ADVISORY COMMITTEE ON

FEDERAL RULES OF CIVIL PROCEDURE

Monday, May 18, 1953

West Conference Room,
Supreme Court of the United States Building,
Washington, D. C.

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MONDAY MORNING SESSION

May 18, 1953

The meeting of the Advisory Committee on Federal Rules of Civil Procedure convened at 9:55 o'clock in the West Conference Room, Supreme Court of the United States Building, Washington, D. C., William D. Mitchell, Chairman of the Committee, presiding.

... The following members were present:

William D. Mitchell, Chairman
George Wharton Pepper, Vice Chairman *
Charles E. Clark, Reporter
Leland L. Tolman, Secretary
Armistead M. Dobie
Robert G. Dodge
Sam M. Driver
Monte M. Lemann
Scott M. Loftin
James Wm. Moore
Edmund M. Morgan
Maynard E. Pirsig
John Carlisle Pryor
Edson R. Sunderland

... Also present:

Charles Alan Wright,
Assistant to the Reporter

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* Present Tuesday, May 19, only.

CHAIRMAN MITCHELL: Gentlemen, I was waiting for Monte Lemann, but we have not heard from him so we will go ahead.

Since our last meeting Leland L. Tolman, of the Administrative Office of the United States Courts, was appointed a member of the Advisory Committee. The Senior Tolman was for many years the Secretary of this organization. We have to have a target for people to shoot at, for people who have letters to write. I am wondering how you feel about asking Mr. Tolman to serve officially as Secretary of the Advisory Committee.

JUDGE CLARK: Mr. Chairman, he has done it actually for a good many years now, at least ever since his uncle died and possibly even before. I think if any title can be given him, we should, because he does the work.

CHAIRMAN MITCHELL: I take it you move, then, that he be made officially the Secretary of the Advisory Committee.

JUDGE CLARK: I would so move.

CHAIRMAN MITCHELL: Is there any objection to that? (No response) If not, it is so ordered.

JUDGE DOBIE: Don't we usually send word to the Chief Justice that we are here?

CHAIRMAN MITCHELL: We don't send word to him. He knows we are here.

JUDGE DOBIE: That is all right, then.

CHAIRMAN MITCHELL: I am wondering if the committee

wants to adjourn at twelve and go in to hear the Supreme Court deliver opinions. That is a matter for you to decide. Of course, our time is precious. When I asked the Chief Justice for money or appropriation, I tried to keep it down as cheaply as possible because we are all troubled about money and appropriations, and I asked for money for just two meetings on the theory that we would go through these rules, one by one, at this meeting and decide whether or not we wanted to make a change in them; and if so, generally what; and then have the Reporter come back to the second meeting with a final draft, and spend enough time then to settle on final action, and that would be enough. If we don't follow that course, we may find that the two meetings have not finished our work, and then I would have the embarrassing job of going back to the Chief Justice and saying we have to have more cash. That would have been easier to do the first time than the second. The Appropriations Committee naturally is trying to conserve public funds.

If you have no objection, we will take up the rules one by one, and hear the Reporter on them and discuss them, and try to reach a conclusion as we go along as to each.

There is one court far out on the Pacific Coast which wants to change the statement of the contents of the complaint, to go back to the old code expression of the facts constituting a cause of action. Judge Hall from that court is here, and I think possibly one other member of that movement will be here. They have asked the right to come before the committee, which

they have. It has been suggested that at two o'clock tomorrow afternoon we interrupt wherever we are and hear the Bar Association people on that subject. Is that agreeable? We will let it go at that.

Has anybody anything to suggest about our procedure?

We have a report from the Reporter reviewing these rules, one by one. I suggest that we take up his report of April 29, covering the first 25 rules.

JUDGE CLARK: As I think I have indicated, I tried in the main summary to cover everything that I thought would be of interest or of information to the committee. Thereafter, and just recently, I drew up suggested amendments covering the matters that I thought were worth considering for change.

I don't know just how you want to take this. I hope you have all studied the summary. Having given you the information as I saw it, then I would not bring up for discussion substantially anything more than I have drawn amendments on.

On the other hand, it ought to be all before you. I don't want to shut off any discussion on other matters. I don't know just how we should take it up. You might ask if the committee has anything on the other sections. As I say, I shall only definitely make the suggestions substantially as covered by my latest draft with amendments, the first one of which is in Rule 4.

CHAIRMAN MITCHELL: On Rules 1 and 2, you have this discussion of the admiralty rules. There is a movement on among

the admiralty bar to try to adapt the civil rules to the admiralty practice.

My feeling about that is that we ought not to take any time on it, because the statute under which we were appointed at that time gave the Supreme Court no power to promulgate those rules, as it did the civil rules, and there isn't an admiralty lawyer that I know of on the committee. It seems to me if there is going to be a general movement to apply our civil rules to the admiralty practice, the Court ought to appoint a committee on admiralty practice just as it did criminal practice. It is futile for us to do anything more than say that, if they want to know anything about.

JUDGE CLARK: I quite agree with that. I wanted to do two things. One of them was to bring you up with the movement, which is fairly important and very interesting. I think there is no doubt that the Supreme Court when it gets around to it will appoint an admiralty committee, and that, in fact, is what I suggested in the consultations I have had with the admiralty people. The admiralty people have gone quite a ways in really drafting rules themselves, which now for the first time during this last year do take over a large proportion of the civil rules and really base the main features of their practice upon it.

JUDGE DOBIE: Could I ask a question there? Is it your idea that that admiralty committee would draw these rules as separate rules applicable only to admiralty, or that they

will just try to change our rules so as to make them applicable, or would that be for the committee to decide?

JUDGE CLARK: I think it would be for the committee to decide. I may add that I think in my capacity as a private citizen -- and I hope I have some capacity still -- I shall certainly want strongly to urge such a committee to take over the civil rules, yes, because I am quite convinced that that is the easiest and best way to do. There will have to be a few more rules, a rule on the limitation of liability, that procedure, and a rule covering the service of process. I really don't believe there is very much more of importance.

I believe the simplest way all around would be to do that. That is a development that I think we don't need push. It has gone very well lately. There was a great objection to that from the old admiralty lawyers up until -- the first sign I saw of modification was last spring when the younger group took hold, and have gone quite a ways. They have done pretty well. However, they still are treating the rules a good deal as the property of the Maritime Law Association. I think that is something that the Supreme Court will have to take care of and should take care of by appointing a committee.

CHAIRMAN MITCHELL: You mentioned this morning to me the fact that the admiralty lawyers are proposing admiralty rules which would apply a good many of these Rules of Civil Procedure; but in so doing they are criticizing, as applied to admiralty, some of the civil rules. I thought maybe if they

substantiated their criticism in proposing admiralty rules, we ought to take a hand in that and see whether we wanted to recognize their criticism of the civil rules and consider them.

Hadn't we better let that rest until we see what the admiralty lawyers are going to do? They may get out a preliminary draft, and in accepting the civil rules in whole or in part they may make alterations.

JUDGE DOBIE: We haven't an admiralty lawyer on this committee, have we?

CHAIRMAN MITCHELL: No, not a one that I know of.

JUDGE DOBIE. Of course, Judge Clark up in New York has had quite a wide experience, and we have a great deal of it in our court, of course, mostly from Baltimore and Norfolk. I don't know why, except that I come from Norfolk -- as I say, I am a seafaring man -- I think I have written more admiralty opinions than Soper and Parker, and I do like them. As a matter of fact, General, I think when you go into it, you will find the differences are not nearly so wide as those people would have you think. They like their terminology, and ordinarily in an admiralty case if you know the rules of road and a few other things, there is not nearly so much difference as is commonly thought.

Don't you think that is true, Charley?

JUDGE CLARK: Yes, that is true. I would like to speak on this a moment, if I may.

My second suggestion was that we ought to consider

certain specific rules that might be thought perhaps a little under attack from that end. I hope you won't, in advance, without looking at what I have suggested, decide you won't, because it seems to me you hardly can consider the suggested changes without taking them into consideration.

For example, we have a long, carefully prepared letter by an admiralty lawyer, Mr. Fiddler, who raises these questions just as any other lawyer would about the civil rules. Since they come from an admiralty lawyer we can't reject those.

There aren't so many of those. They will come up as we go along. If we decide not to make any changes, all right. But I don't think that we ought now to say that no criticism will be accepted when it is discovered to come from the admiralty bar.

CHAIRMAN MITCHELL: I didn't mean that exactly, but I doubt very much whether we ought to spend much time on criticisms of the civil rules from admiralty sources unless we find out that the admiralty committee, when they come into existence, are going to pursue that. If we find when they commence to draft stuff that they are hitting our rules for reasons that ought to affect us as well as them, we can deal with it, but it seems to me --

JUDGE DOBIE: I think if they had a separate committee the admiralty bar would be much more apt to get back of it and push it through. Don't you think so? I think a good many of them probably would take the attitude, as a practical question, that this committee is not an admiralty committee and that we

don't know admiralty.

CHAIRMAN MITCHELL: That is true. I am speaking of a little different thing. Suppose you have an admiralty committee and they look over our rules to see which rules they want to accept to apply to admiralty, and they find that there is one of our rules they don't like, that there has been some criticism of it which, if sound, applies to our rules in civil cases as well as in admiralty cases. That is his point.

JUDGE CLARK: That is my point.

CHAIRMAN MITCHELL: The question we are discussing right now is whether we want to spend the time at this meeting in considering prospective criticisms of the civil rules which the admiralty committee may get up as a result of having such a committee. It seems to me that we would get faster, the mostest and furthest, as the southern gentleman said, if we waited until the admiralty committee made a draft in which they refused to accept one of our rules.

It is a rather hazy subject to go into under the pressure that we are under right now. I would like to see the admiralty business dropped until they get an advisory committee and get something concrete for us to work on. If they come up then and say, "We don't like Civil Rule So-and-So," and we think their criticism of the civil rule is something we ought to think about as applied to civil cases, then we can deal with it, but we haven't anything concrete to go on now.

JUDGE CLARK: Might I just add this: We of course do

have a draft sponsored by the Maritime Law Association, which is the one that they have worked on, and they have it in a good deal of detail. The final form, the last one, is the little printed pamphlet that I sent you of the Maritime Law Association. At the meeting on May 8 of the Maritime Law Association, it was approved in principle and sent to all their members with a request for criticisms. They are going to have a special meeting in June and pass upon that draft finally.

I think it is the considered position of a great many of the admiralty men that the Supreme Court ought to take that draft without appointing a committee. There is a little backfire that some of us who represent the judicial administration have made to remind them that the Supreme Court ought to appoint an advisory committee.

It is possible that the Supreme Court, should it listen to the representations of the Law Association, might adopt that draft out of hand. It was partly because of that that I wanted to be a little forewarned.

CHAIRMAN MITCHELL: Suppose they do, and suppose they alter some of our rules to apply to admiralty. Still, after they have done that, at our next meeting we can consider whether the objection raised to our rules is something that we ought to take note of and apply their points to our rules as applied to civil cases. It seems to me --

DEAN MORGAN: Mr. Chairman, I think the Reporter in his suggested amendments has touched practically all of the

suggestions which the admiralty lawyers make to our rules as our rules, rather than as to their rules. So I think if we pursued his plan we would hit what you are thinking about now, and not touch it on the basis of applicability to admiralty.

It seemed to me when I read all their stuff there that it was just imperative that they should make their own rules first, and then take only these suggestions. For example, they have a suggestion that process should run throughout the United States. They have some other suggestions that might be as applicable for us as for anybody else. I think the Reporter has noted them in those things which he says he is willing to recommend with more or less enthusiasm or lack of enthusiasm, I don't know which.

CHAIRMAN MITCHELL: You mean that we go ahead, and if he has a point of that kind, let him bring it up?

DEAN MORGAN: Exactly. It seems to me we would get along faster if we did that.

CHAIRMAN MITCHELL: If you are talking about extending jurisdiction throughout the United States, from my point of view that is completely out of the window before we start. The idea that Congress will ever consent to extending process in civil actions nationwide so the District Court of New York can serve a summons on a fellow in California and make him come here, just isn't in the cards as a practical matter. We stretched our rules to allow service of process throughout the State, and I have always doubted the validity of that. I thought it was a question

of jurisdiction. In my opinion, Congress would never for one minute allow the law to be changed so that a federal court could ignore State boundaries and drag people all over the country. They have overdone that already. The Department of Justice has a way in a conspiracy suit of picking out a jurisdiction where they think they have a good judge, and if some fellow, an alleged conspirator, wrote a letter in that district.

DEAN MORGAN: I know.

CHAIRMAN MITCHELL: I never used to tolerate that in the Department when I was there, but it has become common practice.

Let's go ahead, then.

DEAN PIRSIG: There is one point I would like to mention which occurred to me in following Judge Dobie's point. I gather from what he said that many of these questions of procedure that occur in admiralty are pretty much the same as they are in civil actions, and if a special separate committee on admiralty is appointed, undoubtedly they would be men in the admiralty field.

I think that would invite a certain separate consideration of identical problems with different solutions, rather than perpetuate what I would like to see avoided, the separate approach from an admiralty standpoint when the problem is the same and the rules ought to be the same. The mechanics for getting that liaison between this committee and whatever new committee is appointed, I don't know. It seems to me we ought not to overlook

that angle of it.

JUDGE CLARK: You are quite right, Dean Pirsig. That is what I have seen right along. If I may say so, I feel like the farmer when they asked him if he believed in baptism, and he said, "Believe in it? Hell, I have seen it." There isn't any question that we apply these civil rules right along.

The admiralty lawyers have been asking, "Can we do thus and so?" We do it in case after case. I had one of my assistants working on that because sometime I thought I would do an article on it. We have some 200 cases where the courts, without any thought at all, applied the civil rules in admiralty. They do it on various grounds. Sometimes they do it because they say the civil rule is so good. Sometimes they do it by a kind of comity. Sometimes they do it by enmity. Sometimes they do it without giving a damn.

The civil rules are substantially controlling the day-by-day activities in admiralty at the present time.

Specifically, I should hope the Supreme Court, which must know this because it is perfectly apparent to anybody who follows admiralty cases, would provide for some liaison. I don't know whether we can formally suggest anything of that kind or not. If the Supreme Court doesn't go into it, if the Supreme Court, for example, should appoint all admiralty lawyers to a committee, I am afraid the result would not be too desirable. But I think the Supreme Court knows about this, as a matter of fact.

CHAIRMAN MITCHELL: After the admiralty committee, if such is formed, gets up some rules and they conflict with some of ours, and we think they ought to be uniform, it will be time then to step in and say we think our rule is all right or all wrong and act accordingly. However, I think we have got to the point where we will allow the Reporter to bring up any suggested change in our rules that he thinks is on behalf of the admiralty fellows, and we will decide whether we like our rule or whether their criticism of it is just.

Charley, Rule 1. Have we anything on that to act on this morning?

JUDGE CLARK: I have nothing to suggest.

CHAIRMAN MITCHELL: Rule 2, the same way?

JUDGE CLARK: The same way. The same on Rule 3.

CHAIRMAN MITCHELL: What is Rule 4?

JUDGE CLARK: Do you have before you my "Reporter's Draft of Several Amendments," May 11? My first suggestion was on 4(d)(4), a suggestion which came from Mr. Perlman, the Solicitor General, then as Acting Attorney General.

CHAIRMAN MITCHELL: You mean as to the matter of service on the Attorney General?

JUDGE CLARK: That is it, yes.

CHAIRMAN MITCHELL: Does Mr. Perlman's request as to the manner of service on the Attorney General of the United States meet with the endorsement of the present Administration? What is the use of our doing something that the Attorney General

in office is vitally interested in, without knowing whether he approves or not? What about that?

JUDGE CLARK: Of course, I haven't done anything about that, and I should certainly say that we might well check to find out whether the present Attorney General did approve.

On the other hand, I have found that a good many of these recommendations come from men underneath, and I think the chances are that on this sort of thing there is likely not to be a great difference in policy.

CHAIRMAN MITCHELL: Suppose we consider the proposal and then adopt it tentatively, if we wish to adopt it, and then find out afterwards whether they like it or not.

MR. LEMANN: I wonder how important it is. Some subordinate may have run into some case and, as you say, he may have said, "I will write a letter." This letter is a year old. He may have had one instance. I just wonder, if he has the proper arrangements in his office to handle mail, why he doesn't just route the mail notice. The document has to be served on the United States Attorney. The summons has to be served on the local United States Attorney under the present rules, and then a copy comes here by mail.

I am wondering what the Attorney General would do if we adopted this change in the rules. Would he designate somebody in his office a special staff member who would receive all these copies of summons? Would that be a better check for him than the check he has through the U. S. Attorney?

JUDGE CLARK: This came in, I might say, with the utmost formality. It was sent in the name of the Department to Mr. Mitchell, with a copy to Leland. I sent that material down. I mailed it myself. Has it come in yet this morning?

MR. TOLMAN: No, it hasn't come in yet.

JUDGE CLARK: It was a very formal document, as you will remember.

MR. TOLMAN: Yes, I remember.

JUDGE CLARK: It was distributed to the committee at that time. It was a considered plan. In general it seems that when a copy is simply mailed to the Attorney General, it is a long time before it gets routed to any particular place. This is to set up a system whereby you would channel or channelize all process coming to the Department to one person who was designated to handle it. That would give them a head start.

As you know, they have always complained that the sixty days that we allow them wasn't enough.

MR. LEMANN: Am I right that this proposed rule would not require you to follow the second method; that you could continue to send it by registered mail?

Take my situation in New Orleans. I suppose it is clear that I should not have to keep up with what is on file in the United States District Court for the District of Columbia.

As I see this quickly, I wouldn't be required to do it. I could continue to mail. If I can continue to mail it, I would not think it would meet his difficulties very much, because if it

only meets the cases that come up in the District of Columbia, he is right here for those cases anyhow and can get in touch with the United States District Attorney for this district.

DEAN MORGAN: What was the cause of this? Do you have the grapevine that is back of this? Why do they want this particular thing? Is it a part of the notion that they were channeling cases without letting Mr. McGranery or somebody else see them?

JUDGE CLARK: I wouldn't know if there is a grapevine in the Department of Justice.

DEAN MORGAN: As Mr. Lemann says, it can really apply only to the District of Columbia. Nobody is going to tote those things up here from the South. That is certain.

JUDGE CLARK: It doesn't need to apply to the District of Columbia if they know who the man is, I suppose. It is monthly published that So-and-So is the man who has been designated. It can be done in other cases.

Mr. Perlman, of course, says that the chief reason is to expedite the service of process in cases originating in the District of Columbia, and he says: "The Post Office substation nearest to the office of the United States Marshal for the District of Columbia is located at Ninth Street and Pennsylvania Avenue, Northwest, and across the intersection from the Department of Justice. Delivery of process to the person designated by the Attorney General would eliminate delay resulting from the mailing process as well as the expense of registration."

MR. LEMANN: The expense of registration is about 20 cents, I think.

JUDGE DOBIE: That is picayune as an expense.

MR. LEMANN: I shouldn't think anybody would bother with it if all he has to do is mail it, which is all he has to do now. Why should he take the trouble of having it delivered in person if all he has to do is mail it?

CHAIRMAN MITCHELL: This is in the alternative. They abolish the mailing.

MR. LEMANN: No, they don't, as I read it.

CHAIRMAN MITCHELL: It says "or."

MR. LEMANN: Yes, either send it or deliver it.

CHAIRMAN MITCHELL: He can do it that way or the old way.

MR. LEMANN: That is right, and I say practically 99 per cent of the lawyers will stick to the old way anyhow, because that is very easy. Twenty-five cents to register it doesn't bother you much if you are bringing a suit against the United States. Why go to the trouble of delivering it?

If he really had a point, Mr. Mitchell, I should think he would say you must do it, but he realizes that would not be a very attractive suggestion, so he still permits it to be done the old way.

I am simply saying I think everybody will do it the old way. Generally, I would say we ought not to make any changes that there is not some very good reason to make.

MR. DODGE: The Acting Attorney General wrote that there was delay in the delivery of registered mail in Washington, and that this proposed change would be utilized only by lawyers in the District of Columbia, probably, in order to get rid of the delay in registered mail because of the location of post offices, and so forth.

MR. LEMANN: Why doesn't he take it up with the Postmaster General to see if he can improve the service? As I recall it, all you have to do is mail it. Still all you would have to do is mail it. Why should the plaintiff's lawyer worry about delay? If the Attorney General is worrying about delay, why not take it up with the Post Office and see if he can cut out the delay. Maybe this happened in one case, Mr. Chairman.

CHAIRMAN MITCHELL: I can't see how a delay in the delivery of a registered letter can exceed more than a day or two, and what difference does it make?

MR. DODGE: The only reason for giving it any weight is that the recommendation comes from the Attorney General of the United States.

CHAIRMAN MITCHELL: The Acting Attorney General for the time being.

MR. DODGE: It seems to be a very small matter.

CHAIRMAN MITCHELL: It is too bad to monkey with a fundamental thing like this, anyway. It causes confusion and may cause trouble.

What is your pleasure with this? Shall we pass over it?

JUDGE DOBIE: I think it is inconsequential. I don't believe we should amend the rules for every little minor detail, General, unless it is something quite important. It always causes some confusion, however clear we are.

CHAIRMAN MITCHELL: Also, every time you change a rule like that, you have to publish the rules and get out a new edition.

JUDGE DOBIE: That is right.

CHAIRMAN MITCHELL: The change is not effective unless you do that. That is a thing you have to consider. The more alterations you make, the more trouble you make for everybody.

JUDGE DOBIE: It seems to me you are using a 16-inch cannon to shoot at a flea.

CHAIRMAN MITCHELL: I understand you are moving to let the rule continue as it is.

JUDGE DOBIE: Yes.

CHAIRMAN MITCHELL: Is it the sense of the meeting that we pass over that subject?

... General assent ...

CHAIRMAN MITCHELL: What is next?

JUDGE CLARK: I have two or three that concern that same general matter. Some of them are small. I suppose we will evolve policy as we go along as to whether we will take corrections that are small, or not.

For example, you will notice in Rule 4(e), which I trust you have before you

"Whenever a statute of the United States or an order of court provides for service of a summons," and so forth.

This is for other service. Of course, our new condemnation rule contains provisions on that. If we were going to be quite accurate, I suppose we would say:

"Whenever a statute of the United States or Rule 71A(d) of these rules or an order of court" and so forth.

CHAIRMAN MITCHELL: That is Rule 4(e), is it?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: "Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order."

What would have to be changed in that to conform to Rule 71?

JUDGE CLARK: Add after the words "statute of the United States": "or Rule 71A(d) of these rules".

MR. DODGE: That gives some meaning to the word "rule" in the last line of the section as it now stands.

JUDGE CLARK: Yes; that is correct.

JUDGE DOBIE: You would think the present rule includes it, but that would make it clearer, is that right?

JUDGE CLARK: That is correct. I don't believe there is any legal question about it, because Rule 71A(d) does provide

for that kind of service.

CHAIRMAN MITCHELL: By necessary implication, it operates to amend this subdivision to mean that without anything further being done about it.

JUDGE CLARK: Probably it would. Of course, if we were to recommend various rules now, query: whether we couldn't correct even small mistakes as we go along. If we are not going to do anything, I mean if we decide by not making any recommendation --

MR. LEMANN: Could we classify these suggestions into really important suggestions and stylistic suggestions, and then make up our minds finally how far we are going? Could we group them so this sort of thing, which is rather a small point but a stylistically good one, would be adopted if we concluded to go in that direction after we see all of them?

Then, on the other hand, if we decide that none of them are of great importance, we could put them all aside and have a sort of general policy about it.

CHAIRMAN MITCHELL: Your idea would be that in that case we now adopt the amendment, and then take a look at the whole business at the next meeting and take that type of amendment and decide whether we will wipe them out or include them?

MR. LEMANN: A sort of conditional or alternative approval. If we go into stylistic changes, this is a good one to include.

CHAIRMAN MITCHELL: I don't think we can decide in

advance, now.

MR. DODGE: This is a little more than a matter of style, because in the last line there is a reference to:

"prescribed by the statute, rule, or order."

and the prior references in the paragraph are only to statute or order. What does that word "rule" mean as it stands now?

MR. LEMANN: You don't think a court would have much real trouble in applying it?

MR. DODGE: It is not a matter of style. It is a slight defect in the rule.

CHAIRMAN MITCHELL: Suppose we adopt the alteration, with the reservation that we will consider a whole group of such amendments at the next meeting that we have adopted, and decide then whether we will go ahead with them or not. We are not in a good position to do that in advance.

MR. DODGE: I move the adoption of the Reporter's suggestion.

CHAIRMAN MITCHELL: Could you just dictate the alteration?

JUDGE CLARK: It is to add after the words "statute of the United States" in subdivision (e) of Rule 4, these words: "or Rule 71A(d) of these rules".

CHAIRMAN MITCHELL: Why do we have to say Rule 71? There may be some other case where it comes up.

PROFESSOR MOORE: Just use the word "rule."

JUDGE DOBIE: That would be general and would

incorporate all rules. Somebody might raise the objection when you say "statute or rule" that that rules out the other rules, although the word "rule" appears in the last line.

Would it be all right to just say "rule" there, Charley, instead of specifying 71A(d)?

JUDGE CLARK: I don't really think it does make any difference. Of course, I take Professor Moore as my authority that this is the only single place. Professor Moore points out that this is slightly inaccurate because there is a reference to this particular place.

MR. LEMANN: If we had no other changes to make in this rule, would we make this one alone?

MR. DODGE: Oh, no.

MR. LEMANN: That is the only point of my comment to see how many we have like this, not to vote finally but to approve it conditionally now.

MR. DODGE: There is one other possible change in this section, and that is to make applicable the statutes of the states which authorize an attachment of property of a non-resident with notice served upon him in another state. It is a question whether our rules, either this or the later rule, prevent the use of such a statute in the federal courts.

JUDGE CLARK: That is quite right, Mr. Dodge. I was going to bring that up.

MR. LEMANN: This present rule has been settled a long time that you can not get jurisdiction in a federal court

by foreign attachment apart from admiralty. I can't get into federal court, as I understand it, from time immemorial, by the process of attachment. This would be a rather far-reaching change.

It has always been the law, I believe, and this would be a rather far-reaching change. Perhaps it ought to be made. There is no question of our power to make it. I guess there isn't, in view of some of the other things we have done.

JUDGE CLARK: Would you look at my summary, page 5, and you will find some reference to that. It is argued that it would not be as much of a change as has been assumed in the past. It can be done by statute, and the question has been raised whether the rules taking the place of statutes may not have gone a long ways or have even achieved it already.

I have referred to this, and I said there would be a good deal to this suggestion. But let me give you what might be the form of this if you were to add it. This would be a draft of that kind. This would go at the end of (e):

"Subject to the provisions of Rule 64, this rule shall also be applicable whenever the action might have been brought in a court of the state in which the district court is held, and the law of such state allows for such service."

If Mr. Justice Frankfurter is right as in the Guaranty Trust case that in diversity cases the federal courts are but another additional court of the state, perhaps they ought to be made completely so and not partially.

JUDGE DOBIE: I don't think you can take that literally. In some sense it is true, and in some it isn't. It is a glittering generality that won't always hold water, Charley, as you perfectly well know. In many instances they are not courts of the state.

MR. LEMANN: Of course, you can say that Rule 64 sort of takes us back to conformity in attachment, and this would be consistent with that idea.

CHAIRMAN MITCHELL: The present proposal is that Rule 4(e) be altered so that the first sentence should read:

"Whenever a statute of the United States or Rule 71A(d) of these rules or an order of court * * *".

What is your pleasure? Do you wish to adopt that or not? It is proposed that it be adopted, as I understand it, with the mental reservation that at our final meeting we may obliterate it.

JUDGE DOBIE: I move that that be done.

CHAIRMAN MITCHELL: All in favor of that say "aye"; contrary. It is so ordered. That is agreed to.

Now, Chalrey, go on.

JUDGE CLARK: The present suggestion is for further addition at the end of (e) on the point that Mr. Dodge brought up.

MR. DODGE: I thought the Chairman's suggestion covered that. Didn't you insert the words "or of a state", the words "Whenever a statute of the United States or of a state"?

CHAIRMAN MITCHELL: No, I didn't insert that.

MR. DODGE: Then I misunderstood.

CHAIRMAN MITCHELL: I read what the Reporter had in his summary.

