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ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

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TUESDAY MORNING SESSION

May 18, 1943

The meeting reconvened at 9:40 a. m., Chairman Mitchell presiding.

THE CHAIRMAN: Shall we proceed? The next is Rule 13, and the Reporter's recommendation is one recommendation on page 36 of his report, the bottom of the page, in which he makes the recommendation about entering judgment on separate issues, counterclaims. Will you take that up, Mr. Reporter?

JUDGE CLARK: That recommendation really becomes important in connection with Rule 54(b), although I think perhaps you can see it separately. As a practical matter, the question of entry of judgment which might seem simple is one that I think in practice, in our court at least, has made as much minor difficulty as any. It seems as though we were having trouble all the while over the final judgment rule. Maybe it is inherent in the nature of things.

We also can't get judgment really entered by the District Court clerk, Mr. Folmer, who is a supreme court in himself, who says that your Rule 58 isn't legal anyway and he doesn't follow it. I think one of the real questions for consideration by the Committee is to see if we can't help out practically. I don't believe I had better try to go into it at the moment. It comes up particularly in connection with

54 and 58.

THE CHAIRMAN: Is that the matter I corresponded with you about?

JUDGE CLARK: Yes. That isn't the whole question. I mean, that is one aspect of it, an important aspect of it, but I think there are other aspects of it, too.

THE CHAIRMAN: I suggest that the proper way to do is to enter the judgment on one issue, that you incidentally hold another untried issue, that the judgment is premature and that the District Court oughtn't to have entered it, and the way to handle it is to turn it back and have them review the judgment. It came up in connection with this proposition. If you had two claims in an action, one was tried in advance of the other, that were totally independent and unrelated, that was all right and if judgment on the one issue was then appealable, it was appealed, although the other hadn't been tried. But some cases arose where separate claims were tried and litigated and the court entered judgment and then it developed that that was res judicata on some issue in an untried claim, and that is where the mess came, wasn't it?

JUDGE CLARK: Yes.

THE CHAIRMAN: There isn't anything you can do about that except to tell the District Judge he was too premature about his judgment.

JUDGE CLARK: I think we can't settle the question

absolutely. I think there is always the possibility of trouble there. But I have the feeling as I go over these cases that the District Judges never thought about the matter. It seems to me over and over again that he is asked to decide one particular question and he decides it, and then he doesn't think about whether it is appealable or not, and then counsel present to him some order which he probably signs without reading very much, and then the opposing counsel is faced with the question, is it appealable or not, and then usually he says, "It isn't save for me not to appeal."

He appeals and then it comes before our court, and we ought to be machines and so on, but somehow we don't seem to be. I have tried to be more mechanical about this, I guess, than my colleagues, but my colleagues say while they are here we ought to try to decide it because in this particular case it is going to help out. That is the way the pressure comes, and I have dissented quite a good deal in some of these cases. It happens at the moment we have a case that I think I can speak of here. We haven't decided it yet, but it involves this very kind of issue.

THE CHAIRMAN: What is the precise point that is being made?

JUDGE CLARK: Perhaps I ought to say this. I am getting a little ahead of the game. Most of what I am talking about is important in connection with 54(b), and

perhaps we had better postpone it all.

THE CHAIRMAN: All right.

JUDGE CLARK: But I was going to say, this is simply to make sure that this rule is tied up with 54(b).

JUDGE DOBIE: In other words, you just expressly tied this up with 54(b) when, without the clause that you want to add there, they would have to go to 54(b) anyway.

JUDGE CLARK: They ought to tie it up without an express statement.

JUDGE DOBIE: Yes.

JUDGE CLARK: But there is one case involving a dismissal, where the Seventh Circuit held that a counterclaim must be considered dismissed in the final judgment without looking at 54(b), because they said that the dismissal rule entirely governed. That is the Jefferson Electric case, and there is a case where they didn't connect the two. What this does is simply supply a little insurance that all these rules which are interconnected will say so on the surface. That is all this does at this point. Everything else I was saying is a little premature.

JUDGE DOBIE: I can't see any objection to it.

THE CHAIRMAN: I don't understand it, myself.

JUDGE DOBIE: I do think that all the way through here where two rules are involved, it is an awfully good thing to call attention of the board and the court to it.

JUDGE CLARK: You see, all we say here is the part that is underlined.

THE CHAIRMAN: I know. But I just don't get it. We are now on Rule 13, aren't we?

JUDGE CLARK: Yes, at the bottom of the page.

THE CHAIRMAN: What is the section that you are going to amend, 13(b)?

JUDGE CLARK: 13(1), the separate trial.

THE CHAIRMAN: It doesn't say what section you are amending. It says that the rule should read, but what part of the rule?

JUDGE CLARK: The part that we would insert is underlined and the present rule is everything without the part that is underlined.

JUDGE DOBIE: Just add the words, "in accordance with the provisions of the terms of Rule 54(b)," to that 13(1).

SENATOR PEPPER: That is right.

THE CHAIRMAN: I see.

JUDGE DOBIE: I move that the amendment be adopted.

SENATOR PEPPER: I second it.

THE CHAIRMAN: Any objection?

MR. LEMANN: I think it just brings up the question of how far we are going to make amendments to polish up. My own feeling is that we should try to keep as few amendments as possible and that we can't possibly prevent all the

mistakes that District Judges may make.

JUDGE DOBIE: I think it is quite important, Monte, that where these two rules work together, the attention of the courts and lawyers be called to the two. I am absolutely in accord with you that we ought not to keep tinkering, but I do think it is quite important that where two rules work together, it is well to call attention to it.

MR. LEMANN: It is going to be a matter of degree as we go along because I feel that perhaps almost all of the Reporter's suggestions are good and ought to be adopted if we could disregard generally the disinclination to make a lot of changes. There is hardly anything that is proposed here that wouldn't be an improvement and wouldn't be a signpost to the lawyers and the judges. If we want to put up useful signposts, I think we probably should adopt all of them, except it is a matter of degree and unless they are important, my personal feeling has been to say, don't change it.

THE CHAIRMAN: That is why I was inquisitive about the purpose of it, to know whether it was really a very useful amendment or not. My understanding of the situation and the problem that the Second Circuit has had is this, just as I stated it: You have more than one claim involved in the case and the court separately tries one of the claims and decides it. Then under 54(b), for judgment at various stages,

he enters judgment at once on the claim he has decided, that is a final judgment, and the man has to appeal from it. He can't wait until the other issues are tried before he can appeal. It has to be tried and decided within three months. So he takes an appeal on that judgment on that separate issue. Then it develops that these different claims, one tried and the others not, have issues in common, and one judgment, although nominally only one claim, has the effect of adjudicating a determinating issue in one of the other cases.

The court in the Second Circuit got into a snarl about that and I had some correspondence with the Reporter about it, informally, and my suggestion was that 54(b) might well have provided that where that situation exists, where there is a common issue, the Rules should provide that the entering of a separate judgment on one of those claims should be withheld until the other claims with the common issue were decided. Otherwise, you had a res judicata on it, and if the common issue was there, what ought to happen is that the lower court ought not to have entered the judgment. Maybe the rule required him to, and the real amendment ought to be in 54(b) and it should provide that where one issue is determinated and one judgment on one claim involves adjudication of a vital issue in one of the others, this separate judgment business ought to be withheld so the whole case can go up on one appeal. That is my understanding

of your real problem, isn't it?

JUDGE CLARK: Yes. You will see when we get to 54(b) that we have provided--practically, there is one way of relief. We there suggest that no final judgment be entered unless the District Judge, in writing, directs that it be entered. I hope that will help. I am afraid it won't completely, because I think District Judges won't pay much attention to it, even at that, and when counsel bring around something for them to sign, they will probably do it. But at least we are going to try to make them conscious of the problem if we can.

THE CHAIRMAN: In view of that statement of mine that we want to amend 54(b), if we can, so as to prevent the separate judgment being entered immediately in the cases such as I have described, it does seem to me appropriate that this Rule 13(1) be amended. It says, "He shall enter judgment on separate claim." It might well contain this clause, "in accordance with 54(b)," because we will put a clause in 54(b) that he shouldn't enter the separate judgment until he has determined all the claims and tried the others.

It seems to me, even though I sympathize with your idea, we won't get the thing worked out right unless we make a special reference here to 54(b), because 54(b) will have that red flag in it, don't you see?

MR. LEMANN: I would have thought under 54(b) as it

stands he shouldn't have entered separate judgment in the case described if he didn't have to.

THE CHAIRMAN: That is the position I took in that correspondence.

MR. LEMANN: He just made a mistake, and I say, we can't stop the mistakes.

THE CHAIRMAN: You can if you put an express clause in 54(b) that if there is a common issue, he shall withhold the judgment on one claim until he has tried the others, because then you have separate appeals, and when you get up on the second appeal you have found it has already been adjudicated in the first judgment and there is nothing to review, don't you see?

JUDGE CLARK: Of course, Monte, I have found from experience it isn't so easy to sit up on high and try to correct mistakes as such. I mean, that requires a degree of hard-boiledness that I guess judges don't now have, and actually, what you have is a complete record, a complete everything before you, and if you are going to tell them, "No, we won't tell you what is in our mind," well, I have stuck to it, but I just say, why shouldn't we decide it? It is all here and it will help the parties out--and in the immediate case it will. I mean, they have, themselves, all the way up.

MR. LEMANN: Couldn't you decide that case that the District Judge was wrong in rendering separate judgment on

the claim that had a common issue with the other claim?

THE CHAIRMAN: That is what I suggested, but Rule 54 doesn't say so, and it was natural for the judge to do what he did. That is the point, exactly.

MR. LEMANN: I don't think we ought to stop long on it. All these things are matters of degree. Nobody can be sure where to draw the line.

JUDGE CLARK: There is the additional point: As I say, the Seventh Circuit just separated these cases. You will find the Seventh Circuit cases, if you are interested, we stated at some length over on 41, and pages 110 and 111 quote the case. Unfortunately, the citations got omitted and we picked up the citation to Rule 54. The citation is Jefferson Electric Company v. Sola, 122 F. (2d) 124.

THE CHAIRMAN: I don't understand there is any more in this than of entering judgment on one separate claim when he really determines another one untried.

MR. DODGE: That minor point of a mistaken use of the word "filing" in (a).

JUDGE CLARK: That is Paragraph 1. I was coming back to that. That isn't on this point here, Mr. Chairman.

JUDGE DOBIE: I renew my motion so that disposition can be made of it. I move the amendment be adopted.

SENATOR PEPPER: I second it.

THE CHAIRMAN: Is there any further discussion?

All in favor say "Aye." Opposed. Carried.

JUDGE CLARK: Paragraph 1 up above that.

THE CHAIRMAN: What section of Rule 13 does that apply to, (a)?

JUDGE CLARK: (a). The use of the word "filing" in subdivision (a) appears inadvertent and should be changed to "serving" so as to correspond with subdivision (e). Moreover, the Rules generally make service of pleadings (other than the complaint) the important matter, and not filing.

DEAN MORGAN: Did you note Rutledge's opinion to the effect that this is ambiguous, "which at the time of serving the pleading the pleader has against any opposing party . . . . "

"A pleading shall state as a counterclaim not the subject of a pending action, which at the time of serving the pleading the pleader has against any opposing party."

That holds in the case where the insurance company brought an action to cancel a policy and then the beneficiary the very next day brought an action to recover on the policy, and the insurance company was insisting that that was a compulsory counterclaim and must be considered as a compulsory counterclaim rather than as an independent action.

Now, one of the questions, a subordinate question, was whether or not that would be a proper subject of a counterclaim because at the time the answer was put into the first

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action by the beneficiary, the other action was pending, so it was the subject of a pending action at the time the counterclaim pleading was served, not at the time when the original claim was served. You see, if this means what it says, the defendant can always prevent a compulsory counterclaim by bringing an independent action before he serves his answer. Rutledge held this wasn't necessarily a counterclaim. The two cases were consolidated for trial, and the main question in the action, as you probably remember, was right to trial by jury on the fraud question.

JUDGE CLARK: I suppose one's natural reaction probably is wrong about anything like this. It does seem to me, though--and I will venture it, however--that that seems rather a strange construction.

DEAN MORGAN: I don't think it is strange.

JUDGE CLARK: " . . . . shall state as a counterclaim any claim, not the subject of a pending action".

DEAN MORGAN: "which at the time of serving the pleading the pleader has against any opposing party."

JUDGE CLARK: You are defining "pending action as of the time of filing the pleading," and I maintain that is a strange construction of "pending action." I don't believe "pending action" means anything but pending at the time the present action is.

DEAN MORGAN: But it doesn't say that. It says,

"which at the time of serving the pleading the pleader has . ." Doesn't pleading and pleader refer to the same person?

JUDGE CLARK: That is true, but the pending action is still pending action. It isn't an action which doesn't start until the answer is filed. It is an action which is pending with this action.

DEAN MORGAN: Oh, not the subject of a pending action which the pleader has at the time of serving his pleading. You mean pending at the time --

JUDGE CLARK (Interposing): Pending with the present action. It seems to me that is the natural thing. If you are going to change it, how would you change it? Not the subject of an action which pends at the time this action pends.

DEAN MORGAN: It doesn't say so.

SENATOR PEPPER: Mr. Chairman, may I inquire of the Reporter what is the need for the words "at the time of filing the pleading"? Wouldn't the ambiguity be removed if it read, "not the subject of a pending action which the pleader has"?

JUDGE CLARK: The reason for putting those words in was to get rid of some restrictions that some courts had made. Some of them said that you must always have your counterclaim in existence and mature at the beginning of the action, and there seemed no reason for that if it was something which arose out of the same matter that was sued on and that

simply came to maturity thereafter.

SENATOR PEPPER: You accomplish that purpose if you say, "which the pleader has," which necessarily means at the time that he pleads, irrespective of the time when the claim has arisen.

JUDGE CLARK: Well, all I can say is that quite often in the Rules we tried to negative as we went along constructions that had been made that we thought improper, and this is one place that we were definitely negativing a construction that didn't seem desirable.

THE CHAIRMAN: Here is a case where the party is required by the Rules to set up a certain kind of claim in his pleading, and it seems to me particularly appropriate that it must be a claim which he has at the time he prepares that pleading.

SENATOR PEPPER: That is it.

JUDGE DOBIE: It doesn't have to be pleaded at that time.

THE CHAIRMAN: So, why say at the time he serves it?

DEAN MORGAN: At any rate, if the District of Columbia Court of Appeals thinks it is ambiguous and that this particular case might well be determined on that basis, it seems to me we can't say it is not ambiguous.

THE CHAIRMAN: I am a little dumb about it. My

thoughts were running somewhat away.

JUDGE CLARK: I still say it isn't ambiguous.

THE CHAIRMAN: Would you mind telling me precisely, again, what the court said was ambiguous about that?

DEAN MORGAN: What the court said was that "pending" was modified by "at the time the pleading was served." ". . . the subject of a pending action, which at the time of serving the pleading the pleader has against any opposing party . . ."--"the subject of a pending action."

JUDGE DONWORTH: Isn't the word "filing" instead of "serving"? My copy says "filing."

DEAN MORGAN: It does, but they changed it to "serving," Judge.

JUDGE DONWORTH: I beg your pardon.

DEAN MORGAN: "As against any opposing party."

THE CHAIRMAN: I don't understand it yet. "A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of serving the pleading . . ."

DEAN MORGAN: Pending when?

THE CHAIRMAN: Well, the word "which" makes it perfectly plain to me --

DEAN MORGAN (Interposing): That it means claim.

THE CHAIRMAN: -- that "pending action which at the time" doesn't mean pending action.

DEAN MORGAN: At the time the answer is served, is it?

MR. LEMANN: The "which" refers to claim, separated by comma. The "which" clause limits "claim."

THE CHAIRMAN: It doesn't at all refer to the subject of a pending action, I wouldn't think as a matter of English.

DEAN MORGAN: I think that is right.

THE CHAIRMAN: I should think it mustn't be pending at the time the pleading is served. That is what it means.

MR. LEMANN: That is what I would think.

DEAN MORGAN: It must be pending at the time the pleading is served--is that what you say?

MR. LEMANN: Not pending.

DEAN MORGAN: That is exactly what happens, you see. The defendant wants to get out of pleading this counterclaim as a counterclaim. He wants to bring another action. He wants to bring it for less than $3,000 so as to stay out of a Federal court, so as soon as the claim is served on him in the main action, he starts an action in the state court.

THE CHAIRMAN: That is right, and he defeats this requirement.

DEAN MORGAN: Then he gets out of the compulsory counterclaim statute. Is it your understanding that he can do that?

THE CHAIRMAN: That is my way of interpreting the rule.

DEAN MORGAN: That is exactly what Rutledge said might be, and Mr. Clark says that it doesn't even bear that kind of interpretation.

JUDGE CLARK: I don't think it does, with all due deference, but still, when a great judge says to the contrary, that ends it, I suppose.

DEAN MORGAN: He conceded that it was ambiguous, but he said that was one reasonable interpretation.

MR. LEMANN: Mr. Dodge doesn't think there is any doubt about it. I would have agreed with the Justice, and so would the Chairman, so it doesn't rest on the opinion of a great judge alone.

THE CHAIRMAN: In other words, I think it is plain under this rule that before he served his pleading in which he would otherwise be compelled to put in this compulsory counterclaim, he can defeat the rule and not be required to serve if before the date comes when he has to serve the pleading, he starts a pending action under another suit. I think that is as plain as daylight under this rule.

JUDGE CLARK: I must be wrong.

DEAN MORGAN: I didn't think it was as plain as daylight, but I thought it was a reasonable interpretation.

JUDGE CLARK: I thought that it was crepusculum,

but I think it certainly ought to be changed, then, because that is certainly not the intent of the Rules. Then I think you have to say "which is not the subject of an action which is pending with the current action."

THE CHAIRMAN: "Not pending when the current action is begun." Is that what you mean?

JUDGE CLARK: Yes.

DEAN MORGAN: Yes, that is what he means--"not the subject of an action pending."

JUDGE DOBIE: You have a seeming ambiguity. At the same time it is a good thing to iron it out and make it so clear that even a United States Circuit Judge can understand it.

JUDGE CLARK: I would generally agree with you, but I am afraid the task is impossible.

JUDGE DOBIE: Probably so.

THE CHAIRMAN: What is the objection, instead of saying, "pending," to say, "pending at the time this suit is begun," instead of "pending at the time of the service of the pleading."

MR. LEMANN: What is the objection if a fellow treat this rule in this way? What is terrible about it--I just ask for information--if he does get into a state court with a suit under $3,000, if he likes the state court better and doesn't like the Federal court, and the other party sues

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him in the Federal court, and he says, "I would like to have this matter adjudicated in a state court"?

JUDGE CLARK: May I suggest --

THE CHAIRMAN (Interposing): It arises out of the same transaction, you see, and there is a desirability of having a single lawsuit.

JUDGE DOBIE: You have two actions in two separate courts, which is bad.

JUDGE CLARK: If Monte's suggestion is correct, you ought to take the whole thing out. I don't see any merit, then, in putting a restriction at this time.

MR. LEMANN: I think that is right, and I think we had better change the rule, if you want to do so.

THE CHAIRMAN: Make it read, "not the subject of an action pending at the time this one is begun." That is what you mean, isn't it?

MR. LEMANN: Yes.

THE CHAIRMAN: Is that your idea?

DEAN MORGAN: Yes, I think that is what was meant, but I think we didn't phrase it properly.

JUDGE CLARK: "Not the subject of an action which is pending," and we mean pending.

MR. LEMANN: "Not the subject of an action brought before the institution of the suit," is what you mean.

THE CHAIRMAN: Yes.

DEAN MORGAN: That is right.

JUDGE CLARK: Well, we have to say we don't use the word "suit." We have to make it, I should think, "not the subject of an action which is pending at the time of the institution of this action."

THE CHAIRMAN: That is what you mean. You will have to phrase it differently.

DEAN MORGAN: I think you can phrase it, Bill.

THE CHAIRMAN: The question is, first, on substituting "serving" for "filing." That is agreed to, as I understand it. Filing may not take place until long afterwards, or not at all. All in favor of substituting "serving" for "filing" say "Aye." Opposed. Carried.

The next motion is the substitution to clear up the question of when it shall be pending, to change the rule so that it means "not the subject of an action which is pending at the time this action is brought." The Reporter will have to frame that later.

JUDGE DONWORTH: If the second suggestion that you are now making prevails, that nullifies our action in the amendment we have just adopted.

DEAN MORGAN: No.

JUDGE DONWORTH: Yes, because if the critical time is the commencement of the first action, then this time of serving or filing is immaterial.

THE CHAIRMAN: That may not be so because the action in the other court may have been pending at the time this suit was brought, but it may have been settled and dismissed.

JUDGE CLARK: There are two dates involved here: one, the date of the pending action, and the other is the date when the claim matures. The date when the claim matures is still important.

DEAN MORGAN: That is to take care, Judge, of a counterclaim which arises after the original action was brought. He has a counterclaim that arose after the original action was brought.

THE CHAIRMAN: That is in a very abnormal situation, isn't it, arising out of the same transaction?

DEAN MORGAN: It might be an additional breach of warranty.

PROFESSOR CHERRY: He could have a contract case.

DEAN MORGAN: In a contract case you could have it, and a breach of warranty that doesn't arise until after the original action is brought.

MR. DODGE: It is conceivable.

DEAN MORGAN: Yes.

THE CHAIRMAN: Then maybe we ought to say "not pending when the suit began or at the time of the service of the pleading"--make it both.

PROFESSOR CHERRY: No, you don't need that, do you?

SENATOR PEPPER: One is negative and the other is affirmative.

PROFESSOR CHERRY: If he hasn't brought suit before this is brought, and if it has matured at the time he files, he has to use it as a counterclaim. That would cover all cases, would it not?

THE CHAIRMAN: Let me put this case to you: Suppose he has a counterclaim arising out of the same transaction which he has at the time this suit was brought, and he brings an independent suit on it so that there is a pending action at the time this action is brought, but before he serves his pleading he dismisses that separate suit and when he serves his pleading he hasn't got a pending action but he still has the compulsory counterclaim. So I say that it ought not to be pending--"which is not pending either at the time of the action or at the time of the service of the pleading," and then you have it.

JUDGE CLARK: I think you have to cover both. I think that is true. This will do it, I think. It isn't the most graceful wording, but it is all I think of at the moment: "Any claim not the subject of an action pending while the present action is pending and which . . ." I think that does it all, perhaps not too gracefully. "Any claim not the subject of an action pending while the present action is pending and which at the time of serving of the pleading,"

and so forth.

THE CHAIRMAN: I don't think it does because it may be pending wile the present action is pending but be dismissed before the pleading is served.

SENATOR PEPPER: May I inquire whether anybody can conceive of a pleading stating a counterclaim which the pleader has not got against the opposing party, because if it isn't possible for a pleader to state a claim that he has not got, it isn't necessary to limit the requirement to cases where he has it. Why are there two times? Why isn't the only thing we are concerned with the existence of a counterclaim not the subject of an action pending when the action in question was brought, and when you have no such pending action, then the pleading must state the counterclaim; and of course if he hasn't got a counterclaim, he can't state it.

THE CHAIRMAN: My idea would be to recast the rule and say --

SENATOR PEPPER (Interposing): Am I not right about that, Mr. Reporter, that it is superfluous to state that the pleader must state a counter claim that he has at the time he pleads? Why not just say he must state a counterclaim which was not the subject of the suit pending when the suit in question was begun?

JUDGE CLARK: Well, you are in every way right

except one. You are logically right and you are grammatically right, but unfortunately, you are not practically right. The reason I say that is that the courts are foolish and they raise these questions.

SENATOR PEPPER: But what we --

JUDGE CLARK (Interposing): What would you do with Mr. Morgan's case of a later breach of warranty? We wanted to include it under the Codes. The court said, "No, it wasn't a breach at the time the action was brought," and we are trying to hit that case. We are trying to be sure to negative that case. We did negative that case here, I think, without any doubt. If we take that out now we are in somewhat worse position than before because it would be thought then, I suppose, that we decided that negativing that case was not wise.

DEAN MORGAN: Do you think that is true, Charlie, when we have (e) in?

JUDGE CLARK: Maybe, I don't know.

MR. LEHMANN: Would this accomplish the change that we were originally discussing: that the first three lines read as follows: "A pleading shall state as a counterclaim any claim not the subject of an action pending at the time of filing the pleading, which at that time the pleader has," etc.?

JUDGE CLARK: Of course, that allows it to go into

the state court, which I should think is undesirable if we have any provision --

THE CHAIRMAN (Interposing): That allows you to bring suit in the state court after this action is brought but before your pleading in it is served.

SENATOR PEPPER: May I inquire again, because I guess I am stupid about it, but it seems clear to me. May I inquire again what the situation would be if you left out the words, "at the time of filing the pleading," and then focused upon the proposition that the counterclaim that we are talking about is the one "which was not the subject of a suit pending when the action in question was begun," and the requirement were that the pleader having a counterclaim must, when he pleads, set it up? Now, if this additional breach of warranty has occurred, he must set it up under the rule.

THE CHAIRMAN: Even though he has a suit pending in a state court?

SENATOR PEPPER: No, no. If there is no suit at all. If there is a suit at all pending elsewhere at the time this action is brought, I understand that (a) doesn't apply. If there is no action pending in the state court, then this section does apply.

THE CHAIRMAN: There is only one hole in that, Senator. You say that if the counterclaim isn't pending in an independent suit at the time this action is brought.

Suppose at the moment this suit is brought and before the pleader having that counterclaim is required to plead his case, he jumps into the state court with a suit on his counterclaim and it is pending, not when the suit was brought but when his pleading is served?

SENATOR PEPPER: Then this rule applies that requires him to set up the counterclaim, because --

THE CHAIRMAN (Interposing): No, excuse me. As you stated the rule, you said expressly, "not pending when this suit is brought."

SENATOR PEPPER: My understanding is that the Reporter is desirous of having this so phrased that the test of whether the counterclaim that you are talking about is to be made the subject of action which is the instant action, is one which was not the subject of any other independent action at the time the instant action was brought. If I am wrong in that, the rest I have to say falls, but isn't that the case?

THE CHAIRMAN: I raised the point in compliance with the strict language you stated, that there might have been no pending action at the time this suit was brought on the counterclaim, but between the time this suit was brought and the date when the fellow having the counterclaim was required to plead, he jumped into the state court and got his claim pending.

SENATOR PEPPER: If that happens, Mr. Chairman, the

case falls squarely within this rule and the pleader, when he pleads, having that other counterclaim, whether he has brought a subsequent suit or not, must plead it under this rule.

THE CHAIRMAN: I am afraid I don't agree with you when you word the rule so that the test is whether his counterclaim is pending when this suit is brought.

SENATOR PEPPER: That is only whether you need take account of the counterclaim at all. If it is the subject of a suit that is pending when the instant action is brought, then we forget it. There is no disposition to displace a jurisdiction of another court which is already attached, but the jurisdiction of this court of the counterclaim attaches the instant the counterclaim comes into existence if it is not the subject of an action in another court, and it is in that contingency that the rule requires the pleader to set it up.

JUDGE CLARK: Of course, I have another objection, the same one I stated before. I think, Senator, you don't take into consideration the history, which is in general that at common law you are not supposed to bring in anything except that which has matured at the date of suit. In equity, the theory was, you go up to date of trial, but at common law you did not.

SENATOR PEPPER: I know.

JUDGE CLARK: Therefore, courts have construed that having a counterclaim in the light of that common law rule,

and saying it means having a counterclaim when the rights of the parties are fixed, e.g., when the action was brought, and it was because that was imported in and because we wanted to negative it that we put this in. If you don't put it in, you don't negative it. That is about the long and short of it.

MR. LEMANN: I would like to make another try on an amendment. Make the first three lines read this way: "A pleading shall state as a counterclaim any claim not the subject of an action pending at the time of the serving of the complaint which at the time of filing the pleading the pleader has." As I understand it, the general rule will be that you must file a counterclaim growing out of the same transaction and there will be only one exception to it, namely, if you have an action pending at the time of the service of the complaint.

PROFESSOR CHERRY: Filing of the complaint.

MR. LEMANN: Or filing of the complaint. I don't know which.

MR. DODGE: You have to counterclaim.

MR. LEMANN: I had it "filing." Mr. Dodge changed it to "serving" and you change it back to "filing."

MR. DODGE: Even though you brought a suit in another court between, you think in that case you would have to file a counterclaim under that language?

THE CHAIRMAN: No, you wouldn't.

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MR. LEMANN: I didn't catch that.

MR. DODGE: What would become of a suit which you brought between complaint and answer?

JUDGE DOBIE: After serving the complaint?

MR. DODGE: Yes.

MR. LEMANN: You would have to file it because, as I said, the general rule is that you must file the counterclaim where it grows out of the same transaction. You have only one exception. Unless you can bring yourself within that exception you have to file a counterclaim.

SENATOR PEPPER: That is clear enough.

MR. DODGE: Isn't the confusion where he has brought already another action between complaint and answer?

SENATOR PEPPER: I don't see that that makes any confusion.

JUDGE DOBIE: I don't think he ought to be permitted to do that. I think that is what the Reporter wants to avoid.

MR. LEMANN: Your point is, if he brings himself within the exception, if he has an action which he did bring before the service of the complaint, and he has therefore brought himself within that exception, and yet he might dismiss it afterwards. I think that might be possible. He had brought himself within the exception. I would say you could at least argue, having brought himself within the exception, he is entitled to stand within the exception. You reply, "Well,

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he got himself within the exception but when he dismissed his suit, he ought then to become re-subjected to it. Is that the point?

THE CHAIRMAN: That is the point, and Morgan called attention to the fact that counterclaims in contract and warranty cases might arise between the date of the suit and the date of the pleading. I suggested that that wasn't probable, but he says it might well occur.

JUDGE CLARK: Could I make another suggestion?

THE CHAIRMAN: Yes.

JUDGE CLARK: Professor Moore has been working on this. This now would strike out the words,"not the subject of a pending action," where they occur, and then at the very end after the word "jurisdiction," add this: "Provided the pleader may, but need not, plead a counterclaim which was the subject of a pending action at the time the present action was instituted."

MR. LEMANN: "Present action" is bad language, I think.

THE CHAIRMAN: That is a detail.

MR. LEMANN: I think the best thing to do, if we know what we want, is to adopt a motion saying what shall be allowed and what shall not be, and leave the wording of it to more critical study.

THE CHAIRMAN: Let's accept that suggestion made

along that line, with the understanding that --

MR. LEMANN (Interposing): May we hear it again?

JUDGE DOBIE: Let's see if I understand Mr. Lemann. If so, I am in agreement with him. Here is a complaint that is served on me. If I have a claim, then, which is the subject of compulsory counterclaim, I can't, instead of putting that in my answer, but before I file the answer, rush out and file an independent suit.

MR. LEMANN: That is the primary purpose of the change, as I understand it.

JUDGE DOBIE: Well, any amendment that encompasses that object, I am in favor of.

MR. LEMANN: The only complication I can see has been brought in by this idea of dismissal. I would like to do a little thinking aloud about that and see how you can shut the door completely. Suppose the suit is brought against me in the Federal court and at that time, the time the suit is filed, I have pending in the state court a claim growing out of the same transaction; we are all agreed that I shouldn't be compelled to abandon my state court suit. That, I understand, would be within the exception, and I needn't counterclaim, then, in the Federal court. I would be within the exception. Now, it is said, "Well, suppose you dismiss that suit in the state court before you file your pleading in the Federal court; you then ought to have lost your

exception, and you ought to plead a counterclaim."

Suppose I don't dismiss it until after I filed my answer in the Federal court; are you going to say then that I have evaded the Rules? Is that a fair inquiry?

JUDGE DOBIE: I would say no, that you don't require dismissal of a state suit but you do forbid the bringing of action in a state court after the complaint is served on you.

SENATOR PEPPER: May I state what I understand Mr. Moore's suggestion to be: that (a) should read thus: "A pleading shall state as a counterclaim any claim which at the time of serving the pleading, the pleader has against any opposing party, if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, provided that if at the time the action was brought the pleader had a counterclaim which was the subject of a suit pending in another court, he may at his option set it up in the action that we call the instant action."

Isn't that it?

JUDGE CLARK: That is the gist of it.

SENATOR PEPPER: I didn't mean the language; but it is to strike out in the body of the section the reference to the pendency of the other action and relegate the provision with respect to the pendency of another action to a proviso

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and make the proviso read in such action that it is optional but not compulsory with the pleader. Is that correct, Mr. Moore?

PROFESSOR MOORE: Yes.

JUDGE DOBIE: I will agree to that and leave the precise wording of it to the Reporter.

SENATOR PEPPER: It seems to me a very sensible suggestion.

JUDGE DOBIE: I make that motion, Senator, if I may steal your idea, just to get it before the group.

SENATOR PEPPER: I will second it.

THE CHAIRMAN: Any further discussion? That eliminates the requirement that he shall plead his counterclaim if it arose between the date the suit was brought and the date he serves, doesn't it? We are doing that with our eyes open.

All in favor of it say "Aye." Opposed. Carried.

JUDGE DONWORTH: Mr. Chairman, I am sorry to ask permission to go back to a matter that was disposed of just as I arrived here, but I should like to get some information from the Reporter. I refer to the point that judgment may be withheld where there are opposing claims, provided the undetermined matters --

THE CHAIRMAN (Interposing): We didn't settle that. That comes up under Rule 54.

JUDGE DONWORTH: Then I can withhold my comment?

34 THE CHAIRMAN: That part of it, yes, will be dealt with under Rule 54. All we did about this rule was simply to say that separate judgment shall be entered as provided in 54, and we left that question for consideration under Rule 54.

JUDGE CLARK: Judge Donworth, this is quite important, and if you don't want to look ahead you will find discussion at pages 145 to 151 and a recommendation concerning 54 at the foot of 150.

JUDGE DONWORTH: I wanted to ask the Reporter if he had in mind a recent decision, I think, of the Supreme Court to this effect: Where an insurance company brought a suit for cancellation of a policy and the defendant answered by setting up a counterclaim to recover on the policy, the District Court ordered that the equitable issues arising on the first complaint be tried first, and the Supreme Court decided that that was equivalent to the granting of an injunction under the old statute which says that when an interlocutory injunction is granted, an appeal lies directly without waiting for further proceedings. You have that in mind?

JUDGE CLARK: Judge Donworth, I think we can say that we have shed a tear over that decision almost every fifteen pages of our minutes. I think it is the most unfortunate and undesirable decision. I don't think it quite

affects this current thing, but I think what it does is to say, in effect, that we believe that law and equity are still separate things.

Yes, I know it all right. I wrote and congratulated Arthur Vanderbilt for having succeeded in winning a poor [illegible] suit.

JUDGE DONWORTH: Let me just finish my thought. If there is the situation that we have been talking about, isn't it proper for the court, when it decides the equitable issues on the suit for cancellation, to pre-judge and determine the other matter, and must it hold its judgment in the cancellation suit simply because the defendant later on is going to be heard perhaps on the other matter?

My point is, if, inherently, the determination of the first issue does bar the second issue, it ought to bar it and you shouldn't be compelled to hold open.

THE CHAIRMAN: We will bear that in mind, but as I said before, that hasn't been dealt with and it comes up under 54(b), "Judgment at Various Stages," and we will take it up and have it in mind.

JUDGE DOBIE: Certainly, if that cancelled the policy, that practically disposes of the claim under it.

THE CHAIRMAN: I think we ought to stick to the order of the rules here unless we are making one amendment that necessarily affects another rule later on, and we haven't

done that in this case.

Anything more on 13, Mr. Reporter?

JUDGE CLARK: I think we have covered everything.

THE CHAIRMAN: Does anybody on the committee have any further suggestions on 13? If not, we will pass to Rule 14, "Third Party Practice."

JUDGE CLARK: On that, we have made a substantial suggestion, and it is one I should think perhaps the committee would want to consider with some care. It is our impression, on the whole, from the cases that the attempt to force a defendant on the plaintiff--that is perhaps a little metaphorical but that is the general idea--hasn't been very successful and that it has produced more problems than perhaps it has solved, and some of the problems are serious and really may affect the rule generally. I am referring now to questions of jurisdiction. I think there is danger that the court, while retreating from some of the problems we put here, may harm the major part of the rule. So we bring up just a question that we perhaps may be retreating.

I think Mr. Dodge originally suggested this in connection with Mr. Fitz-Henry Smith in admiralty. At any rate, that is the idea. It doesn't seem to us to work out very well. I know I have had some cases, and we don't think there is very much you can do if a plaintiff won't accept a new party.

THE CHAIRMAN: And doesn't want to sue him.

JUDGE CLARK: Yes.

DEAN MORGAN: You think that is a matter of substance to compel him, if he doesn't make him a party?

JUDGE CLARK: That is what we held in this New York case, this Thompson v. Cranston.

DEAN MORGAN: Yes, I am afraid it is substance.

THE CHAIRMAN: You have stricken out the words, "or to the plaintiff," on page 39 of your report as your proposed amendment, and you have added the clause, "and may assert any claim which he may have asserted in an original action."

JUDGE CLARK: What we have done--I think this is a good way to put it: The original defendant can bring in only a party against whom he is going to make some claim. After he has brought him in, the plaintiff then has the option of making a claim, if he has any, against the party brought in. But that isn't a condition of bringing him in. All the compulsion there can be on the part of the original defendant is to bring in somebody to answer to him.

THE CHAIRMAN: That sounds reasonable. The only question, then, is whether your amendments have the desired effect, isn't it?

JUDGE CLARK: Well, of course, in my mind I think that is true. Maybe Mr. Dodge wants to say a word for the original suggestion.

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THE CHAIRMAN: What I mean is whether the wording as you have it carries out your purpose as far as the Rules can carry it out. That is our problem.

JUDGE CLARK: I think probably it might be a matter of policy, first. I don't know whether the committee is agreed on the policy.

THE CHAIRMAN: Hasn't your court held that you can't force a defendant on a plaintiff?

JUDGE CLARK: Absolutely.

THE CHAIRMAN: That you can't force a new defendant on a plaintiff when the defendant brings him in as a claim against this man?

