(4) until we consider the whole question of Rule 33.

Rule 16(6) was the provision as to control of the so-called "big case," which is most often the antitrust case. The other possible example is more likely to be a stockholders'

derivative suit.

CHAIRMAN MITCHELL: Which rule is this, Charlie?

JUDGE CLARK: Rule 16, subdivision (6) under it:

"Where protracted litigation of an action is probable, the assignment of the action to a designated judge", and so forth.

This, you may recall, came up first in a suggestion from the Prettyman Committee of the Judicial Conference which issued a long discussion of the trial of the "big case," a long continued action. The substance of this idea is now approved very much by that committee and also by Judge Murrah's pre-trial committee. In fact, the whole idea is approved, and the main question, as I see it, comes to be whether or not this is the proper place.

Several, including Leland of our Committee, have raised the question which we considered before, as to whether this was appropriate for it or not. I do think myself that it is quite all right here, and I should like, if I might, to explain a little why I think so.

Perhaps the main reason is that there is no other place that strikes me as appropriate.

To make clear what I should think was already understood, we might put in the words that I suggested here, "unless the action has already been so assigned" the court may consider the assignment.

You want to recall what we all had in mind, the Prettyman Committee as well as us. This is more in the way of a hint or authorization rather than a mandate. I think we had no doubt that this was all possible without adding anything. The reason for putting it in was to emphasize what the Prettyman Committee thought was desirable.

Among the main things that the Prettyman Committee wanted was an authority to prohibit ordinary discovery, and that is, of course, an important part of it which we should have in mind. By that I mean that in a case such as the Investment Bankers case in New York the idea is to have, not all the parties serving their notices of discovery as they plead, but the judge directing it all and saying in effect, "This is the way we will have the discovery proceedings run, in this order," and so forth. I take it that the Prettyman Committee considers that very important.

So we are making clear an authority which probably already exists. I am a little worried that if we start drafting a separate rule and put it, say, under rules of calendar practice, and so on, we may make it seem more mandatory than I think any of us have the idea. This is now in a rule of pure discretion, and it seems to me that this is the place where it may serve as a reminder to all, including the judge, if it has not already been done.

Consider for a moment some of the alternatives which

have been suggested. The New York committee of both lawyers and judges are thinking of their local rule under which the chief judge assigns, and they have suggested the formula that we put in the direct provision that the chief judge shall assign. I certainly did not want and I don't think any of us wanted to interfere with that rule, but nevertheless if we make that the rule, what are we going to do with jurisdictions such as Chicago where under their practice every case, whether it is a "big case" or not, automatically goes in rotation to a judge? I understand from Will Shafroth's office that there are quite a few who do that. He has been considering working that up and seeing if that adds to expedition of cases or what is the effect of it.

You see, we don't want to interfere with the local rules, and if they are doing everything already, there is no reason for upsetting it. Therefore, to accomplish those various things, a suggestion of complete authority, a hint where it hasn't already been done, but au contraire, a lack of a definite command. Combining all those three things together, it seems to me this does it admirably, and there is danger if you start doing it elsewhere, as by putting in a provision that the chief judge shall assign them, because that would be telling certain districts to do something which is not their practice.

CHAIRMAN MITCHELL: I had some correspondence with

Prettyman about the question of whether our rules need amendment to carry out the Prettyman idea, and I came to the conclusion -- and I think he concurred in it -- that all that was needed in the rule was something to encourage and fortify a judge in his control of protracted cases when he started to tell lawyers what to do and what not to do, and the place for it was in the pre-trial section.

I still think that way. I examined his report very carefully at the time, and I came to the conclusion that there were not any specific rules or any rules needed to empower a district judge to do what the Prettyman report asked for, but that they ought to be encouraged to do it, and a good many judges would be afraid to do it unless they had some encouragement in the rules, and the pre-trial rule is a good place to stick it in.

Nobody has yet pointed out to me anything in the Prettyman report which said that under the rules as they exist the judge could not do it if he wanted to, but some judges need a little encouragement.

MR. LEMANN: This is in the nature of a pious admonition.

CHAIRMAN MITCHELL: Yes. It helps.

MR. DODGE: This isn't a matter that the pre-trial judge would ordinarily determine.

MR. PRYOR: Who is going to make the assignment where

there is only one judge?

JUDGE CLARK: Then you don't have to make assignment. There is nothing about this that you have to do, you see.

DEAN MORGAN: This is just a statement saying that this is a proper subject for consideration pre-trial. It seems to me it certainly can't do any harm, and it ought to call attention to the power of the judge to do that.

CHAIRMAN MITCHELL: The only addition I could suggest is that we might add a note to the pre-trial rule calling attention specifically to the Prettyman report.

MR. LEMANN: It is referred to in our note at the top of page 15. That shows the origin of it.

CHAIRMAN MITCHELL: Yes. That covers the ground.

JUDGE DRIVER: I think another thing this emphasizes which is definitely advantageous is that the same judge handle one of these so-called "big cases" from its outset. Very often some courts, as in San Francisco, for instance, have what they call the master calendar; they have one calendar and the cases are assigned out to particular judges. Los Angeles, on the other hand, doesn't have a master calendar, and cases come in and go more or less by chance to different judges. Sometimes one judge will handle pre-trial, another one will handle motions, and somebody else will take the case for trial. It is definitely advantageous, in my experience, for the same judge to act in these antitrust cases, in protracted cases, from the

outset, and keep them in hand all the time and keep in touch with what is going on.

MR. DODGE: What would the pre-trial judge say? "I will take it up with the chief"?

JUDGE DRIVER: I suppose somebody would have to decide whether it is a "big case" or not, and I suppose that would be the chief judge of the court. When that sort of case came on he would say, "This won't go according to our ordinary plan. I will have to assign it to a particular judge, and I assign it to Judge X."

MR. DODGE: The pre-trial judge wouldn't say that.

JUDGE DRIVER: No, I don't suppose so. I suppose under any system the chief judge should keep in touch with what cases are coming up, and if he spots one which is a big one, he would handle it under this plan if he saw fit.

MR. PRYOR: I am in doubt of the merits of the matter. It seems to me it would be in an illogical position here under pre-trial.

MR. DODGE: I rather thought it ought not to be in the pre-trial motions, because pre-trial often comes so late in the history of the case. This is a matter that should be dealt with at the outset.

DEAN MORGAN: When they have one of these "big cases" coming up in a particular district, the judges always get together and decide. Look at the shoe machinery case in

Boston. Those judges all got together there. They assigned it to Wyzanski to run the whole works, and he didn't have anything else to do. That is the way it is done.

MR. DODGE: It didn't come up at any pre-trial conference.

DEAN MORGAN: It might very well, though, before they assign it.

MR. PRYOR: The only suggestion I have is to make it the second subparagraph of Rule 83.

MR. TOLMAN: In the Southern District of New York I think what they do is that either the United States Attorney in the antitrust case or one of the parties makes a motion to the caneldar judge, who is Judge Knox, for the assignment of a judge to the case, and he does it if he can. He doesn't like ordinarily to take men out of their regular calendar work. I think that is the practice. It is a calendaring proposition more than anything else. It is handled under their calendar rules in the Southern District of New York.

MR. DODGE: Where did you suggest that it be put?

MR. TOLMAN: I think there is a rule here which provides that the court can make up calendars. Of course it is a little hidden. It is over in the rule dealing with clerks.

MR. PRYOR: Rule 83 is the one on rules of the district court.

MR. TOLDMAN: Rule 79(c) speaks of indices and

calendars. It seems to me it is a calendaring proposition.

MR. PRYOR: Maybe that is better.

MR. TOLMAN: It says in that rule, "There shall be prepared under the direction of the court calendars of all actions ready for trial," and you have a distinction between jury actions and court actions.

MR. LEMANN: It would not fit in very well under the caption to 79, which is "Books and Records Kept by the Clerk and Entries Therein."

MR. TOLMAN: I know, but Rule 79(c) is the calendar rule, the only rule which deals distinctly with calendars. That is what occurred to me.

I think I sent all of you copies of excerpts from the Prettyman Committee's report, which indicate that they considered this proposed amendment and thought the idea was fine, but they thought it was out of place, too.

MR. LEMANN: What did they say?

MR. TOLMAN: "Your Committee thought that the proposed new subparagraph (6) included two separate and distinct ideas, one the assignment of an action to one designated judge throughout the entire proceeding, including all motions, etc., and the other idea being the control by the judge of the taking of depositions and of discovery. Your Committee urged in its First Report the designation of a single judge to these cases, and so it now heartily

agrees with the suggestion of the Advisory Committee in that respect. But it believes that the matter does not properly belong in Rule 16 but could properly be inserted in some other Rule.

"Your Committee thoroughly approves the second idea incorporated in the proposed Rule. Uncontrolled discovery in these cases and uncontrolled taking of depositions are undoubtedly sources of gross abuse. Control of these procedures by the trial judge through the operation of the pre-trial conference procedure undoubtedly tends toward a lessening of unnecessary burdens in these trials. Your Committee recommends that the proposed amendment to the Rule be approved, preferably as amendments to two Rules, as we have indicated."

JUDGE CLARK: Which two rules?

MR. TOLMAN: They don't say. I think they feel part of it belongs in the pre-trial rule, but part of it belongs in the matter of assignment to a judge.

CHAIRMAN MITCHELL: When you put it in the pre-trial rule could you add the reason to it, saying that the steps as provided for here may be taken in connection with calendar work or anything of that kind?

MR. LEMANN: If we go in to the district rules, the district courts are pretty jealous, aren't they, of their prerogative of fixing their own rules?

MR. TOLMAN: I don't know that they are. They have gotten away from that a good deal.

CHAIRMAN MITCHELL: It says here "as above provided".

MR. LEMANN: Make it Rule 16(a) and entitle it "Cases Involving Protracted Litigation."

JUDGE DRIVER: One difficulty about putting this control of depositions in the pre-trial conference rule -- I don't know how it is handled in other courts, but usually I try not to have a pre-trial conference until shortly before the trial so we can get things arranged, usually two or three weeks before the trial. Most of the depositions are taken before I have a pre-trial conference. They could be even in your "big case." It seems to me that that would come a little late for control of depositions.

MR. DODGE: The Department of Justice brings up that same point.

CHAIRMAN MITCHELL: We could broaden it out where we find it today. I thought the pre-trial rule would be a good place for it. Naturally, if you had it early enough you could do it. If you are not going to have it early enough, these steps may be taken in connection with the assignment of the case to a judge or in the preparation or disposition of the calendar or any other rule you want to refer to. They need not wait until pre-trial to do this. That is the point.

JUDGE DRIVER: I think the common practice in the

"big case" is that you don't have pre-trial conference in the sense you have in the small case, meeting some afternoon. It is in stages. It is a big job. Usually you get together and have a conference and continue it over and take some depositions and have another conference. There are perhaps several stages before you finally get to trial. That is what I have done in the few that I have had.

MR. LEMANN: This seems to be something of a formalistic nature.

MR. TOLMAN: I think it is largely formalistic.