MR. DODGE: Why wouldn't that cover it?

JUDGE CLARK: Perhaps it might.

CHAIRMAN MITCHELL: I would like to know just what we are driving at.

MR. DODGE: The point, Mr. Chairman, is that the Supreme Court of the United States long ago held that you could not serve upon a non-resident owner in the federal court with respect to an attachment of his property made in the state. It has been commonly believed that our Rule 64 changed that law and made it now possible. That hasn't been decided. The Supreme Court has held since that rule was adopted that it was applicable where the attachment had been made in the state court before removal of the case to a federal court, but it apparently hasn't been decided that that very convenient practice generally sanctioned in Louisiana, Massachusetts, and I guess almost everywhere, definitely is applicable in virtue of the fact that this rule applies only to a statute of the United States.

MR. LEMANN: If the change that you suggest is adopted, perhaps you would go beyond the attachment cases. I am wondering if putting in "state statutes" would not take it beyond the cases that we are thinking about. I suppose the amendment suggested here would also take you just as far. This is the

Fiddler amendment here.

MR. DODGE: Yes.

MR. LEMANN: Charley, if we decide that this ought to be done, did you approve his wording or did you have another wording?

JUDGE CLARK: Let me say, Mr. Dodge was suggesting that perhaps we could accomplish the same result by putting in the word "state" in this place.

MR. LEMANN: Yes.

JUDGE CLARK: I should think it would be wiser to spell it out, because there has been question raised about this. It is an important thing, and I should think that many a court might say, as they seem to be prone to say, that no change was effected because the rule-makers could not have intended so important a change as this without making more of it. So while I think Mr. Dodge's suggestion textually might cover the problem, I think if we are going to do it, it would be wiser to put it in a separate sentence; to wave a flag, so to speak.

MR. DODGE: I would rather see it that way. I think it is a very important matter. If there is any doubt about that question now, it certainly ought to be resolved by these rules.

DEAN MORGAN: The C.C.A. has held that the old rule applied in some of the cases.

MR. DODGE: Rule 64 may cover it as it stands now.

DEAN MORGAN: But it hasn't been ruled that way, has it?

PROFESSOR MOORE: Just the opposite.

DEAN MORGAN: Every case I have seen held the other way.

MR. DODGE: I have seen cases holding the other way.

DEAN MORGAN: Holding that 64 didn't change the rule. There are a number of cases, aren't there, Bill?

PROFESSOR MOORE: Yes, in two or three circuits.

JUDGE DOBIE: As I understand the rule now, under the Big Vein case and the others, you can't proceed originally to get into court of the United States, but if an attachment has been had in state court and then it is removed, it then goes into the federal court with the attachment hanging onto it. Isn't that true, Charley?

JUDGE CLARK: That is correct, except that there has been the belief, argued in certain of the law reviews, that Rule 64 did actually change that.

JUDGE DOBIE: Your idea is that we ought to indicate whether or not it does?

JUDGE CLARK: Yes, and I don't see why we should not indicate that it does, because I agree with Mr. Dodge. It seems to be a very desirable thing. If it can be done in a state court, it also ought to be done in the federal courts in corresponding actions.

MR. DODGE: I would like to see the Reporter's language added at the end.

MR. TOLMAN: Was your language the same as that of the

Fiddler recommendation?

JUDGE CLARK: Yes, it is.

DEAN MORGAN: Yours is a little different, I think.

JUDGE CLARK: Yes. The suggestion which I gave you I suppose limited it to diversity cases, and that is the point I want to bring up. I will read you the two and see which you like.

"Subject to the provosions of Rule 64, this rule shall also be applicable whenever the action might have been brought in a court of the state" -- and that is the limiting part -- "in which the district court is held, and the law of such state allows for such service."

The Fiddler suggestion was broader and would apply to the federal question cases also:

"Subject to the provisions of Rule 64, this rule shall also be applicable whenever the law of the state in which the district court is held, existing at the time the remedy permitted by Rule 64 is sought, provides for such service."

... Mr. Pryor came in at this point ...

JUDGE CLARK: We are now on Rule 4(e), Mr. Pryor. If you can pick out this summary of mine and look at page 5, this is the suggestion whether we should add a provision to 4(e) covering the beginning of a suit in federal court by attachment, as done under state procedure.

I was pointing out two alternatives here. One is a provision which would adopt for the federal court the practice

allowed in the state court for any federal case. The other alternative was to limit it in effect to only diversity cases. I have no strong feeling either way. I think you can make a greater logical argument for the diversity cases because those are to be made comparable to the state court procedure.

MR. DODGE: The broader statement of it covers that.

JUDGE CLARK: The broader statement does cover it.

MR. LEMANN: What cases other than diversity would present the practical problem? What cases other than diversity would you want to institute by power of attachment?

JUDGE CLARK: I should suppose you might have the problem as easily in any of the federal question cases. We have a great deal of ordinary debt collection actions in the federal question cases. I would have to take each case and look up the special jurisdiction.

I was thinking of the Fair Labor Standards Act. That is often a wage collection case.

MR. DODGE: The rule might well be made general.

CHAIRMAN MITCHELL: Charley, you said on page 5.

JUDGE CLARK: On my page 1 of the draft of amendments I have referred to it only quite indirectly. I said there was much to be said.

MR. LEMANN: You haven't given us language.

JUDGE CLARK: You will have to look at my summary, page 5 of the summary.

MR. LEMANN: Yes, but that is Fiddler's language, as

I understand it, not yours. You haven't given us any language on this point. Am I right?

JUDGE CLARK: That is right. It came to me directly from Mr. Fiddler.

MR. LEMANN: The question is whether his language is the best language to accomplish that. It could be done by Mr. Dodge's suggestion, by adding the word "state." You say you would rather make it emphatic, even though it should be obvious. Mr. Dodge's suggestion would be very simple, to put in the word "state" after the words "United States" in line 2. Is that right?

DEAN MORGAN: Yes, but the point was made that you ought to make it more specific than that, and that this language on page 5 that Fiddler suggests is more specific.

MR. LEMANN: Yes, I understand, but I am wondering whether that is sufficient reason to reject Mr. Dodge's suggestion, because I would think putting in the word with reference to "state" would obviously achieve the result. Nobody could doubt it. They would ask, "Why did they put in the word 'state'?" What other reason would there be? Wouldn't that leap to the eye?

DEAN MORGAN: It might leap to the eye, but not to the mind of some circuit courts of appeals. That is what I am thinking.

MR. LEMANN: What does the Fourth Circuit judge think would leap to his mind?

PROFESSOR MOORE: It wouldn't leap to the mind if the committee didn't explain what that word meant.

MR. LEMANN: That is the reason we put it in, I would think, so even an appellate judge would understand why you did it.

PROFESSOR MOORE: I think without some sort of explanation there would be difficulty, perhaps, with just the insertion of the word "state."

MR. LEMANN: How does this Fiddler language strike you, offhand?

PROFESSOR MOORE: I am in general agreement with its purpose.

JUDGE DOBIE: Will you read yours again, Charley, and the difference from the Fiddler language?

MR. LEMANN: He hasn't anything on the subject.

JUDGE CLARK: Yes, I have one. I might say it was one that Professor Wright, my assistant, wrote, so I haven't really --

DEAN MORGAN: Don't we have a special rule about attachment, and so on? It seems to me they could make an argument that that rule was exclusive on the attachment, the quasi-in-rem proposition, if you just put in "state" here. I don't see any use, if we are going to make the change, in not making it in language that can't be mistaken.

JUDGE CLARK: I will give you the two provisions. The Fiddler one is on page 5 of my summary:

"Subject to the provisions of Rule 64, this rule shall also be applicable whenever the law of the state in which the district court is held, existing at the time the remedy permitted by Rule 64 is sought, provides for such service."

By the way, I am not at all sure that that "existing" clause is very necessary. I think that would be obvious anyway. I should almost think you could leave out that part between the two commas. That is only adornment, anyhow.

"Subject to the provisions of Rule 64, this rule shall also be applicable whenever the action might have been brought in a court of the state" -- that is the limiting phrase -- "in which the district court is held, and the law of such state allows for such service."

MR. DODGE: What is the difficulty about making it applicable even if the case had to be brought in the district court?

JUDGE CLARK: The difficulty, as I see it, is purely theoretical, but lawyers live by theory. The only difficulty that I see is this: It might be said that this is an extension by rule of a suit on a federal claim. It never has been done. Therefore, it might be considered as a new and perhaps unusual step.

In the case of diversity, I think that it is easier, because it has been steadily emphasized, and is now more than ever, that in diversity cases the federal court is only acting really as a sort of representative of the state in fostering

the state court right of action, and if it is it ought to do so as completely as the state court does.

MR. DODGE: We didn't make any such limitation in Rule 64, which seems to me probably to cover this point; but if there is doubt about it, I should think it ought to be made plain that Rule 64 is applicable as to any action in a federal court.

JUDGE CLARK: I don't object to that.

MR. DODGE: I move that that clause be added.

DEAN MORGAN: I second the motion.

JUDGE CLARK: Before you put the motion, what do you think of my query as to whether that little phrase "existing at the time the remedy . . . is sought" is necessary?

MR. DODGE: Leave it out.

JUDGE CLARK: Do you want to make your motion leaving that out, then?

MR. DODGE: Existing at the time.

CHAIRMAN MITCHELL: To get the record straight, Charley, will you dictate to the shorthand reporter here exactly what the alteration is, and in what rule?

JUDGE CLARK: I will in just a minute.

Do you want to leave that out now? Is that your motion, Mr. Dodge?

MR. DODGE: Yes.

JUDGE CLARK: This will be Mr. Dodge's motion, seconded by Mr. Morgan: that there be added to Rule 4(e) the

following sentence:

"Subject to the provisions of Rule 64, this rule shall also be applicable whenever the law of the state in which the district court is held provides for such service."

MR. DODGE: Yes. That is exactly right, I think.

MR. LEMANN: I wonder whether we should say "this paragraph" instead of "rule" in line 1. Reference to the rule would cover all the rule, I suppose, ir might do so.

CHAIRMAN MITCHELL: What is the question there?

MR. LEMANN: The question is whether the word "rule" should be changed to "paragraph" in the first line of the amendment.

CHAIRMAN MITCHELL: It should be limited to this subdivision (e). What about that?

JUDGE CLARK: I understand. I was trying to rmember what we had done elsewhere. I guess it is right, but I can't remember for the moment.

PROFESSOR MOORE: We use "subdivision of this rule."

JUDGE CLARK: All right.

CHAIRMAN MITCHELL: Now dictate that over again, will you please, so the reporter will have the record straight.

JUDGE CLARK: "Subject to the provisions of Rule 64, this subdivision of this rule shall also be applicable whenever the law of the state in which the district court is held provides for such service."

CHAIRMAN MITCHELL: Is that satisfactory? That is

agreed to.

JUDGE CLARK: I want to raise one question in this same general connection, but I suppose it ought to come more properly as to (d), the one just before. This is the suggestion made by Professor Moore, who suggests ambiguity in the phrase "agent authorized by law to receive service of process" in the final clause of Rule 4(d)(1). He argues it is not clear whether "law" includes (1) the common or general law, (2) statutes of the United States, and (3) state law, including states, or whether "law" refers only to (1) and (2). Moore argues that the intention was to refer only to federal law.

I don't know whether this is anything that we should do anything more about correcting or not. This now is at the end of 4(d)(1), service of process upon an individual. The whole provision is:

"or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process."

One suggestion I have is "authorized by appointment or by a statute of the United States or by the common law to receive service of process."

I don't know that I would necessarily say you should make a change here. I would like to have Professor Moore pass on it. There was a little ambiguity as to what the word "law" meant. Shall we try to clear it up or not?

PROFESSOR MOORE: I don't believe it has caused any

trouble because of subdivision (7), which permits service to be made in the manner prescribed in state law. While there is probably a little ambiguity, I don't believe that it has resulted in any trouble.

MR. LEMANN: I would say that "by law" is pretty general. I move we pass this.

MR. DODGE: Second the motion.

JUDGE CLARK: All right.

CHAIRMAN MITCHELL: No action is taken. That is agreed to.

JUDGE CLARK: I think perhaps I ought to say something in the way of commitment for burial in connection with the suggestion for service running throughout the United States. I personally think it would be a desirable thing, but I am not going to argue it very strenuously if the committee thinks it should not be done.

The language of the Murphree case I should say was pretty broad, and indicated we had power. The actual situation is that the Government does have service running throughout the United States in a great many cases in which it is interested. I was going to say probably all. That might be a little strong. At least it is true in the antitrust cases.

The case where this is going to be most applicable is to help out private litigants. You will notice the restrictions are still fairly extensive. In order to sue now you must have, of course, federal jurisdiction to begin with, and then

perhaps more importantly for the immediate purpose, venue. Venue in a federal question case must be in the defendant's state; in diversity cases, in either the plaintiff's or the defendant's state. So the situation is a good deal restricted.

There are quite a few cases where it does seem rather unfair to allow the action of the defendant, his having gone away temporarily from his own state, to operate that you are not able to reach him. That is the suggestion here.

Let me point out two or three alternatives.

CHAIRMAN MITCHELL: If he has a place of abode left behind, you are all right when you say "gone temporarily."

JUDGE DOBIE: If you can find somebody there.

JUDGE CLARK: Yes. You may remember that Judge Holtzoff got quite interested in this, and there was considerable correspondence from him which is summarized in my summary. His question came up particularly as to reaching a defendant. In that Graber case he ruled that he could not be reached. He thought that was pretty difficult so far as the court was concerned.

There is a suggestion from some of the admiralty lawyers for allowing this extension as to foreign attachment if nothing else is done, or garnishment, that is, you could still be able to direct foreign attachment out of the state; or, as they put it specifically at the top of page 8:

"A party may elect to have process with a clause of foreign attachment issued conditioned upon the inability to

serve a summons upon the respondent within the district, even though the summons might otherwise be served elsewhere in the state in which the district is located."

There might also be a question whether, if any extension were to be made, that ought to be limited only to a federal question and perhaps not to diversity cases.

I just bring this up and say that I think that would be a natural and normal extension. It is possible that it should be left to Congress. So I am not going to press it substantially.

CHAIRMAN MITCHELL: My feeling about it is that, of course, the Court approved that provision of the rule which extended the running of process and summons to the whole state in which the district was located, and fundamentally the principle is such that by the same token we could make a rule-making process run throughout the Union.

I was shocked at that time. I am frank to say I didn't think they would sustain that extension that we had attempted by rule. But I am perfectly confident that if we went before Congress and proposed a rule in private litigation to allow a plaintiff in one state to sue a man resident in California and to serve a summons on him, if the suit was brought in New York, to drag the fellow across the nation to respond to a suit in another state, they would raise a howl about it and would not approve it. Ever since the Government has been organized, the jurisdiction of the federal court has

been limited in territory. That would be such an extraordinary departure that I think Congress would get up on its hind legs and do something about it.

I don't want to face that. I don't see why we should.

There was a certain justification for what the Court did. There was something about the state limit which split it up into districts. The old rule was that the federal court could not serve a summons outside its district. If you left the state as one district and divided it into regions, they could serve anywhere in the state. That was a sort of palliation or excuse for the Court's sustaining our rule which allowed summons or process to run outside the district but within the limits of the state in which the district is located.

I think it was that limitation that probably enabled or induced the Court to sustain the rule, although it is hard to see where the difference is in the logic between that and a rule going anywhere in the United States.

I think you will just make trouble for yourself with Congress.

MR. LEMANN: It doesn't appeal to me at all -- and I am not a member of Congress -- that I could be sued in New York and that I would then have to go in and move for a change of venue, and that I would then be met with the argument that the plaintiff confused his own fraud, and that I should be put to all that.

PROFESSOR MOORE: Mr. Chairman, I make a suggestion

that I think would be quite helpful aside from process running outside the district, and it isn't very revolutionary. That would be to permit original process to run somewhat along the lines of the subpoena, outside the district, and bring a man, say, 100 miles. That would be very helpful in certain metropolitan areas where you have multiple parties to the litigation. Some of them reside in Connecticut, New York and New Jersey; there are some in Philadelphia and some just across the line in Delaware. It would not work any great hardship on a man to be summoned 100 miles.

JUDGE DOBIE: You put it on practically the same basis as the summons of a witness in a civil case.

PROFESSOR MOORE: Yes.

MR. LEMANN: But it would be open to theoretical objection, and I think that it is hardly worth it to get into all the arguments that you would raise and opening the door to the possibility of extension, and the resistance that you would meet on that ground.

It is like burning down the house to get rid of the fleas. Just weighing one thing against the other, I don't think the evil which now exists is sufficiently great.

JUDGE CLARK: You might like to think of Judge Holtzoff's case to get a concrete thing. You will find that at the top of page 7 of my summary he concluded that an order of commitment for a civil contempt of court could not validly be served outside the district, and thus that the court was

powerless to make the defendant pay his back alimony so long as he remained across the river in Virginia. That is how he got out of serving the order in alimony.

Pointing out that a similar situation could arise in many other cities where there is a considerable metropolitan area located in adjoining states, the opinion called for an amendment to Rule 4(f) which would allow process to be served within the territorial limits of the state in which the district court is held or within any district immediately adjoining that in which the process is issued.

JUDGE DOBIE: I would think that language would be pretty difficult to construe. Don't you think so? Immediately adjoining. If you were going to do it, I would very much rather see Professor Moore's suggestion and specify the number of miles.

MR. LEMANN: What is our provision about a witness who refuses to appear in answer to a subpoena? Do we say that the court which issued the subpoena can punish him for contempt, or do you have to go to the place where the witness is to punish him for contempt? What is the rule on it?

JUDGE CLARK: I don't know what the answer would be.

MR. LEMANN: The rule is the deposition rule.

JUDGE CLARK: Rule 45(e) is a particularly good one.

MR. LEMANN: Rule 37 is the one I am thinking of, Charley, the second sentence:

"Thereafter, on reasonable notice to all persons

affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer."

Under that you would have to go to where the witness was, and that is analogous to Judge Holtzoff's case. You could not cite him for contempt by an order of the court in which the action was pending. I think you would get into some questions about what you would do about witnesses, also, if you were going to extend the process in actions. What are you going to do about the case of witnesses?

JUDGE CLARK: Look at Rule 45(f):

"Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued."

MR. LEMANN: Of course, that doesn't really say what you can do about it.

JUDGE CLARK: It doesn't say how you punish him.

MR. LEMANN: That is right.

PROFESSOR MOORE: 45(e) allows subpoena for trial to run outside the district and to force the witness to come 100 miles. If you run the subpoena effectively that far, I should think the court that issued it would have the power to hold that witness in contempt.

MR. LEMANN: How would it get him? Would it go out and get him 100 miles away in another state? Then could Judge Holtzoff punish this guy for contempt if he lived 100 miles from

his court?

PROFESSOR MOORE: He doesn't have anything to warrant the order being served initially on him over there.

JUDGE DOBIE: I should think if a man was outside the state and within 100 miles, and the man wilfully refused to come, the court that issued the subpoena would have power to punish him for contempt of court, all right.

I have somewhat the feeling of the gentleman over ther, that unless this thing is very important, it might be well not to meddle with it. If it is important, then we ought to do it.

Do you really think there are many cases that arise?

PROFESSOR MOORE: I don't know how many numerically. You see them every now and then. You often see them in third-party practice, too. The person who is third-partied in lives just across the river in New Jersey, while the main action is over in the Southern District of New York. Yet you can't run third-party process effectively there.

You do see it in reported cases involving necessary and indispensable parties.

JUDGE CLARK: We did have such a case as that which involved a gentlemen who soon became Chairman of the Republican National Committee -- Mr. Gabrielson. I don't know whether that has any connection or not. We just let him go in that case. Maybe he should not have been let go, anyway. That was a case of an attempt to bring him in as an additional party.

He was not indispensable there.

MR. PRYOR: Since already, under the present rules, you can subpoena a witness within 100 miles even though he is outside the district, I should not think it would be much more to make the same provision for the service of process. I am inclined to favor Professor Moore's suggestion. I think it would be a desirable thing.

CHAIRMAN MITCHELL: Is there a proposal pending?

JUDGE DOBIE: Mr. Moore's proposal is that you would coordinate it with the subpoena of a witness in a civil case and make the process run outside the district to any point within 100 miles from the place where the court is sitting.

PROFESSOR MOORE: There might be a little problem working out the language, but that is essentially what I am proposing.

JUDGE DOBIE: The 100 miles would take care of all these communities adjacent to big cities.

PROFESSOR MOORE: Considerably, yes.

JUDGE CLARK: How would this do? This would be (f):

"All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and at any place without the district that is within one hundred miles of the place of the hearing or trial" -- no, that wouldn't do. " * * * within one hundred miles of the" --

JUDGE DOBIE: " * * * place where the court is sitting."

JUDGE CLARK: Yes. I don't want to use "situs."

" * * * of the place where the district court is held."

MR. TOLMAN: Did you say "of a place where the district court is held"?

CHAIRMAN MITCHELL: That is the point you made about getting the language right because of the different places where the court might be sitting.

PROFESSOR MOORE: Yes.

CHAIRMAN MITCHELL: And you have to continue:

" * * * and when a statute of the United States so provides, beyond the territorial limits of that state."

JUDGE CLARK: Yes, I would add that at the end.

CHAIRMAN MITCHELL: The fundamental question is whether we want to enlarge the jurisdiction -- and I use that word advisedly -- of the district courts by allowing their process to run out beyond the limits of the state, provided they don't go beyond 100 miles from the place of trial. That proposal has to be carefully worded.

What is your pleasure about that? Do we care whether we adopt that or not? There is no motion.

MR. PRYOR: I would make this suggestion, in lieu of the suggestion of Judge Clark, of how that language should be changed in the last sentence of (f):

"A subpoena may be served within the territorial limits provided in Rule 45."

Could you not accomplish what you have in mind by

saying instead:

"Process may be served within the territorial limits as provided for the service of a subpoena in Rule 45."

JUDGE CLARK: I think we can get up language to cover this.

CHAIRMAN MITCHELL: The question which we really ought to decide is the fundamental one whether we want process to run that way. There are a good many tricks about wording it, and the Reporter ought to have time to work that out.

JUDGE DOBIE: I move we adopt this idea and allow the wording of it to be made later by the Reporter.

MR. PRYOR: I second the motion.

CHAIRMAN MITCHELL: All in favor of the adoption of the principle say "aye." It is agreed to.

MR. LEMANN: I am against it.

JUDGE CLARK: Do you want to register an objection, Monte?

MR. LEMANN: Yes. I am against it.

CHAIRMAN MITCHELL: Did anybody vote "no"?

MR. LEMANN: I did.

DEAN MORGAN: I am inclined to vote "no" on that.

MR. DODGE: I didn't vote at all. If I had voted, I should have voted "no."

CHAIRMAN MITCHELL: Mr. Tolman, Mr. Morgan and Mr. Lemann vote "no."

MR. LEMANN: And Mr. Dodge said if he voted he would

vote "no."

CHAIRMAN MITCHELL: And Mr. Dodge not voting.

We probably had better take a second look at it when we see the draft, Charley. What do you have next here?

JUDGE CLARK: May I suggest again to the committee that I hope you are following the suggested summary, and if there is something you would like to have brought up, I don't intend to shut it out. I am now proposing just to bring up the things that I think most essential, so please go over anything in between.

The next I have myself is Rule 6(b) as to time. This is a suggestion that the admiralty people have made much of, but it is only fair to say that there are others.

One of the district judges in New York, who was not so directly for the complete proposal such as the admiralty people had offered, thought that they could be relieved of some burden by a more general rule. The question arises as to the effect of a stipulation for extension of time to plead, or extension of time to do anything, for that matter.

This is an old story in a way, because I think we bring it up at about every meeting.

JUDGE DOBIE: The proposal is that a stipulation shall be binding on the court.

JUDGE CLARK: That is their proposal.

JUDGE DOBIE: I am against that, hook, line, and sinker.

JUDGE CLARK: I am, too, that way. Therefore, I propose something in between which maybe you are against, too, but let's look at it. That is at the top of page 2.

May I say that the admiralty people, I would say, as I think many lawyers, rather more than judges, feel that the stipulations of counsel ought to be binding. The Maritime Law Association in general wants all stipulations binding.

I never have liked that too much because the courts have to take responsibility to keep business going. They take the blame, and they ought to have the power. I don't like to see the power go out of the court's hands.

On the other hand, as a practical matter, most of these stipulations are respected, and there ought to be some way, I think, of allowing the fact to prevail generally while the responsibility stays where it should be.

At any rate, at the top of page 2 I made this suggestion. This is at the top of page 2 of my suggested amendments this time. I am sorry that this is a little broken up and to have to give you different page numbers, but I had to do it. I couldn't get the work out any other way. This is at the top of page 2 of the suggested amendments:

"The court may direct its clerk to accept, in lieu of a court order and until it shall otherwise direct, any stipulation of counsel for the enlargement of time to the extent permitted in this rule."

MR. DODGE: Is that limited to an order in one case,

a pending case?

JUDGE CLARK: Yes. I tried to make it definitely limited to those orders that are permitted under 6(b). Certain things are excluded and you can't have extensions of time. That is why I put in the language at the end:

"any stipulation . . . to the extent permitted in this rule."

And I guess there, too, I should say "in this subdivision." That is what I meant,"in this subdivision of the rule."

JUDGE DOBIE: I don't object to anything that doesn't take the ultimate power away from the court. I think it is more common among southern lawyers than among others, to delay things. I don't think we would do very much with this rule here. I would not be in favor in any way of taking power away from the court.

DEAN MORGAN: This means, Charles, he could issue a general order, then, that the stipulation shall be received.

MR. DODGE: In all cases?

DEAN MORGAN: In all cases, yes.

MR. DODGE: The Reporter said that he meant this to be limited to one case.

DEAN MORGAN: No.

Charles, did you understand Bob's statement that it was to be limited to an order in a particular case?

JUDGE CLARK: No. I meant to make it general. I think

a good way to put it would be, instead of having special orders in each case each time it comes up, to have a general order which would last until it is revoked in all cases.

Of course, I would not see any objection to a judge's saying in all cases except antitrust cases. This would put it completely in the court's power to do with it as it wished.

MR. PRYOR: You could have your general order stand except in any one particular case where he might otherwise direct. Isn't that true?

MR. DODGE: I had in mind the possibility of a rule that any stipulation shall be received unless disallowed in a particular case by the court on motion of somebody.

CHAIRMAN MITCHELL: How do you know whether he is going to disallow it or not? You sign the stipulation and you don't know whether you have an extension or not.

MR. LEMANN: I think the only argument on this would be in the very busy districts where you would have to go to the judge. Is it giving any trouble in New York? With us, if we have an agreement to extend the time -- and ordinarily the judge approves it -- it is very little trouble to leave it with his secretary and say, "Show this to the judge when he has a moment to spare." The judge ordinarily will sign it, I think.

JUDGE CLARK: I don't think it will cause you a great deal of trouble. I know the judge who has been talking to me about it says, "The clerk hands up a bunch of these things, and we sign them off as fast as we can, without looking at them."

MR. LEMANN: I would not agree with Judge Dobie in his reflections on the delays of the southerners. I think the admiralty bar, however, is notoriously used to years and years of litigation. I guess they don't think much of extending time. Ordinarily in civil cases, at least the plaintiff's lawyer is not anxious to keep on delaying things.

JUDGE DOBIE: To be perfectly frank, Monte, not in the district court but in the United States Court of Appeals, our court, we have had more trouble with the Government than everybody else put together.

MR. LEMANN: That is my limited experience.

JUDGE DOBIE: They always claim -- of course, General Mitchell has had experience with this -- that they are understaffed, and all kinds of things, and they can't possibly do this within that time.

JUDGE CLARK: I would like to put this in a little broader setting, too. It may well be that you would like to pass it now and let's see what the admiralty committee may do on it. This is typically the type of thing on which I think it would be perfectly dreadful to have two separate rules. It is a comparatively small matter. You ought not to have to think about it, either lawyers or the bench. You do it one way or not at all.

I can see no justification whatsoever for a different rule. That is one of the cases where, when, as and if the time comes, I think somebody, someplace, somewhere should make a

determined effort to see that the rule is uniform.

CHAIRMAN MITCHELL: You mean uniform in admiralty and civil actions?

