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Mr Mitchell

ADVISORY COMMITTEE ON

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TUESDAY MORNING SESSION

May 19, 1953

The meeting of the Advisory Committee on Federal Rules of Civil Procedure reconvened at 9:20 o'clock, William D. Mitchell, Chairman of the Committee, presiding.

JUDGE CLARK: Last night when we broke up we were discussing Rule 33 on the interrogatories. As I understand it, the first proposition was not accepted. We voted on the first proposition and that was not accepted.

That would mean that we come, therefore, to the second one, and if you will look at page 6 of my suggestions, I suggest that there be added at the end the following:

"A party may inquire as to the names of witnesses whom the adverse party plans to call at the trial, and may also require that there be attached to the answers such of the documents specified in Rule 34 as are relevant to the answers required, if his attorney shall certify, in writing and subject to the sanctions of Rule 11, that he in good faith believes such documents will constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b)."

In explanation, I will say that this refers to and clarifies two or three things that have caused a great deal of difficulty among the district courts. To take up the one as to attaching the documents that affect the answer to interrogatories, that issue came up in the Hickman v. Taylor case, but

the Supreme Court was able to avoid passing on that directly.

The issue here, as it has been framed, is whether a person seeking documents of this kind must proceed under Rule 34 alone. Rule 34 provides for the obtaining of documents, but you have to get an order from the court on a showing of good cause.

It has been ruled, particularly in the Third Circuit, since the Hicmman case, that you must proceed under Rule 34 alone.

That is a good deal of a hullabaloo for what most of the time is a simple matter. It is a very natural thing to require, as you do, of a party as to various things connected with the case, and then ask if there is a writing. For example, if he has answered that he has a formal contract, you would naturally ask him to produce it.

If the Third Circuit ruling is to stand, that would mean that you could not do that, but would have to make a separate application to the court showing some sort of good cause. It seems an unnecessary thing to make this sharp distinction between the two rules.

CHAIRMAN MITCHELL: I don't understand. You mean it held that in the course of a discovery examination you can't ask for the production of documents; that you have to make a motion under Rule 34?

DEAN MORGAN: It is under Rule 33, Interrogatories, General.

JUDGE CLARK: Yes. You are quite right. That is just what they are ruling.

CHAIRMAN MITCHELL: But it says Rule 34.

JUDGE CLARK: I am going to make some suggestions.

DEAN MORGAN: Under Rule 26 they can do it with subpoena by specifying the documents.

CHAIRMAN MITCHELL: Yes, but I was trying to get into my head just what the Third Circuit said.

DEAN MORGAN: The question here is whether you can get these documents under Rule 33 when you ask interrogatories.

JUDGE CLARK: If you will look at my summary at page 65. Eddie has now suggested that you can get this by process of subpoena under Rule 26. Query: Would you have to show good cause for the subpoena, a subpoena duces tecum?

CHAIRMAN MITCHELL: I am still dumb about it, I admit, but I don't exactly get what you are driving at, unless it is this: Some court has held that in taking depositions before trial you can not at that deposition just ask a man to produce documents; that you have to make a motion, or something, under some other rule. Is that right?

JUDGE CLARK: That is right. The matter comes up particularly as to interrogatories under Rule 33. The Alltmont case has distressed a good many people. The editor of the Federal Rules Service said this committee ought to appear. As a matter of fact, I passed it on to you, Mr. Mitchell, at the time. That was 1949, Alltmont v. U. S., 177 F. 2d 971, in

which the Third Circuit Court held that discovery of documents can be had only under Rule 34, and not as a corollary of interrogatories under Rule 33.

You see, there is a sort of double-barreled question there: Can a party evade the "good cause" requirement of Rule 34 by proceeding under Rule 33? On the other hand, should a party be put to the trouble of first submitting an interrogatory asking his adversary what documents he has, and then start all over again by application to the court under Rule 34? That is the way the issue specifically came up.

I want to come back to this question, which might be another corollary: Could you start examining a person and require him to produce documents with a subpoena duces tecum? I think it is rather assumed that you should, and of course you ought to be able to. On the other hand, if you can get discovery of documents only for good cause, ought you then to be entitled to evade it by doing something else?

I would say the almost additional requirement of Rule 34, good cause, found by a court order, is the kind of thing that is causing us some trouble. What I am suggesting here -- in the first place, I want to indicate the problem, because some of you may have some solution for it.

I am referring to page 65 of the summary. That is the second edition of the summary.

CHAIRMAN MITCHELL: I should think the short one would be called the summary, and the long one something else again.

JUDGE CLARK: All right. At any rate, it is the document which showed up under Leland's signature under date of May 6, 1953.

MR. DODGE: Shouldn't you have provided there for annexing copies of the documents, not tying up the originals in the court papers for all time?

JUDGE CLARK: What is your suggestion, Mr. Dodge?

MR. DODGE: You tie up the originals in a court paper for all time. The form of interrogatory with which I am familiar in our state practice is "Annex a copy to your answer or name a time and place when representatives of the plaintiff may examine them." That is the approved form of interrogatory that we have. I don't think the original document should be required to be filed with answers to interrogatories.

JUDGE CLARK: I think that is a good point. Of course, you have to meet the main issue first, whether we do it at all or not.

MR. DODGE: It is the simplest way of all of getting papers. Either you have to take a deposition or go to the court for an order.

JUDGE CLARK: That is right.

MR. DODGE: I think it is a perfectly feasible and proper way of getting documents.

JUDGE CLARK: Mr. Dodge is suggesting, in effect, as I take it, that we say, "may also require that there be attached to the answers copies of such of the documents specified in

Rule 34 as are relevant to the answers required * * *."

MR. PRYOR: Doesn't his suggestion also contemplate something else: that where the documents can not be easily or readily copied, something be given in the way of advice as to when it can be examined? That is the Massachusetts rule, as I understood it.

JUDGE CLARK: Yes, that is right. Mr. Dodge's suggestion also included the idea that if the documents were too extensive to be copied, a time and place be set for their examination.

Of course, the major question here is whether we shall make some modification of the present situation, which seems, in form at least, and actually is held in the Third Circuit to say that you only get documents by proceeding under Rule 34, which means applying to the court and showing good cause and getting an order.

That seems like too heavy a form of battle for a rather simple situation such as this. It seemed to me as I was working on this (a) that we ought to make it easier to do than that; then (b), I considered whether to do away with the requirement of good cause entirely. I think that is a possibility, but we have had it here and there seemed to be some reason for it.

So what I finally did was to retain the idea of good cause somewhat, but make it that the lawyer certified to the good cause without making it a matter for hearing. So, as I

have stated here, the connection between Rule 33 and Rule 34 is that they both operate, and I think not inconsistently but perhaps a little differently. Under Rule 33 you may have asked for the documents in the way specified. I have put on that the attorney's certifying that it is believed they will contain evidence, and so on, is an adequate showing of good cause.

When I got to Rule 34, I tried to cover that by saying, as I suggest here at the end:

"The requirement of a showing of good cause is satisfied if the attorney for the moving party certifies, in writing and subject to the sanctions of Rule 11, that he in good faith believes such documents will constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b)."

That is the suggestion I have made. As I say, I think another way to do would be to strike out the requirement of good cause, on the theory that there is no particular reason for having that here when you don't require a deposition generally to be formally for good cause.

It seems to me it is a situation that, first, the rules ought to be reconciled. As the courts have found, there is a conflict or an apparent conflict between Rule 33 and Rule 34. There is obviously a conflict in policy, at least, between Rule 34 and Rule 26 considering the use of the subpoena duces tecum, because it is a little silly, if you can get a subpoena on any ground in an examination under 26, and yet when you

proceed directly under Rule 34 you have to get a court order and show good cause.

MR. DODGE: I don't think you need that certificate of counsel. The point is always open on objection to the interrogatory that the document asked for can not be material under any circumstances. I don't believe you ought to certificate it.

JUDGE CLARK: Mr. Dodge, would you then, in Rule 34, strike out the requirement of a court order for good cause?

MR. DODGE: I was talking about Rule 33.

JUDGE CLARK: Of course, we are considering Rule 33 immediately, but we want to make the two look alike somehow, and not be conflicting. I really think we ought to consider what we are likely to do with 34. We don't want an inconsistency there, because that has been the trouble.

MR. DODGE: Ordinary documents, books of account which you couldn't have produced in an answer to interrogatories, and also an examination of property of other kinds.

MR. LEMANN: You can get a book of accounts on a subpoena duces tecum, can't you, Bob?

MR. DODGE: Yes.

MR. LEMANN: The point is that there is a certain inconsistency between getting it more easily done with a subpoena duces tecum than under this rule. Is that your point?

JUDGE CLARK: As it stands on the face of it, you get a subpoena duces tecum by asking the clerk for a lot of them, and you can go to the court and get it quashed, but on

what ground would you get it quashed? I suppose the natural ground you would set up is that it is unduly burdensome or something of that kind, but there is no direct connection between that situation and Rule 34 unless some court would say that there is a connection.

In other words, my suggestion is that Rule 34, with its particular requirements, special requirements, is at odds with both Rule 36, the general examination aided with a subpoena, and Rule 33, where you seek information by interrogatories. I think we ought to work out some thesis that will reconcile them, and also I do think we ought to make this as easy as the other part of discovery. I don't see any particular reason for holding up the natural and easy practice of having copies attached to an interrogatory.

MR. LEMANN: Concretely, you would suggest in Rule 34 that you would eliminate the requirement for a motion and order?

JUDGE CLARK: That seems to me one way of doing it, yes.

JUDGE DOBIE: That first part requires the names of witnesses. Does that mean that he can have them as a matter of right, and a man can't introduce any witnesses unless he sends his names to the lawyer?

JUDGE CLARK: That is another provision I put in. Judge Dobie has brought up another part of my suggestion which involves a somewhat different point. They are both in here. I want to mention it, but I suggest again that there is no

reason why they should not be kept separately.

With reference to another battle in the district courts, I have put in that a party may inquire as to the names of witnesses whom the adverse party plans to call at the trial. Some district judges have been requiring it; some have not. I have an order here of the new judge in Colorado, Judge Knous, who was former Governor, and it is very interesting that the pre-trial order that I have here is one that requires -- and this is the statement in the pre-trial order -- "Counsel for plaintiff may present as witnesses the following," and there are several listed. Then he goes on: "and the following witnesses may be called as unwilling or adverse witnesses by leading questions," stating some more. (10): "Counsel for the defendant will present as witnesses the following," giving names and addresses.

MR. PRYOR: That is the pre-trial order?

JUDGE CLARK: Yes, pre-trial conference order.

Then there is a provision, No. (11), "Either party may call other witnesses by giving names and addresses and a synopsis of testimony to the other party at least ten days before trial."

Other federal judges have ruled that the names of the witnesses can not be required.

There is a certain degree of ambiguity, shall I say -- perhaps it really isn't ambiguity, but unclearness in the rule itself. The rule itself covering this, you may recall, is

26(b). A party may inquire into matter not privileged. This provision, 26(b), is picked up again in Rule 33 as to interrogatories, and so on.

"* * * including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts."

Some judges believe that the identity of persons having knowledge of relevant facts is a generality broad enough so that you can answer specifically: Whom did you intend to call as witnesses?

Other judges say, "No, that means no more than that you can ask if they know of people who know about it, but need make no reference to whether they are to be called or not."

Because this is unclear, it seemed to me it would be desirable to clarify it. After all, the district judges who have to handle this thing ought to get such light as we can give them.

I add as a second step, which is, of course, one the committee would want to consider in any event, that it is desirable, too, in line with our general thesis about discovery, that this information be given. There seems to be no reason why it should not be given if we consistently believe that the days of attempted surprise are over. Some judges who have hesitated about it have said, "How can you be sure in advance of the ones that you will call?" I don't think there is any

disposition to require the impossible. You ask for the witnesses that you plan to call when you know you are going to plan to call them.

Judge Knous' order here, which is as far-reaching as any I have seen, you see, attempts to take care of that. It doesn't seem to me as a practical matter that there is anything in that which is objectionable. In other words, that objection is one which can be taken care of in a practical way. In effect, "Tell us what you plan now, and let us know later what you plan." That is about all there is to that.

I think the real question comes back to whether this is the kind of information which should or may be kept secret and sprung at the trial, or is a part of the general idea that the strategy of the surprise attack is not a proper part of litigation.

CHAIRMAN MITCHELL: Where is the rule that requires the party to name the witnesses he intends to call? Where is that?

JUDGE CLARK: There is no specific requirement now. That is my point. Rule 26(b) contains the statement --

CHAIRMAN MITCHELL: That is a different thing. The answer there is the identity, the name and location of persons having knowledge of the facts.

MR. PRYOR: If there is any unclearness in the rule with regard to this matter of naming the witnesses, our Supreme Court, in adopting the Federal Rules pretty generally, obviated

any so-called unclearness by expressly providing that in answer to interrogatories, the answers can not be required to state the names of witnesses. That is the view taken by our courts in Iowa. I believe it is the right rule. Judge Knous in Colorado may have made a finding of that kind in connection with a pre-trial conference, but it was probably upon agreement of the parties. That is an entirely different thing from requiring a party to answer the interrogatories and give the names of witnesses that he expects to use.

Some of the best evidence I have had in the trial of cases has been evidence that I learned about during the trial of the case.

CHAIRMAN MITCHELL: I have always supposed that these rules required the party, on demand, to give the names of any witnesses, not that he was necessarily going to call them, who had knowledge of the facts or who he thought had knowledge of the facts. I didn't suppose there was any question about that, but you say now --

JUDGE CLARK: The district judges are somewhat split. Professor Wright --

CHAIRMAN MITCHELL: Rule 26 says expressly that you can inquire as to the identity of the witnesses.

DEAN MORGAN: He can be required to give the names of all the witnesses of whom he knows. Do you want to select out of those the persons whom he intends to call?