MR. LEMANN: I suggested a Rule 16(a). I wonder if we could take some of the point from the objections by leaving it as one rule, Rule 16, but adding to the caption after the words "Formulating Issues", "Trial of Protracted Litigation and the Control of Incidental Matters Therein." And then move (6) from its present place and make it follow (7).

CHAIRMAN MITCHELL: And say at any stage of the case.

MR. LEMANN: Yes. And cover by rewording the points which have been made about not waiting until a pre-trial conference to do this, but doing it at the early stage, and also the question of what judge is to do it, the chief judge or who is to do it. That could all be worded, I think, better than we can do it offhand, and catch these points.

By making a separate heading for this and putting it at the end of this enumeration, we would sort of set it aside

from the other things that are being taken up ordinarily in a pre-trial conference.

MR. PRYOR: Or make it 16(b).

MR. LEMANN: Yes.

DEAN PIRSIG: Basically, the objective we have in mind here is the same as we have in pre-trial procedure; that is, to define the issues, to limit witnesses, to get the evidence in some order. It seems to me that this does fall properly within pre-trial procedure purposes. You need some initiation of this at an earlier stage than pre-trial normally begins. Aside from that --

MR. LEMANN: That would be an argument to leave it in this rule. I think maybe you could meet some of these points by expanding the caption of the rule and putting it at the very end of the enumeration.

JUDGE CLARK: I had supposed that a part of the rationale of this whole thing was that it was perhaps a continuous pre-trial. That may be a metaphor, but it is certainly one which has been used in connection with the "big case." One reason for restricting discovery is that the judge, just as in the Investment Bankers case, is conducting pre-trial which has to be more protracted and cover more points than in the ordinary simple case.

CHAIRMAN MITCHELL: It seems to me that the point is well taken, that the provision of paragraph (6) should be

separately stated and then, using this phraseology or something like it, provide that either in the pre-trial proceeding or in such earlier stage of the case as may be proper, the court may do thus and so. Then you make it pretty clear that you do not have to wait until pre-trial proceedings before you get a judge busy on it. That would do it.

MR. TOLMAN: Mr. Chairman, I move that the rule be recast in the form which you suggest.

MR. LEMANN: I second the motion.

JUDGE CLARK: May I make sure that I have it, because of course we must know what to do within the next few days in order to get this prepared for the Court. The more we know, the better we can proceed.

Is the suggestion that there be added a separate paragraph after the present (6) in this rule, or what was it specifically?

CHAIRMAN MITCHELL: As I understood it, the suggestion was that the material in paragraph (6) be taken out of its present position and that a supplemental rule which might be 16(a) embody everything which is now in (6), stating specifically that these steps may be taken either at the pre-trial proceeding or at any earlier stage of the case that the court may want to consider it.

DEAN MORGAN: It occurred to me, Mr. Chairman, that you might put the substance of (6) in subdivision (a) of the

pre-trial procedure, because this assignment is a pre-trial procedure. Then the other portion which we have already there would be (b). Subdivision (a) would be the pre-trial procedure for the purpose of determining who is to try the case and who is to run the proceeding, and (b) would tell these other things on pre-trial procedure before the pre-trial judge.

CHAIRMAN MITCHELL: I am convinced that this sort of discretionary power is essentially pre-trial in nature, and somewhere under the pre-trial rule is the place for it.

I think also the point is well taken that we should make it specifically clear that it may be taken at any earlier stage of the case and not wait until the pre-trial proceeding for it to be brought on in the usual course.

MR. LEMANN: It seems to me it would be covered if we elaborated the caption somewhat and included in the caption cases involving protracted litigation, and then put an (a), as Mr. Pryor suggests, in line 1, which would cover all the material going through paragraph (5) and incorporate paragraph (7), and then in (b) put in appropriate language to cover these protracted cases.

CHAIRMAN MITCHELL: And say at a pre-trial proceeding or at any earlier stage of the case. That is your idea, the same as mine, except you are going into a little more detail.

MR. LEMANN: That is right. You would also cover in that who would make the assignment to meet these points of the

chief judge doing it in some cases and somebody else in others.

JUDGE CLARK: I guess we understand it. This would be essentially a new subparagraph, probably (b).

MR. DODGE: I think it would have a lot more weight if you dissociated it completely from the pre-trial and make it a general admonition to the court to be taken up and considered very early in the case, a year or two probably before there was any thought of pre-trial.

CHAIRMAN MITCHELL: Say it may be taken up at as early a stage of the case as is appropriate, something like that.

JUDGE CLARK: Of course this may be an invitation to the lawyers to come to the judge and stop discovery by this sort of thing. I don't know that there is any way of stopping that. You can have a steady procession to get away from discovery by this means.

MR. LEMANN: How?

MR. DODGE: Pre-trial is very lightly dealt with in a good many districts, I am sure. As the Department of Justice points out, sometimes the trial calendar gets ahead of the pre-trial calendar in the Southern District of New York, and cases are tried which have not been pre-tried at all.

In Massachusetts the pre-trial in the federal court is a very flimsy matter and doesn't ordinarily amount to anything except the assignment of the case for trial at some time. I think you rather subordinate or submerge the importance of

this matter by putting it into that rule.

MR. TOLMAN: Your suggestion, Mr. Lemann, involves a change in the title of the rule, too.

MR. LEMANN: Yes, which I thought would lend the emphasis that Mr. Dodge desires. I thought we could do that.

MR. TOLMAN: I think that should be done.

MR. LEMANN: It is so related to the general idea that it seemed to me reasonable to put it in the rule, but by extending the caption we could emphasize the point and then we would add a separate subsection.

MR. TOLMAN: I think that could be done.

CHAIRMAN MITCHELL: The Prettyman report note ought to be under the second subsection.

MR. LEMANN: That is right.

MR. DODGE: It hasn't much to do with agreement of the parties. It is a matter of the proper administration of the courts so as to effectuate justice.

MR. LEMANN: Pre-trial procedure isn't strictly agreement of the parties. In our district the judges have a pre-trial calendar, and they don't ask the lawyers anything about it. They send for you. They say, "This case is on the pre-trial calendar. You come around here on this day." They don't leave it to the lawyers. It is initiated by the court.

MR. DODGE: Certainly. That is always the case. They initiate it. They put the case on the list. But when they

get you there they try to get the parties in agreement as far as possible. They try to find out what the issues are and talk about depositions, and so forth. They don't talk about this kind of question, the method of administering the business of the court.

MR. LEMANN: I don't know. With us they do. They usually do ask us, "Have you taken depositions? If not, go ahead and take them right away and come back, because until you have taken depositions you don't know enough about your case and the other fellow's case to discuss it." That is what you do, I suppose, Judge Driver.

MR. PRYOR: We have a pre-trial conference a week or ten days ahead of the trial.

MR. DODGE: Really it is an admonition to the chief judge of the court.

JUDGE CLARK: As I understand it, we have a motion before us, which is Mr. Lemann's motion which I won't attempt to restate but which in general provides that this material shall go into a separate subdivision in Rule 16 with an appropriate title. Do you want to add anything to that?

MR. LEMANN: No.

JUDGE CLARK: All those in favor will raise their right hands. Nine. Have I counted wrong?

MR. DODGE: Not voting.

JUDGE CLARK: Nine.

MR. DODGE: I should vote against putting it right there.

JUDGE CLARK: Those opposed. I guess Mr. Dodge is opposed.

This depends a little on how much time I am going to have. If we are going to have a lot of time I can do a lot more. Otherwise, a little more direct discussion on some details would be desirable.

Could I just mention that we have had certain suggestions as to the form that this would take. I shall mention them at least, and see if you want to do anything about them.

What was the suggestion for --

PROFESSOR WRIGHT: The San Francisco Bar Association and General Youngquist both suggested that in line 22 the phrase "permission for" is dangerous. They suggest that we use the language "control of" in order to obviate the implication that you have to run to the judge to get permission for the taking of a deposition.

JUDGE CLARK: Then there was some other suggestion.

PROFESSOR WRIGHT: The other suggestion basically was that this should be cut off in line 22 after "trial", so it would merely say that the judge could have "direction and control of all matters preliminary to trial", without endeavoring to spell them out. They expressed some fear that the way we spelled it out might possibly be thought to limit the power

of the judge.

JUDGE CLARK: I will make this suggestion at this time, and if you want to give more specific direction that is fine. I should think it would be desirable to say "control" instead of "permission". I should think it would be rather desirable to spell it out at least to this extent, because that is a part of the emphasis. They want to make it very clear that the control of the taking of depositions was involved.

Has anyone any suggestions about that? (No response) All right, we will work on it, then.

The next is Rule 20(b).

CHAIRMAN MITCHELL: I would suggest, Charlie, that there are several lawyers who are interested in this thing. I have in mind particularly, among others, Ralph Carson, who has been very active in these long-winded cases. I think they were in the Investment Bankers case and some others. He wrote me a long letter one time giving me general ideas about the Prettyman report.

If you get out a preliminary draft of the details of what you are going to put in the rule about control by the judge, it might be well to send Carson a copy and ask him if he has anything further to suggest. He is an intelligent lawyer and has had a lot of experience in this work. I think he is particularly interested in reforming the conduct of these protracted trials, and might give you something worth while.

JUDGE CLARK: Yes. I know Mr. Carson. He is an able lawyer. I shall be glad to do that, subject to the question of time.

Next we come to the suggestion for the addition to Rule 20(b), which was quite generally approved. One or two correspondents questioned the necessity of making explicit what is already the law. Here, too, I repeat what I said in connection with the other case where we put this up, Rule 14(a), that this is the provision which helps to make explicit what the Committee was suggesting generally as to Rule 54(b).

It seems to me that it is helpful and clarifying. I think the power already exists, but I think it desirable to state it expressly as we have done here.

Is there any comment?

JUDGE DRIVER: I am in favor of the amendment, Judge Clark, but I am a little concerned as to whether it is still specific enough in view of the recent decision of the panel of the Ninth Circuit Court of Appeals which is out only in slip-sheet so far, February 7, 1955, Steiner v. 20th Century-Fox Film Corp. Of course, you know of that case. You mentioned it this morning, I think. It holds that 54(b) applies only to plaintiffs and not to parties. It reversed the lower court decision trying to make final judgment as to one party in the case.

JUDGE CLARK: If you will look at my second letter

on the comments, the one you got this morning, dated March 5, on pages 6 to 8 of that letter I discuss the Steiner case and suggest definitely that we add multiple parties to multiple claims in 54(b), suggesting a form for that modeled on the proposed Illinois statute, appearing on page 7.

JUDGE DRIVER: Pardon me. I didn't have my copy and didn't keep up with your reference to the page. I have it now. I didn't have it when you stated it.

JUDGE CLARK: Look at pages 6 to 8 of that letter. Near the top of page 7 you will see the suggestion that I am making, which is almost the proposed Illinois statute, word for word. It is not quite that. I have made some changes to that in the idea of what a judgment was. I didn't put in "order or decree." There are some details of that kind. The substance of it is the Illinois suggestion.

I think that is important. I don't know that we need to take it up at the moment. When we get to it, I think that is important. It does seem to me that this proposal fits in very nicely with my further recommendation. I think this is helpful particularly if you accept my suggestion. That is, there is all the more reason for putting it in if you accept my suggestion.