JUDGE CLARK: That is what we held. We did it, saying we had to follow New York law. New York has held under their joint contribution statute that there isn't any joint contribution unless there is a joint judgment, and they have also held to the corollary of that, that you can't get a joint judgment unless the plaintiff wants to get a joint judgment. So there really is no contribution unless the plaintiff has organized the case in such a way as to get it.

In our particular case, that Brown and Cranston case, of course they wouldn't do it because Brown was the passenger in the car driven by a relative of his, and there were two cases. In one case Thompson was the executor and the third party wanted to bring in a suit against Thompson

as an individual. Of course, they weren't going to sue each other there unless they were forced to.

Of course, there is another problem there. In that case we decided the issue on the basis only of the New York contribution statute which said that the New York contribution statute was such that you couldn't require contribution here and it was the plaintiff's option. That was state law and we had to follow it. I might say Judge Augustus Hand, who wrote the decision, said he thought it was an awful situation. He kept the case for a couple of months. I was on it with him. I said if he could see any way of improving the New York situation, I would go along with him. The result was very unsatisfactory, but he decided it was too much for us under the New York law.

That sounds like what might be termed substantive law, but also note there is a jurisdictional question there that is not easy. The trial court held in that case, as an additional ground, that, there being no diversity of citizenship between Thompson as executor and Thompson himself, they both living in Pennsylvania, that there would be no claim.

DEAN MORGAN: I know that is a very troublesome question on jurisdiction.

MR. LEMANN: This is a case where the defendant says, "You haven't any claim against me, but you have a complaint against X."

THE CHAIRMAN: Yes.

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DEAN MORGAN: Both against me and X, but no contribution between us.

MR. LEMANN: Let me go out and bring in and hold X.

JUDGE CLARK: You could have your situation, but the situation before us wasn't quite that. The defendant said, "I may be liable, but X also is liable, and I want him here working with me."

THE CHAIRMAN: But I haven't any claim against X.

JUDGE CLARK: He wanted to say he did have; that is, he tried to say that under the New York statute, he had contribution, but the New York Court had said that there wasn't contribution until after judgment.

THE CHAIRMAN: That is what I say; he hasn't any claim.

DEAN MORGAN: He wants to get it so there will be a claim, because if there is a joint judgment against them he will get contribution under the New York statute. I want a joint tort feasor in here;under such circumstances if I get a judgment then there is contribution between joint judgment.

MR. LEMANN: Leaving New York aside and leaving aside the peculiarity of New York, isn't that what the rule on that second phase intended to permit?

DEAN MORGAN: Yes.

MR. LEMANN: Plaintiff sues defendant and defendant says, "Well, I deny liability, but if I am liable, X is

equally liable and I want him to share." Instead of saying, as he might have said, "If I am liable, I want X not merely to share but to exonerate me and pay me," he says, "I want X not to take it all, but to pay part of it." Isn't that exactly what we, in drawing this rule, would have had in mind?

THE CHAIRMAN: I understand the trouble in that case was that under the New York rule his claim against X--the defendant's claim against X--didn't exist when he brought him in. It only existed and arose after the judgment was entered against the defendant by the plaintiff. One of the quirks about it was that at the time he brought in this X, the defendant brought him in as a third party. The defendant didn't then have any claim against X. It was in anticipation that he would have one that he brought him in. That was the theory, wasn't it?

JUDGE CLARK: Yes.

MR. LEHMANN: We wouldn't want to change the rule to avoid that kind of case coming up, perhaps, in a state where the New York rule didn't exist.

JUDGE CLARK: Yes, but I don't think this would. Pennsylvania, as I understand it, allows contribution more freely and there have been some Federal decisions there. But I should suppose that under the change we have suggested, that would still apply. Here one defendant is sued. He wants to bring in another defendant and he says, "I am entitled

to contribution," so he has a claim in his own favor. He doesn't then say anything, and wouldn't be allowed under this version to say anything about the plaintiff's claim against him. It is just his own counterclaim for contribution. I think that would be all right. It would be covered.

DEAN MORGAN: What Monte is saying is that we intended originally to bring in anybody who was liable either to the defendant or liable to the plaintiff, didn't we?

JUDGE CLARK: Yes.

DEAN MORGAN: We intended just what we have here, and now we have two questions arising. One is jurisdictional, and the other as to whether we haven't got into substantive law.

MR. TOLMAN: Mr. Chairman, may I call your attention to another feature of this proposed way of meeting this situation? This rule came to us from the admiralty practice. An admiralty lawyer suggested it to us. This rule as it is now, to the plaintiff, has been in force in admiralty for a hundred years. If you make this amendment striking out the words, "to the plaintiff," then you obliterate this sort of situation: Here is a suit, for instance, personal injury, brought by the plaintiff against A. A says, "I am not the person who committed the tort. X is the man. I want him brought in here because he is the man who is liable to the plaintiff." And I don't think that these cases that present

this trouble have arisen in that type of situation. I think this amendment should not take away that simple form of remedy meeting a situation. I think we should take care in that situation, because it seems to me it is a very important short-cut to justice. It is not only in a tort. It is in a contract. The question might arise in a contract. "I am not the man who made that contract. B is the man who made that contract. Bring him in. He is liable to the plaintiff."

JUDGE DOBIE: It might arise, mightn't it, Major, in a suit where a suit was brought against X, for example, and X might say, "Yes, I signed that but I signed as agent of the corporation and the liability is on the corporation and not the agent"?

THE CHAIRMAN: The trouble with your suggestion seems to me this: You cite the admiralty practice. Of course, the Federal courts have jurisdiction in admiralty cases and they don't need any diversity of citizenship, and no question of jurisdiction arises. The trouble is in these cases that aren't admiralty, there is a very serious jurisdictional question. If you bring in a third party against whom the third party plaintiff has no claim at all and say, "Here, the plaintiff must go after the third party," and we will say that there is no diversity of citizenship between the plaintiff and the

third party at all, in an action in an admiralty case you have this very serious question of jurisdiction, and in admiralty you are not confronted with that, and one of the difficulties about this thing is that you are forcing two people in to a Federal court to try an issue between them in which there are no Federal questions involved and there is no diversity of citizenship.

JUDGE DOBIE: And if that defeats the jurisdiction, General, that would work a very great hardship on the plaintiff. I brought a suit, say, against Morgan in which the Federal District Court has complete jurisdiction. Now Morgan comes and brings in another Virginian. If that does defeat the jurisdiction then he has thrown me out of the court in which I was quite properly. Frankly, I don't think it ought to defeat the jurisdiction.

MR. LEHMANN: It would only throw out the suit of the plaintiff against the second Virginian. It wouldn't throw out the suit against Morgan. He couldn't force the plaintiff entirely out of court.

In listening to the Chairman, it has occurred to me that one consideration, one argument, might be, "Well, if X, the third party brought in, was a citizen of the same state as the plaintiff, the court would not be able to entertain the suit of the plaintiff against X, but that might not always happen, and that might not in itself be a reason

for abandoning the rule. I think at least the argument to that effect could be made.

We realize and say we can't change jurisdiction. All that would happen in the case the Chairman supposes, or in the case Judge Dobie supposed, would be, in that particular case --

THE CHAIRMAN (Interposing): I guess you are right.

MR. LEMANN: -- claim against X would go out, and in the other cases it wouldn't. The way it could work, we would be leaving it to work. That would be the argument.

DEAN MORGAN: The other question is one of substance. Suppose that there is a requisite diversity and you try to compel the plaintiff to state his claim against this second person; you say the common law rule is that he has a right to choose which of the joint tort feasors he will sue. We are changing it now by this rule and saying he must sue so many of the joint tort feasors as the original defendant in the suit brings in. We did that in this case, in the original, practically, because if he didn't, he wouldn't have any action left. Isn't that right?

MR. LEMANN: Couldn't the plaintiff say, "I don't want to sue X, if my claim is against X; as far as X is concerned, I like X; he is my son or my brother or my friend; I don't want to sue X"?

DEAN MORGAN: All right.

MR. LEMANN: "As far as X is concerned, you can

just count X out. I don't want X." But that might be a circumstance that the court would take into account, perhaps, in determining whether the original defendant was liable. Maybe they would and maybe they wouldn't. After all, it would be a question of fact. All the defendant is saying is, "I am not responsible."

JUDGE CLARK: Of course, he can say that, and that is an answer to Major Tolman. He can say that without bringing anybody in. He can always say, "This isn't my contract; X did it," without saying to the plaintiff, "You have to sue X." He can say, in effect, "That is your funeral."

Now may I suggest this: This is really the real reason for the suggestion. I frankly can't see any case where that actually works. I have looked over this and on the cases actually put up to us, I just don't see that we can make it work. Of course, you may say, "Well, all right, it is there and there may arise some unknown case we haven't thought of," and so on. But the difficulty is, it is an invitation and we have to struggle over it. It is a very natural invitation. Any defendant is going to say, "Well, this is marvelous, I will get somebody in and then I will try to unload on him," and therefore, you have had them trying it right along--this Brown and Cranston case where they even tried to get certiorari out of it, they were so sure they could get something out of it, whereas it didn't seem to us they had any chance at all, really.

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MR. DODGE: Doesn't our rule as it stands leave it optional with the plaintiff whether to exercise suit against the third party, and the courts have held generally that he need not exercise that right at all?

JUDGE CLARK: You say generally. I think they have held universally. That is, it seems to me that as the rule stands, all it does is confuse.

MR. DODGE: As you say somewhere, you tender a possible defendant and the plaintiff may accept him as such or not.

DEAN MORGAN: You leave it with him. With your new suggestion, do you allow the defendant to be brought in and tendered?

JUDGE CLARK: Well, you may say that there is a kind of implied tender. That is, the plaintiff can claim against him when he is in; that is, the defendant can't ask any bringing in except on his own hook, so to speak. But after he is in, then the plaintiff may make the claim if he wishes.

THE CHAIRMAN: As I understand the situation, the question is really one of substantive law. It isn't a matter of substantive law right in that case to decide whom he will sue and whom he won't. Under this rule it works this way, if it works at all: The plaintiff hasn't had the idea that he wants to sue X, but the rule works so that the defendant goes and brings X in and exhibits him to the plaintiff, and the plaintiff, while he didn't want to sue him in the first place,

says, "Well, I guess as long as he is here, maybe I will tackle him," and if he doesn't take that position then X goes out. Isn't that just what happens?

MR. LEMANN: He doesn't have to take him. That is the answer, it seems to me.

THE CHAIRMAN: When you actually bring him in, you sort of urge the plaintiff to play along, and sometimes you hope he will, and that is about all there is to the rule.

MR. LEMANN: It seems to me that is the answer to the argument that it affects the substantive rights of the plaintiff. It doesn't force it on him.

DEAN MORGAN: Isn't it useless, when it doesn't force it on him?

MR. LEMANN: That is the whole point; I think it comes down to that. It is a useless thing. Are there any cases in which it has happened and the plaintiff has said, "Well, I am awfully glad you brought this fellow X in"? I never thought of that.

THE CHAIRMAN: Your point is, instead of bringing him in by an impleader provision, defendant ought to walk over to the plaintiff's office and make the suggestion informally and try to urge the plaintiff to bring in the other defendant.

MR. LEMANN: That wasn't my suggestion because at the moment I am inclined to think the rule doesn't do any harm and it may not do any good, but the jurisdictional

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argument doesn't worry me because I say if that happens, that is out, and I say the argument about interfering with substantive rights doesn't bother me because you can't force him on the plaintiff. So, the only point really left, to my thinking, is whether it amounts to anything practically.

JUDGE CLARK: Of course, I will agree with almost all that Monte says except the one point which seems to me to be important. I think it does a great deal of harm. I think lost motion in court is harmful. This is, frankly, just a trouble-breeder. It holds out an inducement to defendants which just isn't so, but they are going to try all they can to do it. I think the Chairman's suggestion of calling up the plaintiff's office or the counsel and saying, "Why don't you bring him in?" is a good one. Of course you can do that. And in a way when he tries to sign him in even under the rule as changed, he is making an offer. The only thing, as the rule now stands, it seems to give something very definite, and it doesn't.

MR. DODGE: I think the amendment proposed is a very good one and I move its adoption.

JUDGE DOBIE: I would like to make one observation there, that that thing about forcing him in on the plaintiff may sometimes be very important. I had this case in St. Louis. They were painting a sign on a public street in front of a big department store. The sign painter fell off the ladder

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and hurt my client on the street very badly. There wasn't any question that the sign painters were liable but they didn't have any money. The department store was not very popular in St. Louis. It was owned by people who were not public-spirited and were not propular. So I tried the res ipsa loquitur doctrine against the department store. I left out the painters entirely. I was perfectly sure in my own mind, if I had brought suit against both of them, they would have given me judgment against the painter who had no money, and would have given a very small one, and would have let the department store off. I recovered against the department store and it went to the St. Louis Court of Appeals and stuck.

THE CHAIRMAN: Was that with the painter in?

JUDGE DOBIE: I didn't want that painter in there.

THE CHAIRMAN: Did the department store come under this rule?

JUDGE DOBIE: This was in the state court out there. They tried to do something but under the practice there they couldn't. That was very vital to my case to keep those painters out. I kept them out and got a $3,000 judgment. I am satisfied if the painters had been in there, they would have given judgment against the painters who were liable, and not against the department store which was not liable.

THE CHAIRMAN: There seems to be something to the point that all this rule does is to allow the defendant to

tender a new party as a target for the plaintiff.

JUDGE DOBIE: To allow the plaintiff for judgment.

THE CHAIRMAN: Our method of tendering is actually to serve summons on X and bring him in and tender him that way. It seems to me if you are going to make a tender--and that is all it is where the defendant himself hasn't any claim against X--it is just as effective to go and tender him by a letter or telephone message. This machinery for tendering him through actually bringing him in and offering him to the plaintiff as an actual defendant, then having the court tender him and having him accepted, and going through the rigmarole of dismissing him again is just what the Reporter says it is--it is an idle proceeding that cumbers up the case and isn't effective and hasn't been effective. It seems to me there is good ground for saying that that rigmarole of making a tender that way, instead of by walking over to the plaintiff's office and asking him to sue the other people, isn't worth much.

MR. TOLMAN: I should like to ask one question more. Take a case where there is a real joint liability, where two men sign a note, and there is no jurisdictional difficulty. This change will say that a defendant who is one of two joint defendants cannot compel the other joint defendant to be made a party to the action. It seems to me it cuts that out.

JUDGE CLARK: I am afraid the Major is quite wrong about that. The question of indispensable parties is covered

in 19, and of course this doesn't change the rule of indispensable parties. We still have it in Rule 19. I don't know that the defendant can necessarily tell the plaintiff under Rule 19 how to continue his case, but he can say, "You can't keep going unless you cover it," and then under Rule 21, The "Misjoinder and Non-Joinder of Parties," the court can summon anyone in if it wants to. It seems to me that end of it is completely covered.

MR. TOLMAN: I was only talking about the right to compel him to be brought in.

JUDGE CLARK: I might add, too, as I was going to say, that while not the most important matter, the questions of procedure here were rather troublesome. On the matter of tendering a new defendant, what do you do next? We have had that up two or three times. Is it up to the plaintiff to move to dismiss? What happens when the man comes in? May the man summoned in himself say, "Here, I want to go out immediately"? We have had that case up, and the plaintiff has just done nothing. The original defendant says, "Why, we don't know what the plaintiff is going to do." The man says, "Well, I want to go out, because the plaintiff has done nothing."

THE CHAIRMAN: And he moves for no action for new party and makes motion for dismissal under Rule 12(b)(6) on the ground that the complaint doesn't state a claim against him, because he isn't even mentioned.

JUDGE CLARK: Yes, that is it. I suppose you could iron out a procedure. I don't suppose this is important, but really it does show a little weakness. Whose job is it, then, to do anything about the matter?

THE CHAIRMAN: You have to get an order from the court compelling the plaintiff to amend his complaint and name the defendant as a negligent person.

MR. LEMANN: How many cases have arisen under this rule where the defendant has brought in someone who is not liable over to the defendant, but simply says that the man is liable to the plaintiff. "I am not liable, but X is." How many such cases have there been?

JUDGE CLARK: I can remember quite a few cases. I should say that is used quite a good deal. I don't know that I can give you any real statistical information, but I really think that is quite useful.

THE CHAIRMAN: I have read quite a lot of cases in the bi-monthly reports from the Department of Justice.

MR. LEMANN: We are not talking about the cross-claim of the defendant, but cases where the defendant has said, "I am not at all liable. X is liable. Bring in X. Go away. Let me alone." We are not talking of the cases that the rule was chiefly intended to cover, where the defendant says, "If I am liable, X is liable to me," but the class of cases that we have been really arguing about.

JUDGE CLARK: I have the feeling those are the cases we have discussed here. What do you say about that?

PROFESSOR MOORE: I don't know of many cases where the defendant tried to say that he himself wasn't liable at all, but a third person was. I think there was one in the District of Columbia.

THE CHAIRMAN: The question was how many cases there are where the defendant tried to bring in a third party who the defendant claimed was liable to the defendant, where there wasn't any claim by defendant against the third party, these cases where it is optional to the plaintiff whether he will want to sue the third party or not. There are quite a lot of those.

PROFESSOR MOORE: That would include all the New York cases, Mr. Chairman. The defendant never has a claim over against that third person until the joint judgment against both the defendant and the third person.

MR. DODGE: A lot of cases are cited on page 38 where it has been held that the plaintiff need not accept the third-party defendant as a defendant to him. Have there been any other cases under this rule except that class of cases?

JUDGE CLARK: I don't think there have been any. There are some more cases cited in the supplement on page 24, but they are the only cases I know of. I speak of a case from Pennsylvania, but there there was contribution, you see. There

is a good contribution statute. I know of no case where the court has held that you can force a man on a plaintiff. There isn't any, is there?

MR. LEMANN: Apparently, Mr. Clark, there is only one case that is of the simon-pure situation that we have been talking about. The proposed amendment would not have much practical scope. I am just trying to get it in my head if I am right about that. You would still be bringing in this third party under the rule as amended in practically every case where he has been brought in under the reported cases up to this date.

PROFESSOR MOORE: I conveyed the wrong impression then, because in all the New York cases involving negligence, the defendant would not be entitled to bring in a third party, X, under the rule as we propose to amend it. X is liable to the plaintiff if the plaintiff wants to assert a claim, but the defendant himself has no claim at all against X.

THE CHAIRMAN: There are quite a lot of cases that say you can't do that in New York.

PROFESSOR MOORE: I think all of the New York cases say you can't.

THE CHAIRMAN: There is more than one case.

MR. LEMANN: But the amendment wouldn't preclude you from trying to do it in Louisiana and Massachusetts, where there is a different rule of contribution.

THE CHAIRMAN: No, because it says if X is or may be

liable to the defendant. That anticipates liability where there is a joint tort feasor contribution rule.

MR. DODGE: I renew my motion that the amendment be adopted.

MR. LEMANN: Which amendment?

MR. DODGE: The amendment suggested by the Reporter.

DEAN MORGAN: There are some other things in the amendment.

MR. LEMANN: Which I think we ought to talk about. Why not change your motion and say that we approve the elimination from the rule of the right to bring in a person who may be liable to the plaintiff but against whom the defendant would have no claim?

DEAN MORGAN: Yes. I will second that.

MR. DODGE: I accept that amendment.

THE CHAIRMAN: That is supposed to be the purpose of the amended rule as drawn.

DEAN MORGAN: Yes, but we have some doubts about some parts of it.

MR. LEMANN: There are some parts here that Mr. Morgan and I think will go further.

THE CHAIRMAN: Let's take the principle, then, and not the form. The motion is to amend the rule so that the third party can't be brought in unless the defendant who brings him in had or may have a claim against him arising out of the suit.

All in favor say "aye"; opposed. Carried.

Now what is your point about the form of the amendment?

DEAN MORGAN: My first one is in the brackets. "The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim." It is suggested that that be taken out. I don't quite see that, because if the third-party defendant is liable over to the third-party plaintiff, the original defendant certainly ought to be allowed to assert the defenses that that party has.

JUDGE CLARK: It is for your consideration. You see the reason we did it. The footnote explains.

DEAN MORGAN: I don't believe there is anything to that footnote.

JUDGE CLARK: Well, all right.

MR. LEMANN: That is the great privilege that a court always has--there is nothing to it.

THE CHAIRMAN: How about that part in brackets there, Mr. Morgan?

DEAN MORGAN: That may be substantive law. I think it necessarily follows.

THE CHAIRMAN: Do you want to leave it in the amendment?

DEAN MORGAN: I don't care anything about that one way or the other, as far as that goes.

THE CHAIRMAN: Then you would suggest in the draft of the amendment on page 39 that the clause now in brackets there,

the sentence which reads, "The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim", should be left in the rule?

DEAN MORGAN: I feel very strongly that is true, and I don't see why he shouldn't make his defenses and counterclaims and cross-claims against the plaintiff either when he is brought in.

THE CHAIRMAN: What amendment is that?

DEAN MORGAN: That is striking out "the plaintiff" in the brackets right above that.

MR. LEMANN: Before you get to that, isn't there a point about the second sentence bracketed in the middle of page 39? Could we stick to that before we come to the counterclaim?

DEAN MORGAN: I see.

MR. LEMANN: In the footnote the Reporter says he wants to take out the second sentence in the bracketed material in the middle of the page because "it may or may not state the correct rule of res judicata". Then he goes on to say, "in a particular case now that the third-party defendant is not entitled as of right to present defenses which the third-party plaintiff has to the plaintiff's claim". If we adopt your amendment, we will give him that right and we will then destroy the Reporter's grounds for that second sentence in the bracketed material.

DEAN MORGAN: I think the second sentence follows as a

matter of substantive law.

MR. LEMANN: I should think so. I thought you were a little confused at the moment.

DEAN MORGAN: It is a matter of substantive law, and I would just as soon leave it out.

PROFESSOR CHERRY: If it were new matter, yes, but would you want to leave it out now when it has been in the rule?

DEAN MORGAN: My point is that I don't care about it one way or the other.

PROFESSOR CHERRY: Leave in all the matter that is bracketed?

THE CHAIRMAN: It doesn't sound very good for us to have a clause in here defining the substantive rights of the parties.

DEAN MORGAN: That is what I was afraid of.

THE CHAIRMAN: Even though we had it in before, I don't like the looks of it.

PROFESSOR CHERRY: I don't either, but I don't like the looks of striking it out now.

THE CHAIRMAN: We can make a note to the amendment and say we struck it out merely because we thought it was a matter of substantive law and that it had better be omitted.

MR. LEMANN: That we thought it was right and a correct statement of substantive law, but that we had no business stating it.

THE CHAIRMAN: That is the way to handle it. We will take the amendments up one by one.

The first suggestion Mr. Morgan has is the one I just made, that "The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim" be left in instead of stricken from the rule. Is there any more discussion on that?

JUDGE CLARK: Might I just comment a little on it? I don't know that I am going to be very strenuous about it. I think you want to consider that also with this earlier one, because the two are much alike, that is, the one just above it, which is that "the person so served, hereinafter called the third-party defendant, shall make his defenses as provided in Rule 12 and his counterclaims and cross-claims against" (we have stricken out "the plaintiff," but Mr. Morgan's suggestion is to leave that in) "the plaintiff." We were trying to prevent confusion in the rule. It may be that I am just old-fashioned, but I think it a little odd that this man may make a claim and cross-claim against the plaintiff when the plaintiff hasn't accepted him as a party. The idea was that we didn't believe there was much in this tendering of a party to the plaintiff, but what we are saying here is that even though you can't tender the party to the plaintiff, yet the party can hold the plaintiff all around in the case. I should think that with an active third-party defendant, the plaintiff would soon get

in a hole where he would have to take him over.

THE CHAIRMAN: Why are those two connected--the one that Mr. Morgan first mentioned which merely gives the third-party defendant a right to assert his defenses, and the one you are talking about which gives him counterclaims and cross-claims against the plaintiff? I don't think they are connected.

DEAN MORGAN: No, I don't think they are together.

JUDGE CLARK: Do you want to say anything about this, Mr. Moore?

PROFESSOR MOORE: Which one?

JUDGE CLARK: Either one or both.

THE CHAIRMAN: Take the one that Mr. Morgan made. Let's pin it down to that and then go down to the other one and see whether we agree to that or not. It is to leave in the sentence, "The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim." That means that the third-party defendant is brought in because the defendant has a claim against the third party. He is properly in the case because the defendant brings him in and has or may have a claim against him. When he is in, he can assert any defenses.

MR. LEMANN: It seems to me you would be bound to say that the defendant hasn't any claim against anybody. The plaintiff himself was negligent.

THE CHAIRMAN: The right is necessarily involved. The

defendant hasn't any claim against the third party for contribution if the plaintiff hasn't any good claim against either of them.

MR. LEMANN: I don't see how you could deprive him of that right if you bring him in the case.

THE CHAIRMAN: It is part of his defense to the defendant.

MR. LEMANN: He is at the mercy of the principal defendant's handling of that part of the case.

PROFESSOR MOORE: We didn't think he was. Naturally, if the third-party defendant is, say, an insurance company, if the defendant under the ordinary policy would not let the insurance company take over his defense, I suppose he might very well lose his claim over against the insurance company as a matter of substantive law. We thought that the defendant should be allowed to conduct his own lawsuit the way he wanted to, subject to the fact that if he failed to conduct it the way he should under substantive law, which would give him the right of contribution or exoneration over, he would lose it.

MR. LEMANN: It wouldn't prevent the defendant from conducting his lawsuit in the first instance. He could go ahead and do all he could to knock out the plaintiff, and then when he stopped and said, "That is all I can do," that would permit the third-party defendant to come in and make any additional showing that he wanted to. I don't see why we should

leave the third-party defendant protected only by the rule which you have referred to, which is a rule of insurance law. If you haul this fellow into the case, it seems to me he ought to get his chance to be heard. It might not always be an insurance case. I am wondering whether every case would be an insurance company case. It might be some other case.

DEAN MORGAN: I would just say that the insurance company had another lawsuit.

PROFESSOR MOORE: Aren't you in effect making this third-party defendant, as a practical matter, an original defendant if you allow him to assert the defenses which the original defendant may have but doesn't care to put forward?

MR. DODGE: Isn't that essential? One of his grounds of freedom from liability is that he is not liable to the third-party plaintiff because he is under no liability to the first plaintiff.

PROFESSOR MOORE: He can assert that in defense of the third-party defendant's claim over if the third-party plaintiff hasn't presented all the defenses that he should have.

DEAN MORGAN: All you are saying is that he could force the original defendant to make the defense. Why should you take that roundabout way of doing it?

THE CHAIRMAN: It seems to me that that is a very practical situation. If the insurance company that you speak of (which is a special case and doesn't cover the whole field) and

the original defendant, the insured, are cooperating together, there is no argument about it at all; they will get together. It may be that the defendant will follow the insurance company's desires and put up certain defenses. That is all right. But if they are at sword's points with each other and the insurance company is in the case, it seems to me it has as much right to conduct an independent attack on the plaintiff's case as any other party. It seems to me that the insurance case is just one particular type, and under a lot of conditions and policies the insurance company wouldn't be liable if the defendant didn't do thus and so. I don't think we ought to make a rule just to fit an insurance company in a policy case.

What is the harm, Mr. Moore, of leaving the third-party defendant, if it is an insurance company, with the liberty of attacking directly the plaintiff's case if he wants to?

PROFESSOR MOORE: There are some mechanics there. I suppose that is an incidental matter. The plaintiff has no pleading against this third-party defendant. What does this third-party defendant do? He can't serve an answer on the plaintiff very well, can he?

DEAN MORGAN: Suppose the defendant is a city and it brings in a contractor which it claims is primarily responsible for the matter. Do you think that the contractor ought not to be allowed to make the defenses that the city would make but didn't because it didn't have proper notice and a few other

things at the time or maybe didn't want to use?

THE CHAIRMAN: Furthermore, Mr. Moore, this rule as recorded says "certain defenses." That doesn't necessarily mean pleadings. It gives him a right to be heard in court--

DEAN MORGAN (Interposing): Of course.

THE CHAIRMAN: --to argue to the jury, to take an appeal, or to do anything of that kind.

JUDGE CLARK: Suppose that the third-party defendant files an answer to the plaintiff's complaint, and the plaintiff says, "I don't know this fellow at all," and objects to his arguing to the jury. He says, "I don't hold anything against this defendant. He is an interloper as far as I am concerned. I object to his appearing before the jury."

DEAN MORGAN: Our whole theory is that he is not an interloper; he is a party to the action. You can't make a plaintiff make him a defendant so as to state a claim against him, but certainly he is in for the purpose of destroying the plaintiff's claim against the original defendant. That is what he is in there for.

MR. LEMANN: You can't deny him that right unless you want to take out your third-party practice. If you think he is an interloper, abrogate your rule.

JUDGE CLARK: I thought that the theory was that we were making a change on it and that you couldn't force him on the plaintiff.

DEAN MORGAN: You aren't.

JUDGE CLARK: Here you are forcing him on him as far as the jury is concerned.

DEAN MORGAN: No. You can't force the plaintiff to take him. That is what you are saying.

JUDGE CLARK: But he has to take on a three-cornered battle.

DEAN MORGAN: Certainly he has to--not a three-cornered battle.

JUDGE CLARK: Two cornered.

DEAN MORGAN: It isn't a three-cornered battle at all. He is just protecting the defendant's rights; the original defendant himself is not. You can't separate these questions; otherwise you might just as well have two lawsuits.

PROFESSOR MOORE: How is the third-party defendant going to set up, say, an affirmative defense that the defendant hasn't raised without pleading.

DEAN MORGAN: By an answer, if he wants to. You have to allow him to come in there.

MR. LEMANN: Tell me, has this problem that you are putting been raised by any of the cases? There must be quite a number of cases bringing in a third-party defendant. Aren't there quite a number of cases? Has it given any trouble? Has anybody raised the argument after your suggestion? Are there any cases in which the third party has said, "I want to show

the plaintiff is not entitled to recover," and the point has been discussed as we are discussing it here?

PROFESSOR MOORE: I don't know of any.

MR. LEMANN: The rule has worked all right, apparently. Why should we change it? It seems to me to be entirely unjust to haul me into a case at the instance of the principal defendant and tell me that I can't do anything to show that the defendant has no claim against anybody and put me at the mercy of the original defendant on that question.

THE CHAIRMAN: Mr. Moore's objection is largely a matter of mechanics. He wonders how the third-party defendant can assert defenses--

DEAN MORGAN (Interposing): We say he can assert them. He can do it by an answer.

THE CHAIRMAN: --unless the third-party defendant puts in a pleading, and he makes the further point that the original complaint isn't a complaint against the third-party defendant and why should he be answering a complaint that is against another fellow? My answer to that is that I think he can put in an answer to the complaint against the defendant and assert a defense that relieves him of liability, as well as the other defendant, even though there hasn't been any complaint in which the third-party defendant is named as a defendant. I don't see any difficulty about the mechanics of it.

MR. DODGE: It seems perfectly obvious, the issue

being the liability of the new defendant to the original defendant, that one element which destroys that liability is non-liability of the original defendant to the plaintiff. He doesn't set up any defenses of his own as against the plaintiff directly, but he must be allowed to set up his defense that the plaintiff has no claim against the defendant and therefore that the original defendant has no claim against him.

MR. LEMANN: Wouldn't he put that all in his answer to the complaint of the original defendant against him? Suppose I were brought in as a third-party defendant. I think I would put in my answer and say, "Well, the plaintiff has no rights to begin with, because he was guilty of contributory negligence" or "There was no negligence on anyone's part. It was an unavoidable accident." I think I would plead it all in my answer as a third-party defendant.

MR. DODGE: The answer being simply to the original defendant. "I am not liable to you."

MR. LEMANN: I give him all the notice he ought to have as to what the defenses are that would be urged. I don't see any trouble with the mechanics of that.

THE CHAIRMAN: He would certainly have a right to be heard before the jury or the court and to argue as to whether the defenses that he said the defendant has to the plaintiff are good. Otherwise he would have to sit quietly and let the defendant argue the case to the jury alone. I am looking

beyond the mere question of pleadings and looking at the right to be heard all through the case on requests to charge, exceptions to the charge, and whatnot--anything.

PROFESSOR CHERRY: To carry out your idea still further, Mr. Chairman, if the original defendant hasn't pleaded those things, he can't argue to the jury, can he, even if he wants to?

THE CHAIRMAN: That is it.

DEAN MORGAN: What Mr. Moore would say, it seems to me, if he is going to be logical about it, is that he can't argue that to the jury on the question as to whether they should find against the original defendant, but that he has to argue it to the jury as to whether they should find in favor of the third-party defendant as against the original defendant.

PROFESSOR CHERRY: And what a mess that makes!

DEAN MORGAN: Yes, just like a lot of things we have now in evidence that are so absurd.

PROFESSOR MOORE: If you allow this third-party defendant to assert these defenses out of a pleading or to put in evidence at the trial to defeat the plaintiff's original claim, aren't you in fact, though, actually making the plaintiff deal with him as a party to the action, which a moment ago you decided you weren't going to do?

DEAN MORGAN: No, no; not at all. He is in the action. He can't be disregarded by any party to the action. The plaintiff can't be compelled to state a claim against him if he

doesn't want to. Take the case that you suggested of relatives. Suppose you have the right of contribution, and a relative of the plaintiff is the driver of the car. The mother sues the daughter, and the insurance company wants to make the defense. Let's suppose the insurance company wants to make the defense and the daughter says, "No, I am not going to allow it."

JUDGE CLARK: Of course, that shows what you are up to. You are changing the substantive law of insurance.

DEAN MORGAN: All right, but that is simply because of the provision in the insurance policy that the insurance company shall have the right to conduct the action.

PROFESSOR MOORE: If the defendant doesn't let the insurance company come in and take over the defense, wouldn't the daughter lose her right of recovery over against the insurance company?

THE CHAIRMAN: Not necessarily.

DEAN MORGAN: There would be a question of fact about that.

THE CHAIRMAN: I can think of many cases where the insurance company through some action of its own has waived or lost its right to take over the defense of the case. After that has happened, the defendant comes in and interpleads with the insurance company, which is brought into the case but hasn't control of the defense because the right has been waived and lost. That is quite frequently so in insurance cases. It

is in the case then and its best bet to save its own liability over to the defendant is to defeat the plaintiff in its claim against the defendant, and it ought to be allowed to be heard to defeat plaintiff's claim against the defendant, which is a necessary route to save its own liability, and to say that it can't be heard or to raise any defense that the defendant ought to have asserted and hasn't in order to save its own liability, is to deny it a day in court.

I can see your point to the extent of thinking of defense in pleading and all that sort of thing. I don't think that would bother the court very much on this. I just can't disconnect the right of the third-party defendant, even if it is an insurance company, to go right to the jury and take an active part in the trial all the way along to save its own skirts by attacking the plaintiff's claim against the defendant. That is the nub of the thing. Yet if we strike this clause out, it seems to me that the insurance company couldn't do much more than let the case go as the original defendant puts it up.

JUDGE DONWORTH: Isn't the subject allied to that of intervention? If a man wants to intervene in a case and he has an interest in defeating the claim of the plaintiff, he can get in and he can set up his reasons for wanting to defeat the claim of the plaintiff. If the court grants him the right to intervene, the plaintiff is helpless. The intervenor is there defending. Isn't the same principle applicable here?

THE CHAIRMAN: I should think so.

MR. DODGE: In most cases I should think it would be the new defendant's only defense, probably.

JUDGE CLARK: It is all right, I guess, if you all want it in. My feeling is that while I probably wouldn't put it in, I don't believe it will make much difference. I think that most of this is a little unreal. The worst thing the insurance company is going to try to do is to stay as far away from it as possible. Usually they will ask for separate trials. I don't feel strongly; if you are all comforted by it, go ahead.

THE CHAIRMAN: The question is on Mr. Morgan's motion to leave in the clause now bracketed, to leave in the rule the clause, "The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim." Are you ready for it? All in favor of leaving that sentence in, say "aye"; opposed. Carried.

Now we go back to the bracket four lines above, where the words "the plaintiff" are stricken out. That has to do with allowing this third-party defendant to assert counter-claims and cross-claims against the plaintiff. It seems to me it is a different matter.

DEAN MORGAN: That is very different.

THE CHAIRMAN: Are you satisfied to leave that bracket there and strike out "the plaintiff"?

DEAN MORGAN: As long as it is as compulsory as "shall"

I don't want to make the motion. I should be glad to have it "may make his counterclaims and cross-claims against the plaintiff."

MR. LEMANN: That "shall" simply means that if he has any he has to put them in or shut up, so that really is not hurting the plaintiff particularly. It is done to protect the plaintiff, to further the idea of getting all the litigation through in the same procedure. I suppose the "shall" would particularly apply to compulsory counterclaims and cross-claims, wouldn't it? You are not taking it out except as against the plaintiff. You are going to leave it in as against the original defendant.

THE CHAIRMAN: "against the third-party plaintiff, or any other party".

MR. LEMANN: And against any other party. I think it is at least open to question whether you should delete the reference to the plaintiff.

MR. DODGE: I think you should delete it because you are not talking about liability as between the plaintiff and the third-party defendant, but only as between the two defendants. The liability as between the plaintiff and the defendant is not at issue.

THE CHAIRMAN: It seems to me that if you are going to strike out the words "or to the plaintiff" in line five, you necessarily strike them out in this case because you are

eliminating the idea that the third-party defendant is liable directly to the plaintiff, but he isn't because you have done that already in line five. If he isn't liable directly to the plaintiff, then the third-party defendant ought not to be allowed to put in counterclaims and cross-claims against the original plaintiff, who hasn't any claim against him. I may be wrong about that, but I can't quite visualize the third-party defendant's being brought into the case and setting up counterclaims against the plaintiff when our rule as amended assumes that the third-party defendant isn't liable to the plaintiff. They are not cross-claims or counterclaims; they are original claims.

MR. LEMANN: I was thinking of a counterclaim growing out of the same transaction that the third-party defendant might have against the plaintiff, which would be one way of extinguishing his liability to the plaintiff. I think my answer would be that that might give the original defendant a free ride on a counterclaim that belonged to the third-party defendant. I can see that complication. The third-party defendant might have a counterclaim.