JUDGE CLARK: You use the term "witnesses." According

to the idea of these judges who so ruled, no, you can not ask for the names of witnesses. You can ask for the names of persons who may have seen the accident. They make a distinction between --

DEAN MORGAN: No, it is more than that. Identity and location of persons having knowledge of relevant facts. That doesn't mean that this attorney or this party says he is going to call all these, but he has to give notice of all he knows of having knowledge of relevant facts. That isn't requiring him to say which ones of those he will pick out as favorable to himself.

Your proposition is to make him disclose the witnesses he expects to call for himself. There is quite a distinction between those two, it seems to me.

JUDGE DOBIE: There might be a man who knows a great deal about it, and yet whose knowledge and testimony would be entirely adverse to the man who gives his name, and he doesn't expect to call him at all.

DEAN MORGAN: Heavens, I have had all kinds of people that I knew had relevant evidence, that I didn't expect to call.

CHAIRMAN MITCHELL: Where is the provision that you propose to put in which requires him to list the witnesses that he expects to call?

JUDGE CLARK: Page 6.

CHAIRMAN MITCHELL: Rule 33 or 34?

JUDGE CLARK: It is under Rule 33. I put this in as

a part of this longer provision, which also raises this issue as to good cause. There are two distinct problems there, so don't keep them mixed. We started first on the good cause matter. Now we have shifted over onto this question of the witnesses.

DEAN MORGAN: There are two distinct questions here.

CHAIRMAN MITCHELL: It seems to me that when you get into a rule which requires a man in advance of the trial to name the witnesses he expects to call, if he tries to call somebody he hasn't named, he is barred from doing it. What other result can there be? I don't think we ought to make a rule that a man has to name every witness he is going to call, and if he calls one he hasn't named, the court would throw him out and say he couldn't testify.

JUDGE CLARK: I don't think nor have I seen in any of the cases any suggestion of that rigidity. I think that is a little made up by the judges who don't want to do it. They say you can not be restricted in any way. All that is required is an element of good faith about it. What witnesses do you plan to call? There is no idea that you shall be shut out from somebody who is newly discovered.

CHAIRMAN MITCHELL: I am talking about your proposal. You say on page 6 of your memorandum under Rule 33:

"A party may inquire as to the names of witnesses whom the adverse party plans to call at the trial * * *."

Suppose you have a witness in mind that you plan to

call, and inquiry is made and you don't name him. What is going to happen to you? I should say at once that a party who called a witness that he had not listed in this way would be prevented from using him. Otherwise, the rule is futile. If he lies about it and doesn't get punished for it, what is the use in making it a rule?

JUDGE CLARK: I think if he lies about it, he ought to be punished, and I don't see any reason why he should not be asked just that.

On the other hand, I don't think that has anything to do with whether a witness is later discovered. Of course, you wouldn't plan to call witnesses that you don't know anything about. Your answer to the interrogatory would have been perfectly true then. This is merely a part, it seems to me, of your general theory that litigation is advanced and more just results are achieved if each knows the other's case, so to speak, in all details. That is one reason why discovery helps promote settlements, because you haven't something that you can spring as an ace in the hole.

DEAN MORGAN: I want to know about that. Do you have any ace in the hole if you have disclosed the identity and location of persons having knowledge of relevant facts? I don't see that you have any ace in the hole there. It seems to me if you have to disclose all, you disclose those whom you expect to call and others. I don't quite see why you should have to tell the other person now that of this bunch of 12, I am going

to call these 7. Why should I?

JUDGE CLARK: Why shouldn't you?

DEAN MORGAN: Why should I, I want to know. Is it so he won't have to subpoena them? Is that it?

JUDGE CLARK: You can answer, of course -- suppose that you have a grandstand go down and bring suit on it. You can put in the names of 200 people having relevant information. A good deal of these can be answered. There are two ways, you know, of answering an interrogatory, if you don't want to show your hand completely. One is not answering it and taking the penalty. Another is of answering it in such infinitive detail that you don't tell anything. That can be done here.

It seems to me there isn't any reason why it should not be indicated which of those you are going to use.

DEAN MORGAN: We have tried to keep from disclosure, haven't we, what you call the plan or strategy of the trial lawyer. You say he doesn't have to disclose that sort of thing. Suppose that I have 12 witnesses here. I know that I won't call more than 7 of them if I can help it. Suppose I am for the defense. I am not going to call these witnesses unless you fail to call them. If you fail to call them, I am going to call them; I will have to call them. Do I have to disclose that? That is what I want to know. What are you trying to do in a situation of this kind? Why should I have to disclose a person I am going to call as distinguished from the persons who have relevant information?

I don't see how, under Rule 26, any judge can fail to say that you must disclose persons who have relevant information. I don't see how you will get any question on that. But when you ask me whether I am going to call "X" or "Y" or "Z," why do you want to know it? So you will know whether you will have to subpoena him to see that he is there, or why?

MR. LEMANN: You can say, "Give me a statement of all the points on which you expect to defend this case, all the arguments that you are going to make, with the citations of authorities. Give them to me by interrogatories that I file on you ten days after I bring the suit. I want you now, within ten days, to give me all the cases that you think support it." I suppose you could distinguish that.

JUDGE CLARK: I thought you could do substantially that, anyway.

MR. LEMANN: Not quite that way.

JUDGE CLARK: I do that right along as a judge. You ask, "What authorities are you going to rely on?"

MR. LEMANN: Not quite that soon, you see. These interrogatories, as I recall it, can now be filed within ten or fifteen days after the suit is formed, and then they have to be answered in fifteen days.

JUDGE CLARK: Many judges require a trial brief before they start a case.

MR. PRYOR: They don't require them to serve them on the other side.

PROFESSOR MOORE: Yes, in Connecticut.

JUDGE CLARK: As a matter of fact, you have to serve it on the other side. There were a lot of trial judges who thought it was undesirable to do that. The Supreme Court refused to put that in the Criminal Rules. Chief Judge Vanderbilt led a crusade on the theory that that was entirely wrong, and the Judicial Conference therefore passed rules that a federal trial judge should not receive a trial brief from one side only.

I rather think that was a mistake. Nevertheless, they have to exchange them.

May I read perhaps the most distinguished authority on the subject, if I could? Moore's Federal Practice. This is Volume 4, page 1079. He has discussed the idea that the supporting theory of litigation is eliminated.

"Elimination of this sort of tactics is a legitimate purpose of the discovery rules, especially when considered in connection with Rule 16 on pre-trial proceedings. These rules, taken together, give the courts broad powers to simplify litigation and to avoid surprise. Since a party clearly can ascertain the names of all persons who might be witnesses, under the specific provision for discovery as to 'the identity and location of persons having knowledge of relevant facts,' no good reason is seen why he should not have the right to learn, at some reasonable time before trial, which of these persons will be witnesses. The adverse party need not be ineluctably bound to use all of the witnesses at the trial, nor precluded

from using other witnesses if their existence or the relevance of their testimony is discovered at a later time, if notice is given or circumstances otherwise justify it.

"To give an example: Suppose that the depositions of X, Y, and Z have been taken and their testimony supports a defense of the defendant D. Plaintiff P also knows that W has some knowledge of the matter in litigation. P does not want to use W as a witness, but if D is going to use him, P in order to protect himself should take W's deposition or be prepared to impeach W in case he is called at the trial. If D can be required at the proper time to state what witnesses he intends to use at the trial, and the statement does not include W, then P need not go to the expense of taking W's deposition nor be prepared with impeaching testimony. If expert testimony is involved in a case, no reason is seen why the party should not be required to state what experts he intends to call, so that the adverse party may inquire into their qualifications prior to trial.

"This does not mean that parties should be required to furnish their adversaries in advance of trial with an outline of their case or state precisely what witnesses will be used to prove particular facts."

CHAIRMAN MITCHELL: I should like to ask a question. Do you propose to make it a rule that a party must name the witnesses on demand in an interrogatory, name the witnesses he proposes to call? That opens, in my mind, a Pandora's box

of problems arising at the trial. Suppose he answers in good faith, but he changes his mind. After interviewing the witness he finds that he isn't what he thought he was or doesn't know as much as he thought, and he doesn't call him, after saying he would. The other fellow gets up in court and yells his head off and says, "I have been trapped. I want that man's testimony. They told me they were going to call him. Now he is in Europe."

There is no deposition. What are you going to do in a case like that? I don't see how you can make a rule requiring a man to name the people he is going to call, especially at an early stage in the case like these interrogatories, and have no sanction or consequence flowing from his failure to do or not to do what he said he was going to do.

The thing that I am not clear about is how you are going to handle the situation and what consequences flow from the fact that a man, even in good faith --

SENATOR PEPPER: I suppose each of us, as he thinks of these problems, has a different pattern of a case in his mind and his thinking is influenced by that pattern. For instance, I could be entirely satisfied with a rule applicable to the run-of-the-mine case where maybe there are ten or a dozen witnesses. I happen to have pending now, representing a defendant in an antitrust case, a situation in which there are approximately 3,000 potential witnesses, dealers all over the country. The complainant's case contemplates a showing

that the defendants have engaged in various nefarious practices. Just suppose that the plaintiff, the United States Department of Justice, in filing its complaint, has information from, say, ten witnesses out of 3,000 dealers who have been bad boys, and whose testimony would go to that extent to support the complaint.

If the defendant could find out in advance who was to be called, he avoids the alternative, which is that if he doesn't know, he has to take the depositions of some 3,000 witnesses to establish the negative of the proposition, that they haven't done these things.

You have such an entirely different case from the ordinary run-of-the-mine case that you almost think that your rule ought to take account of the difference between the types of case, but that is not feasible.

Just think of that for a minute. Three thousand potential witnesses who, if they were all called and all said that they had never done any of the things complained of, that is one thing. Suppose they were all called and ten admitted that they had done the things, but the remainder of the 3,000 said they had never done them. There is a question of law as to how many of the total number can bind the defendant by their nefarious conduct.

The defendant is perfectly helpless in preparing for trial if all he knows is that at the trial, some witnesses are to be called who will testify to things that support the plaintiff's contention. He has somehow or other to find which

of the 3,000 potential witnesses are those whom he is going to confront.

That is not an imaginary case. That is a real case. It does seem to me that we ought to have something like that in mind when we are making our rule.

MR. PRYOR: Might I ask what kind of notice you would contemplate being necessary in order for a party to produce a witness who had not been named?

JUDGE CLARK: Let me go back over this a little. I just don't see why there is any more question about enforcing this than any of the other provisions, if you feel it is good policy.

For example, we have the requirement that you have to give the names of the persons there. That is a requirement that must be answered in good faith, and if you don't do it you are subject to the penalties under depositions generally. I can't see that there is any difference here, or anything more than the requirement of good faith.

It may be, of course, that a lawyer is going to let the court down, but we have to be used to that, in a way. If it is decided that there has been a false answer, that the intent was different, there should be the penalty. It is probably going to be true that a court is going to hesitate to find that, and very likely that a good deal of this will be a statement of a general principle. I doubt if there will be too many strong orders. There haven't been, so far as I know,

on the provision as to listing the names of the people who have knowledge of it.

It seems to me it is just the same general situation as others elsewhere; namely, all you can expect of a party and his counsel is good faith compliance with the rules. The court is probably going to give him the benefit of the doubt. The rule is not intended to preclude a person from the benefit of testimony which may develop when he didn't know about it.

One other thing, and I will try to stop. I put this in the interrogatories section because it seemed to me that if you were going to give any credence to the idea at all, this was a very simple place to put it. There is no particular reason why it needs to be here. It can go back in 26(b), if that is thought to be a better place for it. That is a matter of detail, if you decide that it is a proper thing to be known.

It seems to me that Senator Pepper has given a very convincing demonstration of the value and the real need of it.

MR. DODGE: It is an utterly impractical rule. I just happened to think of a case I have now pending in the United States Court, which has been pending a year and a half, and today I couldn't give the name of a single witness whom I plan to call, because it is so complicated. We haven't determined in my office what issues are ultimately going to be material. I could not name one witness whom I definitely plan to call.

That is only one of countless situations which make

it utterly impractical to ask for the names of witnesses.

SENATOR PEPPER: You represent the defendant or the plaintiff?

MR. DODGE: I am for the defendant.

SENATOR PEPPER: Are you going to keep that up until the day of the trial?

MR. DODGE: Very likely; not to the day of the trial, but to the time when the trial becomes immediately imminent.

MR. PRYOR: I tried a railroad crossing case where the sole ground of negligence upon which there was any evidence was that the railroad had negligently placed freight cars on a sidetrack next to the mainline running track over which the train approached the crossing. The testimony of five witnesses was that those cars were standing there at the time, and up so close to the track that they totally obstructed the view of the man driving the truck. We had tried the case fully, with this exception: Just before I was going to rest, the reporter for the local newspaper, who was in the audience, called my attention to the fact that he was present at the depot -- this accident was at the first crossing west of the depot -- and waiting for a train when this happened; that he had his camera with him and he ran out there and took pictures. He had five pictures, and the first one showed the train stopped there and the men lying by the train. It showed the other track, and there wasn't a thing on it. He had pictures of the crowd gathering. All these pictures showed no cars on that track.

I got a verdict from the jury in that case, but I never heard of this man until I was almost ready to rest that case.

CHAIRMAN MITCHELL: The thing that bothers me is not so much a case where a man fails to name a witness that he ultimately does call.

DEAN MORGAN: That is the one that bothers me.

CHAIRMAN MITCHELL: It is the converse of that. Suppose he tells his opponent he is going to call Smith, and his opponent wants Smith there; and, relying on the assurance that he is going to be called, his opponent doesn't subpoena Smith or doesn't take his deposition. Lo and behold, when the trial comes along, Smith is not there, although he has been named by the other side as a prospective witness. What do you do with a thing like that? The fellow is helpless. He doesn't have Smith there. He told him he was going to be there. He hasn't subpoenaed him or taken his deposition. He may be unavailable at the time.