JUDGE CLARK: Yes, in all district court civil matters. I don't know that we need to do anything more than look at the matter now. This is one of the matters that the Maritime Law Association makes a great deal of. I venture to believe that most bar associations and, I think, lawyers generally, would react that their stipulations ought to be observed.

Don't you think so, Monte? Would you like to have your stipulation disregarded?

MR. LEMANN: It is a sort of unrealistic question. Except in abuse, I think when you talk about enlargement of time a court will approve it.

DEAN MORGAN: It is not confined to large towns. The judge in our district once had to make a rule that he would accept no stipulations.

MR. LEMANN: I suppose it would have to be a case where abuses had developed.

I move we pass this suggestion, Mr. Chairman.

CHAIRMAN MITCHELL: It has been moved that we pass this point without action. All in favor say "aye." It is agreed to.

JUDGE CLARK: Again I trust that you are following the summary so you won't overlook bringing up anything.

The next thing that I suppose will be definitely before us would be this proposal of the Ninth Circuit. Do you want to pass that until you hear from them?

MR. LEMANN: Didn't we agree to hear Judge Hall this afternoon?

MR. TOLMAN: He just said he could not arrange it this afternoon. He wanted to appear tomorrow afternoon.

MR. LEMANN: We should not decide the case without hearing counsel.

DEAN MORGAN: We could decide it like the justices of the peace -- decide it before hearing argument.

JUDGE CLARK: I should like to throw this out, but I guess we should not do anything. I should like some day to strike out Rule 12(e) altogether.

MR. LEMANN: You go to the other extreme.

JUDGE CLARK: I suppose so. There is a happy middle ground, isn't there?

MR. LEMANN: You don't say much about it, so I guess we can pass it.

JUDGE CLARK: I have said a good deal about it at different times. I wrote a pamphlet for the American Bar Association which I entitled, "Simplified Pleadings," in which I appeared as something like waving a red flag in front, if I may use the simile, of a bull.

JUDGE DOBIE. What is the remedy for that, Charley? If you strike out the rule, what would you do?

JUDGE CLARK: Then you would have to attack the pleading for failure to state a legal claim.

JUDGE DOBIE: You don't think there is any difference between stating a claim and stating it so indefinitely and inconclusively and so vaguely --

JUDGE CLARK: There might be theoretically a difference, but I think practically it is awfully hard to work out; and so far as I can see, most of these motions for more definite statement don't amount to very much. This is just a question really of practical usage.

JUDGE DOBIE: There are not many of them, I think.

JUDGE CLARK: Oh, yes, there are. I am sorry, but there are. Look again at my summary, page 23. I first start with the statement of a good district judge, Jones, in Ohio, who refers to a particular case:

"The facts here present a forceful argument for the elimination of Rule 12(e) of the Rules of Civil Procedure. Too often such motion is used solely for the purpose of delay * * *" and so forth. "Its elimination would cause no serious inconvenience to any party. Adequate procedure has been provided for discovery of necessary information in Rules 26 to 37."

There are some cases. In the six volumes of Federal Rules Service published since the 1948 amendment to Rule 12(e) became effective -- that was the amendment to strike out motion for a bill of particulars -- there appear 109 published opinions on motions for a more definite statement. In 28 of these cases

the motion was granted, although usually only in part. In 81 cases the motion was denied in its entirety.

Then there is a further discussion.

JUDGE DOBIE: When the motion is frivolous, the judge has complete power to deal with it, hasn't he? Do you think justice is really delayed by these motions, which of course can be frivolous?

JUDGE CLARK: I think it is, somewhat, yes. It depends somewhat again on the place. It is true that many districts pay so little attention to the motion for more definite statement that no great harm is done.

That, very interestingly, seems to be the situation in New York where they have a very long motion calendar. They have almost no motions of this kind. I have talked to some of the judges there, and they say they have practically none, which is interesting because the experience seems so different from the one Judge Hall is going to tell you about.

To pass that, I think when you have this number of cases where the judges sit down and write formal opinions and grant them in only about 20 per cent of the cases, and then only in part, you have a considerable waste.

MR. PRYOR: I don't see that there is any harm in keeping the rule in. Generally such motions are overruled, are they not? Once in a while there is some merit in them. It seems to me there could be some argument for leaving the rule in.

MR. LEMANN: There is nothing before us on this. The

Reporter doesn't make any proposal. He doesn't propose any change. Couldn't we go on, Mr. Chairman?

CHAIRMAN MITCHELL: Are you making any proposal?

JUDGE CLARK: If the committee would consider it, I would just move to strike out Rule 12(e), yes, certainly. That is my view.

MR. LEMANN: You didn't recommend it. You said "there is much to be said." Let's pass on to the next matter.

DEAN MORGAN: Much has already been said, hasn't there?

JUDGE CLARK: I might say that my assistant, Professor Wright, wants to bring up a question on imposing costs. He said to add to the end:

"If the motion is denied and the court finds it to have been interposed for purposes of delay, the court shall require the moving party to pay the other party reasonable expenses incurred in opposing the motion, including reasonable attorney's fees."

I throw that out. I guess I am getting old and tired. I never saw a court do anything much with that kind of power. It is a good one in theory, at any rate.

CHAIRMAN MITCHELL: If you strike this rule out, then a fellow --

DEAN MORGAN: I think if the experience in New York were general, I would vote to strike it out, because there is no doubt they have been abusing it there tremendously. It does

not make any difference how often the motion is denied, it delays the game a little.

CHAIRMAN MITCHELL: Suppose a fellow gets up a complaint and says, "I was badly hurt, hit by the defendant as a result of his negligence."

DEAN MORGAN: It is very seldom that the complaint is such that you couldn't answer it. That is the only time this thing is supposed to be applicable.

CHAIRMAN MITCHELL: You get so far away from any pleadings that amount to anything that you have to start in and examine the witnesses on depositions to find out just what the case is all about.

DEAN MORGAN: And when he makes it more definite, you don't know anything more about it than you did to begin with. If he makes it more definite, he throws the book at you. He tells you everything that could possibly have happened. You don't know anything more about it then than you did when he gave you a general statement.

DEAN PIRSIG: Wouldn't you transfer the objection, really, though, that a good lawyer has made in good faith to this motion to dismiss? If that is the only remedy, wouldn't there be an inclination for the rather liberal approach we now have in the motion to dismiss, to be hardened into more specific requirements?

DEAN MORGAN: There is some place for it, but it is something that can be abused. New York lawyers abuse bills of

particulars, and motions to make more definite and certain, continuously, those people who just want to delay all the time.

DEAN PIRSIG: Isn't the remedy there the one which has been suggested, some penalty for unreasonableness?

DEAN MORGAN: Yes, there ought to be.

MR. PRYOR: That would serve as a deterrent, even if the courts are inclined to overlook such sanction.

CHAIRMAN MITCHELL: Is there a suggestion that we strike out 12(e)?

JUDGE CLARK: I suggest that we strike out Rule 12(e).

CHAIRMAN MITCHELL: Do you have an alternate?

JUDGE CLARK: I gather that is a little too advanced for the committee, so perhaps we might consider that turned down. The alternative was this: Add to the end of Rule 12(e):

"If the motion is denied and the court finds it to have been interposed for purposes of delay, the court shall require the moving party to pay to the other party the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees."

MR. LEMANN: I think that possibly would defeat its own purpose. The judges are not going to be prone to impose attorney's fees. If they felt they had to, I think they would be perhaps disinclined in overruling the motion. It is a hard thing to get a judge to do.

As the Reporter himself said, he never knew that kind of provision to amount to anything. I think if it should be

construed as a suggestion to the judges that these motions were in disrepute with the committee and ultimately with the Supreme Court, I gather that would be adding fuel to the fire of the group represented by Judge Hall, because it is really going to the other extreme from what they propose. They want to require more definite statements to begin with.

If we adopt this suggestion which, as I say, is sort of slapping down the idea of making motions by having a penalty presented, I think we really would start a lot of remonstrance.

CHAIRMAN MITCHELL: I should think this proposal about 12(e) might well wait until we have had our hearing on Rule 8, they are so closely related.

JUDGE CLARK: All right.

There is one other thing I might bring out about this general Rule 12. In (f) the last time when we had the amendments we extended a little the motion to strike to make it available to a pleading to which there was no response. Mr. Walter Armstrong said that this ought to have a provision similar to that in 12(b) and (c) converting this motion into one for summary judgment when matter outside the pleadings was received.

I should think theoretically that was true. I should think they are much of the same ilk, so to speak. I have not seen any cases which bring this up. I don't know that it is too much needed as a practical matter, but theoretically I do think it is the same.

You remember we added to (b) and to (c) the provision

that if affidavits or other matter was presented, the situation in effect became one for summary judgment. It always does, in fact, unless the district judge drags his feet, and the district judge is practically never going to drag his feet because he doesn't see the material until it is all presented to him by the clerk, anyway.

CHAIRMAN MITCHELL: What is the use of changing (f), because if a fellow has a ground for summary judgment he never would make a motion under (f).

JUDGE CLARK: Mr. Mitchell, look at the material in (b), which starts "If, on a motion * * *." The same is in the second sentence of (c). It was Armstrong's suggestion --

CHAIRMAN MITCHELL: I understand, but if you read (f) you find if there is ground for making that kind of motion to strike, the fellow is going to act under (b) making a summary judgment case out of it.

JUDGE CLARK: You could have a question of insufficient defense, and that would raise a similar kind of issue.

I think the suggestion is theoretically sound, but I don't think it is practically very important. That is my reaction.

CHAIRMAN MITCHELL: We have gone quite a ways already in allowing certain motions in a summary judgment case.

JUDGE CLARK: The next direct suggestion I have is as to Rule 13, and this is a suggestion for bringing up claims that may not fully have matured but that are really in the case.

The question has come up a great deal in connection with third-party practice. If you want to see the question as it is raised, will you look at my summary on pages 32 and 33.

Before I discuss that a little, I think I had better suggest definitely what I think might be a change in the rule here. I am suggesting that in Rule 13(b) there be added this:

"The claim need not be due at the time of service of the pleading if it appears reasonably likely to be due at the time of judgment."

Another suggestion intended for the same end is to add a provision in (e) to the same general nature:

"A claim heretofore cognizable only after opposing party's claim has been prosecuted to a conclusion may be asserted as a counterclaim."

That alternative spells out the actual situation where this question arises.

Now if you will turn to my little explanation at the foot of page 32:

Difficulty has arisen where the passenger and driver of one car, both injured in a collision, sue the driver of the other car, and defendant wishes to implead the plaintiff-driver to assert indemnity against any damages that plaintiff-passenger may recover. Impleader is not proper, since under the rule it may be used only against "a person not party to the action"; a cross-claim will not lie because the plaintiff-driver is not a co-party to the defendant; and a counterclaim is thought to

be improper, since, unlike the impleader and cross-claim rules, the counterclaim rule does not specifically authorize the pleading of contingent claims. The solution has been found in what a critic refers to as a "little morality play" by which the claims of the two plaintiffs are severed, the plaintiff-driver is then able to be impleaded in the action brought by the pkaintiff-passenger, and the actions are then consolidated again for the purposes of trial. Would it not be desirable to make this legerdemain unnecessary by specifically authorizing pleading of contingent claims as counterclaims?

That is the reason for the suggestion which I made.

MR. PRYOR: The trouble I find with the suggestion is the words "if it appears reasonably likely to be due at the time of judgment"; "appears to be" is pretty vague. I think it would accomplish the purpose if you provided a counterclaim, whether the claim was existing or contingent.

JUDGE CLARK: Yes, I think that is right. I think probably that language is too vague that way.

Another way might be to take out that sort of contingency and say this:

"The claim need not be due at the time of service of the pleading if it is due at the time of the entry of judgment."

CHAIRMAN MITCHELL: What you mean by that is that when you come to the entry of the judgment, if it is then due you can assert it. Your previous assertion doesn't amount to

anything if you get to the point of judgment before the claim matures.

MR. PRYOR: On the question of when you can plead a counterclaim, as to whether or not it is going to be due when the case comes to judgment, you can't tell until after you plead your counterclaim. I think if you said you can plead your counterclaim, whether the claim is existing or contingent, it takes care of the situation.

JUDGE CLARK: That is the idea. There is no question about it. The word "contingent," of course, is not a crystal-clear word itself.

MR. PRYOR: If you take care of it in any other way, there is a certain vagueness about it that it seems to me is not desirable.

DEAN MORGAN: You can conceive a case, Charles, where the decision in the main action would end the contingency.

JUDGE CLARK: Yes.

DEAN MORGAN: That is what I supposed. Otherwise, you would have the whole thing hung up in the air. You mean contingent upon the outcome of the main action, then.

JUDGE CLARK: Yes, that is right, in this kind of case. Of course, I was trying to state the thing more broadly even than my particular case which raises the issue. I didn't know that it was necessary to limit it to that particular case, which is rather striking in the way the courts tried to get around it, because that is a case where naturally it would seem

the court should be able to dispose of the matter in one action.

I was trying to state it as a generality. The alternative I gave you was to hit practically only that case.

MR. PRYOR: A very rare case.

DEAN MORGAN: Would you want to plead as a counterclaim a claim where the contingency wouldn't end with the main action? I don't quite see why you should be permitted to have that as a counterclaim and hold up the whole judgment.

JUDGE CLARK: If the contingency is ended, sure, but I suppose that is covered by what we have already in the rule. We use the word "matured." I don't know that that makes much difference. Our Rule 13(e) now provides:

"A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading."

This is really only an expansion on the idea of (e), but this claim is not going to mature, to use the word "mature" instead of "contingency," until the judge states what he is going to do in the main action.

DEAN MORGAN: Exactly.

JUDGE CLARK: Therefore, the time for supplemental pleading has already gone by. The pleading stage is all closed.

CHAIRMAN MITCHELL: Have we a definite proposal, Charley, on Rule 13?

JUDGE CLARK: I have made this in the alternative.

I would like to get a suggestion. Which would you prefer? Mr. Pryor I think has suggested that he would take the one I made on 13(b), but stating it a little differently.

MR. PRYOR: That is right.

JUDGE CLARK: Have you language that you would suggest?

MR. PRYOR: I am not satisfied with it entirely, but I would suggest"whether the claim be existing or contingent." It seems to me that is really what you want. I think the language suggested here is too vague.

MR. DODGE: Judge Clark, where is the discussion of the law and the notes on this proposed amendment to Section or Rule 13(b)?

JUDGE CLARK: My suggestion I put under the impleader rule, because it came up more naturally under it. So if you will look at my summary, really under Rule 14, that is where I bring it up. That is at page 32. It starts at the very bottom of page 32 and goes over on pages 33 and 34.

MR.DODGE: It is thought that that phrase "any claim" does not include contingent claims?

JUDGE CLARK: That is right. The courts are hesitant to do it, and I think they probably have some justification, because you see already in our subdivision (e) we make a distinction where a claim is not matured.

MR. DODGE: Under which rule?

JUDGE CLARK: Under Rule 13(e).

MR. DODGE: 13(b)?

JUDGE CLARK: I am now saying that 13(e), the counter-claim maturing, and so on, suggests to the court that it does not have jurisdiction over this contingent claim.

MR. PRYOR: I think it should be covered to take care of a case such as you just suggested.

JUDGE CLARK: Mr. Pryor suggested adding the word "contingent." That is certainly the idea. I am not entirely happy about "contingent," because "contingent" is a contingent word.

DEAN PIRSIG: What other cases have we in mind beyond the one specifically given here that might be desirable to include and which are not now available?

JUDGE CLARK: I can think of none. I know of none except the kind of case that will grow out of the action itself. That is, I think you might have the same general situation more broadly than merely the automobile case. I think it would be a natural case where the judgment about to be entered is a matter for which the person against whom it may be entered can claim indemnity and claim liability over. It would be a good thing if he could make that claim in the same action.

DEAN PIRSIG: If we used the language of the third-party procedure rule and permitted it in a case against the plaintiff in the action, wouldn't that take care of the personal injury as well as other types of cases? That is the essential problem, as I understand it.

JUDGE CLARK: Yes, that is the essential part of it.

There is no question about it. It could be covered there.

MR. PRYOR: It seems to me if you just used the word "contingent," as I suggested, you have sufficient limitations as to the kind of contingent claims in the language that is in the rule, subdivision (b). That it must be a claim may not be connected -- I am mistaken.

DEAN PIRSIG: I am afraid of the word. I think it would invite endless litigation over that.

JUDGE DOBIE: Do you know a better one?

DEAN PIRSIG: I would follow the third-party procedure language, "permitted against a plaintiff."

JUDGE CLARK: How about this expression in the alternative I gave you? This would be an addition to (e). This is substantially the same as you have, Mr. Pryor, although it does not use the word "contingent." This suggestion is to add in (e):

"A claim heretofore cognizable only after opposing party's claim has been prosecuted to a conclusion may be asserted as a counterclaim."

MR. PRYOR: That would seem to take care of it.

CHAIRMAN MITCHELL: Will you describe a situation of that kind?

MR. PRYOR: It would be the case that you supposed here.

JUDGE CLARK: It is a case of indemnity. "A" sues "B," and "B" impleads "C." "C" wants to say, "I am not liable at all; but if I am liable at all, I want to put in a claim against

"A."

As it now stands, it has been held the rules are not broad enough to cover the making of this contingent claim depending upon the liability back against "A."

DEAN MORGAN: Will you read that last one again, Charles? I didn't quite get it.

JUDGE CLARK: This is to add to (e) a separate sentence:

"A claim heretofore cognizable only after opposing party's claim has been prosecuted to a conclusion may be asserted as a counterclaim."

JUDGE DOBIE: Do you think that would be understood?

JUDGE CLARK: I don't know.

CHAIRMAN MITCHELL: You might put a note on the rule to explain what you are driving at.

JUDGE DOBIE: We understand what we are trying to do, but I am afraid the people who read the rule would not know.

PROFESSOR MOORE: I am inclined to think this is one case where trying to make the rule perfect will cause more trouble than we now have. In the one case which is cited here, the court worked it out pretty well.

CHAIRMAN MITCHELL: What did it do?

PROFESSOR MOORE: Let's see. How did they do it?

MR. PRYOR: They split the cases.

CHAIRMAN MITCHELL: Split them, and then re-fused them again.

MR. LEMANN: It has happened in only one case, Mr. Chairman. Ought we to make a change because we have had difficulty in one case in which the court solved it, perhaps not ideally, but practically satisfactorily?

CHAIRMAN MITCHELL: You say it has arisen in only one case?

MR. LEMANN: That is what I am asking. I heard Mr. Pryor say it was a very rare case, and I heard Mr. Moore say it has come up in one case in which the court was able to find a way to handle it. So I revert to my general principle of not making a change unless we have some real serious trouble.

JUDGE CLARK: I think it has come up more than that. We cite three cases. It is the kind of case that is not unreasonable.

MR. PRYOR: It is conceivable it could come up many times, especially in connection with automobile accident cases.

MR. LEMANN: Mr. Moore seems to think if we change it, we may create some new problems.

JUDGE DOBIE: I am inclined to think perhaps that is the only situation in which it would arise, and that Professor Moore is right. Every time you make one of these changes, you throw more liability on courts and the parties and they wonder what exactly is meant by that. I would be inclined to skip it, if that is the only situation in which it arises.

CHAIRMAN MITCHELL: I hear no motion. If there is none, we will pass the subject and go on.

JUDGE CLARK: Turning now to Rule 14, the impleader rule, the question is whether it was not a great nuisance, an unnecessary nuisance, to require a court order; and New York, generally backward, adopted a new provision of this kind and eliminated that requirement.

If you want to see a draft, I have a considerable draft made up a good deal from the new provision which has recently been adopted in New York.

Our rule now, if you will look at it, 14(a), requires application for leave to be made to the court before the defendant may move ex parte or after service on notice, and so on, for leave to serve a summons, and so on.

The suggestion, in effect, is that that requirement of going to the court be eliminated so that the rule would read:

"At any time after service of process upon him a defendant may serve a summons and complaint as a third-party plaintiff", and so forth.

JUDGE DOBIE: Just delete the requirement that he obtain leave of court.

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: Why did we require him to obtain leave of court in the first place? What was our theory?

JUDGE CLARK: There is some element of discretion left in the court to prevent delays. I really don't know how real that is in view of our general scheme of things allowing pretty wide action, but at least theoretically this might be

done in such a way as to delay the trial of the main action.

Judge Clark

~~MR. PRYOR~~: To cover that I suggested a new subdivision (c), which is actually the New York rule, the fourth paragraph of the New York rule, and that appears at the foot of page 2 of my suggested amendments. That would read:

"The court, in its discretion, may dismiss a third-party complaint without prejudice to the bringing of another action, order a separate trial of the third-party claim or of any separate issue thereof, or make such other orders concerning the proceedings as may be necessary to further justice or convenience. In exercising its discretion the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice any party to the action. A motion to dismiss a third-party complaint pursuant to this subdivision may be made after the third-party defendant has appeared in the action by the plaintiff or the third-party defendant upon notice to all the parties who have appeared."

Conceivably that may be a little too elaborate. It is true that under Rule 42(b) the court has pretty broad powers now for ordering separate trials, and so on. Nevertheless, I thought I would bring it to you. It is the New York provision.

MR. PRYOR: Do I misread this or should it say "after the third-party defendant has appeared in the action by the third-party plaintiff"? You have "by the plaintiff." Don't you mean "by the third-party plaintiff"?

JUDGE CLARK: No. The third-party plaintiff is really the original defendant.

MR. PRYOR: I understand that.

JUDGE CLARK: And he is the one who is bringing in.

MR. PRYOR: I understand that.

JUDGE CLARK: He doesn't want to make a motion to drop the person he has brought in.

MR. PRYOR: He might.

JUDGE CLARK: You mean he might change his mind by that time?

MR. PRYOR: Yes, just as the plaintiff might want to make a motion to dismiss.

CHAIRMAN MITCHELL: A motion to dismiss a third-party complaint pursuant to this subdivision may be made by the plaintiff or the third-party defendant upon notice to all the parties who have appeared after the third-party defendant has appeared. It seems to me it is a little confusing as it reads now.

JUDGE CLARK: I think your language does sound better. Of course, it is the New York Judicial Council's recommendation which the New York legislature has adopted.

CHAIRMAN MITCHELL: Word-for-word the same, is it?

JUDGE CLARK: It is word-for-word the same.

PROFESSOR MOORE: Dismissal of the third-party plaintiff is now covered by our Rule 41(c).

MR. PRYOR: I am very much in favor of the suggested

changes as far as that is concerned. We have substantially the same procedure under the Civil Rules of Procedure in Iowa, the State Supreme Court rules. I can't see any good reason for requiring a motion in a case of that kind. The defendant isn't going to bring in a third-party defendant unless he has reason to do it, as a general proposition.

Leave it to the court in his discretion to dismiss if it should not have been done.

DEAN MORGAN: The only difference is that you give the plaintiff a chance to get rid of it after the defendant, third-party, is in, instead of before. The only purpose of your motion to begin with is to enable the plaintiff to object, isn't it? He is the only one who is going to serve the motion there.

JUDGE CLARK: The reason for making the change, mainly, is partly, of course, not to have to run to the judge. The judge has to pass on enough of these orders anyway. Partly, too, and I think perhaps much more so, rarely should the plaintiff be entitled to prevail. That is why the defendant wants to cite him, and he ought to be allowed to.

JUDGE DOBIE: Yours is better than the very complicated New York rule. If you are going to make the change, I would prefer your wording to the New York rule, which introduces a whole lot of new wording and all that.

MR. PRYOR: To get the matter before the committee, I move that the addition suggested or change suggested to Rule

14(a) be adopted.

JUDGE CLARK: I want to find out how far it goes. I am in favor of this myself.

MR. PRYOR: My motion goes to the addition of subdivision (c), too.

JUDGE CLARK: You would add the material from New York, too?

MR. PRYOR: What you have here.

JUDGE CLARK: Judge Dobie has raised a question about adding that. Mr. Moore had some suggestion that I didn't get. What was that?

PROFESSOR MOORE: I believe Judge Pryor said that you needed some provision to allow the third-party plaintiff to dismiss his complaint, and I said I thought that was now adequately covered by Rule 41(c).

MR. PRYOR: My motion would be limited, then, to the change made in 14(a) which you propose for the present, making it read:

"At any time after service of process upon him a defendant may serve a summons and complaint * * *."

JUDGE CLARK: Are you going to take up separately the other material? Mr. Pryor separates the question, and he has now moved only as to the first paragraph. Then the question will come later whether the second paragraph should be added. The first paragraph simply eliminates the provision. The second paragraph would provide for motions to the court to dismiss.

CHAIRMAN MITCHELL: The first paragraph deals only with the present requirement of the rule that you have to make a motion for leave, is that right?

JUDGE CLARK: That is right. It would eliminate that motion.

CHAIRMAN MITCHELL: We are agreed on that.

Now the second proposition is what?

JUDGE CLARK: The second proposition is one giving the parties the right to make a motion to dismiss.

DEAN MORGAN: Would you need that, Charley? Our rules don't provide for every possible motion, do they?

MR. PRYOR: I think your idea goes further than giving the parties the right to dismiss. It gives the court, in its discretion, the power to dismiss a third-party complaint.

JUDGE CLARK: Answering your question specifically, Eddie, I really don't know. I only bring that up for discussion. Originally, you see, in our rule we had the idea that this was a sort of discretionary thing, anyway; that you had to get the permission of the court. We are now going beyond that, as I think we should. It is more nearly the ordinary thing to allow it in as a matter of course.

Now, do we want to leave some remnant of our former position and say that the parties may still move to strike out on the ground that it will delay the case unduly? I should not think there would be very much occasion for this because, after all, what is delay in civil action? That is one of the things

that we can be most generous of, apparently. I don't think it is a very pressing matter.

On the other hand, conceivably there might be cases of abuse. My own reaction would be that it is not very necessary, but it may be comforting to the lawyers and the courts to have it in.

That is about the best I can suggest. I won't feel badly if you leave it out, but I think this is one of those reassuring things, really, perhaps a general admonition not to allow the matter to be delayed unduly.

Conceivably, of course, the defendant could wait until after the court has filed a memorandum of decision, and then start in doing it.

CHAIRMAN MITCHELL: Suppose we put this in, and then we will take a look at it at the final meeting.

JUDGE CLARK: All right.

CHAIRMAN MITCHELL: Is that agreeable to you?

JUDGE CLARK: That is agreeable to me, yes.

MR. DODGE: Then we adopt the first suggestion and not the second?

CHAIRMAN MITCHELL: No, we are adopting both, but my suggestion was that we adopt this section providing as in the New York statute, and then take another look at it after we see the whole thing together. The Reporter can think it over further, too.

JUDGE CLARK: There should be a small change in the

Form 22 which goes along with this impleader section. In the first place --

CHAIRMAN MITCHELL: Change in what?

JUDGE CLARK: In the appendix of forms. This would be Form 22.

First off, we strike out "motion" in line with what we have just done.

CHAIRMAN MITCHELL: Yes.

JUDGE CLARK: Then there is a small difficulty in the language of the summons to which some of the clerks have called attention. This mistake I speak of has nothing to do with this other matter. You will notice that the summons says, "You are hereby summoned," and so on, and are required to make an "answer to the complaint of the plaintiff, a copy of which is herewith served upon you, within twenty days after service of this summons."

That is no longer true after our amendment of 1948, which struck out the answer to the complaint. The rule now provides that the new defendant may answer the plaintiff, but that there is no compulsion.

You see, the direct connection of the plaintiff making a claim over against the impleaded defendant was taken out then.

What we should do to correct this particular thing is, in this part of the summons, to strike these words "and an answer to the complaint of the plaintiff, a copy of which is herewith served upon you". We omit that because you don't need

to answer. Then add at the end:

"There is also served upon you herewith a copy of the complaint of the plaintiff, which you may answer if so advised."

JUDGE DOBIE: So advised by the court?

MR. PRYOR: Why not just say "which you may answer."

JUDGE CLARK: Of course, that is what you do mean.

CHAIRMAN MITCHELL: As I understand, your proposal is to eliminate entirely Form 22, "Motion to Bring in Third-Party Defendant."

JUDGE CLARK: Eliminate all the top, but not to eliminate the summons. You can leave in what we call Exhibit A. Take away "Exhibit A" and call it "Summons to a Third-Party Defendant."