THE CHAIRMAN: It is a hard thing for me to visualize all those situations, but I can't quite get it into my head if the original plaintiff hasn't any claim against the third-party defendant (and that is our rule when we have stricken out "or to the plaintiff" in line five), how the third-party defendant

can assert a counterclaim or cross-claim.

MR. LEMANN: Suppose there is a contract claim against the original defendant, and the original defendant says--

THE CHAIRMAN (Interposing): It isn't a counterclaim.

MR. LEMANN: "If there is a claim against me, I have a claim over against the third-party defendant, X."

THE CHAIRMAN: That isn't a counterclaim.

MR. LEMANN: No.

THE CHAIRMAN: And it isn't a cross-claim.

MR. LEMANN: No, that is right, not up to this moment. We have brought in this third-party defendant. We are letting that stay in the rule. The third-party defendant can be brought in in that situation. When the third-party defendant comes in in that situation, under our amended rule he may say, "Well, I am not liable to the original defendant," or he may say, "This plaintiff hasn't got any claim at all against anybody" (we have just been talking about that), or he may say, "Well, I have a counterclaim against this plaintiff out of this transaction, and I should like to assert it in this proceeding. Not only has the original plaintiff no claim against anybody, but he in fact owes me some money."

MR. DODGE: The rights as against him on the part of the original plaintiff are not in issue in the case.

THE CHAIRMAN: What I object to is the use of the word "counterclaim." A counter is a counter, and the word "counter-

claim" is appropriate only where you have a claim against me and then I counter with a claim against you. The rule down to that point eliminates the idea, doesn't it, that there is any claim by the plaintiff against the third-party defendant. He may assert any claim that he has against the original plaintiff arising out of the same transaction--that is one thing--but how can you call it a counterclaim?

MR. LEMANN: That is a matter of terminology, but Mr. Dodge makes a further point that ought not to be in the case at all, that is, that you ought to have some limit to the idea of settling all controversies in one suit. As I suggested, it would permit the defendant perhaps to get a free ride on a counterclaim or claims that belonged to the third-party defendant, which the original defendant had no interest in.

DEAN MORGAN: It certainly would, right in accord with our joinder statute. There is no doubt about that.

THE CHAIRMAN: I would suggest that maybe the practical solution of it would be that the third-party defendant can't assert claims against the plaintiff because the plaintiff hasn't any and doesn't assert any against him, that all the third-party defendant has to do is to bring a separate suit against the plaintiff in the same court and then ask to have them consolidated, if the court has jurisdiction.

PROFESSOR MOORE: We felt we had covered that, Mr. Mitchell. You notice that he"may assert any claim which he

might have asserted in an original action." That is to be added. We had the same view that you have, that since this third-party defendant is not an adverse party as against the original plaintiff, it is inaccurate to speak of a counterclaim.

THE CHAIRMAN: The words "or any other party as provided in Rule 13" might save it, too, Monte, if any case arose in which he did have a proper claim. Why don't the words "or other party" include the plaintiff as well as the words "any other party"?

MR. LEMANN: I am content that the bracketed words, "the plaintiff," be taken out. That is in line ten.

THE CHAIRMAN: In other words, if you strike out the words "the plaintiff," the words "or any other party" include the plaintiff and would give him the right to assert any claims against that original plaintiff as provided in Rule 13, which is all we wanted to do anyway.

Is there any objection, then, to striking out the words "the plaintiff," in line 9? If not, that deletion will stand.

Now we have the third proposition, the second sentence in the brackets below the underlining, which states a rule of substantive law which ought not to have been in in the first place. My suggestion, as the Reporter has indicated, was that we strike it out and then have him append a note saying it is stricken out not to change the law but because it is substantive law and we ought not to say anything about it. What is your

reaction?

MR. DODGE: I move that it be stricken out.

... The motion was regularly seconded ...

THE CHAIRMAN: All in favor say "aye"; opposed. Carried. Is there anything else on Rule 14?

JUDGE CLARK: At the bottom there is another bracket. Doesn't that come out anyhow? I should think that makes it in line with what we have done earlier.

DEAN MORGAN: Yes.

THE CHAIRMAN: Is there any objection to the Reporter's deletion of the words "or to the third-party plaintiff" down in the last sentence of the proposed rule?

JUDGE DOBIE: I move it be deleted.

THE CHAIRMAN: If there is no objection, that will be deleted.

JUDGE CLARK: Do we assume that we have inserted the underlined material? That is in, is it?

JUDGE DOBIE: Yes.

DEAN MORGAN: That should stay in.

JUDGE CLARK: All right. We just wanted to be sure about it.

THE CHAIRMAN: It is understood that the underlined clause on page 39 is to be inserted in the rule as new matter.

Now we go to Rule 15.

JUDGE CLARK: You will see that this is a suggestion

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to carry out what we think is logical in Rule 15(b), "Amendments to Conform to the Evidence," and we suggest the insertion of the words underlined.

"When issues not raised by the pleadings are tried by express or implied consent of the parties or by order or direction of the court, they shall be treated in all respects as if they had been raised in the pleadings."

Notice the comma. "This would provide for the situation where upon objection to the presentation of evidence as not within the pleadings, the trial judge overrules the objection and orders the evidence admitted. As the rule now stands, such an order could be grounds for a reversal by the appellate court," and so forth.

When the matter comes before the trial court and an objection is made that it is not within the pleadings, should the trial court always be forced to say, "Well, I think it is within the pleadings, but let's be safe and have an amendment"? That seems a little foolish, really, practically. That is the only way you would be safe if you took this rule literally. If he says, "It is clearly within the pleadings; objection overruled; evidence admitted," then unless the appellate court agrees with him completely, they ought to reverse; whereas if it has all been gone into, it seems a little foolish to do it.

DEAN MORGAN: You are assuming, of course, that the record shows that the issue is actually tried out.

JUDGE CLARK: Oh, yes; that is what this is based on.

JUDGE DOBIE: Does that take away the right of appeal in case that order or direction of the court might be highly improper?

THE CHAIRMAN: I should think not.

JUDGE DOBIE: In other words, the direction of the court enlarges the issues, and let's assume that that is in a particular case where that is a highly improper and very objectionable thing, that the judge's foot slipped, as judicial feet sometimes will. Does that preclude taking that up on appeal?

JUDGE CLARK: Of course, I suppose we presuppose a matter that is amendable to begin with, that it is a matter that the pleader (that is the plaintiff normally) could have brought in, and it is a question of whether or not he has brought it in. Therefore, it presupposes a situation where it never would be highly objectionable.

THE CHAIRMAN: Let me ask you this, Charlie. I see your point. There isn't express or implied consent to the trial of the issue, because that wouldn't require you to make strenuous objection to it.

JUDGE CLARK: That is it exactly, and yet they go ahead and try it.

THE CHAIRMAN: When they get to the Court of Appeals, the court will say, "If it was properly triable, the court was right," and just treat the case as if the pleading had been

amended accordingly.

JUDGE CLARK: That is right.

THE CHAIRMAN: I am wondering if we should tinker with this rule unless there are actual decisions that have created any trouble about it. Do you know of any trouble.

JUDGE CLARK: No. I rather think that the appellate court would do the job. That is true.

THE CHAIRMAN: Isn't it a case, then, where we are anticipating trouble that hasn't really arisen, in which the appellate court has a ready means of taking care of it? Isn't it just one of those amendments which just mean another amendment without any special trouble that we are trying to correct?

JUDGE CLARK: I think that is true. We put it in the class of amendments recommended for clarity rather than for absolute change.

THE CHAIRMAN: I think, as in Dobie's remarks, when it is done by the direction of the court, you would have to say a "proper direction", because the point under this rule is that it should be treated as if it were in the pleadings. If it were trated as in the pleadings, you certainly couldn't assign error on appeal.

JUDGE DOBIE: If you are the judge and you say, "I direct that this be done," and I say, "That is all wrong; I don't know whether I want it in this or not," and you say, "I don't care what you want; it is in," then it would be treated

Just as if I had done it. I don't think the appellate court would reverse a case like that unless there had been a very gross abuse of discretion. I am in favor of giving the trial judges the widest measure of discretion. I think the only question is the one you raise, General, whether or not in cases like that, that haven't given trouble but where it makes something a little easier, it is worth while taking it into the rule. I seriously doubt it here.

DEAN MORGAN: I have seen cases--in fact, I have been in them--where the trial judge made me try an issue that was clearly outside the pleadings and there wasn't any question about it, but my objections were inadmissible under the pleadings, and he said, "Overruled." Then after it was all over, he ordered an amendment to conform to the proof, which of course cleaned me out of any exception, and there was no question about that.

What I had in mind, Charlie, was suppose I hadn't been actually prepared to try that, you see. Would it come down then to a question of whether he ought to have granted me a continuance or something of that sort?

THE CHAIRMAN: It would be within the discretion of the court.

DEAN MORGAN: That is what I should suppose it would come down to in every one of these cases where I have been compelled to go on when I was not prepared.

JUDGE CLARK: I suppose that always should be raised.

DEAN MORGAN: The objector ought properly to raise it.

JUDGE CLARK: But taking the case that you put, where the trial judge later on, after it is over, orders an amendment, could he do it under our Rules as they stand?

DEAN MORGAN: I don't know.

THE CHAIRMAN: It strikes me that, no trouble of any kind having arisen, this amendment is the type that we ought not to make.

SENATOR LOFTIN: I think, Mr. Chairman, it is rather a change in substance, not simply a clarification.

THE CHAIRMAN: Your point is that the historical idea is that if the parties consent to try an issue, it ought to be treated in the pleadings. I am going beyond that and saying it is treated as if in the pleadings even if there is no amendment.

SENATOR LOFTIN: I think that might be the construction put upon it by an appellate court.

JUDGE DONWORTH: Haven't we a rule against reversing for non-prejudicial error?

JUDGE DOBIE: Surely.

MR. DODGE: That is where that belongs.

THE CHAIRMAN: I think the thing will be taken care of by that.

JUDGE DOBIE: To bring it to an issue, I move that the

rule be left as it is.

SENATOR LOFTIN: Second.

THE CHAIRMAN: All in favor of letting the rule stand as is, say "aye." Carried.

Is there nothing further under Rule 15? Rule 16, "Pre-Trial Procedure."

JUDGE CLARK: We are raising the question whether it would be desirable to put in a clause (6), "The granting of a summary judgment for all or part of the relief sought."

THE CHAIRMAN: On a pre-trial hearing?

JUDGE CLARK: Yes.

MR. DODGE: Without any affidavits? Just on the oral statements of counsel about the case?

JUDGE CLARK: On that, of course if the summary judgment is to be granted, it would have to be in accordance with the conditions of granting summary judgments. You wouldn't grant a summary judgment to take away jury trial, and so on, but the question is one of settling the issues at the time. What would you do if you were a judge at a pre-trial hearing and it appeared that there was a certain part of the matter that was thoroughly settled in the admissions and discussion of counsel? Wouldn't you take that out of the case somehow?

THE CHAIRMAN: Yes, but the whole theory of the pre-trial hearing is to get out the things that are stipulated by consent of both sides. Now you want to make it so that if a

man goes into a pre-trial procedure he is in danger of having judgment rendered against him summarily that he doesn't consent to. It seems to me that the pre-trial procedure is based wholly on the idea that the court can't eliminate any issue unless there is consent.

JUDGE DOBIE: It would be bad to do anything to scare them, General. I am frank to say that down in our Circuit we are strong for this pre-trial thing. We have had it up at our conferences, and a lot of us have made speeches on it. I cluttered up the record with several, and Judge Parker did the same thing. It has worked well, and some of the lawyers down there have been a little afraid of it. Southern lawyers are more conservative than northern lawyers--and lazier. They don't like to learn a new practice. We have them indoctrinated, and we are helping to show them that this is something fine, that it is for their good as well as ours. I hesitate to put anything in there that may scare them. Then they may be saying, "If you go to this pre-trial conference, that old Federal Judge may smack you with a summary judgment."

THE CHAIRMAN: It would mean he would have to go in prepared to fight, whereas as the pre-trial procedure is formulated now, he isn't going to get caught on anything that he doesn't agree to. I think that is quite a different proposition.

DEAN MORGAN: I heard one North Carolina Judge report

at one of the conferences of the Third Circuit that he had eliminated all the jury cases but two by pre-trial conference, and one of them was a jury case that had been tried one time before and there had been a disagreement. So I think if he is an example, the Fourth Circuit doesn't need any encouragement.

THE CHAIRMAN: Isn't it true, Charlie, that the whole pre-trial theory is that a man can't be held to anything he doesn't admit, and now you are interpolating a procedure by which the pre-trial procedure is converted into something else? If he doesn't admit it, he would be hit by a summary judgment procedure that he strenuously objects to.

JUDGE CLARK: I think, as a matter of fact, that the courts to a certain extent would be doing this anyhow. I don't see how they can avoid it. In one sense what you say is true. The judge asks the counsel, "Are you going to contest such and such issues?" and there he says he has to come clean and say what he is going to do. After he has said that, what is the legal effect of what is left? I know that Judge Moscowitz asked me a while ago about a case of his. It was jurisdiction, it is true, but nevertheless I think it presents the idea. The parties made certain admissions as to the facts, upon which the judge concluded there was no jurisdiction and properly entered a judgment at the pre-trial hearing.

THE CHAIRMAN: I think it would be better to leave the pre-trial procedure as it is and have the court make an order

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THE CHAIRMAN: I think it would be better to leave the pre-trial procedure as it is and have the court make an order

reciting the admissions of both sides. Then when he goes into court in the regular way, he has a chance to prepare and to fight out there the question whether these admissions require that judgment be entered forthwith against him. That is the place to do it, and he should have to be prepared to fight that battle before he goes into a pre-trial procedure.

JUDGE DOBIE: Of course, sometimes the judge may do something that virtually amounts to it. I remember I had one case of a poor, mountain boy who got drunk and laid down in the middle of a road and got run over by three hearses. In the pre-trial conference we went into that in some detail. I said, "Well, I am going to try this case solely on the doctrine of last clear chance. Nothing else is in the case." The lawyers went out and settled it. One of the hearses took his body back, incidentally. (Laughter)

THE CHAIRMAN: It was a fortunate coincidence to have all that service. That is what I call service:

What is your pleasure about amending this pre-trial rule to allow the court to enter summary judgment at a pre-trial hearing?

JUDGE DOBIE: I am open-minded, but I am very dubious. I should be very glad to hear from any of these gentlemen. As I said, our experience with pre-trial practice down our way started in slowly, but now we find it is working superbly. I think it is one of the most magnificent things in the Rules.

MR. DODGE: I move that the rule stand as written.

SENATOR LOFTIN: Second.

THE CHAIRMAN: All in favor of not putting in the clause allowing summary judgment in a pre-trial hearing say "aye"; opposed. Carried.

You have a further suggestion here, Mr. Reporter. "Failure to attend a pre-trial hearing may be a basis for dismissal or default." Have you ever had a case where a lawyer refused to attend one when the judge has ordered it?

JUDGE CLARK: I don't know of any. Do you remember who made this suggestion to us (to Professor Moore)? This came from the Federal Rules Service editors.

JUDGE DOBIE: I should like to say one thing on that. I don't know whether his failure to attend would be failure without proper showing. That is, should there be proper excuse or something of that kind? There is a little reason in our part of the world for putting a little pressure on them to attend. In the big cities, where they just take a streetcar or taxi, I can see that there might not be, but in the Western District of Virginia the District Court meets in seven places, and some of them don't like to come to one of those places to pre-trial hearing where it is necessarily held, when the trial is going to be held in another place. I am very strongly in favor of any rule that isn't unduly hard that will put a little pressure on them.

THE CHAIRMAN: Do you have any experience where lawyers have declined to attend?

JUDGE DOBIE: I have never had one, no, but I know some of the lawyers have kicked on it, and I know one or two came in very reluctantly, chiefly due to their ignorance of what was going to be done there. In the case of one of them it was due to his ignorance of what a kind-hearted judge I am. He admitted that.

THE CHAIRMAN: It strikes me that if you haven't had any trouble with the rule, and if no one knows of a single instance where the lawyer has had the courage to refuse to go, it is one of those amendments that we might forget.

MR. DODGE: Particularly as it is largely covered by 41(b), the first sentence.

JUDGE DOBIE: 41(b) and 55(a) give the judge the right to do that, don't they? That is certainly an order of the court.

THE CHAIRMAN: You can waive that at them if they get balky down in your territory.

JUDGE DOBIE: I am inclined to think probably it is better to leave that whole thing as it is, but I am open-minded, if the Reporter has anything to say.

DEAN MORGAN: Some of the literature with reference to the Detroit procedure, where this more or less originated, I think suggested that in order to make it effective they had

to provide for dismissal for failure to appear. Isn't that right?

PROFESSOR SUNDERLAND: Yes, they did. It never worked very well until they had the compulsory rules.

JUDGE DOBIE: There is no objection to a local rule where it doesn't work well, is there?

THE CHAIRMAN: This rule says, "The court in its discretion may establish by rule a pre-trial calendar". If he makes a rule that is authorized by these Rules requiring lawyers to appear, plainly it would come under Rule 41(b), the rule that Mr. Dodge referred to.

JUDGE CLARK: 41(b) ought to hit the plaintiff, and 55(a) ought to hit the defendant.

SENATOR LOFTIN: It seems to me under 41(b) the court could dismiss.

JUDGE DOBIE: To bring it to a head, Mr. Chairman, I move that the rule be allowed to stand as is and leave this to the local rules. You needn't put that in. Just leave it as it is.

THE CHAIRMAN: Any further discussion? All in favor of not putting in a compulsory provision in the pre-trial rules say "aye." It is carried.

PROFESSOR SUNDERLAND: Would it be worth while to add another item to the effect that proof may be designated by affidavit? The parties might be willing to agree to that when

they wouldn't agree absolutely to the truth of facts. They might say, "If such and such affidavits will be filed, I will accept them, but I don't know enough about this" or "I won't admit the truth of the fact itself." They are doing a good deal along the line of substituting affidavits for more elaborate proof in England, and it might be a useful thing.

THE CHAIRMAN: I think it is covered by subdivision (6) of the pre-trial rule. It says "for a conference to consider (6) Such other matters as may aid in the disposition of the action."

PROFESSOR SUNDERLAND: Everything will come under that. Even summary judgment will come under that.

THE CHAIRMAN: Yes. Under that the parties could stipulate that certain evidence may be taken by affidavit instead of by deposition, and plainly that would be in (6), wouldn't it?

PROFESSOR SUNDERLAND: I think so, but I thought we might call their attention to it. Of course, we could have (6) alone, and nothing else, and it would include everything. Wouldn't it be an advantage to call their attention to that particular way of saving time?

THE CHAIRMAN: Well, there may be a hundred other ways of saving time that we won't mention.

JUDGE DOBIE: I think that would occur to almost any judge. I know I had one case in which there was a question, and

it was said, "If the president will make an affidavit, I will take that."

PROFESSOR SUNDERLAND: It is a very useful thing.

JUDGE DOBIE: Yes, it is. That did come up. That man said, "I don't know this, but I know that president and know that he is not a liar. If he will make an affidavit that that is the fact, I will take it and that will go into the case as admitted." I believe that could be left. I think all the Judges will testify that that has worked magnificently. We have had one or two somewhat conservative judges who were a little afraid of it, but I think we are getting them around. Our experience has been very, very happey with this rule, and I know Judge Parker is wildly enthusiastic about it. We have urged judicial council again and again and pre-trial calendars. We have done everything we can to get the District Judges to use this rule as much as they can.

THE CHAIRMAN: This matter of putting proof in the form of affidavits is plainly within the terms of subdivision (6). I don't see why we should pick out just one thing and stick that up in front of them when there may be fifty others which are equally within it. If there is no motion on that, we will pass on to Rule 17.

JUDGE CLARK: In Rule 17 on (a), "Real Party in Interest," we raise question about certain cases but haven't any suggestion of anything to be done about it. You may note

that later on I raise the question whether it would be desirable for us to make a report as such, which might be outside of amendments. That is, is our function limited only to amendments or is our function perhaps somewhat a survey of procedure? It seems to me that there may be occasion at some time for us to make a report on the state of Federal procedure. I have raised that question later in connection with the appendix. I just throw that out now.

As far as the (a) section here is concerned, all we are doing is to raise doubt about these cases. I don't believe there is anything we could do to change the rule. We say, "it is believed that no change in Rule 17(a) would be helpful in view of the principle enunciated in Rule 82."

JUDGE DOBIE: Rule 66, then.

JUDGE CLARK: That is the next question on (b). It gets to 66. I am talking about (a) here.

THE CHAIRMAN: I suppose that when we prepare our tentative report which, after at least inspection by the Court, will be authorized to be distributed to the bench and bar so that they can take a whack at this thing before we make a final report, as we did before, we should have a very carefully drawn set of notes, and whenever we make amendments we ought to explain very carefully just why we did it and what the purpose of it is. Then with respect to quite a number of the rules where some controversies existed or amendments have been

suggested but we haven't made any, I think we ought to put a note in under that rule, carefully drawn, stating just what the situation is and what the cases have held and our reasons for thinking the rule ought to stand as it is, because that is going to have a very important effect, I think, on the lawyers and judges who read this tentative report. They will know that we have considered it and that we had our reasons for not changing it. Whether we want to go beyond that and make any general report doesn't seem to me to be quite our problem now. Do you think so?

JUDGE CLARK: No.

THE CHAIRMAN: That will fit the bill as you see it?

JUDGE CLARK: I think what you suggested is fairly inclusive anyway.

THE CHAIRMAN: You haven't any amendment to suggest to 17(a), have you?

JUDGE CLARK: As to Rule 17(b), that is important but would come up more directly, we think, in connection with 66. We have made a definite suggestion in the receiver rule.

THE CHAIRMAN: Let's pass to 66, then, if that is where it is going to come up.

JUDGE CLARK: I should think so, if everybody is agreed. You can just postpone it, and when you get to 66 you will see our suggestion on page 179, with discussion.

THE CHAIRMAN: The recommendation is that 17(b) should

not be changed and that any change that is made should be made in 66. Why not just lay it aside until we reach 66? Has anybody in the Committee any recommended amendments to 17(a) or (b)? Have you any recommendation for any other amendment to Rule 17?

JUDGE CLARK: I think that covers it all. We have put in a little reference to the question of jurisdiction and venue of unincorporated associations and have said that we don't think there is anything we can do. There is a decision by my colleagues that I didn't participate in, which I think has been rather helpful. It is cited on page 43. But there is no recommendation that we should do anything here.

DEAN MORGAN: What page is it?

JUDGE CLARK: Page 43 of the original comment.

THE CHAIRMAN: Of the Reporter's report.

DEAN MORGAN: Have you any citation on that?

JUDGE CLARK: The Sperry Products case on page 43, Comment II.

DEAN MORGAN: I believe certiorari was denied in that.

THE CHAIRMAN: There are no suggestions for amendment anyway, so we will pass on to Rule 18, "Joinder of Claims and Remedies." Have you any suggested amendment to that rule? Take (a).

JUDGE CLARK: As to Comment I, there again we called attention to certain problems which are real problems, and that

is the question of jurisdiction when you have a claim arising out of the same transaction which is based on a non-Federal matter. I guess there isn't anything we can do about it. It is something that causes real difficulty.

THE CHAIRMAN: It is a matter of jurisdiction, and we can't settle it one way or another. It is for the Court to say whether the rule enlarges or doesn't enlarge the jurisdiction.

JUDGE CLARK: That has worried our thought a good deal.

JUDGE DOBIE: It has worried a lot of courts because that cause of action is in there, too. I don't believe we can do anything about that.

THE CHAIRMAN: Comment II. Is that the same sort of thing?

JUDGE CLARK: No; Comment II is a little different. Professor Scott thinks there is an inconsistency between Rules 18(a) and 13(a), this one and the same transaction section of the counterclaim rule.

DEAN MORGAN: He wonders why, if you have to put in a counterclaim arising out of the same transaction, you ought not to have to join actions arising out of that?

JUDGE CLARK: Yes, that is his general point, that if we are strenuous in Rule 13(a), the compulsory counterclaim one, we ought to be strenuous here and make this compulsory.

THE CHAIRMAN: Is there a single court decision that

has developed any trouble on it?

DEAN MORGAN: No.

JUDGE CLARK: No; and we made an answer, such as it is, on page 45. In fact, the reason we put this in is that we tried to notice criticism of the Rules wherever it appeared, especially from distinguished professors.

PROFESSOR SUNDERLAND: Is there any reason that the same principle shouldn't apply?

JUDGE CLARK: Yes, but we should think it did.

PROFESSOR SUNDERLAND: Your suggestion is that with your definition of "cause of action," you have such a broad definition that wherever other things arise out of the same transaction they necessarily constitute one and the same cause of action.

JUDGE CLARK: That is it.

PROFESSOR SUNDERLAND: But the courts don't sustain that, do they?

JUDGE CLARK: Of course, they don't always thoroughly sustain us. They do every little while. The case I gave you yesterday on the separate statement of claims, the Original Ballet Russe case, of course was on the separate statement but it was a little different thing. There they did sustain.

PROFESSOR SUNDERLAND: But the books are just full of cases where they hold that there are two or more causes of action arising out of the same transaction exactly. There are

hundreds and hundreds of them.

DEAN MORGAN: Particularly on the res judicata or splitting causes question.

PROFESSOR SUNDERLAND: Yes.

JUDGE DONWORTH: Does the expression "cause of action" occur in our Rules?

JUDGE CLARK: No, it does not. Of course, as you say, there has always been a conflict on this principle. There is no doubt about that. Do you think that by changing the rule here we can do much more?

PROFESSOR SUNDERLAND: If you make a condition that if it arose out of the same transaction or the same occurrence, they should all be joined, and put a penalty on if they aren't, I think you would get away from the technicalities of the term "cause of action," and it would be a very practical rule which would work very easily.

JUDGE DONWORTH: You favor introducing that expression into the Rules?

PROFESSOR SUNDERLAND: The same as we have for compulsory counterclaim, the same transaction or occurrence. Isn't that the language you use?

JUDGE DOBIE: We don't use the term "cause of action" anywhere in the Rules.

PROFESSOR SUNDERLAND: No, no.

JUDGE CLARK: I suppose specifically what it would

mean would be adding to Rule 18(a) something like this somewhere: "The plaintiff must include in his complaint all claims arising out of the same transaction or occurrence."

DEAN MORGAN: That is what it would amount to.

JUDGE DOBIE: Scott is in favor of that, is he?

PROFESSOR SUNDERLAND: Yes, he is.

JUDGE CLARK: I take it so.

MR. LEMANN: He says it is "somewhat curious" that we don't so require. Personally, I don't think we should cut it out just because Professor Scott was a wonderful man and remarked in the course of writing a law review article that this is a rather curious inconsistency between our positions of the plaintiff and defendant. I think his comment is perfectly correct and does great credit to his study of the Rules and his acuteness of observation, and if we were rewriting the rule I would remove it, but I think it is one of the things that we must reconcile ourselves not to do.

DEAN MORGAN: If Judge Clark is right, though, and there is a great deal of conflict as to whether a person makes a claim and gets a judgment and is thereby barred from any other claim arising out of that transaction. It is an important thing in substance, not just of form.

MR. LEMANN: On what basis has it given any trouble? We had battles over cause of action.

DEAN MORGAN: I know it.

MR. LEMANN: I remember those.

DEAN MORGAN: He has contended for years that all the group of operative facts that can be handled should be a single claim. He wants you to use the same definition for cause of action in splitting, I believe, don't you, Charlie, as in the other cases?

JUDGE CLARK: Yes.

DEAN MORGAN: If you are going to do that, it is a very important thing for the lawyer to know whether he has to assert all the claims in one action or be barred.

MR. LEMANN: It is the point of the Reporter's view of it that the plaintiff may lose some rights under the rule as it now stands that the bar may not realize, but in four years the bar has had no reported case showing any misfortune about it. I am asking.

JUDGE DOBIE: I think it is a matter of practice. The lawyer is inclined to do it. I don't think there would be many cases where I have two claims against you, Monte, that arise out of the same transaction, where there would be any great advantage in my asserting one and leaving the other out.

MR. LEMANN: It hardly would happen.

JUDGE DOBIE: I don't think it would often happen; I doubt seriously that it would. I think it would cause more trouble than it would eliminate in actual practice.

MR. LEMANN: My thought is that it hardly ever happens

and why should we now go out of our way to change this? This is one change, among others, that we could forego. It is very difficult to deny yourself the privilege of changing something.

JUDGE CLARK: It is, of course. It must be said that there is some doubt now, and if we put in an express provision we might lessen the doubt. That is, I would be inclined, if you want to call it so, to be as hard-boiled about res judicata as about separate statement, and so on. This doesn't say either way; that is, the court can be either hard-boiled about this or not. There is nothing in the rule that pushes him one way or another. If we put something in the rule (if we are going to put anything in the rule, I would certainly want to push him as I have stated), then there would be some additional clarification, that is true.

THE CHAIRMAN: As I try to understand what the controversy is about--see if I am right--Rule 13 deals with counterclaims and 13(a) requires him to join, to counterclaim, everything arising out of the same kind of transaction; when you get to Rule 18(a), joinder of claims by the plaintiff, you don't compel him to join every claim arising out of the same transaction--you permit him to do it, but you don't require him to do it. Is that it?

JUDGE CLARK: That is Professor Scott's point, and of course involved in that is a construction of what a claim is, and he is construing a claim rather narrowly. If I were

doing it, I would construe a claim more broadly. Nevertheless, as it now stands there is nothing here that says a court can't construe a claim either way, broadly or narrowly.

MR. DODGE: There is a need for compulsion in the case of a counterclaim which doesn't exist here. In ninety-nine times out of a hundred, at least, there is failure to join all the claims he has arising out of the same transaction.

JUDGE DOBIE: Of course, in connection with the counterclaim we have made it very broad and have given the defendant a whole lot of rights. We have eliminated all the distinction between the old setup and recoupment, and we have eliminated a lot of restrictions of the code. It seems to me that there is a good deal of reason there for saying, "We have done all that for you. Now you have to set up all the counterclaims that arise out of the same transaction and clean them up. You bring that into litigation."

But here you may have two absolutely separate claims. You may have a claim against me for fees as a lawyer. On the side, as a lawyer, I may fix automobiles. Another time I fix your automobile, and you have another claim. I don't think there is the same compulsion that if I litigate one of those claims, I necessarily must litigate the other. I am inclined to leave it as it is.

THE CHAIRMAN: What action do you want to take on it?

JUDGE DOBIE: I move that it be left as it is.

DEAN MORGAN: I second the motion.

THE CHAIRMAN: Any further discussion? All in favor of leaving Rule 18(a) as it is say "aye"; opposed. Carried.

Is there anything on 18(b)?

JUDGE CLARK: I will bring this up. This is the question of the stockholders' suit and the rule in Hawes v. Oakland. Some comments have suggested, as I think well they might, that perhaps under Railroad v. Tompkins there may be doubt about that. I think the courts have generally sustained the rule, as they might quite naturally. In our court the matter came up, and I was rather amused at the development. We confirmed a case that is cited.

THE CHAIRMAN: This is Rule 18(b) that you are talking about?

JUDGE CLARK: No, I got a little off on that.

THE CHAIRMAN: I thought so.

JUDGE CLARK: Nevertheless, this is a kind of corollary of that. This is the fraudulent conveyances thing. You may have the argument that this is a matter of substantive law. I suggested on this, as I do right along, that I don't think we had better start making changes on any of these things until the Supreme Court has definitely raised the question. We should follow rather than attempt to lead the Supreme Court on the Tompkins rule.

THE CHAIRMAN: I don't see what the point is. Is it

16(b) that we are talking about?

JUDGE CLARK: At the end of 16(b) we inserted a provision recommended by Professor McLaughlin, which had been long advocated by people interested in creditors' rights, and so on, and which came from the uniform fraudulent conveyancing act. It is the last sentence: "In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money."

THE CHAIRMAN: What is wrong with that?

JUDGE CLARK: I think it is all right, but I think that considerable argument may be made in the light of present-day concepts that that is a rule of substantive law.

JUDGE DOBIE: I haven't heard any complaint about it, have you?

JUDGE CLARK: I didn't think I had heard any complaint about contributory negligence until the Supreme Court raised it.

THE CHAIRMAN: I don't think we ought to assume that that is substantive law.

JUDGE DOBIE: The Supreme Court has already passed on this once.

THE CHAIRMAN: Wait until the Supreme Court says it is.

JUDGE DOBIE: The Supreme Court passed on this rule once.

MR. LEMANN: I think we might have a rule of order or

procedure that wherever the Reporter does not himself propose a rule or amendment, we might follow his leadership. I don't know that we would all be agreeable to that.

THE CHAIRMAN: In a proper case.

MR. LEMANN: I think it would create a strong presumption that a change should not be made where the Reporter does not himself present it.

JUDGE CLARK: It is the sole function of the House to introduce revenue-making measures.

MR. LEMANN: I wouldn't make it as a definite conclusion, but just a general presumption where he doesn't recommend a change.

THE CHAIRMAN: You notice I am sliding over the Rules pretty fast where he doesn't suggest anything.

JUDGE CLARK: I don't want to make a change here. I think this is a matter the Committee might well be thinking about, and when we get to the Hawes v. Oakland rule, you may want to think back on this.

THE CHAIRMAN: Notwithstanding Erie v. Tompkins, I am far from convinced that that last sentence in 18(b) is a rule of substantive law.

JUDGE CLARK: I would argue strenuously with the procedure--but I argue with a good many things in the procedure.

JUDGE DOBIE: I think it is a rule of procedure, and I think it is one of those keys you had to have to get into the

equity door. We have given out a lot of keys that didn't exist before, and I think they are fine keys. I am for them. I am a "key" man.

JUDGE CLARK: I thought you said the Supreme Court passed on this.

JUDGE DOBIE: They approved it as we put it in there. They didn't make an objection to it.

JUDGE CLARK: That is a good principle to go on!

JUDGE DOBIE: I move it be left as is.

JUDGE CLARK: I agree with that.

THE CHAIRMAN: There are some District Court decisions, you say, that hold that the rule is void because it is a substentive law provision? There are some cases cited down here.

JUDGE CLARK: What do you say about that?

MR. LEMANN: They are liability cases, not fraudulent conveyance cases. Page 45.

DEAN MORGAN: That is joinder on separate bonds.

MR. LEMANN: Separate bonds.

DEAN MORGAN: That is not the same kind.

THE CHAIRMAN: The theory is that there have been some District Court decisions on other states of fact which might be argued as the principle to make this void. Is that right?

PROFESSOR MOORE: They don't say it is void.

THE CHAIRMAN: They hate to slap the Supreme Court in the face, of course.

I understand your pleasure is to do nothing to 18(b). We pass now to Rule 19. You have some definite amendments to propose there. Is there anything on Rule 19(a)?

JUDGE CLARK: The question of raising the objection.

THE CHAIRMAN: What subdivision of Rule 19 is it in, (a), (b), or (c)?

JUDGE CLARK: We made the suggestion, and the question came up yesterday whether it should not be added to Rule 12(b).

THE CHAIRMAN: But you have an amendment proposed here.

MR. LEMANN: It is a proposed amendment to Rule 12.

JUDGE CLARK: You remember yesterday Mr. Moore brought that up, and we referred to it a little, I think.

What is the objection to an indispensable party? Some courts rather talk of it as though it were an objection of jurisdiction. If it is an objection of jurisdiction, of course it is already covered by what is in 12(b). My friends, Messrs. Pike and Fischer, said it wasn't jurisdiction, and perhaps in one sense it is not. If it isn't jurisdiction, then we specify several forms of objection. Ought we not for completeness to put it in?

MR. LEMANN: In 12?

JUDGE CLARK: In 12(b). I will say that as a logical matter, yes, but there is just one hesitation I have. I think that indispensable parties are rather few as the cases are, and maybe we are worrying a good deal about something that isn't

so very important now. Nevertheless, there is that logical omission, and I bring it to your attention. There it is.

THE CHAIRMAN: How narrow is the rule as it stands? If there is a failure to join an indispensable party, how do you raise the point as the rule stands?

JUDGE CLARK: There is no way expressly specified.

THE CHAIRMAN: I know, but how would you do it?

JUDGE DONWORTH: It would have to be by answer.

MR. DODGE: You would have to set it up in your answer. There is no provision for a preliminary hearing on that.

THE CHAIRMAN: At the option of the court, you put it in your answer.

JUDGE CLARK: It has been raised under Rule 12(c), which is motion for judgment.

JUDGE DOBIE: You couldn't do it by a motion to dismiss very well, could you?

JUDGE CLARK: It is not specified in Rule 12(b). This is Mr. Moore's baby. He says to be logical, you ought to add it in Rule 12(b).

DEAN MORGAN: 21 doesn't cover it, does it?

JUDGE CLARK: Not in so many words. I think you might deduce a theory from 21 to cover it, yes.

DEAN MORGAN: By motion.

THE CHAIRMAN: Isn't it the kind of objection, anyway, that had better go into the answer? The court would hardly

want to pass on it until he knows something about the facts of the case.

MR. LEMANN: I don't know. I think if you are a party, you want to call attention to it right at the beginning. "Here is an indispensable party who ought to be here." He could tell that from reading the complaint. Particularly as we are changing Rule 12 anyhow, I should think that there is no objection to putting this in Rule 12. We have already voted to rewrite Rule 12.

JUDGE DONWORTH: Won't it often happen that the indispensability depends on facts not appearing in the complaint, in which event naturally it would be in the answer?

MR. LEMANN: That might happen. Of course, if we put this in the list of matters which may be presented by motion in Rule 12, as I understand it, that doesn't prevent anybody from putting it in the answer if he wants to. Is that correct?

JUDGE CLARK: Yes.

THE CHAIRMAN: If you make some motions and don't put that in, it is waived, isn't it?

MR. LEMANN: Well, let's see.

JUDGE CLARK: Yes, that would be true. That is, you don't have to put this in; you don't need to make a motion, but if you once start making a motion, our theory is that you have to move to the limit.

THE CHAIRMAN: If you put it in 12.

MR. LEMANN: You have to move to the limit of motions, but does that exclude you from putting it in your answer? You can't have any more motions.