That is the sort of thing that it seems to me you have to provide for in this rule. If you are going to make a rule requiring that a man in good faith name all the witnesses he is going to call, there ought to be some sanction or something to protect the other fellow if he doesn't make good.

MR. DODGE: The defendant is in a peculiarly hard position, because he doesn't know what issues are going to be material until the plaintiff's case is in. The whole thing

seems to me so bad that if there is a disagreement among district judges on it now, I think the word "not" should be inserted after the words "A party may" in the wording of this. That would settle it.

MR. PRYOR: That is what our rules in Iowa provide, "may not."

DEAN MORGAN: There is a question, of course, that ties up with the rules of evidence. That is the thing that bothers me. In most states I can not impeach a witness that I call. If I have to call him, I can't impeach him. The testimony may break so that I don't have to call this particular witness, and if I give notice that I am going to call him and then at the trial I say I don't want to call him -- suppose he is there and I say I don't want to call him -- what is going to be the result then?

JUDGE CLARK: You don't call him.

DEAN MORGAN: You just don't call him.

JUDGE CLARK: True.

DEAN MORGAN: As you measure my good faith, do I have to reveal the fact that I will call him if I have to, but I would rather have the other fellow call him so I can impeach him? Do I have to reveal that?

JUDGE CLARK: I am a little surprised. It seems to me this just goes back to the old question of surprising the other man. These are imaginary difficulties.

DEAN MORGAN: If you didn't have that fool rule of

evidence, I would agree with you, but you are up against that rule. You are up against it in jurisdiction after jurisdiction. The federal courts hold with it.

JUDGE CLARK: The real question of policy involved is how far you want to extend the idea of the Hickman case for protection; and how far, on the other hand, you think it is a wise thing to have the case pretty fully disclosed on either side. I say I think there is a real question of policy. I must say, though, that beyond that it seems to me that the mechanical objections raised here are not real. I think you are working on imaginary difficulties because you don't like the policy.

I suggest that the decision be made on the main policy.

DEAN MORGAN: I don't think my situation is imaginary at all.

JUDGE CLARK: I don't see that they are really any different from any of these other things that we are requiring; for example, the names and location of people who have seen what happened.

DEAN MORGAN: Who have relevant knowledge. That is all.

CHAIRMAN MITCHELL: That is a very different thing from requiring a man to say in advance whom he is going to call as witnesses.

SENATOR PEPPER: Mr. Chairman, I think I know what would happen if the suggestion were adopted that counsel need not name the witnesses whom he expects to call, but should

name the witnesses who he believes have relevant knowledge. In my case the prosecuting attorney would just comply with that rule and say that he thinks all the 3,000 dealers on the list of the defendant's employees have knowledge, and just give their names and addresses, and you are in exactly the same position as you were before the rule was written. It is too easy to evade a rule like that, where the requirement is merely that you must give a list of everybody who knows anything about the case. You can just put down any list and let it go at that.

PROFESSOR MOORE: Mr. Loftin, this practice is used down in your state. Do you know how it works?

MR. LOFTIN: We haven't had it in force long enough, yet, really to tell. Some like it and some don't like it. It is quite a change, for Florida was a common law state until these rules were adopted.

JUDGE CLARK: Professor Wright tells me that in Minnesota, under the Minnesota rules, the judges there are requiring the naming of the witnesses. Minnesota, of course, adopted the Federal Rule. That is a construction that is being made locally.

CHAIRMAN MITCHELL: It seems to me, Senator, if I were representing the defendant in the case that you speak about, and all I could get the government to do was to give me the names of the witnesses who have knowledge, I would realize at once that the government's case about misconduct required an inquiry on defendant's part as to how many of these salesmen,

or whatever they were, 3,000 of them, got in wrong on this thing. Make an inquiry among your business salesmen and associates as to what had been going on in the trade, what they had been doing, and find out in that way how many there are of them or approximately how many, what proportion of them had been misconducting themselves, and then proceed on that basis. Get as much testimony as you can as to the limited character of the misconduct. That is the thing you would be up against in a case like that. There is no rule on the subject.

I can understand how, in that particular case, there is some good reason for your asking the government how many of these salesmen have been misconducting themselves. It is fair to ask the government to name them. But so many other different kinds of cases come up. I can think of case after case that I have had in years gone by where it was very important for me to know whether the other fellow was going to call Sam Jones as a witness or not, and if I asked him and he said he was, I would say I don't have to take his deposition or subpoena him. Then I would get caught and would be in trouble if he didn't produce Sam Jones.

I can think of many cases, before these discovery rules were adopted at all, where it was very important to know whether the other side was going to call a certain witness or whether it wasn't. My whole strategy of the case might depend on that.

Outside of everything else you have said, I have the

feeling that if you make a rule requiring him to name the people he is going to call and he doesn't call them, we can't leave in the air the question of what are the consequences, what he suffers by not calling them. Is he going to be penalized? Is the case to be continued until the witness can be located? Or how are we going to do that?

It is all right to say good faith, but I have changed my mind in many cases from one day to another as to whether I wanted or didn't want to call a certain person as a witness. Sometimes I wouldn't know until the case was half disposed of.

DEAN MORGAN: Would it be possible to draft a rule to allow this disclosure to be made in the discretion or required to be made in the discretion of the trial judge in a particular case so as to cover cases where proper preparation would require the disclosure of the men to be called on the other side?

PROFESSOR MOORE: That would follow more or less the Denver practice, perhaps. It could be done at pre-trial.

MR. LEMANN: They are doing it under the existing rule at pre-trial, aren't they?

PROFESSOR MOORE: Apparently it is done out in Denver.

MR. LEMANN: If it is good for Denver, if it is any good, I suppose other places could do it if they thought it was good.

JUDGE DOBIE: I remember we had an admiralty case before our court which was a very important one. The Battleship

New Mexico ran down a $10 million ship and 32 men were killed. It was three years from the time the case was filed until it was tried. It was postponed once on account of security reasons. They didn't want this thing during the war. There were 100-and-some witnesses. There were four destroyers forming a screen for this vessel, and the men were saved. It was absolutely impractical for the boat that was sunk to have furnished, at an early stage, the names of the hundreds of these witnesses. They didn't know where they were going to be, or anything of that kind.

Of course, that is an exceptional case, but you have to think about them.

MR. LEMANN: Pre-trial usually comes not too far in advance of the actual trial. It seems to me that would permit you to do it at a very early stage after the suit is brought.

CHAIRMAN MITCHELL: This pre-trial situation sort of appeals to me, because if they can exchange demands on who is going to be called, and that sort of thing, in the pre-trial proceeding, you can iron it out there and can find out a little more definitely just what the consequences are going to be.

MR. PRYOR: In our pre-trial proceedings now the court will ask the parties about their exhibits and have them produced and marked, and save a lot of time at the trial. He asks them if they want to disclose the witnesses that they plan to produce, but they can do that now under the pre-trial practice. I don't see any reason for changing the rule to do that.

JUDGE DOBIE: I believe that is the best way to handle it. It is a difficult problem, but I believe the pre-trial is the most practical way of handling that situation.

Take experts, for example, in a patent case. The plaintiff says he is going to make you do so-and-so. Judge Coleman, for example, in Baltimore, is very much prone to the practice, which I think is a good one, of appointing an impartial expert.

It seems to me pre-trial is the best way that it can be worked out.

JUDGE CLARK: There is a subdivision (4) in Rule 16 which could be expanded in the rule. Subdivision (4) of Rule 16 provides that among the subjects to be considered is the limitation of the number of expert witnesses. This could be expanded a little to cover this.

CHAIRMAN MITCHELL: That is a thing that appeals to me more than trying to make a rule on this subject, spelling out a lot of penalties and consequences and what-not if the man doesn't carry out his promises.

JUDGE CLARK: I think that would be a good idea.

CHAIRMAN MITCHELL: Of course, when we adopted Rule 16 there was a lot of prejudice among the federal judges. We deliberately refrained from making it compulsory for a federal judge to adopt the pre-trial system because it was a new thing, and there were only two jurisdictions in the country, I think, that had started it. There was a lot of opposition to it among

judges. They resented the idea of giving time to it.

This was made permissive here. The judges gradually picked it up, one after the other, and they began to find it was a useful thing, and it is pretty generally used.

I haven't heard recently of any federal judge who refuses to have anything to do with that system. They are given discretion here about having pre-trial calendar. That is a matter of choice with them, but it has worked.

It may be that by an addition or two to the pre-trial rule and the list of things you can do, you could add right there the point that they can go into the question of who is going to be called as witnesses. Why not?

MR. PRYOR: There is an addition made to the pre-trial rule in our state, and I have wondered if it would be well to add it here. It adds the provision that the record of the pre-trial conference shall show what matters the court will take judicial notice of.

CHAIRMAN MITCHELL: There is a general clause that says, "Such other matters as may aid in the disposition of the action." That is so broad that it would cover even what we are talking about. The point is that as long as this issue has been raised among the judges, none of them is paying any attention to the possibility of disposing of it in the pre-trial proceedings, but tucked in as one of the list of things the pre-trial conferences deal with you might have the solution.

JUDGE DRIVER: It has been my experience that lawyers

are not too happy about pre-trial conferences, and they are trying at least to stand on their rights as to disclosure as much as they can. I would be inclined to think I have had lawyers who would decline to give the names of witnesses and say they don't think that is contemplated under the rule unless it is specifically mentioned. You have a limitation on the number of expert witnesses. A lawyer can say if it was intended that the names of witnesses be disclosed, why say anything about the number of them here? That would seem to imply you weren't to give the identity of witnesses, but only give the number of them.

I think if you are going to contemplate disclosure of witnesses under pre-trial, it should be mentioned as one of the things that are to be covered. Otherwise, I think you will have difficulty with it.

Most of us have tried, as Mr. Mitchell has indicated, to ease this pre-trial along. After all, a lot of the older lawyers don't like it too well, and we try to make it as much as possible voluntary. I have had very good response, and I think most judges have. Lawyers are willing to cooperate, but still they want to know that what they are doing is something that they are required to do.

DEAN MORGAN: The Kentucky provision on pre-trial requires the judge to hold pre-trial on motion of either party as well.

MR. PRYOR: So does the Iowa rule.

DEAN MORGAN: Because certainly some state judges don't like the idea.

CHAIRMAN MITCHELL: Judge Driver, would you think there was any resistance on the part of federal judges generally now to using the pre-trial system, and that it would be wise for us to make it compulsory instead of optional as it is today.

JUDGE DRIVER: I don't think there is any resistance that I know of, but there are still a good many who feel there should be a selection made of the cases in which it is applied. That is particularly true in a district such as mine, where a judge has to hold court in a number of widely separated places. I have court in Walla Walla, Yakima, and Spokane, a triangle of about 165 or 200 miles between them. Very often I feel that to bring lawyers from Seattle to Yakima would not be worth while in a small case where the pleadings show pretty well what the issues are, and I feel there isn't any particular cause for calling a pre-trial conference. I feel there it would be a waste of time, effort, and expense. So I don't have pre-trial in every case, and I think a good many other judges feel the same way about it.

However, I have followed the practice -- and I think most of them do -- that if either party asks for it, then we usually have it. Certainly we give serious consideration to whether pre-trial should be had, but we don't have it in every case.

JUDGE DOBIE: We have had it up at several of our

conferences. We have had Millar come down with these practical demonstrations. We have some conservative judges who do fight it. I think there is a great deal in the point that you made about where the district court meets in a great many places. In the Western District if Virginia, where I was once district judge, it meets in seven places. We had one paper read before our conference about the particular problems presented in a situation of that kind. It was a very able paper. I wrote it myself.

There is some resistance, but I think it is gradually breaking down.

JUDGE CLARK: I think there is still a very considerable problem in the Southern District of New York. Leland knows about it, of course. This is one of those things that isn't too easy to make by compulsion. I don't think there was resistance in the Southern District of New York, but there is a great difference in the way it is done.

It started out with Chief Judge Knox, who of course has been there so long, and is so well respected, that he is almost a sacred figure. He wanted to do all the pre-trial. It has been a great problem because his pre-trial, frankly, wasn't much good except for settlements. That is really his conception of pre-trial.

Then the judges, under a little pressure, of course, of the very active Committee on Pre-Trial Conference headed by Judge Murphy, are pushing right along; not compulsion, of course, but a group spirit. The judges now have established a pre-trial

calendar in New York, and they have two different ones. They have a general pre-trial calendar and a special Judge Knox pre-trial calendar. A lawyer a little while ago said, "What does this mean? What is this special pre-trial calendar?" Really, it is just Judge Knox's idea of getting settlements.

I am inclined to think, looking at it a little from outside, that the other judges who have tried to do it very faithfully, on the other hand, have overdone it.

Mr. Pryor, referring to the question of judicial notice, I should hate it if you took a conscientious judge like Judge Leibell, who takes it almost too seriously as it is, and cross-examine him on what he was to take judicial notice of. I bet he would take as much time on that as he would take eventually on the trial, he would want to do it so conscientiously. By the time you got him cross-examined, you might as well have tried it.

Judge Irving Kaufman was talking to me about assigning the cases to different judges, to make a commercial calendar, and so on. He said that they were coming more or less to believe that pre-trial was largely wasted in the great run of automobile accident cases; that that took a lot of time and that there wasn't much you could get out of it.

At our judicial conference, one of the lawyers, Mr. Palmer, made quite a drive that there should not be any in the ordinary auto case.

I don't know the answer, but as I told Judge Kaufman,

what I thought they ought to do was to experiment; that that was one thing they should try to do, to have different forms of trying to meet the great load of cases they have. That is why I think it is a little doubtful that we should try to make them conform to a mold as when the conference committee pushes the judges into doing this. Of course, out in Judge Driver's territory, Judge Fee's pre-trial orders are regular books.