CHAIRMAN MITCHELL: Do you think if you read that statement from the record you would know exactly what you were doing? I think we ought to have it a little more specific for the reporter's record. I have before me Form 22, "Motion to Bring in Third-Party Defendant." Then it says:

"Defendant moves for leave to serve a third-party complaint as set forth in Exhibit A hereto attached."

That is eliminated, is that right?

JUDGE CLARK: I would eliminate all the form of motion down to and including the words "Exhibit A," and substitute as a title, "Summons to Third-Party Defendant."

CHAIRMAN MITCHELL: Substitute in Exhibit A?

JUDGE CLARK: Substitute for the words "Exhibit A" the

title, "Summons to Third-Party Defendant."

CHAIRMAN MITCHELL: All right. Then would you make any other changes?

JUDGE CLARK: "Summons and complaint," because we have a complaint over there. This would be Form 22, "Summons and Complaint Against Third-Party Defendant."

MR. LEMANN: There wouldn't be any motion at all.

JUDGE CLARK: No motion at all. Then we use the material as before, of both the summons and the complaint, except that we make that change in the summons, which I will repeat, if you wish.

MR. DODGE: Where is the summons?

DEAN MORGAN: Form 22.

CHAIRMAN MITCHELL: If you think that is clear, it is all right with me.

MR. LEMANN: Are you going to omit from this summons any reference to answering the complaint?

JUDGE CLARK: No. I am going to add it in a separate sentence and say that he may answer. Now he must answer.

MR. LEMANN: Why not eliminate entirely any reference to it? It seems to me rather strange to put in the summons something that you may answer if you feel like answering. Why not omit it?

CHAIRMAN MITCHELL: That indicates the fellow doesn't have to answer unless he wants to, if he is willing to take the consequences.

MR. LEMANN: You do summons him to answer it, but it doesn't seem very artistic to me to put in a summons that you may answer the complaint if you feel like it.

JUDGE CLARK: Let me remind you, Monte, that the complaint will be there. Referring to the language I suggested, I said:

"There is also served upon you herewith a copy of the complaint of the plaintiff * * *."

It would be your suggestion that we stop there?

MR. LEMANN: "* * * an answer to the third-party complaint which is herewith served upon you," and omit "an answer to the complaint of the plaintiff, a copy of which is served upon you," so it would read:

"You are hereby summoned and required to serve upon So-and-So an answer to the third-party complaint, which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken," and so on.

I understand your suggestion is to do all that just as I have read it, but to add a paragraph: "and you may also do it if you feel like it," or "if you are so advised," without adding anything whether you feel like it, "You may answer," which impliedly would be if you feel like it.

CHAIRMAN MITCHELL: Isn't that already covered? It says, "If you fail to do so * * *." That implies that you can fail, willingly or unwillingly.

JUDGE CLARK: It is just because of that compulsion in the last sentence that we want to take out this language, because there will not be a default here if you fail to answer the complaint.

Monte, you want to bear in mind that we are requiring the original complaint also to be served, and of course we should. A poor fellow who doesn't know anything about law gets a document, and he doesn't know what it is. It seems to me that in any event you ought to put in somewhere a statement of what it is.

MR. LEMANN: If the poor guy really doesn't know, you say "We are serving on you a copy of a complaint, and you don't have to do anything about it. You can answer if you want to, and you don't need to answer if you don't want to."

JUDGE CLARK: The point is that I think you ought at least to say, "There is also served upon you herewith a copy of the complaint of the plaintiff," because he won't know what it is and he may think he still has to answer that.

I would still be inclined, myself, to give him a little free advice and add to that, "which you may answer." It would seem to me, having defined a part of the papers you are serving in this very official document, you ought at least to mention the rest of the papers, because he might say, "They forgot to tell me what this is. Do I have to answer that, too?" That will be in the bundle the marshal leaves him.

CHAIRMAN MITCHELL: I think we had better let that

ride and let the Reporter come back at the final meeting with an explicit draft to place before us to avoid confusion. If we don't like it then --

MR. LEMANN: If you are going to put the thing in, you should say, "There is also served upon you herewith a copy of the complaint, which requires no answer."

DEAN MORGAN: But he has the privilege of answering it. Why shouldn't he?

MR. LEMANN: He can, but he is not required to answer.

DEAN MORGAN: That is right. He isn't.

MR. LEMANN: I would put that in.

MR. DODGE: Has that made any trouble in the past?

DEAN MORGAN: We haven't had this before.

JUDGE CLARK: This didn't come up until the amendment in 1948. If you ask me if it really makes any trouble now, I will have to say it has worried the minds of clerks of the court. They are greatly upset by it because it seems to tell the parties they must do something that they don't have to.

I don't think there has been any actual case about it. I think perhaps the clerks are more worried than anybody else.

You see, they sign a direction that they say is not true.

MR. LEMANN: Have you had more than one clerk say anything about it? On page 31 you say a district court clerk has asked about this.

MR. DODGE: Third-party defendants have regularly filed

answers to the plaintiff's claim as well as answers to the cross complaints.

PROFESSOR MOORE: Not always, sir.

MR. DODGE: They have been required.

MR. LEMANN: The rule doesn't require it as the rule is amended, but the form does. The suggestion is that we are not very artistic in the form, and when we changed the rule we should have made a corresponding change in the form. Is that the point, really?

PROFESSOR MOORE: Yes.

MR. LEMANN: We changed the rule saying you need not answer the complaint, but we didn't change the form. So one clerk writes in and says, "What do you guys mean by not changing this form? What does this form now mean? It doesn't agree with your amended rule."

MR. DODGE: I didn't notice that amendment.

JUDGE CLARK: I can't find at the moment what clerk it was who was objecting or whether it was more than one. After all, shouldn't we do something about it? It is absolutely untrue now. The clerk of the court has to say, "I direct you by official mandate of the court something that is not so."

I can imagine if Mr. Claude Dean were in the district court he wouldn't do that.

CHAIRMAN MITCHELL: I was just thinking about him.

JUDGE DOBIE: He is still living. I think he is the oldest clerk in America.

CHAIRMAN MITCHELL: Let's pass on. We have a few more minutes before we adjourn for lunch.

JUDGE CLARK: The next suggestion I make is in connection with supplemental pleadings. It is a point which I think is of some interest.

I provided in Rule 15(d) about supplemental pleadings. As you will see:

"Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."

I suggest the addition:

"It shall not be a bar to the court's order that the original pleading is defective in its statement of a claim for relief."

Some courts, of which I must say perhaps my own court is the prime offender, have said that you can not supplement a defective statement of a cause of action, which I must say seems to me a gloss that is not in the rule itself and a very undesirable gloss. We have already held you can amend a defective statement in the cause of action. Why in the world shouldn't you? If you want to get matters completely decided and disposed of, why shouldn't you supplement?

The cases appear on page 35 of my summary.

DEAN MORGAN: It sounds as if those judges had been

raised in Illinois.

MR. LEMANN: One is from your circuit, Charley.

DEAN MORGAN: The Second Circuit.

JUDGE CLARK: There have been some that have come from other places, Pennsylvania and Missouri. I may add, however, that the cases that I refer to particularly come from Guatemala. The judge was raised in Guatemala, if you know what I mean.

CHAIRMAN MITCHELL: What do you mean by "shall not be a bar to the court's order"?

JUDGE CLARK: The word "bar" may not be the proper word. What I mean is --

JUDGE DOBIE: To file a supplemental pleading even if the first pleading doesn't state a claim.

JUDGE CLARK: That is right.

MR. LEMANN: That seems to be the majority opinion now, anyhow. How can you take care of all these Vermont judges, and Louisiana, and other guys, who go off the reservation?

JUDGE CLARK: You raise a nice question, Monte, and I think it well might be discussed somewhat. What are we to do about additions of glosses made on the rules? I myself have no absolute answer. I should think we ought not to take the position that we are not to do any changing. Of course, we didn't in 1948. I think we ought to take the position that where the rule is important enough, we should note it. It might be that this might help the rules to a more proper general interpretation and working together.

Take this question. How formidable is it? I don't want to pass on it generally. I would say since we don't have supplemental pleadings too often, it doesn't shine large in the total of the rules.

On the other hand, I think this is one of the most important questions that can come up with reference to supplemental pleadings, as such.

When you suggested that you thought the majority view was the contrary, I am sorry to say I don't believe that is so. In fact, the reason I put it in was that I thought the majority view was going very solidly the other way. It is true that the great Fourth Circuit did decide the other way, but I shall have to go on and say they didn't even discuss the matter, from which you can draw one of two contrary conclusions, of course. The first is that they may have felt it so obvious as not to require discussion; and the second, which perhaps is ruled out from the nature of the court but would certainly be possible if the court were mine, that they never thought of it.

All I can say is that there are cases where there has been considered discussion. I don't quite like the word "considered." Where there has been extensive discussion the decision has all been the other way.

MR. DODGE: What is the point? Is the point to make recoverable in the original action a claim which was not good then but which subsequent events have established is a good claim?

JUDGE CLARK: Exactly.

MR. DODGE: Not the original claim, but a new claim?

JUDGE CLARK: That is it.

MR. LEMANN: Not the original claim?

MR. DODGE: "You didn't injure me on January 1st, but you did last week"?

MR. LEMANN: As I understood it, the fellow just omitted to state a claim. Now he thinks of it afterwards and he says, "I don't want to wait for the defendant to raise the point on me. I come in with an amended complaint in which I supply it."

MR. DODGE: Amendment is all right. Of course that is permitted. But I am wonderingabout stating a new which some people call a cause of action which has arisen since the suit was brought.

MR. PRYOR: Occurrences or events which happened since the suit was brought.

JUDGE CLARK: Suppose the statute of limitations may have run, or something of that kind. I take it that every defense of that kind is still available. This is simply a question whether you may be entitled to bring it up or not. The thesis these cases have gone on is that you can't even bring before the court a matter which is a matter to be presented to the court unless the original claim was a complete cause of action.

I don't see any reason for that, really. What reason is there? Our theory is to get cases out before the court as

rapidly as possible. What this means is that the parties are all here with all their lawyers and all set to go, but because of this formality you can't consider the case and it has to be started over anew, and you have to go through that and have your three or four years on the calendar, as we have in New York, before it comes to issue.

DEAN MORGAN: Would they hold the same way with a supplemental answer?

JUDGE CLARK: That I don't know.

DEAN MORGAN: Suppose the original answer didn't state a defense. The supplemental defense would not be any good? Is that the idea, too?

JUDGE CLARK: That is a good argument. I wish I had thought of that.

DEAN MORGAN: This is about as silly a thing as ever happened, except the Illinois cases.

MR. PRYOR: If I understand you right, don't you mean instead of a bar, that it shall not be affected by an order of the court that the original pleading is defective in the statement of the claim for relief?

JUDGE CLARK: I think the word "bar" is probably not correct. I meant it shall not prevent the court's exercise of discretion.

DEAN MORGAN: I suggest, if you are going to adopt the substance, you just add the clause, "whether or not the original pleading is defective in its statement of a claim for relief."

JUDGE CLARK: That is the idea.

JUDGE DOBIE: I move that we adopt that.

MR. PRYOR: Second the motion.

MR. LEMANN: I think we ought to consider the general question of policy. I don't know how many such cases we will have before us when we review all this material. It seems to me it is a serious question of policy whether we are going to make every change in the rule which an unfortunate decision may suggest would help guide another court. It is a question of degree. Maybe we should. Maybe we ought to adopt every intelligent corrective suggestion where a rule has been construed improperly.

I just raise the general question of policy, because I think we ought to be consistent about it. I would not think this was any more important than some of the others that we have passed.

JUDGE CLARK: Don't you think the only way you can really decide this is to get the broader picture?

MR. LEMANN: Yes, after we have seen them all.

JUDGE CLARK: I think you have to go back over this.

MR. LEMANN: Is it something we would recommend a change ou if we didn't have anything else on it?

DEAN MORGAN: Oh, no.

CHAIRMAN MITCHELL: I myself have thought that to say in advance that we are or are not going to make a lot of seemingly unimportant changes, we don't know what we are saying because

we don't have them before us. After we go through these and work them out, and when a draft is brought back to us, then when we have the whole picture and when we may find we are messing up a whole rule requiring a whole new edition by the West Publishing Company, and all that sort of thing, maybe we will say we don't want that.

After we go down through one after another, we may wipe them out. When we have a draft and know what it means and know the importance or the lack of importance, we can decide. To try to make a formal decision in advance that we will or will not do this or that, we don't have an adequate basis to work on.

I would like to see what proposals we have and how much they are going to disturb the rules.

MR. DODGE: I still don't understand what is meant by this. Assuming that the plaintiff hasn't stated any case and hasn't a good case, but something has happened since that puts a new aspect on the matter and gives him then a new and good claim, is he going to be allowed to set that up and make it part of a suit brought two years ago, having all the effect of a suit then brought?

CHAIRMAN MITCHELL: It is a statute of limitations problem.

DEAN MORGAN: It is the same thing as whether you let them add counts.

MR. DODGE: Based on facts after the suit was brought

which was a worthless suit. You have a worthless suit pending, and the fact that it is a worthless suit will not prevent you from continuing it by an allegation with regard to circumstances of recent date.

DEAN MORGAN: If it was worthless, the defendant could have raised the point promptly and got a prompt decision on it. He let it lie right along.

MR. DODGE: It seems to me that has serious consequences which I don't fully understand.

JUDGE CLARK: May I suggest again the kind of case where it has come up. The particular case we have cited here is a case of patent infringement. This was a suit for a declaratory judgment to hold that a patent was invalid. The district judge dismissed the action on the ground that there had been no adverse claim. It was admitted that the claim had been made after the action was brought, so the question was whether you could bring that up by bringing it in as a supplemental pleading of a fact that had occurred afterwards.

It seems to me, if I may suggest it here, that really it is a little absurd to say that you have to shut your eyes to a complete cause of action, if you want to use that term, at the time that the court is considering it. Everybody admits that the adverse claim by the defendant has been made. The query was whether the complaint had jumped the gun a little, because these claims in patent litigation are a serious matter.

He knew the defendant was going to make the claim. What good does it do for the court to have to throw this case out and have to start over again?

Let me suggest that I don't understand this would have any effect -- and if it should have any effect, it can be disclaimed -- I don't think this has any effect whatsoever on questions of substantive right. For example, if the statute of limitations has run, it has run, and you put up the defense to the supplemental pleading. This doesn't change any substantive defense. This simply says that you don't have to go through the formality of requiring people to start out again if there is some defect in the failure to state the cause of action

Of course, as we know, judges vary a great deal. Judge Hall out in Los Angeles is going to require a lot more than some other judge. Whenever you find that kind of defect, you throw it out and make him start over.

MR. LEMANN: Charley, I just took a look at the second case you cite, and from a quick look I don't think it goes off on any defect in the pleadings. An action under the Fair Labor Standards Act had been filed prior to passage of the Portal-to-Portal Act. A proposed amendment subsequent to the passage of the Act attempting to bring in claim for compensation for activities after the effective date of the act was ineffective, since it would relate back to the date of the original complaint. The court said:

"The amended complaint which was dismissed alleged nothing which would give the court jurisdiction after the effective date of the Portal-to-Portal Act and the dismissal was clearly right under Section 2 of that Act."

Then they went on:

"On the other hand, if the proposed amendment is treated as a supplemental complaint, it was also ineffective since the court had no jurisdiction over the original action."

On a quick look, I would think that those grounds were entirely independent of the wording of our rule.

JUDGE CLARK: I think so. I am not sure, but isn't that what I said? I was suggesting --

MR. LEMANN: This decision doesn't seem to me to indicate any defect in the rule. Maybe the other cases that you have referred to do so. This came from the Southern District of New York, and you spoke about Vermont cases. Maybe those are the ones.

I don't see any Vermont cases here. The other cases are from Pennsylvania and Missouri.

MR. DODGE: You get into questions of substantive law here.

JUDGE CLARK: I am sorry, Mr. Dodge, but I don't see how you do. That is the very question. I don't see how you do get into questions of substantive law.

MR. DODGE: Suppose the original complaint is defective as a matter of substantive law because of a statute or something

that nullifies the claim stated there, would you allow the revival of that suit by events that have happened since?

JUDGE CLARK: My point is that if they are in court and if there is now a cause of action, it ought to be considered by the court.

MR. DODGE: It ought to be, but should it be considered in an action brought two years before, which may have some effect one way or another because of the fact that it was brought then?

JUDGE CLARK: Those questions of the statute of limitations, and so on, are not turned down. This seems to me merely a question of pleading. That is why I wasn't quite sure that I got Monte's point. If there is any question of jurisdiction, it is still raisable, of course.

MR. LEMANN: My point is that I am not too sure that even your amendment would create a different decision from that which was rendered in this case. It didn't seem to me to go on any labored construction of our rule or any misapprehension of our rule. There is no reference at all to the rules. I have only glanced at it. It seems to me to go on substantive grounds that would be applicable perhaps under your amendment.

JUDGE CLARK: The case you are referring to is the Fourth Circuit one, isn't it?

MR. LEMANN: It is the Second Circuit, Bonner v. Elizabeth Arden.

JUDGE CLARK: If you are asking did the court reach

the correct result, the answer is yes. It goes on another ground. But it throws out this thing that the lower courts are now following, as happens so often in this situation. This is being repeated in the lower courts.

The point that is being repeated seems to me to be the entirely procedural one that the court must dismiss and can not allow a supplemental pleading if it finds some defect in the original complaint.

I don't see any reason for that whatsoever. It does not seem to me that it raises these substantive points, because they are entirely separate. I am not suggesting and the rule is not intended to be worded that a court must accept a supplemental pleading that doesn't say anything or that it is barred by jurisdiction or by the statute of limitations or what-not.

As a matter of fact, I wrote this up in what I said in that Technical Tape case, if you want to see it. I said the judge could probably refuse to accept a supplemental pleading which was clearly barred by the statute of limitations or otherwise, although it seemed to me that he had better first take it and allow it to be brought up on a direct issue by pleading.

This rule is not a compulsion on the judge. It is permission. It is to allow him to end the matter in litigation between these parties without being barred from considering it by a formal rule.

MR. DODGE: We are not confining ourselves to technical

complaints and pleadings. We are dealing with cases also where there is, as a matter of law, no right in the plaintiff, such as he has set up in the original suit, and to allow him instead of bringing a new suit, to rely in that worthless suit upon facts which have recently happened, long after that suit was brought.

I am afraid of the consequences which there might be in a rule like this.

JUDGE CLARK: I must say that I don't see any harm in it. It seems to me very desirable. The purpose of a law-suit is to ease out the sore spots between litigants. Our whole idea is to take hold of the entire controversy between parties and settle it so then they can go about their business and the thing is ended.

Here is something which, by premise, is a matter at odds between the parties. It has to come up sometime. We are simply saying, "No, you can't treat it as a part of the whole matter which is before us because for some reason you haven't made a complete complaint in some fashion. You have to go out, get your witnesses, start all over again, and come back some years hence." It seems to me that is just against the general idea of our pleading here, which, among other things, provides that if you have a defective complaint you can improve it in any way that you can.

The idea, as I understood it, was to end all controversy between the parties in one action, as Eddie used to say. The

action is a kind of envelope in which you put all the points of irritation between the parties. Here is one, and the only reason you are going to shut this out and put it in another envelope is that you think that the first case wasn't correctly stated.

What difference does that make if there is a real point of irritation between the parties?

MR. DODGE: The first case wasn't well stated, did you say?

JUDGE CLARK: Yes. I say if it is not well stated.

MR. DODGE: I am talking about cases where the claim was stated as perfectly as possible, but it was a worthless claim. I don't think we ought to hold out a suggestion here that if a claim is defective on that ground, you can, without starting a new suit, keep the old thing going by setting up recent facts in a new claim.

CHAIRMAN MITCHELL: Suppose the defendant was in New York and the suit was started in New York, and something disturbed the worthless claim after two years had gone by and he had moved out to California. He can be dragged back here on a supplemental pleading on the strength of its being within the jurisdiction of the court by virtue of the first claim?

MR. DODGE: It is wholly different from the power of amendment. The power of amendment is all right, but I had not understood that these rules were desired to bring into one action all claims which a person now has or may ever have had

down to the time of the trial of the case.

CHAIRMAN MITCHELL: Gentlemen, we will adjourn for lunch.

... The meeting adjourned at twelve-fifty o'clock p.m. ...

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MONDAY AFTERNOON SESSION

May 18, 1953

The meeting reconvened at 1:45 o'clock, William D. Mitchell, Chairman of the Committee, presiding.

CHAIRMAN MITCHELL: Judge Clark, what is our next section for consideration?

JUDGE CLARK: The Chairman has asked me what is next, and my next would be 23, but I want to make sure of our previous action.

My understanding at the moment is that on 15(d), I am to bring in a little different draft and it is to be looked over at the next meeting. If that isn't correct --

CHAIRMAN MITCHELL: That is about supplemental pleadings.

JUDGE CLARK: Shall we go on?

CHAIRMAN MITCHELL: You know what the point is. You may try your hand at a draft, and we will look at it.

JUDGE CLARK: Mr. Wright suggests something that I didn't have in. He has a suggestion as to Rule 20, at the top of page 40 of my summary:

Where joinder is sought of multiple claims and multiple parties, it has been said that the claims joined must arise out of the same transaction, and so forth, and that there must be a question of law or fact common to the claims. We cite two or three cases.

This reading of the rule has been very sharply

criticized in the commentary, citing Professor Wright's own article. The critics say that the effect of this reading is to put a limitation on joinder of claims which the rule on that subject, Federal Rule 18, does not contain; they contend that Rule 20 requires a question of law or fact common to all the parties, not to all the claims, and that it is enough that some right to relief is urged for or against all the parties arising out of the same transaction or occurrence.

To meet that, the suggestion might be made thus in the first sentence of Rule 20. This is to clarify the question. Toward the end, "all of them" appears to refer to the claims, not to the persons. This is only a slight change which really substitutes for the words "of them" which appear near the end, the words "such persons," so the sentence will read, as a whole:

"All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all such persons will arise in the action."

Then there would be a like change in the next sentence. It makes clear that the tying point is as to the persons, the parties.

CHAIRMAN MITCHELL: And not the question.

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: You say "all of them" have been construed by some court as the claims, and you want to confine it to the persons.

JUDGE CLARK: That is correct.

CHAIRMAN MITCHELL: Is that what the courts have done with it in the cases you have cited?

JUDGE CLARK: Yes.

PROFESSOR WRIGHT: You will notice, Mr. Mitchell, in addition to the holdings on it, there are probably half a dozen other cases in which a court has said by way of dicta that this means a question of law or fact common to all of the claims rather than persons, but it wasn't necessary to the decision.

JUDGE DOBIE: You are changing "of them" to "all such persons"?

JUDGE CLARK: Yes.

MR. LEMANN: Can you speak of a question of fact or law common to persons?

CHAIRMAN MITCHELL: I was just wondering about that.

MR. LEMANN: That is unusual.

CHAIRMAN MITCHELL: They may be commonly interested in them if it isn't common to the claims they are interested in.

MR. LEMANN: You haven't made a suggestion in your list of suggestions for this, have you?

JUDGE CLARK: You can see what has happened is that there would be a restriction made here which is more than the restriction in Rule 18. Rule 18 provides for a complete joinder

of claims. Here we get over to parties, and the idea is to get those parties in who are interested in general in the same general series of transactions. Then it works out so that you have less joinder of the claims than you have of the parties, or that you had when the claims were separate by themselves.

CHAIRMAN MITCHELL: That is all right, but it is the phrasing of it that bothers me. It reads, "if any question of law or fact is common to the parties."

MR. LEMANN: How can Mr. Mitchell and I have a question of law common to us?

CHAIRMAN MITCHELL: I know what they are driving at; that they are commonly interested in the question, that it is a question in which they are all commonly interested. To say it is a question of law common to all of the parties is what troubles me. Do you see what I mean there?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: You think the correction should be made. Suppose we vote on it in principle, and then you work out the question of phraseology.

JUDGE CLARK: All right.

CHAIRMAN MITCHELL: All in favor of making the change to Rule 20(a) so as to make it clear that we are dealing with questions of law or fact in which all the parties are commonly interested --

MR. LEMANN: Has this given any trouble in the cases?

CHAIRMAN MITCHELL: There are several cases in which

the other construction has been placed upon it by the courts, and you don't think it produces the right result. Is that it?

JUDGE CLARK: That is it. It is an unnecessary restriction on joinder that the courts are reading in.

CHAIRMAN MITCHELL: They are reading in by taking our rule literally.

What is your pleasure? All in favor of making this change say "aye"; opposed. It is agreed to.

JUDGE CLARK: The next thing that I have is Rule 23. Again, I note that I discussed several things in between, but on all the matters I have brought up in between, I have no suggestions for change and I am assuming that you are accepting that. If you want to make any suggestions in between, of course I will be glad to hear them.

The first suggestion I have is with respect to Rule 23, which is Class Actions. As to that, there has been a great deal of discussion by the professors, and somewhat in the cases, of the language here, the classification of three classes, the joint, the several, and so on, which have been translated as meaning the "true" class action, the "hybrid" class action, and the "spurious" class action.

DEAN MORGAN: That is an invention of the judges.

PROFESSOR MOORE: Judge Storey, in fact.

JUDGE CLARK: What I have done myself -- and this is, of course, more a suggestion for discussion than otherwise -- is to try, if you will, to ride both horses, by which I mean to

put in a little of the idea of the professors, which is to make the rule more usable where you make some provision for citing in parties, without myself having repudiated the old classification.

These people who write on it, I think would take out all the old classification, and instead of having subdivision (a) with the (1), (2), (3) classes, would probably suggest a different approach entirely.

I am now suggesting, at least for the purpose of discussion, merely an addition which I think, as we read it, you will see does have some practical meaning. I mean in the ordinary case it allows the use of a class action perhaps somewhat more widely than otherwise.

That appears on my page 3 of suggested amendments, and I have suggested adding a new subdivision (d), "Orders to Ensure Adequate Representation."

I might say this comes directly from the recommendation of the New York Judicial Council to the New York Legislature. It hasn't been adopted in New York as yet. In fact, I don't know that the Judicial Council has definitely recommended it for adoption. They have put it out for discussion more than otherwise.

"The court at any stage of the action may impose such terms as shall fairly and adequately protect the interests of the persons on whose behalf the action is brought or defended. It may order that notice be given in such manner as it may

direct, of the pendency of the action, of proposed settlement, of rendition of judgment or of any other proceedings in the action, including notice to come in and present claims. When, notwithstanding such orders, the representation appears to the court inadequate fairly to protect the interests of absent defendants, the court may, at any time prior to judgment, order an amendment of the pleadings, eliminating therefrom all reference to representation of the absent parties, and the court may render judgment in such form as to affect only the parties to the action and those adequately represented."

JUDGE DOBIE: Don't you think most of that is implied?

JUDGE CLARK: Possibly, but that is a part of the idea. Let me give you a little background of the cases.

The case that Judge Frank had, the Guaranty Trust Company, went to the Supreme Court. They suggested there that in a spurious class action, the third class, you might secure a wider representation if you were able to see that they were properly represented or had a chance to come in.

We had the matter come up later in the case of Dickinson v. Burnham, which started as a kind of stockholders' derivative action to recover a fund for the benefit of the stockholders. That was then a defunct corporation. Recovery was had, but there was a question of what you would do with the distribution, because a lot of the old stockholders were now missing. You couldn't get any return from them. They were presumably scattered, dead, and so forth. The district judge

there, holding it a spurious class action, nevertheless ordered citation in of everybody who could be reached at the last known address, and got a great many, not most of them, certainly many more than half. He didn't get them all, because it was impossible, just because of the passage of time and because they could not be reached.

The men who had to put up the money, the defendants against whom the judgment went, as alternative claim, of course claimed they weren't liable at all on appeal, but they claimed in any event they should not have to put up this extra amount, that is, that they should be held only for whatever they had to pay to living people.

We got around it for good or ill on appeal by saying it was not a spurious class suit, but was a hybrid one, and therefore the matter of distribution was for the court. Therefore, the defendants had nothing to say about the distribution. We therefore affirmed the distribution below, which was to divide it up among all the people who appeared, because they weren't being paid in full anyway, you see. Instead of giving back to the defendants the amounts that might be recovered for the adverse parties, the result is to have this all go into the fund to the people who have appeared and have made their claims. So they get a higher dividend than they would have gotten if everybody showed up, but they are not paid in full.

CHAIRMAN MITCHELL: You mean the recovery wasn't big enough to pay all the claims in full if they had been asserted?