PROFESSOR MOORE: I want to support your proposed amendment to Rule 54(b), but if that is carried I don't see why we need to have it here. I think it is added here at this

time because you were only writing a note to 54(b). Now that you are going to amend 54(b) to hit multiple party claims, I would like to leave it out here and avoid amending an additional rule. I don't think we need it. Not that I disagree with what you are trying to achieve. I am heartily in accord with you on it.

JUDGE CLARK: Of course, there is a great deal in what Mr. Moore says. I was trying to gild the lily, it is true. I still like to gild them somewhat. You see, there is a long wait before we get everything made right as to 54(b), including not only you gentlemen when you get to 54(b), but also the Supreme Court. I am trying to go step by step.

If you wish, we can leave this until we see what we do on 54(b).

In order to get along, unless someone has some objection, let's leave this for the moment and we can take it up again when we get to 54(b).

The next is Rule 23(d), which is the order to ensure adequate representation in class actions. This has been approved quite generally by commentators, except that there has been some suggestion of going further. Has there been anything recently on this?

PROFESSOR WRIGHT: There is only one thing which seemed to me significant, and that is the letter of February 25 from John Dorsey, a pretty good Minneapolis attorney, which

makes several points about 23(d). He first suggests that in 23(d) in line 3, instead of saying "The court at any stage of an action under subdivision (a) of this rule", it should read "an action under this rule". His point is that there is some existing question or confusion as to whether or not a stockholders' suit under 23(b) must also meet the requirements of 23(a). He is afraid that by our reference here to subdivision (a) of this rule we are lending support to the view that a stockholders' suit is something different and not a suit under 23(a).

The other comment which Mr. Dorsey makes is that the last sentence of the proposed 23(d) may subject the party litigant opposed to the class representative to a multiplicity of suits. He has in mind a situation in which a class action is brought in which the class are the plaintiffs, that the action is then stripped of its representative character under Rule 23(d), and that this might prejudice the defendant, who then will have to face individual suits by each member of the class.

There is one other additional comment on 23(d) other than generally favorable comments, from an attorney who apparently represents minority stockholders in derivative actions and quotes a lengthy decision from a New York court about what wonderful things these are, and that they should not be hampered. He says that stockholders' suits ought to be excepted from Rule 23(d), which I take it is just the opposite of Mr. Dorsey's

view, because he says that this would provide another means, that the defendant would come in and say, "Let's strip this of its representative character" or in some other way interfere with the stockholders' suit.

JUDGE CLARK: On this let me again recall, as to the entire Rule 23 on the so-called representative suits, there has been a great deal of discussion from academic sources, that is, from professors in law reviews, and so on. All the trend in that has been to use representative suits more. Such criticism as has been expressed of this rule is that it did not go further. There have been various suggestions that in all the possibilities of the suit, the doctrine of res judicata might be carried much further than anything the Committee has suggested, if that was safeguarded by a provision making sure there was adequate representation and having the court add others if necessary, or refusing them where it was not.

We have not attempted to go that far. Actually, I think this does not go a great ways further, if any further. As a matter of fact, it seems to me to be doing about what we judges have done from time to time. I think it makes explicit the kind of protection that presumably a court would feel like giving anyway, and yet orients it and channelizes it, makes it a definite way of proceeding.

The language was modeled on some language proposed by the New York Judicial Council. I think that it makes clear

that the rule is safeguarded and provides a method of carrying it out. While it is not a world-shaking thing, it is rather desirable so far as it goes.

I am inclined to think, in view of the comments -- I refer in particular to the comments -- that I would leave the suggestions about as they are here, and specifically that I would continue the limitation to subdivision (a).

What shall we do?

DEAN MORGAN: Bill, you are the expert on class actions. What do you say about where to put this?

PROFESSOR MOORE: I don't want to set myself up as an expert on this, but I think --

DEAN MORGAN: You got this darned classification, and I have had to defend you I don't know how many times.

PROFESSOR MOORE: Let me put a case and see what is going to happen under this rule, and then I shall know whether or not I am in favor of it.

Suppose you have a number of people injured in the same accident. They may come from various places. The tort-feasor may be amenable to suit in a number of places. One person who is injured or perhaps a couple get a lawyer, and that lawyer starts a class suit on behalf of them and all others similarly situated. Another person who is injured goes and sees a different lawyer and he starts a suit maybe in a state court in a different place. Can the federal court in

the class action give notice to all the other persons who were injured, including those who have commenced their action, to come in and present claims and defenses in this class suit?

If the amendment does that -- and I think it does -- I am opposed to it.

DEAN MORGAN: Carroll Hincks had a case something like that, didn't he, when he was district judge, before he was on the Second Circuit, and he held it didn't.

PROFESSOR MOORE: Didn't what?

DEAN MORGAN: That it would not really be a class action, practically. That is what he was practically holding, that what was done in this particular case could not bind anybody who brought an action afterward. They were trying to get a decision with reference to the liability of an airplane company, you remember.

PROFESSOR MOORE: I am in agreement with that, but I wonder if this does not change that.

MR. LEMANN: What you object to is the entry of an order under lines 6, 7, and 8, particularly 10 and 11, "including notice to come in and present claims and defenses." What part of this don't you like? None of it?

PROFESSOR MOORE: That, plus the inference which I suppose comes from that and negatively from the balance, that if after giving that notice to come in your class suit goes to judgment ahead of these various individual suits, that

judgment could be pleaded as res judicata.

MR. DODGE: Is that a class action?

PROFESSOR MOORE: It is what I would call a spurious class suit.

DEAN MORGAN: It is a spurious class suit.

PROFESSOR MOORE: There isn't any relationship between the parties other than the fact that they all happened to be riding on the bus or train together.

MR. LEMANN: There is an accident in which 50 people are injured. One brings a suit. It wouldn't happen if he brings suit for himself, but if he says, "I am suing for myself and all my fellow passengers," our rules say he can do that and that is what we call a class action. We have made that definition.

MR. PRYOR: Under which one of these subdivisions would that come?

MR. LEMANN: Subsection (a)(3), I suppose.

MR. PRYOR: They don't seek common relief.

MR. LEMANN: A common question of law or fact and common relief.

MR. DODGE: Are they seeking common relief?

PROFESSOR MOORE: They are seeking damages.

MR. PRYOR: But not the same damages.

MR. LEMANN: If it isn't within that, it isn't in it. Then Mr. Moore's case doesn't come up under this rule.

MR. PRYOR: I don't think it does.

MR. LEMANN: How about it? You are out of court.

PROFESSOR MOORE: Rule 23(a)(3) has been used to permit a party to start such a class suit, which is nothing more than an invitation, really, for others to come in and they don't need independent jurisdictional grounds.

As I understood Professor Chafee, he recognizes that that type of class suit was entirely distinct from the other; that it is just an invitation to joinder.

MR. LEMANN: When you say it doesn't need any independent jurisdictional grounds, do you then mean if this accident happens in Massachusetts and Passenger A lives in Connecticut, he can bring suit in federal court, can bring a class action, and all the other people who were hurt in that accident who were citizens of Massachusetts can get in the federal court along with him and get the benefit of the jurisdiction which he has established? That is the theory of the rule?

PROFESSOR MOORE: Yes.

MR. PRYOR: What is the difference between that and the cases under the Fair Labor Standards Act where a lot of employees of a common employer bring a suit under the Wage and Hour provisions? They all have questions in common as far as the law is concerned, but they are not seeking common relief, because they have different claims.

PROFESSOR MOORE: Those were brought originally --

MR. PRYOR: Those have been called spurious class actions.

DEAN MORGAN: That is what these are.

MR. LEMANN: That is what this is.

MR. PRYOR: That is what this airplane case is.

MR. LEMANN: It is still a class action with an adjective attached.

MR. PRYOR: You don't have any adjective attached to our rule.

MR. LEMANN: In fact, Mr. Moore wrote a paper on it and divided class actions. We put you to work on this, didn't we? It was too tough for the Reporter, and you wrote a paper on it.

PROFESSOR MOORE: I don't think it is anything original with me. Story had the same terminology. He called it spurious. It goes back a long time.

MR. DODGE: How can one fellow sue in behalf of all when every one of them must testify as to his own damages, when his own case is separate from all the others?

PROFESSOR MOORE: It is likely a federal jurisdiction joinder provision. If they joined originally as plaintiff, each plaintiff would have to be able to sue each defendant, and each plaintiff would have to have a claim establishing his grounds. This so-called spurious class suit is such that once

you have jurisdiction between the original plaintiff and the defendant, any other claimants could come in. Each one of course, if he wanted to, could come in and prove up his amount of damages.

MR. DODGE: They can all join in one suit, but no one can carry his trial through to the end in behalf of others. It is just like common heirs of an estate whose interests are identical except as to amount. These fellows each have a different claim.

DEAN MORGAN: Oh, no. The issues are identical.

MR. DODGE: Except as to liability.

DEAN MORGAN: Yes, everything except the amount, how much damages.

MR. PRYOR: There will be different facts.

DEAN MORGAN: As to damages only.

JUDGE CLARK: Neither this rule nor the earlier rule attempted to state the principle of res judicata. So far as I can see, I don't think that Mr. Moore's question adds anything here. If the question is there, it was there just as much under 23(a) as it is here. We are not stating the effect in these rules.

It is true that some writers take that to be there under 23(a). They think that under our present rule the only question is whether these people who have been assumed to be represented have been adequately represented and adequately

notified. They refer to the Supreme Court case of Hansberry v. Lee, which discussed this matter, and point to the language of Chief Justice Stone in that case pointing out that if they were adequately notified, and so on, res judicata could be more broadly extended. I don't see how we have affected that law at all.

At one time when we first drafted the forms of the rule we did have definite provisions as to what we thought the rules of res judicata were, and we eliminated those away back because we didn't want to state substantive law. I don't see that we are doing any different on that score.

What is a court going to hold? I don't think he gets the answer from either the original rule or our amended rule. He has to go back to what the court considers to be the general principles of representative suits as developed in equity and carried out into existing law. So it seems to me if Mr. Moore's question exists, it is already there and this doesn't change it.

What this does -- and it seems to me it is a small development -- is to warn the court, so to speak, to make sure that it does the best it can in all these cases that it tries and considers, to get the parties fairly taken care of. What happens thereafter has to be decided by law outside these rules.

MR. DODGE: How could the absentees in Mr. Moore's

case possibly be bound by the judgment in a case carried through by him and purporting to represent all the other injured parties? This is for the protection of parties who would otherwise be bound by the judgment, but how could there be a judgment in one of these spurious class cases?

PROFESSOR MOORE: I don't think there should be a judgment which would bind a person who didn't come in, but here you have a provision which says the court may do such-and-such things, including notice to come in and present claims and defenses.

MR. DODGE: "and the court may order the entry of judgment in such form as to affect only the parties to the action and those adequately represented." How could he fail to make such an order?

PROFESSOR MOORE: I suppose it goes on the earlier --

DEAN MORGAN: If they are adequately represented, on the question of negligence, surely he could.

MR. DODGE: How could they be adequately represented?