JUDGE DOBIE: I don't believe you can classify cases so easily as that, Charley, because I remember one case I had, an automobile case. A poor fellow was run over by a hearse and suffered the most ignominious death I ever heard of. I had a pre-trial conference on it, an automobile case, and as a result of the thing, where they had said it would take over a week, we reduced it to the doctrine of last clear chance, and tried it in two hours.

I think in the main, there is something in what you said, but I don't believe you can classify them as absolutely as that.

DEAN MORGAN: In order to get something definite, I move that we add to the list of the pre-trial conference, a provision with reference to disclosure of the names of witnesses to be called.

JUDGE DOBIE: I second that, and leave out this provision in its entirety, Eddie?

DEAN MORGAN: I leave it out here, and put it in Rule 16.

SENATOR PEPPER: Your motion is a substitute for the one proposed?

DEAN MORGAN: Yes. There isn't any motion on that yet.

CHAIRMAN MITCHELL: Any question?

MR. DODGE: The difficulties arise there just the same, because pre-trial often comes a good while before the real trial of the case.

DEAN MORGAN: The judge doesn't have to order it if he doesn't want to.

JUDGE DRIVER: It seems to me if it is required, pre-trial is a more opportune time under discovery. It might stimulate pre-trials, too. If a lawyer knows he can get the names of witnesses through pre-trial, he would be more likely to ask for it. I think where lawyers ask for it, most judges will give it.

CHAIRMAN MITCHELL: There is another thing that bears on this problem, and that is, suppose he makes a pre-trial order and recites that the parties have named so-and-so as witnesses. "* * * such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustices."

A case where a witness isn't produced as promised, or something of that kind.

JUDGE DRIVER: I don't think that would be any different than the problem of documents. I think practically all of us list documents in the pre-trial order. I think most

judges are very liberal. If a party says, "I overlooked this document and it is something I discovered later on," or "I changed my plan," I don't think there is much difficulty about that. There hasn't been in my experience.

CHAIRMAN MITCHELL: It has been moved and seconded that instead of trying to deal with this question of naming the witnesses intended to be called in Rule 33 or Rule 34, we add a provision to Rule 16 listing, among the subjects that may be taken up and dealt with, the matter of naming the witnesses that either party or each party intends to call at the trial.

MR. DODGE: How about the documents he proposes to put in evidence at the trial?

JUDGE CLARK: Don't you think you had better take that up separately? I understand we haven't settled that. That is the other part of this problem.

DEAN MORGAN: Yes.

CHAIRMAN MITCHELL: It is already mentioned in (3).

MR. DODGE: I haven't heard it suggested anywhere yet that any party should be required to give a list of the documents he proposes to put in evidence.

CHAIRMAN MITCHELL: That is one of the things that are listed to be discussed at the pre-trial proceedings.

All in favor of that motion say "aye"; opposed. That is agreed to.

JUDGE CLARK: Now may Isuggest, don't you think this can be perhaps best done by adding to subdivision (4) of 16, or

would you prefer to have an entirely separate listing? I should think subdivision (4) would be the place.

CHAIRMAN MITCHELL: That would be an appropriate place for it.

JUDGE CLARK: I hope you will come back to the other question, which I think is really a serious one. Broadly speaking, it is a question of reconciling the matter of the production of documents under Rules 33 and 34 directly, and of course the general subpoena duces tecum idea.

How would it do to take out the requirement of good cause? Is that your idea, Mr. Dodge?

MR. DODGE: I thought the first part of yours was very good on that.

DEAN MORGAN: He suggested, Charles, that you should have copies of such documents rather than the originals.

JUDGE CLARK: I think that is good.

MR. DODGE: Or that an opportunity be afforded to interrogate the party and to examine the originals and make copies of them, without that last part about the certificate of counsel. I think there should be the fullest discovery of facts and documents which are material, but no discovery on pre-trial or anywhere else of the mode of proof which a particular party proposes to adopt, either the witnesses he is going to call or the documents he proposes to offer in evidence.

JUDGE DOBIE: Would you want the rule to read, "A party may require that there be attached to the answers copies

of such of the documents specified in Rule 34 as are relevant to the answers required"?

DEAN MORGAN: That is where he wants to stop.

MR. DODGE: "or that an opportunity be afforded the interrogating party to make copies of the originals." You can't force a man to make copies of very lengthy documents.

DEAN PIRSIG: Would that exclude the other items listed in Rule 34 and require cause to be shown as to papers, books, and documents?

JUDGE CLARK: As I understand, we haven't done anything yet to Rule 34, and whether we do anything hasn't yet been decided. As it stands, I think the answer is no, you can do everything you now can do under 34, and in addition you can do this additional step under 33. That is the present situation, isn't it?

MR. DODGE: Might it not be appropriate to bring it to a head by moving that that latter suggestion be adopted in Rule 33, and that the first suggestion be disapproved, about the names of witnesses.

MR. PRYOR: I second the motion.

JUDGE CLARK: I am not sure how far Mr. Dodge wants to go. If he wants to put in a provision here that you may not inquire as to the names of witnesses, I hope you don't do that. That would confuse what we have done with 16. Why don't we just leave that out and forget it? I thought we had taken care of that. We go on to the next question, which is documents.

I suggest, Mr. Chairman, that this is what we should do now: We should add to the end of Rule 33 the following:

"A party may require that there be attached to the answers copies of such of the documents specified in Rule 34 as are relevant to the answers required, or that an opportunity be afforded counsel to examine the documents at some reasonable time and place."

MR. DODGE: And, if he desires, to make copies.

DEAN MORGAN: "May examine and take copies."

PROFESSOR MOORE: Judge, don't you think all this would be achieved by just striking out the "good cause" requirement in Rule 34 and leaving it to the adverse party to move for a protective order?

JUDGE CLARK: That is a good suggestion. Yes, I do think it would.

You didn't mean to leave in the requirement for an order, did you? You strike out the good cause and the order?

PROFESSOR MOORE: Yes.

MR. DODGE: It would be subject to the same requirements as Rule 11; is that what you meant?

DEAN MORGAN: We are talking about 34 now.

Why don't we finish this first, and let 34 go, and then decide what we want to do with 34.

JUDGE CLARK: Of course, Mr. Moore's suggestion is relevant. If you strike out the good cause, you don't need this.

DEAN MORGAN: Rule 34 has a lot of other things in here. You can go into premises, and so on and so forth, with orders. It applies to other things than documents. It applies to chattels, and so on. It is a wider rule than this one.

JUDGE DRIVER: Under 33 your idea, as I understand it, Judge Clark, is to permit the production and copying of documents on interrogatories under 33 without getting a court order, as required under 34.

CHAIRMAN MITCHELL: What about the similar provision when you are just taking a deposition? What have we done with that? Interrogatories are just one form of a deposition. Instead of an oral deposition, it is a deposition made on written interrogatories instead of oral. That is the only difference, as I understand it.

What would happen to your production of documents if you were taking the deposition on oral interrogatories? Is that taken care of?

JUDGE CLARK: I think that won't raise any question now. That is covered, really, under Rule 45, Subpoena. That doesn't contain any limitation now. Rule 45(b), you see, is a provision for subpoena for the production of documentary evidence; and (d) is the subpoena in connection with depositions.

CHAIRMAN MITCHELL: That answers my question, I think. Let's go back to Rule 33.

JUDGE CLARK: I guess Mr. Morgan or Mr. Dodge moved the adoption of this provision.

DEAN MORGAN: Mr. Dodge made the motion, and Judge Pryor seconded it. I call for the question.

CHAIRMAN MITCHELL: That is an addition to Rule 33?

DEAN MORGAN: Yes, sir.

CHAIRMAN MITCHELL: About the production of documents and granting leave to make copies of them?

DEAN MORGAN: To add to Rule 33 what the Reporter read.

DEAN PIRSIG: Might I ask a question of Mr. Morgan there.

Is it your intention to leave for further consideration these other items which would appear to be within the policy you suggest, such as papers, books, and letters, which now appear in Rule 34? If you make this change in 33 and limit it to documents, then you have cause required as to these other items I have mentioned.

DEAN MORGAN: After you finish 33, then you determine what you want to do with 34.

MR. LEMANN: What is the amendment, exactly, now proposed to 33?

MR. DODGE: That the first proposal on page 6 of the Reporter's suggestions be disapproved.

DEAN MORGAN: Be deleted.

MR. DODGE: That is the first two lines.

MR. LEMANN: How about the first paragraph of the suggestion on page 6 for Rule 33: "Substitute for the second

sentence the following"? What have we done about that?

JUDGE CLARK: I thought you disapproved it. If you haven't, I shall be glad to make another speech in favor of it, because I think it is a very good idea.

MR. LEMANN: I think the first suggestion was disapproved yesterday. That was my understanding. I didn't want to leave the Reporter under any possible misapprehension.

JUDGE CLARK: The Reporter asked the reporter here, and concluded that he couldn't be under misapprehension, although he would like to be.

MR. LEMANN: I concur in that. Then we come to the rest of the suggestion on Rule 33. You are deleting the first line and the first five or six words of the second line, as I understand.

MR. DODGE: That is right.

MR. LEMANN: You are going to leave in the rest. Where are you going to put in this copy business? How are you going to do that?

MR. DODGE: The substance of the middle part of that paragraph, as modified by the insertion of "copies" instead of "originals," and by the alternative right to give the interrogating party the right to examine the originals.

MR. LEMANN: Wouldn't he have that?

MR. DODGE: That is the practice in Massachusetts, and it has been very satisfactory.

JUDGE DOBIE: When he examines them, of course he can

make copies.

MR. LEMANN: Are you going to specify that you only need to furnish copies, or you must furnish the originals, under this Rule 33?

MR. DODGE: He must annex copies. I wouldn't tie up the originals by putting them in this rule.

MR. LEMANN: All right, if this rule only requires annexing copies at that point, then it could go on and put in something about inspecting the originals, and aren't you really meeting the point I think Judge Driver or someone asked, about the effect on Rule 34? You might as well consider that right now. If Rule 34 is amended to inspect original documents, are you going to change that if you make this change?

JUDGE DRIVER: It is an alternative method, I think.

MR. DODGE: It is an alternative method. It involves books of account and all kinds of things.

MR. LEMANN: There is an overlapping in the rule.

MR. DODGE: Two different methods.

CHAIRMAN MITCHELL: May I ask a question about this thing? It strikes me -- I may be wrong about it -- that Rule 34 is limited, or was intended to be limited, to cases where you want to get at the documents and you are not taking any deposition or submitting any interrogatories. It is an independent, separate way of forcing the other fellow to let you see some papers and to furnish copies of them. What we do in 33 is to prescribe the practice for producing documents where

you are submitting interrogatories.

JUDGE DRIVER: Am I right, Mr. Dodge, that your idea about Rule 33 is that if you annex a requirement that copies of documents be furnished in answer to interrogatories, then you have to make some provision for the thousand pages of fine print that the document might be, and you can't require a man to give a copy of that. In that case he can show you the original and give you an opportunity to examine it and make a copy yourself.

MR. DODGE: Yes.

JUDGE DRIVER: Isn't that your point here? If you are going to require copies, you have to make provision, where it would be too burdensome to make a copy, that the original be produced under Rule 33.

MR. DODGE: I think the alternative is universal. It isn't whether it is a short document or not, although of course it is particularly applicable to long ones. I think our courts have said you can't require the other side to make copies. He may if he elects furnish you with a copy, or he may give you an opportunity to examine it and make a copy for yourself.

CHAIRMAN MITCHELL: Before you vote on anything in connection with Rule 33, are there any additions or deletions or alterations? I think the Reporter ought to state exactly how the rule will read when it is corrected. There has been a great deal of confusion about various paragraphs, and I wouldn't know what is to be done.

MR. PRYOR: I think Judge Clark has it.

JUDGE CLARK: I have it, and I want to read it again, but before I do, I want to raise one question along the line of Dean Pirsig's inquiry.

I had put in "such of the documents specified in Rule 34 as are relevant to the answers required." By that circumlocution, if you want to call it that, I had hoped to make it broader than simply a document. I have tried to include substantially all things under 34. It is possible that that language --

CHAIRMAN MITCHELL: You wouldn't include in that, would you, tangible things?

JUDGE CLARK: It seems too bad that this should be restricted to only a matter in written or printed form. At any rate, let me read it, and you can have that in mind as I read it. This is the way it stands now: Add at the end of Rule 33 the following:

"A party may require that there be attached to the answers copies of such of the documents specified in Rule 34 as are relevant to the answers required, or that an opportunity be afforded counsel --" I put in "counsel." I wonder if it shouldn't be "the parties."

DEAN MORGAN: The interrogating party is what he suggested.

JUDGE CLARK: " -- or that an opportunity be afforded the interrogating party to examine and take copies of the

documents."

MR. DODGE: That is the idea.

MR. LEMANN: How can you do that? I answer by saying that "I hereby demand that you furnish me an opportunity," and you don't say when or where.

MR. DODGE: The interrogatory can be answered, "name the time and place." That is the way the interrogatory is answered, by naming the time and place where the interrogating party may examine and make copies.

MR. LEMANN: I think you would have to word your rule accordingly.

JUDGE CLARK: " * * * or that an opportunity be afforded the interrogating party to name the time and place"?

MR. LEMANN: Requiring the adverse party to name a time and place at which the originals might be examined.

MR. DODGE: That is, the specific form of the interrogatory is, "Annex a copy to your answers or name a time and place where the interrogating party may examine them."

DEAN PIRSIG: It seems to me we are going to get into trouble if we use the word "documents" in Rule 33 to mean something different than it does in 34. As now proposed, "documents" would exclude the other items indicated in 34. It occurs to me that what we are doing is really dealing with a question of discovery and production of documents separate from interrogatories, and that we might approach this from the standpoint of changing Rule 34, possibly with separate

divisions, one of which would provide for discovery without an order of the court, which would include documents, papers, books, and other items which we feel might be required without any showing of cause; and have other items, such as possibly in subdivision (2) of Rule 34, requiring an order based on a showing of cause. It seems to me we would have a clearer-cut rule on the discovery of documents, and not related to an interrogatory, which serves a somewhat related but different function.