JUDGE CLARK: Not even of those who were present. The recovery was only partial, anyway. Of course, there was a bigger dividend by virtue of allowing the unclaimed amounts to stay in the fund and be distributed to everybody.

That is this case of Dickinson v. Burnham, 197 F. 2d 973, certiorari denied, 334 U.S. 875.

As I say, we got around that by calling it a hybrid transaction, but nevertheless it seems to me that is a desirable result in any kind of action. The only problem, you see, is this one of representation. Can we make decisions of this kind when people are not all in accord?

If you could follow a process such as was followed there, of notice to the last known place of address, and so on, you reach a result which is, I think, on the whole fairly desirable.

The critics of the rule are almost entirely along this line: They say that the rule as it now stands is rigid, in that it makes the class action depend not on the practical question of complete representation, but on the more theoretical question of the nature of the interest. Therefore, the general line of recommendation is to make it turn upon the question of representation, relying, among other things, on the decision of Chief Justice Stone -- I guess he was not Chief Justice then -- in Hansbury v. Lee, that the issue so far as res judicata is concerned is one of adequate representation, and that the class action and judgment will be upheld so long as the representation

is considered adequate and no one is shut out on that ground.

That is a little of the background, and what I have done here is to try to reach the situation like that which we had in Dickinson v. Burnham so we would not have to change the labels around. In other words, assume that we were stuck with the label that the district judges use, the "spurious" class action.

JUDGE DOBIE: There is no place in the rule that the terms "spurious" and "hybrid" are used.

CHAIRMAN MITCHELL: There is no classification on that basis.

JUDGE CLARK: You don't know a classification such as "hybrid"?

JUDGE DOBIE: I say we don't use those classifications in our rules.

JUDGE CLARK: No, we don't.

MR. PRYOR: Judge Clark, shouldn't the word "defendants" in the third line from the bottom of your page 3 be "parties"? Suppose the judge was convinced that the plaintiffs do not adequately represent all the interests that they purport to represent.

DEAN MORGAN: ~~Innocent~~ absent parties.

JUDGE CLARK: In the third line from the bottom, "to protect the interests of absent defendants"?

MR. PRYOR: Shouldn't that read "absent parties"? You use it in the last line, "absent parties."

JUDGE CLARK: I think you are right about it. As I say -- and I don't say it by way of an excuse, but just by way of fact -- this is the New York Judicial Council's draft.

PROFESSOR SUNDERLAND: Two lines above that on this page, "and present claims and/or defenses"?

JUDGE CLARK: I should think it would be.

JUDGE DOBIE: That broadens the rule, doesn't it, as I think it ought to be broadened. Instead of "defendants," "parties". That would be an improvement.

PROFESSOR MOORE: Judge, in your proposal could the court order in tort-feasors and make them come in and present their claims or defend, and be bound by the judgment if they didn't?

JUDGE CLARK: I frankly don't know for sure, because the more typical question they are thinking of is claimants rather than defendants. I should suppose the answer is probably yes.

PROFESSOR MOORE: Do you mean because I am involved along with several hundred other people in an accident, that because some of them get their lawsuit started, I have to come in with them?

JUDGE CLARK: Of course you have to have the limitation stated. You can't have it unless you have a common question of law or fact and the numbers are not too great to be brought in, and so forth. I suppose a more specific answer to what you say is that you start out with a case where you could

cite them in anyway.

PROFESSOR MOORE: Who could cite them in?

JUDGE CLARK: Here, instead of having them joined originally, you would in effect build up the case as you go along, so to speak, by eventually giving them notice to come in.

PROFESSOR MOORE: I represent a client who doesn't want to come in, though. Am I nevertheless obliged to get in this lawsuit merely because he happened to be in an accident along with several other people?

JUDGE CLARK: Of course, your client couldn't control whether he would be sued originally or not. What I am suggesting is that in these cases where a person may have been made a party originally, which he could not prevent, he then can be brought in through this means.

PROFESSOR MOORE: There is a recent case growing out of that Perth Amboy explosion. The Pennsylvania Railroad has brought a suit in the nature of a declaratory judgment bill of peace in which they name as what they call primary defendants, seven different defendants. The United States is one of them; others are the Reading Railroad, the manufacturer of the explosives, the lighterage corporation which was transferring explosives from the pier to the steamship company, and the Isbrandtsen Line. Those are named as the seven primary defendants who, with the plaintiff, the Pennsylvania Railroad, are said to be in general the persons against whom claims are being made.

Then they seek to name the other -- there are some

8,000, I guess -- tort claims growing out of that explosion. The Pennsylvania has attempted to pick out and name at least one person as the representative of each type of tort claim. That is, they picked out the city and county to represent the governmental corporation that might make a claim. Then they picked out some person who had a death claim, some person who had nothing but a property claim, and so on. By that device they hoped to force some 8,000 tort claimants into this lawsuit.

The judge held that there wasn't too much before him. The government was the only one that had come in at that point, and it moved to dismiss on the ground that it had not consented to be sued in that form of action. He overruled that, but he did refuse to enjoin the various 8,000 lawsuits that are pending or about to be started against these various people.

CHAIRMAN MITCHELL: They didn't seek to bring in all those people. They sought to bring about a judgment through a single representative of the class, is that correct?

PROFESSOR MOORE: That is correct. Under this could the court give notice to these some 800 or 8,000 -- 8,000, I guess -- and force all these tort claimants to come into this so-called class suit?

DEAN MORGAN: That is saying whether you are going to be able to use the bill of peace for regular tort claims growing out of the same cause. That is what I suggested to Chafee in his discussion of this subject. He thought theoretically they ought to be allowed to do it; but practically, because

of trial by jury, and so forth, it probably would not be done by the court. It is the regular bill of peace notion. There are hundreds of cases all growing out of the same thing, on the very same questions of law and fact. The only question is whether a bill of peace could be expanded to cover that. It usually doesn't cover it. That is, it hasn't been applied to tort actions, but why should it not be?

JUDGE CLARK: I think there is a real question, though, from the standpoint of the theoretical term justice, whether it should not be done. Unless, in a situation of this kind, it is handled as a whole, somebody is going to lose out very badly. Some people may, of course, get a bonanza.

PROFESSOR MOORE: Why should they lose out?

JUDGE CLARK: It may be the first to sue who get it, and the rest might not. I really think there is a question.

For one thing, a defendant who is in that unfortunate situation is entitled to some consideration, I think, too. The most spectacular situation I know of the kind was the Ringling Brothers and Barnum & Bailey Circus and their terrible fire up at Hartford that killed so many people a few years ago. On that they started suits, and they were about to put the Circus out of business and nobody would have gotten too much out of it. Finally in that case the legally permitted consequences were such that the parties avoided it. It was an amazing thing that somebody didn't kick it over, but they didn't, and they all joined and appointed a master in the state court, in the

superior court. Eventually they settled all the claims that way through the master, and gave the circus several years to pay it off, which the circus did by keeping running and making money.

If you had not had an extralegal device by agreement of the parties, everybody would have lost out on it.

PROFESSOR MOORE: You had a concord of creditors there, largely because Ringling Brothers was insolvent, and you had a receiver appointed. But you have people here alleged to be the tort-feasors -- the Pennsylvania Railroad, the United States, the B & O, and several others -- who are not insolvent, and there isn't any tort claimant who is going to lose out because the tort-feasors are financially irresponsible. There are about 8,000 claims, and they aggregate approximately forty million dollars.

MR. DODGE: What did the court do in that case?

PROFESSOR MOORE: Denied the Government's motion to dismiss, and denied the plaintiff's motion for an injunction against pending suits.

JUDGE DOBIE: Do you know what happened in that Sonja Henie case in Baltimore? I think they had very much the same problem there. The seats collapsed at that rink. I know Judge Niles, one of the best judges down there. He made some drastic orders about the whole group, about how they should proceed. Do you know how that was handled?

PROFESSOR MOORE: No, sir.

JUDGE DOBIE: You remember the situation. The seats

collapsed. I guess nearly a thousand people were injured.

MR. DODGE: Did the court rule that these absent parties were not proper parties, the other 8,000?

PROFESSOR MOORE: It ruled that this was a "spurious" class suit, and they could not be bound by the judgment, and the plaintiff should not be able to enjoin their suits.

MR. DODGE: They went beyond the denial of an injunction and said they wouldn't be bound by any judgment?

PROFESSOR MOORE: That was the theory. They haven't gotten to an actual decision on that. It seems to me that we ought not to tack on just a new subdivision (d) like this and leave the question of res judicata open.

DEAN MORGAN: We can't fix res judicata, can we? That is a matter of substance, is it not? It is not a matter of procedure.

PROFESSOR MOORE: What is the point, then, of having notice in here to determine adequacy of representation? The first thing you know, you will get a rule drafted so that it will logically require res judicata.

DEAN MORGAN: Surely, I agree, but this is a procedural matter up to the point of what is going to be the effect of the judgment. If it turns into an action where there is proper representation, then the court is going to say as a matter of substantive law that the judgment is res judicata, even though you call it a "spurious" action.

Judge Biggs, in the Third Circuit, in one of these

claims of interference with one of these hair-do patents, and so on, said this was a "spurious" action, but this will prevent any one of the other thousand suits against any one of these other defendants. The plaintiff, you can say, had his day in court, all right, but none of these defendants did. He said, "I am holding as against this particular defendant and as against the association," which he said was the proper representative of all the alleged infringers, "that this would prevent a suit against any one of those infringers."

You remember that case, don't you?

CHAIRMAN MITCHELL: I would like to inject here a question. I remember when this rule was drawn, if my recollection is correct, George Pepper drew it. He seemed to be very well posted about class actions, and I didn't know anything about them, and don't yet. You are using expressions that don't mean anything to me, and I would like to have them defined.

What is a "spurious" class action, and what are the other kinds, that have no adjectives applied to them in this rule? What is a "spurious" class action? What does the word "spurious" mean?

DEAN MORGAN: A "spurious" class action isn't a class action at all, except it is an action in which persons may come in ordinarily. Isn't that right, Bill?

PROFESSOR MOORE: Yes.

DEAN MORGAN: They may be allowed to come in jointly

on a common question of law or fact.

PROFESSOR MOORE: It is 23(a)(3), generally.

CHAIRMAN MITCHELL: In the case you cite, the explosion, aren't there common questions of fact?

PROFESSOR MOORE: Yes, sir.

CHAIRMAN MITCHELL: Uncommon questions of fact, too, as to how badly you were hurt, and all that. But the common question is the question of negligence on the other side.

DEAN MORGAN: They would all be proper parties. There is no doubt about that.

PROFESSOR MOORE: They could all come in.

DEAN MORGAN: They could intervene or they could call them in or could all be served; if you could serve them all, you could handle it that way.

MR. PRYOR: There have been a lot of these wage and hour cases that are called "spurious" class actions. Their rights are common in a sense, and yet their right of recovery is different. They are called "spurious" class actions, under this third classification.

JUDGE CLARK: I may suggest this is a matter that has been discussed a great deal. I don't think it is a question that is exactly easy. There is, I think, fairly weighty criticism of our rule as being ineffective. I think, myself, it doesn't amount to much. I mean, the answer may be that you can't do much by a class action. Perhaps that is the answer. I think it is a good deal of the answer to date.

I would like to ask Mr. Moore if he is not moved by any of the suggestions of the professors and what, for example, he would have done in the Dickinson v. Burnham case. The Dickinson v. Burnham case struck me as a case where we ought to do something. We went ahead and did something, as a court must, but we felt a little uneasy about it because it didn't seem to fit explicitly in the categories.

I think we did justice there, but we were trying to find our own way, so to speak. Would you leave this just as it is?

PROFESSOR MOORE: I don't know, Judge. So many of the ones who are critical of the rules, though, definitely want to be able to force tort-feasors and other claimants into the litigation. If you start to change the rule, I think the basic problem should be discussed as to whether self-appointed representatives should be able to force other people in the litigation merely because there is a common question of law or fact. Maybe they should.

MR. DODGE: You suggest the possibility of some modification of paragraph (3) so as to impose a limitation of some sort on the "spurious" class suit?

PROFESSOR MOORE: No, I don't know that I would do anything with the rule right now, unless I was prepared to take the position that many of these critics do, who want the judgment to be binding. I think that is the basic problem.

Granted that perhaps the rule can't say exactly

whether the judgment is res judicata or not, if you start drafting a rule along the line of orders to ensure adequate representation and notice to come in, and so on, the logical implication from that must be that you do have a suit from which the judgment will be res judicata.

MR. LEMANN: What did you think of Chafee's suggestion that we omit everything in the rule after the words "sue or be sued" in the fifth line of Rule 23(a)? He says that we have made too rigid a classification, so he wants to stop with that broad, general language. He doesn't like chewing it up into three subdivisions.

PROFESSOR MOORE: What is going to happen under that proposed rule? Suppose we did that. As a judge, what would you conclude from that change?

MR. LEMANN: I don't know that I could do anything more than has been done here. I thought perhaps your enumeration was pretty exhaustive, but I don't know. Apparently he doesn't think it is.

JUDGE CLARK: I understand that Chafee really suggests there to provide for other things. For example, he suggests that there is no way left to handle a possible fourth kind of class suit which might come up in the future. He makes a distinction between solid class suits and invitations to come in. He has an extensive thing here of about 52 pages that I could not summarize too adequately.

It seems to me you will get the flavor of it if you

look over at the next page, on page 43. There is a complete representation of the proposal of the New York Judicial Council which attempts to follow the idea of these people. You will see that subdivision 1 there is general, just as Chafee suggests. Then there is an attempt to put in these other provisions and to see that persons are adequately represented.

It is to be admitted and there is no question, as Professor Moore says, that it is expected that the judgment when entered will be res judicata. That is the idea. All the people who make this argument go back and say that the thesis of the Supreme Court in the Hansbury v. Lee case is not based upon the idea of theoretical rights, whether joint or otherwise, but is based on the propriety of the representation, the adequacy of the opportunity to defend, and so on. In other words, it is based on more practical aspects rather than the theoretical ones.

So this suggestion from the New York Judicial Council is an attempt to work it out.

I might say, as I think I said before, that this suggestion from New York has been made after an extensive study. This is a part of the study of the Council, but it has been made, as I understand it, not as a recommendation yet to the Legislature, but as one for consideration of everybody, and they expect to get in responses from it for further consideration.

Of course, Senator Pepper was in on some suggestion of that kind. You will see at the top of page 42 citation of

the Cornell people, Keeffe, Levy & Donovan, "Lee Defeats Ben Hur." That title is supposed to be a reference to Hansbury v. Lee, and supersedes the old Ben Hur case. Those three authors, the first being a professor on the Cornell faculty, sent this on to Senator Pepper, and Senator Pepper comments on it in the Cornell Law Quarterly at the place given here.

I think it is proper to say that his comments were rather on the skeptical side, as we put it here. There they are, 33 Corn.L.Q. 349.

I don't remember that he really wrote this. I really thought Mr. Moore had more to do with it. I was responsible in a way. I certainly went along with it. Going back into history, I thought Mr. Moore had most to do with it.

These terms, these lovely terms, "true," "hybrid," and "spurious," were labels that were used in old equity cases. Those were not invented. They were not something new. After the classification was made, those old equity terms fell quite naturally into use in connection with them. So the judges have referred to them a good deal in that way. Goodrich wrote such an opinion.

MR. LEMANN: Have there been many cases on Rule 23?

JUDGE CLARK: There have been a good many cases on different aspects of it, but there have been very few on the particular point of what might be termed extending the res judicata effect by devices of notice, and so on; or, to put it another way, the situation we had in the Dickinson v. Burnham

case, where we had the fund in court, and the question was what to do with it. That is one difficulty of being a judge. I often find you have to do something. Here was this money, and we had to do something with it. There seemed to be very little that definitely told us what to do in that particular situation.

JUDGE DOBIE: In that case after you had disbursed the fund, and all of that, which was res judicata for all practical purposes, suppose some man from some remote part of the country had never heard of it and came forward. He couldn't come in and get money, could he?

JUDGE CLARK: I should not think so, but of course that question is not answered. What is answered is that the defendants who were objecting to putting up the money had to do it. That was settled. What might happen if somebody suddenly came to light and asked to come in, I don't know. I should think the court might well say, "Everything was done to get you in before and you weren't around, and you can't do it now."

JUDGE DOBIE: There is no other recourse that these people have. When you finish distributing the fund, I don't care if you call it res judicata or upsy-calla, that is the end of it.

JUDGE CLARK: This is really quite a practical question which, thank God, doesn't come up all the while, but it is the kind of thing that comes up. I would put it this way: It

seems as though it is a case that the courts ought to be able to handle. It is too bad, I think, to sit back and say we can't do anything. Let everybody sue as can, and catch as catch can.

PROFESSOR MOORE: I am inclined to think you need some implementing legislation, probably, to take care of at least some of these situations. Take the Pennsylvania Railroad case. Some of the suits are brought in the state court of New Jersey. Some are brought in the state court of Pennsylvania. Some of them are brought in the state courts of New York and Ohio. You run into a statute that in general a federal court can not enjoin state court proceedings.

If you are going to have some sort of over-all class suit which you are going to force everybody in, I believe you are going to have to implement that with legislation that will permit the court to enjoin suits in state courts, and perhaps in other federal courts, at least bring to and consolidate with the main action suits in other federal courts.

MR. DODGE: Is this a suit for declaratory judgment?

PROFESSOR MOORE: The Pennsylvania Railroad is trying to get a declaration of liability or non-liability of it, and some seven or eight other primary tort-feasors.

MR. DODGE: Raising only a question of law?

PROFESSOR MOORE: Who was liable for that Perth Amboy explosion.

DEAN MORGAN: Law and fact.

MR. DODGE: The 8,000 cases would involve many questions of fact which could not be determined on this suit for declaratory judgment.

PROFESSOR MOORE: If the court sustained the class suit and all these people came in and it was adjudged that the Pennsylvania Railroad or the United States or one of these others was liable, then you would have to have separate assessments of damages for each claim. If the Pennsylvania Railroad got a declaration that neither it, the United States, nor any of the other so-called primary defendants was liable, that ends it.

MR. DODGE: Liable as a matter of law.

PROFESSOR MOORE: Yes.

DEAN MORGAN: It is just like the consolidation of a lot of personal injury accidents to determine liability. We did that in Minnesota once with 300 accidents right after World War I, that railroad fire. We had about 300 cases. You remember in Minnesota right after World War I we had 300 cases because of a fire, whether the United States caused it or there was some other cause. They tried the case for about three months, and they found liability. Each one of them had to show how much damage after that.

JUDGE CLARK: Could I suggest that it seems to me there is perhaps a little to be said for the solution that I was intimating as a kind of intermediate step. You will notice I didn't suggest, not yet at least, as does Professor Chafee and

as do these other critics, wiping this all out and starting anew. I simply said, taking the existing classification and allowing it to stand, then let us add some provisions making clear this point of adequate representation.

I suggest that the effect of that could well be that at the moment, put it as you may, there is some doubt as to just how far our rule does go. Some people think it goes very far. If you take the suggestion made by Judge Frank in this Guaranty Trust Company case, which has been applied somewhat, which the district judge purported to follow, you will find that perhaps it goes further than we originally contemplated. The courts are putting some significance in it.

It seems to me if you added this without taking away anything, you would make it clear that in cases where the representation is adequate, the matter would be settled. That is clarifying one point of view of the rule, but not necessarily adding anything to it. In other words, as an intermediate step, so to speak, this is not likely to raise some of the questions that Professor Moore has in mind because it doesn't go that far.

It is not a complete adoption of the views of this Cornell article, for example. Without going that far, it really adds a measure of clarification of something which may well be true of our present rule and seems somewhat to be so construed by the courts.

CHAIRMAN MITCHELL: How about the point that has been discussed here? Suppose you adopt this provision here, the

court can not, as I understand, enjoin all these parties which are just represented by one, be they personal injury claims or whatever they are. Isn't that right? For instance, one of these people in the so-called class of claimants has brought a personal injury action of his own in some state court. The federal court could not stop it.

How can you determine the question of liability as to people like that when they have cases pending in a state court, properly brought? The federal statute says a federal court can not enjoin a proceeding in a state court. How do you get the competence you are after?

JUDGE CLARK: You quite frankly wouldn't get it in cases where you can't get it, so to speak. In other words, the way I have drawn this, this can't solve all the questions, without any doubt.

CHAIRMAN MITCHELL: What would it solve?

JUDGE CLARK: I think it would clarify what the rule may very properly be held at the moment to mean. I don't think it breaks new ground. This provision has no suggestion of enjoining state courts, and so on.

CHAIRMAN MITCHELL: Of what use is a class suit of this kind against a class of prospective claimants if, when you get their judgment, they are perfectly free to fire away themselves in separate suits? That is what I don't understand about it. I had always supposed a class action, whatever that means, is an action where the effect of the judgment is to bind

everybody in the same situation, provided there is a fair representation of the class. Admittedly, this rule wouldn't have that effect, as I understand it.

JUDGE CLARK: You may remember when we originally drafted this rule back in 1935 or 1936, we originally had a provision in as to its binding effect. That appears in the early drafts. We provided that class action under (1) would bind everybody; under (2) would bind simply as to the disposition of property, while under (3) it would not be binding upon those absent. Then we struck that out at one of our later meetings, on the theory that that would be substantive law and it should not be stated in the rules.

Nevertheless, I think it was the general understanding that that was substantially the law as we were understanding it.

PROFESSOR SUNDERLAND: Before this rule is of any use it would have to have the effect of res judicata. If it doesn't have that effect it is a useless formality.

JUDGE CLARK: Yes.

PROFESSOR SUNDERLAND: We are dealing here with a case of res judicata, which is outside our procedural rule field. It always was a case that we ought to have kept our hands off of.

PROFESSOR MOORE: It isn't always useless. In the federal courts if the parties join as original plaintiffs, you must have complete diversity between them on the one hand and the defendants on the other, because there were cases that held

that if you had diversity between the representatives of the class on the one hand and the defendants on the other, then these other persons could intervene and prove up their claims, irrespective of the amounts or their citizenship. So the so-called "spurious" class suit did serve a useful function from that point of view.

PROFESSOR SUNDERLAND: It lets other people come in and ride with the rest.

PROFESSOR MOORE: They don't necessarily ride with the rest any more than they would if they joined as original plaintiffs.

JUDGE DOBIE: But the fact that one of the intervenors is of the same citizenship as the defendant wouldn't defeat the suit.

PROFESSOR MOORE: Yes.

JUDGE CLARK: The "spurious" class suit as we have known it, I take it, in a state court, for example, would have practically no meaning except as a kind of shorthand for joinder. For example, in New York I think they have said essentially that. It could have a little more effect in federal law as extending federal jurisdiction. Perhaps "extending" it is not the word. Excusing or supplying federal jurisdiction.

PROFESSOR SUNDERLAND: Liberalizing.

JUDGE CLARK: Yes. That is a good word, "liberalizing." It is essentially a joinder instrumentality. It is not really the old class suit in the sense of settling anything. It is

more an excuse for not joining people that you naturally would join.

JUDGE DOBIE: Do you have a concrete suggestion?

JUDGE CLARK: My suggestion, you see, was that we take this much here and add it on top of the other, on the ground that this would give a court a practical way of accomplishing some results which, frankly, we are doing now. I think the court is going to do substantially that, anyhow, because what else are you going to do? What else could we have done in the Dickinson v. Burnham case, for that matter? This makes our work legitimate, really.

JUDGE DOBIE: Do you favor adding what you have on page 3 of your little pamphlet, or just paragraph 3 from page 43 of the big one, or both?

JUDGE CLARK: I think I would rather add it the way I put it in 23(d), subject, of course, to changes in wording, suggesting the whole thing, which is a combination of No. 3 of the New York Judicial Council.

MR. LEMANN: Would your language in the last sentence of your suggestion imply that if the representation does appear to the court adequate, the court may render judgment in such form as to affect those who are not parties?

JUDGE CLARK: Yes, or may I put it another way round.

MR. LEMANN: We are trying to say that they would be bound?

JUDGE CLARK: Of course, this rule can not say that

and does not say it, partly because it doesn't say it expressly and partly because it is our theory that we are not stating substantive law. So when you ask me that, I think I ought to answer, I hope so.

MR. LEMANN: If you adopt this amendment, wouldn't you come nearer saying what we deliberately abstained from saying in our previous rule? Mr. Tolman just called my attention to the fact that in one of our earlier drafts we said we didn't feel that we could express any opinion as to the effect of the judgment; that that was a matter of substantive law. I am just wondering, if you adopt this change, whether you are by implication saying that if the court thinks the parties are adequately represented, it will render judgment in a form to bind the people.

DEAN MORGAN: We said that by (1) just as much as we would say it by this.

JUDGE CLARK: Answering your suggestion, Monte --

MR. LEMANN: We didn't talk about the judgment in No. (1), Eddie.

JUDGE CLARK: It seems to me right along that we make it easier for the court to decide questions of substantive law. That is a part of our function. We have done it a great deal.

For example, take our "clearly erroneous" and several of those things which deal with appellate review. We have stated various principles, and we don't say the appellate courts will follow them, but of course we hope they will have

sense enough to do it, as they have had. It seems to me this is the same sort of thing.

If we can make it easier for the court to see the proper answer, I don't think there is any reason why we should not do it. We are not telling them; we are not laying down the law, that this is the answer. We are trying to give the court a means of taking care of litigants in this kind of case.

CHAIRMAN MITCHELL: A means of doing something we think they ought to do but we haven't any power to make a rule requiring them to do.

MR. LEMANN: I would be afraid again this was a case in which, when you got through with it, instead of putting an end to Law Review discussions and uncertainties, you would create some room for some new ones. I wouldn't think you would add to certainty.

MR. DODGE: It seems to me that something like this is pretty good as calling the attention of the court to powers which it has. They may be implied, but there is nothing in Rule 23 as it stands now which suggests any order of the court anywhere along the line.

If this is particularly applicable to paragraph (3), "spurious" actions, I think it would be helpful.

JUDGE CLARK: That is just the point I was attempting to make. It would have been helpful to us in the case we had. We went ahead and did it. The court has to go ahead and do these things. This is making a naturally obvious thing clearly

legitimate. It might be presumed to be legitimate anyway, but this makes it expressly so, so the parties don't think the court is springing something new on them.

That was the great howl in our case. They thought we had made a rule that was doing them dirt. They went to the Supreme Court on that basis. They didn't impress the Supreme Court, but I sympathized a little bit with their howl.

JUDGE DOBIE: I am inclined to think this (d) here would be helpful. If you said "parties" instead of "plaintiffs" or "defendants," don't you think that would be more appropriate?

JUDGE CLARK: I should think so.

MR. PRYOR: I would suggest instead of making that a new subdivision (d), that you make that (c), and move (c) down to (d). That would be a more logical location for this new subdivision.

JUDGE DOBIE: In other words, make this (c); and what is now (c), (d).

CHAIRMAN MITCHELL: One trouble with that is that you have a great many references in existing publications and decisions to paragraph so-and-so, and then you come along and change it.

JUDGE DOBIE: I don't think it is important. If I were writing it originally, I would follow your suggestion. I think we should leave (c) the way it is.

CHAIRMAN MITCHELL: (c) says it shall not be compromised without approval of the court. (d) goes on and says you

give notice of the compromise.

MR. DODGE: You mean instead of at the end of the section, put it after (3)? Is that all right, Mr. Reporter, make it paragraph (b) instead of (d)?

JUDGE CLARK: Yes, except there is a little question along the line which Mr. Mitchell suggests. Paragraph (b) is, of course, very famous now. That is the so-called secondary derivative action by shareholders. That has been sustained as a procedural matter. In the Cohen case, Mr. Justice Jackson said it was a procedural matter, and yet if there were some state rule that governed it, you had to take the state rule.

CHAIRMAN MITCHELL: Until the Supreme Court taught me otherwise, I thought this rule had no application except in a state that had a statute to that effect or even an opinion to that effect.

JUDGE CLARK: I don't know it said quite as much as that. It did say it was procedural.

CHAIRMAN MITCHELL: Whether it is good or bad depends on whether it is procedural or not.

JUDGE CLARK: So, Mr. Dodge, 23(b) os now known as the derivative section. It would have been more logical, had this been new, to put it here; but I wonder, in view of the arrangement which has been familiar and cases tied to it, and so on, if it is worth doing now.