JUDGE CLARK: I understand that the idea yesterday was that you couldn't then put anything in the answer.

MR. DODGE: That isn't right.

JUDGE CLARK: If you take Mr. Moore's second motion on 12(h) (I call it Mr. Moore's, but I have accepted it too), which is the waiver one, he has taken that out. That is on this same page, page 47.

"A party waives all defenses and objections .... except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party ...."

If you accept that too, of course that would cover your point.

MR. DODGE: It might develop at the trial that there was an indispensable party whose indispensability was not made manifest by the pleading.

JUDGE DOBIE: The judge would have power in that case, would he not, to direct that that party be brought in?

JUDGE CLARK: If he could get jurisdiction of him.

MR. LEMANN: If he hasn't jurisdiction, and if the person is indispensable so that he can't proceed without him and he can't get him in without defeating jurisdiction, then

the case must be dismissed.

DEAN MORGAN: We have in Rule 12(h) "failure to state a claim upon which relief can be granted". You can always make that during the trial. If he is indispensable you can't get relief, can you?

JUDGE CLARK: I should think so.

MR. LEMANN: That is what Mr. Moore has proposed on page 47 to add to Rule 12(h) now, to put in indispensable party.

DEAN MORGAN: I mean without it.

MR. LEMANN: Why not put it in? In other words, since we are rewriting 12, wouldn't the sensible thing now be (a) to add indispensable parties to the category of points that may be raised by motion--

DEAN MORGAN (Interposing): That is all right with me.

MR. LEMANN: --and (b) to add indispensable parties to the category of defenses which are not waived in 12(h) by failure to include in the motion? Wouldn't that really put it in pretty good shape?

MR. DODGE: Yes.

JUDGE CLARK: That is what we have suggested rather against our general principles, but nevertheless it is logical. That is, we are making Rule 12(b) a larger thing than ever, but nevertheless it is logical the way the rest of Rule 12(b) goes.

MR. DODGE: As long as we are amending Rule 12 anyway,

I move that these two additional amendments be made to 12(b) and 12(h).

MR. LEMANN: I second it.

THE CHAIRMAN: Then you mean adding subdivision number (6) to 12(b)? Would it be (7)?

JUDGE CLARK: I think it had better be (6) and let what is now (6) be (7). That would be more logical, I should think.

MR. LEMANN: Reverse the order of enumeration.

THE CHAIRMAN: We have decisions and textbooks which talk about Rule 12(b)(6). Now we are going to change the numbers on them?

JUDGE DOBIE: I should rather put it as (7) and not change the numbers unless it is absolutely essential.

THE CHAIRMAN: Unless there are practical objections, I don't like to see anything switched from one rule to another and from one subdivision to another because of that mix-up.

JUDGE DOBIE: I think that is very important, Mr. Chairman.

JUDGE CLARK: I don't know that it makes much difference, does it?

MR. LEMANN: Of course, there will be a number of paragraph changes in Rule 12 as a result of the vote yesterday, I think, anyhow, but this may be one that can be avoided, as you have suggested.

THE CHAIRMAN: There are no transpositions.

JUDGE CLARK: Mr. Moore calls my attention to this. In the suggestion here it is "failure to join a necessary or indispensable party". The additional problem is as to "necessary." According to our classification, a necessary party is one that isn't indispensable.

DEAN MORGAN: That is right; that is what they say. You ought to have him, but you can go on and give relief without him.

JUDGE DOBIE: That is it.

JUDGE CLARK: That is a little different thing.

DEAN MORGAN: That is what I say.

JUDGE CLARK: I wonder why we shouldn't take it out of here. We don't want it in here, do we?

PROFESSOR MOORE: I thought it would be proper to allow the defendant by motion before answer to raise the point that a necessary party had not been added, but at the trial stage the only party that he could object to would be the lack of an indispensable party.

DEAN MORGAN: I think that is right.

MR. LEHMANN: What you would do, then, would be to put "necessary or indispensable" in the added enumeration in 12(b), but in your amendment to 12(h) you would restrict yourself to "indispensable."

PROFESSOR MOORE: That is the way it appears here on

page 47.

MR. DODGE: Has the defendant any right now to move for the addition of a necessary party?

DEAN MORGAN: Oh, yes.

MR. DODGE: One who is not indispensable?

DEAN MORGAN: For the addition of indispensable parties, yes. Rule 21 says, "Parties may be dropped or added by order of the court on motion of any part or of its own initiative at any stage of the action...."

MR. DODGE: Is it a ground for dismissal?

DEAN MORGAN: No.

MR. DODGE: These are motions to dismiss that we are talking about.

PROFESSOR MOORE: We have it as a defense in one of the official forms when they want a necessary party.

DEAN MORGAN: Should you have a dismissal for failure to add a necessary party if the court can order him in? If he is not indispensable, I don't think you should have a dismissal for that.

JUDGE CLARK: I wonder if you should have any reference to "necessary" here.

MR. LEMANN: Is it a defense?

DEAN MORGAN: If the one you want to have is an indispensable party.

MR. LEMANN: Is a necessary party a defense?

Apparently not, according to Rule 21. Then it shouldn't be in Rule 12(b) at all.

DEAN MORGAN: No, it shouldn't.

JUDGE DOBIE: I think that is true. Leave the "necessary" out and limit it to indispensable parties.

THE CHAIRMAN: Your defense as to the necessary party is to have a motion that the party be joined.

DEAN MORGAN: It seems to me that Rule 21 covers all necessary parties.

PROFESSOR MOORE: Then we ought to change official Form 20, because we provide there as the second defense that he can raise lack of joinder of necessary parties.

THE CHAIRMAN: What harm does that do if you raise the point in your answer and the court says, "Well, I will order him in"?

JUDGE DOBIE: If he won't defeat the jurisdiction, of course.

THE CHAIRMAN: Yes.

JUDGE DOBIE: Sometimes you deliberately leave out a necessary party where it will, and that doesn't defeat the judgment. I should just like to ask if there is any place in the Rules where it would make any difference if you used the term "proper" parties. I always thought it was a hideous terminology.

JUDGE CLARK: Use what term?

JUDGE DOBIE: The term "proper" party. "Formal, necessary, and indispensable" is the real Supreme Court classification.

JUDGE CLARK: Do we use "proper"?

PROFESSOR MOORE: I don't think so.

JUDGE DOBIE: If we do, I should like to see it cut out. It is a very bad term and has caused a whole lot of trouble. I know that.

JUDGE CLARK: I couldn't be sure without checking it up, but I don't believe we use it.

DEAN MORGAN: No.

JUDGE DOBIE: I congratulate you, then.

THE CHAIRMAN: What is your pleasure now? Do you want to add subdivision (7) to Rule 12(b) to include the motion--

JUDGE DOBIE (Interposing): Has there been a second to that motion?

JUDGE CLARK: You are leaving out "necessary," aren't you?

JUDGE DOBIE: Yes.

JUDGE CLARK: Wasn't that the last judgment? Very well.

JUDGE DOBIE: Have we voted on that?

THE CHAIRMAN: No, we haven't. The proposal, as I get it, is, first, to add to Rule 12(b) a subdivision (7), "failure to join an indispensable party", or words to that

effect, and also to amend Rule 12(h). What is the amendment to 12(h), Mr. Moore?

PROFESSOR MOORE: It is printed on page 47, Mr. Mitchell.

JUDGE DOBIE: To make that an exception. It is not waived. Isn't that the idea?

JUDGE CLARK: That is right.

THE CHAIRMAN: 12(h) would be amended as shown on page 47 of the report. "A party waives all defenses and objections .... except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party," and so on. The addition to (h) is the phrase, "the defense of failure to join an indispensable party".

DEAN MORGAN: You don't want that now, after what we did before, stating a claim, and so forth, do you?

JUDGE CLARK: No, we changed the form. The form would be a little different. I think it is the idea you want.

DEAN MORGAN: The next question is that this allows you to raise it in a later pleading even if you raise it in a motion. As I understood when we got to waiver before, if you raise it in the motion, then you can't raise it again until you get to trial on the merits. Does this on page 47 do that on Rule 19? "the objection .... may also be made by a later pleading, if one is permitted, or by motion for judgment on

the pleadings or at the trial on the merits ...." I understood we were cutting out the motion for judgment on the pleadings in a case of that kind.

JUDGE CLARK: I should like to put this the same way that we put the others.

DEAN MORGAN: Quite so.

JUDGE CLARK: I wouldn't want to be bound by this language, which has been a little superseded. We are going to bring in a form of Rule 12. We ought to have it by tomorrow, I think. I should like to cast this in the same language.

DEAN MORGAN: That is what I was hoping, rather than the motion as Mr. Mitchell put it or the motion as it is on page 47.

THE CHAIRMAN: I am confused. Will somebody state not the particular words of the amendments, but the principle that we want to have incorporated? I don't believe I can do it. Can you state it?

JUDGE CLARK: That in Rule 12 as redrafted there be a provision that the defense of failure to join an indispensable party may be raised at trial.

THE CHAIRMAN: You don't say anything about 12(b) now. I want the whole motion. It is all part of one thing.

JUDGE CLARK: I will start over again. That there be added to the motions specified in Rule 12(b) another number, number (7), "failure to join an indispensable party," and that

there be added to Rule 12(h) as redrafted a provision that the defense of failure to join an indispensable party may be raised at trial.

THE CHAIRMAN: All in favor of that motion say "aye"; opposed. Carried.

JUDGE CLARK: The next comment, Comment II, is the only comment made by the cases. There is no suggestion there.

THE CHAIRMAN: Now we are talking about what rule?

JUDGE CLARK: 19.

THE CHAIRMAN: You have no amendment to propose to 19.

DEAN MORGAN: Mr. Moore, Form 20 was to comply with Rule 19(c), wasn't it?

PROFESSOR MOORE: Yes, sir.

DEAN MORGAN: "In any pleading in which relief is asked...." That is right. This is only in which relief is asked, isn't it? "the pleader shall set forth the names," and so on.

THE CHAIRMAN: While we are on the subject, do we have to make any amendment to the forms at the end of the Rules to comply with what we have just done to Rule 12?

DEAN MORGAN: If so, we ought to do it.

PROFESSOR MOORE: I don't think so.

THE CHAIRMAN: You don't think so. All right, let's pass on to Rule 20, "Permissive Joinder of Parties." You have a suggestion for amendment to Rule 20(a). What is it?

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JUDGE CLARK: As a matter of fact, we haven't. We discuss a suggestion and say that we are doubtful that it is necessary. The suggestion is that next to the last sentence in 20(a) be amended to read: "A plaintiff or defendant need not be interested in each claim for relief or in obtaining or defending against all the relief demanded."

That probably came from Pike and Fischer, but I think that arose particularly because of one case that had a somewhat narrower construction. We say, "It is our thought, however, that such a change is not needed. The case referred to was handled adequately in that the claims were not dismissed but were separated by the court." So we recommend no change. We call it to your attention as a suggestion that was given to us.

THE CHAIRMAN: Unless there is some objection, we will pass on--

DEAN MORGAN (Interposing): What about the provision that you suggested that all persons may be joined, and so forth, "and if any question of law or fact common to all of them will arise in the action" should read "is likely to arise in the action"? There was some suggestion from somebody on that, I remember.

JUDGE CLARK: That is Comment II. Isn't that the second comment? Isn't that the one you are talking about?

DEAN MORGAN: Comment II on 20, yes.

JUDGE CLARK: That is an additional point. It is assumed that on Comment I nothing is done. Is that right?

THE CHAIRMAN: That is right.

JUDGE CLARK: All right, Comment II. The criticism is that the words "will arise", which Mr. Morgan has just read, are too vague and that they should be deleted since it is impossible exactly to predict what actions will arise. It has been suggested, therefore, that the following phrase should be substituted: "if a situation admits of their arising in the action any questions of law or fact common to all of them." It is contended that this is what the rule really means.

THE CHAIRMAN: To get the record straight, we are talking now, Mr. Reporter, about Rule 20(a).

JUDGE CLARK: We go further and say, "No difficulty, however, has arisen under the present language, and we doubt if the suggested substitute secures sufficient added exactitude to warrant a change now."

JUDGE DOBIE: What is the difference between that and "will arise"? Of course, we all know the probabilities.

DEAN MORGAN: "likely to arise". I should hate to say "admits of there arising". That would be terrible English. I don't think there is much difference, Judge Dobie. It seems to me that is what any court would take it to mean. Has any court done otherwise?

JUDGE CLARK: No. Unless I am wrong, this comes right

from the English rule.

DEAN MORGAN: That is what I though.

JUDGE CLARK: The English rule uses "will arise." This suggestion came from a good man, Professor Atkinson, who has been working on the Missouri rules, but I think it is just a little exact, perhaps more exact than lawyers need to be.

JUDGE DOBIE: I move that it stand as is.

JUDGE DONWORTH: I second the motion.

THE CHAIRMAN: With no objection, it is so ordered. That means that Rule 20(a) stands as is.

We are now on Rule 21.

JUDGE CLARK: Rule 21, Comment I simply again raises the question that we have already considered and, I suppose, disposed of, as to how non-joinder of indispensable parties is raised. The next question, in Comment II, is as to the effect of non-joinder of an indispensable party.

JUDGE DOBIE: Haven't we already covered that?

JUDGE CLARK: Yes. I think there is nothing to be done, so I think there is nothing in Rule 21 that calls for any suggestion.

THE CHAIRMAN: Then we will pas to Rule 22, Interpleader. Have you any proposed amendment to Rule 22?

JUDGE CLARK: We have none. What we have done is to quote from Professor Chafee's article, and he wants further reforms. That draft you have is the second one. Does he suggest

anything more specific?

DEAN MORGAN: No, I don't think so. His whole question was on the service of process.

THE CHAIRMAN: Do you want to state to us just exactly what his proposal is and why he makes it, so we will understand it?

JUDGE CLARK: I am not sure that I have it in mind.

DEAN MORGAN: We are all right anyhow on his reform because by our joinder of parties and this interpleader we go beyond the Federal Interpleader Act, but, of course, under this we can't change jurisdiction, while they did change the amount involved to $500, I believe, in their particular case, didn't they?

PROFESSOR MOORE: Yes.

DEAN MORGAN: Here we are bound to stick by the $3,000.

JUDGE DONWORTH: How was that again, Professor Morgan?

THE CHAIRMAN: The rest of us don't understand what this is all about.

DEAN MORGAN: The Federal Interpleader Act has a limit of $500, while our provision is a limit of $3,000, you see.

JUDGE DONWORTH: I don't see that. I may be a little dull, but it seems to me that if the case is under the Federal Act, the $500 act, then we are under that pro tanto, and if the case is not under that act, then we are under the $3,000.

DEAN MORGAN: That is right; that is the point. Just

in so far as our act coincides with the Federal Interpleader Act, we have a $500 limit, but in so far as it exceeds it, we have a $3,000 limit.

JUDGE DONWORTH: That is quite right.

MR. DODGE: What is Chafee's objection?

DEAN MORGAN: His objection to the Federal Interpleader Act is that all you can do is to dispose of the res that is in the court, and so forth. He would like to have counterclaims, and so forth, disposed of at the same time. Under our provision, if we get a person in we can take care of all that, as I understand it. Don't you understand it that way?

PROFESSOR MOORE: I should think so.

DEAN MORGAN: With our joinder of parties and our counterclaims, and so forth, for people who are brought in.

JUDGE DOBIE: He doesn't advocate any change, does he?

DEAN MORGAN: Not in our Rules.

JUDGE CLARK: He wants to change the statute, I believe.

DEAN MORGAN: He wants to change his statute.

SENATOR PEPPER: He says in so many words, if the quotation on page 51 is correct, that this is the first of two articles "devoted to the special difficulties presented by the Federal Interpleader Act."

DEAN MORGAN: Yes.

SENATOR PEPPER: In other words, I don't see any criticism of our Rules.

JUDGE DOBIE: I move we pass it.

THE CHAIRMAN: With no objection, it is so ordered.

We will pass to Rule 23, Class Actions.

JUDGE CLARK: This is the Hawes v. Oakland rules, and there are questions about it, but I make the same suggestion I made before, that we leave it alone until the Supreme Court has spoken.

DEAN MORGAN: It is a beautiful statement. The only question is how to apply it.

THE CHAIRMAN: I agree with that idea. Maybe I know something more about this than I know about a lot of other things in these Rules. Rule 23(b), which we are talking about now, "Secondary Action by Shareholders," provides that "In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver" (this is the clause involved) "(1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law".

The history of that rule is in the case of Hawes v. Oakland. The Supreme Court in an equity case in those days when it thought it had power to announce as law substantive law in equity cases, regardless of the lower court, held that

a man didn't have any right as a shareholder to question corporate transactions of that kind unless he was a shareholder at the time of the transaction. That was a matter of substantive law that they announced before Erie Railroad v. Tompkins.

Then, having announced that rule of substantive law, very properly and consistently with their holding as to substantive law, they adopted an equity rule of pleading procedure to the effect that, that being substantive law, in a complaint by a shareholder in a derivative suit, the shareholder must allege that he was a shareholder in the transaction.

So there is a plain record of the decision announcing as a substantive law of right, the right of the shareholder to bring suit, the conditions under which he has the right, coupled with a procedural rule to carry out the substantive law.

We drew this rule very properly, in the light of Hawes v. Oakland and before the Erie case was decided, on the assumption that there was a Federal rule of substantive law that fixed the right.

Now Erie Railroad v. Tompkins comes along, and it makes it as plain to me as the nose on my face that the question of the legal right of a stockholder to bring such a suit is now a matter to be determined by local law. I don't think the question of his right to maintain the suit is a matter of procedure at all. So Hawes v. Oakland, as a rule of substantive Federal law, has gone by the board, and the law today is that a

man can't be asked properly to plead the fact in his complaint that he was a shareholder at the time of the transaction in those jurisdictions in which the law allows him the right to bring the suit without being such a shareholder. I don't think there is any reason for argument about that. There is some argument about some of these other provisions as to whether they are substantive or procedural, but I don't see any in that at all.

I don't remember that any lawyer has been smart enough or quick enough to raise the point that I have just talked about, and the courts have gone on. Even in New York State the rule is that a shareholder may bring such a suit even though he wasn't a shareholder when the suit was brought. Yet in the Federal Courts the bar take it for granted--most of them--that in the Federal Courts they have to allege and prove that fact.

JUDGE DOBIE: We held that in a suit against the National Cash Register Company involving a very large sum of money. There were other points, but we followed the rule in Hawes v. Oakland.

THE CHAIRMAN: What was the law in the local state?

JUDGE DOBIE: The local law in that state was the same as Hawes v. Oakland, it is fair to say.

THE CHAIRMAN: That is all right. I shall finish in one more sentence.

I think that subdivision (1) of this rule ought to be amended so that that averment that he was a shareholder at the time of the transaction is to be made only when under local law that is a condition affecting his right to maintain the suit. I think it is inevitable that when this case finally comes up to the Supreme Court, they are going to hold that. They can't consistently and intelligently do anything else. We are just misleading the bar by making them think that they have got to allege and prove that fact in jurisdictions where it isn't a local law. I feel very strongly about that.

SENATOR PEPPER: Mr. Chairman, is it possible that you have oversimplified the problem? I think the difficulty arises from the opening statement in (b) that the action is brought "to enforce a secondary right" on the part of the shareholder. It is brought in the exercise of the shareholder's right under exceptional circumstances to enforce a cause of action that belongs to the corporation. He doesn't enforce any right of his own. He is an emergency representative who sues to enforce the cause of action which belongs to all the associates, the normal representative system having broken down through the failure of the board of directors to act. It strikes me that it is not a question of substantive law at all. It is a question of the extent to which procedurally a court is going to recognize representation on the part of the plaintiff to sue for a great group of people other than himself.

You remember, way back of Hawes v. Oakland, the original case was Dodge v. Woolsy, which resulted in such a flood of litigation in the Federal Courts in representative suits that Hawes v. Oakland was decided in an effort to stem the current. It was a procedural question. Rule 94 of the rule you referred to, the old equity rule, was adopted pursuant to the decision in Hawes v. Oakland. I can't see that a decision that a shareholder shall be permitted to bring a suit on a cause of action belonging to the group is any more a question of substantive law than the matters of the earlier part of Rule 23 having to do with class actions. It is a procedural matter, and I don't see that it is necessarily to be regarded as one of the cases falling within Erie Railroad v. Tompkins.

THE CHAIRMAN: I would make this suggestion. If there seems to be disagreement among us whether it is substantive or procedural, I will be content if in our report to the Supreme Court we state the origin of this situation practically as I have stated it--

SENATOR PEPPER (Interposing): Yes.

THE CHAIRMAN: --without arguing whether it is substantive or procedural, and state that a question has arisen now under Erie Railroad v. Tompkins as to whether it is a matter of substantive right affecting the right to bring a suit in a representative capacity or whether it isn't, stating that we think that if under Erie Railroad v. Tompkins this is to be

treated as a matter of substantive right which is determined by local law, the rule ought to be amended as I have suggested, that if, on the other hand, the Court thinks Erie Railroad v. Tompkins doesn't apply because it is procedural and not substantive, we recommend that the rule stand as it is. Let us not take my opinion or yours as to which it is, but let us put it squarely up to them in just that way. Then if they come back and leave the rule as it is, I will apologize to you at the next meeting we have. I should like to see it settled, and I don't like to see a matter that is really difficult just brushed aside and our sort of cowering in a corner waiting for the Supreme Court to announce it. Let's put it right up to them and get it there in such a pointed way that they can't approve our recommendation one way or the other unless they make up their minds whether they want to treat this as substantive or procedural.

JUDGE CLARK: Mr. Chairman, I should like to raise a question about that, because there are several places through the Rules where this question arises. There are certain ones that we refer to later. I am not sure that we can foresee all the places where it will arise, but it arises in several places. One place it arises, for example, is trial by jury; how far you are going to be governed by the local law on what is an issue triable by jury.

To go back to the question we were just considering

under 18(b), it is my opinion that the provisions in the Fraudulent Conveyancing Act is just as much substantive as this. They are conditions precedent to the right of the plaintiff to pursue--

THE CHAIRMAN (Interposing): But, Mr. Clark, let me call your attention to the fact, as I remember it, that when we proposed that rule about bringing a suit in a fraudulent conveyance case, we accompanied our report to the Supreme Court with a note expressly calling their attention to the fact that an argument had been made that the thing was a matter of substantive law and that the Committee, however, thought it was procedural. We put it right up to them. We never did put this thing up to them because Erie Railroad hadn't been decided then, and there was no occasion to do it. I think that we ought to put it up to the Court.

JUDGE CLARK: In addition, it seems to me it is a very serious problem whether we are going to try to call to the attention of the Court the various questions that arise under Erie Railroad v. Tompkins, because there are a good many, and if we don't, I am not at all sure which we should pick out. I don't feel that this is clearer than other cases. There is a question here certainly (it is a question in lots of other cases, and it is doubtful in my mind) of whether we are not faced with the issue of saying every case where the question arises, which has obvious difficulties, or else of not making

particular references to special cases.

There seems to me to be an additional reason that it may be doubtful in this case. I suppose this question is likely to be on its way to the Supreme Court anyhow, and I think it is really rather questionable how far we should help pre-judge one side or the other. As a matter of fact, this question is argued and has been argued strenuously in the courts. In the Piccard case that was the whole ground of attack, and we held that the rule applied.

JUDGE DOBIE: Is the New York law different?

JUDGE CLARK: The New York law is different, yes. That is the case of Piccard v. Sperry Corporation. Then we said we would facilitate counsel in every way to take the case to the Supreme Court, because we thought it ought to be settled. I haven't heard whether in that case they have attempted to go further or not, but the matter is in litigation, and I think it is a little dangerous for us to pass an opinion in this case on matters that are now pending.

MR. DODGE: The Circuit Court of Appeals for the Sixth Circuit did the same thing, didn't they?

JUDGE CLARK: I think so, yes.

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

TUESDAY AFTERNOON SESSION

May 18, 1943

The meeting reconvened at 1:50 p. m., Chairman Mitchell presiding.

THE CHAIRMAN: The meeting will come to order.

I have something to say about this stockholder's suit business that I think will save time. I think we want to save time. I don't think there is any object to our discussing it further at this time. I think we want to get through. My reason for saying this is that from what has occurred here, from the views expressed by the members, it is quite plain to me now that we ought not just to take it for granted that this rule is "busted" by Erie and we ought not to amend it, that the most we ought to do in any event is to give a note to the Supreme Court calling attention to it. Also from what has been said, that this is a procedural matter, I would join in a note that recommended that the Court let the rule stand and not try to decide in their own bosom ex parte whether this is substantive or not, but that they consider the question in an adjudicated case, where they have the benefit of arguments pro and con and can be sure they are right.

That is the way I feel about it. Why not just drop it now and reconsider what kind of note we want, if any, when the thing comes back to us a month or two hence?

JUDGE DONWORTH: Mr. Chairman, I should like to make a

few observations for the record.

It strikes me that there is a little more to it than the distinction between substantive law and procedural, although the question undoubtedly is very much that. There is a recent decision, Black & Yates v. Mahogany Associates, decided on rehearing June 1942 by the Third Circuit Court of Appeals, reported in 139 F.(2d) 227. Without taking up any time, I recognize the propriety of what the Chairman has said. I will say that certiorari has been denied in this case. I will say this for what it is worth.

"The words of Mr. Justice Frankfurther in the Ticonic Bank case are a plain indication that the rule enunciated in Payne v. Hook, supra, (7 Wall. page 430, 19 L.Ed. 260), 'The equity jurisdiction conferred on the Federal Courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation not restraint by state legislation, and is uniform throughout the different states of the Union,' is the law so far at least as the granting of equitable remedies is concerned. The rule of Erie R. Co. v. Tompkins being determinative of substantive rights, there is still preserved to the Federal Courts a uniform basis for granting equitable remedies in cases in which substantive rights have arisen under state law."

That is all I wish to say.

THE CHAIRMAN: If you are agreeable, we shall forget

the Erie Railroad case and pass this thing over now. Have we any other proposals under Class Actions that you want to bring up, Mr. Reporter?

JUDGE CLARK: I think there is nothing there.

THE CHAIRMAN: Has anybody else any recommendation for change in Rule 23?. Senator Pepper is not prepared to run the gantlet, I see. That is his pet.

Rule 24, Intervention.

JUDGE CLARK: On intervention we have had a very serious and well worked out criticism, and we haven't accepted it, but I suspect we are a little prejudiced, and I think perhaps it needs to be considered.

Mr. Berger, who is in the Government service but is apparently quite a scholarly person and has written a good deal, wrote an article on Intervention by Public Agencies in Private Litigation in the Federal Courts in 50 Yale L. J. 65, and he feels that our rule on the whole is rather too narrowly restricted. In the first place, some of the terms we use restrict the right more than it was before, and more indefinite terms are desirable. Secondly, he is definitely anxious for wider intervention by governmental agencies to test the validity and the workability of various of the statutes which affect such agencies.

I might say privately that I should think on the whole there is a great deal to be said for that. In a private

litigation which involves the work of a governmental agency there perhaps ought to be more reason for the governmental agency to be allowed to intervene and raise questions.

We make two answers, which may or may not be sufficient. One is that we think the wording here is rather better and more explicit than the more indefinite wording that he has, and as to the latter suggestion it rather seems to us that it is more a matter of legislation than a matter to be covered in a rule. I think since he has carefully worked it out that perhaps you ought to give some attention to his draft. He presents a draft which appears on pages 56 and 57. Our quotation from his argument begins on page 55. His discussion begins at the bottom of 55 and says, "The terms 'claim or defense' present troublesome problems." * * * "The terms 'inadequate representation' and 'bound by the judgment', and 'adversely affected by a distribution of property in the custody of the court ....' are equally troublesome." * * * "Inadequate representation" he says is troublesome.

THE CHAIRMAN: His amendment is found on pages 56 and 57?

JUDGE CLARK: That is correct.

THE CHAIRMAN: To start with, the first thing he does that I don't like is to transpose (b) and (d). He starts out with intervention in action. I don't like that. He starts out with permissive intervention. I am opposed to transposing

subject matter from one numbered rule to another unless it is necessary.

JUDGE CLARK: Outside of the matter of detail, if you will look at the permissive intervention one, I think the most important change he has is in (2). You will see that our original (2) is "when an applicant's claim or defense and the main action have a question of law or fact in common." He wants to change it to "whenever the pecuniary or other interests of the applicant may be injured by the pending action." He thinks that the way the rule is drawn is too narrow and that by making this "pecuniary or other interests of the applicant", "Other interests", I take it, might well be a governmental agency that is interested in sustaining the validity of regulations, and so forth.

DEAN MORGAN: What does he mean by "interest"?

THE CHAIRMAN: "other interest".

DEAN MORGAN: Yes. That is what I should like to know. Sentimental? Emotional?

JUDGE CLARK: That is what he says. "He desires not only a specific rule allowing governmental agencies to intervene, but also going back in the main rule to the vaguer, but, as he considers it, more liberal test of affecting 'the pecuniary or other interests' of the intervenor."

THE CHAIRMAN: I am opposed to adding further interventions by the Government in private litigation. Congress has

None that in enough cases where the interests of the United States are vital. You can hardly get into court nowadays with anything but that the RFC or the WPA or something is intervening and trying to muss your case up. Half the time they haven't any real interest in it at all except some hazy idea about protecting public interest. I don't think the bar would welcome any broader opportunity for the Government to intervene in everything.

JUDGE DOBIE: They are doing a lot in asking us, General, as amicus curiae to be heard and file a brief. We don't object to the filing of a brief so much, but it lengthens the time. They want to come in and be heard on almost anything.

THE CHAIRMAN: Not only that, but they want to intervene, and then they have a right to conduct the litigation, to appeal, and to do all sorts of things.

JUDGE CLARK: I want to state his position as fairly as I can. I haven't favored it, but, of course, I will say he has worked it out. He spent a good deal of time on it. If you turn over to page 57, "Intervention of Right," you will see that his number (2) carries on the same general idea. "whenever the pecuniary or other interests of the applicant may be injured by the pending action and the applicant has no other remedy". Next, and in that same provision, there is a new clause, beginning "Whenever a party relies for ground for relief". That is a special provision he wants to have to cover

the situation as to governmental agencies. "the agency shall be permitted to intervene", you see.

PROFESSOR SUNDERLAND: I think that is a general nuisance provision.

JUDGE DOBIE: I am "agin" that.

THE CHAIRMAN: I don't know what other interests there would be. "pecuniary or other interests". Reputation might be one.

MR. TOLMAN: Mr. Chairman, I think we might take note of the fact that yesterday one of the two opinions handed down dealt with that very subject matter, applied a rule of interest and defined it. I don't think we need to put anything in here on the subject. It was a TVA condemnation case.

THE CHAIRMAN: Intervention is a right. What is your pleasure on this proposal?

JUDGE DOBIE: What does the Reporter recommend, to leave it as is?

JUDGE CLARK: We have recommended one or two slight changes that appear a little later, but on this main point we will recommend to give Mr. Berger's suggestions careful consideration and then--

DEAN MORGAN (Interposing): Turn it down?

JUDGE CLARK: Yes.

THE CHAIRMAN: He has given it consideration, and we will do the turning down. I don't mean any disrespect to Mr.

Berger, but I don't think the attitude of trying to get the Government sticking its nose into any more private litigation is a very acceptable one, and I think in other respects the draft is open to serious doubt as to what it means. If the Attorney General came around and pointed out to us a case where they ought to be allowed to intervene, that would be a different proposition.

JUDGE CLARK: It is only fair to say that he was not doing this as an official matter anyway. He wrote a private article and discussed it. I don't understand that it represents an official request of any kind.

THE CHAIRMAN: We will just write him a letter and tell him that careful consideration has been given to it and that the Committee, not desiring to make any more changes than they should, decided to let the matter stand at present.

JUDGE CLARK: Very well.

THE CHAIRMAN: If that is acceptable to the Committee.

DEAN MORGAN: Didn't you have something, Mr. Mitchell?

THE CHAIRMAN: I had one slight one from my old friend, the Black Tom case, too. I will tell you what happened there.

JUDGE CLARK: That appears on the next page. It is in here if you want to look at it. There is a little one at the top and there is the one you suggested.

THE CHAIRMAN: Here is the point: 24(a) deals with intervention of right. I have described to you the case brought

by some award holders under the Mixed Claims Commission to restrain the Secretary of the Treasury from paying the awards that had been subsequently rendered to my client because there wasn't enough money to go around. They were trying to compete our awards and claimed our awards were invalid. You see, it was our money, we thought, in the Treasury's hands. The Treasury was just a stakeholder. We thought the Treasury ought not to be enjoined against paying us unless we had a right to appear in court and defend our award. So we moved to intervene.

Then we ran up against the question of whether it was permissive or a matter of right. Clearly it was permissive. We could have gotten in under that section, but it seemed to me it was utterly wrong to leave us in a position where it was discretionary with the court whether we would be allowed to go into this case and defend our right to this fund. We were the only people interested in it. The Government had no interest. So we read subdivision (3) of Rule 24(a) and said the intervention of right may be had "when the applicant is so situated as to be adversely affected by a distribution of other disposition of property in the custody of the court or of an officer thereof." I was immediately confronted with the fact that this money wasn't in the custody of the court; it wasn't in the court's hand. It was a fund in the Treasury, and the rule for intervention as a matter of right wasn't broad enough to allow us as a matter of right to intervene.

I suggested to the Reporter that the rule be amended so as to read: "adversely affected by a distribution or other disposition of property in the custody of the court or an officer thereof or subject to control and disposition by the court." That would have fitted the case exactly. I don't know just how you have worded that. The amendment is: "When the application is so situated as to be adversely affected by a distribution or other disposition of property in the custody or control, directly or indirectly, of the court or of an officer thereof."

SENATOR PEPPER: May I inquire, Mr. Chairman, what specific statement of these cases where intervention by right exists, is exclusive of other cases? Unless there is one, it would have seemed perfectly clear to me, if I had been judge in that case, that you were entitled to intervene as a matter of right. Would I have been handicapped or would my hands have been tied by the fact that the exclusive statement didn't quite cover the case?

THE CHAIRMAN: I should think so. We are stating here the conditions under which you may intervene as a matter of right, and when they are not broad enough to cover a particular case, I don't think that the court can make a rule of its own in the particular case. I have always assumed that when we say by these Rules that certain things may be done under certain conditions, it excludes the right to do them under other

conditions. I may be wrong about that.

SENATOR PEPPER: I didn't realize that. It seems to me that it is a pretty dangerous thing to have an affirmative statement which is necessarily limited by what your imagination suggests at the time you frame it, pregnant with the negative that when a new case comes up falling within the same reason, a defect of language may make it impossible for the court to grant relief.

THE CHAIRMAN: My understanding is that that is the effect of our Rules. Talk about being hoisted by your own petard, I will explain to you how I was hoisted on my own petard by the 60-day rule in this very case. The joke of that was that I was the man who sat here at our Committee meeting and fought five years ago for granting the Government judicial time, against the protests of a great many of you who thought the Government ought to toe the mark along with the other litigants. Then when I got into the Black Tom case, I was hoisted by my own petard. I myself drew this phrase "in the custody of the court" when we went over this rule several years ago, and then when I got into the Black Tom case I found I was hoisted again. I didn't have a right to get in court.

MR. DODGE: Did you get a permissive right?

THE CHAIRMAN: Oh, yes, I got a permissive, but I trembled in my boots when I saw I didn't have a right, you see.

MR. DODGE: The Supreme Court appears to have held that

this list of grounds is not exclusive. See page 58 of the memorandum.

THE CHAIRMAN: Even at that, as long as we define a particular case "in the custody of the court", it would be more comfortable if we made it deal with the distribution of a fund or the power of disposition or control of the court, even though it is not technically in the custody of the court.

MR. DODGE: It was in the control of the court in your case merely because there was litigation pending with regard to it?

THE CHAIRMAN: Litigation to decide who was entitled to it. The court was going to render a judgment saying whose money it was.

MR. DODGE: That put the money in the indirect control of the court.

THE CHAIRMAN: The Secretary of the Treasury was a party to the suit, and if the court decided that this set of award holders or the other set were entitled to the money, it would have bound everybody; it would have settled the question of who was to get it.

MR. LEMANN: The only question would be how far this ran into (2) under permissive intervention, whether you could make a convincing argument that this particular case should be under (a)(3) instead of (b)(2). That is the only thing I am wondering about. As far as the hardship is concerned, you

might have hardship in a case in (b)(2) if the court wouldn't permit you. Of course, the trial court's decision on that, I take it, would be subject to review in the appellate court. Would there have been any more hardship on you?

THE CHAIRMAN: It might have been in error if the court had refused permissive intervention, if that is what you mean.

MR. LEMANN: Would there have been more hardship in keeping you out of that case than keeping a man out of intervention in cases falling within (b)(2)?

DEAN MORGAN: Just on a question of law and fact, I should think so, very much more.

THE CHAIRMAN: Suppose there had been a judgment in the United States Courts--and it might have gone to the Supreme Court--judging that the Secretary of the Treasury be permanently enjoined and restrained from paying any of that money to us, we would have been sitting out on the sidelines. I should like to know just how you would have gone after getting that money under those circumstances. In the face of that injunction and the decision of the Supreme Court, for instance, that the other fellow was entitled to it, we would have been in difficulties.

However, that is another case that I was disturbed about at the time. I may not have another one. I am always prejudiced when I have a personal interest in a thing, but

that is an experience I was in. It is quite plain, I think, that the rule itself didn't permit me to intervene; it didn't as a matter of right. Is there a decision on page 58 that says that you may intervene as a matter of right, whether Rule 24(a) allows it or not?

DEAN MORGAN: It says it is not exclusive.

JUDGE CLARK: The case begins on page 57.

JUDGE DOBIE: Has any case arisen about the modification of a judgment already entered?

JUDGE CLARK: That is the case there.

JUDGE DOBIE: The Missouri case. They held that the rule is not a complete enumeration, didn't they?

JUDGE CLARK: Yes, and that there could be intervention as a right in connection with modification of a judgment.