MR. LEMANN: I agree with that suggestion. I think otherwise you are going to have an overlapping between 33 and 34, and possibly a contradiction and an attempt to reconcile it. It seems to me all this matter could be covered in 34, which could be recast so to provide, particularly if you are going to eliminate the requirement of a motion and order, and I think the Reporter has made a good case for doing that.

You can get a subpoena duces tecum, although I see you can't get one without an order, Mr. Reporter. So you do have to have an order for a subpoena duces tecum in connection with a deposition. Am I right?

DEAN MORGAN: No.

MR. LEMANN: Wrong.

DEAN MORGAN: Look at 45, and I think you will see you don't have to have an order.

MR. LEMANN: The last sentence of 45(d)(1), "A subpoena commanding the production of documentary evidence upon the taking of a deposition shall not be used without an order

of court." We struck that out?

DEAN MORGAN: That is right, without order.

MR. LEMANN: Then I think that supports the suggestion that the order should come out in 34.

I move, Mr. Chairman, that this matter be recommitted to the Reporter with the request that instead of amending Rule 33 as proposed, he recaxt Rule 34 to eliminate the requirement of a motion and order, and cover the thought that was intended to be covered by Rule 33 with proper provision for copies.

DEAN MORGAN: I think it will always have to be with reference to writings of some kind. You have other tangible objects here. You are not going to make them attach tangible objects.

MR. LEMANN: No. It would have to be documents as now in Rule 34: "documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged."

DEAN MORGAN: Tangible things not privileged. A locomotive would be a tangible thing not privileged.

MR. LEMANN: I was looking at our original language.

DEAN MORGAN: You can have 34 for inspection of a lot of things that aren't in this.

CHAIRMAN MITCHELL: Let me ask you something. I made the statement a minute ago that my conception of 33 and 34 was that 34 was intended as a method of getting at documents and tangible things, and what-not, independent of any deposition

or interrogatory, and you say you want to change 33. You have a deposition provision in 33 based upon written interrogatory with no provision at all for producing documents.

Would you accept the amendment we have made to 33 which allows you to require their production in connection with a deposition on written interrogatory, and then go over to 34 and make this just a simple alteration in that, independent of any deposition or interrogatory?

MR. LEMANN: First I would say if 34 is amended properly, it would cover all that you are now planning to do and in a more logical way than putting it in interrogatories.

CHAIRMAN MITCHELL: 34 hasn't anything to do with interrogatories.

MR. LEMANN: I know it hasn't, but it has to do with examining documents, which is what we are talking about. We are talking about examining documents.

CHAIRMAN MITCHELL: It has to do with interrogatories or depositions. You still have your provision for interrogatories, written and oral depositions, with no provision at all about producing papers in connection with those depositions. Why not leave it that way and just make it clear that Rule 34 is an independent proceeding and has no connection, necessarily, with any interrogatory or depositions, which is really what it was intended to cover.

MR. DODGE: That would be my idea entirely, because if a man wants to go beyond the scope of the interrogatories

and examine objects and things, and so forth, he should also in that proceeding be entitled to ask for the production of documents, too.

CHAIRMAN MITCHELL: Of course.

MR. DODGE: An alternative, more cumbersome method of getting at what he wants.

JUDGE CLARK: I think it is possible to follow Monte's idea. Let me see if I can visualize it. I don't know which is the better. I should say if you were going to put everything in 34, you would want to do this: First, there would want to be at least three parts to it. One would be a general provision for the production of documents, without court order, which are relevant, and so on.

A second and subsidiary provision to that would be that that request could be made in connection with other of the discovery proceedings, notably the interrogatories.

The third one would then be a provision for a court order to cover entry on land and possibly your locomotive case.

I should suppose, as I look at it now, that you probably need the court order, don't you, for the entry on land? That is subdivision (2) of 34. I should think possibly you don't need it, but it would be a little better to go on with a court order.

If, therefore, you may need the court order in that sort of extreme case, you would have to make provision for it. Then it might be used in other cases where that would facilitate

the getting of the particular thing.

So I should think that would be the way you would work it out if you were going to, the three parts, as I said: (1) The general broad production with no court order. (2) A specification that you can use it in connection with interrogatories, and so on. That might be understood, but it would be much clearer if it were specified that you could. Then (3) This now rather limited court order, but necessary in a particular case.

MR. DODGE: That is a complicated way of handling the matter. The motion relates only to Rule 33, and if it is carried I don't see why you have to amend Rule 34 at all.

MR. LEMANN: What are you going to do about documents, as Dean Pirsig asked?

MR. DODGE: If a man prefers to go through the cumbersome proceeding of a motion in court, he may apply Rule 34.

MR. LEMANN: You can take "motion" out and "order" out in 34 as an independent suggestion.

MR. DODGE: I suggest that you do not take it out as to tangible things, real estate, and so forth.

MR. LEMANN: What are you going to do, then?

MR. DODGE: Leave it the way it is. It won't make any trouble.

CHAIRMAN MITCHELL: I think the simplest way is to add to Rule 33 the provision that you can require the production of documents, as the Reporter suggested, in connection with

interrogatories. You don't get locomotives and tangible things, but you get documents. The other thing would be to put a clause in 34, not changing anything in it except to say somehow that independent of the interrogatories or depositions, you resort to this court proceeding to get hold of the tangible documents and other things without taking deposition.

MR. PRYOR: I suggest we vote on the motion on Rule 33 that Judge Clark has read.

CHAIRMAN MITCHELL: This is all hooked up together. Of course, if we make the amendment to 33 as proposed, then we are through with the idea of recasting 34 entirely.

DEAN PIRSIG: Am I clear, then, that as to any item that falls within the category of papers, books, accounts, letters, and photographs, you could not raise any question with respect to those in connection with interrogatories? It would only be with respect to "documents," whatever that means.

CHAIRMAN MITCHELL: I see your point. It is not clear to me that there should be any limitation in 33 as to anything except tangible things.

MR. PRYOR: I would have no objection to including, in addition to documents, papers, books, and those things, as far as that is concerned.

DEAN MORGAN: All the documents mentioned in 34. It refers to 34.

DEAN PIRSIG: But the word "documents" is used in Rule 34 as distinguished from that.

DEAN MORGAN: Do you want to say "all the documents and papers mentioned in Rule 34," or "documents, books, and papers"?

PROFESSOR MOORE: What about photographs? Unless the language parallels 34, you are going to run into trouble as a matter of construction, I think.

MR. PRYOR: It can't parallel it, because 34 goes into a lot of things that 33 can't deal with.

PROFESSOR MOORE: I mean parallel it as to documents, books, papers, accounts, photographs.

CHAIRMAN MITCHELL: It doesn't do any harm to meet the thing by repeating that sentence in 33.

MR. PRYOR: Surely.

CHAIRMAN MITCHELL: That would be the solution to that. His point is a good one. If you just said "documents," then the question would be raised, by comparison with 34, whether that includes books, accounts, letters, photographs, papers.

JUDGE DOBIE: In other words, you want to use the same language in both rules.

CHAIRMAN MITCHELL: With the exception of excluding such things as objects and tangible things.

JUDGE CLARK: There would have to be some slight change. You don't want to use the word "designated" here, because you don't know what it is going to be yet. The provision here is, "that there be attached to the answers copies * * * as are relevant to the answers required" to the

interrogatories. As yet you can't be expected to designate, because you are trying to find out what they are.

CHAIRMAN MITCHELL: Why not take one thing at a time here, now. I was called on for a motion to amend 33 by adding that clause at the end of it to call for documents in connection with interrogatories. That is to be made broad enough to cover all the documentary matters referred to in 34. All in favor of that say "aye." That is agreed to.

Now, the next proposal, mine would be in the case of 34 to make it clear that you can say, independent of depositions or interrogatories, you may move the court for an order and all that sort of thing. That is my conception of what 34 was intended to do. It has no relation, necessarily, to any kind of deposition or interrogatory. It is an independent proceeding to get at something. You would make it clear and segregate it from deposition and interrogatory by saying so in the rule itself. Why not leave it for a court order? What is the harm?

DEAN PIRSIG: It would be only the case where he decides that there is no other reason for an interrogatory except discovery. In that event I would assume the same reason for eliminating a showing of cause exists as there is for the interrogatory accompanying it.

CHAIRMAN MITCHELL: If you are going to strike out the motion, you would have to say you would have to serve notice.

DEAN PIRSIG: You would still have the job I suggested,

of separating those items which require good cause from those which would be required merely on notice.

CHAIRMAN MITCHELL: You have amended 33. What do you want to do with 34?

DEAN PIRSIG: I would like to see Mr. Lemann's motion renewed at this time, if it is still in order.

MR. LEMANN: These are stylistic matters, and I suppose each man has the way he would do it.

DEAN PIRSIG: I think this is something more than stylistic at this stage, even in the light of what we have done. Now, if our action which has just been taken is adopted, you can obtain a discovery of these documents, papers, and so on, without a showing of cause, if it is part of an interrogatory. You can not do that, as the rule now stands, without an interrogatory.

MR. LEMANN: I think it is foolish, myself, but eminent members think that we should leave 34 as it stands and say, "If you are foolish enough to try it under 34, you deserve to have to get a motion and order. If the rules don't read together very well, why are we going to bother about it?"

I see that is a plausible point of view. It wouldn't appeal to me.

JUDGE CLARK: I should like to suggest that I, myself, really would like to see at least the words "for good cause" go out, because it seems to me that the courts just don't know what they mean. It is very difficult to know what is good

cause here. You will notice that later on in the body it says any "which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control".

What is good cause beyond that? If he is a bad actor and yet it is relevant evidence, ought he not to get it?

MR. PRYOR: Don't you take care of that question of what is good cause by your proposed addition at the end of 34 at the bottom of page 6?

JUDGE CLARK: I had supposed that that was going to fail, because, you know, Mr. Dodge raised objection to the certificate on Rule 33, and I should suppose the same objection would be raised here.

Mr. Pryor's point is that I have covered the matter of good cause by my suggested addition to Rule 34 at the bottom of page 6. I have.

CHAIRMAN MITCHELL: Rule 34?

JUDGE CLARK: I would suggest that something be done as to good cause. Another way to do it would be to strike the damned thing out. You can still require a court order, but the court order is for the production of relevant evidence, without this requirement of good cause.

CHAIRMAN MITCHELL: Of course, in 34 you have something about getting a license to go on a man's property, his land, and to inspect and measure and survey and photograph.

I think you ought to have a court order in a situation

like that.

JUDGE DRIVER: You would have to have notice to the other party. Somebody would have to settle the time and place and where it could be done, and so on. I should think an order would be a logical method.

JUDGE CLARK: How would it do to do something like this at the beginning sentence in Rule 34? Say:

"In addition to the right to obtain the production of any document or thing for inspection in connection with an examination under Rule 26 or interrogatories under Rule 33, any party may move the court for an order upon another party" or "adverse party," and then go ahead, "to produce and permit the inspection," and so forth.

CHAIRMAN MITCHELL: I think that is fine.

MR. PRYOR: That is all right.

JUDGE DOBIE: Strike out "for good cause."

JUDGE CLARK: That leaves out the "good cause." It does two things. That provides that this is in addition to other rights. It leaves out a separate indefinite requirement of good cause. The body of the rule requires that it must be relevant under 26(b), and I should think that was all that was needed.

CHAIRMAN MITCHELL: Is there any motion on that proposal?

MR. PRYOR: So moved.

CHAIRMAN MITCHELL: All in favor of this last proposal

of the Reporter for an alteration in Rule 34 say "aye"; contrary. That seems to be agreed to.

JUDGE CLARK: This would cover both 33 and 34. I have certain details that I want to bring up.

Is there any suggestion we ought to make as to whether a party should get his own statement or not? That happens to be the kind of question that has produced some trouble in the district courts, too. The natural case is that a claim agent visits a party and takes a statement at an early date. Thereafter, when he employs a lawyer, the lawyer knows he has given a statement to the claim agent but doesn't know what it is. Is that a part of the lawyer's work product or preparation for trial, and it can't be obtained?

Specifically, would the provision that we now directed be added to Rule 30(b), the Hickman provision, we might call it, make it less clear that you could get the statement?

My final suggestion is, ought you not to be able to get the statement? Why shouldn't you? Why isn't that one of the most desirable things that you ought to get? How can counsel prepare a case in the dark if he knows that some statement is outstanding against his client but doesn't know what it is?

So, query: If we should not provide, perhaps in Rule 33 or possibly in 30(b), somewhere, to make it clear that the things you can obtain would include the written statement.

MR. LEMANN: I was going to ask whether the limitations embodied in the Hickman rule in 30(b) should not appear

somewhere in 33, because you have written in the Hickman rule under 30(b), but that relates only to oral depositions. Are you going to be required to disclose under 33 the things that you couldn't be required to do under 30(b)?

PROFESSOR MOORE: 30(b) is applicable to Rule 33, Mr. Lemann; the last sentence of 33.

MR. LEMANN: Yes, I see. That answers that.

JUDGE CLARK: I am sorry I was tied up for a moment. Was that all settled?

CHAIRMAN MITCHELL: It was not settled. I was trying to figure out where that kind of language should appear, whether in 30(b), that is, depositions upon oral examination. It probably would be appropriate in 34, but that is not in connection with any deposition or interrogatory. That is an independent proceeding.

Would you not have to resort to that to get a copy of a statement made by the plaintiff to a claim agent?

JUDGE CLARK: I would like to bring up two other things, too.