CHAIRMAN MITCHELL: I would like to see this made

paragraph (d).

MR. DODGE: It would seem to have no application to the corporation suits. There is no question of proper representation of parties there, is there?

JUDGE CLARK: There is no question it is more logical to put it up as (b). There isn't any doubt about that.

CHAIRMAN MITCHELL: You could make it (a)(4) without doing any harm.

JUDGE CLARK: It is true that the present (c) refers more directly back to (a) than it does to (b). We have already made a little bit of a jump in the original rule. Look at (c). (c) refers specifically to (a), although I suppose it could be used as (b), too.

MR. PRYOR: My suggestion was "parties" instead of "defendants" in the third line from the bottom. In view of the decision to make this (d), you might insert in there, "The court may, at any stage of an action, under subdivision (a) of this rule," and so on.

JUDGE CLARK: Yes, that could be done.

MR. LEMANN: Would the second sentence of your (d) conflict or repeat anything that is in the second sentence of (c)? Wouldn't the second sentence of (d) cover what is now in the second sentence of (c), or would it? The second sentence of (d) says, "It may order that notice be given in such manner as it may direct * * *." The second sentence of (c) says in certain cases notice shall be given. Maybe that is the answer.

PROFESSOR MOORE: May I ask what would happen in that Pennsylvania case if the court ordered or at least gave notice to the various tort claimants to come in and present their claims? What is the failure if they don't come in and the federal suit gets the judgment before their own personal suit? Is the federal judgment res judicata?

MR. DODGE: They wouldn't come in and present their claims on that question of law. They would simply assert their right to be heard as parties in interest. Presenting their claims at once raises a question of fact which could not be before the court on the question of law.

PROFESSOR MOORE: The question of liability is before the court.

MR. DODGE: That is a question of law.

PROFESSOR MOORE: Fact and law.

DEAN MORGAN: If you got judgment in the state court, if it were in favor of the plaintiff, the plaintiff could put in a supplemental pleading and make that res judicata. If it was for the defendant, the defendant could put in a supplemental pleading and make it res judicata.

PROFESSOR MOORE: Now turn it around.

DEAN MORGAN: You have that same kind of question, exactly, in the Minnesota-Iowa workmen's compensation case, where the Minnesota court went ahead after the Iowa district court had given a judgment, and refused to recognize the judgment. The Supreme Court reversed them.

PROFESSOR MOORE: Suppose after notice to come in and present a claim was given, one of the tort claimants had his suit pending in Ohio, and the federal suit gets the judgment first.

DEAN MORGAN: If the federal suit gets judgment first, and if it is a proper class action, it is res judicata, according to your theory, and if it is res judicata it can be pleaded as a supplemental plea in the other place.

PROFESSOR MOORE: I understand that, but what I don't know is whether the purpose of this subdivision (d) is to make that federal judgment res judicata where the court has given notice to the person to come in and he hasn't done so.

DEAN MORGAN: Why not? Surely. That is what you do in a bill of peace all the time. I don't see why you couldn't do it here.

PROFESSOR MOORE: The bills of peace haven't lain in these tort suits.

CHAIRMAN MITCHELL: It seems silly to me to have a class suit and have a representation of a few, and then punish a fellow in the class if he doesn't come in and make it res judicata.

DEAN MORGAN: What is that?

CHAIRMAN MITCHELL: You are trying to get rid of having a thousand people in the court. The whole purpose of the class action is that.

DEAN MORGAN: That is right.

CHAIRMAN MITCHELL: Yet notwithstanding that, suppose the practice rule enabled the court to serve notice on each one of those thousand people and say, "If you don't come in" --

DEAN MORGAN: If you haven't complied with the conditions, then of course your judgment would not be binding. It has to be one way or the other. It is a class action which is binding, or it is not. If there is true representation, then it binds everybody who is represented.

CHAIRMAN MITCHELL: Why do we have a provision for ordering these people to come in and present their claims? That is one thing we tried to dispense with.

DEAN MORGAN: That order would be only to prove the amount of the claim.

CHAIRMAN MITCHELL: As to the common question.

DEAN MORGAN: What this court did was to hold it wasn't a class action. It was an action where you could come in if you wanted to. This court in this particular case refused to recognize it as a class action or refused to recognize these people as adequately represented.

CHAIRMAN MITCHELL: Where do we stand on this, Charley?

DEAN MORGAN: If they are adequately represented, then you have res judicata.

CHAIRMAN MITCHELL: Has it been agreed?

JUDGE CLARK: I don't know whether it has been formally agreed. We have had discussion and several have expressed

approval. Mr. Moore has expressed disapproval. I think when the discussion has reached the proper point, the only thing we can do is vote. I don't think we have had any vote as yet.

JUDGE DOBIE: I move that we adopt this New York rule, adding "claims or defenses" and changing "defendants" to "parties." We can't settle everything, but I do believe it is helpful.

MR. PRYOR: You mean the rule stated beginning on page 3, Judge?

JUDGE DOBIE: Yes.

CHAIRMAN MITCHELL: With the word "defendants" in the third line from the bottom changed to "parties"?

JUDGE DOBIE: And "claims or defenses."

CHAIRMAN MITCHELL: " * * * present claims or defenses."

What is your pleasure with that motion? All in favor say "aye"; opposed. The "ayes" seem to have it by a majority of one.

All right, Charley.

JUDGE CLARK: The next one is Rule 25. Rule 25 is a rule that something ought to be done about. It is quite clear that it isn't easy to do it. It is a rule that has certainly caused a great deal of difficulty.

If you will look at my summary beginning at page 46, on this one I think we may have a somewhat similar question to that which we had before, but I can at least start out, as I do,

by quoting Professor Moore, and he says that, "Rule 25 is very unsatisfactory. It is easily the poorest rule of all the Federal Rules."

CHAIRMAN MITCHELL: Didn't we have a provision there once that we offered to the Supreme Court for substitution, and they rejected it?

JUDGE CLARK: That is right. It isn't too clear, perhaps, that they rejected it because they didn't like the substance of it. When we presented the rule they had a case that involved the question. There were two or three cases of that kind. One of them was the Taylor case.

MR. TOLMAN: It was the Yungkaw case that they had under advisement.

JUDGE CLARK: So I don't know whether they rejected it because they didn't believe it, or whether they rejected it because they were making the decision in the Youngkaw case. That was Anderson v. Youngkaw, which was decided on January 13, 1947. It held in that case that Rule 25(a) operates both as a statute of limitations and as a mandate to the court to dismiss it.

CHAIRMAN MITCHELL: Let's get it straight, now. Rule 25 of the original rules was based literally on a federal statute, wasn't it?

JUDGE CLARK: That is right.

CHAIRMAN MITCHELL: We didn't change the statute. We just embodied it in the rules. The statute says application for the substitution of a party for a dead party must be made

within two years.

JUDGE CLARK: That is right.

CHAIRMAN MITCHELL: We tried to change that by a statutory rule by adding the clause, "if the application is made after two years, the court may order substitution, but only upon the showing of a reasonable excuse for failure to comply within that period."

They struck that rule out, and I have always thought they probably did it because they thought there was a statutory limitation equivalent to a statute of limitations, and that that was a matter of substantive right. We were trying to give them discretion to increase the statutory time of two years, and they didn't like it.

You say there was a case pending and that is why they didn't accept the rule?

JUDGE CLARK: It may have been.

CHAIRMAN MITCHELL: What did they hold in the case?

JUDGE CLARK: They held the application must be made within two years, and the action is barred when it hasn't been made.

CHAIRMAN MITCHELL: The rule would not have applied to that case, anyway, would it?

JUDGE CLARK: No, it could never have been adopted to apply; but had the rule been in existence, I suppose the Supreme Court could have acted under this ameliorating clause in the rule to reach a different result. It would not have done

it in that case, because the rules were not applicable at the time it was deciding.

It should be noted, however, that the rule then was practically identical with the statute, 28 U.S.C., Section 778. The statute is now gone.

CHAIRMAN MITCHELL: The new Judicial Code has wiped the statute out, is that it?

JUDGE CLARK: Yes. Therefore, the question is, what should be done? I am not sure at the moment. Did the revisers wipe it out because they thought we had covered it in the rule? They did that sometimes.

MR. TOLMAN: That was the reason given for the repeal.

JUDGE CLARK: Did they say so?

MR. TOLMAN: They thought it was covered by the rule.

CHAIRMAN MITCHELL: And the rule was the same as the old statute. (Laughter) Like a dog going after its own tail.

JUDGE CLARK: Of course, they have done that in other regards. We had trouble on the subpoena statute because they repealed the subpoena statute on the ground it was covered by the rule.

DEAN MORGAN: What they meant was it should properly be covered by rules.

JUDGE CLARK: Probably they did.

CHAIRMAN MITCHELL: Suppose there isn't any statute or rule at all, and the Advisory Committee for Procedural Rules propose a rule that you can substitute parties but you have to

do it within two years. Is that a matter of substantive right that we are injecting ourselves into? Let us forget there ever was a statute or that there wasn't.

JUDGE CLARK: I would suggest, don't you think it would be rather obvious to us then that we were injecting a substantive right or a policy decision? We would be saying that a right which, so far as we could see, might last indefinitely, we would now cut off to two years.

MR. LEMANN: Is the proposal procedural? We have a statute which says if you don't do anything in five years the case can be dismissed. I always assumed that was a procedural matter. That doesn't do anything to your cause of action, necessarily. Your case is dismissed. If your right is barred by limitation, bring a new one. But if you have a suit, you have to pursue it.

DEAN MORGAN: Under Erie v. Tompkins, they have said the statute of limitations was substantive.

MR. LEMANN: That is a statute of limitations which may extinguish the right.

CHAIRMAN MITCHELL: What about our Rule 60(b). It says the motion shall be made within a reasonable time, not exceeding one year. What are we going to do?

JUDGE DOBIE: Professor Moore says that, "Rule 25 is very unsatisfactory. It is easily the poorest rule of all the Federal Rules." That is pretty drastic. I would like to hear him on that.

PROFESSOR MOORE: I think it is too bad to dismiss a suit arbitrarily which was commenced in time, merely because the substitution of the administrator or executor may not have been made, when that failure to make the substitution in no way prejudices the other party. I think Equity Rule 45 was a much more flexible rule:

"In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived with the substitution of proper parties * * *."

CHAIRMAN MITCHELL: What does it say about the time?

PROFESSOR MOORE: "If the successorsor representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion, may make the necessary orders for notice to the parties to be substituted * * *."

MR. LEMANN: Suppose the court says it is unreasonable. Does that make it a substantive action beyond the power of the rules?

PROFESSOR MOORE: I don't know. I won't argue the adoption od Equity Rule 45 in toto, but I think the theory is sound enough.

MR. LEMANN: It seems to me you are just objecting to a two-year fixed limitation.

PROFESSOR MOORE: Yes.

MR. LEMANN: That is really your whole objection.

PROFESSOR MOORE: In the Anderson v. Youngstown case, for example, due to the great number of suits that the receiver had to bring, he got his suit started in time against these particular defendants, and then certain ones died and he didn't know anything about them. They failed to make the substitution, but without any showing of prejudice or harm to the estate, the suit abated.

JUDGE CLARK: Let me say in my first suggestion on page 4, I thought, at least in my humble style, that I was following implicitly Professor Moore and Equity Rule 45, trying to bring it down to modern language. So the intent on page 4 is to do just that.

What I did in one sense was to evade the issue, if you will, by suggesting that it be considered substantive law and out of our hands. If you look on page 4, Rule 25, it is suggested that you strike out of the first sentence the words "within 2 years after the death", strike the second sentence, and have the whole then read:

"If a party dies and the claim is not thereby" -- and then I want to put in and I can suggest putting in, if you want to evade seeming to do anything on substantive law -- "is not thereby or does not become extinguished * * *."

PROFESSOR SUNDERLAND: Say the claim is not extinguished.

JUDGE CLARK: If it is not extinguished, the court may order substitution of the proper parties, the motion for

substitution may be made, and so on.

This rule does not say whether the claim is extinguished or not. Presumably if there is no statute it wouldn't be extinguished, but if a statute is passed --

MR. PRYOR: I move the adoption of the proposal.

DEAN MORGAN: Second.

MR. DODGE: Which? Mr. Moore's proposal?

CHAIRMAN MITCHELL: Where does that appear?

JUDGE CLARK: Page 4 at the top.

Mr. Pryor, do you like or don't you like the words that I put in brackets?

MR. PRYOR: I don't think they are needed.

JUDGE CLARK: The motion that Mr. Pryor makes is to make this change, leaving out the matter in brackets.

MR. DODGE: Those words in parenthesis are stricken out?

JUDGE CLARK: Yes.

MR. LEMANN: Did I understand this Yungkaw case went off on the statute? I am looking at it. They say:

"The case is here on a petition which we granted because the case presented an important problem of the construction of the Rules of Civil Procedure. The case involved reconciliation of Rule 25(a) and Rule 6(b)."

They did say the rule was based in part on the statute, but it seems to me they dealt with this entirely as a rule question. I notice the reference at some length, but the

others didn't seem to worry about it being a substantive rule of law. They applied the two-year rule in a very hard case to apply it. There was a lot to be said. It reached a very harsh result for the reason that you gave, Professor Moore. They didn't do it without consideration.

I would think this case was almost a direct holding that it is procedural. They had no trouble in applying the rule.

MR. PRYOR: As I understand it, there is no statute now.

JUDGE CLARK: No statute.

JUDGE DOBIE: I take it the word "may" didn't compel the court.

MR. LEMANN: They didn't proceed on the statute. They proceeded on the rule. I think the case is a very recent case, a relatively recent case. The rules were applicable. They considered they were applicable. It was based on construction of the rule. They didn't go on the statute at all. The subsequent repeal of the statute I think is immaterial.

JUDGE CLARK: We might well bear in mind that the Supreme Court has never declared a rule invalid, not one of ours, and they have taken them very far, as we know.

MR. LEMANN: They considered res judicata when they approved it.

JUDGE CLARK: I wouldn't object if you want to go on the basis we have followed. I am suggesting this change because I think the rule is a very harsh one as now written.

I would say if we want to assume the power and modify a harsh rule, I would not flinch from it. I think we ought to do something to do away with the two-year absolute limit.

CHAIRMAN MITCHELL: The original question was whether we had power to set aside what might be considered a statutory statute of limitations. That is what we assumed we had the right to do, and they rejected the rule. Now the question is that we have no statute of limitations, but have we power to create a fixed time limit on something like this?

What is the difference between casting out a statute of limitations and making one?

PROFESSOR SUNDERLAND: Isn't it only those limitations that affect a right that are outside the scope of our authority?

CHAIRMAN MITCHELL: We always thought we could not make any rule of substantive law, and I think we have always been confronted with the conclusion that a statute of limitations is a matter of substantive right and we can't alter it. There isn't a place in our rules that we have ever attempted to knock out a statute of limitations which affects the time for commencing an action.

PROFESSOR SUNDERLAND: That wouldn't affect a right, would it?

CHAIRMAN MITCHELL: You haven't got any case if a man is dead unless you can substitute a party. You have to bring in a new suit unless you can substitute.

JUDGE CLARK: What would you say, Edson, if a state

provided you must do it within six months, and this was a diversity case?

CHAIRMAN MITCHELL: I was trying to find Holtzoff's memorandum on this. He has had a couple of cases.

JUDGE CLARK: I have Holtzoff's here.

CHAIRMAN MITCHELL: What was his trouble?

JUDGE CLARK: His trouble was more particularly on the next section, the one we are coming to.

CHAIRMAN MITCHELL: Public officers, you mean?

JUDGE CLARK: Yes.

MR. TOLMAN: The Department of Justice is concerned about that now, too, because of the change in administration. The Department is quite excited about that now. They are having a hard time.

CHAIRMAN MITCHELL: You mean the next one?

MR. TOLMAN: Yes, the next one.

CHAIRMAN MITCHELL: Public officers?

MR. TOLMAN: Yes.

JUDGE CLARK: I don't think Judge Holtzoff referred to this particular one. I have his material here. I think it was entirely on the other, the public officers section. He had two very harsh cases of dismissal of public officers. Those are stated in the discussion as to the next one, if you will look on pages 47 and 48 and 49. The case of Snyder v. Buck and McGrath v. National Association of Manufacturers, where the Washington court said:

"If the Federal Rules of Civil Procedure require such results, certainly they ought to be amended. In cases of this sort justice could best be served by making an action automatically applicable to the successor to the officer sued."

Both those cases were cases that Judge Holtzoff had in the trial court.

CHAIRMAN MITCHELL: Is there any question about the validity of subdivision (d) of our rules to provide for the substitution of a state officer in a federal court?

MR. PRYOR: Aren't you protected there by the language, "When an officer of the class described herein may sue or be sued in his official capacity"? We are not undertaking to say when he may be sued. If he can be sued, he can be sued in his official capacity.

JUDGE CLARK: May I ask, have we settled 25(a)? Was that passed, or what happened? We seem to have gone on to 25(d).

CHAIRMAN MITCHELL: We are just discussing it. We haven't settled anything.

JUDGE CLARK: I see. All right.

MR. LEMANN: 25(d) was based on a statute that was fixed in the statute. The statute was repealed. The judges said, "You boys are covered by the rule," and they removed the statute. Now it is suggested that we remove the rule which justified the repeal of the statute.

JUDGE CLARK: That is right. Isn't that pretty good?

MR. LEMANN: Very good.

CHAIRMAN MITCHELL: We go back to the proposition we once handed to the Supreme Court a rule which struck out a statute for a two-year period, and they wouldn't accept the rule.

MR. LEMANN: I am talking about six months now.

CHAIRMAN MITCHELL: They must have thought we didn't have any right to make it.

MR. LEMANN: We are talking about (d) now, aren't we?

CHAIRMAN MITCHELL: We are talking about all of Rule 25.

MR. TOLMAN: I think partly the reason they rejected that rule was that the Anderson v. Youngkaw case was under advisement at the time when they had to act on our amendments. We were working on a time limit then to get them before Congress before a certain date. At the same time they didn't act on another rule which involved the Hickman case.

CHAIRMAN MITCHELL: There were three cases.

MR. TOLMAN: My understanding is that the reason was that they simply didn't want to give any impression, by acting on the rule, as to how they would feel in those cases which were then pending. I don't know that they really felt that it was beyond the power of the committee. I think it was just a feeling that they didn't want to deal with the subject at all because of those pending cases.

MR. LEMANN: Wasn't our amendment proposed at that

time that they didn't approve?

JUDGE CLARK: Yes, Our amendments were proposed and were adopted late in December. I have the date here.

MR. LEMANN: As I understand from what Mr. Tolman said, we proposed an amendment to this rule which they did not approve.

JUDGE CLARK: That is right.

MR. LEMANN: What was the amendment?

MR. TOLMAN: Mr. Mitchell has it right here.

JUDGE CLARK: The amendment is stated here in my summary. It was an amendment to provide that after the two years had run, the court may allow substitution for good cause shown.

CHAIRMAN MITCHELL: "Rule 25(a) Death.

"(1) If a party dies and the claim is not thereby extinguished, the court, upon application made within two years after the death, shall order substitution of the proper parties."

That is the statutory period of two years. Then it goes on:

"If the application is made after two years the court may order substitution, but only upon the showing of a reasonable excuse for failure to comply within that period."

That was all that was new, and they refused it.

MR. DODGE: Why shouldn't we lessen the number of applications to the court and adopt this 25(d) as drawn by our Reporter? It seems to me it is a very good change.

CHAIRMAN MITCHELL: As drawn by the Reporter. How do you have it?

JUDGE CLARK: Which are you moving on now?

CHAIRMAN MITCHELL: 25(a).

MR. DODGE: 25(d).

JUDGE CLARK: We haven't got quite to (d) yet.

CHAIRMAN MITCHELL: They are separate things. One has to do with public officers, state and federal, and the other is as to any parties. They are quite different.

Now, 25(a)(1). You want that to read:

"If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties."

Then:

"The motion for substitution may be made --"

DEAN MORGAN: Just as it is in the present rules.

CHAIRMAN MITCHELL: Bu don't say anything about a reasonable time.

JUDGE CLARK: That is right.

CHAIRMAN MITCHELL: They can do it ten years afterwards.

JUDGE DOBIE: The word "may," of course, gives them the power.

JUDGE CLARK: Furthermore, my own guess is that in a diversity case you would have to take the state rule, as I think Erie Railroad v. Tompkins rears its vile head here and will have to be applied. That would be another reason for not

putting that in here. We can't touch Erie Railroad v. Tompkins. We can't touch the doctrine. We are not presuming to settle that here.

I guess the Supreme Court would say on that, anything that substantially affects the result is subject to Erie Railroad v. Tompkins. I should think this substantially affects the result whether you could win or not.

CHAIRMAN MITCHELL: How would it work? Suppose a party dies and the claim is not thereby extinguished, and no substitution or motion is made.

JUDGE DOBIE: Would this extinction of right go into the difference which we had in the Scarborough case where the right had extinguished for want of action? The right goes with the statute of limitations in the ordinary suit. In that case they had a rascally claim agent who told this boy he could not sue until he became of age, and the boy didn't sue. We obliterated that distinction, and equity reared its forces to combat fraud. Is that why that right is not extinguished? Does that make that technical distinction?

JUDGE CLARK: I don't know that it would in your case. Your case is one that the limitation stated is part of the right. That might indicate that promptness is desired, but I don't see that that in itself answers this question. Here is a case where the action is already started within, presumably, the time.

CHAIRMAN MITCHELL: How about this? You say if the

substitution is not so made, the action shall be dismissed. Who moves to dismiss if you haven't a substitution for the deceased party?

MR. PRYOR: Part of the proposal is to strike that sentence.

JUDGE CLARK: That is right. I propose striking that, you see.

CHAIRMAN MITCHELL: The whole sentence, "If substitution is not so made, the action shall be dismissed * * *."

MR. LEMANN: What happens if you make a motion and the judge doesn't see fit to order substitution? Does this amount to a direction to the judge to order substitution?

JUDGE CLARK: I should not think so. That is a question that the judge would have to decide when the time came. I think the judge could properly say, and eventually the Supreme Court if it ever got that far, should this right be properly barred by laches, or something of that nature; and if they think it is, they will properly hold that there should not be any change. As I say, that is something that we simply are not passing on here.

MR. LEMANN: I am wondering if you should strike out the second sentence. Even granting that you should make the change in the first sentence, should you strike out the second sentence? What will happen if the substitution is not made? Did you just leave that as a hiatus?

I would rather infer that you struck out the second

sentence so that the judge was ordered to make the substitution in every case.

DEAN MORGAN: No.

MR. LEMANN: Then why did you strike out the second sentence?

DEAN MORGAN: It says "may order." He doesn't have to.

MR. LEMANN: That is right, but why strike out the second sentence?

JUDGE CLARK: If you are going to leave in the second sentence, I think you ought to put in some qualification, "if substitution is not so made within a reasonable time," or something of that kind.

MR. LEMANN: That could be.

CHAIRMAN MITCHELL: Otherwise, no one would ever know when you could dismiss the action.

MR. LEMANN: I think you would have to do something of that sort if you took it out entirely.

JUDGE CLARK: We take out "within 2 years."

JUDGE DOBIE: "If substitution is not so made," also.

MR. LEMANN: You can take the "so" out or put in "within a reasonable time." Perhaps taking out the "so" would do it, but I think the second sentence should stay in in some form, or some of the ingenious commentators will impute the result that I suggest. Why did you take it out?

JUDGE CLARK: That is a solution. I don't object to that. If you think that is the best solution, if that is a

desirable way of working it out. That would mean it would read something like this:

"If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. If substitution is not made within a reasonable time, the action shall be dismissed as to the deceased party."

Then it goes on as now. You can, of course, embroider that, "within such time as the court shall determine to be reasonable."

MR. PRYOR: I don't think that is needed. It is in the discretion of the court, anyway, whether he allows substitution or not.

CHAIRMAN MITCHELL: We have to have some basis for action. You can't be arbitrary.

JUDGE DOBIE: If a long time has gone by, a man can say, "This should be dismissed. It should not be on the books against me forever."

DEAN MORGAN: I don't think you should have a provision if substitution is not made within a reasonable time, it is mandatory upon the court to dismiss the action. I don't believe that makes sense.

MR. DODGE: I would postpone that second sentence to the end and put in your provisions about the making of a motion within a reasonable time.

CHAIRMAN MITCHELL: The court is sitting there and the action is pending, and the party is dead, and nobody has

made a motion for substitution. What is going to stimulate the court to dismiss the action?

MR. LEMANN: The defendant may come in himself after, say, ten years and say, "There has been no substitution and I want this suit dismissed." Shouldn't there be something here that the judge shall or may dismiss it?

CHAIRMAN MITCHELL: I think there ought to be something to give the court the basis for exercising his discretion, if you are going to make it discretionary.

PROFESSOR MOORE: Doesn't the court have the power now to dismiss the suit for want of prosecution?

DEAN MORGAN: Surely. It always has that.

CHAIRMAN MITCHELL: They ought to have a rule on the subject. They don't do it without a rule.

JUDGE DOBIE: It is suggested that we put "within a reasonable time" before "order." "If a party dies and the claim is not thereby extinguished, the court may within a reasonable time order substitution of the proper parties."

CHAIRMAN MITCHELL: If it doesn't act within a reasonable time, then the case remains pending forever. A reasonable time ought not to be a limit on the order, but a limit on the motion for substitution.

JUDGE CLARK: I am not fully sure that you need any provision at all. I think the court does have the power. Back in 55, for example, it has the power to dismiss an action for lack of prosecution generally. But if you are going to put it

in, it now seems to me the wiser thing would be, as Mr. Dodge says, to put it at the end. Let all this go on as to the motion, and so on, and then say at the end: "If substitution is not so made, the action may be dismissed as to the deceased party."

JUDGE DOBIE: I think that is clearer.

MR. DODGE: I move that that change be made.

CHAIRMAN MITCHELL: Read it. I am not sure just what it is. Rule 25(a)(1).

JUDGE CLARK: (a)(1). The first sentence will read as follows:

"If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties."

The second sentence is eliminated, the third sentence reads as it now is, and a fourth sentence is added thus:

"If substitution is not so made, the action may be dismissed as to the deceased party."

CHAIRMAN MITCHELL: You have nowhere put any time limit on substitution.

JUDGE CLARK: Wait a minute.

"If substitution is not made within a reasonable time, the action may be dismissed as to the deceased party."

CHAIRMAN MITCHELL: That is something else again. That is all right.

MR. PRYOR: I adopt that as an amendment to my motion.

CHAIRMAN MITCHELL: Is that agreeable? Nobody objects.

That is agreed to.

Do we have anything about (d)?

JUDGE CLARK: As to (d) I suggest two changes. The first, in substance, is to do something similar to what we have done as to (a). The first is to strike out of the first sentence the words "within 6 months after the successor takes office." That leaves it without an absolute time limitation. Whether you want to put in a provision such as we have just added to (a) or not, I don't know.

I have a suggestion there. This takes out the time limitation.

The other suggestion I make is to add at the end the following:

"When an officer of the class described herein may sue or be sued in his official capacity, he may be described as a party by his official title and not by name, subject to the power of the court, upon motion or of its own initiative, to require his name to be added. Unless his name is so added, no formal order of substitution is necessary as otherwise required in this rule."

I pointed out that, without any express authority, more and more we are getting cases of suits against officers. Nobody raises any question. In fact, I remember one time in an argument we had a case against the Compensation Commissioner of New York. I asked them who was it. The parties all looked at me as though I struck them. I said, "There must be some

person involved here." Finally they admitted, when I asked what the name was, that nobody knew. They were going ahead without any reference to the person. I was enough old-fashioned that at first it struck me as strange. But why not? The parties were satisfied. The question was raised. Finally, I shut up and went right ahead and decided the case that way.

JUDGE DOBIE: In one or two cases where the person holding the office is changed between the time of the court below and when it got before us, we have allowed the change to be made, without any objection, which I think is sensible. As I remember those cases, there was no objection.

CHAIRMAN MITCHELL: As I understand it, the Reporter proposes that Rule 25(d) as it stands shall be modified in the first place by striking out the words "within 6 months after the successor takes office" and then adding at the end of the rule as it now appears, the words:

"When an officer of the class described herein may sue or be sued in his official capacity, he may be described as a party by his official title and not by name, subject to the power of the court, upon motion or of its own initiative, to require his name to be added. Unless his name is so added, no formal order of substitution is necessary as otherwise required in this rule."