SENATOR PEPPER: It seems to me, Mr. Chairman, unless you conceive of (a) as being non-exclusive, there is real need for some amplification of (b)(2), because if you didn't have a right in your case to intervene, although you were potentially the very owners of the fund which was in litigation, it is doubtful whether you could have had permissive intervention the way (2) is worded, and if you can't have either intervention of right or intervention by permission in such a case as yours, there is something wrong with the Rules.

THE CHAIRMAN: I rather imagine subdivision (b)(2) covered us, because it says "when an applicant's claim or

defense" (that is, the applicant for intervention in the main action) "and the main action have a question of law or fact in common." In the main action, the question was whether our awards were valid or not.

SENATOR PEPPER: What was that action?

THE CHAIRMAN: An action to restrain the Secretary of the Treasury from paying our award.

SENATOR PEPPER: Yes, but I mean what was the main action?

THE CHAIRMAN: It was an action to restrain the Secretary of the Treasury.

DEAN MORGAN: No; your action.

THE CHAIRMAN: I didn't have one. I was an applicant for intervention. The main action in which I sought to intervene was a suit brought by a prior award to enjoin the Secretary from paying my award, and the question involved was whether our award was valid or not. So, when we made application for intervention, our claim involved the question of whether our awards were valid or not. Therefore, we had a plain question of law or fact in common, and plainly we were entitled to intervene under (b)(2).

SENATOR PEPPER: I should have supposed that the main action was the action brought by these other people to restrain you, and if that were the case--

THE CHAIRMAN (Interposing): They didn't bring a suit

to restrain us.

SENATOR PEPPER: To restrain the Secretary of the Treasury from paying you.

THE CHAIRMAN: That was the main action.

SENATOR PEPPER: That was the main action. Can it be said that you had a claim or defense within the meaning of (2)? That sounds as if there were some other action pending in which you had a claim or defense.

THE CHAIRMAN: We, we had a claim that we wanted to assert by this intervention, the right to this money, and we had a defense to the plaintiff's claim in the main action, to wit, his claim that our awards were invalid was no good. We had both claims and defenses to assert, and they involved the same questions of law and fact as the plaintiff's claim in the main action. So I would say I never had any doubt that we were entitled to the matter of permissive intervention and that we could be let in under (b)(2).

Charlie, forgetting the fact that I suggested this amendment, and looking at it from a totally different standpoint, how do you feel about the necessity for making any amendment to (a)(3)?

MR. TOLMAN: I think it should be amplified in accordance with this suggestion.

THE CHAIRMAN: The point is made that even though we say you can intervene when the disposition of property is in

the custody of the court that is going to be affected by it, it still means that we can intervene if it isn't in the custody of the court if we are still going to be affected by it.

JUDGE CLARK: I should think that there is a good deal to be said for this. I think it is rather desirable. There is only one possibility I can see. The direct control of the court is clear, but the word "indirectly" makes it a little unclear.

THE CHAIRMAN: I didn't suggest those words "directly or indirectly". I think that is some draft of yours.

JUDGE CLARK: I think it is, yes.

THE CHAIRMAN: "the disposition of which is subject to the control of the court or of an officer thereof" is the way I would word it.

JUDGE CLARK: What do you think of that (to Professor Moore)? You had better take it down. "the disposition of which is subject to the control of the court".

DEAN MORGAN: You could say "property which will be distributed or otherwise disposed of by the judgment".

THE CHAIRMAN: I haven't any particular preference about phraseology. The idea I want to get across is that if the court is entertaining litigation in which it is going to settle the disposition of a particular fund held in trust by a stakeholder, and his judgment is going to have that effect, then the mere fact that it isn't in his judicial custody in a

technical sense ought not to make any difference. That is my point.

Let's not take too much time with it. I don't care.

DEAN MORGAN: I move that an amendment to that effect be drafted and inserted.

JUDGE DOBIE: Do you want to leave it "directly or indirectly"?

THE CHAIRMAN: No, I didn't put in those words "directly or indirectly". I want something such as I dictated, or did Mr. Morgan have another suggestion? I didn't put in those words "directly or indirectly" at all. I just expressed the idea to the Reporter, and he made the draft. I think I suggested that it read: "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of, or subject to the control of, or disposition by the court or an officer thereof."

JUDGE DOBIE: How about putting out the words "directly or indirectly"?

THE CHAIRMAN: I haven't put them in. They are not in the rule now.

JUDGE DOBIE: No, but they are in this suggestion on page 59.

SENATOR LOFTIN: That is the Reporter's suggestion.

JUDGE DOBIE: Don't you think "directly or indirectly" is just put in there for caution? Wouldn't "control" include

indirect control?

THE CHAIRMAN: I wasn't quite satisfied with "control". It is subject to the disposition of the court. It is something a little different, but maybe there is no difference in meaning. I don't care how you word it. I don't care whether you adopt it or not. This is an actual experience that I had in court where I thought the rule was defective. I am surprised to find that it is true that under the Supreme Court decision it didn't make any difference anyway. I had a right even though the Rules say I didn't or don't say I had.

SENATOR LOFTIN: Mr. Chairman, I move that the amendment be adopted in principle anyway and that the specific language be left to the Reporter in the light of the discussion.

THE CHAIRMAN: All in favor say "aye"; opposed. It is carried.

JUDGE DOBIE: That includes the modification of judgment already entered.

JUDGE CLARK: Judge Dobie's suggestion is that that also should include the suggestion just prior to that, which appears at the top of the page.

JUDGE DOBIE: Which is the Missouri-Kansas Pipe Line case.

THE CHAIRMAN: I don't understand. Is there another amendment to the rule?

JUDGE DOBIE: It is above that, General. "bound by a

judgment in the action or by a modification of a judgment already entered". I am not at all sure that that isn't judgment where you hand something down that modifies another judgment.

THE CHAIRMAN: You mean that is putting in the rule what the Supreme Court has already held in the Pipe Line case?

JUDGE DOBIE: That is it.

THE CHAIRMAN: Do you think that is necessary?

JUDGE DOBIE: No, I don't, but the Court might like it.

THE CHAIRMAN: What is your pleasure about that?

SENATOR LOFTIN: I didn't include it in my motion. It didn't seem to me it was necessary.

THE CHAIRMAN: It is separate.

JUDGE DOBIE: I think "judgment" includes a modification of another judgment. It is a judgment in a way.

THE CHAIRMAN: It is a judgment in the action, whether it modifies another one or does something else.

JUDGE DOBIE: Certainly. What do you think, Charlie? Would you like to put that in?

JUDGE CLARK: I am not very strenuous about it. Of course, here is another case that came up. The District Court here thought it couldn't act, and it went to the Supreme Court and the Supreme Court did act.

THE CHAIRMAN: The Supreme Court has settled it now. We don't need any rule except to publish the decision of the Supreme Court in the Rules.

JUDGE CLARK: I guess that is so. Isn't that so?

PROFESSOR MOORE: Yes.

JUDGE CLARK: If you can consider that things decided by the Supreme Court are settled.

DEAN MORGAN: It is all right until next Monday.

SENATOR PEPPER: Longer than that--the 15th of June. Mr. Chairman, would the Reporter refresh my recollection of why we phrased (b)(2) as we did? You would think that there ought to be permissive intervention when it appears to the court that the judgment in the main action may adversely affect the pecuniary or proprietary interests of the applicant. I was wondering why we put it on the ground of a question of law or fact common to the two.

JUDGE CLARK: I can answer that. Whether the reason is adequate or not, the reason we did it was that we were striving for that old devil, consistency. The common question of law or fact, first, is the basic reason now for joinder of parties. That appears in the permissive joinder section, Rule 20.

SENATOR PEPPER: Yes.

JUDGE CLARK: Second is the basis of the class action joinder, when you get away from the stricter cases. That appears in Rule 23(a)(3). There is a common question of law or fact. We made this, as a kind of logical consistency, that the same general idea affected all these cases. That is why we

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did it.

SENATOR PEPPER: I see. It occurs to me that there is not a very strong analogy between the two other cases, the joinder cases and the class actions, and this one. It seems to me the ground of intervention here is not the existence of a common question of law or fact, but that the applicant can satisfy the court that a judgment in the main action may adversely affect his pecuniary or proprietary interests. It seems to me that if that is really the rationale of the thing, it is a pity to express it in terms of a common question of law or of fact, because your imagination doesn't grasp all possible cases and you may have a case where no common question of law or fact exists and you would be entitled neither under the rights section nor under the permissive section. If we thought of it before, I don't want to bring it up again.

DEAN MORGAN: I don't think we have discussed that before.

JUDGE CLARK: I would add, as our discussion with reference to Mr. Berger indicated a little, those other and broader, if you will, but at least vaguer expressions are not quite understood by anybody. They can mean all things to all men. We thought this was getting to be a clearer idea, a concept that we were using right along that had more content to it. We were hoping, in other words, that we were telling the courts more what they could do, that it was a more workable rule.

Do you want to add something to that?

PROFESSOR MOORE: No.

SENATOR PEPPER: I don't question the point.

DEAN MORGAN: Don't you think, Mr. Reporter, that there ought to be permissive intervention in the kind of case the Senator has described?

JUDGE CLARK: I should say generally, yes. What did he say--pecuniary or proprietary interests?

SENATOR PEPPER: Yes. You are not a party to the pending litigation. You ask leave to intervene. The court asks, "On what ground?" You say, "I can satisfy the court that if this pending case proceeds to judgment and the judgment is unfavorable to a position that I would take were I a party to the record, in my absence it will affect injuriously a pecuniary or proprietary interest of mine, which I am prepared to indicate."

JUDGE CLARK: What is a proprietary interest?

SENATOR PEPPER: In the case I was thinking of, the distinction is usually made as between money and objects of ownership, such as tangible property. I think Mr. Morgan will tell me whether I am not right in saying we have declarations against the pecuniary or proprietary interests.

DEAN MORGAN: That is right.

SENATOR PEPPER: So as to cover the pecuniary and property-holding interests, I thought if this were going to put

a cloud on a man's real estate, he ought to be permitted to intervene, or if it were going to deplete a fund which he would be entitled to participate in if he were before the court, like the Chairman's Black Tom case, in that case he ought to be permitted to intervene.

I am a little puzzled to know just how these words "question of law or fact in common" would apply. Of course, if the court says, "We are going to construe those words as broadly as possible and say that any question raised by a claimant raises a question of law or of fact which the other case would involve," then that would cover every possible case; but if the court were to say, "I can't tell now what questions of law or fact are going to be involved in the main litigation," I should very much want to be able to say to him, "Well, irrespective of what the questions of law or fact may be, the judgment rendered is going to cut me out of access to a fund to which I have a right," or "It is going to put a cloud on the title to my real estate."

JUDGE CLARK: Senator, I trust you realize that what you are suggesting is a limitation on the rule.

SENATOR PEPPER: Is it?

JUDGE CLARK: Yes, absolutely, a very strong limitation. Every case you put, it would seem to me, would practically come in (a) anyhow, "Intervention of Right," but when you get to (b), and it is something that affects you and your

pocketbook, I cannot conceive how a court could say that something in the main claim to which your claim is opposed is not a common question. But, you see, the cases that you are shutting out are cases where there is just a similarity of action, and yet it would be a good thing to have the man come in and get it adjudicated here and not have a separate suit. Here he can come in, in the court's discretion, and say," I have the same question that I am going to bring up. Let me come in and we will settle it all here."

SENATOR PEPPER: Perhaps you are right on it.

DEAN MORGAN: You are right about that. I have no doubt that this ought to stay in, but I was just wondering if your phraseology covered all the cases that the Senator had in mind.

SENATOR PEPPER: That is the only doubt I had, but I think it is too nebulous to prolong the discussion.

PROFESSOR CHERRY: May I ask the Senator a question? Aren't your cases cases where your client would be an indispensable party to the first action?

SENATOR PEPPER: They may be.

PROFESSOR CHERRY: I think they are, as you illustrated. Of course, that point would come up on the question of whether intervention were possible or not, and they couldn't go ahead with the suit without you.

SENATOR PEPPER: One would have thought that the

Chairman's clients would have been indispensable.

PROFESSOR CHERRY: I would have thought that myself.

SENATOR PEPPER: I assume that for some reason the court wasn't regarding them as indispensable parties, because in that event he would have applied for joinder and not for intervention. I was assuming that for some reason, joinder wasn't available, and if it wasn't available by way of motion to join, I thought it ought to be available by motion to intervene.

THE CHAIRMAN: The point in the Black Tom case is that we weren't in there to say we were indispensable, and unless the Secretary of the Treasury pointed to us and said we were indispensable, the point wouldn't be raised, don't you see?

SENATOR PEPPER: I think the matter has been sufficiently covered by the Reporter's explanation, and I don't press the point.

THE CHAIRMAN: On Rule 24, page 59, the Reporter has some other matter that I raised and he doesn't think is necessary. Neither do it, so I withdraw it, and we will just forget that. That brings us up to Rule 25.

JUDGE CLARK: Just a minute. There is one at the top of page 60.

THE CHAIRMAN: I overlooked that.

JUDGE CLARK: I don't know whether the word "pleading" is sufficient, and we want to put in the word "motion".

THE CHAIRMAN: Haven't you defined pleading somewhere?

JUDGE CLARK: You may remember that I originally had it that a motion was a pleading, and Mr. Wickersham asked me where I got that. I said that is what it was. He said, "You can't say that." I asked, "Why not?" He said, "Because it isn't." So, nowhere do I think we call a motion a pleading.

DEAN MORGAN: No, we don't; we very carefully didn't.

JUDGE DOBIE: A pleading may be a pleading, a complaint, an answer, and in some cases, a reply.

JUDGE DONWORTH: A pleading makes him a party and gives him standing in court. Then any motions that he feels warranted in making follows. Isn't that true?

JUDGE CLARK: The idea under our procedure here was that he had to show what he was after when he asked to come in so the court could see what he was up to. That was the purpose of his attaching a pleading here. Couldn't he just as well attach one of our various motions?

JUDGE DONWORTH: I think he ought to appear by pleading and then make a motion, like any other party.

THE CHAIRMAN: I don't understand it. The rule already says he can make a motion to intervene. "The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." If the motion to intervene is allowed and his pleading is accepted, what is to prevent him from making a

motion for summary judgment, just like any other? I don't quite get the idea myself.

JUDGE CLARK: That is true. Most parties can move for summary judgment without filing an answer. An intervenor here would not be able to.

THE CHAIRMAN: He couldn't do it under our existing summary judgment rule until his pleading had been answered.

JUDGE DOBIE: "The motion .... shall be accompanied by a pleading or motion...."? Would you say that the motion shall be accompanied by a pleading or motion?

MR. LEMANN: The motion shall be accompanied by a motion?

JUDGE CLARK: It is not a joke.

MR. LEMANN: I didn't say it was a joke.

THE CHAIRMAN: Explain what you are trying to do here, Charlie. I don't quite get it.

JUDGE CLARK: When a person intervenes, we require that he show a pleading so that he may appear in the case.

THE CHAIRMAN: That is rational. I get that.

JUDGE CLARK: I suppose that the simple thing would be to move for summary judgment instead of answering or otherwise. Instead of a formal pleading, why shouldn't he show a motion for summary judgment? Your suggestion is that he could file a pleading and then later move for a summary judgment. I suppose that is so. When they answer now, most people--and

our discussion indicated the Committee wanted it so--move for summary judgment without making an answer.

JUDGE DONWORTH: Yes, but they are already parties to the case. He needs a pleading to make him a party, showing the grounds of his intervention, it seems to me.

THE CHAIRMAN: Furthermore, you have overlooked the fact that his proposed pleading may be a complaint and not an answer.

JUDGE CLARK: That is true.

THE CHAIRMAN: If it is a complaint, then the other parties have a right to answer it before he, as a plaintiff, may be allowed to make a motion for summary judgment under our existing summary judgment rule.

JUDGE CLARK: I don't believe it is important enough to change.

SENATOR PEPPER: Has any court raised that question? Has it come up in any judicial discussion?

JUDGE CLARK: No. Maybe they thought they couldn't do it. Well, let it go.

JUDGE DOBIE: I doubt that it is important enough.

THE CHAIRMAN: Let's go to Rule 25, then.

SENATOR LOFTIN: Mr. Chairman, I don't think you ever put my motion.

THE CHAIRMAN: What was that? I didn't get it.

SENATOR LOFTIN: It has been some time ago. It was

interrupted by Judge Dobie. He mentioned a thought he had in mind. I told him that I did not intend to include that. That was about the modification of a judgment.

SENATOR PEPPER: If I recall it, Senator, your motion was that amendment be made to subsection (3) or Rule 24(a) along the lines of the statement made by the Chair and in language to be determined by the Reporter.

DEAN MORGAN: That was put.

SENATOR PEPPER: Was that carried?

SENATOR LOFTIN: It never has been put.

DEAN MORGAN: Yes, that was carried.

THE CHAIRMAN: I will submit it again--or the first time, whichever it is. All in favor of that motion say "aye"; opposed. It is carried. I can't afford to take any chances on not having that passed. (Laughter)

JUDGE CLARK: Rule 25. I wish you would turn to the supplemental material that I put in, which appears on pages 28 to 30. Mr. Borchard, of Yale, is writing an article which will appear in the next number of the Yale Law Journal, on "challenging 'Penal' Statutes by Declaratory Action." He criticizes the Supreme Court primarily, but it comes down eventually to a criticism of the provision in 25(d) on the substitution of a new officer, requiring that it be shown that "the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be

in violation of the Constitution of the United States. In order that you may have in mind his whole argument, it was in general that the idea developed in some of the Supreme Court cases that a suit to enjoin an action is a suit not against the state or the governmental body, but against the individual--the attorney general or whatnot, who is only an individual wrongdoer--and that you can't have a declaration unless he makes some threats. Mr. Borchard says that he thinks that is a very foolish rule because the legislature, in effect, in passing the statute claimed to be unconstitutional has made all the threat in the world, and to say that this officer should be enabled to threaten to sue or to make faces, so to speak, is a very undesirable rule. He states that generally and criticizes Ex parte La Prade along on 28 and 29, and it comes in on 30, saying that we have carried "the unfortunate emendation" into the Federal Rules.

"Just what is meant by 'adopts or continues or threatens to adopt or continue' is still unclear. But it manifests the unjustified conception originating in Ex parte Young that the mandatory official duty to enforce a statute implies a personal delinquency of the enforcing officer if the statute should after test prove unconstitutional. This, it is submitted, is an unfortunate view of official duty, totally unnecessary to preserve the guaranties of the 14th Amendment, and deserving of the earliest possible abrogation by a new Rules

Committee, by the court itself, or if necessary by Congress."

SENATOR PEPPER: What kind of case presents this question, Mr. Reporter.

JUDGE CLARK: Substantially an injunction, coupled with a request for a declaratory judgment against a state officer, against the enforcement by a state officer of an act claimed to be unconstitutional. The particular aspect of it that comes up in Rule 25(d) is where the state officer dies and a new successor comes in. The rule says, in effect, that you have to have a new threat by the successor. Mr. Borchard criticizes the whole background of the rule, but as far as the rule is concerned, that is the particular thing he is criticizing here.

PROFESSOR SUNDERLAND: He is right, isn't he?

JUDGE CLARK: Oh, yes, I think he is right. Maybe we shouldn't say it here, but it does seem to be a kind of foolish concept that when the legislature has passed an act, it then becomes a matter for the official personality to make faces on it. I think it is rather an unjustified and undignified rule. I suppose it goes back to the theory that in general you can't--

DEAN MORGAN (Interposing): You can't sue a state. That is the whole proposition.

JUDGE CLARK: I suppose that is it.

DEAN MORGAN: It is to avoid the 11th Amendment. That is really what it is for.

MR. LEMANN: We followed the Supreme Court in this rule, is that right?

DEAN MORGAN: Yes.

MR. LEMANN: Our argument is that the Supreme Court made some very foolish decision and they ought to be withdrawn or overturned by a rule which would say their existing decisions are wrong. We put this up to the Supreme Court and say, "We think this rule should be changed because it was based upon a very foolish decision of your predecessors." The Supreme Court then goes into a huddle, I suppose, and says, "Well, what is the decision of our predecessors to us when we think it is wrong?" It imposes on the Supreme Court an obligation to review a decision of their own and to have to set it aside without argument except from the Committee and our note. I just wonder, if I were on the Supreme Court, whether I would feel that this was the sort of thing I wanted to tackle in this way, whether it wouldn't be better to let it come up. I can't see that this does much harm. I suppose it is foolish to say that the substitute must make faces. He will usually make a face.

JUDGE DOBIE: Suppose he won't make a face.

PROFESSOR CHERRY: He won't come in and say he doesn't intend to carry out a state law. Isn't that why it is foolish?

MR. LEMANN: I think it is foolish, but I don't think it is of any importance.

PROFESSOR CHERRY: I agree with you.

MR. LEMANN: I would say it is a foolish thing, but the Supreme Court is responsible for it.

JUDGE DOBIE: Has that Ex parte Young principle come up recently before the Court? If I am Attorney General of Virginia, when the legislature passes a statute it is my job to enforce it. It may be unconstitutional. If it is unconstitutional, that is no shield for me. I am no longer Attorney General Dobie; I am just plain, ordinary, garden-variety Dobie. My whole official status drops away when, in my role as Attorney General, I am enforcing a state statute, even though unconstitutional.

PROFESSOR CHERRY: I take it that what Judge Dobie wants to know is whether the Supreme Court, as now constituted, intends to carry out the threats of its predecessors. I think we will have to assume that it does.

DEAN MORGAN: I suppose, Charlie, you would like a note saying, "This isn't the only foolish thing that you have done. Would you like to correct this one, though?"

JUDGE CLARK: I think that is a good way of putting it.

JUDGE DOBIE: I don't believe it is serious.

SENATOR PEPPER: Seriously, though, Mr. Chairman, the fact that it is in here now may be a good reason for leaving it, but that sentence beginning "Substitution pursuant to this rule", and ending with "in violation of the Constitution of the United States", seems to me to be a sort of excrescence on the

rule. The rule reads perfectly and covers all cases if you leave that out. "When an officer .... dies, resigns .... the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it." Then: "Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given ..... notice ...."

That is a good rule in general terms, that doesn't descend to particulars. I don't see why we should cite one case out of a hundred that we might think of where the gentleman has thumb-nosed the plaintiff or otherwise spitefully treated him.

PROFESSOR SUNDERLAND: Isn't that sentence substantive law, anyway?

SENATOR PEPPER: I think it is. As a matter of procedure, as a matter of rule-making, I think it would have been better if we hadn't included the sentence.

PROFESSOR SUNDERLAND: I think it is pure substantive law.

SENATOR PEPPER: If we strike it out now, it will give rise to comment.

PROFESSOR CHERRY: Yes, and if we hadn't included it in the first place and had left it out, the Court would be

faced with the fact that they intended to amend Ex parte Young.

MR. LEMANN: The note shows the origin of the sentence. We have a specific tracing of paternity which places it right on the doorstep of the father. It says, "With the second sentence of this subdivision compare Ex parte La Prade." If we say to them, "Since thinking this over, we have read an article by Professor Borchard which says Ex parte La Prade is wrong, and we think we should take it out and you should take it out," I think we are dumping something on them for argument among themselves, which serves no useful purpose that I can see.

JUDGE DONWORTH: Isn't the only ground for getting it in the Federal Court against Mr. Young (who is Attorney General of Minnesota) the fact that he is doing something for which in law there is no justification? He, as Attorney General of Minnesota, is going to try to enforce an act that is no act. It is on the statute books, but it is no law, because it violates the Constitution of the United States. Why isn't it entirely proper to say we are not going to sue Mr. Young unless he has made a threat? If you don't get into court on that ground, it is a suit against the state. It seems to me the arguments that have been put forward here would indicate that you are suing the State of Minnesota, which you cannot do, but the minute that the officer of the state makes a personal threat, he loses his immunity because he is going to violate the Constitution. It seems to me that it is right as it is.

SENATOR PEPPER: Of course, Judge, if you did strike it out, the point that you so clearly make would be within the conditional clause at the top of page 31 of the Rules. If within 6 months after the successor takes office, it is satisfactorily shown to the court that Attorney General Young proposes to do what the plaintiff fears, in that event there is substantial need for continuing and maintaining.

JUDGE DONWORTH: I agree with you.

SENATOR PEPPER: So all I meant, that being the general statement which is all-inclusive, was that there wasn't any good reason for the insistence as a matter of substantive law that the new officer has to make a new threat. But I agree with Mr. Lemann that having put it in there and the Court having acted upon it or at least its being in accordance with some action that the Court has taken, we had better not monkey with it.

THE CHAIRMAN: Especially as we are making no other change in that rule at all, and it is rather a touchy subject, anyway.

SENATOR PEPPER: Yes.

JUDGE DOBIE: I move we leave it as it is.

JUDGE DONWORTH: Second.

THE CHAIRMAN: With no objection, it is so ordered. Now we come to Rule 26.

JUDGE CLARK: On these rules on depositions and dis-

covery, you will notice that Professor Sunderland has made some suggestions. I asked him if he wouldn't make some, and he answered. I wasn't quite sure he said he was going to, so I went ahead and Mr. Moore and the stenographer and I made some. Then he came through with his. I think we should follow them both. How we should do it, I don't know. If you wish, I think I can keep track of them both and tell which is which.

For example, on Rule 26 he and we make about the same suggestion in one place. We make some more than he has made. If you wish, I think I can follow it along, and of course he can jump in anytime. We can do just as we are doing now.

THE CHAIRMAN: We will settle that as you please.

PROFESSOR SUNDERLAND: You go ahead.

JUDGE CLARK: If I miss anything you have made, you bring it up, to make sure about it.

PROFESSOR SUNDERLAND: All right.

JUDGE CLARK: The first thing we brought up was comments from government officials who felt burdened by these Rules.

THE CHAIRMAN: Are we going to waste any time over the question of whether the Government is going to be subject to examination?

DEAN MORGAN: It is just too bad that it bothers Thurman. It made me weep when I read that.

JUDGE CLARK: That brings us to Comment--

THE CHAIRMAN (Interposing): This idea that the Government is untouchable and can't be compelled to tell the truth to a citizen who is suing is revolting, I think.

JUDGE DOBIE: Thurman Arnold is on the bench now, so he isn't interested.

JUDGE CLARK: There is a Professor O'Reilly, from Boston, who also is a special attorney in the Department of Justice. He writes a lengthy article.

SENATOR PEPPER: What is the reference?

THE CHAIRMAN: I objected to the Government's objecting to the indignity of being called upon to disclose the facts by having somebody in the government service examined. In my time in the Department there used to be a lot of lawyers around who had the idea that the Government couldn't be compelled to disclose anything, and when a litigant was suing one of the Departments and needed release of papers and contracts, I found these fellows refusing to disclose. They said, "Oh, my! You can't ask the Government for anything." I used to have to call them in and put them on the carpet and say, "If this is a matter of State and the Secretary of State or somebody certifies that it is against the public interest to have publicity about it, all right, but let's have the Government treating and conducting its litigation honestly."

If anybody ought to disclose the truth of a case whether it hurt him or not, it is the Government in a suit

against its own people. This talk about the Government's not being subjected to our rules about interrogatories and depositions before trial in order to allow a citizen to dig the truth out of them is just damned nonsense, to my idea.

JUDGE CLARK: I might say that after United States v. Sherwood, which was the Tucker Act case, I am not so sure but that the Supreme Court is going to be more tender with the Government than we have expected. I think that is another case where we might put in a footnote and ask, "Why, oh why, did you do this?" That is a case that says you can't require anybody to be joined under the Rules because the Tucker Act wouldn't permit it. If they carry on that theory, they may eventually say that various of these rules don't apply.

THE CHAIRMAN: That is the Government's immunity to suit, and this is a case where the Government is a plaintiff coming into court.

DEAN MORGAN: That is what he is talking about. They grab everybody else's papers and then don't want to give any information.

JUDGE CLARK: I certainly don't want anything done there.

DEAN MORGAN: I should say not!

JUDGE CLARK: I am not sure but that you may hear from it more in the future. I don't think the matter is ended.

THE CHAIRMAN: I certainly wouldn't open the door to

exempting the Government from any rules unless there were some special reason that it should be done.

MR. HAMMOND: I think perhaps I ought to say that these are just two members of the Government who are making these suggestions.

DEAN MORGAN: Yes, I think so.

JUDGE CLARK: To pass to the next one, beginning on page 64 of the suggestions, you remember that the present Rule 26(a) provides that depositions may be taken "By leave of court after jurisdiction has been obtained .... or without such leave after an answer has been served". You have to go to court up until the time of answer. I have had several suggestions asking why that wasn't an unnecessary piece of machinery. Mr. Atkinsons, of Missouri, you will see has written in about it and said, "It has always been the Missouri practice to permit the taking of depositions without leave before an answer has been served," and so forth. A leading lawyer in Connecticut protested quite vigorously about that because he had a case pending in Connecticut and he wanted to get the deposition of somebody who was about to take ship from Seattle. He telegraphed out to local lawyers out there and asked them to proceed to get hold of the person. (F. H. Wiggins is the man who raised this objection.) The local lawyers said that they had to go and get permission from the District Court in Washington (I don't know whether it was Judge Donworth or other distinguished

members of the Seattle bar), which is another qualification. I should have supposed that the District Court in Connecticut could have done it, but they said they had to go to the District Court in Washington, and by the time they got through fooling around, the boat had sailed.

We suggest, therefore, the provision at the top of page 65. There are other ways that you could phrase this, but this is a way which we thought would be as good as any.

"After the commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes."

That eliminates the restriction. Of course, the opposing party still has all the rights of a party to go to court and ask for restriction or prevention of oppression, and so on.

MR. LEMANN: You could do the same thing, couldn't you, by just taking out the first three lines and the first three words of the fourth line, saying "After commencement of action", and proceeding from there?

JUDGE CLARK: That is what we have done, haven't we, substantially?

MR. LEMANN: You have shifted the arrangement.

JUDGE CLARK: I guess we did a little. We thought we

were improving the English somewhat.

THE CHAIRMAN: Let me ask you something here. We are talking about Rule 26(a), aren't we?

JUDGE CLARK: Yes, right at the beginning.

THE CHAIRMAN: Where is anything stated there about serving notice of the taking of deposition? As it stands here, Rule 26(a) doesn't provide for any notice to the defendant, but that was brought about by applying to the court for leave. A man can file a complaint without any service of process, and yet he can immediately take depositions.

DEAN MORGAN: No. He has to have leave of court.

THE CHAIRMAN: You are striking that out, aren't you?

JUDGE CLARK: Yes, I was striking that out.

THE CHAIRMAN: There isn't any provision now for any notice to the defendant, whom you yet haven't served that you are going to take any depositions.

JUDGE CLARK: Just a minute on that.

JUDGE DONWORTH: Rule 30 covers that.

JUDGE CLARK: The notice is all covered by other sections.

THE CHAIRMAN: I am wrong, then.

DEAN MORGAN: That is Rule 27, Mr. Chairman.

JUDGE CLARK: Rule 30 tells you how you do it. You see, Rule 26, the basis of it, is a general grant, a statement of what you can do, and so on.

THE CHAIRMAN: I was wrong.

JUDGE CLARK: The method is Rule 30.

JUDGE DONWORTH: I think the reason for this rule was that it was thought the taking of depositions should not be encouraged until the issues were framed, but I think that is a minor point. I don't think it is important that it be retained.

THE CHAIRMAN: The proposal, then, at the top of page 65, is to amend Rule 26(a), the first sentence, by making it read as follows: "After the commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes." It eliminates merely the application to the court for leave. What is your feeling about that?

JUDGE DONWORTH: Professor Sunderland, do you favor this change?

PROFESSOR SUNDERLAND: I think that is a good change.

THE CHAIRMAN: It has been moved and seconded that we make a change as I have just stated it. Any further discussion? All in favor say "aye"; opposed. It is carried.

What is your next proposition, Charlie?

JUDGE CLARK: The next matter for discussion is quite an important one, and that is the scope of the examination. The way we have it set up in our notes, first we discuss in some detail some of the questions that have arisen.

THE CHAIRMAN: Is this (b), "Scope of Examination"?

JUDGE CLARK: That is it, yes.

THE CHAIRMAN: All right.

JUDGE CLARK: I might say that Comment II in the middle of the page will be taken care of.

THE CHAIRMAN: Yes. I have that.

JUDGE CLARK: This matter as to scope is a very interesting matter and there have been some differences of view, although on the whole the courts have considered it rather broadly--and I have, among other things. You will find the cases. On page 67: "There has been sharp disagreement in the decisions as to what extent inquiry may be made into the other party's case," and there has been some feeling that you are going too far, and so on.

To make a somewhat long story short, we should ourselves very much hesitate to start making any limitations there. I think once you start making limitations, you are going to go much farther than you really think. I don't want to go all over this. I think this material is interesting. There have been a lot of cases on it.

What we come out with is only one suggestion for change, which, I take it, is almost like Professor Sunderland's, and I will give you both. It occurs way over on 72. The other pages are all a discussion of the cases, you see. It has been considered a good deal. We say in effect that we

think it doubtful that we should put restriction on it. Some people think you should restrict it, that you shouldn't examine into your own case, and so on. Coming down to page 72, you will find our suggestion there, and Professor Sunderland's, which was made independently but seems to me directed substantially to the same end, is on page 2 of his notes.

At the end of 26(b) he suggests that you add "and any information which will facilitate the discovery of relevant matter. Hearsay testimony for the sole purpose of discovering sources of evidence is not objectionable."

We say: "Unless otherwise ordered by the court as provided by Rule 30(b) or (d)," (those are the times you can go to the court to get a limitation) "the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether or not it is admissible therein, and whether it relates to the claim or defense of the examining party or to the claim or defense of any other party...."

JUDGE DONWORTH: What do you mean by "whether or not it is admissible"? You mean evidence plainly inadmissible may be shown by deposition?

JUDGE CLARK: You can get it out and know where it is and what it leads to. Judge Donworth, perhaps if you ran down the page after Professor Sunderland's statement on page 2 with reference to hearsay evidence--

THE CHAIRMAN (Interposing): It is perfectly plain, I think, under the rule as it stands, although the courts seem to have disagreed about it, that these examinations before trial have two purposes. The first is that they may be for discovery; they may also be for the purpose of obtaining evidence which is competent and admissible at the trial. Plainly, as I would look at it, the notice is wrong, and if you ask a question and get information that is hearsay, that is proper discovery even though the answer wouldn't be admissible at the trial because it is hearsay. It puts you on the track of the facts, and I just don't get why any judge should hold that these depositions are limited to stuff that is actually admissible as competent evidence at the trial.

PROFESSOR SUNDERLAND: There have been some very strong decisions on the point that they must be admissible evidence, that hearsay cannot be obtained for the purpose of discovery, and even in the cases that have held the other way, they have used hedging language and haven't come out quite squarely; they have been a little afraid. It seemed to me that it would be better if the rule made that perfectly clear.

THE CHAIRMAN: I should think so.

PROFESSOR SUNDERLAND: It would stop a lot of litigation on this subject.

DEAN MORGAN: I think the only objection I have to Mr. Sunderland's statement, Mr. Chairman, is that it is too narrow,

because the same thing would apply to the best evidence rule as well as it would to hearsay. So I should want that second sentence changed so that evidence (or was it testimony) which would be inadmissible at the trial is no ground of objection to testimony sought for the sole purpose of discovering sources of admissible evidence.

PROFESSOR SUNDERLAND: That would be very satisfactory. Then you could cut out the statement about whether it is admissible or not.

MR. LEMANN: Look at the Reporter's language on page 72. He doesn't limit it to hearsay.

DEAN MORGAN: Whether or not the evidence is admissible.

MR. LEMANN: He has in there: "whether or not it is admissible therein", on page 72 of the Reporter's material.

DEAN MORGAN: What do you mean by "which is relevant"?

THE CHAIRMAN: That raises a question.

JUDGE CLARK: "any matter .... which is relevant".

MR. LEMANN: The "which" refers to "matter."

THE CHAIRMAN: It is whether the evidence you obtained is admissible or not. That is what you really mean.

MR. LEMANN: That is not good, but the thought you have is there. It is not as limited as Mr. Sunderland's suggestion; it isn't limited to hearsay. I had an experience recently that was very trying, where I was made a witness myself in a bitterly contested suit. My deposition was taken--hundreds of

pages. I was asked for all kinds of information--what people told me this, and what this man said, and what the other man said to him, and what I had said to my client. The case was such that I didn't want to ask the judge for an order to stop it. I was suing for fraud; the Government was trying to get the facts, and I didn't want anybody to suggest that I was trying to conceal anything. Yet it did cover a very wide range of information that ordinarily you wouldn't get out of any witness for anybody. Of course, the trial judge had an opportunity to read it all. It was obviously not admissible. On popular objection he excluded it, but it resulted in getting out a lot of statements that ordinarily you would never get out of the mouth of a witness at all. Yet, upon reflection, apart from this particular suit, I think that it was all right; it ought to be permitted. They got all there was to get.

MR. DODGE: Was it a Federal Court case?

MR. LEMANN: A Federal Court case. As to some of the questions I think I could have applied to the judge to say that they were improper questions. They went into all sorts of collateral matters--the other lawsuits that other people I represent had had, to show that they were bad people and had taken advantage of stockholders in other cases, all of which was perfectly irrelevant. I think I could have gotten an order to stop it and, if I had wanted to, could have gone over to a judge in another district in another state (Texas in this case)

and argued it before him. Yet with that very glaring instance of the far-reaching character of this discovery procedure, taking a quasi judicial position in my own mind about it, I couldn't say that there was anything wrong in the Rules. The hearsay part of it should be permitted to be developed, and the Rules provide your protection in appealing to the District Judge, if you want to, or objecting on the trial as to the admissibility of it, as was done to much of the material in that case.

THE CHAIRMAN: Have there been a considerable number of cases, other than this one by Judge Otis, to the effect that if the evidence derived in the deposition is not competent for admission at trial, it can't be inquired into?

PROFESSOR SUNDERLAND: There have been quite a good many cases.

THE CHAIRMAN: Otis is the man who also held that our rule which allows physical examination where a man's physical condition is at issue, is limited to the consideration of personal injury.

JUDGE CLARK: The cases at the top of page 56 are along this line, I think.