CHAIRMAN MITCHELL: Let's settle this one thing. A prospective plaintiff or an actual plaintiff has given a statement to a claim agent without his lawyer seeing what it is, and he wants to get it and look at it. You say there is some difference among the judges as to whether he can have it or not. You want it settled, don't you, as to whether he shall have that, and what rule that ought to be put in.

MR. PRYOR: Does that belong in pre-trial?

CHAIRMAN MITCHELL: You might not have it at pre-trial.

JUDGE CLARK: I was going to say, I wondered if it didn't really come properly in 30(b), because 30(b) is the protective order provision, and that is where we are about to make the provision that you shall not get certain things. That is the Hickman provision. I should think it would be therefore reasonable and logical to say that where you are saying you shall not get work products, and so on, this does not extend to statements of the parties.

CHAIRMAN MITCHELL: Before we get to that, let's decide what the answer is going to be to the question of whether you are going to get it or not. All those in favor of fixing up the rules so that if the plaintiff has given a statement to his adversary, he can get a copy of it or have the original to examine so his lawyer can find out whether he gave the case away or not -- all in favor of having him have the privilege of getting that document or copy of it, say "aye"; opposed, "no."

... There was a division ...

JUDGE CLARK: Do you want to ask for a show of hands?

CHAIRMAN MITCHELL: Yes. All in favor of letting the plaintiff see his statement or get a copy of it, raise their right hand, please. Those opposed. The "ayes" have it.

MR. DODGE: Isn't that document covered by Rules 33 and 34 now, anyway?

DEAN MORGAN: Yes.

CHAIRMAN MITCHELL: The courts disagree about that.

JUDGE CLARK: That is right. Mr. Wright tells me that in seven cases they allowed it, and in six they didn't.

Where does that appear in our summary?

PROFESSOR WRIGHT: Page 67.

JUDGE CLARK: Page 67 of our summary. It is in the middle of that page 67, with a citation of the cases. Some recent cases have refused to allow a party to get his own statement. In other cases they have allowed plaintiff to get his own statement, although in some of them the circumstances were such as to meet the most rigid requirement of good cause.

Moore argues very forcefully that no showing of good cause at all should be required.

MR. PRYOR: If you are going to have such a provision, could it not be inserted in Rule 33 in connection with the list of things there, papers and so forth, including a statement of the party previously given as to the facts in the case?

JUDGE CLARK: I think it could go there, and it might be complete. This is, of course, now a question of style. Think back a moment. At the top of my page 6, the Hickman requirement:

"The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney * * * in anticipation of litigation * * *."

You can see how this statement pretty thoroughly falls in line with that language. Hence, it would seem to me rather logical, if you don't want it included, to take it out right here, because that language, as you see, is pretty inclusive.

CHAIRMAN MITCHELL: Why make a man resort to a written interrogatory in order to get a copy of his statement?

All those in favor of putting it in Rule 30(b) as the Reporter suggests, say "aye"; opposed. That seems to be carried.

JUDGE CLARK: Now I want to bring up two or three things, and I think they are best to be considered in 30(b).

May I, without perhaps retracing steps too much, bring up again the question of expense or undue expense. We did decide not to make any addition of that kind, but that was before we had voted in the Hickman provision. If we are going to make a change in this rule--I think there was perhaps an argument that if we weren't going to touch it at all, we didn't need to insert this, but if we are going to make a change in it anyhow, as we have now voted, don't you think perhaps it would be a good idea to relieve people's minds somewhat by putting that in?

MR. DODGE: In what rule?

JUDGE CLARK: 30(b).

DEAN MORGAN: The first part of 30(b).

PROFESSOR SUNDERLAND: Just add "expense."

JUDGE CLARK: Or, if you like the Louisiana provision,

"undue expense." I have no particular choice on that at all.

CHAIRMAN MITCHELL: Didn't it come in the last line of 30(b), "to protect the party or witness from annoyance, embarrassment, or oppression"? Where we have tried to get the expense item in before, that is where we tried to put it.

MR. PRYOR: I move the words "undue expense" be included there.

DEAN MORGAN: Second the motion.

CHAIRMAN MITCHELL: All in favor say "aye." That is agreed to.

JUDGE CLARK: There is another provision in this connection that isn't in, and there has been a good deal of discussion about it. I am not so sure that it is necessary, because it seems to me implied. On the other hand, if we are giving suggestions to the district attorneys, it may be worth considering. That is the question that the court has the right to order priority of taking depositions. There seems to be a good deal of discussion and possibly a little tumult in what is called the race for the taking of depositions. Parties apparently are striving for that a great deal.

Some courts appear to have ruled that it is just a question of who gets there first. It ought not to be that, I think. I think the court has clear power otherwise.

Do you have the cases on that?

PROFESSOR WRIGHT: Page 56, and 57 at the top.

JUDGE CLARK: Pages 56 and 57. Query: Whether it

might not be worth while to specify here -- I think the judges have the power now, but they don't seem to be using it -- that they may order the priority in the taking of depositions.

JUDGE DOBIE: Do you remember what the Stover case was, just briefly, "a horrible example of the race of diligence." It may not be important.

JUDGE CLARK: We will get it right here. It may not be a sufficient answer to this criticism to point out that nothing in the rules requires this rule of priority. Some judges have been flexible in their rulings, but others have adhered strictly to the rule of priority in the face of circumstances which made a different course seem more just.

Out in Minnesota they say that is the most easily discernible abuse.

MR. DODGE: What page of our document is this on?

JUDGE CLARK: This is on pages 56 and 57. It starts at the middle of page 56, with a reference to the cases.

CHAIRMAN MITCHELL: It seems to be well recognized that there is a jockeying for position going on to see which one is the first to examine the witnesses. I don't know why they should be in a hurry, but they are. Do you think it ought to be regulated; that the court ought to have power to regulate it?

JUDGE CLARK: I think the court probably now has the power, but some of these judges apparently don't realize it.

JUDGE DOBIE: That is what Kirkpatrick held in the Stover case. "The order in which parties shall take depositions

is largely in the discretion of the court, though the party having power to demand will ordinarily be permitted to proceed first."

JUDGE CLARK: Here is a concrete suggestion, and it might well come in Rule 30(a) instead of (b), although either one of these is a natural place for it.

Rule 30(a) Notice of Examination: Time and Place. This could be added to (a):

"The court may regulate, at its discretion, the time and order of taking depositions * * *."

CHAIRMAN MITCHELL: Rule 30(a)?

JUDGE CLARK: Subdivision (a) of Rule 30:

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

CHAIRMAN MITCHELL: You say "shall" or "may"?

JUDGE CLARK: "The court may regulate, at its discretion." Perhaps the language might be changed around a little.

CHAIRMAN MITCHELL: What is it now?

JUDGE CLARK: "The court may regulate, at its discretion, the time and order of taking depositions as shall best serve the convenience of the parties and witnesses, in the interest of justice."

CHAIRMAN MITCHELL: What is your pleasure with that?

MR. PRYOR: You would add that to 30(a)?

JUDGE CLARK: That is it.

MR. PRYOR: I move it be added.

MR. DODGE: That is on motion, is it?

DEAN MORGAN: It would have to be on motion.

JUDGE CLARK: Yes, they would practically have to do it by a protective order.

MR. DODGE: That would be added to the last sentence, as part of that sentence?

JUDGE CLARK: It could be done, yes. The last sentence is:

"On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time", and you could add this provision.

DEAN MORGAN: " * * * and may order * * *."

CHAIRMAN MITCHELL: You wouldn't want to limit the right to appeal to the court merely to the party on whom the notice was served. Suppose he served one of his own. I think your original statement, "The court may regulate," is as much as you have to say.

All those in favor of adding that provision to Rule 30(a), say "aye"; opposed.

... The motion was carried ...

MR. PRYOR: Was anything done with the suggestion that the words "time or" be inserted in lines 6 and 7?

JUDGE CLARK: I think it would be a good thing to put it back. It may not be absolutely necessary, in the light of

what we have just voted, but certainly it makes it clear.

MR. PRYOR: You might just have one deposition. There wouldn't be any regulation there.

JUDGE CLARK: Don't you think that is a good idea, Mr. Chairman? Mr. Pryor moves to put in the other provision of Rule 30(b) that we considered before, that is, to add in the sixth and seventh lines the words "time or" to make it read:

" * * * or that it may be taken only at some designated time or place other than that stated in the notice, * * *."

CHAIRMAN MITCHELL: All in favor of that insertion, say "aye." That is agreed to.

MR. LEMANN: While you are changing all these things, don't you want to bring up page 62 of your notes about the guy who didn't want to pay for writing up the deposition? It is a very sad case, I thought.

JUDGE CLARK: Yes. You are quite right. I wanted to bring that out.

I don't know whether we can do anything about it or not. You are certainly quite right. It should be brought out.

MR. LEMANN: Professor Moore, an eminent authority, suggests that we amend the rule. Do you see that in the middle of the page? And somebody else has suggested we amend the rule.

JUDGE CLARK: My assistant was prodding me, and the next prod was going to be this. Yes, it ought to be considered.

MR. LEMANN: I wanted to be sure you didn't overlook that.

JUDGE CLARK: This is on page 62 of the summary, and the question has come up as to the cost of transcriptions. In this case, from the Delaware District, the cost of transcription of the depositions was estimated at $1200 to $1400, and the plaintiff decided not to have them transcribed. The cost of an extra copy, if the depositions were transcribed, was $250. Held that defendant had a right to be given a copy of the deposition on payment of $250, and that plaintiff must bear the cost of a transcription which he does not wish. Contra: Odum case from the District of Columbia. Professor Moore agrees that the first case is a sound construction of F.R. 30(c) as written, but doubts the desirability of the result, and suggests amendment to the rule so that it would require the deposition to be transcribed unless the parties agree otherwise "or unless the court for good cause shown, either before or after the taking of the deposition, orders that the deposition need not be transcribed."

CHAIRMAN MITCHELL: What is your pleasure with that? We are talking about Rule 30(c), as I understand it.

JUDGE CLARK: Yes.

DEAN PIRSIG: Under that provision, if the court does order the deposition to be transcribed, would the plaintiff who does not want it still bear the cost?

JUDGE CLARK: He would have to pay the cost of the original, and the other fellow would have to pay the lesser cost of the copy.

Of course, this might be very, very harsh occasionally, but I guess to make the deposition practice run, the court must have power to order such costs.

MR. LEMANN: Under 30(c) as it now stands, I gather Professor Moore agrees that you have to transcribe, no matter what; is that right, Mr. Moore? The second sentence of 30(c):

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

That is what made you conclude that the first decision was correct?

PROFESSOR MOORE: Yes, sir.

MR. LEMANN: So this would be ameliorating the present situation.

CHAIRMAN MITCHELL: Under (c) as it stands today, if it has to be transcribed there is no special provision for the costs.

PROFESSOR MOORE: The person taking the deposition has to put up the costs. I guess there isn't anything expressly in the rule so stating, but that has been the construction.

CHAIRMAN MITCHELL: As it stands, the other party hasn't any right to a copy, has he?

PROFESSOR MOORE: If it is transcribed, then he can get a copy on paying the cost of the second copy.

CHAIRMAN MITCHELL: What is the proposal for change in (c)? Has there been a proposal to change 30(c)? If so, what is it?

PROFESSOR MOORE: You see, General Mitchell, 30(f)(2) provides:

"Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent."

So if the rule is construed as the court did in that case, the party taking the deposition has got to see that it is transcribed, and then the other party can get, in that case, the copy for about $200, about one-fifth of what the original copy cost.

CHAIRMAN MITCHELL: What do you propose to do to the rule now?

JUDGE CLARK: This would be in the second sentence.

CHAIRMAN MITCHELL: Of what?

JUDGE CLARK: Rule 30(c). The second sentence now reads:

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

This would simply add after the word "otherwise,"

"or unless the court for good cause shown, either before or after the taking of the deposition, orders that the deposition need not be transcribed."

MR. DODGE: How about paragraph (f) of that rule, which requires the filing of the deposition in court?

CHAIRMAN MITCHELL: You would have to amend that, too, to state an exception, "unless the court orders that it not be

transcribed."

JUDGE CLARK: Where does that come in in (f)?

CHAIRMAN MITCHELL: That requires certification and filing by the officer taking it.

JUDGE DOBIE: That is the officer. It requires the officer to seal the deposition in an envelope and file it with the court.

CHAIRMAN MITCHELL: If you made that change in 30(c), then you would have to provide that in the next one, too.

MR. PRYOR: I wonder how badly this proposed addition is needed. It seems to me that it worked all right in the case cited.

PROFESSOR MOORE: I don't think it comes up too often.

CHAIRMAN MITCHELL: This order saying it shall not be transcribed even though the parties want it transcribed would be an awkward sort of thing. It is assumed if a fellow takes a deposition and then does not want it transcribed, he had no business taking it, that it was useless.

DEAN MORGAN: Suppose the plaintiff takes a deposition and it turns out to be favorable to the defendant. The defendant wants his copy. When the plaintiff makes his determination to take the deposition, shouldn't he be prepared to pay the expense?

PROFESSOR MOORE: I think in that case, yes.

DEAN MORGAN: If the parties agree that it needn't be transcribed, that the deposition isn't worth anything, then

neither side would want it.

CHAIRMAN MITCHELL: The judge should not be put to the job of reading the deposition to see whether it is material or whether it would be worth while to have it produced.

DEAN MORGAN: Suppose I don't show up for the deposition.

CHAIRMAN MITCHELL: A witness, you mean?

DEAN MORGAN: No. I am the opposing counsel. I say, "Let him take it." Do I get nothing out of it at all? Don't I get to know what happened at the deposition?

CHAIRMAN MITCHELL: As the rule stands today, it would have to be transcribed.

DEAN MORGAN: Yes. I want a copy of it. I want to know what that fellow said.

CHAIRMAN MITCHELL: That is the way the rule reads today. There has to be an agreement.

DEAN MORGAN: I am asking, why should we change it?