JUDGE DOBIE: You don't make that a case where the man is sued by name and the office changes, do you?

JUDGE CLARK: We take out the time limitation. That

is taken care of at the first. When he is sued by name, there would have to be a formal substitution, but the statute of limitations feature is taken out.

CHAIRMAN MITCHELL: Charley, does this mean that if the man is sued by name and he dies and another fellow is appointed to the job, the same title, the judgment is good against the new officeholder, regardless of any substitution?

JUDGE CLARK: No, I think not. This is the way I conceive it: When the action is actually against the person by name, you have to go through the formal substitution here required; but when the parties are willing to have it go without that, then you don't need formal substitution.

It is, however, provided that any party may require your going back to the formality, and the court may require it, itself.

MR. PRYOR: The action should be brought against the officer and not against the named person.

JUDGE CLARK: I think it would be. It seems to me that is what is happening more and more now, anyhow.

CHAIRMAN MITCHELL: Is that rule, as so altered, satisfactory?

DEAN MORGAN: Should it not be "required in this subdivision of this rule"?

JUDGE CLARK: I think so. Where is that?

DEAN MORGAN: Just as a matter of form.

JUDGE CLARK: Generally, instead of saying "this rule,"

you have to say "this subdivision."

MR. LEMANN: If you are going to put in the requirement of action within a reasonable time in paragraph (a), should you not do it in paragraph (d) or have some comment or a corresponding provision in subdivision (d)?

JUDGE CLARK: I didn't hear your question.

MR. LEMANN: I was asking, for consistency of expression, if you are going to put in a requirement of a motion within a reasonable time under (a), if you should not do that in (d) where you take out the specific time limit now appearing. Either do it in both places or in neither, I would suggest.

JUDGE CLARK: There is a certain logic in what you say.

MR. LEMANN: There is another thing here. There is an ambiguity left on the face of the rule. There is a sentence here which says, "Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States." Does that affect the whole rule? You say substitution may be made, and then it says why it may be made in a certain case.

JUDGE CLARK: Of course, that particular part of the rule came up because of those decisions, which had been pretty strict, as in Ex Parte La Prade.

CHAIRMAN MITCHELL: I would like to make a suggestion to the Reporter, and for the record here, that after this rule is redrafted it be sent to Judge Holtzoff of the United States District Court for the District of Columbia. He has had a couple of these cases and has been distressed over the operation of the rule. I think it would be only courteous to him to send him a redraft and see if he is satisfied with the revision.

JUDGE CLARK: I shall be glad to do that. Here is what Judge Holtzoff says. This is fairly short, on this point. He says:

"I often wondered whether all of this unnecessary circumlocution could not be eliminated by providing that on the filing of a suggestion of a change of office, the action shall be deemed to continue against or in behalf of the successor; or, better yet, to allow the officer to be sued not in his individual name, but by his title, in which event the judgment will run against whoever happens to be the officer at the time judgment is rendered."

CHAIRMAN MITCHELL: I have a note here which says Chief Justice Vinson will see this group now.

... Brief recess ...

CHAIRMAN MITCHELL: Gentlemen, we are on Rule 25(d), and I think I had dictated the final form of Rule 25(d), which would strike out the phrase "within 6 months after the successor takes office" and add at the end:

"When an officer of the class described herein may

sue or be sued in his official capacity, he may be described as a party by his official title and not by name, subject to the power of the court, upon motion or of its own initiative, to require his name to be added. Unless his name is so added, no formal order of substitution is necessary as otherwise required in this rule."

That is the form we seem to be agreed on.

JUDGE DOBIE: Subdivision.

CHAIRMAN MITCHELL: Yes, "required in this subdivision of this rule." That is right.

Are you satisfied with that? It is so agreed.

Shall we go on.

PROFESSOR MOORE: Would you stop here just a minute. Judge, you want to make a change over in 6(b), I guess, and take out any reference to Rule 25.

JUDGE CLARK: Yes, that is correct.

CHAIRMAN MITCHELL: That means that in Rule 6(b), in the fourth line from the bottom, we strike out "25". Is that right?

PROFESSOR MOORE: Yes, sir.

CHAIRMAN MITCHELL: That would come as a necessary result of the other change.

PROFESSOR WRIGHT: There is one question I didn't catch. Are we adding the language "within a reasonable time" in this subsection as we did in subsection (a)?

JUDGE CLARK: I don't know whether that was decided

or not. This was a separate question. Did we decide, or not, to add that provision dismissing on motion if not made within a reasonable time?

MR. LEMANN: My recollection is that we voted to put it in subdivision (a), and I said if we put it in (a) I should think we would put it in (d), and you grudgingly conceded there might be some logic in that suggestion. I think we voted to put it in.

JUDGE CLARK: It was voted to go in (a), as I understand the action taken. The question is whether it should be added here. If it were to be added here, I think it should be in the last sentence of the rule as it now stands, but before this addition. If it goes in, I think it would then be, "If substitution is not made within a reasonable time --"

CHAIRMAN MITCHELL: Where does that go in? I can't locate it.

JUDGE CLARK: It would go in at the end of (d) after the sentence, "Before a substitution is made, the party or officer to be affected," and so on, "shall be given reasonable notice * * *" "If substitution is not made within a reasonable time, the action shall be dismissed --"

DEAN MORGAN: May be.

JUDGE CLARK: You are right, of course. " -- the action may be dismissed as to such public officer," I think it is.

CHAIRMAN MITCHELL: Where does that come in with

respect to this?

JUDGE CLARK: Just before that.

CHAIRMAN MITCHELL: Just before the addition I read.

JUDGE CLARK: Is that agreed to? I want to raise one further question.

CHAIRMAN MITCHELL: I think so.

JUDGE CLARK: Here is another small change that possibly should be made in Rule 10, Form of Pleadings, (a) Caption; Names of Parties. Possibly we ought to pick up this new provision of Rule 25(d). This would be in the second sentence of Rule 10(a). We could say:

"In the complaint the title of the action shall include the names of all the parties, subject, however, to the provisions of Rule 25(d)," or "except as otherwise provided by Rule 25(d), but in all other pleadings," and so forth, just as it is now.

CHAIRMAN MITCHELL: I am not sure it is necessary to mess up that rule and reprint it.

JUDGE CLARK: I am not sure, either.

CHAIRMAN MITCHELL: This other rule supersedes it in that respect, and it is specific.

JUDGE CLARK: I don't say that it is essential.

CHAIRMAN MITCHELL: It says here he may be named by title and not by his name. That is certainly being specific on a specific type of case, which would overrule this requirement that the name be given. I think Rule 10(a) is a very

general rule requiring you to state who the parties are so you know who is being sued. That is not inconsistent with 25(d). Let's let Rule 10 go. We are getting to the state where, if we start making such changes going back through the rules, we will alter half a dozen more of them and we will have to publish a complete new edition of the Federal Rules, and we won't have anything left in its original shape. Don't you think that is all right, Charley?

JUDGE CLARK: Yes, I think it is all right, although the Lord knows how you can stop West Publishing Company and Foundation Press, and so on, from getting out these rules and charging $10 or $12 or "25. The West Company gets out another edition this summer. They wanted me to write something for them and I told them I was too busy, so they got Mr. Longsdorf.

CHAIRMAN MITCHELL: We are just giving them the material.

JUDGE CLARK: Lawyers now think they have to buy them without getting anything. At least we are giving them a chance to get something, but I think you are right.

CHAIRMAN MITCHELL: What is next?

JUDGE CLARK: We now come to the matter of depositions, and there are several interesting and important matters.

First, to cover the question of the so-called "Big Case," I put this in. It doesn't come quite in order, but I wanted to bring the question up. That is supposed to be the government antitrust action, about which a great deal is made.

So I put in a new subdivision (g) which you will find on pages 4 and 5 of my amendments.

Let me say first that I don't really think this is necessary. The court is actually doing it now, and it is assumed to have power. The reason I brought it up for your attention is that a lot of the people who have discussed it thought something of this kind was necessary. I thought it at least should be brought to your attention.

You will see that I have suggested that the court may follow its own gait, so to speak, in cases of protracted litigation, where litigation is long, drawn out.

CHAIRMAN MITCHELL: Have you studied the reports enough to make up your mind whether, to execute their recommendations, any portion of the rule has to be amended? That is the first question.

The next question would be whether, to execute their purposes, it would be advisable to jog the judges up by putting in some general provision that they do this?

JUDGE CLARK: First, I think I have studied the report. As a matter of fact, I discussed it with Judge Prettyman. He sent it to me first, and I got him to change some language. He had some language that I think was more condemnatory of discovery than he intended. I got him to substitute a different formula in the report to say that the ordinary rules of discovery not controlled by the judge were inappropriate, which he was perfectly willing to do, because that was his idea. I don't

think that he regarded it as necessary to change. He never so suggested. But discussion has raised the question.

Leland, do you have the Prettyman Report here?

MR. TOLMAN: Yes, I have.

JUDGE CLARK: You were secretary of that committee, weren't you? You were secretary of almost every committee.

MR. TOLMAN: No, I was not.

CHAIRMAN MITCHELL: I read the report very carefully when it was published, and my general impression then was that probably every course of action the Prettyman Report recommended is within the power of the federal judge as it stands today, but I have the feeling that if they want to get a report like that to push the operations along, to encourage the judges to follow the report, you should go ahead and put something in the rules which would have the purpose of stimulating the judges to carry out the recommendations.

You could do that very easily by giving the court general authority, for instance, in long cases, to make all kinds of rules and regulations in general terms. I haven't thought it out at all. I just have the impression that it would not do a bit of harm.

We stuck a clause in our rules originally adopted on pre-trial conference. We realized there were a good many federal judges who had not adopted the pre-trial practice, and it would be a mistake to jam it down their throats, so we got up a general rule saying they could do this and that. They got

in the habit of doing it and gradually it became the system.

Today we could make pre-trial compulsory instead of optional, and nobody would complain about it. It was my idea that maybe a general provision in the rules calculated to induce the judges or to help persuade them to carry out the recommendations of the Prettyman committee might be useful in the same way. That was my impression about it.

MR. PRYOR: Along that line, Mr. Mitchell, I might say that under the Iowa rules adopted by the supreme court, pre-trial conference is compulsory on the judge if it is questioned by either side.

CHAIRMAN MITCHELL: When we started out we were very timid about it. I think we were right. We didn't force it on anybody. Nobody could kick. Yet pressure got strong on them, and one after another they adopted the pre-trial system.

JUDGE CLARK: The provision of the Prettyman Report referring particularly to depositions and discovery is as follows, on page 37. This is what Judge Prettyman wrote after I had suggested some modification. I thought this was all right from this standpoint. He stated it more drastically before. What he says here is:

"In a case of the type here under consideration, where pre-trial is a necessary, although preliminary, part of the trial proceeding, deposition or discovery proceedings outside the planned scope of the judge's direction are likely to be at least surplusage if not quite in conflict with the judge's

program. Your Committee is, therefore, of the view that inter-party discovery proceedings, under the Rules of Procedure, not arranged for in the judge's pre-trial program, are not helpful in the elimination of unnecessary delay, expense, or volume of record."

JUDGE DOBIE: What does this provision of yours do, Charley? I don't think it is entirely clear. The presiding judge is the designated judge?

JUDGE CLARK: Possibly I should have said the chief judge. The reason I didn't say "chief judge" is because in a district with only a single judge, I suppose they have no chief judge. The presiding judge and the designated judge must of necessity be the same.

The idea was that the assignment of cases would be made by the presiding judge or the chief judge of the district court, and he would enter the order after designating the judge to try it. Thereafter, the judge to try the case would control all the proceedings.

MR. DODGE: Who is the presiding judge?

JUDGE CLARK: Ordinarily the chief judge of the district court. That, of course, is the judge senior in point of service, who now has the title of chief judge.

For example, in the Southern District of New York, Judge Knox is the Chief Judge. As I recall, Judge Driver, you are Chief Judge, aren't you?

JUDGE DRIVER: Yes, sir, as a roving judge who covers

both eastern and western Washington. So I am a general and half a private in my army. Lindberg is also a judge in the Western District.

MR. DODGE: You are going to change that to read "the chief judge"?

JUDGE CLARK: I don't know. How about that? There are some districts yet that don't have any privates at all. I mean, they are all privates. In Vermont there is just a single judge. Therefore, he has no chief judge. There it is true, of course, that the presiding judge and the designated judge must of necessity be the same unless he can haul in somebody from outside, as he probably can.

CHAIRMAN MITCHELL: In connection with this Prettyman Report, is the Association of the Bar of New York -- headed by Ralph Carson, which has tried a good many of these long-winded cases, and I wrote him in January 1952 asking him if he or his committee had any suggestion to our committee as to whether we should, in our rules, try to implement anything in the Prettyman Report. This is his answer. Didn't he send you a copy of it, Charley?

JUDGE CLARK: Yes. I have it. His letter of August 28.

MR. TOLMAN: I have mimeographed copies of it.

CHAIRMAN MITCHELL: I won't bother to read it, then. The question is what you think about it. Has he made any suggestion about implementing the Prettyman Report?

JUDGE CLARK: I agree with you he is a very good man,

and it seems to me his suggestions in part require discovery against the government. I always believed myself that discovery should be had against the government. I worked on one case, the Quebec Line case, which so held. The Supreme Court not long ago, in the Reynolds case, by a divided vote upheld some privilege of the government.

CHAIRMAN MITCHELL: There always has been some privilege in matters of state as certified by high authority, as against the public interest to disclose. That is a little bit different.

The Attorney General in recent years has been taking the position, as the courts have, that the government is immune, that if it doesn't want to produce anything it doesn't have to produce it.

I remember in the years I was in the department we had the opposite position: that in its course of action the government had to be decent with the citizens unless there was some important public interest at stake which obviously would be damaged if there were disclosure. It was the duty of government lawyers to produce all the documents and everything else in the government's possession which was material to the case. The shift has been the other way in recent years.

JUDGE CLARK: Let me amplify a little. I think we never intended to make any exception for the government. Whenever special rules are applied to the government we have stated them. The best known, of course, is the 60 days instead of 30

days in the case of appeal. I think it was always quite clear that the rules applied fully to the government. That has been ruled in quite a number of cases. I have sat in cases where my court has ruled that way.

I think it was a deduction from U. S. v. Sherwood, where the court refused to uphold a particular kind of claim there under the Tucker Act and impliedly upheld the rules. It was true in other cases like the Aetna Casualty case, which deals with the assignment of claims.

CHAIRMAN MITCHELL: Do you claim there isn't any privilege in the government of any kind?

JUDGE CLARK: No. I don't know. I think we have gone quite a ways.

CHAIRMAN MITCHELL: There is a cardinal rule that is not only a federal government court rule, but all the states have applied it, that the police of the state don't have to give the name of informants; that it is against the public interest to force police to say where they got their information about some criminal. There isn't a word in our rules about that. Can it be possible that we have abolished that rule?

JUDGE CLARK: I don't think we have.

CHAIRMAN MITCHELL: You say we haven't any exceptions.

JUDGE CLARK: I want to say I think we intended the rules to apply rather broadly, and if there was any substantive privilege of right, the deposition rule doesn't change that, of

course. It doesn't change the rule of attorney and client, among other things.

I was going to say the Supreme Court has now made one construction of this in the recent Reynolds case, holding there is a privilege as to security documents. Against this background, I should wonder what we could do by gilding the lily, so to speak.

The point I was leading up to, I am afraid all too slowly, was: What good is it going to do to make another statement, because as it now stands all the rules, including the deposition rule, do apply against the government, subject, however, to whatever modification, whatever limitation of privilege the Reynolds case now holds.

MR. LEMANN: Isn't that the effect of this Cotton Valley case which went up from the Western District of Louisiana, in which Judge Dawkins, when the government refused to submit to discovery, dismissed the case with that penalty, and of the case from Texas which the Supreme Court of the United States decided four to four.

DEAN MORGAN: That is all right when the government is prosecuting, as the Reynolds case points out, but in the Reynolds case it was a state which needed it for some other purpose.

MR. LEMANN: What is your answer to Charley's point. Isn't this something that we can leave to the court to work out?

DEAN MORGAN: I don't see that there is any answer to it. I think we have just got to it.

MR. LEMANN: I make a motion to that effect.

CHAIRMAN MITCHELL: This was all brought about by Ralph Carson's suggestion that the rules provide that they shall apply against the United States with the same force and effect as any private party.

MR. LEMANN: The Supreme Court has in effect so held, except where it states a privilege. I don't think we ought to do anything more about it. I agree with Professor Morgan.

JUDGE CLARK: That is what I propose.

CHAIRMAN MITCHELL: I wouldn't agree to attempt in this rule to insist that the government be compelled to disclose the names of informers or state secrets or anything of that kind.

MR. LEMANN: That would be for the Supreme Court to define their privilege at that point, which they apparently have in this latest decision.

JUDGE CLARK: If you want to look at these cases, look at page 63 of the summary, and there you have a discussion of them. That case was a divided court. Three judges dissented for the reasons set forth by Judge Maris in writing the opinion below which permitted the discovery there. It seems to me whatever one may want to do about it is more or less academic. The Supreme Court has a right to speak, and it has spoken. The law is as you see.

I should take it quite clear that the rules do apply, limited, however, to whatever privilege --

CHAIRMAN MITCHELL: -- is appropriate for the government.

JUDGE CLARK: Yes. Therefore, what can we do by adding Mr. Carson's suggestion and attempt to gild the lily. He wants more discovery against the government.

CHAIRMAN MITCHELL: I don't think he is right. I don't think we need to tamper with that question.

JUDGE DOBIE: Doesn't he want something about their having to produce a witness?

JUDGE CLARK: That isn't the only suggestion he makes, but that is one of them. He has another suggestion that really, with all due respect to Mr. Carson, I am afraid he was still trying the case before Judge Medina, which has taken unconscionable time. He wants a requirement that when you have the deposition of an adverse party, you can't use it unless you call the adverse party. I think that goes against the general idea. You see, what that would do is that you can't do anything about it, but it might make an adverse party your witness. That is his first suggestion.

CHAIRMAN MITCHELL: I don't see anything in his letter that we can adopt.

DEAN MORGAN: All those things are admissions against the party, anyhow, so there is no sense in talking about that.

CHAIRMAN MITCHELL: That leads me to the idea I had mulling around in my head, and that is the question whether it is worth while for us to stick something in the rules that we

think might stimulate the federal district judges in trying to get on with their cases.

DEAN MORGAN: I think that is what he has in mind.

CHAIRMAN MITCHELL: He hasn't said that.

DEAN MORGAN: I think that is what he had in mind when he said the government is always resisting it, and so forth, and perhaps the judges aren't quick enough to grant discovery against the government.

CHAIRMAN MITCHELL: I am not suggesting that we force the government to disclose something that, according to well established judicial principles now, a sovereign government is immune from disclosing, matters of state, the names of informers, and things of that kind. I think the government should have every privilege of that kind that has been common to governments.

In this report which you have read, there are all kinds of suggestions. Is it worth while for us to try to frame a clause that goes down the line giving the court general authority, in its discretion, to regulate the length of depositions, the number of exhibits, and all that sort of thing, or just leave it alone?

What is your reaction? Do you think it desirable and necessary?

MR. PRYOR: This is one matter that the Chief Justice called our attention to when we had the meeting with him before on the condemnation rule, you remember. He spoke about this.

JUDGE DRIVER: Am I correct in my assumption, Judge Clark, that the Prettyman committee didn't recommend any change in rules or legislation regarding these protracted cases? If I am correct in my assumption -- I read the report -- Judge Prettyman's committee didn't recommend any changes in rules or any specific rules or legislation.

CHAIRMAN MITCHELL: No. I don't think they considered it very much. I wrote Prettyman and asked him what they felt about it, and I didn't get any responsive reaction from them about it. I felt they hadn't given much thought to it.

JUDGE CLARK: They say specifically on page 5:

"Your Committee does not recommend legislation or rules. It believes that the maximum benefit will be achieved by an authoritative statement of the importance of the problem in the administration of justice and a description of remedial methods and measures thought by experienced judges to be effective."

I was talking to Judge Whitney in the Morgan Stanley case, and he said the Prettyman Report hadn't done any good at all. Lawyers feel rather seriously about that case, anyway. It has gone on and on. At any rate, that was the reaction of someone who went into it, that the Prettyman Report, after all, was pious suggestions. I am not quite sure what more we can do.

CHAIRMAN MITCHELL: It is one thing to have a pamphlet which anybody may have and carry in court and throw it at the judge, and another thing to have a set of Federal Rules that

encourages him to take the case by the nape of the neck and govern it.

DEAN MORGAN: After all is said and done about the "Big Case," what would you do without the discovery? Take the Ferguson case, for example, the tremendous amount of money and the tremendous amount of discovery. Suppose they had pulled all those people in as witnesses in the first place, how much more time of the court would it have taken?

You can point to all the abuses of this particular thing, but it seems to me that after all is said and done, you can show that you have saved a tremendous amount of time. You would not have gotten this Ferguson case, for example, settled until that case was half way through trial, in all probability.

Here everybody had to show his hand, so they knew. They sued for 324 or 340 millions, and settled for 9-1/2. Of course, it must have cost them a million dollars to take the depositions, and so forth, but when they got through with it they had the basis for the trial.

It seems to me that all this committee could have done would be to make suggestions to the trial judge as to where they can hurry this up.

The way Wyzanski handled the International Shoe Machinery case was to require the lawyers to cut down on a lot of this material, and so forth. Even then he said it was a prodigious task to go through it, and he censured the government for the kind of discovery they asked for in a lot of places.

I don't see that we can do anything else about it.

It may be that this suggestion of Charley's, of having the presiding judge provide that the trial judge shall have full control over it after it is once assigned to him, would help cut it down to a very considerable extent.

CHAIRMAN MITCHELL: That is just as easy for the judge to do without a rule as anything else. He can do it today.

DEAN MORGAN: As Wyzanski pointed out, they offered 4400 exhibits in a bunch, practically, and he said it is perfectly obvious that counsel for the government hadn't even read most of them.

CHAIRMAN MITCHELL: Let me ask you this: Have we got enough Wyzanski's on the district courts --

DEAN MORGAN: We may not have.

CHAIRMAN MITCHELL: -- to lay down the flat on that sort of abuse and do something about it, without having any stimulation in the rule.

DEAN MORGAN: Maybe not. I don't know.

CHAIRMAN MITCHELL: That is the question. I rather gather the committee doesn't feel it desirable to try to formulate anything.

JUDGE DRIVER: I think the machinery is adequate if properly used. My own view of it is that you could cut down the time and expense of a lot of these big cases if the chief judge of the circuit could make special assignments for these big cases and pick a judge who has experience and has an

aptitude for that sort of thing and a capacity to hold down the lawyers and to hold down the time of trial.

Much as I disagree with him in many matters, Judge Fee would make a splendid assignment to an antitrust case. They wouldn't run six months or eight months or two years with him, I am sure. I think if you had special assignments made of those big cases and got a judge who can handle them, you wouldn't have so much trouble.

CHAIRMAN MITCHELL: They have plenty of authority to do that now.

JUDGE DRIVER: Yes, they have that authority now. It is a matter of administrative policy rather than rules.

CHAIRMAN MITCHELL: In Florida, one judge has been charged with a bankrupt railroad for twenty years and has presided at every hearing they have ever had. I don't think we need any rule to authorize that, but we might stick one in to draw their attention to it.

JUDGE CLARK: Of course, I was talking to Judge Holtzoff one time, and he said the government spent all their time. I have the greatest sympathy with him. He had a criminal case which shows what a judge can do if he wants to. He had discovery in a criminal case, even though the rules don't authorize it. He just told them he thought it would be helpful, and they went ahead and did it. Then he told them that they ought to waive jury and try it before the court. My brother was counsel, and this was against some of the milk companies.

My brother said that he never thought the government would agree to it. The government agreed, and everybody did except one defendant, and the damned fool, they nearly had to knock him in the head and make him agree. Then Judge Holtzoff tried it.

I saw him down here. I said, "Are you still trying that antitrust case?"

He said, "No. It is already decided." He tried it in the necessary amount of time, and on a Friday he said, "I want you all to be in court on Monday morning, at which time I will decide it," and he decided it.

CHAIRMAN MITCHELL: All my misgivings about this sort of thing would be satisfied if you would suggest to the Reporter that in some appropriate place in the report we finally make, he gets out a note discussing this very problem, just talking about it, just referring to the Prettyman Report, stating that this committee has studied it and is satisfied that every course of action that the Prettyman Report recommends is now in the charge of the judges, and that our opinion is that we would not help anything by trying to draft a rule on the subject. That would encourage the district judges, some of them who are weak-kneed, to go ahead.

MR. LEMANN: There is no suggestion to the contrary in the Prettyman Report. I have just thumbed through it again. They say in effect what you have just said. That is their finding already. Would we add anything?

CHAIRMAN MITCHELL: We have something to do with that.

It is our responsibility. A report like this is made. We examine it and see whether it needs implementation. We know the rules better than that conference does.

MR. LEMANN: They don't recommend any change in rules.

CHAIRMAN MITCHELL: You don't think it is necessary even to put it in a note, then, or say anything about it? That is the point.

MR. LEMANN: I would not have thought so. If the Prettyman Report to the Judicial Conference doesn't do the job, I wouldn't think we could do it, not that I would object to it, Mr. Mitchell.

MR. DODGE: What do they say in that report about the right of discovery against the government?

MR. LEMANN: They don't discuss that.

JUDGE CLARK: They had what I read you, that they didn't think it was appropriate except as controlled by the judge. The judge enters the order.

CHAIRMAN MITCHELL: I wonder if all the district judges of the country have had copies of the Prettyman Report.

MR. TOLMAN: Yes, they have.

MR. LEMANN: That was part of their recommendation.

JUDGE CLARK: In view of the discussion, perhaps I think the better of my suggested provision (g). If you really are going to call it to their attention, (g) will do it, and the other way is wrong.

MR. LEMANN: In what, Charley?

JUDGE CLARK: I suggest a new subdivision (g).

CHAIRMAN MITCHELL: To what rule?

JUDGE CLARK: Rule 26, at the bottom of page 4.

MR. LEMANN: As Mr. Mitchell himself says, they could do it now. Mr. Mitchell says that everything you propose here can be done now under the existing rules.

JUDGE CLARK: I think that is so.

DEAN MORGAN: Monte, that would require one of the parties to move to prevent the taking of depositions, and so forth.

MR. LEMANN: I am looking at the bottom of page 4. Is there anything in that on your point? I am looking at the point I thought Charley was referring to, the bottom of 4 and the first two lines of 5. I think your point comes a little later. I am looking at the language at the bottom of 4 and the first two lines of 5. Isn't that what you were talking about, Charley?

JUDGE CLARK: That is right.

MR. LEMANN: I think your point comes a little further along.

DEAN MORGAN: That is correct, the bottom of page 4.

MR. LEMANN: The question is, do we do a sufficient amount of good by adopting this, if they already have the right to do it. Would it be an admonition, maybe?

JUDGE CLARK: That is just what it would be. It is a suggestion and an admonition.

CHAIRMAN MITCHELL: I am content to let it drop. Let us pass on to the next rule.

JUDGE CLARK: We now start on Rule 26. I put what we have been discussing as a general suggestion. I bring up again the question that we have discussed before, and that is the question of securing an ex parte order when the plaintiff starts at once.

CHAIRMAN MITCHELL: You mean the depositions and discovery rule, Rule 26? We are now on that?

JUDGE CLARK: That is right. I suggest striking from the second sentence the words, "except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action," so the sentence will read:

"After commencement of the action the deposition may be taken without leave of court."

I have suggested that if you want some admonition, an alternative puts it up to the lawyer, so to speak, this way:

"The deposition may be taken at any time after commencement of the action and without leave of court upon the giving of notice as stated in Rule 30 and subject to the restrictions on its use stated in subdivision (d) of this rule."

There is no provision in subdivision (d) now, but if that were done then I would suggest adding at the end of (d) the following:

"A deposition shall not be used as against a party who

has not been served with a summons and complaint at the time of its taking, except upon showing to the satisfaction of the court that immediate taking of the testimony, before service could be effected, was necessary for its preservation."