DEAN MORGAN: These people had exactly the same interests to be protected. In the Hansberry v. Lee case, every policyholder's right to be in a particular class and the amount in each case would have been different from the recovery in each other case, as I remember it, because they were insurance policies. They were changing the class. So they were affecting the rights of every one of them. There were several

hundred people, I believe, in that case, and some of them were non-residents of Indiana, against the company. The Court held that the change was entirely proper. They held that that bound not only the people who were there, but the Indiana people who could not come in.

MR. DODGE: That is more like the case which I suggested, of heirs interested in different amounts.

DEAN MORGAN: The whole question was liability or doing away with a vested interest in a policy. Here were people who could not come in. The reason they were not made defendants or parties to the action was because they were residents of Indiana. The Court pointed out that they could have come in as ancillary people in the particular case without spoiling the jurisdiction of the court, but in the case as it was they could not, and it was held that their interests were adequately represented there and it was a good class action.

In that waterworks case in England, the plaintiff waterworks company brought an action against four or five representatives of a great group of people who were entitled to claims. They all belonged to the same class because they came in after the expiration fixed for the notice. The whole question was, Did that expiration fixed in the notice bind them all? There were only four or five representatives of a large number of defendants. The English court held the defendants were bound.

That is a class action for defendants. You know that case. What was it? I have forgotten the style of the case now.

DEAN PIRSIG: I know it to some extent, yes.

DEAN MORGAN: All these cases are discussed by Chafee.

PROFESSOR MOORE: The Pennsylvania Railroad attempted to bring such a suit growing out of the Perth Amboy explosion. They picked out representatives of property interests, representatives of the municipal interests, representatives of the personal injuries, and they named the United States as a defendant, and they ran aground there because the government hadn't consented to a declaratory judgment action.

MR. DODGE: What are they going to do?

PROFESSOR MOORE: They hope to get a judgment declaring they were not liable to all these persons.

MR. PRYOR: It is a declaratory judgment action.

PROFESSOR MOORE: Yes.

MR. DODGE: They might try the question of liability. They couldn't possibly try the whole case, though.

DEAN MORGAN: Suppose they find for the defendant on the question of liability, that knocks the whole works out. If they find liability, then these persons can come in afterwards and prove only the amount of damages. That is the theory. I don't know whether it ought to be that way, but I am saying that is the kind of thing that can happen, and that is the kind of case that Chafee, as Bill says, says this ought to be just

a sort of invitation to come in. The defendant can't object because the defendant at any rate has his full day in court on everything. The other plaintiffs might object all right. If they want to come in, it is O.K. It is just like the overtime case. I want to know if that hits it. If it does, you are then going into this very question of invitation to come in.

I don't object to the invitation to come in at all, myself, because this doesn't say that the judgment is res judicata for anybody who doesn't come in.

CHAIRMAN MITCHELL: That is a matter of substantive law, isn't it?

MR. DODGE: If you are trying only the question of liability and it is clear that the question of liability is identical as to all parties, you might get a class action out of that trial.

DEAN MORGAN: You might, but it is what we call a spurious class action here.

MR. DODGE: It isn't the whole case.

DEAN MORGAN: If they found it was inadequate, the court would strike out the allegation that this is in behalf of others interested. They could not come in then even on an invitation to come in.

PROFESSOR MOORE: Judge, would you be content to amend this in line 10 to read "including notice that he may come in and present claims and defenses"?

JUDGE CLARK: Yes, I think I would.

MR. LEMANN: Suppose we adopted your suggestion, Mr. Moore, that he doesn't order you to come in, but he says, "We will give you notice that you can come in if you want to," and he said, "I don't know. I am going to stay out. I don't like this. I am out. I never heard of it." Then the case proceeds without him. Then the judge enters an order in such form as to affect only the parties to the action and those adequately represented. The judge says, "I find that you, Mr. Smith, didn't come in but you were adequately represented. The man who presented the argument was a very good fellow and he made very good points. I think you were adequately represented." Could he do that and bind the party who didn't come in? Is there an implication in the last clause that if the judge thinks the lawyer who tried the case adequately represented everybody who was involved in the matter, they are bound?

DEAN MORGAN: I don't know whether that would be true in this particular case. I am saying that if he did hold that, it would be just like these overtime cases, that persons who were not made parties could come in and prove the claim as to the amount. As Chafee suggests, there ought to be a time limit within which they could come in and prove the amount. The judgment would not be res judicata against them if they brought a separate action.

I think this class action business is the worst

balled-up of any that I know of.

MR. LEMANN: There is implication in lines 19 and 20 that only parties adequately represented would be affected. It says the court shall direct the entry of judgment "in such form as to affect only the parties to the action and those adequately represented." That seems to me in effect to say that parties adequately represented are affected.

JUDGE CLARK: Again I say this cannot settle the question of substantive law. That is what we left out. As I take it, this works out a procedure which enables you to do or tells the courts how to do what it can do now. How far the result goes, I don't think we are saying here at all.

This is desirable even if it does no more than I conceive it does, state existing law. It is desirable because it shows the way of applying existing law.

Take some of these situations we have thought of. Take the situation that the Pennsylvania Railroad was trying to work out to show no liability. We know as a practical matter that if that matter is thoroughly tried out, whether it is technically res judicata or not, the first whack, particularly if it comes out with a judgment for the railroad, is going to be very important. It would be a good thing for the court to have in mind, seeing that it has in enough that the case is well presented.

We know in our history of the attempts often made in

various ways to get an issue presented by weak parties. Perhaps the most famous of all is Pollock v. Farmers Loan & Trust Co., the famous case dealing with the original income tax fraud. This is desirable as stating ways and means.

Here is another situation which shows how stating the usual, if you want to call it that, is helpful. That is the case that we had, cited here at the top of page 17, Dickinson v. Burnham. That was a case of essentially a stockholders derivative action, but it was a case attempting to hold officers of a corporation to restore money to the stockholders. That had gone on for quite a few years and the ultimate judgment was that one of these men -- I think it was Aspinall Dickinson -- had to return a large sum. A suit had been brought by the plaintiff on behalf of himself and others interested. The question was what to do with the money which was paid by this defendant in a tort action, and whether we had to hold it in court or how it should be done.

The defendant, the wrongdoer, as he was held, said, "Oh, no, I can't be required to pay anybody this way. I therefore will get that much release from this obligation because people have died, they can't be located, and so on."

The amount, in any event, was not going to be a windfall. It was not going to make any of these people whole. It was really a dividend.

The question that we were faced with was whether we

could distribute the whole sum as a dividend to all the former stockholders we could locate. The trial judge ruled that that was a spurious class action, but nevertheless he could do it. We solved that difficulty, I think quite neatly, by saying, "No, it is a hybrid action but you still can do it."

What we did was to send out notices. He took care of that quite carefully. He sent out notices to the last known address and all that sort of thing, and gave them time to come in. But having gone all through that procedure, he held that he didn't need to reserve funds for those who after a considerable length of time had not appeared, or he didn't need to say that the defendant didn't need to pay that. He distributed that as a dividend to the others, and that is what we upheld. We upheld it by calling it a hybrid, whereas he called it a spurious class action.

DEAN MORGAN: You got rid of the fund.

JUDGE CLARK: Yes. But you see, there wasn't any fund originally. The fund was provided only because we said this fellow was a wrongdoer and he had to dig down in his jeans and provide the funds. It seems to me that that result was most desirable.

DEAN MORGAN: You wouldn't have done it if it hadn't been most desirable.

JUDGE CLARK: Perhaps so. Nevertheless, it didn't look easy on the surface. Everybody fumbled around and tried

to see how to do it. This provision tells them how to do it. That is all this does, as I see it.

This provision would have made it easy and possibly might have prevented an appeal, I don't know. At least it would have made it clear that what the trial judge did was quite appropriate.

DEAN PIRSIG: Mr. Chairman, I wonder if I could raise a question here which might help. I don't know if it would or not.

In line 14, after the word "parties," add the words "who may be bound by the judgment".

As I understand the problem here, we have two types of class actions to which this rule might apply. In one I include the first and second class of subsection (a), the true class action and the hybrid class action where the parties are bound in some measure even though they are not actually present before the court. Then you have the other or the spurious class action where only those who are actually before the court are bound, and absent parties are not bound if they do not come into the action.

The second sentence of this proposed rule on the giving of notice would serve different purposes with respect to each of those two groups. In the true and hybrid class actions the effect of that notice would be to bar them; to compel them to come in or to be bound by the judgment. With

respect to the spurious class action, the only effect of that would be to give them notice to present their claims if they wanted to, and if they didn't they would not be bound.

Coming to the third sentence, then, what we are dealing with essentially is the true and hybrid class action, I would suppose. If we could eliminate the suggestion that this applies also to the spurious class action, we would not have the difficulty that Mr. Lemann was referring to as arising by implication.

I don't think it would change the intent of the rule which you have in mind to say, "When, notwithstanding such orders, the representation appears to the court inadequate fairly to protect the interests of absent parties who may be bound by the judgment, the court may, at any time prior to judgment, order an amendment --"

Would you have any objection to that?

JUDGE CLARK: No, I don't think so.

That is, to include after the word "absent parties" in line 14 "who may be bound by the judgment"?

DEAN PIRSIG: Yes. That makes it explicit that we are not intending here to bind anybody who under the rules of class actions should not be bound.

MR. DODGE: Shouldn't the word "may" in line 18 be "shall"? He may order the amendment of the pleadings, but he shall in any event order a judgment which will not affect the

absent parties. He has found that the representation was inadequate, and therefore the judgment could not bind the absent parties.

JUDGE CLARK: I think, particularly if we put in the suggestion of Dean Pirsig's, it would be a good idea to change "may" to "shall" in line 18.

MR. DODGE: May to shall at the end in the judgment provision.

MR. LEMANN: What has been the practice about the use of the word "may"? Haven't we often used "may" as equivalent to "shall" throughout these rules? Have we used "shall" to any extent?

JUDGE CLARK: I think we have been rather careful not to. I think we differentiate between "may" and "shall".

MR. LEMANN: We have differentiated. Have we used "shall"?

MR. TOLMAN: We have used "shall".

PROFESSOR MOORE: Dean, would it carry out your ideas and would it be a little clearer to the reader if we referred back to 23(a)(1) and (2)?

DEAN PIRSIG: That would make it even more specific.

JUDGE CLARK: I should prefer not to do it, but I don't know that I would fight if it were done. It seems to me that we are going pretty far there in trying to direct the result of what will happen. We are assuming not to direct the

result.

DEAN PIRSIG: In specifying the classes.

JUDGE CLARK: Yes. If we were going to do all these things, we might as well come back to what we were doing originally and say this shall be res judicata and that shall not be.

CHAIRMAN MITCHELL: We threw that out on the ground we were not dealing with substantive law, and that is one thing which has always bothered me about the class action rule. There is nothing in it that probably should not be there. People's rights are affected according to their different situations.

I don't think we can avoid the conclusion that that is a matter of substantive law and that we cannot deal with it.

JUDGE CLARK: It would seem to me, if we make the two suggestions we have before us, that pretty much limits it. Those two suggestions, as I understand it, are to insert in line 14 after the word "parties" the words "who may be bound by the judgment"; and the second suggestion is to change the word "may" in line 18 to the word "shall".