CHAIRMAN MITCHELL: My point is that we ought not to bother the court to have to decide whether a deposition is going to be worth while or not. The parties ought to settle that by agreement.

DEAN MORGAN: Surely. That is the idea. I am not too shocked by the result here. If that deposition was helpful to the man who wanted a copy of it, it doesn't shock me by saying the fellow who took it has to pay for it.

PROFESSOR MOORE: You can get it working harshly,

though, where the deposition is essentially worthless to both sides if the party who took the deposition can be forced by a recalcitrant attorney on the other side to go to the expense of transcribing and filing.

DEAN MORGAN: When you take $1250 worth, you must have had a long deposition.

MR. PRYOR: The party that took the deposition ought to have had some idea whether it was going to be any good or not. If he took it, he ought to be willing to pay for it.

PROFESSOR MOORE: It isn't always the theory of the rules that you know what the person is going to testify to when you start out taking a deposition.

MR. LEMANN: Your argument, Mr. Moore, I suppose is that if the deposition is taken and the other guy likes it better than the fellow who took it, why shouldn't he pay for it as if he had taken it himself? He can always pay for it. It costs $2,000. The question is whether he thinks it is worth it. If there were certain passages he thinks are good, he could then proceed to take testimony himself on those points. I would imagine that is your argument. If a fellow wants the benefit of it, why should he not pay for it?

The amendment would give the judge the right to regulate the matter. I personally would not think it of sufficient importance, but I think it is as important as some of the other things we are doing. For that reason I would leave it to the judge specifically. I think the language as it now stands

doesn't give the judge any discretion. I think that decision, as you say, was correct. It had to be transcribed.

JUDGE DRIVER: I think we should take into consideration, too, that the party other than the one taking the deposition can greatly extend it if he goes on an exploratory expedition of his own by extended cross-examination. If he greatly increases the size of the deposition, the rule should not be so inflexible as to require the other party to pay for it. That is what you can get now under the present rule.

DEAN MORGAN: I think that is true.

JUDGE CLARK: I should think there might be many cases where everybody would be satisfied with having taken the deposition and didn't need the transcription, especially if it was costly. If in a case it is just a matter of securing the names of the witnesses, you can have a law clerk there and take them down. You don't need a transcription. It would seem to me that it is a good element of power that the court ought to have.

DEAN MORGAN: I move the adoption of the amendment.

CHAIRMAN MITCHELL: If there is no specific proposal, why not say in Rule 30(c):

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

Is that all right?

JUDGE CLARK: That was Mr. Moore's suggestion.

CHAIRMAN MITCHELL: I didn't mean to substitute this

for anything he proposed, but I don't remember what his proposal was.

JUDGE CLARK: I want to ask further, is it better to do it that way, or to provide further that the court may regulate who shall pay for the transcript.

CHAIRMAN MITCHELL: This is something quite different.

MR. LEMANN: Mr. Moore's language is on page 62 of the notes, Mr. Mitchell.

CHAIRMAN MITCHELL: " * * * or unless the court for good cause shown, either before or after the taking of the deposition, orders that the deposition need not be transcribed."

Is that it?

JUDGE DOBIE: It has to be transcribed unless the parties agree or unless the court orders otherwise.

CHAIRMAN MITCHELL: What is your pleasure with respect to this?

PROFESSOR MOORE: May I suggest that perhaps that could be improved on, to the extent he orders the deposition or only certain parts of it to be transcribed. It may be that you have a long-winded deposition.

MR. LEMANN: You could add, "in whole or in part" at the end of your suggestion.

PROFESSOR MOORE: Yes.

MR. LEMANN: Can't you take out "for good cause shown"? You don't think a judge would do anything except for good cause?

DEAN MORGAN: You could say "or otherwise." I don't

see why that doesn't fix the whole business. "Otherwise" would include a part, or anything else.

JUDGE DRIVER: May I make this suggestion. I think the parties should be given an opportunity to agree if they can, and provision be made to appeal to the judge only in cases where it is necessary when the parties can't agree. As a practical matter, it has been my experience that the judge is very seldom called upon in depositions. As a general rule, they are taken and the judge hasn't heard anything about them until they come in and they are used in the trial.

I think the judge should not be burdened any more than necessary in the deposition practice. Usually lawyers do get along, and I think they will.

JUDGE CLARK: What is the suggestion now? As I understand it, it is "unless the parti agree otherwise or the court otherwise orders"?

DEAN MORGAN: That is what I should say. I don't think you need all that language.

CHAIRMAN MITCHELL: Professor Moore suggested that that would require the court to order the whole or nothing, and he wants to split it up and give the court a chance to say part of it should be typed and part of it should not be.

MR. PRYOR: If you put it "unless the court otherwise orders," doesn't that leave it up to the court to order a part of it transcribed?

CHAIRMAN MITCHELL: Do you want to state what the

proposal is now? How would you like to have it, Mr. Moore?

PROFESSOR MOORE: I am agreeable to the suggestion of these gentlemen to add to the general statement we now have in:

"unless the parties agree or the court otherwise orders."

CHAIRMAN MITCHELL: All in favor of that, say "aye." That is agreed to.

JUDGE CLARK: What did you say?

CHAIRMAN MITCHELL: " * * * unless the parties agree or the court orders otherwise."

DEAN MORGAN: Charles, you are going to have to change (f), too.

JUDGE CLARK: I should think it would probably be a good idea to change (f). I am not absolutely sure that we need to.

CHAIRMAN MITCHELL: Doesn't it appear obvious that if you haven't got a transcript and the court says there shall not be one, you don't have to file it?

DEAN MORGAN: I think that carries itself.

JUDGE CLARK: You could say, "The officer shall certify on the deposition, if transcribed * * *."

CHAIRMAN MITCHELL: I don't think we want to tamper with that, because it is an obvious thing and it just means the printing of another rule.

What is the next section you want to take up?

JUDGE CLARK: I think we are down to 35. I have some

suggestions on 35. I am not sure whether we have covered everything about these protective orders now. I really think that this is important. It may seem like small stuff, in a way, and yet on the other hand the discovery matters are the things which have interested lawyers and judges, and I think it is a good idea to show that we have considered them carefully and are trying to make the thing more workable.

I think these suggestions that we have adopted will do that. So I am not sure that everything that has been suggested to date has been covered, but I think we have covered all that seemed important, isn't that right, Mr. Moore?

PROFESSOR MOORE: I believe so, Judge.

JUDGE DOBIE: Rule 35, the Physical Examination rule.

JUDGE CLARK: Coming to 35, covered by pages 63 to 64 of the summary, the first suggestion slightly expands the taking of the physical examination in two ways in that provision. One is that it extends the kinds of actions in which the matter is important, and extends it not only to the case where the mental or physical condition of the party is involved, but also where his blood relationship is involved.

The other extension is to extend it somewhat beyond parties, as we have put it here, to a person under the control of a party.

In the particular case that brought it up directly -- there may have been others -- I had a letter from a lawyer in Colorado who was quite disturbed. The case is stated on page 64,

toward the end. That was under the state Colorado rule, which is the federal rule. That was the case of Kell v. Denver Tramway Corporation. Plaintiff claimed that he was injured because the driver of defendant's bus was color blind, and sought an order requiring the driver to submit to an eye examination. But the court, reading the rule literally, held that the driver was not a party and could not be examined.

CHAIRMAN MITCHELL: I remember four or five years ago a lawyer wrote me and wanted to know whether, under our rule for physical examination, it was permissible to require a party to submit to a blood test to determine parentage. Our rule reads:

"In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician."

I stretched the rule a little bit and advised him that his physical condition was in controversy if the state of his blood would or would not show whether he was the parent of the child. At that time there were only some very few cases in the courts which adopted the medical view that the parentage is shown by the type of blood. Since then I believe the courts have pretty generally come around, since the Chaplin case, to the proposition that it is almost practically conclusive.

MR. PRYOR: It is conclusive to show that he is not the parent, but not the other way around.

CHAIRMAN MITCHELL: That is right. They give to medical evidence the full weight that doctors give to it.

JUDGE DOBIE: Doesn't the Kell case deal with the question whether it extends to a witness? Do you think that extension is proper?

JUDGE CLARK: I guess so, because you look at the rule and it says, "in which the mental or physical condition of a party is involved," and so forth. The witness is not a party.

What the Chairman is talking about is the other angle. That is the Beach case in the District of Columbia that extended to the question of the relationship of the parties.

JUDGE DOBIE: The courts interpreted "parties" to mean parties to the suit?

JUDGE CLARK: In the Colorado case they interpreted it to mean parties to the suit.

JUDGE DOBIE: Don't you think it desirable to extend it to a witness? It might be very important sometime.

MR. PRYOR: I think in that Colorado case it would have been very desirable and important to have had such a modification or change in the rule, but what disturbs me is the use of the words "under control of a party." That would need definition. I think that is pretty vague.

JUDGE DOBIE: If you have to get a court order and it is in the discretion of the court, shouldn't you extend it to all persons?

JUDGE CLARK: The reason I picked this here is because

I have a precedent, which is what lawyers always want. That is what they did in Minnesota. That is the Minnesota rule. Whether it is desirable or not, I am not so sure.

CHAIRMAN MITCHELL: What did they do there?

JUDGE CLARK: The language is at the top of page 64. "In an action in which the mental or physical condition or the blood relationship of a party, or of a person under control of a party, is in controversy * * *."

CHAIRMAN MITCHELL: That means a minor child whose parentage is in question. Why shouldn't they take a sample of the blood?

MR. PRYOR: In this Colorado case it was an employee. Are you going to say the employee is under the control of his employer, or not?

JUDGE DOBIE: I don't see why you should have any of those limitations, myself. I would make the rule very broad and leave it to the court.

MR. PRYOR: I think that would be better.

JUDGE DRIVER: This matter is involved in citizenship declaratory judgment cases. There are several thousand of them pending on the Pacific Coast. A lot of refugees from Hong Kong, Chinese people, claim that they are the sons and daughters of American citizens. Chinamen go back and forth to China. In a number of instances in these cases they claim to be citizens by virtue of being the offspring of an American citizen.

It is impossible to get evidence in many cases because

they were born in Communist China. You can't go there and take depositions and get evidence. Blood tests are useful in many instances. If the child doesn't have the blood type of the mother and of the father, then you can prove negatively he couldn't have been the child of a citizen.

That is involved in those cases, and there are several hundred if not thousands of them pending on the Pacific Coast.

JUDGE DOBIE: I would cut out the "control of a party." I don't see very much sense in that. I would make the rule very broad and leave it in the discretion of the court.

I remember reading an article the other day about a criminal case in which the thing turned very largely on the testimony of one witness. This man was a psychiatrist, and he said the only sensible thing to have done in that case was to have had an examination of that witness.

PROFESSOR MOORE: Judge, how are you going to enforce it in the face of the refusal of a witness to submit to a physical or mental examination? At the present time, under our rules, if a party is ordered to submit, certain sanctions can be imposed on the party, like striking the pleadings or taking certain allegations to be true. You don't have an express provision to hold him in contempt.

JUDGE DOBIE: I think there is some constitutional provision against it.

PROFESSOR MOORE: I don't know about that.

JUDGE DOBIE: Wasn't it Frankfurter who voted against

this rule when this thing came up?

JUDGE CLARK: That is right.

JUDGE DOBIE: He said it wasn't in our power, didn't he?

JUDGE CLARK: That was the Siback v. Wilson case. There was quite a dissent there. Frankfurter wrote it, but I think it was five to four.

JUDGE DOBIE: Of course, I don't want to go beyond constitutional limits, but I think it is a magnificent rule. I can see, as Moore says, it is a little tough on a man who is subpoenaed who has really no interest in the case, or something like that, to compel him to submit to examination, but it certainly would be very helpful. Is this man color blind or not?

PROFESSOR MOORE: I don't think you can justify holding a witness in contempt, though, when there is no provision in the rules that you can hold a party in contempt.

DEAN PIRSIG: Can a witness be compelled to give his fingerprints? I am not sure.

PROFESSOR MOORE: I don't know, sir.

JUDGE DOBIE: I think you can. I know Wigmore holds that you can. Eddie Morgan would know about that. He is the great authority on evidence. I know in one case they compelled a man to put on a coat and a hat to see how he would look in it. They said there wasn't any self-incrimination in that. It was a question of identification, you understand. One of the

witnesses said, "If that man would put on that coat and hat, I can tell you whether he is the man." The fellow put on the coat and hat and the witness said, "That is the man."

Wigmore said that was all right. Do you think, Moore, there would be constitutional objection or practical objection to making a witness submit? It is a little tough.

PROFESSOR MOORE: I wouldn't think there would be any valid constitutional objection.

JUDGE DOBIE: I don't think the cases are treating it right, but I think that Kell case is one of them. I think the only sensible thing to do there was to have that driver examined and see whether he was color blind.

JUDGE CLARK: Of course, this is specifically covered now in the section on the refusal to make discovery. Rule 37(b), Failure to Comply With Order, (2) Other Consequences.

(1) is that if he refuses to be sworn or refuses to answer, he may be held in contempt. I suppose that might not cover this directly.

"(2) Other Consequences. If a party * * * refuses to obey * * * an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:"

There are four different provisions. One of them is that the fact be taken as established which you wanted supported by the testimony. Another is to prohibit the disobedient party

from introducing evidence to support the opposite. He can't introduce evidence opposing it. (iii) is an order striking out pleadings or staying further proceedings or dismissing the action or rendering a judgment by default. And (iv):

"In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party * * * for disobeying" -- Wait. This is excluded here -- "for disobeying any of such orders except an order to submit to a physical or mental examination."

So only the first three apply here.

PROFESSOR MOORE: It wouldn't be quite fair to impose the first three sanctions upon the corporate employer if the employee was unwilling to submit to a physical or mental examination. I don't believe a corporate employer has the right to order an employee to do that, do you?