To go back on this a little, we have discussed this before. We made a modification in our amendments in 1946. I think the original was that you had to get an order before the defendant answered, as I remember. We modified that by requiring the order if it were done within 20 days. The thought was that a plaintiff might very harshly require deposition at once.

I think there are substantially two arguments the other way. One is that this is a mere formality in any event, because you can get an ex parte order. It would put a little hindrance in your way but nothing substantial. I think we all know that ex parte orders mean very little. That is, you just have to get a judge to write his name. There isn't any requirement of notice and a hearing. It is just that.

The other is that occasionally this may be of some difficulty because the witness is about to leave and you may not be able to locate the judge.

These are matters that I brought up before. I know that I never was very strong for the restriction. I thought it was more theoretical than otherwise.

CHAIRMAN MITCHELL: By "restriction," you mean requiring the order.

JUDGE CLARK: Yes. At any rate, I am bound to say now that I bring it up once more because this happens to be one of the battling points of the admiralty lawyers. They have made more fuss about this particular provision, saying that you simply could not operate in admiralty unless you could pick up the testimony of a sailor about to go to sea.

I do think that this is another kind of case where there isn't enough justification for different rules between admiralty and civil law to support a difference. This is either fair generally or it is an unnecessary restriction which may be burdensome in the case of some witnesses.

I have had various suggestions and they have been sent to you. You may remember that Mr. Knauth, an admiralty man, wrote quite in detail about exceptions for witnesses who were about to go to sea, and so on. You could provide in this rule for a court order generally except in case of a witness, and so on.

Frankly, it seemed to me that that was piling up machinery, and if you were going to do it you had better do it by my alternative here, which says that you can take the deposition but you take the chance you may not get it in if the lawyer doesn't show that he couldn't do it any other way.

I would suggest that I would not put any restriction on. You do have the ordinary restriction, when any notice of taking a deposition which is unduly harsh is subject to the protective order of Rule 30(b). Always the adverse party can

appeal to the court for protection.

This involves the question of who goes to the court first. As it now stands, the general scheme of our discovery provisions is that the party harmed has to go to the court. The procedure runs along by itself until somebody is hurt. That is our general rule. We have made this little exception to the whole business, this little provision as to 20 days after the commencement of the action.

It seems to me that we are making a lot of fuss about something that can be taken care of in the ordinary procedures for seeking protection.

My first recommendation would be to take it out, to let it go along in the ordinary system. I say if it does seem a little harsh, I would then suggest my alternative, which is a kind of, shall I say, cautionary admonition to lawyers that they should not do that unless they have to.

MR. LEMANN: We put in a limitation on the theory that if a man is sued he ought to have a little time to find out about the case before he was called upon to attend depositions. If a client walks in my office and says, "I have just been sued for $100,000," he might not even have been served a summons, according to this. He might not know he was being sued. He might get a notice of taking depositions and he might not have seen the complaint. He would have to go around to the judge and say, "This is terrible. You have to give me a little time to read this complaint and find out all about it and know what

I have to meet."

Your argument is, "Why should you object? All the plaintiff is doing is taking testimony."

Of course, I suppose the defendant is supposed to have a lawyer there, but the lawyer is not going to do him much good if he doesn't know much about the case. You say, "Well, you go tell the judge, and weep on his shoulder, and get him to give you a little time, if you feel badly about it."

It would seem to me that really it is the other way around, because why should a defendant be confronted with a notice of taking testimony immediately?

I would like to ask Mr. Sunderland whether there is any limitation in state deposition statutes.

CHAIRMAN MITCHELL: They may make a special rule of their own.

MR. LEMANN: He can go to the judge and get an order. I would not agree with Judge Clark that if it is good for admiralty, it is good everywhere, because I think the seaman case happens in admiralty quite often, but I think the comparable case doesn't happen in non-admiralty very often. I could well imagine that you would have a special reason to get that order in admiralty quite often, or even to permit it in admiralty cases without an order, because you do have seamen going to sea. That is the ordinary thing in admiralty, in the case of the collision of a boat, and so on.

DEAN MORGAN: If you add the sentence that he suggests,

the only deposition that can be used against a person who hadn't had all this opportunity, and so on and so forth, is a deposition of the party himself. Why should the party himself not have to answer questions?

MR. LEMANN: I think he ought to get a little notice.

DEAN MORGAN: Why?

MR. LEMANN: He hasn't even seen the complaint.

DEAN MORGAN: Why should he? I just want to know why he shouldn't have to tell the truth right now.

MR. LEMANN: He has to tell the truth, undoubtedly.

DEAN MORGAN: He is under oath. If he doesn't know, he can say he doesn't know. If he doesn't remember, he can say he doesn't remember.

MR. LEMANN: Why not make him answer the petition in 24 hours? He knows about it.

CHAIRMAN MITCHELL: This 20-day rule arose because we thought when you brought a suit a fellow should have 20 days to answer. The theory was that he had that length of time to hire a lawyer and acquaint him with the case so he was competent to answer.

JUDGE DOBIE: He might make a lot of admissions in the answer that would make the taking of depositions utterly unnecessary.

CHAIRMAN MITCHELL: That is why we had the 20-day rule. We incorporated it in this deposition rule on the theory that if a man brought a suit, the other fellow was entitled

to get a lawyer before he had to appear at some deposition.

MR. LEMANN: Our rule has been adopted in a number of states. I know in my own state we have just adopted that limitation. How is it, Mr. Sunderland, generally?

PROFESSOR SUNDERLAND: I don't have in mind what the general rule in the states is.

MR. LEMANN: I think the states that have followed the Federal Rules haven't quarreled about this limitation, as far as I know.

JUDGE CLARK: There is no doubt about it, they have. When they follow the Federal Rules, they follow them, of course.

MR. LEMANN: Not necessarily.

DEAN MORGAN: The Kentucky rule is the same way, but they never even discussed this part.

JUDGE CLARK: They don't. I ask again, what good is the provision?

CHAIRMAN MITCHELL: What good is what provision?

JUDGE CLARK: The one that is here now.

DEAN MORGAN: If you can't take them within 20 days?

JUDGE CLARK: Yes, unless you get a judge to write his name. You don't need any hearing or anything else. In New York we have 15 judges, and the New York lawyers have lots of office boys, and it is fairly simple. They send the office boy down and say, "Judge So-and-So, sign this," and he says, "Yes," and signs it. Of course, when you are down in Judge Paul's district down in Virginia, you don't have the same advantage,

because Judge Paul may be down on the other side of the district and then you have to go down there and get him.

MR. LEMANN: It hasn't created any complaint that I know of. I just said to Judge Driver,"I bet you don't sign an ex parte order without knowing what you are doing." I know our federal judges are strongly disinclined to sign any order ex parte. You have to explain it to them pretty fully before they will sign it.

CHAIRMAN MITCHELL: I was interested to hear and see that the new Nevada rules, which is a good job, are exactly the same as our rule is today; and the Minnesota rules, which are also a good job, have the same thing.

DEAN MORGAN: The Kentucky rules are an excellent job, also, but that doesn't mean they considered this 20-day period particularly.

JUDGE CLARK: They thought we had considered it all. There is no independent consideration of these points in the states which follow the Federal Rules.

CHAIRMAN MITCHELL: I don't know whether there is or not.

We have a rule today which says that if you want to take a deposition within 20 days after the commencement of the action you have to get leave, with or without notice. What do we want to do about it?

JUDGE CLARK: There is one possible change, that you might tie this up with service of process rather than commencement

of the action.

CHAIRMAN MITCHELL: I was going to say that under our rules you commence the suit by filing the complaint, and when you give the summons to the marshal for service you could whisper in his ear, "You don't need to serve it for 20 days." You could go on and take your deposition the next day, and the fellow hasn't even had the summons served on him. I think there is something wrong about that.

The basic idea of 20 days running through our rules was to give the fellow a chance to get a lawyer and to inform himself about the case before he was required to do anything. Maybe we were wrong about that.

JUDGE CLARK: There is still another alternative. Would you like to try some of the more detailed provisions as to when a person is going to sea, and so forth?

MR.DODGE: This deposition may be of a witness as well as of a party, to make it usable against a defendant who is served for the first time with a copy of the complaint on the very morning of the deposition.

JUDGE CLARK: Page 60 contains suggestions as to this proviso. One at the top of the page says:

"Provided that if any witness is seagoing, any party may take his deposition at any place in the United States on reasonable notice to the attorneys of record named in any pleading filed in the case, without application to the court and each attending party paying his own costs of attendance, the

admissibility of such deposition to be dependent on the showing that the attendance of the witness upon the trial cannot be obtained, and all questions of relevancy of questions, answers, and exhibits being reserved until pre-trial or trial."

The other alternative:

"The 20 day rule could be amended without requiring leave whenever an attorney for a plaintiff has reason to believe that the witness or party is about to leave the district in which the action is pending or is about to leave the United States or is bound on a voyage to sea. This subjective test could be attacked by a motion under 30(b) if untrue, but the attorney's signature should be a sufficient certification to that effect. Compare the supplementary proceeding subpoena procedure under the New York Civil Practice Act, frequently utilized in the Federal courts. Under this procedure, an attorney 'who has reason to believe' that a third party has assets of a judgment debtor may issue a subpoena containing an injunction against transfer directed to such third party."

That particular suggestion is from Mr. Charles N. Fiddler, of New York, a former managing clerk for the Cravath firm, and who is now in the Haight, Deming firm. The first one was from Mr. Knauth of New York, who is with an admiralty firm.

MR. PRYOR: He goes on to make the same suggestion that Mr. Mitchell made a moment ago:

"If the intent of the present rule has any significance, the 20 day rule should not run from the 'commencement

of the action' but from the time the defendant learns of the existence of the suit by service of process."

JUDGE DOBIE: Of course, in admiralty cases they do have difficulty. I know in one case we had 170-some witnesses, and they took depositions all over the United States. They have to grab them when they can.

It seems to me we ought to be able to take care of that by a general rule if we want to, rather than by having special admiralty rules about going to sea.

JUDGE CLARK: I disagree with Monte there. It does seem to me that this is a case where the rule ought to be uniform. I don't see any reason at all for a difference. There may be more cases of application of the rule, whatever it may be, on one practice than the other. The times the situations occur may be more numerous. It seems to me whenever you get the situation, whether numerous or not numerous, it is exactly the same, I should think, as far as the equities are concerned.

CHAIRMAN MITCHELL: Let us adopt the rule that we think is right, and then if your principle is right, let the admiralty fellows copy our rule. Why are we sweating over theirs?

MR. LEMANN: It is the tail wagging the dog, just like the Southern District of New York running the whole United States because they have a particular situation. That isn't a fair test to go by.

CHAIRMAN MITCHELL: There is no reason why we should

not adopt a rule that is workable.

MR. LEMANN: What is their practice now? Do they just go ahead and take a deposition immediately without even serving a complaint?

JUDGE CLARK: Yes.

MR. LEMANN: How do they work it now in admiralty? The Supreme Court haven't promulgated any new admiralty rules, have they? They have some old ones.

JUDGE CLARK: The situation at the moment is this in admiralty: The Supreme Court in 1939 adopted substantially all the discovery rules except the examination of witnesses. It adopted the other provisions for the documents, and so on, in exactly the same words as the civil rules.

I might say that the admiralty lawyers from time to time have thought that there were some sinister machinations on the part of this committee. They have suspected a lot of people because they claim they were never consulted.

I don't know any reason why the Supreme Court has to consult a particular bar association, but they have always felt very grieved about that.

At any rate, that was the fact. The Supreme Court in 1939 adopted these several discovery rules in admiralty, which they have never changed. They didn't change them even after our amendments. Our amendments may not have been considered too serious a change, but at any rate the Supreme Court started out quite boldly in admiralty.

The next step was along in 1941 or 1942, when there was some consideration of adopting more rules. I know, because Justice Harlan Stone spoke to me about it. At that time the admiralty lawyers, the Maritime Section of the American Bar Association, urged against it, and the Supreme Court took no action.

One could properly assume that they decided they didn't have an adequate power, because they did not have the power to supersede statute at that time. These discovery rules which they had already adopted in 1939 were made under their former power, which did not contain any superseding of statutes. No question has ever arisen about them so far as I know. No question has arisen about that feature of it.

At any rate, the Supreme Court did not act in 1942, and it was not until 1948 that they got the complete rule-making power which includes the power to supersede statute. Of course, they have not actually done anything since, either.

MR. DODGE: Do you think there would be any harm in providing fairly to the defendant by rule that he should not be forced to take a deposition until the expiration of a certain period of time after service of process upon him, unless the plaintiff satisfies the court that the immediate taking of the deposition is in the interest of justice because the man is going away or is a seaman or something of that sort? I don't see any reason whatever for hurrying up these depositions so. I have never seen such a tremendous rush to take depositions the moment

you start a case. All the fellow has is some notice that a deposition will be taken next week. He doesn't know what the case is. He hasn't any lawyer.

I don't think he ought to be required to take a deposition until after he has been served with process and has had time to get a lawyer.

JUDGE DRIVER: I agree with that. Theoretically, of course, the litigant shouldn't do anything but come in and tell the truth, but it isn't quite so simple as that. We all know that litigants, if they don't have the advice of attorneys, don't know what the issues are and may make statements which may be very detrimental to them. I am talking about an honest litigant. He should have the benefit of advice of counsel and know what the issues are before they make a deposition which may be determinative of the case. I think they are entitled to that consideration.

If they can be safeguarded, then I think perhaps there should be provision for these emergency situations where it is necessary to hurry up the time.

I just remarked to Mr. Lemann on this matter of uniformity it seems to me we should be careful not to amend our rules too much when the states are adopting them, because we will destroy the very uniformity in the states which we have been trying to bring about. We have them adopt our rules, and then change them when it isn't absolutely necessary or it isn't warranted.

MR. LEMANN: I thought that point Judge Driver just made was very persuasive, because we are very much pleased with the number of states that are adopting these rules. Some of them do it by statute, as in my state. Now we should not proceed to make changes in them, unless, as he says, there is some real necessity for it.

As I get it, this arises only from the suggestion of admiralty lawyers, not from the bar generally. There has been no complaint, no suggestion that this is a necessity, except for this one phase of the law.

JUDGE CLARK: I guess that settles it.

JUDGE DOBIE: Under the present rule, of course, if you get to the judge and show a reason for it, you can get the order all right. I am frank to say I am somewhat impressed by the statements those gentlemen have made, that a man should have a lawyer before he answers or anything of that kind. To have notice served on him and rush in and take his deposition I think would impose a right serious hardship on him. I don't think he ought to be subjected to it except in a very exceptional case, normally.

MR. DODGE: I have experienced the very great value of these discovery provisions of ours in federal cases, where depositions have been taken against me and where I have taken them, but I have never had any experience of any man who wanted to take a deposition the moment he filed the complaint.

JUDGE DOBIE: It would certainly be very exceptional.

MR. DODGE: I think he ought to make a good showing of need for it.

CHAIRMAN MITCHELL: There is one thing about it: If he wants to take a deposition right away, as soon as he has started his suit, he has to serve notice of taking deposition, and that is equivalent to serving a summons. He is advised from the notice that the suit is started or pending.

MR. DODGE: That puts the burden on the defendant or on the witness of going to the court and trying to get a stay, and all that. He hasn't even got a lawyer yet. He gets a notice that, "A week from tomorrow I am going to take the deposition of 'A' and 'B' in the case I have brought against you." That is all he knows about it.

JUDGE CLARK: I think it is clear the committee doesn't want to do anything. I suggest that we pass on to the next.

CHAIRMAN MITCHELL: I am not so sure about this "commencement of the action."

JUDGE CLARK: There are some problems connected with that that we would have to work out. If we were going to make the rule more flexible generally, we should work them out. But if we are not going to do it, I am not sure. After all, you have to make some provision, I should think, for action in certain cases after the commencement of the action. Suppose that you do have a case of a witness going to sea, and so on, and you just have not been able to reach the defendant yet. Wouldn't you want the testimony of the witness preserved in some

fashion by going to court or otherwise? I should think it might be a little difficult to make it absolute that you could not take any deposition unless you had succeeded in serving all the defendants in the action.

PROFESSOR MOORE: Unless the defendant against whom that deposition is going to be used has notice and has an opportunity to cross-examine, I should suppose it was hearsay and was not usable.

DEAN MORGAN: It couldn't be used anyhow. It is only the admissions that could be used, if he didn't have notice and opportunity to defend.

There is no question about the seagoing fellow, and so on. The other fellow has to have notice anyhow.

JUDGE CLARK: That is right. Of course, the notice is somewhat shorter than the 20 days.

DEAN MORGAN: Yes, it might be much shorter. I should suppose you could get to the court and get an order for a quick deposition in a case of that kind. The only case I was thinking of was that the party to the action would take a deposition of his at almost any time. I don't feel so much like protecting him.

MR. DODGE: I do. I think our present rule goes too far in speeding up this thing. I certainly would not vote in favor of speeding it up any more.

DEAN MORGAN: I think it is an unusual case where you really do want to tie the defendant down immediately. Don't

you, Bill? I would like to tie a lot of them down before they get to a lawyer. I must say that.

PROFESSOR MOORE: The plaintiff has been to a lawyer, though.

DEAN MORGAN: The plaintiff, too. I would like to tie him down.

JUDGE CLARK: My thought is that if we are going to leave in the order of the court, we had better leave the whole rule as it is, including the commencement of the action, because you have to do a good deal of doctoring to change it.

CHAIRMAN MITCHELL: All right. Shall we pass on?

JUDGE CLARK: The next suggestion I have is Rule 30(b), the protective order rule. I raise here now the restrictions we suggested at the time of the Hickman v. Taylor case. You remember when the Court adopted the amendments, December 27, 1946, the Hickman case was then pending and was decided later on that winter. The Hickman case was substantially in line with the thought behind these suggestions.

The suggestions are more precise in several different respects. The suggestions have been adopted in several of the states which have followed the procedure, but not in all. I have given those states here in the summary somewhere.

The query now is whether we should go back to those suggestions, and those you will find in my suggested amendments on page 5. There are three different provisions. The first two are somewhat limited.

The first of all is: Add the underlined words in the 6th and 7th lines, and the underlined words are "time or", so this is a protective order that may be taken only at some designated time or place other than that stated in the notice.

Add in the next to the last line the word "expense," "to protect the party or witness from annoyance, expense, embarrassment, or oppression."

Then the more extensive provision is over on the next page. Add the following two sentences at the end. I think it is fair to say that the underlying principle is the same as the Supreme Court a few weeks later adopted in the Hickman v. Taylor case. On the other hand, this affects not merely the person but the other party; as we have said here:

" * * * prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial * * *."

The court may nevertheless order those papers given out, you see, under substantially the same conditions as the Supreme Court worked out in Hickman v. Taylor.

CHAIRMAN MITCHELL: I don't see much point in our trying to patch up the rules now to conform with what we think the Supreme Court intended in the Hickman v. Taylor case. There is the decision, and the lawyers can read that. We may not have expressed it the way they would like, and they may balk at it.

On page 5 of your summary, at the middle of the page,

you have two proposals. You are not pressing those now?

JUDGE CLARK: Those went out. That was the discussion we had about 26(a). I understood those were turned down. This is 30(b).

CHAIRMAN MITCHELL: When 30(b) was rejected by the Court, I never felt they rejected the rule because we had the word "expense" in there. They rejected it because we were dealing with some things that related to some pending cases they had, and they didn't want to cross their wires on them. When they rejected the rule, the addition of the word "expense," "to protect the party from annoyance, expense, embarrassment, or oppression," fell with it. I always felt if we put the word "expense" back alone as a separate amendment to the rule, the Court might adopt it. I never saw anything about their action as throwing out our amendment which included that word "expense," which indicated that that is what they were aiming at. Did you?

JUDGE CLARK: No, I don't think so. I don't think they had that in mind. In fact, they might not have considered it in any more detail than Leland suggested as to the substitution rule. They knew they had this important and very warmly argued case before them, and didn't want to make any showing on this.

Monte, I understand that in Louisiana, instead of "expense," you have "undue expenses."

MR. LEMANN: That is right, because when we came to

consider this rule in Louisiana, we took into account the fact that the Supreme Court by its opinion had supplied the hiatus that our supreme court might not supply. So we naturally covered the hiatus in our rule because we were not protected and covered by the Supreme Court rule. Then we expanded it to cover expense. I would say as an original proposition, Charley, we would embellish what we did before, but practically, I think the Supreme Court would not be very much impressed with the suggestion that we now put in the rule what they declined to put in.

CHAIRMAN MITCHELL: In Rule 30, subdivision (b), at the end it says:

" * * * the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression."

We have added "expense" in there. Why don't we say "undue expense" in the last line, and put it back to the Court on the expense question? It always seemed to me the argument on "undue expense," "travel," and the like, was a part of this deposition rule.

JUDGE CLARK: How about the question of the time of taking, too, the first suggestion. That is of the same nature, isn't it?

CHAIRMAN MITCHELL: A different time and place?

JUDGE CLARK: Yes.

MR. DODGE: Is that language at the top of page 6 what

we recommended before?

JUDGE CLARK: That is what we recommended before.

MR. DODGE: That is verbatim?

JUDGE CLARK: Yes.

MR. DODGE: And it is in line with the decision in the Hickman case?

JUDGE CLARK: Yes, only the Hickman case did not consider these other relationships.

DEAN MORGAN: This gives more protection than the Hickman case, necessarily.

MR. DODGE: I think this is good. I don't see why we should not reaffirm our recommendation, which was probably not followed simply because the case was pending.

JUDGE CLARK: Of course, there is a question now, what should a court now decide as to an agent not an attorney? What is the answer to that one? Does anyone want to advise the court? They had only the case of attorneys before them.

CHAIRMAN MITCHELL: We brought the thing out in this draft, surety, indemnitor, or agent.

JUDGE CLARK: They talk about such a thing as the doctrine of the equity of the statute. How about the equity of the decision? Actually, I put it to you, what should a court now decide when they have the case of an agent not an attorney?

JUDGE DOBIE: Claim agent?

JUDGE CLARK: Yes, a claim agent, a non-attorney. The

Hickman case, of course, actually had an attorney. Should you say that the Hickman case covered only the attorney and therefore doesn't apply, or should you say that the Hickman case obviously didn't want trial preparation disclosed unless it was going to be vastly unjust not to order it?

CHAIRMAN MITCHELL: Has anybody had any experience lately with a case where a party has been subjected to undue expense in the matter of taking deposition?

MR. LEMANN: I read here that 99 of 101 practicing lawyers that were questioned said that the benefits of discovery were commensurate with the expense; 82 of 94 said that the expense of discovery is no hardship on either party.

CHAIRMAN MITCHELL: Where did this occur?

MR. LEMANN: In Minnesota, where a complete revision was made of the rules. They sent a questionnaire out to the lawyers. I would think this is within my guiding principle: Why change details that haven't made any hardship?

CHAIRMAN MITCHELL: I would agree with that.

JUDGE DOBIE: Would you say the same thing about the time?

MR. LEMANN: I don't know what my own state did in its recent statute. I don't think they did anything about "time."

CHAIRMAN MITCHELL: Why isn't that all covered by "undue annoyance and oppression"?

MR. PRYOR: The expense proposition, too.

CHAIRMAN MITCHELL: Yes.

JUDGE DOBIE: It is very embarrassing and annoying and oppressing, sometimes, to have to cough up money, isn't it?

CHAIRMAN MITCHELL: I guess we had better pass that one up.

JUDGE CLARK: Where do we stand at the moment, now?

CHAIRMAN MITCHELL: We are ready for something new.

JUDGE CLARK: The whole business of 30(b) goes out?

DEAN MORGAN: I am going to move that we recommend the section at the top of page 6.

MR. DODGE: And if we are going to do that, those two on page 4.

DEAN MORGAN: Monte doesn't like them because the questionnaire in Minnesota didn't show anybody was hurt by it. There is no case that has come up that has caused as much discussion as the Hickman case, and the question as to limits which it puts upon it. It seems to me this would help tremendously to clarify the Hickman case. I don't see why we should not suggest it.

JUDGE DOBIE: You move the adoption of the language at the top of page 6?

DEAN MORGAN: That is my motion, yes, sir.

JUDGE DOBIE: I will second that.

CHAIRMAN MITCHELL: What is your pleasure with the motion? It has been moved and seconded that we add to Rule 30(b) the provision at the top of page 6 of the memorandum from

the Reporter.

MR. PRYOR: Where would that go? As an addition to 30(b)?

CHAIRMAN MITCHELL: Yes. It restores substantially what we had in the rule at the time they rejected it because they had the Hickman case pending.

DEAN MORGAN: That is right.

CHAIRMAN MITCHELL: We have always felt that what they included in their opinion, to the extent they went, was substantially what we recommended in the rule.

DEAN MORGAN: As far as it went, yes, sir.

CHAIRMAN MITCHELL: Now this goes a little bit further.

All in favor of adoption of that provision at the top of page 6, to Rule 30(b), say "aye"; opposed. The "ayes" seem to have it.

Charley, go ahead now. We might as well go until six o'clock unless you want to quit now.

What is your pleasure? Unless somebody moves to adjourn, we will go ahead.

JUDGE CLARK: Rule 33 is the next one about which I make a suggestion. My two suggestions are on page 6 of my suggestions, and they are of different kinds so they should be considered separately.

The first one is one which has to do with time, and while perhaps it has a little connection with the matter we considered in 26 and rejected as to 26, I think it has enough

difference so it is worth at least bringing to your attention. In fact, I think it might not be a bad idea. Instead of a provision which restricts the interrogatories at the beginning of the action, I put in this:

"Interrogatories may be served after commencement of the action and without leave of court, except that they shall not be served upon a party until or as a part of service of a summons and complaint upon him."

CHAIRMAN MITCHELL: Why do we need that? Interrogatories are written interrogatories, and if he is served, what difference does it make when they are served? He can go and get a lawyer after they are served, can't he?

JUDGE CLARK: As it now stands, it can't be done.

JUDGE DOBIE: You have to go to the court if it is within ten days.

JUDGE CLARK: That is right. These are interrogatories to the parties. They are not written depositions, so to speak, of a witness. These are the simple questions you ask of a party.

As it now stands, the second sentence of Rule 33 says:

"Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained."

CHAIRMAN MITCHELL: How long does he have to answer, ten days?

JUDGE CLARK: Twenty days. That, I should think, was rather unnecessary, and I suggest there is a neater way of doing it by the provision here. You could ask him to answer as a part of his answer. This, of course, has some ancient analogies, anyway. I take it this was always a part of the equitable bill of complaint. You had a section on discovery in the equitable bill of complaint.

This is the modern development of it. Why isn't it simpler to say you can require the defendant to answer your questions at the very time he gets the answer?

JUDGE DOBIE: Twenty days? Twenty days in which to answer the interrogatories?

PROFESSOR MOORE: Fifteen.

JUDGE DOBIE: It takes long enough to get a lawyer.

JUDGE CLARK: But he has the complaint, you see. There can't be any surprise on him. He doesn't get any notice to answer any question until he sees the complaint. He sees them both at the same time. Then he answers the interrogatories according to this rule, which is fifteen days. He then has the ordinary time to plead, which is twenty days.

As we know, I don't suppose any lawyer would be caught dead observing that rule, would he?

CHAIRMAN MITCHELL: I haven't heard of anybody complaining about this rule or wanting to change it. It seems to

be a very unvital point.

JUDGE CLARK: Perhaps I should run away before I drop my answer, but my answer is that the admiralty lawyers --

CHAIRMAN MITCHELL: To hell with the admiralty lawyers.

JUDGE CLARK: I think even good ideas can come out of them. The idea of having interrogatories along with the complaint is an admiralty one. They weren't original on it. As I say, it goes back to the old equitable bill of complaint. I think even a good idea might come out of admiralty. I think once in a while they have a flash of genius.

CHAIRMAN MITCHELL: If they get the admiralty rule to fit their idea and the Court adopts it, we can turn around and conform our rule to theirs without causing any trouble, I guess.

Nobody has said anything about it.

JUDGE CLARK: I think they are all getting sleepy.

CHAIRMAN MITCHELL: Nevada and Minnesota have copied our present rules verbatim.

I guess maybe we had better adjourn. It is ten minutes to six.

What time shall we meet in the morning? Nine-thirty?

JUDGE DOBIE: How about nine? Is that too early?

... Discussion off the record ...

... The conference was adjourned at five-fifty p.m. until nine-fifteen a.m., Tuesday, May 19, 1953 ...