MR. LEMANN: Then you have the other suggestion by Professor Moore to change in line 10 "notice to come in" to "notice that he may come in".

PROFESSOR WRIGHT: Yes.

PROFESSOR MOORE: I would like that to read "including

notice that he may come in and present claims and defenses if he so desires." I should like to see it very clear that the court cannot force in a party who has a suit pending merely because someone else has started a class suit in one of these mass tort cases.

JUDGE CLARK: I don't object to that. In lines 10 and 11 we want to change it to read "including notice that he may come in and present claims and defenses if he so desires."

MR. PRYOR: Who is "he" in that? There is an antecedent for that.

MR. LEMANN: That is a very good point. That is a lost child.

JUDGE CLARK: Professor Wright reminds me there is a lady here somewhere who wants all these references to be "she".

MR. PRYOR: You don't know who either he or she is.

MR. LEMANN: Not even an "it".

JUDGE CLARK: There is that difficulty about the "he," "she," and "they."

DEAN PIRSIG: It goes back to "persons" in the fifth line.

JUDGE CLARK: I should not think it very necessary in view of the other things.

PROFESSOR MOORE: If you amended it in line 3 so it would read, "The court at any stage of an action under subdivision (a)(1) or (2) of this rule may impose", and so on,

I would be perfectly satisfied. But I don't think that is what you want, Charles.

JUDGE CLARK: I don't want to do it very much. I am just a servant of the Committee, of course.

PROFESSOR MOORE: That would clearly exclude this spurious class suit from any implication that the court can force in members having claims.

MR. LEMANN: You want to limit the reference in line 3 to subdivision (a), to subdivision (a)(1) and (2).

DEAN MORGAN: If you do that, you don't need the other amendments.

JUDGE CLARK: That serves to perpetuate these distinctions which we must ascribe, of course, to Justice Story and not to Mr. Moore, although they are generally now ascribed to the latter. That preserves them for all time.

MR. DODGE: General Youngquist made a good minor suggestion here, that the word "parties" in lines 14, 17, and 19 should be "persons," as in line 5.

CHAIRMAN MITCHELL: They are not parties until they are joined.

JUDGE CLARK: Yes, somebody suggested that.

MR. LEMANN: What was the argument that you sold the Committee as to the necessity for this? I have just been looking at the case you cited in the note, Hansberry v. Lee, and Chief Justice Stone said everything you have got in

here. You say in the note that all you are doing is to make the class suit device more flexible.

I am a little puzzled by that. That is probably because I don't understand the class suit device too well. Then you go on to say it is intended "to allow in all kinds of class suits that full and fair protection of the absentees which is said in Hansberry v. Lee to be necessary . . ." It has already been said to be necessary. Everybody says it is necessary. I just wonder how you got this over. I think I voted against it. I hope I did. Maybe I didn't.

I am just wondering what it adds here.

Mr. Moore, don't understand me as suggesting that we withdraw anything we have put forward.

MR. PRYOR: I think it is a pretty good guide to the court, but I am a little dubious about whether or not you should include subdivision (3) of (a); and if you don't include that, you don't need these other amendments.

JUDGE DRIVER: You don't need these amendments then.

DEAN MORGAN: If you are going to take his first amendment as to the scope of it, there is no sense in putting in these other amendments.

MR. LEMANN: You could get away from the linguistic difficulty in your first suggestion, Mr. Moore, by inserting in line 10 something like "including notice to persons who may be affected that they may come in if they so desire and present

claims and defenses." That will take care of your point, Mr. Pryor, that it had no grammatical antecedent.

JUDGE CLARK: The reason I was suggesting it earlier, it seems to me this flexibility should go as far as the class (3) or the spurious class suits. Understand, I am not now discussing or trying to assert what the effect of the judgment should be. I am, however, saying that the court should have the hint and the method as to the bringing in of the parties. I refer again to the suggestion that in a suit like the Pennsylvania Railroad, if the Pennsylvania can establish non-liability on substantive grounds after a complete trial as to any one person, it has injured all the others, as we know. It seems to me that it would be proper there to bring it to the court that here is a method of making sure that we are not going to make our particular judgment too harsh on others who have not had a shot at it.

Therefore, it seems to me that this very method should be as available in that class as in any of the others. Therefore, I should really hate to see the limitation in the first sentence.

DEAN MORGAN: What do you say about these other amendments?

JUDGE CLARK: I am perfectly ready to accept those, as I have indicated, the amendments of Dean Pirsig and Mr. Dodge together, those covering lines 14 and 18. I think those are

desirable.

DEAN MORGAN: What about line 11?

JUDGE CLARK: The one in line 10 I don't object to particularly if we can get it worked out. I don't think it is very necessary, because it seems to me to be covered by the two I am accepting. I have not yet seen any good language to do it because you can't say "he, she, and they".

MR. LEMANN: I suggested some language, which you can polish up.

JUDGE CLARK: What did you suggest?

MR. LEMANN: My suggestion was, "including notice to persons who may be affected that they may, if they so desire, come in and present claims and defenses." That would cover Professor Moore's suggestion.

CHAIRMAN MITCHELL: What was it again?

MR. LEMANN: Notice to the person who may be affected, to persons who may be affected.

DEAN PIRSIG: The people in the spurious class action would not be affected, and yet the intent here is to give them notice that they can come in.

MR. LEMANN: You may suggest a better word than "affected."

JUDGE CLARK: I don't see why we haven't got everything here as it is without trying to specify confusedly as this does, I think.

DEAN MORGAN: If notwithstanding such notice they don't come in, that means they don't have to. I don't think they need that.

MR. LEMANN: How about using the words "absent parties"?

MR. PRYOR: They are not parties.

MR. LEMANN: You use the words "absent parties" in line 14. That is where I got it.

JUDGE CLARK: We are going to change that to "persons".

MR. LEMANN: Say "absent persons", then. How about using "absent persons" to cover Mr. Moore's idea?

JUDGE CLARK: I guess so. That would be "including notice to absent persons that they may come in and present claims and defenses".

MR. LEMANN: "if they so desire."

DEAN MORGAN: "present such claims and defenses as they desire." There is nothing the matter with that, is there?

JUDGE CLARK: I guess so. I guess it would be "including notice to the absent persons that they may come in and present claims and defenses if they so desire."

DEAN MORGAN: That is all right.

MR. LEMANN: Would that cover it, Mr. Moore?

DEAN MORGAN: "claims and defenses if they so desire."

PROFESSOR MOORE: I believe so. What are you doing in line 14 as to the interests of absent persons?

JUDGE CLARK: What was the language? "of absent persons who may be bound by the judgment".

MR. LEMANN: You are going to change "may" to "shall" in line 18.

JUDGE CLARK: Make it "shall" in line 18.

MR. LEMANN: Why don't you change "may" to "shall" in line 3 on the page before? I just like to be consistent.

JUDGE CLARK: I should not think you would want it there. In ordinary cases you may not need anything further.

MR. LEMANN: Why wouldn't you need always "such terms as shall fairly and adequately protect the interests of the persons on whose behalf the action is brought"? Why wouldn't you always need terms fairly and adequately to protect them? How could a judge be justified in refusing to impose such terms?

MR. PRYOR: You would have to change the first part of it, then, if you make that "shall". The court at any stage shall impose.

MR. LEMANN: Yes. I am being too much of a purist, I think.

JUDGE DRIVER: There may be no necessity at the earlier stage.

JUDGE CLARK: I am not sure that I am up with you. My ears are getting old and I don't get all this. I take it that you are worried about having some may's and some shall's. I would rather not make the change in line 18 and make the change

in the others. We can keep it all "may" if you want. I don't think the change in 18 is terribly important one way or the other. This is a discretionary thing with the judge, and I would hate to put too many directions at the beginning.

With the other limitations in, I think the change in 18 may not be very important either way. I will compromise with you, Mr. Lemann, and keep that "may" if you prefer that.

MR. PRYOR: I move that Rule 23 as it has been amended be approved.

DEAN PIRSIG: There is one more question I would like to raise before we come to that, if I may.

JUDGE CLARK: Yes, you shall raise it.

DEAN PIRSIG: At the beginning of the sentence is it the intention that the court cannot eliminate all reference to absent parties until it has made these orders for notice to absent parties, or would you permit the court to decide that a notice of that character would not accomplish this purpose and immediately order an amendment of the pleadings?

JUDGE CLARK: I should think the latter ought to be open to the court. Don't you think it would be?

DEAN PIRSIG: That would be my preference.

CHAIRMAN MITCHELL: It says at any stage of the action.

DEAN PIRSIG: I am referring to the third sentence beginning in line 11.

CHAIRMAN MITCHELL: You said line 3.

DEAN PIRSIG: I am sorry. I meant the third sentence.

JUDGE DRIVER: "When, notwithstanding such orders"?

DEAN PIRSIG: Yes.

JUDGE DRIVER: That might be taken to mean that the court should give the order first.

DEAN PIRSIG: That is the matter I had in mind.

MR. LEMANN: You want to take out the words "notwithstanding such orders"? Would that meet your point?

DEAN PIRSIG: That had occurred to me.

JUDGE CLARK: This suggestion is to leave out the words "notwithstanding such orders".

MR. LEMANN: Yes, and change the "When" to "Whenever".

DEAN PIRSIG: I would rather leave it up to the Reporter to work it out. I am a little bothered about eliminating the language.

JUDGE CLARK: All right. We had better not stay much longer on this. We are slowly chopping it to pieces.

MR. LEMANN: What have we done to it now? May I ask what I would do if I am a defendant for this bus line, that procedure appeals to me and I would like to get rid of all these cases at one time, do I bring a class action against all the passengers? Does it work in reverse?

PROFESSOR MOORE: In theory it does. That is what the Pennsy tried, and there is nothing in the rule that stopped

them.

MR. LEMANN: The Pennsylvania Railroad did it?

PROFESSOR MOORE: The reason they ran out of gas was that they included the United States as a defendant.

DEAN MORGAN: There was a declaratory judgment on liability against them all.

MR. LEMANN: It worked?

PROFESSOR MOORE: The trouble was they needed to have the United States in, and the United States hadn't consented to be sued, so that sort of wrecked their action.

MR. PRYOR: What has happened to it?

PROFESSOR MOORE: I don't know what has happened to the suit since.

JUDGE CLARK: I understand there is a motion to approve of the amendment with three changes. The first change is in line 10, which makes it "including notice to absent parties that they come in and present claims and defenses if they so desire."

MR. LEMANN: Absent persons.

JUDGE CLARK: Absent persons, yes, I am sorry.

PROFESSOR WRIGHT: Would you say "may come in"?

JUDGE CLARK: "that they may come in and present claims and defenses if they so desire."

The second change, in lines 11 and 12, will change "When, notwithstanding such orders," to the word "Whenever".

PROFESSOR WRIGHT: No. That hasn't been moved.

DEAN PIRSIG: I just raised the point and left it to the Reporter to work out.

JUDGE CLARK: Then I will leave out that one. If it is going to be left to the Reporter, I will leave that out.

All right, there are only two changes. That one hasn't been made yet.

The other one is in line 14, to delete the words "absent parties" and make it "absent persons who may be bound by the judgment".