THE CHAIRMAN: The sense of the meeting seems to be that in view of this line of decisions which hold that only competent evidence can be inquired into even for purposes of discovery on depositions, we ought to fix the rule so that that

line of cases is squelched. If that is the sentiment of the meeting, the problem is one of phraseology.

JUDGE DONWORTH: The problem is aided a little by the provision in Rule 30(c). I read from Rule 30(c): "All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections"; which indicates that even though the opposing counsel objects to a question because it relates to immaterial matters, nevertheless the evidence must go into the deposition.

THE CHAIRMAN: That still leaves the judge in a position, on application, to stop the examination.

JUDGE DONWORTH: Quite right.

DEAN MORGAN: But what happens there in a good many of these depositions is that counsel instructs the witness not to answer when the evidence that he is asked for is relevant but highly objectionable. Then the only remedy for the person taking the deposition is to go before the judge and get an order. If you go before a judge like Judge Otis, he says, "No, you don't get any order." The counsel was quite right in ordering the witness or suggesting to the witness that he should not answer, you see. So this provision in the rule for taking the

evidence just doesn't work in actual depositions.

MR. LEMANN: Of course, it is very far-reaching.

DEAN MORGAN: That is right; it is tremendously far-reaching.

MR. LEMANN: I was very much shocked at the plain spelling out in the proposed ruling of the right to ask all kinds of hearsay questions, because if you are trying an equity case in open court, the judge won't permit a witness to answer a question about hearsay testimony; yet by these depositions you can bring it all out, and when the answer is all there, it is pretty hard for any judge to be entirely unaffected by it, even if it is hearsay. I think we ought to realize that when we spell it out. I think the profession was rather taken aback by that.

DEAN MORGAN: Some of them were very much shocked by it. There is no doubt about it.

MR. LEMANN: I say it is very far-reaching. I don't know any other way you can get all that hearsay in effect before the judge.

THE CHAIRMAN: I think the principal row that you would have about the discovery is whether the files of their investigation of the case would be dug into by the other side; things of that kind.

MR. LEMANN: Yes.

THE CHAIRMAN: I thought that the bar pretty generally

understood that this discovery business really meant what it said, and that if you could find out what the facts were by getting some hearsay stuff that put you on the trail, it was squarely within the purpose of the rule. Most of the court decisions that I have read explained that rather fully, but if there is any line of decisions that is like Otis', any considerable number of them--

PROFESSOR SUNDERLAND (Interposing): There is quite a number of them.

THE CHAIRMAN: --then I don't see why we shouldn't amend the rule and expressly state it.

DEAN MORGAN: A number are not reported. Particularly if you get out away from your own district and get before a judge that you think is prejudiced against the case to begin with, he will just shut up these people.

THE CHAIRMAN: None of these applications for an order to stop the examination is really ever reported.

DEAN MORGAN: I think not. That is just the point: not an application to stop, but an application to compel the witness to answer, you see.

THE CHAIRMAN: Yes. That is what I meant.

DEAN MORGAN: None of them is reported as far as I know. Maybe some of them are.

SENATOR PEPPER: Is it possible, Mr. Chairman, the court being satisifed that this deposition right is being

abused, as it obviously was in Monte's case, uses the theory that it is not going to compel answers to irrelevant questions and puts the decision on that ground, but that the real thing is that the court is using a kind of supervisory jurisdiction to prevent abuse? I think we have all had experience with cases in which this procedure is admirable and helpful, and I think we have all seen cases, or had them, in which there has been gross abuse, fishing expeditions, not so much to get evidence as to compel a settlement of the case by getting hold of some material which it is thought that the other party would desire not to have exploited. In that posture of events, is it or is it not desirable to leave the District Judge a little bit free? He may not always be ingenuous in the reason that he gives for stopping the examination or refusing to order an answer, but maybe what he is really doing is trying to keep the proceeding decent.

PROFESSOR SUNDERLAND: Our rule on protective order gives him all the power in the world on that. If you change this, it will simply show that this would be the normal situation where there was no abuse, but under our protective order rule he can shut down on it at any time, under the same Rules.

JUDGE DONWORTH: I notice that the Reporter's suggestion on page 72 draws a distinction between what is relevant and what is admissible.

DEAN MORGAN: That is right.

JUDGE DONWORTH: His suggestion is that the evidence be restricted to what is relevant, but he lets it in if relevant, even though not admissible.

THE CHAIRMAN: That is the way you would like to have it, isn't it?

JUDGE DONWORTH: Tentatively. My mind is not at all clear on the subject.

THE CHAIRMAN: What I meant was that you don't object to the distinction in the amendment.

JUDGE DONWORTH: I am not objecting.

SENATOR PEPPER: What is the distinction? What relevant evidence is inadmissible?

THE CHAIRMAN: I should say that on page 2 of the Sunderland memo, the distinction between relevancy and inadmissibility is pretty plain. It was a case where "the deponent, who had obtained his information by inquiry from others, was asked what persons were present at the accident. It was held that his information, obtained by hearsay, could not be inquired into." That was relevant in the sense that it was a matter involved in the action, because it led directly to the witnesses, and yet it wasn't admissible because the information of who was present as to that witness had been obtained second or third-hand. Isn't that what it was?

JUDGE CLARK: Yes, that is one instance and I think perhaps the most natural instance of all on hearsay matter.

I suppose there are other instance.

DEAN MORGAN: I can think of the best evidence rule.

JUDGE CLARK: Yes.

DEAN MORGAN: If a fellow read a document and testified as to what was in the document, you would want to trace that document, and so forth.

PROFESSOR SUNDERLAND: Couldn't hearsay be mentioned by name because that is the ordinary thing? Couldn't you say "hearsay or other inadmissible evidence" instead of merely the general term, "inadmissible evidence", as you suggest?

SENATOR PEPPER: I confess I have a sort of unanalyzed objection to that, like the District Judge in his handling of this deposition business. I can't help feeling that the use of the deposition is available now under ordinary conditions to the full extent that it is desirable. I rather suspect that in cases where somebody has been cut off or is complaining that he has been cut off, whatever the judge says about it, the real reason is that it was the kind of case that Monte talked about. I haven't any doubt that in that case if Monte had felt free to go to the court and ask for protection, he would have gotten it. Isn't that so?

MR. LEMANN: Yes, I think that is so. We eventually got a ruling in a pre-trial hearing before the judge that many of the matters that I had been asked about and had freely testified about were irrelevant and couldn't be brought before the

jury. There were hundreds of pages of testimony taken, lots of time and temper used, but it was my judgment not to go to the judge in that particular case because of the character of the case. There was nothing wrong with the Rules about it. As Professor Sunderland says, the Rules would have given me protection if I had wanted to say, "I won't answer this question unless the judge orders me to. Let's go over to Houston."

There was one particular question where some third party was mentioned as being involved in an improper transaction, and they asked me for the memoranda of all my interviews in the course of my investigation of my client's case. Much of it probably wasn't privileged because it wasn't a communication between me and my client. I had made a record of everybody I talked to. When they found I had, they asked me for all these memoranda. So they got my innermost thoughts, as they put it. One of them was with reference to a person who had no connection with the litigation, who was supposed to have been involved in a rather reprehensible transaction. They asked me who it was. (It was a corporation.) I said, "Well, I don't think I ought to answer that because it has no bearing on the suit; it doesn't affect my client, so it is not within the purview of this consideration unless the judge orders me to answer. If you think that you are entitled to that answer, get an order from the judge and I will answer it." They didn't ask the judge for it.

JUDGE CLARK: I think, though, the difficulty is the opposite of one suggestion Senator Pepper had in mind. This is a young practice, and it is developing, but, unfortunately, these are binding precedents, set in cold print and reported by all the various writers. They are in a hardening process. The place where the court ought to act, and where a good many of them are, is Rule 30(b), which, after specifying a long string of things the court can do, ends with: "or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression."

We have cited here a case from the Southern District of New York where a witness was uncooperative, as the Judge found, and they ordered that he come down to the court house and have his deposition taken down there, which is a little different kind of thing, but I should think it was all right and within the discretion of the court. On the other hand, you have statements like this, of Judge Otis: "It is inconceivable, however, that the Supreme Court intended to authorize such a question as this", when we think it is just what the Supreme Court did intend to authorize.

JUDGE DONWORTH: I should like to inquire what position our Reporters take on the admissibility of accident reports made to transportation companies, and so on.

PROFESSOR SUNDERLAND: It isn't privileged, is it?

JUDGE CLARK: I should say it was not privileged, and

you could inquire, certainly, at least as to the witnesses that they produced.

JUDGE DOBIE: Can you make him produce a memorandum? That is before the Supreme Court of Virginia. A lawyer refused to do that, and Judge Sutton said, "You either produce that memorandum or I am going to fine you for contempt of court." The man said, "Fine ahead," and he did, and that is before the Supreme Court of Virginia now in the Virginia Electric Power case.

DEAN MORGAN: The Minnesota Supreme Court recently held that privileged. It was a report made to the insurance company by an insurance investigator.

MR. LEMANN: On what grounds?

DEAN MORGAN: That it was a privileged communication to the attorney or representative, made for the purpose of litigation.

JUDGE DONWORTH: I didn't understand what you said the ruling was. What did you say the ruling was?

MR. LEMANN: I thought that privilege was only between attorney and client.

DEAN MORGAN: I did, too, until I got that.

JUDGE DONWORTH: They were not allowed to inquire about it, is that it?

DEAN MORGAN: That is what they held in Minnesota, because it is privileged in Minnesota. It wasn't until this

court spoke, but it is now.

THE CHAIRMAN: There is some reluctance on the part of the court to permit it where one party, through his investigator or agent, goes out and spends a lot of money investigating the case and getting all the facts and everything together, and the other fellow sits tight and doesn't do anything. After the full collection of facts is dug up at the expense of the other party, then he goes in and asks to see his investigation findings. They will beat it if they can. I have always sympathized to some extent with that view.

DEAN MORGAN: That wouldn't have protected Monte.

THE CHAIRMAN: No, but the Minnesota case is along that line.

MR. LEMANN: My memoranda were of interviews with witnesses, you see. I was trying to get to the bottom of a very complicated case, involving the court. I interviewed a great many people, many of whom told me what A had told them what B had told them, all of which I put down and all of which they saw. It took me two years for me to get an answer in the case, and meanwhile they were taking my depositions intermittently. They dug out everything they could and, incidentally, got a jury verdict against me.

THE CHAIRMAN: Gentlemen, the matter of examining investigators' files and attorneys' files and memoranda is one thing; this question that we are on is another. Let's settle

that first.

SENATOR PEPPER: Would it be helpful if the Reporter read to us the exact language we are asked to vote on?

THE CHAIRMAN: He has two proposals before us. One is on page 72 of his report. I will read it to you. "Unless otherwise ordered by the court as provided in Rule 30(b) or (d)--

SENATOR PEPPER (Interposing): That goes where?

THE CHAIRMAN: Page 72 of the Reporter's report.

SENATOR PEPPER: Yes, but the insertion.

DEAN MORGAN: 26(b).

JUDGE CLARK: 26(b), I think.

THE CHAIRMAN: It is 26(b), starting at the beginning. If you will follow 26(b), I will read the proposed amendment.

SENATOR PEPPER: Thank you.

THE CHAIRMAN: "Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether or not it is admissible therein, and" (that is new) "whether it relates to the claim or defense of the examining party or to the claim or defense of any other party ...."

The real amendment is in the phrase "whether or not it is admissible therein".

JUDGE DOBIE: Is that language satisfactory to you?

PROFESSOR SUNDERLAND: I would add at the end of that paragraph, the following: "and any information which will facilitate the discovery of relevant matter. Hearsay testimony for the sole purpose of discovering sources of evidence is not objectionable."

MR. DODGE: You use the word "relevant" in a different sense from his use.

DEAN MORGAN: No.

MR. DODGE: Don't you?

PROFESSOR SUNDERLAND: No.

MR. DODGE: He says relevant but not admissible, and you use it in the sense which a good many would use it in meaning admissible.

PROFESSOR SUNDERLAND: "any information which will facilitate the discovery of admissible matter."

MR. DODGE: No; you say "information which will facilitate the discovery of relevant matter."

PROFESSOR SUNDERLAND: Anything relevant to the subject matter, yes. I think it is the same sense.

MR. LEMANN: Neither proposal would permit inquiry into irrelevant matters. It has to be relevant in both suggestions.

JUDGE DOBIE: The question itself may be irrelevant (where have you got those documents, or something of that kind), but the evidence which it produces must be relevant.

MR. DODGE: And admissible.

JUDGE DOBIE: You have an irrelevant and inadmissible question asked if what it elicits is inadmissible.

MR. LEMANN: The answer may be relevant but not admissible, as I understand.

DEAN MORGAN: If Mr. Sunderland't statement said "which will disclose any information which will facilitate the discovery of relevant matter", I think it would be a little clearer than the Reporter's statement.

MR. DODGE: He is obviously talking about the discovery of matter that would be admissible.

DEAN MORGAN: No, no.

MR. DODGE: He goes right on in the next sentence and says, "Hearsay testimony for the sole purpose of discovering sources of evidence is not objectionable."

THE CHAIRMAN: We might make the Reporter's amendment read this way: "Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action or which will facilitate the discovery of relevant matter, whether or not it is admissible therein, and whether it relates to the claim or defense...."

DEAN MORGAN: I think you try to tie too much in one germanic sentence when you do that. I should think you might very well have a separate statement somewhat like Professor

Sunderland's statement.

THE CHAIRMAN: He wants his separate, and he doesn't put it in the same place as the Reporter. He wants to add it at the end of the entire paragraph.

DEAN MORGAN: I think that separate statement might very well be at the end of the paragraph.

THE CHAIRMAN: Then I understand you like both proposals, with possibly some modification of language.

DEAN MORGAN: That is what I should like, yes.

THE CHAIRMAN: You make a motion as to the Reporter's one just as you would like it to be worded.

DEAN MORGAN: "Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the action or which discloses any information that will facilitate the discovery of relevant matter, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party ...." I would go that far with him.

JUDGE CLARK: Don't you want to say, "whether admissible or not"?

DEAN MORGAN: No; I am going to put that in the last sentence. Then at the end insert that "Testimony that would be inadmissible at the trial is no ground for objection if the testimony is sought for the sole purpose of discovering sources

of admissible evidence."

THE CHAIRMAN: That is concrete.

JUDGE DOBIE: That is a sort of combination of the Reporter's and Sunderland's, isn't it?

DEAN MORGAN: Yes.

MR. DODGE: Don't you think the bar at large would be confused by these words, "relevant" and "admissible"?

DEAN MORGAN: I don't think so.

MR. DODGE: "Relevant" is so often used in the sense of admissible; "irrelevant", as inadmissible and immaterial.

PROFESSOR SUNDERLAND: I should like to have that word "hearsay" put in.

JUDGE DOBIE: Do you object to the use of "hearsay"? I want to put it in there. I think for purposes of symmetry it may not be thought desirable, but there are so many decisions on that specific subject that it might be well to mention that in nomine.

DEAN MORGAN: I don't see why. The only ground on which you could keep it out would be that it was inadmissible. The minute you say "hearsay and others," they begin to talk about ejusdem generis.

PROFESSOR SUNDERLAND: The statutes that relate to evidence before administrative boards provides that you can't receive hearsay.

DEAN MORGAN: I know. They talk about hearsay.

PROFESSOR SUNDERLAND: They say the rules of evidence will not be observed, but they say that doesn't allow hearsay to come in.

DEAN MORGAN: They say the technical rules of evidence shall not be effective. Hearsay is not technical.

PROFESSOR SUNDERLAND: They always gag on hearsay. It seems to me if we put hearsay in, it would clear up that point.

SENATOR PEPPER: May I inquire, Mr. Chairman, the sense in which "sole" is used in the proposed amendment, the sole purpose of doing thus and so? Is it ever possible to isolate a sole purpose from collateral ones? I fancy in a lot of cases that which will be advanced under the guise of getting information for use at the trial will really be motivated by a desire to get hold of something that will result in forcing a settlement of the case. Is the fact that an improper motive is present inconsistent with the statement that such and such results follow if the sole motive is a proper one? How are you going to differentiate?

THE CHAIRMAN: Mr. Morgan, in your proposed amendment you didn't use the word "sole."

DEAN MORGAN: Yes, I did, but you can omit that and say "for the purpose".

THE CHAIRMAN: Then we will leave out the word "sole" in Mr. Morgan's amendment. Do you want to act on that proposal?

JUDGE DOBIE: I move its adoption.

... The motion was regularly seconded ...

THE CHAIRMAN: All in favor of the motion last made by Mr. Morgan said "aye"; opposed, "no." It is carried.

What is your next, Mr. Reporter?

JUDGE CLARK: Page 72, under (d), "Use of Depositions." We have had a suggestion that you may have an impeachment of a deponent by self-contradiction without having laid foundation for it. You will notice in our discussion of that, that that is what is provided in the new Nebraska Rule, which is generally modeled on our Rules. We raise the question, however, whether that shouldn't be broader than just the matter of depositions and that it should come under evidence generally. I think perhaps Mr. Morgan would like to comment on that.

DEAN MORGAN: Of course, we tried to make it broader than that, didn't we, in the rule when we first drafted it, and the Supreme Court threw it out. We tried to fix that generally that you could impeach a person without having laid the foundation. The Supreme Court threw it out.

JUDGE CLARK: We can always try again on that, I should think.

THE CHAIRMAN: I don't like the idea of trying to worm in on them and accomplish a purpose that they turned us down on before, if that is what it is going to do.

JUDGE CLARK: I agree with that. I should rather do it directly than by piecemeal.

MR. LEMANN: I don't think we ought to do it here if we didn't do it before. We tried it in the final draft, and the Court rejected it. I don't think we ought to reopen it.

DEAN MORGAN: Yes, on the general question, but this is on a special case, you see.

MR. LEMANN: I don't see why there should be a special rule on the deposition, do you?

DEAN MORGAN: Yes, because at the trial you practically always know about the prior contradictory statement. The deposition may be taken before you know anything about the prior contradictory statement. Then the deposition is offered at the trial, and you have no chance to lay your foundation. There is a great difference between a deposition or even former testimony and the other.

JUDGE DONWORTH: Isn't the principle of the thing that the witness should have an opportunity to clear himself on the matter?

DEAN MORGAN: That is right, Judge, except that if the party wants to get the witness down in advance of trial, then he ought to take the risk of it.

MR. LEMANN: The Judge's point is that if it is a proper rule to protect the witness by saying--

DEAN MORGAN (Interposing): It isn't to protect the witness; it is to protect the party against unexpected testimony. That is really what it is for.

MR. LEMANN: I thought the idea was to show the man the statement before it was offered.

DEAN MORGAN: An oral statement is just the same, you see. It is a prior contradictory statement--the same proposition. Suppose that the witness has made a contradictory statement after he has given his deposition. The time that counts is when the deposition is read at the trial. That is when it first becomes testimony. The party doesn't make the witness his own, according to our own cases here, unless he offers the testimony at the trial.

JUDGE DONWORTH: It is too late for the witness to explain.

DEAN MORGAN: It doesn't make any difference about the witness. We are not trying to protect the witness. It is the party we are trying to protect. If we give the party the advantage of having all this so that he can bring it in, he ought to take the disadvantage; he ought not to be able to throw that disadvantage on the other party. Very often these depositions are taken before the party has had a full opportunity to investigate.

MR. LEMANN: If you are going to show that the witness has made a contradictory statement, you must have made some investigation.

DEAN MORGAN: You make that after the deposition is taken. You can't make all your investigation before these

depositions are taken. They can be taken now just as soon as the complaint is served. You discover the prior contradictory statement after the deposition is taken, and by this, if you don't have this rule in, you may be helpless.

THE CHAIRMAN: Just a minute. You discover the prior contradictory statement after the deposition is taken. Under the proposed amendment, in order to impeach the witness do you have to call him back and re-examine him?

DEAN MORGAN: You don't under the proposed amendment.

THE CHAIRMAN: That is just a plain effort, isn't it, to put back in part as to depositions the very proposal that we put to the Court and they rejected, saying that you couldn't impeach a witness without laying a foundation by confronting him with his contradictory statement?

DEAN MORGAN: I don't think so, Mr. Mitchell.

THE CHAIRMAN: You haven't confronted him with it, and you are allowed to impeach him without confronting him with it because you didn't have the information when you examined. Why isn't that a partial attempt, as far as the deposition end of it is concerned, to restore precisely what we tried to do as to all cases--depositions or examinations in court?

DEAN MORGAN: If I may say so, it is for this reason: The testimony is not the testimony of the party until he offers the deposition. That is the first time that you are confronted with evidence against you. The party has been given

the privilege of putting it in in this fashion, and he ought to take the risks that go with it. You have an analogous case in the case of a dying declaration. There are some courts that have held that if the estate puts in a dying declaration, the defendant can't put in a prior contradictory statement by the declarant because, forsooth, the defendant had no opportunity to confront him with a prior contradictory statement.

THE CHAIRMAN: The proposed amendment is not stated expressly here, but the Nebraska Rule is quoted precisely on page 72, and that is the idea we are asked to put into our rule. It reads this way: "Impeachment of Deponent. Any party may impeach any adverse deponent by self-contradiction without having laid foundation for such impeachment at the time such deposition was taken."

That means, as I understand it, that an adverse deponent's evidence is taken; he makes a statement, and then whether you have a contradictory statement in your possession or whether you haven't, at a later date when that deposition is offered in court, the witness himself being out of court and not available, you can then impeach him by your contradictory statement without ever having confronted him with it.

DEAN MORGAN: That is right.

THE CHAIRMAN: Even though you had it in your possession when his deposition was taken?

DEAN MORGAN: That is right.

THE CHAIRMAN: As far as depositions are concerned, why isn't that a plain attempt to put back what we tried to get?

DEAN MORGAN: It is in that case; there is no doubt about it.

THE CHAIRMAN: Yes. That is what I am driving at.

JUDGE DONWORTH: I am afraid this offers a premium for fraud. I take the deposition of a man in Nebraska for a case pending in Seattle, and they know he is in Nebraska. Then Jim Smith comes forward and says, "I talked with that witness. He told me....," and he says something very, very bad for the deponent's case. Doesn't that give me a contradictory statement, and wouldn't the man be immune, almost, from detection?

DEAN MORGAN: That is right.

THE CHAIRMAN: As this reads, certainly you could have that contradictory statement up your sleeve when the deposition was taken and not confront him with it deliberately.

DEAN MORGAN: You could.

THE CHAIRMAN: Then you could spring it at the trial when he wasn't around and the deposition was being used.

DEAN MORGAN: That is right.

THE CHAIRMAN: I have the feeling that is trying to get broad rules as to all cases of impeachment without laying a foundation and without confronting the witness with his contradictory statement. The Court has turned that down flatly, and I don't like to try to creep back around the edge and try

to worm it in on a deposition case.

DEAN MORGAN: And use that as a basis for extending it.

THE CHAIRMAN: It is a sort of process of attrition.

MR. LEMANN: What did they do in Nebraska? Did they restrict this rule to depositions, or did they extend it?

DEAN MORGAN: Just to depositions.

MR. LEMANN: They didn't extend it to trial generally; they made the distinction you suggest.

DEAN MORGAN: That is right.

MR. LEMANN: Of course, the Committee voted to out out this impeachment proposition altogether, but the Court wouldn't follow us, and the only question would be--

DEAN MORGAN (Interposing): Whether they would do it on this special case.

MR. LEMANN: --whether there is enough argument for the difference in situations.

THE CHAIRMAN: You certainly wouldn't want to leave the Nebraska Rule going, allowing you to have the thing all the time and to keep it up your sleeve. You would at least have to change the provision by allowing it in cases where you hadn't discovered the contradictory statement until after the deposition was had. That is plain enough. This would never do.

MR. LEMANN: Not if you turn down the general rule. Of course, if you had a general rule that permitted you to impeach a witness as we propose without laying a foundation, this

would be all right.

THE CHAIRMAN: Oh, yes. You wouldn't need this rule at all then.

DEAN MORGAN: No.

THE CHAIRMAN: The issue is pretty sharply framed there, and this Nebraska statement, with Mr. Morgan's explanation, makes it pretty clear. What do you want to do?

JUDGE DONWORTH: I move that the Nebraska Rule be not incorporated.

DEAN MORGAN: Be what?

THE CHAIRMAN: That the Nebraska idea that we have here be not incorporated in the rule.

DEAN MORGAN: I don't think we need a motion on that, I suppose, to restrict the Nebraska Rule.

PROFESSOR SUNDERLAND: You haven't really proposed it, have you?

JUDGE CLARK: No.

DEAN MORGAN: To get a motion before the house, I move that the Nebraska Rule be incorporated, with "the" substituted for "such" each time.

MR. DODGE: With the Chairman's suggestion?

DEAN MORGAN: I should rather have it without any limitation.

JUDGE DOBIE: Are you willing to add to that Nebraska Rule the fact that the man must not have known of the self-

contradictory statement at the time it was made in the deposition?

DEAN MORGAN: I don't think it is worth while going into such inner detail of that kind on the rule. If you are going to narrow it to that extent, I don't think it is really worth while.

THE CHAIRMAN: The motion is that we incorporate the Nebraska Rule as is. All in favor of it raise your hands, please.

... Four hands were raised ...

THE CHAIRMAN: Those opposed.

... Five hands were raised ...

THE CHAIRMAN: Lost.

DEAN MORGAN: That astonishes me:

THE CHAIRMAN: That is as bad as that five to four decision in the physical examination case.

PROFESSOR CHERRY: We were six to five, as I recall it, on the other thing, which the Court turned down. Isn't that right?

THE CHAIRMAN: I have forgotten how our Committee voted on that.

DEAN MORGAN: With all the lawyers on one side and the law teachers on the other. No; Bob was with us, and he was the only lawyer with us, but that is Massachusetts practice.

THE CHAIRMAN: Mr. Reporter, have you anything more

on 26?

JUDGE CLARK: Comment II we just state to you gentlemen. You don't need to take it up unless you want to. An attorney from North Carolina says that the rule is too limited as to examination of officers, directors, or managing agents, but we suggest that that was discussed before.

THE CHAIRMAN: There is only one person that you know of who has raised that suggestion, is there?

JUDGE CLARK: Yes. He wants it to be changed so that lesser agents or representatives of a corporation can be included.

THE CHAIRMAN: And you don't believe there is anything to warrant a reversal of our former position?

JUDGE CLARK: That is what we say.

THE CHAIRMAN: Is there any proposal for action that you want to make on that?

JUDGE DOBIE: I move we leave it as it stands.

THE CHAIRMAN: Without objection, it is so ordered.

JUDGE CLARK: Edson, I have covered all your suggestions on Rule 26, haven't I?

PROFESSOR SUNDERLAND: I think so.

THE CHAIRMAN: We pass now to Rule 27.

JUDGE CLARK: On Rule 27 we made none, but Professor Sunderland has a suggestion, which appears in his draft at the bottom of page 3, as a result of a limiting decision by Judge

Hulbert, that "The order may direct production", and so on. Judge Hulbert has held that there shall be no inspection which comes under Rule 34 for the perpetuation of testimony under Rule 27.

JUDGE DOBIE: Do you think there is some conflict between those two?

JUDGE CLARK: Yes. You see the decision he cites there. Do you have it? On page 3?

JUDGE DOBIE: Yes.

JUDGE DONWORTH: Does he claim that the language if unfortunate and insufficient there? Is that the idea? Is it criticism of the language?

PROFESSOR SUNDERLAND: No, No. He just says it isn't included, that this isn't strictly discovery, that Rule 34 applies to discovery and that this isn't discovery; it is perpetuation of testimony. Therefore, the discovery rule doesn't apply.

JUDGE DOBIE: Is that wording satisfactory to you, Charlie?

JUDGE CLARK: Yes, I think so. I haven't the decision immediately in mind. It was curious, anyway. I should have thought it an unnecessary decision.

MR. DODGE: Isn't it enough to leave it within the power of the court making the order? Under 27(a) a court has power to define the scope of the examination.

JUDGE CLARK: This is one of those cases where the court seemed to hesitate. The thought occurred to me originally that there was no reason for the limitation, but here a judge has made it.

THE CHAIRMAN: I don't quite get it. Our Rule 34 says that upon motion the court may order any party to permit another party to enter upon designated land, and so on, for the purpose of inspecting, and so on. That isn't limited to the use of it at the trial. Why can't they undertake it expressly under Rule 34?

JUDGE CLARK: The matter came up under Rule 27 to perpetuate testimony, and they wanted to make discovery by photographing documents. The Judge said, "This is over under Rule 34; it isn't under 27. Therefore, you can't do it under 27, although 27 does say that depositions may then be taken in accordance with these Rules."

MR. DODGE: Isn't the decision a wrong one? Should we try to amend the rule merely to correct one erroneous decision?

PROFESSOR SUNDERLAND: This isn't depositions. Our rule says depositions may be taken under the rule, but the production of documents isn't strictly depositions.

MR. DODGE: But you have it under Rule 27, which is a type of deposition. I wonder about the caption of Rule 27 when we get finished.

THE CHAIRMAN: The trouble is that Rule 34 relates to parties, and in 27 you haven't got an action; there aren't any parties. That must be the Judge's point. Is it?

JUDGE CLARK: I wonder if it might not cover it if we changed the sentence, "The depositions may then be taken in accordance with these rules", to read, "The Depositions may then be taken and discovery had in accordance with these rules." It is a fine distinction, but I think the feeling is that 34 is discovery and not depositions.

THE CHAIRMAN: What line in 27 are we dealing with?

JUDGE CLARK: 27(a)(3), "Order and Examination." It is the second sentence.

Mr. Sunderland proposes inserting after the second sentence that I have just read, his longer statement that "The order may direct production of documents and things for inspection, copying, photographing, measuring or surveying in connection with the taking of the deposition, in accordance with Rule 34, if the petition so requests."

I now ask whether it might not be about as effective and rather broader simply to change the second sentence to read: "The depositions may then be taken and discovery had in accordance with these rules."

MR. DODGE: No. The power that he now has to specify the subject of examination is broad enough.

THE CHAIRMAN: What is it, Judge?

JUDGE DOBIE: I doubt if the ordinary lawyer or ordinary judge reading Judge Clark's suggestion would know exactly what he is after. The Professor's amendment is a little longer, but it is perfectly clear, and I think anybody reading it would know just what he is after.

DEAN MORGAN: Why don't you just say, "The order may direct the production of documents and things as provided in Rule 34", and just let it go at that?

JUDGE DONWORTH: That is pretty good.

PROFESSOR SUNDERLAND: That will do it.

JUDGE DOBIE: I think that is fine.

JUDGE DONWORTH: That would go at the end of subdivision (3), would it?

DEAN MORGAN: Wherever Mr. Sunderland had it.

THE CHAIRMAN: It would come in Rule 27(a)(3) following the second sentence.

PROFESSOR SUNDERLAND: It ought to be after the first.

THE CHAIRMAN: The Reporter asks that it be put after the second sentence, which reads, "The depositions may then be taken in accordance with these rules."

JUDGE CLARK: What was the proposal?

DEAN MORGAN: I was just proposing to abbreviate Mr. Sunderland's statement by just saying, "The order may direct the production of documents and things under Rule 34."

THE CHAIRMAN: That would properly come after the

word "interrogatories", because that is what relates to the order.

DEAN MORGAN: Yes.

THE CHAIRMAN: After the first sentence.

DEAN MORGAN: Following the first sentence.

JUDGE DONWORTH: That last suggestion would interfere with the continuity of the sentence. "The depositions may then be taken...." What would "then be taken" refer to?

PROFESSOR SUNDERLAND: Cut out the word "then".

JUDGE CLARK: Edson, you don't think Rule 35, "Physical and Mental Examination of Persons," ought to come in here?

THE CHAIRMAN: How far are you going to go in permitting a man, when there is no lawsuit pending and he has a prospective adversary around somewhere who isn't yet in court, to get orders to examine him physically and go upon his property and do everything he can think of just on the chance that some day or other he is going to have a lawsuit with him? I think you are running into very unsafe ground there.

PROFESSOR SUNDERLAND: A document is something that you very commonly want to get.

THE CHAIRMAN: But the Reporter says you can have discovery generally in accordance with these Rules. If that were done--anything like digging up documents or physical examinations--I don't know how far you could order a man to produce stuff if there isn't a lawsuit pending.

MR. LEMANN: I would state to Mr. Dodge and the Chairman that I think the Judge just decided this case wrong.

DEAN MORGAN: So do I.

MR. LEMANN: I think this is another case where we could deny ourselves the privilege of making it too plain for everyone. This is one rule that we don't have to amend. It can't happen often. The appellate court may correct it, if it is appealed.

THE CHAIRMAN: Monte, I am not sure the Judge was wrong. If you look at Rule 34, this is what it says: "Upon motion of any party showing good cause therefor and upon notice to all other parties, the court may order inspection and photographing." As that rule is worded, fairly construed, it means that a lawsuit is pending, that they are parties, that they make a motion in a lawsuit. That is where I think Hulbert is probably right.

MR. LEMANN: It is not a deposition proceeding; it is not a deposition rule.

THE CHAIRMAN: This is a lawsuit.

MR. LEMANN: You have to have a party.

DEAN MORGAN: Notice to other parties.

MR. LEMANN: It is an expected adverse party.

DEAN MORGAN: You can't give him a notice.

MR. LEMANN: Yes, you do give him a notice; 27(a) provides for notice. You have to give notice to the expected

adverse party. Of course, you can say that is not a party, that that is an expected adverse party. I think that would be a good technological phrase.

... Brief recess ...

THE CHAIRMAN: We are considering Mr. Sunderland's suggestion about amending Rule 27 as to perpetuation of evidence by adding some provision to allow in connection with that the production of documents investigation, surveying, and so forth. I should like to ask just what the circumstances were in the case Hulbert was acting in. Was that a case where the party was expecting a lawsuit to be brought against him by the person whose land he wanted to investigate?

PROFESSOR MOORE: It wasn't land. He wanted to take a picture of a boat, Mr. Chairman. He felt the fellow who owned the boat was going to sue him.

JUDGE CLARK: He was suing the owner of the boat. It was a personal injury case.

THE CHAIRMAN: Why did he want to perpetuate the testimony, then? He could have brought suit the next day. This was a deposition taken before action was brought. There certainly couldn't have been any suit pending.

MR. DODGE: He didn't seek to take the deposition of anybody in this case. He simply sought an order to make a photograph of the tugboat and plans of it.

THE CHAIRMAN: There wasn't any suit pending, was there?

JUDGE CLARK: No. Of course, it is fair to Judge Hulbert to say that he finally ended up by saying that it was quite clear that the petition did not seek to perpetuate the testimony of any person within the purview of the rule and that it could not be entertained under Rule 34 since there was no action pending. It would have seemed, therefore, that the petitioner should have been able to frame a complaint and institute an action.

THE CHAIRMAN: That is what I thought. The fellow who wanted the inspection was the prospective plaintiff. Why couldn't he have gotten an order to take the deposition under Rule 27, because that is allowed only where it is clear that for some reason or other suit can't be started?

MR. DODGE: If there is to be any amendment, I suggest it might be more appropriate to amend 34 than to amend 27. Then you would cover that case.

THE CHAIRMAN: My point is that this is the only case in which it has arisen, and the case doesn't amount to a thing because all the plaintiff had to do was to bring a suit and get started right away. Then he certainly would have had a right to proceed under 34. If he didn't have a suit, it was his own fault because he was in that respect not the denfedant, as I thought probable. I don't know why we should make an amendment to fit a failure where the failure was due to the plaintiff's own fault, the other party's own fault.

SENATOR PEPPER: Suppose he had been the defendant or prospective defendant and wanted to perpetuate evidence of the construction, and so forth, of the tug for the purpose of showing at the trial that the thing which he was charged with couldn't have happened for some structural or mechanical reason. Could he bring a suit or couldn't he?

THE CHAIRMAN: Oh, if that had been the case there would have been no argument about it.

DEAN MORGAN: He would have had an action for declaratory judgment, wouldn't he? That is all.

SENATOR PEPPER: If there was a just issue for a controversy.

THE CHAIRMAN: What is your pleasure? The proposal is to amend Rule 27(a)(3) by adding at the end of the first sentence after the word "interrogatories", the provision: "The order may direct production of documents and things for inspection, copying, photographing, measuring or surveying in connection with the taking of the deposition, in accordance with Rule 34, if the petitioner so requests."

JUDGE DOBIE: Mr. Morgan cut out "for inspection," and so forth, and made it: "The order may direct production of documents and things in accordance with Rule 34, if the petitioner so requests."

THE CHAIRMAN: Rule 34 is more than production of documents and things. It is entry upon property, isn't it?

JUDGE DONWORTH: Mr. Chairman, don't you think there is something in the point that inserting the words you speak of would be unfortunate in that it would then imply that the next sentence, "The depositions may then be taken", means it is conditioned upon this other stuff being involved?

THE CHAIRMAN: No. The court says "It may"; it doesn't say "It shall." If the amendment said that the court shall do thus and so, and then the deposition may be taken, I would assume that you couldn't take the deposition unless the court made that order, but it is merely permissive.

JUDGE DONWORTH: My suggestion was that the language would come in better if it followed the second sentence, ending with the words "these rules."

DEAN MORGAN: I agree with you.

THE CHAIRMAN: All right, we will treat the amendment as proposed to follow the sentence, "The depositions may then be taken in accordance with these rules."

JUDGE DOBIE: Do you think it is important enough to put that in there?

PROFESSOR SUNDERLAND: I think that the rule ought to include that privilege.

JUDGE DOBIE: All right. I move that that be adopted.

JUDGE DONWORTH: Second.

THE CHAIRMAN: But the motion limits the thing. The amendment isn't broad enough to include entry for the purpose

of photographing; it doesn't include all the privileges in Rule 34. How would you shorten it, Eddie, just to remove that objection, so that it is clear that you are allowing all the things that 34 provides for?

DEAN MORGAN: "For any purpose" or "for all purposes mentioned in Rule 34." Something of that sort, if you wish.

THE CHAIRMAN: Will you state it in full so the record will show it?

DEAN MORGAN: "The order may direct the production of documents and things for any purpose stated in Rule 34."