Then there is another "parties" in line 17 which becomes "persons".

PROFESSOR MOORE: I think Dean Pirsig's suggestion is a good one.

MR. LEMANN: I don't know why he was so pusillanimous. Dean, why don't you propose it?

DEAN PIRSIG: I thought if it was good, the rest of you would pursue it.

MR. LEMANN: I second Dean Pirsig's motion.

JUDGE CLARK: I had already given way on it. I had been all softened up on it.

Then we will add that. "Whenever" in lines 11 and 12 instead of "When, notwithstanding such orders".

Is there any further discussion? If not, all those in favor will raise their right hands.

PROFESSOR MOORE: I do this reluctantly.

JUDGE CLARK: Ten. Those opposed. I don't see any.

I think that brings us to the substitution rule, which of course is a rule which has caused a great deal of trouble. Rule 25, the substitution rule.

There are two parts to that, Rule 25(a) and Rule 25(b).

First on Rule 25(a), the main purpose of the amendment there is to take out the limitation of time in the case of death, the limitation of two years. You may recall a little the history of this. This was a period of limitation provided by statute. When this rule was originally drawn, we took over the statutory period; and then they took the statutory base away from us and left us hanging in the air without a statutory base, partly, as I understand it, on the theory that it was covered in the rule. Now the rules of their own weight carry a definite period of limitation which is a fairly strict rule of limitation.

Our proposal has been to take that out of the rule. I think we can say that it is rather generally approved. Mr. Wright says I am overstating it a little.

PROFESSOR WRIGHT: The majority disapproved.

JUDGE CLARK: Is that so? It may be that I was referring to Mr. Fischer and his article on the proposed amendments to the rules when he said this rule "will no doubt

be universally welcomed." You think more disapproved than otherwise?

PROFESSOR WRIGHT: Yes.

JUDGE CLARK: I don't suppose that many of them discussed whether this was a proper rule-making question or not. They just thought it was desirable to have the limitation.

At any rate, let's look at the proposal because of its importance. If you will look at the book on page 17 you will see what we have done. We take out the two-year limitation and the absolute direction for dismissal, and we make a more flexible rule saying, "If substitution is not made within a reasonable time, the action may be dismissed as to the deceased party."

DEAN MORGAN: I thought I noted a good many objections to the reasonable time.

PROFESSOR WRIGHT: Yes. There were objections both ways, both that it holds it open too long and that it might let some judge dismiss it too soon. That is the Department of Justice position in their memorandum.

DEAN MORGAN: It is so indefinite.

MR. PRYOR: I think it should be indefinite.

PROFESSOR MOORE: I think this is a good rule the way it is.

CHAIRMAN MITCHELL: You mean without striking out the limitation?

PROFESSOR MOORE: No.

CHAIRMAN MITCHELL: The way we want it?

PROFESSOR MOORE: The way the Judge has it amended.

MR. LEMANN: You mean the amendment is good?

PROFESSOR MOORE: Yes.

MR. LEMANN: Of course that Louisville Bank case was a very hard case. There were so many stockholders, it was almost impossible for the receiver to know of the deaths. I think there were 5,000 of them.

CHAIRMAN MITCHELL: Didn't the Court strike down our rule because it conflicted with the statute of limitations when we originally tried to do this?

JUDGE CLARK: On page 19 we discuss that previous situation. That was Anderson v. Yungkau, a case which was then pending. It may be questioned whether the statute of limitations may be prescribed by rule of court. At the time of the Anderson decision this question did not arise because the two-year provision of the rule was substantially identical with what was the then Code provision; but the statute was repealed by the Revision Act of 1948 for the stated reason that it was superseded by Rule 25 of the federal rules.

Even if the existing rule is valid, the rigid limitation it prescribes is not satisfactory. Thus, in Anderson v. Yungkau the Court noted that it was through no lack of diligence that the plaintiff, who was seeking to enforce assessments

against more than 5,000 stockholders, failed to learn of the deaths of a few of these stockholders until more than two years after the event.

In a late case coming from the district court in Connecticut, Bush v. Remington Rand, Inc., the lawyers had overlooked making substitution in a case which involved something over a million dollars of royalties while it was pending before a master. The court conveniently helped them out by saying that there had been waiver by the other party. I wasn't sitting there. I sat in the original case in the district court and found the judgment for payment to this inventor. I had what I thought was a very good compromise involved because they had to hire Mr. John W. Davis, then whom I think they could have done no better, to tell my own court on appeal how wrong I was, and he did. He told them very well. They affirmed my decision and then they got this lawyer out of the trouble he was in. I wasn't in that stage of it, but I had visions that he would have to pay a million dollars for negligence, which I thought he might well have done. But they rescued everybody, I guess.

It does seem to me as though it is something desirable, and I still think that what we recommended was good.

MR. LEMANN: May I ask what is meant on page 19 by the last two or three lines? "thus to the extent that the period for substitution is not otherwise limited by applicable

state or federal law, the trial court is left free to consider the circumstances of the particular case . . ." How would the state law come into that?

PROFESSOR WRIGHT: I think where it would come in, Mr. Lemann, is that this would regulate a suit against a state officer and there is at least a question whether or not under the Erie Railroad v. Tompkins doctrine the state law would not be controlling for the period of substitution, with Professor Moore in his treatise stating that state law would control, although a couple of courts which have passed upon it haven't seen the difficulties and have ridden rather roughshod over that and have said it is purely a federal question.

MR. LEMANN: Isn't substitution a procedural matter?

PROFESSOR WRIGHT: That is the question.

PROFESSOR MOORE: What about the time period, though?

MR. LEMANN: We are not talking about subdivision (d) of this. We are talking about subdivision (a)(1). That would not normally be a suit against a state officer. We are saying it might be.

I wonder why that should be controlled by state law any more than a suit against an individual. If you take the position of Professor Moore that substitution is a right, would that not be equally true if the suit was against an individual who died?

PROFESSOR MOORE: I would say in the typical diversity

case, state law may have a certain period as to when the suit comes to an end for failure to substitute. The Supreme Court in Anderson v. Yungkau said that 25(a)(1) was in the stature of a statute of limitations. If you believe that, then you take the Erie doctrine that the statute of limitations is substantive --

MR. LEMANN: They didn't say anything about the Kentucky law in that case, though.

PROFESSOR MOORE: That was a federal case. That involved a federal matter, stockholders' liability in a federal bank.

CHAIRMAN MITCHELL: If in Rule 25 we leave a wide open time like a reasonable time, it would be a different period in every lawsuit you had anywhere. We might say, "A reasonable time shall not be longer than one year after knowledge of the death," something like that.

The trouble is, if we fix a time limit, a man may have a good reason for not knowing about the death. He may never have heard of it. If he once has knowledge of it, there ought not to be an indefinite time for him to move for substitution. He ought to get busy right away.

If we provided words the substance of which would make it one year after knowledge of the death --

MR. DODGE: That was suggested by one commentator. One year after notice of the death is filed in the case.

JUDGE CLARK: That is the Missouri provision. That appears at page 24 of Professor Wright's summary.

MR. LEMANN: Am I right now in understanding that Professor Moore is correct that we ought not to have this rule at all? It is a matter of state law. Federal law is going to have nothing to do with it unless you have a federal case like a suit against the stockholders of a national bank, which was Anderson v. Yungkau. In every other case it is going to be a matter of state law.

JUDGE CLARK: What is the answer to that?

MR. LEMANN: I was astounded. I would not have thought it was anything but procedural even in federal law. I think we are misleading here if the"great authority" says that this is a matter of state law. He says unequivocally:

> "If the action involves a federal matter and the suit is equitable, substitution could be made within a reasonable time. . . . If the suit is legal, the state time period for making substitution would govern."

He doesn't make any if's, and's, or qualifications or perhaps, or "it would seem." There it is.

JUDGE CLARK: Mr. Justice Frankfurter in the Guaranty Trust case defined as controlling state law whatever would substantially affect the outcome of the action, and under that there have been cases by some of the federal courts saying on the question of amendment after the statute of limitations that

our Rule 15(c) must be controlled by state laws.

MR. LEMANN: Whatever affects the rights of the parties, according to Justice Frankfurter?

JUDGE CLARK: Whatever substantially affects.

MR. LEMANN: I should think almost everything in these rules might substantially affect the rights.

DEAN MORGAN: You know the Kansas case where they held that if the service of summons was made too late under the Kansas statute, then the action wasn't even begun in the federal court. The rule says it was begun in the federal court when the statute of limitations starts to run as well as when it is over.

DEAN MORGAN: If this is a statute of limitations they were right, but is it?

MR. LEMANN: If he is right I think we ought to do something about this and not leave it merely to be picked up as a footnote at the bottom of page 19.

PROFESSOR MOORE: On this statute of limitations, that is what Douglas said it was in Anderson v. Yungkau.

DEAN MORGAN: That was after deep study.

MR. LEMANN: Let me ask you, how confidential is this transcript?

MR. TOLMAN: We take good care of it.

MR. LEMANN: I hope no Justice will ever be permitted to read it.

JUDGE CLARK: I think sometime you are all going to realize just how awful Erie Railroad v. Tompkins is.

DEAN MORGAN: You mean the extension of it.

JUDGE CLARK: All right. I mean the way that it is currently applied in practice. I think it is just dreadful.

CHAIRMAN MITCHELL: Gentlemen, just a minute. There has been a suggestion here that there is a lot of opposition to making this a reasonable time with no definition of what the reasonable time is. It would be a very simple thing to put in this rule a statement that reasonable time shall not be longer than one year after knowledge of the death of any person who is involved. Why could we not do that?

DEAN MORGAN: Then you have to show knowledge. The other suggestion is time after filing of notice of death in the action.

MR. LEMANN: Isn't it almost insulting to our federal judges to say we think it reasonable to wait more than a year after you knew the party was dead?

CHAIRMAN MITCHELL: Make it six months after knowledge if you want to. I don't insist on it, but I don't like that reasonable time business. No two judges would agree on it.

JUDGE CLARK: Would you want to put in the provision of the Missouri statute directly? That is on page 24. "within one year after notice of the death is filed in said action."

CHAIRMAN MITCHELL: No. I think the cases that come

up are cases where nobody files a notice and you don't know anything about it.

MR. PRYOR: I think it ought to be a certain time after knowledge of the death.

CHAIRMAN MITCHELL: That would be the same --

MR. LEMANN: Suppose he doesn't do it for five years. Suppose he doesn't know it for five years. If he was as smart as you are, he would know it in six months.

DEAN MORGAN: It puts a limit on it, a reasonable time but not more than a year after knowledge.

CHAIRMAN MITCHELL: That is what I meant. Say a reasonable time shall not extend beyond a year or six months after knowledge of the death.

MR. PRYOR: You are putting a limit on what is a reasonable time.

CHAIRMAN MITCHELL: Yes, we are making a specification of what we mean by reasonable time. It might be even shorter the way I framed it.

MR. PRYOR: It might be less than that.

CHAIRMAN MITCHELL: It should not be more than six months after knowledge of the death.

MR. LEMANN: That is better than a year. It seems to me a year after you know about it is plainly unreasonable.