THE CHAIRMAN: That doesn't do it. We are not asking for the production of anything when we want to go upon a piece of land.

DEAN MORGAN: That is what he says here.

THE CHAIRMAN: Who says?

DEAN MORGAN: "The order may direct production of documents and things for inspection, copying, photographing, measuring or surveying in connection with the taking of the deposition...."

THE CHAIRMAN: The words "for inspection, copying, photographing, measuring or surveying" are left out? What is your amendment?

DEAN MORGAN: I said "for any purpose"; "documents and things for any purpose". That is what he said. All these are purposes stated in Rule 34, for which you must produce. Right?

THE CHAIRMAN: No, I don't get it.

DEAN MORGAN: I am just taking Mr. Sunderland's language for this amendment on page 3.

THE CHAIRMAN: I haven't got it.

SENATOR LOFTIN: Rule 34 mentions specifically all those things which he refers to.

JUDGE DOBIE: As I understand, it is, "The order may direct production of documents and things for any purpose mentioned in Rule 34, if the petition so requests."

THE CHAIRMAN: And Rule 34 also provides for entry upon designated land or other purposes.

DEAN MORGAN: Yes.

THE CHAIRMAN: I don't call that a production or inspection.

DEAN MORGAN: No. I think you are right.

THE CHAIRMAN: So I say his motion doesn't cover all the things that are specified in 34. I was trying to get him to give us a shortened statement that would bring into play all of the privileges in 34.

DEAN MORGAN: You could say, "The order may direct compliance with Rule 34."

THE CHAIRMAN: That does it, doesn't it? Well, at least the Reporter has something to work on there. All in favor of making the amendment to Rule 27(b)(3) as stated say "aye"; opposed, "no." It is carried.

Our next rule is 28?

JUDGE CLARK: Yes, I think so. Somebody wants to have depositions taken before somebody in the same office. They can now do that by agreement; they can do anything by agreement, and I am not sure they should without agreement.

THE CHAIRMAN: What do you mean by "in the same office"? I don't understand.

DEAN MORGAN: Have the attorney's stenographer take them.

JUDGE CLARK: Yes. "It has been suggested that Rule 28(c) should not be so rigid as to exclude the taking of a deposition before a notary who is employed in the office of a party or a party's attorney." We say, of course, that you can do it now by agreement, that there is a rule that provides that the parties may stipulate it, and we doubt if you would be able to do it unless there were agreement.

THE CHAIRMAN: That sounds reasonable to me.

JUDGE CLARK: Have you any suggestions as to that?

PROFESSOR SUNDERLAND: I think that is all right.

THE CHAIRMAN: There is no recommendation.

JUDGE DOBIE: Rule 29 covers that, doesn't it, if the parties consent?

PROFESSOR SUNDERLAND: Yes, I think that is adequate.

THE CHAIRMAN: The next rule, then, is 29.

MR. TOLMAN: No change is recommended.

JUDGE CLARK: That is so.

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THE CHAIRMAN: Rule 30?

JUDGE CLARK: On this, first we brought up that somebody wanted a re-hearing and the depositions conducted before a court or master. That is Comment I. We say "No." I shouldn't think we want to go back over that ground. We considered that a great deal before, of course.

THE CHAIRMAN: All right, what is your next matter, Comment II?

JUDGE CLARK: The next is a suggestion by a gentleman whom I think is rather intelligent about these things.

DEAN MORGAN: He agrees with you, does he, Charlie?

JUDGE CLARK: No, not always. At any rate, he suggested that the costs of taking depositions be made taxable costs if the depositions are received in evidence. That was a suggestion he made in an address down here, which has been reprinted. It has been held, however, that expenses incurred by the prevailing party in the taking of necessary depositions may be taxed as costs, and the fees of stenographers have been held taxable.

DEAN MORGAN: That is a stipulation, though.

JUDGE CLARK: That is true.

THE CHAIRMAN: What does this propose that we do?

JUDGE CLARK: That we provide that the costs of taking depositions be made taxable costs if the depositions are

received in evidence. We think it is being done substantially enough, anyway. Have you any ideas about that?

PROFESSOR SUNDERLAND: No, I haven't.

JUDGE DONWORTH: What are you doing with Mr. Hammond's point that the party who gives the notice and takes the deposition may not like it and may refuse to have it written up, and all that? Are you doing anything about that?

JUDGE CLARK: Have we anything specific on that (to Professor Moore)?

JUDGE DONWORTH: I don't know that it is worth stopping for. I understand the situation has arisen that the party taking the deposition doesn't like it and says, "Oh, I don't want that written up," and lets it go.

JUDGE DOBIE: Could the other party use it?

JUDGE DONWORTH: The other party would have to pay for having it written up then.

JUDGE DOBIE: But could he use it under our Rules?

JUDGE DONWORTH: I presume he could.

JUDGE DOBIE: For example, I take a deposition and it is rather unfavorable to me. After taking it, I say, "I don't believe I want to use it," and you say, "I do." You could have it written up and use it.

THE CHAIRMAN: You ought to be glad to pay the expenses under the circumstances.

JUDGE DONWORTH: If you haven't anything on the point,

let's not delay.

THE CHAIRMAN: All right.

JUDGE CLARK: Then the idea is that nothing need be specified about cost.

THE CHAIRMAN: I think so.

JUDGE CLARK: The law is evolving.

THE CHAIRMAN: Unless somebody makes a proposal here at the meeting, you don't recommend anything?

JUDGE CLARK: No. Before we pass to (b), Professor Sunderland has a suggestion with respect to (a), on his page 4.

THE CHAIRMAN: All right, let's take that up. What is it?

JUDGE CLARK: He refers to some decisions here. "It has been held that a notice to take a deposition under Rule 30 may not include a request for production of documents, and that for the latter purpose Rule 34 must be used"; much the same suggestion. "This seems to suggest that no production of documents is possible in connection with Rule 30. This is incorrect. .... It seems desirable to correlate Rule 30 and Rule 45(d)(1) by inserting the following sentence after the first sentence of Rule 30(a): 'A subpoena duces tecum may be used as provided in Rule 45(d)(1).' The latter rule should then be changed as hereinafter suggested."

MR. LEMANN: That is just a polishing suggestion. I applied to the court for a subpoena duces tecum for a deposition,

and nobody had any doubt of it. It seemed to me very plain under Rule 45(d), in connection with the deposition rule, that I was entitled to the subpoena duces tecum.

JUDGE DOBIE: This is another one of those flags that we put up there, which I think are rather desirable.

MR. LEMAN: Rule 45(d), "Subpoena for Taking Depositions": "A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be used without an order of the court." That certainly says it shall be used with an order of the court. I think it is just a counsel of eloquence to put it in 30(a), as suggested.

THE CHAIRMAN: In what rule is the provision that gives you the right to get an order for the production.

DEAN MORGAN: 45.

MR. LEMANN: 45(d). I think Professor Sunderland agrees to that. He just says that it looks as if somebody doesn't yet understand it.

PROFESSOR SUNDERLAND: It is just calling attention to the fact that that is available.

MR. LEMANN: It is just putting a red flag up here so he can't overlook it.

PROFESSOR SUNDERLAND: It integrates the rules. I think what we tried to do when we drew them was to get them all integrated. That integration hasn't quite permeated the professional mind.

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THE CHAIRMAN: In what rule is the provision that gives you the right to get an order for the production.

DEAN MORGAN: 45.

MR. LEMANN: 45(d). I think Professor Sunderland agrees to that. He just says that it looks as if somebody doesn't yet understand it.

PROFESSOR SUNDERLAND: It is just calling attention to the fact that that is available.

MR. LEMANN: It is just putting a red flag up here so he can't overlook it.

PROFESSOR SUNDERLAND: It integrates the rules. I think what we tried to do when we drew them was to get them all integrated. That integration hasn't quite permeated the professional mind.

MR. LEMANN: Well, almost.

PROFESSOR SUNDERLAND: Pretty well, but not quite. I thought this would help integrate the rules and show that it is one single system that we are working out.

MR. LEMANN: I say it is all a matter of judgment. There can be improvement. If you want to make every improvement, I think this would be one. But I have a self-sacrificial spirit, if you will observe.

THE CHAIRMAN: It simply means that the lawyers practicing the law haven't read the Rules over; that is all. You want to save them the trouble of reading more by putting it in two different places, so they will catch it in one place if they don't get it in the other.

SENATOR PEPPER: Put it on a billboard: They won't get it in the Rules, if you put it there.

THE CHAIRMAN: Rule 45 certainly deals specifically with the matter of getting subpoena duces tecum in a deposition case. It is as plain as daylight, if you just read it. If we are going to have these references back and forth, we will have to go through these Rules and do fifty of them before we have carried out that principle. I don't think that is the kind of amendment that the Chief Justice would like.

PROFESSOR SUNDERLAND: You see, we have several decisions here which hold that a notice to take a deposition under Rule 30 may not include a request for production of documents,

and that for the latter purpose you have to use Rule 34.

THE CHAIRMAN: That is the law. In your notice to take a deposition you can ask him to produce the documents, but if he doesn't produce them, then you have to make a motion before the court to get leave to have a writ of subpoena duces tecum issued to compel him to come in with them.

PROFESSOR SUNDERLAND: But that isn't under 34.

THE CHAIRMAN: It is expressly provided in 45.

PROFESSOR SUNDERLAND: The suggestion here was to go to 34, but you don't have to use a subpoena duces tecum.

THE CHAIRMAN: You mean that you want to change 34 so that when you serve a notice on the other party to take a deposition, you serve an effective notice on him requiring him to produce them?

PROFESSOR SUNDERLAND: No. My only suggestion was that we put into Rule 30 that a subpoena duces tecum may be used in connection with it, and make it clear.

THE CHAIRMAN: As provided in 45.

PROFESSOR SUNDERLAND: Yes.

THE CHAIRMAN: In other words, it is a statement that if you want it, you have to--

PROFESSOR SUNDERLAND (Interposing): Use the two rules in conjunction.

MR. LEMANN: What would 45(e) mean if you can't do it under Rule 30?

PROFESSOR SUNDERLAND: I don't know.

MR. LEMANN: It wouldn't mean anything.

PROFESSOR SUNDERLAND: What are these judges talking about? I don't know what they are talking about.

MR. LEMANN: Was their attention called to 45(d)? Do the cases that you report show it? You have two District Judges, both in New York; one in the Southern District, one in the Eastern District. They said you couldn't proceed under Rule 30, apparently. Now I ask, was their attention called to 45(d)(1)?

PROFESSOR SUNDERLAND: I don't think so.

MR. LEMANN: It says, "A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be used without an order of the court." What can that mean except that I can summon John Brown (as I did) and that I also get an order of the court directing John Brown to produce the documents I want? It never occurred to my opponent to question it, but maybe I was lucky.

THE CHAIRMAN: What is your pleasure with the suggestion?

JUDGE CLARK: Here is the case. It is Matthiess v. Peter F. Connolly Company.

PROFESSOR SUNDERLAND: It simply says you can't get production under that rule.

THE CHAIRMAN: He is right about it.

PROFESSOR SUNDERLAND: He isn't right about it.

THE CHAIRMAN: He is certainly under Rule 30.

PROFESSOR SUNDERLAND: Under Rule 30 you are taking an oral deposition. In connection with that oral deposition under 30, you can get a subpoena duces tecum.

THE CHAIRMAN: Where is the provision for that?

PROFESSOR SUNDERLAND: 45.

THE CHAIRMAN: It isn't under Rule 30, then, that you get the subpoena duces tecum. It is under Rule 45, and the Judge is absolutely right in telling the lawyer there is nothing in 30 that allows him to serve a notice compelling a man to produce papers. You have to go to the court under 45 to do it. He notified the lawyer that if he wanted to produce anything, he had to go to 45.

PROFESSOR SUNDERLAND: From this report you can't tell a great deal about what was before the court. I don't think it would do a great deal of harm just to pass it by.

THE CHAIRMAN: All right. Now, Charlie, have you anything more on Rule 30?

JUDGE CLARK: Yes. I don't know that I have so much, but Mr. Sunderland has. On page 78 we made the comment--

THE CHAIRMAN (Interposing): Comment what?

JUDGE CLARK: This is (b), Comment I.

THE CHAIRMAN: Relating to rule what?

JUDGE CLARK: Rule 30(b) and 30(d).

THE CHAIRMAN: All right.

JUDGE CLARK: "Judge Francis C. Caffey has suggested that the power of the trial judges to stop examinations before trial which are harassing to a defendant in a strike suit should be enlarged." We suggested generally that the Rules were pretty broad, but now Mr. Sunderland, however, suggests several matters that might well be considered. So I suggest you turn over to his page 4. He has two or three sugestions. You might take them up, Edson, and go ahead.

PROFESSOR SUNDERLAND: It is at the bottom of page 4 and on page 5. I thought that expense as a ground for protective order is not sufficiently stressed and that we might very well put in at the bottom of (b) the word "expense", so that it would read as follows: "or the court may make any other order which justice requires to protect the party or witness from expense, annoyance, embarrassment, or oppression." Then following that with this sentence: "A party giving notice of deposition upon oral examination shall not be required to pay, or secure the payment of, travelling expenses of counsel for any adverse party or fees of such counsel for time occupied in travelling, except on a showing that competent local counsel are not available."

I think there have been some atrocious rulings on the expenses of shipping counsel around the world at the expense of the party taking depositions. It doesn't seem to me that it is

justifiable, and it piles up expense. I suggest this as one way of reducing unnecessary expense.

JUDGE CLARK: You also have another suggestion as to putting in a restriction on time.

PROFESSOR SUNDERLAND: Yes.

THE CHAIRMAN: You passed that by.

PROFESSOR SUNDERLAND: I passed it by for the time being.

THE CHAIRMAN: Let's take this one up first and get rid of it.

JUDGE DOBIE: I know of a case where the defendant was ordered to pay the expenses of plaintiff's attorneys going to the Bahamas.

PROFESSOR SUNDERLAND: That is an old habit in New York. I was talking to a New York lawyer who said he took a trip to Europe, and he played shuffleboard all the way over and all the way back and had a wonderful time at the expense of the fellow he was going over to take the depositions for.

THE CHAIRMAN: Being from New York, I am opposed to the proposal.

PROFESSOR SUNDERLAND: I think that local rule in New York is atrocious. I don't know how many other local rules like it there are, but it seems to me it is subversive of the very purpose of what we are trying to accomplish.

MR. DODGE: There are some cases where it is all right.

PROFESSOR SUNDERLAND: But there ought to be a showing, it seems to me, that you can't do it in any other adequate way.

THE CHAIRMAN: Let me state the proposal, then. The first proposal is to amend Rule 30(b) in the next to the last line by inserting after the word "from" the word "expense", so that it reads: "protect the party or witness from expense--"

DEAN MORGAN (Interposing): You really mean "undue expense," don't you?

PROFESSOR SUNDERLAND: Yes.

DEAN MORGAN: You can't protect him from expense.

PROFESSOR SUNDERLAND: It doesn't make any difference. It is all right; "undue expense."

THE CHAIRMAN: All right, does the word "undue" apply also to "annoyance, embarrassment, or oppression"?

DEAN MORGAN: Surely; that is right, certainly.

THE CHAIRMAN: We didn't have it before.

DEAN MORGAN: Lord! You have to embarrass some of these people.

MR. LEMANN: "as justice requires." Don't you think "as justice requires" covers it?

JUDGE CLARK: Let me see if we can put somebody else in who supports this. Beginning on page 226, Mr. Nathan Heard, of Boston, wrote in and objected to this same rule in New York. He wrote quite at some length that he thought it was improper.

THE CHAIRMAN: Let me state the question now so we can

get it in the record and so you can find it when you want to make the revision. The proposal is to amend Rule 30(b) by inserting in the next to the last line after the word "from" the words "undue expense", and also to add the following provision at the end of Rule 30(b), to wit: "A party giving notice of deposition upon oral examination shall not be required to pay, or secure the payment of, travelling expenses of counsel for any adverse party or fees of such counsel for time occupied in travelling, except on a showing that competent local counsel are not available."

Do you want to consider those together? What is your pleasure with them?

MR. LEMANN: It is a difficult thing, I think, to dispose of these local rules, although the local rules may be a bad thing and this is a hard thing for the defendant. Here is a plaintiff who gives notice to take testimony of somebody who is quit a bit away. He imposes on the defendant the burden of going out there to examine the witness at his own expense. It might be a weapon for oppression in the hands of the plaintiff, it seems to me. You say "competent local counsel". That is rather tough. My limited experience has been that it is pretty hard for me to pick up a local man who doesn't know all about the case and have him cross-examine a witness. Unless he has been in the case and knows a good deal about the case, it is pretty hard for me to tell that fellow in Boston or

California or even in Mississippi. I have to educate him in the case. He might be a very competent man. In fact, it is pretty easy to find a competent lawyer in almost any town of 5,000 people or more, but that doesn't mean, from my view, competent to cross-examine a witness. It may be a very important witness. Yet this amendment would say that, if there was a competent lawyer in that place. As I said, it is a pretty large order to say that there isn't a competent lawyer in almost any town.

JUDGE DONWORTH: Do you have such a local rule in Louisiana?

MR. LEMANN: No, we don't have that New York local rule. From the material that the Reporter has just referred to I see that it exists in North Carolina and two or three other districts.

JUDGE DONWORTH: We never heard of it out West. We assume that if we give the other man notice, he must employ an attorney for that deposition as well as for any other service.

MR. LEMANN: Or will himself appear.

THE CHAIRMAN: How does the New York local rule read?

MR. LEMANN: I am not arguing particularly for the rule, Judge, as much as I am hesitating about saying it must never be done.

PROFESSOR SUNDERLAND: I wonder if it is a practice very widespread in the country outside of New York. If we

adopt this amendment, we will simply prevent this new rule from coming into operation. If it hasn't come into operation in very many places, that shows that it will work all right without permission to charge up these travelling expenses for lawyers, and preventing charging them up with expenses is all we prohibit here.

MR. DODGE: There is a question whether it should be prohibited absolutely or on the condition as you have stated. Mr. Lemann raises the exact point I was going to raise. Sometimes it is perfectly impossible sufficiently to instruct a non-resident lawyer as to the details of a complicated case and a person who knows all about it from the beginning has to go out. In some cases (in the state courts in Massachusetts, for example) this is without any rule; this is discretionary with the court. An application is made for leave to take oral deposition, and the court in certain cases may require at least a contribution toward the expenses of the counsel who knows about the case and has to go. There are cases where that is proper.

MR. LEMANN: Does this New York rule mean only travelling expenses or also payment for his time?

THE CHAIRMAN: I just read the rule. It provides for payment of travelling expenses and fees of counsel taking the trip. It is not imperative, mandatory; it is a discretionary rule. The court can impose that or not, as he sees fit. There

isn't so much objection to the rule, because it is discretionary and a careful judge would not impose that unless there was a terrible hardship forced by one party on another. I imagine from what Professor Sunderland says, he thinks the discretion has been abused. Plainly, the rule itself is optional with the local judge, and he ought not to require any such action unless one party has served a notice of taking depositions and make put the other fellow really out of court who can't afford to send a lawyer out there.

MR. LEMANN: That is what I was thinking might happen. If you are required to pay the other fellow's travelling expenses, would the amount you paid be taxed as costs if you prevailed, so that you would get it back?

THE CHAIRMAN: It is so provided in the local rule, that the amount that you do pay for the other fellow's lawyer and travelling expenses can be taxed as costs if you win the case.

MR. LEMANN: That seems to me to make it a pretty arguable proposition whether you should absolutely take away the right of a New York court to establish such a rule, whether you should say that a local judge might never require me, if I want to examine a witness in Boston or California, at least to put up the expense in the first instance of opposing counsel's going to Boston or California to cross-examine that witness. If I accomplish my case, I will put it up and get it back, and

then I win, because it will be taxed as costs. If I lost my case, I have just had to pay the expenses of permitting my adversary to cross-examine this witness.

Any other rule has the objection of subjecting the defendant to this expense of going to Boston himself. You say, "Well, he can get a competent lawyer in Boston." I say, "there are plenty of competent lawyers in Boston, but it might be very hard for them adequately to cross-examine." I think you can argue it on both sides, and I am just a little hesitant about interfering with the discretion of the local court.

THE CHAIRMAN: It may work the other way. Suppose the defendant wants to take the deposition against an impecunious plaintiff, a poor fellow in New York who brought the suit. He hasn't much money, and the case is against a rich corporation. The foreman in the factory where the accident had occurred has been transferred to a factory in California. Then the defendant can move to take the deposition of this witness in California as to the circumstances of the accident. That is not a complicated case. The plaintiff ought to be able to instruct a local lawyer, I guess. Under our practice it never occurred to anybody that if the witness was in another area and his deposition had to be taken, there was any thought of making the party who wanted to take the deposition pay your lawyer's fee and travelling expenses. There are some difficulties in educating a local lawyer properly to cross-examine,

and all that. In thirty years I have never seen that done, and nobody has ever expected it to be done.

JUDGE DOBIE: I have the feeling that I don't think we ought to put these absolute prohibitions in there unless there is pretty gross abuse. I think there is a good deal in what Mr. Lemann says over there about the difficulties of instructing local counsel. I know when I was running for lawyer in St. Louis (there is still some question as to whether I was elected), I had a case and had to take a deposition in Norfolk, Virginia. A lawyer asked me if I would go there for expenses and the munificent sum of $10, and I jumped at the offer to go back home. On the other side was one of the best lawyers in Virginia. He knew more about law on his little finger than I will ever know. But he wasn't properly instructed, and I was. So a rich corporation won a big case by paying me $10 and travelling expenses. There might very well be a case like that where the plaintiff is poor.

PROFESSOR SUNDERLAND: But the merits of the case were with you.

JUDGE DOBIE: I thought so.

JUDGE DONWORTH: If we adopt this amendment, I suppose we should make it plain that if local counsel is available, then the party taking the deposition must pay the fees of that local counsel. That is only implied, not stated.

PROFESSOR SUNDERLAND: Yes. This is just a prohibition

on shipping a lawyer back and forth and paying him for his time while he is travelling and for his travelling expenses.

MR. LEMANN: I shouldn't think, Judge Donworth, that you could make that distinction without being inconsistent with the idea behind this whole amendment. If you say there can't be quite a bit of travelling expenses, I shouldn't think you would be required to pay the fee of the local competent attorney. You don't pay the fee of the principal attorney. That is all part of the job of defending the case.

THE CHAIRMAN: You see, this rule doesn't provide for paying fees for taking the deposition; it is for the fees of counsel for their time travelling to and fro, plus expenses. But the New York rule, as I read it, doesn't require the party to pay for the professional work of examining or cross-examining the witness.

MR. LEMANN: That would be another reason, then, why Judge Donworth's inquiry would have to be answered, I thould think, in the negative.

JUDGE DONWORTH: In the negative. I think so.

JUDGE CLARK: Here is a case in the Ninth Circuit recently where the trial court had ordered the deposit of the sum of $1,681.14 so that counsel could go to New York. They tried to take it up with the Circuit Court of Appeals to get a mandamus against it. The Circuit Court of Appeals refused to consider it then. They said it was a matter that could be

brought up on appeal.

JUDGE DONWORTH: Who was the District Judge?

JUDGE CLARK: It doesn't say. Denman is the one who wrote this opinion. It doesn't tell in this report. "Travel expenses and fees of the opponent's counsel required as a condition precedent to order undertaking the payment by petitioner of that amount."

MR. LEMANN: That is the case referred to on page 228 of your comments.

JUDGE CLARK: That is it.

MR. LEMANN: They simply said they would deal with it when the merits of the case came before them, and they denied mandamus because there was no showing for an extraordinary writ. When they got it finally, they may have disallowed it.

MR. DODGE: What would you think, Mr. Sunderland, of changing that last "except" clause of yours to "except on a plain showing that the case cannot be adequately handled otherwise", or something like that?

THE CHAIRMAN: I was thinking that the thing to do is not to scotch this New York rule completely, but to place some restraint on it that way, if you do anything; except on a showing that competent local counsel are not available or a showing of the difficulties of educating counsel, and to avoid undue hardship. I think that word ought to go in. I think if the fellow has plenty of money to make the trip and pay his

lawyer, the rule ought not to be applied at all.

MR. LEMANN: If you put it in that way, I think you will give ideas to a lot of lawyers who have never heard of this New York rule. Judge Donworth asked me if we have such a rule. We have no such rule; Judge Donworth has no such rule. If you put it in the way you suggest, Mr. Chairman, you will have plenty of cases that will come within the proviso.

THE CHAIRMAN: I plead guilty.

MR. LEMANN: You might be making more trouble than you would believe.

THE CHAIRMAN: Surely. This implies that if those conditions do exist, this rule authorizes it. Instead of scotching the New York rule, we spread the disease all over the country. They will say you can do it under the Federal Rules.

MR. LEMANN: That is right.

THE CHAIRMAN: I take back my suggestion.

JUDGE CLARK: What do you think of Mr. Heard's suggestion that the expenses of counsel for taking the depositions should also be taxable costs?

THE CHAIRMAN: My personal view is that we had better leave it alone. Monte has just made a point that hadn't struck me before, that when you put in this so-called negative pregnant, it is very pregnant, and we then have a Federal rule--not a local New York rule--that allows all these expenses to be

charged up in any case if these conditions exists, and that what is now a local evil in New York will be a national evil under our new Rules. It will start everybody to getting allowances in a case like that under authority of the Federal Rules.

PROFESSOR SUNDERLAND: That would be true unless our exception were so tight that it wouldn't do much harm. Otherwise, I think it is better to say nothing.

THE CHAIRMAN: Let's not advertise the idea.

JUDGE DOBIE: Mr. Chairman, I move that we pass it. I think there probably are some abuses here, but I don't believe that they are sufficient in number to justify our putting in a rule of that kind.

JUDGE DONWORTH: I will second it.

THE CHAIRMAN: Is there any further discussion? All in favor of the motion to leave the rule as is say "aye."

PROFESSOR SUNDERLAND: Just a moment now. Does this exclude "undue expense"? That can go in there, can't it?

THE CHAIRMAN: I will limit the motion to the mere question of this travelling expense business.

PROFESSOR SUNDERLAND: Yes.

THE CHAIRMAN: All those opposed say "no." The proposal is lost. We also want to vote on the provision putting in the words "undue expense".

PROFESSOR SUNDERLAND: How would that read, Mr. Chairman?

THE CHAIRMAN: The last part of Rule 30(b) now reads: "or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." As amended, it would read: "requires to protect the party or witness from undue expense, annoyance, embarassment, or oppression." All in favor of that proposal say "aye."

MR. LEMANN: Have we had any complaint to indicate we need this?

PROFESSOR SUNDERLAND: I don't know that we have. You see, the expense would be quite different in connection with different modes of discovery, and expense might be a determining factor. If we are mentioning annoyance, embarrassment, oppression, and that sort of thing, why not also put in "undue expense"?

MR. LEMANN: I think that is another detail of improvement that we have had no demand for, and I don't think we ought to make that sort of change.

PROFESSOR SUNDERLAND: I thought it would be a good thing to emphasize that matter of expense. That is my point.

THE CHAIRMAN: If we haven't had any trouble with it, why do we fool with it?

SENATOR PEPPER: I move we don't fool with it.

DEAN MORGAN: We already have fooled with it.

THE CHAIRMAN: We haven't had a completion of the vote,

and I didn't declare the result, so the motion is still pending.

DEAN MORGAN: Are you going to call for the negative vote now? And all those who voted wrong will vote in the negative?

THE CHAIRMAN: Surely. Is there any further discussion? All in favor of putting the words "undue expense" in there raise their hands.

... Two hands were raised ...

THE CHAIRMAN: Opposed?

... Six hands were raised ...

THE CHAIRMAN: The motion is lost. Is there anything else under Rule 30?

JUDGE CLARK: Do you want to mention the time?

PROFESSOR SUNDERLAND: I have two or three other things that will probably be knocked out under Mr. Lemann's proposition.

THE CHAIRMAN: What page of your report?

PROFESSOR SUNDERLAND: This is still (b), in the middle of that paragraph.

THE CHAIRMAN: Rule 30(b), the middle of the paragraph.

PROFESSOR SUNDERLAND: It reads there "that the deposition shall not be taken, or that it may be taken only at some designated place". That ought to read: "time or place other than that stated in the notice, or that it may be taken only on written interrogatories under Rule 31 or Rule 33, or

that only interrogatories under Rule 33 shall be allowed," (now 33 isn't included here at all) "or that certain matters", and so on.

I just introduce those two items: time as well as place, and a reference to Rule 33 as well as to Rule 31.

THE CHAIRMAN: Is your proposed amendment written out in your report?

JUDGE CLARK: Yes, I think so.

THE CHAIRMAN: What page is it on?

JUDGE DOBIE: Page 4, close to the bottom; next to the last paragraph beginning on the page.

JUDGE DONWORTH: If you wish to take these two matters up separately, I move that we insert the words "time or" in (b) after "only at some designated", so that it shall read: "only at some designated time or place".

MR. DODGE: The judge has the power to make such order as to time now under the last clause of the paragraph.

PROFESSOR SUNDERLAND: I think so. It can be done. But why do we mention place? That also comes under the last provision. If you are going to mention place, I think you ought to mention time. It looks as though we are excluding time.

SENATOR PEPPER: Won't the notice specify the time? You speak, do you not, of some place other than that designated in the notice? Doesn't that indicate that there must have been

both time and place in the notice, and that the only thing that has changed is the place? The notice must have specified a time and place.

THE CHAIRMAN: That is just the point. That is what he wants to change, to give a time.

SENATOR PEPPER: The only thing that is specified is where they change the place.

DEAN MORGAN: Could they change the time under that rule? That is the question.

PROFESSOR SUNDERLAND: There ought to be a provision for changing the time as well.

JUDGE DOBIE: If they want to take it on the 1st of November and it is utterly inconvenient and inconsistent, the judge will say, "No, I won't grant it for the 1st of November; I will grant it for the 15th."

PROFESSOR SUNDERLAND: It certainly ought not to throw any doubt about that being proper.

JUDGE DOBIE: Has that motion been made?

JUDGE DONWORTH: I make it.

JUDGE DOBIE: I second it.

PROFESSOR SUNDERLAND: How did the last line read?

THE CHAIRMAN: "annoyance, embarrassment, or oppression."

DEAN MORGAN: "expense, annoyance...."

JUDGE CLARK: "Expense" is out. "Expense" didn't get

in.

JUDGE DONWORTH: You haven't got "inconvenience" in there, and this will take its place.

DEAN MORGAN: Pecuniary annoyance.

THE CHAIRMAN: The last three lines don't protect the lawyer if he has another engagement in court. The lawyer isn't usually the witness. Are you ready for the vote?

JUDGE DOBIE: I second Judge Donworth's motion.

JUDGE DONWORTH: Merely to insert the words "time or" after "designated."

JUDGE DOBIE: Rule 30(b).

THE CHAIRMAN: Are you ready for the vote? All in favor of inserting "time or" in Rule 30(b) between the words "designated" and "place" say "aye"; opposed, "no." I shall have to call for a hand vote. All in favor of putting "time or" in, raise their hands. All against. I call it six to five. Worse than the Supreme Court: It is carried by one vote.

MR. LEHMANN: A notable victory.

DEAN MORGAN: A moral victory.

THE CHAIRMAN: Go ahead, Mr. Reporter. What have you next?

JUDGE CLARK: Do you want to press the other? He has one at the end of that: "may be taken only on written interrogatories under Rule 31 or Rule 33".

DEAN MORGAN: There isn't any other place for written

interrogatories, is there? You don't provide any other place for interrogatories except Rules 31 and 33, do you?

JUDGE DONWORTH: Why do you need that designation?

PROFESSOR SUNDERLAND: Because we have a rule on "Interrogatories to Parties," which is Rule 33. Then we have a rule on discovery against witnesses or parties on written interrogatories which results in a deposition. In our Rule 33, "Interrogatories to Parties," we merely get an affidavit, and there is an ambiguity there about interrogatories. You don't know whether you mean interrogatories to depositions on written interrogatories under Rule 31 or whether you are talking about interrogatories to parties under Rule 33. I thought we might just as well specify both of them there.

THE CHAIRMAN: Has that question arisen in court?

PROFESSOR SUNDERLAND: I don't know that it has.

THE CHAIRMAN: I remember one thing, which may be covered later, that some decisions have held that if you start to take a deposition before trial and take it, then you have waived your right subsequently to submit written interrogatories to submit the thing, or vice versa. Haven't there been rulings to that effect?

PROFESSOR SUNDERLAND: I think there has been something like that.

THE CHAIRMAN: You don't deal with that.

PROFESSOR SUNDERLAND: No, I don't.

THE CHAIRMAN: I remember reading some decision which held that you had to take one or the other, that you couldn't use both. It occurred to me there might be cases where you submitted the written interrogatories and the answers were unsatisfactory, and then you decided you had better take an oral deposition and you went at that.

JUDGE CLARK: I think we referred to that a little under Rule 33, page 84.

THE CHAIRMAN: We will reach it later, then, will we?

JUDGE CLARK: Yes.

THE CHAIRMAN: All right, let's forget it now. The question is whether we should insert in Rule 30(b), the same paragraph we have been dealing with, after the words "written interrogatories", the phrase: "under Rule 31 or Rule 33." What is your pleasure with that? It is going a long way, isn't it, to give the court power to forbid a man to take a deposition and to insist on his merely submitting a written interrogatory, without any examination or cross-examination?

DEAN MORGAN: Suppose he wanted to take the deposition of a witness. Would the court have power to say that he must be satisfied with an interrogatory of a party?

THE CHAIRMAN: That is what this means.

JUDGE CLARK: I should think so, yes.

DEAN MORGAN: Of a party? When he wants to take the deposition of somebody else, who is a witness?

JUDGE CLARK: Not to a party, maybe. I was thinking this was one way of saving expense.

PROFESSOR SUNDERLAND: It would apply only to depositions of the same party. You may either take the deposition of that party or submit interrogatories to that party. That would be the only case where it would apply.

THE CHAIRMAN: This rule we are talking about isn't limited to the depositions of parties; it may be of other witnesses. Your amendment would mean a person other than a party.

PROFESSOR SUNDERLAND: Where you have tried to get the deposition of a witness the court would hardly make an order that instead of that, you would have to take the deposition of a party or some other witness.

THE CHAIRMAN: You are giving him power to make such an order.

PROFESSOR SUNDERLAND: I don't believe it means that.

THE CHAIRMAN: You don't say so. The title of (b) is "Orders for the Protection of Parties and Deponents." It is pretty plain that you don't draw any distinction between parties and witnesses, and power to the court to put an end to oral depositions and to require the submission of mere interrogatories is given by your amendment.

JUDGE DUNWORTH: Mr. Chairman, your suggestion is that this be left as it is?

DEAN MORGAN: I will move Mr. Lemann's motion. (Laughter)

JUDGE DOBIE: What was that?

DEAN MORGAN: I move Mr. Lemann's motion.

MR. LEMANN: He means leave it as it is.

THE CHAIRMAN: Is there any further discussion? All those in favor of inserting in Rule 30(b) the phrase "under Rule 31 or Rule 33", say "aye"; opposed, "no." The motion is lost.

Have you anything else under this rule?

JUDGE CLARK: I am not clear. What is the result on this? Does it go in now or come out?

THE CHAIRMAN: It doesn't go in. The motion to insert is lost.

JUDGE CLARK: I want to mention a couple of things, the first under (c), page 78. Judge Donworth, you were asking a question about what happened when one party refused to print, and I couldn't immediately find our discussion. It is here under (c). There is a case, the Odum case, which says quite reasonably that you don't need to have it transcribed unless the other fellow pays the costs. Pike and Fischer referred to a Maryland rule which is rather detailed, covering that. Mr. Koenigsberger says practically what the Odum case held. That is the background material.

We said that we believed of the two suggestions (that is, the Maryland one, which appears at the top of 79, and the Koenigsberger one) the latter has more merit. We add this:

"But it merely embodies the result in the Odum case, and, since the courts, therefore, appear to be handling the problem adequately, we recommend no change."

That is our discussion on it. I am sorry I couldn't find it before, when you asked.

JUDGE DONWORTH: This comes under the rule in Lemann's case, then?

JUDGE CLARK: The next is under (f) at the bottom of page 79. There is a considerable number of local rules concerning the publication of depositions upon filing, and the suggestion of the editors of the Federal Rules Service is that there ought to be a uniform rule. "Local court rules in some districts provide that upon receiving a deposition the clerk, unless otherwise ordered, shall open and file it forthwith. Other rules provide that the deposition shall be opened for examination upon application of any attorney in the cause. In Massachusetts only a party or attorney can examine the deposition; under Washington rule, the deposition can be opened only on order of court for good cause shown or by stipulation or on notice to the adverse party."

MR. LEMANN: Read the next paragraph.

JUDGE CLARK: "The above analysis indicates, however, that the courts are disposing of the question satisfactorily to themselves under the local rules, and it is not perceived how any principle of uniformity is here essential. We believe that

the courts should be left to deal with it as they see fit."

JUDGE DOBIE: There is nothing vital there, is there? I am frank to say that where a thing is not vital and is not a definite evil, I believe in letting them do as they see fit. I move that it be left as is.

THE CHAIRMAN: If there is no objection, that will be so ordered. We pass now to Rule 31?

JUDGE CLARK: On Rule 31 what we have done is to suggest a briefer statement of what seems to us to be the essentials of the rule. You will find a statement of Rule 31 on page 82. It so happens that this rule was a very imposing looking rule, which for some reason or other has meant very little in practice. I think perhaps it is set up as though it meant a great deal more and was much more important than it really is. It is set up with some detail, whereas I think really it is essentially only one way of doing the general deposition, which is provided for generally. I have given some results of the New York study, showing that the use of it is quite small and quite a good deal smaller than the use made of written interrogatories before the Rules went into effect, which I think is natural. That is, the oral deposition has to a considerable extent superseded this provision.

I suggest "that the present Rule 31 is too cumbersome and unnecessarily imposing in light of its true character as a useful and comparatively inexpensive complement to the oral

deposition method of Rule 30. In some respects, the rule by its extensive statement appears to duplicate Rule 30; in other respects, a query may well be raised as to whether there is some conflict between the procedures provided. In any event, it would seem desirable to emphasize the proper subordinate character of this form of deposition and to tailor the rule in accord with its proper place in the discovery scheme. A less formidable and complicated statement might also induce greater use of the rule than now appears."

So we suggest that you cover it in the three sentences that follow.

JUDGE DONWORTH: Has this rule been criticized by the courts?

JUDGE CLARK: They have paid very little attention to it generally.

DEAN MORGAN: It is an unusual case where a lawyer will take a deposition on interrogatory when he can have an oral examination, except for just some formal matter or something of that sort. I don't believe you are going to sprinkle any sugar on this by shortening it.

JUDGE DONWORTH: Take such matters as the date of a transaction or the delivery of a document. Often you can reach that very well by interrogatory.

JUDGE CLARK: Really, I think that the correct place for this rule is as a minor subdivision of Rule 30.

DEAN MORGAN: We don't want to change the numbering.

PROFESSOR SUNDERLAND: If this rule operates at all, it operates outside the court, with no orders of the court. You have to have machinery provided in the rule; else no one would know what to do. The way that rule is shortened it leaves out quite a number of things which it seems to me would be useful to know. Under this proposed amendment, the opposing party is not informed who the officer is before whom the deposition is to be taken. It does not provide for any recross interrogatories. It would require the notice, in accordance with Rule 30, to state the time and place of taking the deposition, which is quite unnecessary, and the time would be difficult to fix prior to the completion of the series of interrogatories. There is no provision for getting the interrogatories into the hands of the officers. There is no provision for certifying or mailing a deposition as in Rule 30, but only for taking it, and no provision for notice that the deposition has been filed. It seems to me that the machinery we provide there is almost necessary machinery.

THE CHAIRMAN: As to the last sentence of the proposed amendment, that "The taking of the deposition shall then proceed as in Rule 30", I should like to add that nothing of the kind happens. The rule in 31 is that the officer shall take the responses.

PROFESSOR SUNDERLAND: Yes.

THE CHAIRMAN: There is no such provision in 30. The lawyer is supposed to do it. In Rule 31 you don't have any lawyer, so it is wrong to say that "The taking of the deposition shall then proceed as in Rule 30."

PROFESSOR SUNDERLAND: It doesn't seem to me that anybody would know what to do.

SENATOR PEPPER: I second Mr. Lemann's motion.

DEAN MORGAN: I made it for him.

THE CHAIRMAN: Is there any further discussion.

JUDGE DOBIE: May I inquire what the motion is?

THE CHAIRMAN: The motion is to leave Rule 31 as is.

JUDGE DOBIE: I second the motion.

THE CHAIRMAN: All in favor say "aye"; opposed. Carried.

JUDGE CLARK: You can be happy about 32, because I think nobody is worried about it.

THE CHAIRMAN: Rule 32 is passed over. Rule 33, "Interrogatories to Parties."

JUDGE CLARK: There is a considerable amount of discussion about 33 one way or the other. There has been some suggestion, it seems to me, to limit the rule, and I think on the whole it is a rather useful thing. You will find that Mr. Sunderland discusses this, and we do, too.

I shall first say that after discussing the various suggestions and some of the cases on it, we suggest the form of the rule on page 87. Mr. Sunderland suggests certain

modifications of the rule. I think some of them are along the general direction we follow, but in general it isn't a complete revision.

THE CHAIRMAN: You don't underline any changes. We haven't any way of comparing. You just state what you do in your proposed rewrite of Rule 33(a) that makes changes over the existing 33. There is nothing there to enable us to check the differences.

JUDGE CLARK: I am sorry that that is true. We should have underlined the changes.

THE CHAIRMAN: Just state precisely what you do, for the purpose of the revision here.

JUDGE CLARK: As I take it, the first paragraph is the present rule; the first paragraph--I think I am correct--is identical with the present Rule 33. The additions begin at the bottom of the page, and there is a wholly new addition in (b). What should have been underlined is the provision beginning "Such interrogatories may relate to any matters which can be inquired into under Rules 26, 31, 34 to 36, may be in addition to or in lieu of the provisions thereof, and the answers may be used in evidence to the same extent as matters discovered under the said rules. Orders for the protection of the parties may be made as provided in Rule 30(b)."

That is all to raise the present issue. The other subdivision (b) is an entirely separate matter, anyway. So it is

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That is all to raise the present issue. The other subdivision (b) is an entirely separate matter, anyway. So it is

that paragraph that is the addition.

THE CHAIRMAN: The first addition you make is to make clear that even though you have taken an oral deposition, you may follow it up by submitting interrogatories if you find you haven't covered the ground; or vice versa, if you submit written interrogatories merely and don't get satisfactory results, under your first amendment here you could then proceed to oral depositions. Some courts have held that you can't do both, that you have to do one or the other. That is your first proposal.

JUDGE CLARK: That is really the second. That is an important point, but it is the second. The first one is as to the scope of the inquiry. There has been considerable question as to what the scope of the examination should be here. We provide that the scope of examination shall, in effect, be as wide as the discovery rules proper, and in his suggestions on page 6, Mr. Sunderland also considers that matter and goes somewhat the same way we do, only perhaps not quite as far. He says, "The interrogatories may relate to any of the matters mentioned in Rule 26(b) and shall be answered separately and fully in writing under oath." We include not only 26 but also the other rules.

PROFESSOR SUNDERLAND: Rule 26(b) is the one that states the scope.

THE CHAIRMAN: Why do you have to put in 31 and 34 and

36?

DEAN MORGAN: Doesn't 26 take care of all the things that can be inquired into?

PROFESSOR SUNDERLAND: That covers everything relating to the scope of the thing. It seems to me that that is the basic rule and that all the others should relate back to it for scope.

THE CHAIRMAN: Rule 31 doesn't say a thing about matters of inquiry. 31 is the rule we have just been considering. It has no place in your amendment.

Rule 34 is the rule about surveing and entering upon real estate, and all that sort of thing.

JUDGE CLARK: Discovery of documents is one.

SENATOR PEPPER: Mr. Reporter, what is the meaning of the phrase, "may be in addition to or in lieu of the provisions thereof"?

JUDGE CLARK: That covers the point that Mr. Mitchell brought up. Some decisions have held that if you start taking an oral deposition, you can't ask these questions.

SENATOR PEPPER: But in lieu of the provisions of what? You can't have interrogatories in lieu of the provisions of rules.

THE CHAIRMAN: I don't like the phrase, anyway. Let's settle this question first, whether you want to make any reference to 31. Does 34 dash 36 mean including 35?

JUDGE CLARK: Yes.

THE CHAIRMAN: I wouldn't be sure about that. Rule 35 is "Physical and Mental Examination of Persons," and you are talking about some interrogatories. Do you want to bring in physical examination? That doesn't seem appropriate, does it?

PROFESSOR SUNDERLAND: The way we have our Rules drawn, I think 26(b) covers the whole question of scope of discovery.

DEAN MORGAN: It is the only provision on scope.

PROFESSOR SUNDERLAND: That is the only one that covers scope. I think all these others ought to relate back to 26(b).

THE CHAIRMAN: That is why I think the expression in the Reporter's amendment which includes 31, and 34 to 36, ought to be out, leaving it simply "Such interrogatories may relate to any matter which can be inquired into under Rule 26".

JUDGE CLARK: I guess so. Of course, as Mr. Sunderland has just been pointing out, he has had to put 34 in several already; Rule 34, as to the production of documents.

PROFESSOR SUNDERLAND: That is in 27. That doesn't say anything about scope. There isn't any of them that says anything about scope except 26(b).

THE CHAIRMAN: Suppose we strike "31, 34-36" out of the last line on page 87.

JUDGE CLARK: All right.

THE CHAIRMAN: That is that. The next thing is: "may be in addition to or in lieu of the provisions thereof". That

doesn't seem to me to be a very apt way of expressing it. I think you ought to strike that out and put a sentence at the end explaining that you may take written interrogatories notwithstanding oral depositions, and vice versa, or words to that effect, which would wipe out the decisions that if you once take a deposition or once take an interrogatory, you haven't the other means. What undue hardship is there on a man if his adversary submits a written interrogatory, hoping to get what he wants, and the fellow dodges around and doesn't give it and it doesn't come out; and then he says, "I will have to take an oral deposition," and goes at that? Some courts are stopping them from doing that.

PROFESSOR SUNDERLAND: It shouldn't be done.

THE CHAIRMAN: Of course it shouldn't. The rule would protect against any undue hardship.

SENATOR PEPPER: I move the approval of the recommendation of the Reporter, minus the references to 31, 34, and 36, and with such modification of the final clause as has been suggested by the Chair.

JUDGE DONWORTH: Second.

MR. LEMANN: What is the real, important evil now that is supposed to occur?

THE CHAIRMAN: The first thing, the thing that is uppermost in my mind and, I think, the most important thing--although it clears up a little of the scope problem--is the

proposition that some courts have now decided, notwithstanding there is no rule to that effect, that if you submit a written interrogatory, you are barred thereafter from taking the same man's deposition. If your interrogatories have failed to produce the goods, you can't take an oral deposition. I am not sure they haven't held the other way.

MR. LEMANN: I thought it was just the other way, and not in many cases at that. Page 84, second paragraph. Am I right?

"Mr. Mitchell suggests that an examination should be made of the question as to whether a party may first take depositions and then resort to written interrogatories. The rule as it now stands is silent on the point. The courts to date, however, have sustained objections to interrogatories served after the oral deposition of a party had been taken." Then you cite three cases, all from the Southern District of New York. Then the concluding sentence: "On the other hand, an oral examination of a party, after the submission and answer of interrogatories, has been permitted."

There is no trouble with that. That is right, and the other is wrong, and all by one court.

THE CHAIRMAN: Just a minute. You said, "On the other hand, an oral examination of a party, after the submission and answer of interrogatories, has been permitted." Then it doesn't work both ways. But those New York cases are the ones

I saw, and they have held--

MR. LEMANN (Interposing): All cases from one District, Mr. Chairman; all from the Southern District of New York.

JUDGE CLARK: Mr. Lemann is working up toward his famous motion. He is hitting these things down piecemeal.

MR. LEMANN: That is right.

JUDGE CLARK: I suggest that is not proper, that this rule, unfortunately, is being limited by the judges. This happens to be one limitation, but there are other limitations of a different kind. There is a limitation on scope; there is a limitation on numbers. While this one limitation may be centered in New York, there are other limitations spread all over.

MR. LEMANN: You don't mean that as to limitations on numbers, because you say in your footnote on page 87 that you believe the number of interrogatories should not be limited. "If a limit were prescribed, the use of Rule 33 as an inexpensive alternative to Rule 30 might be lost in a particular case." Then you provide that the judge can always limit them under your proposed amendment, don't you see?

JUDGE DOBIE: I understand that by limit there he means that you don't prescribe any specific number.

MR. LEMANN: But he didn't mean to say that the court itself couldn't under this general privilege of preventing abuses.

JUDGE DOBIE: As Judge Chesnut did in the Coca-Cola case.

MR. LEMANN: The court could still limit it. So when you got through here, you could still yourself prevent the restriction of the number of them. You wouldn't want to deprive the District Court of that power, would you?

JUDGE CLARK: I don't want to take it away entirely. I want to negative some of these limitations that they have stated are inherent in the rule. I want to put it all on the basis of avoiding harassment, annoyance, and the other things. It seems to me there is quite a difference.

MR. LEMANN: Where is there a decision that says the limitation on number is inherent in the rule as it now is written? I wouldn't see where to get it out of the rule as now written. Where is the decision that defines it thus?

JUDGE CLARK: In the Coca-Cola case you will see that the court said: "But in general it may be observed that it will be only the exceptional case where more than fifteen or twenty interrogatories can conveniently and efficiently be submitted."

MR. LEMANN: Then it goes on to say, "If insistence is made upon answers to such a large number of interrogatories that they become unreasonably oppressive or vexatious, it would seem appropriate to impose penalties." That shows that that judge had in mind his general power to prevent abuses, and you don't propose to take that power away from him by your amendment.

Was it Judge Chesnut who wrote this opinion quoted from on page 85? It seems to me he could write the same opinion after you have adopted this amendment and could reach the same result, couldn't he?

JUDGE CLARK: I shouldn't think so. Of course, now you are laying down a principle for future cases. You are saying that never can you expect more than fifteen or twenty interrogatories.

MR. LEMANN: Who says that?

JUDGE CLARK: In Maryland you have an answer limit stated by rule. More than thirty are prohibited. It seems to me that the way that should be reached is that you shouldn't have an answer limitation of that kind, and the only power is the power to appeal to the court.

MR. LEMANN: We have it now in our answer limitation, haven't we? Where is the answer limitation?

THE CHAIRMAN: The Maryland rule limits interrogatories in number.

MR. LEMANN: That is a Maryland State rule; that is not a Federal rule.

JUDGE CLARK: The District Court has said in general that you can't get more than fifteen or twenty.

MR. LEMANN: That is just one judge's opinion, and that isn'thisidea generally. He could change that the next time he wrote an opinion.

JUDGE CLARK: I don't think that you should apply the doctrine that a decision is just wrong and that therefore you want to clarify the rule, but when there have been so many decisions and the general tendency is to limit this rule, it seems to me it is a proper function then to say that is the wrong kind, and what we ought to do is to set up the current the other way.

MR. LEMANN: Would you be doing it, Charlie, by this amendment? I don't think you would. If that is what you want to do, put in a statement and let him ask a hundred interrogatories if he wants to; say that no court shall impose any limit. I don't think you would want to do that, though.

JUDGE CLARK: Of course, if you think I haven't gone far enough, all right. I think when we say that the interrogatories may be as broad as the whole field of discovery, we have said something. That is what we say in the first provision here. "Such interrogatories may relate to any matters which can be inquired into under Rule 26." If you want to put in an additional provision that there shall be no limitation on the numbers, I am willing to put it in, but it would seem to me that is not very necessary.

MR. LEMANN: I wouldn't put it in, but if you don't put it in, you haven't changed the existing law.

DEAN MORGAN: How are you going to meet that objection to numbers of interrogatories? I have heard it expressed in a

number of instances that the judge was going to limit rather arbitrarily the number of interrogatories that were to be put. Now you want to prevent any arbitrary limitation of numbers and provide that any number of interrogatories shall be allowed which are necessary to develop a case. Take Justice Chesnut for example. If you are going to have any more than a brief number of interrogatories, his idea is that the answers to these interrogatories should simply take the place of special findings under your special verdict motion. That is the kind of thing you should put to the parties by interrogatories. If you want anything more, you should take the depositions of the parties. That is his theory. That is the way Maryland lawyers explained it to me, at any rate. That is why he is still inclined to follow the state practice and put practically an arbitrary limit on number. If you want to stop that and say that you shall be limited only by the subject matter, and so forth, I don't know how you would phrase it.

THE CHAIRMAN: He has tried to do that by saying that the interrogatory covers the whole field that may be covered by an oral deposition, and it has some tendency to do that.

DEAN MORGAN: Will that do it, if they do the way they did in Massachusetts, when they have to have thirty, each one having about fifty subdivisions?

THE CHAIRMAN: I think the objection the courts have to these written interrogatories is a sort of outgrowth of their

objection to demands for bills of particulars a mile long. They get angry at those. They treat this thing in the same light. I should think a party would rather have a whole lot of written interrogatories submitted to him, even if there were a hundred or two hundred, when he could sit down and study and frame his answers carefully, than to be dragged to the witness stand and have two hundred questions asked. I don't know why it is a hardship on the person to whom the interrogatories are presented to have a larger number. The point is that he is asked for things that are going to take the time and expense of expert accountants to go over his books and prepare answers. That is another thing, and that is protected by the order that the court can make.

JUDGE DONWORTH: Senator Pepper's pending motion is that we approve this much at the bottom of page 57: "Such interrogatories may relate to any matters which can be inquired into under Rule 26"; and that the Reporter be requested to re-frame the rest of that paragraph to express more clearly the ideas that he wishes to recommend.

SENATOR PEPPER: I am sorry Judge Donworth remembered it, because my excursion into the domain of liberalism was something I was repenting of in the light of the debate, and I was going to withdraw that motion and return to fellowship with Lemann. But I don't think it was seconded, so I don't have to ask anybody's permission to withdraw it.

JUDGE DONWORTH: I seconded it.

SENATOR PEPPER: Did you second it?

JUDGE DONWORTH: Yes.

JUDGE CLARK: I should like to say again I think it is a great mistake to leave this rule without trying to make it clear. The practice has been that there is a great deal of confusion about the rule, I think perhaps more than the rule deserves, but the rule was a new thing and the parties and courts haven't understood it. Both Professor Sunderland and we, working separately and in different parts of the country, have come to the conclusion that it would be well to clarify this point, and it doesn't seem to me that Mr. Lemann's arguments apply here. There are too many decisions.

MR. LEMANN: That is what I am trying to get at, Charlie. Even though you do have a Judge like Judge Chesnut who feels that there is abuse in a lot of interrogatories, I don't feel you ought to change it just because of his attitude. Under his general control against abuse, he still would have power to say, "This is abuse," if the lawyer on the other side brings it to his attention. There are too many interrogatories, and I don't think you are going to deprive him of the power to do it or get him to change his point of view by the change that you suggest.

I ask myself, "How can you force Judge Chesnut into line with what you think he ought to do?" The first thing I

say is, "What do you think he ought to do?" You yourself wouldn't put down any cast-iron rule as to the number of interrogatories, because you are not proposing to do that. So I am not sure just what you will accomplish by this. Really, if I thought this was a substantial and necessary improvement, I would be glad to stop debating it--but I am not going to discuss it further.

JUDGE DOBIE: Why not put in Professor Sunderland's suggestion? "They shall not impose an unreasonable burden of investigation or research upon the adverse party." Somebody told me (maybe it was you, Charlie) that in the Coca-Cola Company they have what they call the "Coca-Cola bible." It has somewhere between three and four thousand cases in it involving Coca-Cola. I think one of the interrogatories was that the other party should take each one of these and state what the facts were and the decisions were, and so on, which was perfectly hideous.

I happen to remember a case that Judge Barksdale decided and in which I sat and heard the case. There was an utterly unreasonable number of interrogatories in that case, and a great many of them were very, very silly. They had nine different counsel. I got them together in a pre-trial conference and we pretty well ironed it out in an hour.

JUDGE CLARK: May I say this? Mr. Lemann has rather centered on one point under this, and it is a point of some

importance, it is true, but it isn't the only point. What I tried to do was, I think, a little more than Edson tried to do. He and I were striving for the same thing, it is true, but I still think this is a little more complete. While it may not absolutely tell Judge Chesnut what to do (I hesitate a little, I must confess, to tell him absolutely), I certainly think it sets up a trend, which is about all that we should do, perhaps.

But note that there are at least four things that this suggestion does. One is that it clarifies the general scope of the questions, and there has been doubt about that. It clarifies it by tying it up to 26(b). Another is that it makes clear the point Mr. Mitchell has suggested, that you are not limited by having started with the oral deposition. The third is that the answers may be used in evidence to the same extent as other discovery cases. That has been a question, too. The final one is that you get certain protection. The protection that I gave was the general protection given under Rule 30(b). Edson has a little different phraseology. I think we are dealing with the same thing.

All those matters have been in dispute, and it seems to me that even if the rule doesn't wholly settle the question of the number of interrogatories, it does do those four important things, each one of some importance. Even if we haven't perhaps got the millenium yet, I really think that each one is worth while. I think Monte is pulling me to pieces by

separating these.

SENATOR PEPPER: Judge, what shall we do? Shall we leave our motion standing and let them vote on it?

DEAN MORGAN: I will move your motion this time, if you don't.

JUDGE DONWORTH: If I were king of the world, I would certainly ask our Reporter to reframe this sentence, because I don't think it expresses clearly what he has in mind or what any of us have in mind.

JUDGE CLARK: I will say that I am quite clear about Mr. Mitchell's and Senator Pepper's objection, the second one, that they "may be in addition to or in lieu of the provisions thereof". That isn't very well expressed. Perhaps it should be "may be in addition to or in lieu of the other forms of discovery provided in these Rules." I am going to change that in any event, and I am willing to reframe the whole business if you wish it.

I do think that we ought to cover certain things, and it seems to me the four things I have indicated are of some importance here and should be covered.

SENATOR PEPPER: On the understanding that the Reporter will consider the revision of the language of his proposed amendment, shall we let our resolution stand and let the Chairman put it?

JUDGE DONWORTH: Wouldn't it be better to pass this

particular amendment to Rule 33 until morning and go on to the next subdivision?

SENATOR PEPPER: I wouldn't sleep a wink tonight if we did that. (Laughter) I think we had better dispose of it now. I got too excited about it.

JUDGE DOBIE: I believe it is a good motion to refer it back to the Reporter in the light of this discussion and in the light of Professor Sunderland's suggestion, so that he may reframe the rule in some way that he thinks will do away with the evils that now evidently attend the enforcement of this rule by the lower Federal Courts.

THE CHAIRMAN: The only part that he needs to reframe is the clause: "may be in addition to or in lieu of the provisions thereof". The rest is perfectly clear, and no objection has been made to the wording of it here.

DEAN MORGAN: Mr. Mitchell, may I suggest that he should be careful about the way he frames the admissibility of evidence also, because these interrogatories are to parties, and they are admissions for the most part, and they will be receivable for the truth of the matters asserted generally unless the material is just for the purpose of discovery. In the part where we call for admissions, it is specifically provided that they shall be used in the particular lawsuit but shall not be usable elsewhere. So I think you have to frame that part of your statement pretty carefully, too, Charlie.

THE CHAIRMAN: May I ask the Reporter why he leaves in the clause: "and the answers may be used in evidence to the same extent as matters discovered under the said rules"? Do you not think that would be necessarily inferred? You refer to one case in California. What holding did they make that causes trouble?

JUDGE CLARK: Do you remember that, Mr. Moore?

SENATOR PEPPER: Isn't it really a resolution of reference back to the Reporter for submission of a subsequent draft, and can't we make progress by voting on that resolution and letting him make his revision in the light of this discussion?

THE CHAIRMAN: If you are willing to approve the proposal here, subject to the principle of each one of the elements here, so that we know what to redraft, that is true.

SENATOR PEPPER: That is what the motion amounts to.

THE CHAIRMAN: Are you ready to vote on that? All in favor of approving the substance of the Reporter's proposed amendment to Rule 33, which commences with the words "Such interrogatories may relate" and goes down to the phrase "Orders for the protection of the parties may be made as provided in Rule 30(b)", with the understanding that the Reporter will revise the language, where necessary, and bring us in an approved draft, say "aye"; opposed, "no." It seems to be carried.

You now have subdivision (b), in which you want to add

something entirely new.

JUDGE CLARK: That is true, yes.

THE CHAIRMAN: What is that? Explain the purpose of it. What is the evil you are up against, and how do you propose to fix it?

JUDGE CLARK: I shall have to say that this isn't so much an evil. It is a new idea.

THE CHAIRMAN: It is undoubtedly an evil, then.

JUDGE CLARK: I thought this would be introducing something that might be a little helpful. Professor Sunderland was speaking of the increasing use of affidavits. This is practically asking the witness to make what amounts to an affidavit.

JUDGE DOBIE: There is nothing in here besides interrogatories to witnesses.

JUDGE CLARK: This is new.

JUDGE DOBIE: The other is interrogatories to parties.

JUDGE CLARK: Yes.

JUDGE DOBIE: So this is the only thing in the Rules that applies to interrogatories to other than parties.

MR. LEMANN: Rule 31 refers to depositions of witnesses, so this just throws in some new hybrid.

THE CHAIRMAN: This is to ask to submit interrogatories not to a party but to an outsider.

DEAN MORGAN: That is right.

THE CHAIRMAN: Without cross-examination. If he

answers them, you can use them against the other fellow just like an affidavit.

JUDGE DONWORTH: And you can put them into your own witness.

THE CHAIRMAN: Yes.

JUDGE DONWORTH: With the fellows you are in cahoots with.

THE CHAIRMAN: Charlie, are you guilty or not guilty?

JUDGE CLARK: That is true, and it is a good thing.

THE CHAIRMAN: How do you expect to be able properly to use the ex parte affidavit of a person not a party to a case?

JUDGE DOBIE: Without giving notice to the other side or anything!

THE CHAIRMAN: Not a thing.

PROFESSOR SUNDERLAND: You can get those affidavits now, but they won't do you any good.

JUDGE CLARK: That is true.

DEAN MORGAN: That is just the point, isn't it, Charlie?

JUDGE CLARK: Yes. I want to make them do some good.

THE CHAIRMAN: He knew it was evil. (Laughter)

JUDGE DOBIE: The other side can't serve cross interrogatories or anything.

THE CHAIRMAN: No; they don't know anything about it.

JUDGE CLARK: I suggested as a footnote we could put that in too.

PROFESSOR CHERRY: I think it should be admissible on appeal, too. I think your court should get some of these. (Laughter)

THE CHAIRMAN: What do you think of that, Mr. Reporter? Do you want to go on the block and be voted on?

JUDGE CLARK: Oh, I can see that a spirit of levity is involved here on a very serious proposal, and it isn't going to allow it to be adopted. I think you had better pass it now, and I will bring it back ten years from now and you will be ready for it.

THE CHAIRMAN: It is laid on the table.

DEAN MORGAN: You can see what is going to happen to my substitute for 43, Charlie.

JUDGE CLARK: You have to chip away at the stones.

THE CHAIRMAN: Does that complete Rule 33?

JUDGE CLARK: Yes; I think so.

THE CHAIRMAN: Before we take up a new rule, I want to read a letter from the Attorney General. I don't know that it is necessary for me to read it. It is a letter signed May 15, which was Saturday, and it is a request that we take up at this meeting and pass on a proposed condemnation rule. You ought to know (maybe some of you don't know) what has been going on. A year or so ago, the Department of Justice prepared their idea

of a condemnation rule and, you remember, we condemned it fourteen to nothing because it was pretty nearly as long as the whole Federal Rules. It proceeded on the theory that none of the regular Federal procedure Rules applied unless expressly stated. We wanted it the other way around, that all the Federal Rules would apply to condemnation cases unless expressly excepted. After we voted on that, I wrote Litell, the Assistant Attorney General, and told him we were unanimous about that. Then I invited him to present another draft along our line. My theory was that there wasn't any use of our trying to impose a condemnation rule that the Government had opposed, because they are practically all Government cases. We couldn't get it through the Court or anybody if we were fighting with the Government about it.

Months went by, and he didn't produce any draft. Our subcommittee--Major Tolman and Judge Donworth and Judge Clark--started after him, and they have been after him tooth and nail for some long time. Recently, very recently, the Department has gotten out another draft, and our subcommittee has been negotiating with the Department on matters in which they were not agreed with the Department, to see if they could iron those things out and get a uniform rule that both our subcommittee and the Department would be willing to take up. I kept writing the Major that I didn't want the general Committee troubled with the condemnation rule, and still we knew

definitely that we had an accord, that there was a proposal emanating from the Department that our subcommittee agreed to, or one emanting from our subcommittee that the Department agreed to. So, up to this minute (this letter was handed to me just today), I have taken the position, without consulting you about it, that we hadn't seen any such draft, (there isn't a man in this crowd who has seen it unless he is one on the subcommittee), and that we couldn't intelligently consider a condemnation rule at this meeting until we had seen the draft and had the leisure to examine it. I thought that the subcommittee ought to try to get in accord with the Department and when they had done that, that they should disseminate the draft and let us consider it at our next meeting, whenever that was--a month or two hence--when we have to consider the Reporter's redraft that he is going to bring to us.

Now the Attorney General comes in and respectfully urges that at this meeting consideration also be given to the condemnation rule. I haven't yet seen it, and I was told yesterday by the Major that there were some matters yet in dispute to iron out with the Department. My notion about it is that this week we are going to have to hustle to get through with our main job here, that if the Department rule is agreed to by our subcommittee, it will be disseminated among our members and then we can consider it at our next meeting. There is just as good a chance of its being printed and distributed to the

bar for suggestions as it is that our own other amendments shall be done that way. I don't see how we can take any other view.

I thought I would tell you what he said about it.

SENATOR PEPPER: Mr. Chairman, presumably what the Attorney General is doing, naturally, is pressing for prompt action, but also, presumably, he is not expecting us to pass upon this body of condemnation rules and submit them to the Court before we make our general report.

THE CHAIRMAN: He doesn't ask that.

SENATOR PEPPER: If he doesn't ask that, then it seems to me our proper response to him is that these are being given or will be given consideration with the other matters that we have before us and that we hope to embody our recommendations on all the Rules, including the condemnation rules. I don't see how he can expect us to make a separate report in advance of the other, and we can make just as much progress with the condemnation rule by waiting for a discussion until after the dissemination of which you speak.

THE CHAIRMAN: That is all right, except that it does one thing: It respectfully informs the Attorney General that we can't consider the rule at this meeting, as he has asked.

SENATOR PEPPER: Don't you suppose it is quite possible that he thinks of this meeting just as an isolated meeting and that if we don't act on them this time, they will

go over indefinitely?

THE CHAIRMAN: Very likely.

SENATOR PEPPER: If he is assured that when we separate, it is only to recess until we reassemble at an early date to pass upon various matters, and that we will give them the right-of-way at that time, he will be satisfied, don't you think?

THE CHAIRMAN: He will have to be. I don't see how there is any escape from it. You see, the fact is that the Department has been running along for months and months and months without producing any progress, and now, right at the last minute, in the midst of a meeting, they suddenly dump this in our lap and ask us to consider it at this meeting. I don't think we can do that.

DEAN MORGAN: We won't gain any time now, Mr. Mitchell.

THE CHAIRMAN: I will write him and tell him that as soon as this draft is ready, it will be disseminated among the members and that it will be taken up at our next meeting, which should be in time to have it dealt with this year by the Court. That is the best we can do. Here it is Wednesday, and we haven't yet seen the draft.

MR. TOLMAN: Mr. Chairman, I think I ought to tell you what happened today, to bring you up to date. I told the acting head of the Department that it wouldn't be possible for us to act on this rule at this week's session. His anxiety in

regard to this matter is based on a very real crisis as far as his office is concerned. All that he wants, of course, is that we really speed up the consideration of his rule as much as possible. I think there is no serious question left. I think there is nothing but a very, very few points in which the mode of expression has to be changed. If a letter goes to the Attorney General without some promise that we will act on it pretty soon, it leaves him in some distress. If he knew that just as soon as the Department and the Committee agreed upon a form of rule, it would be distributed and we would act on it (this is what the head said to me) so that when we give our other rules to the Supreme Court in October (he has a notion of October in his mind), the condemnation rule can be submitted also, he can suffer his distress for a little while longer. The distress arises from the fact that there is a very large amount of money paid into courts in the condemnation cases, which he can't dispose of because he can't dispose of the cases under the Conformity Act. He can't do it in any reasonable time. He thinks that under these Rules, if, like all other rules, they apply to pending cases, he can clean up his mess, or he is very hopeful of cleaning it up, in short order.

THE CHAIRMAN: If we assure him that if we get his draft in the very near future, we will deal with it in time so that the Court will have an opportunity to present it to Congress on January 1st, that is all he can ask, because that

is all we can do, anyway.

MR. TOLMAN: So it can be presented. The results could be presented to the Court and our amendments could be presented to the Court in October when they reconvene, and the Lands Division has definitely come to the conclusion that the date when all of these amendments go into effect could be advanced by a joint resolution of Congress.

MR. HAMMOND: How about the matter which Judge Donworth mentioned last night when we were talking? He thinks, I believe, that even after we are through with the condemnation rules and after the court has looked at them, they ought to go to the bar, like the rest of our Rules.

THE CHAIRMAN: I think he is right.

MR. TOLMAN: But when will our Rules go to the bar?

THE CHAIRMAN: There is a problem there. The Court is going to adjourn, I suppose, the first week in June. The Reporter has the job of making the final draft of these proposed amendments, plus his notes, which are as important to put up to the Court as the rest of it. Then this Committee has to look at it again. We can't have it just put into the Court without having these various proposals in black and white again. We are not going to be able, of course, to receive and consider the Reporter's next report and the details in it until after the Supreme Court has adjourned. As soon as we get them from the Reporter, I shall communicate with you, and I hope that

we can have a meeting in June, for instance--the latter part of June or the early part--if he can get his work done in two or three weeks. We hold a meeting, say, in June, and there we say these Rules are all right tentatively for distribution to the bar with the notes. Then I go to the Chief Justice (or hunt him up wherever he is) and say that we should like to have permission of the Court to print and disseminate these Rules to the bench and bar, not as your Rules but as our tentative draft, the way we did before. I don't know just what the Chief will do about getting that consent. He may have to distribute copies to the judges around at their vacation points and ask, "Are you willing to have these at least printed and handed out?" If he can't do that, we can't even get them printed and distributed, and it puts an end to the idea of having them presented in Congress in January, because there is no use of distributing them unless we give the bar two or three months to consider them and to come back with some resolutions. I hope that the Court will be able to give us permission during the early summer to print them and distribute them. The lawyers will be out fishing and one thing and another, and we may not get their suggestions in until maybe late in October, and we shall have to move pretty fast to get the final draft out for submission to the Court. They have to have about a month or six weeks to decide whether they will promulgate them and lay them before Congress January 1st. That is the situation, as

far as I can spell it out.

SENATOR PEPPER: Mr. Chairman, wouldn't it be in line with what Major Tolman says is the hope of the Department if we were to reply to this communication by saying that we were proposing to give consideration to this matter and to embody our recommendations in our forthcoming report to the Court? It seems to me that is proper, and that is all we need to say, isn't it, Major?

MR. TOLMAN: I think it is, yes.

SENATOR PEPPER: We make it clear then that we are going to act.

MR. TOLMAN: I think it would be unfortunate to mention the date of January 1st, because they had hope of an earlier date.

SENATOR PEPPER: Don't say anything about it, but just say that we were proposing to give careful consideration to this matter and to embody our recommendations in our forthcoming report to the Court.

JUDGE DONWORTH: You mean our forthcoming tentative report.

SENATOR PEPPER: It is a report that we can call a tentative report, but our forthcoming report is a report that we expect to make in advance of our request to the Court for leave to disseminate the material for the criticism of the bench and bar.

THE CHAIRMAN: We can assure him that we are not going to leave his condemnation rule behind.

SENATOR PEPPER: That is it.

THE CHAIRMAN: That if he gets it in pretty promptly, we will see to it that it goes along as quickly as our other proposals do.

SENATOR PEPPER: That is it.

THE CHAIRMAN: Say nothing about the quickness that we are going to get the other work done.

JUDGE CLARK: May I make this suggestion? It seems to me it would be just a little bit unfortunate to suggest that he should be getting his rule in. The rule is really before us, and I think really great progress has been made. I have been on the subcommittee, and I have the draft here. I don't believe that we are very far apart as to the form. I don't really think it is quite fair to suggest the responsibility is up to him now. I think it is rather mutual. We are getting along pretty well. Here is a draft that I find pretty good, and therefore it would seem to me not to--

THE CHAIRMAN (Interposing): Well, I will soften that up.

JUDGE CLARK: Yes.

THE CHAIRMAN: What I had in mind is that the Department has had more than a year now after we rejected the original draft, to do something, and if they hadn't been prodded

pretty hard by our subcommittee, we wouldn't have had anything yet.

JUDGE CLARK: I think that is all true, but they have been swinging into high speed now; they have done pretty well, and I wouldn't run salt in the wound, so to speak.

THE CHAIRMAN: I will soften that.

MR. HOLTZOFF: May I say a word about that matter, Mr. Chairman?

It had been the hope of the Department, in view of the fact that there is a great deal of urgency to expedite condemnation proceedings (of which there are many thousands all over the country, arising largely out of war activities), that possibly this Committee could submit the condemnation rule in advance of its general report to the Court, and then, if the Court approved the rules, we could possibly secure special legislation to make them effective immediately, without going through the long process of submission required by the 1934 Act.

It is my understanding that the Lands Division and your subcommittee are in accord now. There may be some differences of phraseology, and on those I am quite sure the Lands Division will yield to the gentlemen of your subcommittee.

There is an urgency, because there are thousands of condemnations proceedings pending. They are subject to the Conformity Act, the forty-eight states having varying

procedures and some states having a number of different procedures for different kinds of proceedings. That is the situation so far as the Department is concerned.

THE CHAIRMAN: You wouldn't expect to apply to Congress for a joint resolution to adopt them. You would understand, of course, that the Court would have the rule submitted and approved, and then it might be up to the Congress, if you get legislation, to allow the effective date to be advanced. You are not proposing just to get a statute enacted, are you?

MR. HOLTZOFF: Our thought was that if the Court adopted and promulgated the condemnation rules, then with the Court's permission we could apply to the Congress to provide, notwithstanding the provisions of the Act of 1934, that these rules shall become effective immediately.

JUDGE DOBIE: You do want a special statute from Congress, then.

MR. HOLTZOFF: Yes, we do; otherwise these rules couldn't take effect until the close of the session of the Congress beginning January 1, 1944, which would completely defeat our purposes. We believe that if the Court adopted the rule and had no objection to our applying for such legislation, we could probably secure it.

THE CHAIRMAN: You would want the Court to promulgate the rule before January 1, to make an order promulgating them and ordering that they be laid before Congress January 1st.

Then you could step in in November and have the existing legislation changed so they would become operative sooner. Is that it?

MR. HOLTZOFF: Precisely. We will have to request the change in the existing legislation by the passage of a special bill or special joint resolution applying to these particular rules, to the effect that notwithstanding the general legislation, these rules shall become effective immediately. That was the thought we had in mind, if that was agreeable to the Committee and to the Court.

THE CHAIRMAN: We will write the Attorney General and state that we obviously couldn't consider them at this meeting, that we have never seen them (and we can't do it very well unless we have had time to study them), that we have our hands full with these other problems here, but that we will consider them at our next meeting, which we expect to hold very soon, and assure him that then they will be given consideration and put in such shape that they can be reported to the Court in full. You can iron out the rest of it in the Department with respect to the resolutions and one thing and another.

MR. HOLTZOFF: Thank you very much.

... The meeting adjourned at 6:30 p. m. ...