MR. PRYOR: Is this same objection made in connection with (d), too, where we have reasonable time?

PROFESSOR WRIGHT: It has been, but not by so many people. A lot of the people who objected to it in 25(a) say they have no feeling about 25(d).

DEAN MORGAN: That is right.

PROFESSOR WRIGHT: Also, I think you should note the contrary position which the Department of Justice has just urged and which a number of other correspondents urged, that what we ought to say is that you cannot dismiss within a particular time. The Department says that in the 25(d) situation we should say that the action may be dismissed if substitution is not made within one year or within such additional time as may be reasonable, in order to allow you a fixed period which the judge cannot cut down.

PROFESSOR MOORE: We have been talking about 25(a) largely from the point of view of a defendant who dies. The Bush v. Remington Rand case involved a suit where one of the plaintiffs died. That interest vested in surviving plaintiffs. If the suit had been dismissed, under Connecticut law the surviving plaintiffs could have turned right around and sued anyway, because the original suit was begun within time and Connecticut has the usual abatement statute. Where a suit abates, another suit can be brought within a year.

That is a little different from where you have the defendant involved and he dies. If you can't continue the lawsuit against him under this, the time for filing a claim

against the estate would probably be gone and you can't bring another lawsuit just as a practical matter.

So I think we ought to have in mind that the rule deals with both plaintiffs and defendants, although the problems involved are quite dissimilar at times.

CHAIRMAN MITCHELL: I would leave it a reasonable time considering all the circumstances, but in any event not longer than six months after knowledge of the death. I don't mean filing anything, because I can't conceive of anybody filing with the court a notice that so-and-so is dead.

JUDGE CLARK: In the particular case that Professor Moore was talking about, the lawyer who made the motion knew that his client had died.

DEAN MORGAN: He just didn't know what to do about it.

JUDGE CLARK: I don't think he ever gave it thought. He just didn't get operating.

DEAN MORGAN: He never had a case like that before.

JUDGE CLARK: He wasn't used to the federal law, I guess.

CHAIRMAN MITCHELL: Isn't there a Supreme Court rule about substitution in case of death?

JUDGE CLARK: They took our present rule more or less. They amended our rule. They took the existing rule, not our amendments because they are not made yet.

MR. LEMANN: You mean the two-year rule?

JUDGE CLARK: Yes. As I understood it, they took it because it was our rule. They wanted to have the same rule.

CHAIRMAN MITCHELL: You mean in their new rules they adopted what?

JUDGE CLARK: The old rule, the present rule.

CHAIRMAN MITCHELL: Two years. They can amend their rules easily enough after they see ours.

JUDGE CLARK: We ought to have Judge Dobie here to make motions. We want somebody to make motions fast.

MR. PRYOR: It seems to me we ought to think about this. If we change the language in (a), we have to change it in (d), also, to be consistent. In 25(d) it appears in line 42.

CHAIRMAN MITCHELL: We are definitely changing it now. We are striking out something which is in the rule, so we are not adding to the burden of the court or anybody else, for that matter. The Department of Justice doesn't want to have to substitute at all when successors in office are appointed, do they?

JUDGE CLARK: No.

MR. LEMANN: I see on page 8 that the Department of Justice says they have a little different feeling if they are sued. They do not like too much latitude about bringing in a new man. They say at the top of page 8: "One year (actually 12 months) is the time which Congress ordinarily provides for

substitution when an agency is succeeded by another. . . . Accordingly, if this rule is to be amended, we suggest that this part of the rule be left as it stands except that 'one year' be inserted in lieu of '6 months'" and they suggest "or within such additional time as may be reasonable."

CHAIRMAN MITCHELL: Nobody seems enthusiastic about my little suggestion.

DEAN MORGAN: I was just going to move that your suggestion be embodied.

CHAIRMAN MITCHELL: Thank you.

DEAN MORGAN: A reasonable time, but not longer than so long after notice of the death.

MR. LEMANN: Not longer than six months after notice of the death, resignation, or change in the holding of office under (d); a uniform provision. A reasonable time, not longer than six months after notice of the circumstances which would make substitution proper.

JUDGE CLARK: I must say that I really think if we are going to do that we had better not do anything. Now a plaintiff has two years, and this will give him six months.

MR. LEMANN: After knowledge.

JUDGE CLARK: He has knowledge.

MR. LEMANN: Why do you say he has knowledge? He didn't have it in Anderson v. Yungkau.

JUDGE CLARK: I say when you are bringing suit and

your client dies, you are going to know pretty soon. You are looking at it from the defendant's side. What you are doing is certainly requiring the poor lawyer who does not know all these rules to act pretty quickly.

MR. LEMANN: You mean six months is too fast?

JUDGE CLARK: I should think we are making law with a vengeance in the very case that I am talking about. As I say, it would operate to cut down the two-year period to six months.

MR. LEMANN: After he knows.

JUDGE CLARK: I know, but a lawyer is probably going to know when his client has died. Not always. He might not if the client had gone on a trip around the world and died somewhere else.

MR. LEMANN: The trouble is with the other fellow, not the lawyer of the decedent but the lawyer on the other side.

JUDGE CLARK: The lawyer that I am a little sympathetic with, who was held negligent, hadn't realized what he should do in two years. In this case you are just going to give him six months.

CHAIRMAN MITCHELL: If a man's client dies and he doesn't act to keep his case alive, he is a pretty poor lawyer.

DEAN MORGAN: If he waits two years he does not know enough to start a lawsuit.

JUDGE CLARK: I think there is something in what you

say. In this case, as we know from looking back, it would not have helped him whether it was six months or two years or if it was quite a little longer. Even so, it is possibly somewhat the looks of the thing. We are very hesitant about substantive law, and here we are suddenly coming up with something that cuts everybody down -- that is too far. I won't say everybody.

CHAIRMAN MITCHELL: We have a rule here which says you have to answer within 20 days. Is that a substantive rule?

JUDGE CLARK: That is what I wondered about, as a matter of fact. I am not sure what would happen. I will say when we come to that issue, there was a student who wrote in the Law Quarterly something that I thought was wiser than it was desirable. That young gentleman, whoever it was, said that now the problem in the diversity cases is that you really cannot tell what part of what we have understood was procedure is procedure or substance. Therefore, the wisest thing for the lawyer is always to follow all technical rules, which was an awful thought but I am not sure that that is so. I am not sure under the Guaranty Trust rule on that very point of the 20 days. I think you could raise a point about that.

MR. LEMANN: That is beyond this rule. We have to do two things in this rule about the time limits, and then I am going to say I thought we ought to put a caveat or something to highlight Professor Moore's view that maybe this rule is of no

importance except in a suit involving federal rights.

CHAIRMAN MITCHELL: You would scare all the lawyers to death then. They would not know what to do.

JUDGE CLARK: In this case I frankly would rather do the opposite to what the Department suggests particularly for their own rule, when we get there, that is, Rule 25(d), "If substitution is not made within a reasonable length of time, which shall be not less than one year", not to limit it to six months but to make it that you cannot make it a shorter time than a year.

CHAIRMAN MITCHELL: Their theory is that a case is not brought to trial now in a good many districts for four years, or something like that, so why make the man hurry up?

JUDGE CLARK: If you have had time to look at the Department's suggestions, naturally this is one thing they are very much interested in. Let me read from page 8 of their statement which deals particularly with subparagraph (d), which is the one they are more interested in.

"Accordingly, if this rule is to be amended, we suggest that this part of the rule be left as it stands, except that 'one year' be inserted in lieu of '6 months' in line 28 and that the following be inserted after 'months':

"', or within such additional time as may be reasonable.'"

You see there they are extending that provision quite a little.

What they say about subsection (a) is that they do not oppose the change. They want a uniform rule.

"In addition, there are some advantages in having a minimum period in which substitution is proper, as of right . . . It might therefore be more desirable, if the rule is to be amended, to leave the rule as it is, with the addition of the following words to be inserted after the word 'death' in line 4: ', or within such additional time as may be reasonable,'".

Here is a case where the Department of Justice is suggesting more reasonableness, if I may put it that way, rather than less. We seem to be going the other way.

DEAN MORGAN: I am going to offer a compromise, and that is, "If substitution is not made within a reasonable time, which shall not be less than one year nor more than one year after knowledge of the death".

JUDGE CLARK: That is better.

CHAIRMAN MITCHELL: I agree, too.

Excuse me. The Chief Justice wants to see me now. What time shall we meet in the morning?

JUDGE CLARK: Would you like us to adjourn, or shall we go on?

(Discussion off the record.)

JUDGE CLARK: Let us go on for a little while.

DEAN MORGAN: I make my motion. Does anybody here second it?

MR. DODGE: Yes. Was that the Chairman's suggestion?

DEAN MORGAN: I think you can make that apply to both subsections. "shall not be less than one year and shall not be more than one year after knowledge of the death".

MR. PRYOR: I would like to offer a substitute, and that is that we approve the amendment as printed.

JUDGE CLARK: That is, as it now appears on page 17.

MR. LEMANN: I think I would second that. You cannot get anything that is perfect. If you bring in this new provision you would have some criticism of that, too. There are not too many of these cases, I imagine.

JUDGE CLARK: Mr. Pryor moves a substitute which is to approve the amendment in the form submitted as it appears on page 17 of the printed draft. All those in favor raise their hands.

MR. DODGE: What are we voting on now?

JUDGE CLARK: Seven.

MR. LEMANN: To leave the substitution within a reasonable time. We voted not to substitute anything for the "reasonable time".

I should like to ask whether we should make a special note to extricate from its present obscurity the point of Erie

Railroad v. Tompkins.

JUDGE CLARK: Let me say this for our transcript here. I take it the vote was seven to nothing, with Mr. Dodge not voting.

MR. LEMANN: He would have voted, but he was reading at the time.

MR. DODGE: I understood at the last moment that we were abandoning all the discussion about the suggestion of putting in a definite time.

JUDGE CLARK: That is right.

MR. DODGE: Being in favor of a definite time, I vote against that motion.

JUDGE CLARK: All right. It is seven to one.

I ought to say in all fairness to Mr. Dodge or to anyone, that I think perhaps we will need to reconsider this or that we ought to look at it again after we have settled on the (d) provision, and we probably will be reconsidering it somewhat because the (d) provision dealing with public officers also presents either exactly the same issue or an issue of the same general kind. So why don't we take this as a tentative vote now, and we can reexamine it when we look at (d).

Your further question, Mr. Lemann, is at the foot of page 19 as to the note.

MR. LEMANN: Yes. I would suggest that you elevate that. It seems to me to be a very obscure suggestion that this

may not at all be governed by the rule. I think it would be a help to the profession if you would put it in the form of a note:

"Note. It has been suggested that under the doctrine of Erie Railroad v. Tompkins the period of limitation for substitution in suits not involving federal questions may be considered a question of state law."

MR. DODGE: How can it be if it is within our jurisdiction as a matter of practice?

MR. LEMANN: We are told that as to federal matters this is within our purview. The federal bank suit, Mr. Moore says, involves the enforcement of the national banking law. Then he says if Lemann sues Dodge in the federal court in Massachusetts, the question of when substitution may be made if Dodge should die would be governed by Massachusetts law, not by the federal law.

MR. DODGE: How can the Massachusetts law affect practice in federal courts?

MR. LEMANN: If it is a substantive matter. Anything that affects your rights is substantive.

JUDGE CLARK: This is really too good an opportunity to miss. I wonder if you would permit me to go back and read the notes that we recommended before and we were directed to strike out, to abbreviate, and so on, and to cite Professor Moore, and then we got into all this hassle with Barron and

Holtzoff and all that. This is our original note.

"Thus the rule now stands as a statute of limitations without support in the statutes. If a rule of limitation is substantive, as suggested for some purposes by Guaranty Trust Co. v. York, 326 U.S. 99, then Rule 25(a) is not binding in diversity litigation, and it would be invalid in federal matters because of the provision of the rule-making statute, 28 U.S.C. Section 2072, that substantive rights are not to be affected by the rules. The Committee expresses no opinion as to whether the existing rule is substantive in nature. Compare 4 Moore's Federal Practice Paragraph 25.06, Second Edition 1950 with Commercial Solvents Corp. v. Jasspon, 10 F.R.D. 356, and Hofheimer v. McIntee, 179 F.2d 789, Seventh Circuit. Even if the existing rule is valid, the rigid limitation as prescribed is not satisfactory."

Then it lists Anderson v. Yungkau, and so forth. There we told all we knew.

MR. PRYOR: As to whether or not the rule about substitution of parties in case of death is substantive, Rule 15 of the Rules of Civil Procedure adopted by the Supreme Court of Iowa under statutory provisions exactly the same as the one under which we are acting provides as follows:

"Any substitution of legal representatives or successors in interest of a deceased party must be ordered

within two years after the death of the original party."

JUDGE DRIVER: It seems to me, Judge Clark, that while you might say that this definite time limitation of two years or six months, or whatever you have here, might be substantive as being a statute of limitations under the extension to Erie, I do not think you can necessarily say that as to the provision we now have, the amendment providing for dismissal within a reasonable time, because I cannot conceive of a court's right of power to clear its dockets of stale litigation as being substantive rather than procedural.

Certainly, I do not have to refer to a state statute in order to tell how long I have to go before I can clear my docket of a stale case. That would be going further than even the Supreme Court has gone in any case.

DEAN PIRSIG: I would like to add to that, Mr. Chairman, this language from the Supreme Court is not that this is a statute of limitations as a matter of substantive law. They are saying that it is a statute of limitations upon revivor. They do not say whether revivor is a matter of procedure or of substantive law. It could well have had in mind that this is a statute of limitations on a procedural matter, which would still leave it within the jurisdiction of this Committee.

In addition to that, since the rule was earlier adopted, there has been Congressional action to the effect that

no statute is needed because the rule has established it, which seems to me to be a recognition by Congress that we do have the power and it is from Congress that we got the power.

I would not like to see a note which would question the validity of what we do here. If we do not do anything, there is no statute now which would take care of it.

MR. LEMANN: I think we have to face it. The only thing I have to say about it is when I see the categorical statement Mr. Moore makes that state law controls, it is news to me and I am reasonably certain it would be news to many of the people reading this rule. It would not occur to them. To that extent we would not be serving them.

I do not know if it need be as full as what Judge Clark said, but one of our members is on record as having that view.

PROFESSOR MOORE: I am rather inclined toward Dean Pirsig's view that the less said about this in the note, the better. Despite the fact that I think if there is a rigid time limit it is substantive within the preachment of the Supreme Court, I would just as soon not say anything about it.

JUDGE DRIVER: I have the idea that the tide is receding in the matter of the extension of Erie, and I do not think we should do anything to stir it up or prevent the recession from going on. I do not think the Court is going to go any further than it has, and that it will be inclined to back

away from the extreme cases like Guardian Trust.

MR. DODGE: I think a reasonable time is not substantive, but two years is.

PROFESSOR MOORE: I think reasonable time is sufficiently loose and flexible that a court, if faced with the Erie argument, might uphold that and would have to reject the rigid two-year limitation. I come back to the Bush case. It seems ridiculous that that lawyer did not make the substitution. There were two suits, one by a Mrs. Dysart as executrix of her husband's estate, and a second by herself in her individual capacity and three plaintiff children. She died. Incidentally, this case went on for 17 years and was concluded just recently. During this long litigation she died. The suit has been to a master and through complicated accounting proceedings. The only people interested in her successive rights were the three plaintiff children.

Granted that the lawyer was perhaps careless -- I do not think he had read the rule, really -- the defendant knew about it. Nobody was prejudiced by the fact that there was no substitution made for Mrs. Dysart. It would really have been absurd, unless compelled by rule or statute, to dismiss that lawsuit after the long accounting proceedings had been going on, because the very next day under the Connecticut statute the three children and one of them as administrator de bonis non of her mother's estate could have started the suit

all over again. Nobody was hurt.

It would be very regrettable, I think, to have a rule which would say in those circumstances, if this rigid two-year period went by or six months or a year, whatever you adopt, that the court has to dismiss it. I really think it was bad that it caused the Second Circuit to think up this doctrine of waiver.

JUDGE CLARK: That shows it is an ingenious court.

MR. LEMANN: It seems to me a rather obvious thing. Don't you think so?

JUDGE DRIVER: Judge Clark, there is a good deal of this material which I have not been able to go through, and I assume that is true of other members. I have not been able to look at the Department of Justice memorandum which came to us, and I think there are a few others which have been put on the table. I would like to see those before we go any further.

I think we should adjourn and give us a chance to look them over before we start in again tomorrow morning.

JUDGE CLARK: I think there is a great deal in that. I have not had a chance to see them myself. I would like to go over what the Department of Justice has said. I do not know that it would be worth while to take two or three minutes to see what the issues are.

MR. LEMANN: They have not too much to say about this.

You have stated it already. I would like to get through with this rule myself. If we start all over in the morning we will start de novo and devote another hour to it.

JUDGE CLARK: Let me say on this particular point as to the note, in this one case, although I was a little pleased to read back our earlier notes, I certainly want to say just as little about Erie Railroad v. Tompkins as I possibly can. I will suppress the thing if we can. I shall not feel very bad if you think that nothing need be said.

I rather wondered if in all due honesty we ought not to mention as much as we did before. I mean not the earlier time, but as much as is mentioned here. This had some qualities of being vague, which is what Erie Railroad v. Tompkins now requires, but it was at least honest. Therefore, I am not sure that that was not too bad a solution, but I do think the way we should go is less rather than more.

There isn't much here. If you think we can get by without telling anything, all right. I do not object -- subject to one question that I want to bring up later as to whose notes these are, anyway.

MR. TOLMAN: What do you suggest about revision of the note?

JUDGE CLARK: I would suggest that it be left as it is. I do not think it is too bad as it is. I wouldn't go back to our original note. We did say too much, I think. This

gives a hint to any lawyer so no one can say we misled them. They may not be able to read it with a seeing eye. I should think we either leave it as it is or, if we are going to do anything, leave out all reference to this question "is not otherwise limited by applicable state or federal law".

MR. LEMANN: I now move that we retain the note in its present form.

JUDGE CLARK: All right.

JUDGE DRIVER: I second the motion.

JUDGE CLARK: Is there any objection? If not, there is no objection, and that will stand.

That does bring us to subdivision (d), and I think we should adjourn and consider it tomorrow, but I wonder if it would not be a good idea to take two or three minutes just to open the subject. That might help you as you read late into the night tonight.

The great difficulty here in working this out easily in the absence of a statute is the Supreme Court decisions, notably Ex parte Young and Ex parte LaPrade.

In Ex parte Young, in order to be helpful when they needed to be helpful, the Supreme Court ruled that a suit to restrain a public officer from enforcing an unconstitutional statute was not against the government and therefore it could be maintained, a very desirable result in the particular local case, but now that creates some difficulty when we try to work

it out here. Let me indicate how some of the problems come up.

Professor Davis, a very able member of the University of Minnesota Law School, has objected that that is all silly and in effect that this is a case where the government is involved, as of course it is actually. I mean as a practical matter the officer is doing these things because he is an officer. Therefore, it is a rather ridiculous situation.

Accepting all that, Professor Davis then came up with a suggestion which, as I understood it, was to provide in effect that if the suit was in reality against the government or for the government, it should be made in that form.

I thought that was an inconclusive result which might be reached by statute, but I do not see how we could reach it by rule, because we have these Supreme Court precedents. Therefore, if we had a rule of the form that Professor Davis has suggested, we would not have anything to meet the situation caused by the Supreme Court's decision, because the Supreme Court's decision is that the suit is not in reality against the government. That just wipes this rule out.

So my own reaction on that point was that we had better stick to what we were trying to do here, and that Professor Davis' solution was not a solution until he could guarantee that the Supreme Court would take back their decision in Ex parte Young, and they may not want to for the very reason which led them to do it in the first place.

Along comes the Department, on the other hand, saying that we have gone too far in suggesting that where a suit is made by name for or against the office, we will accept that as such until somebody requires that a name be put behind it. I do not know why they want to object to it. I think that is a good rule. Maybe they can convince me as I read tonight, but it seems to me that our going that far in the direction that Professor Davis suggests is a desirable thing. Apparently they do not think so.

One thing more, and that is all I have to say to you unless somebody wants to raise some question.

I suggested to Mr. Brownell, the Attorney General -- there is a reference to our correspondence, and I suspect that probably is here somewhere -- when he first urged that we ought to do something in this regard, that the only complete way was an Act of Congress which would cover all these matters, which would cover statutes of limitation and all of this.

He responded in effect that that was a good thought, and he hoped something could be developed. Then his minions got busy thinking how lovely that would be and how they could add various provisions protecting the Department of Justice and making a distinction between actions which are against the officer as an individual and those which are against the office.

My reaction to that was, God forbid a statute in that regard, because that statute would be loaded down with all sorts of special provisions for the Department of Justice and would not too much help out the poor litigant. So that again more or less threw me back to what we were trying to do, which is as far as I have gotten at the moment.

Does anybody want to add anything? Have I stated the question properly? Mr. Wright, maybe you can tell them. You are holding the brief for Professor Davis. Maybe I have not done right by him.

PROFESSOR WRIGHT: I think you stated the question properly, and the members of the Committee have his letter.

JUDGE CLARK: Do you want to say anything, Dean Pirsig?

DEAN PIRSIG: No. I was rather persuaded by your comments on this. I don't think he has the solution, myself.

JUDGE CLARK: I do not think the Department of Justice has as yet, but I have not been able to do more than glance at theirs.

DEAN MORGAN: It is treason to say that the Department of Justice hasn't the solution.

JUDGE CLARK: Shall we now adjourn so we can all study this all night long?

If we are going to adjourn, I have to suggest to you as told to me by the Marshal that this room has to be used

tonight by some group that are studying psychiatric developments of one kind or another, and they have to take notes. He suggested that we collect our materials and put them over on the table. I think I have to say, therefore, that you had better move your material somewhere, because these tables are all to be used as early as 8:15.

We will adjourn until 9:30 tomorrow morning. Is that the agreed hour?

end aj ... The meeting adjourned at 5:30 o'clock p.m. ...