JUDGE DOBIE: I don't think so, no.

PROFESSOR MOORE: What sanction do you want to impose?

JUDGE DOBIE: That is a different question.

MR. DODGE: What is meant by those words, "person under control of a party"? I thought you were referring to guardian or ward.

CHAIRMAN MITCHELL: Minor child would be the first idea that would occur to me. The guardian or parent would have power.

MR. DODGE: But not an employee.

CHAIRMAN MITCHELL: No. I don't know whether that is

right or not, but that is what I would assume.

JUDGE CLARK: Professor Wright says there have been no cases that he knows of in Minnesota. I asked what the theory was in Minnesota.

CHAIRMAN MITCHELL: How does the Minnesota rule read now?

PROFESSOR WRIGHT: This is the language of the Minnesota rule, "a person under control of a party."

CHAIRMAN MITCHELL: There is something else about it. Our rule only related to where the physical condition was in controversy, and the Minnesota committee I think added the parentage provision.

PROFESSOR WRIGHT: Yes. They added the blood relationship.

CHAIRMAN MITCHELL: I remember that, because when they sent me their preliminary draft, I just had this case I was telling you about, the parentage problem, and I suggested to the Minnesota commission that they broaden the rule out to make it clear it covered parentage cases.

JUDGE CLARK: You mean you are responsible for it?

CHAIRMAN MITCHELL: For the Minnesota rule, yes. I don't know anything about this question of "person under control of a party," but I suggest it would apply to a minor child, ward, or something like that.

What is the proposal now? Do you want a vote on it, Charles?

JUDGE CLARK: This is the proposal in the form I submitted it which, as I say, is the Minnesota rule: that you change the first sentence by the addition of the words underlined on my page 7 of proposals. That would make it read --

CHAIRMAN MITCHELL: I am on your page 64.

JUDGE CLARK: It has the same thing.

JUDGE DOBIE: It is on page 7 of the shorter document.

JUDGE CLARK: "In an action in which the mental or physical condition or the blood relationship of a party, or a person under control of a party, is in controversy, * * *"

JUDGE DOBIE: Does that include an employee, do you say?

JUDGE CLARK: I think it would be a little unfortunate to exclude an employee. He ought not to be excluded.

MR. LEMANN: Then you have to consider your employer, because suppose a bus driver said, "I don't want to be examined. I will quit my job if you examine me. I am not going to put up with it." It might be an examination for venereal disease.

JUDGE DOBIE: I was thinking of that.

MR. LEMANN: It might be an examination for tuberculosis that he thinks might make it difficult for him to get a job. He says, "I won't take it. To hell with it. You can't make me, and I am not going to do it." What happens to the employer's case? You couldn't fine the employer, could you?

JUDGE DOBIE: It might come up in the case of the driver. One of the allegations might be that they are negligent

in employing him knowing he had syphilis and was not a proper man to drive a bus. The man might very well object to that. He might say, "I am not going to subject to a physical examination to show whether I have syphilis."

MR. LEMANN: We could get away from the difficulty of saying "a person under control," by saying "a person employed by or under the control of," but I don't quite see how we could get away from the other difficulty. If this is a five to four decision as to the validity of the rule even as applying to a party, I would think we would be almost inviting trouble to try to extend the rule to an employee or someone not a party.

CHAIRMAN MITCHELL: That five to four decision doesn't worry me very much. I remember when that case came up. It is the only case involving an interpretation of the rule in which our Advisory Committee or any member of it has ever presumed to interfere by filing a brief amicus in the Supreme Court. In that particular case --

JUDGE DOBIE: You did file a brief?

CHAIRMAN MITCHELL: I did.

JUDGE DOBIE: But you didn't appear in the oral argument?

CHAIRMAN MITCHELL: Oh, no. Here is what happened. We were very careful in our rule to provide that the penalty for refusing to submit to an examination was a consequence in the suit, like a dismissal or striking out the allegation or taking a fact against a party who refused. We didn't try to punish a

man or put him in jail or find him in contempt, because we thought that was going too far. In that case, in order to get it to the Supreme Court, the parties stipulated that if the fellow was found at fault for not submitting to an examination, he might be punished for contempt. I found that out in advance of the argument, and I wrote the counsel for one of these parties and I said, "Look here, you are taking this case up to the Court in a contempt case, and you ought to make it clear that the rule doesn't authorize contempt. It only gives penalties to a party in connection with the lawsuit."

They wouldn't correct their position or explain that to the Court. They were going up there on a contempt case and arguing the validity of our rule on the theory that the rule authorized commitment for contempt for failure to submit to examination. I thought that imperiled the rule and that it was fraud on the Court. So I wrote a brief and pointed that out to the Court. I acted on the theory that it would put a man in jail for contempt for not submitting to a physical examination when all we did was give him some bad consequences in his lawsuit.

My recollection is that Frankfurter's opinion was that he sort of assumed there were some fields that were strictly procedural matters, and yet the Court hadn't any right to make rules about them. I never took any stock in his opinion.

I think it was Roberts who wrote the majority opinion, and it was a perfectly clear opinion. We will never have any

more five to four decisions on that problem.

On this matter of employees, suppose a man has a man in his employment and the fellow is driving a truck for his employer, and the employer is sued for damages because the truck runs into somebody, and it turns out the employee who drove the truck is color blind or something like that. What can happen in a case like that? Can we force the employer to force the employee to submit to an examination or penalize the employer as a party to the case in some way if the employee won't submit?

My idea about this change in the rule is that I guess the Minnesota Commission put that in in connection with the blood relationship idea that I called their attention to -- you can see right away that it isn't enough to examine the blood of a party. You have to test the blood of a child and the parent. Usually it is the mother suing, with a man charged with being the parent of the child, and she has custody of the child; and, of course, if she wants to prove he is guilty, she would naturally allow the child's blood to be tested, especially if she had gone to a doctor privately in advance and found out whether it would help the case any.

I think that is what they meant there. I doubt if they intended by the Minnesota rule to cover employees, and I don't know whether we should try to do that.

MR. LEMANN: The only case which came up is that Colorado employee case?

JUDGE CLARK: That is all I know about. That was just

in the state court of Colorado, which has the federal rule in Colorado.

CHAIRMAN MITCHELL: The rule has nothing about blood relationship in it.

JUDGE CLARK: That is right. That is another angle. The blood relationship angle came up in a District of Columbia case, Beach v. Beach.

CHAIRMAN MITCHELL: Did they authorize a physical examination in that case under our old rule?

JUDGE CLARK: Yes, they did.

MR. LEMANN: That is cited here?

MR. PRYOR: I think our rule is broad enough to deal with this.

CHAIRMAN MITCHELL: I said it was. I certainly don't think we had it in mind when we wrote the rule, because this blood relationship business has been developed since.

JUDGE CLARK: If you look on page 64, you will find there is a case, Wadlow v. Humberd, a federal district court case from Missouri, where the court refused to allow physical examination in support of a defense of truth where the alleged libel was a description of plaintiff's physical and mental condition.

SENATOR PEPPER: Would you read that once more?

JUDGE CLARK: This of course relates to that provision as to blood relationship. In Beach v. Beach, the District of Columbia court allowed the order for a test there. That was a

family relationship case. It was the parentage of a child there.

On the other hand, in this last case I spoke of, the Wadlow v. Humberd case from the Federal District Court in Missouri, the court refused, went the other way, denied physical examination in support of the defense of truth where the alleged libel was a description of plaintiff's physical and mental condition. They wanted to examine the plaintiff in support of their claim that the mental or physical condition of the plaintiff was as the libel said.

MR. PRYOR: Under the language of our Rule 35, that would have been impossible, wouldn't it?

JUDGE DOBIE: There is nothing in the rule that limits it to personal injury. That seems to me nonsense.

MR. PRYOR: In an action in which the mental or physical condition is in controversy.

JUDGE DOBIE: If it was, I think the Wadlow case is clearly wrong.

It may be best not to try to extend it any further than the Reporter says. I like the rule very much.

CHAIRMAN MITCHELL: The Reporter wants to add "or the blood relationship" of a party.

JUDGE DOBIE: Yes.

CHAIRMAN MITCHELL: What do you say about "or a person under control of a party"?

JUDGE DOBIE: That would clearly include a minor child.

CHAIRMAN MITCHELL: It ought to.

JUDGE CLARK: I should think those could be included and there wouldn't be too much question about it.

MR. PRYOR: You could insert in the second line of 35(a) the words "or blood relationship."

CHAIRMAN MITCHELL: The old clause is on page 7 of this.

JUDGE DOBIE: You don't think "control" would apply to an employee, do you?

PROFESSOR SUNDERLAND: Why not say "legally under the control"? That would exclude employees but would include minor children.

JUDGE CLARK: Do you think that would exclude employees?

PROFESSOR SUNDERLAND: Yes. There would be no legal control there.

DEAN PIRSIG: Usually the expression is "in the custody of" when you speak of minors, "in the custody of a parent."

PROFESSOR MOORE: If a guardian ad litem was suing for the minor, though, would the minor be in the custody of the guardian?

JUDGE DOBIE: No.

PROFESSOR MOORE: Yet you want this rule to hit the minor in that case, I guess.

JUDGE DOBIE: It certainly wouldn't be next friend. How about putting it "under the custody or legal control"? Wouldn't that be more precise, as Mr. Pryor suggests.

CHAIRMAN MITCHELL: If you are going into this blood relationship business, it certainly ought not to be limited to parties.

JUDGE DOBIE: Then they ought to be able to take the blood test of the child.

CHAIRMAN MITCHELL: The test is incomplete without a test of the child.

Then your idea would be a person in the custody or under the legal control of a party?

JUDGE DOBIE: Yes.

CHAIRMAN MITCHELL: That would be in addition, also, to the words "or the blood relationship of a party"?

MR. LEMANN: The only case which you have cited says the child is a party. In Beach v. Beach, that is the way they justified the result. In an action by a wife for maintenance of a child, and counterclaim for divorce based on adultery, the child is a party, in the presence of the rule -- United States Court of Appeals for the District of Columbia.

CHAIRMAN MITCHELL: But that decision was under our present rule, where it is very doubtful whether or not physical condition is in controversy. There may be no controversy about it at all. They want to know what it is. I think that decision doesn't hurt us any. It went quite a ways, considering that the rule was not explicit about this blood relationship business.

The proposal is that in Rule 35(a) we will add to the first sentence the following:

"In an action in which the mental or physical condition or the blood relationship of a party, or of a person in the custody or under the control of a party, is in controversy, * * *."

MR. PRYOR: Legal control.

CHAIRMAN MITCHELL: Yes, thank you.

"* * * person in the custody or under the legal control of a party is in controversy, * * *."

All in favor of that say "aye"; opposed. That is agreed to.

JUDGE CLARK: Before we leave this entirely, let me ask if anyone thinks there is any question now that we need to make any change in the penalty provisions for refusal or failure to comply, That is Rule 37(b)(2). Or can those stand as they now are,

"* * * the court may make such orders * * * as are just, and among others the following:"

JUDGE DOBIE: That is a party or officer or managing agent of a party. It doesn't apply to one under the control of, does it? You see, we have extended it now to one under the control or custody. Do you want to insert that in there:

"If a party or an officer or managing agent or one under the legal custody or control of a party refuses to obey an order * * *"?

CHAIRMAN MITCHELL: It isn't the party in control. The question is whether the party makes a bona fide effort to

compel his custodee to submit. You can't place a penalty on anybody but the party, I think.

Having in mind that case in the Supreme Court of the United States where this question of physical examination was so closely divided, I think we ought to refrain from trying to place any penalty on a witness or on an employee.

JUDGE CLARK: I should think that is correct, and that probably no order should go against anybody except a party.

Even if that is so, query? If it isn't then perhaps l.c. necessary to make these additions:

First, in the provision of (2) near the end of that first broad, general paragraph which says, "or an order made under Rule 35 requiring him to submit to a physical or mental examination," do we need to say there, "requiring him or a person in his custody or under his legal control"? If we do need to do that, do we need to do it also in subdivision (i) where it now says, "or the physical or mental condition of the party"? Do we need there to add "of the party or person in his custody or under his legal control"?

MR. LEMANN: Also in (iv), perhaps.

JUDGE CLARK: Yes. Possibly in the next one, too, although that is not specified. Maybe it is all-inclusive.

CHAIRMAN MITCHELL: I would produce that result this way, Monte: In subdivision (b)(2) where it says, "refuses to obey an order made under Rule 35 requiring him to submit to a physical or mental examination," I would strike out "him to" and

say, "an order requiring submission to physical or mental examination."

That applies to the guardian and to the party. Instead of saying "an order under Rule 35 requiring him to submit," say "an order made under Rule 35 requiring submission to a physical or mental examination." That takes care of it.

MR. LEMANN: You would still have to have what the Reporter suggested under subdivision (i), wouldn't you? You would have to change that where it speaks of the mental or physical condition of the party. You would have to insert, "one under his custody or legal control." That would have to be put in subdivision (i), I would think.

MR. PRYOR: You could change that by striking out "party" and saying "or physical or mental condition."

CHAIRMAN MITCHELL: We don't want to put the penalty for failure to submit to a physical examination in (b)(1), because that is a jail proposition for contempt. I thought, and I think the Court thought, that the fact that our rule didn't have a penalty of that kind for physical examination was the thing that saved the rule.

MR. PRYOR: I wasn't referring to that, Mr. Mitchell.

CHAIRMAN MITCHELL: I think Mr. Lemann was, wasn't he?

MR. LEMANN: I don't think so. On a quick reading, I didn't think subdivision (i) had anything about a jail order. The language that you called to the Court's attention is in subdivision (iv), which says you can't arrest anybody for

disobeying an order to submit to a physical or mental examination. That you would keep in, except you might want to expand it now to correspond to the expansion in the rule itself.

CHAIRMAN MITCHELL: What section are you talking about?

MR. LEMANN: I am talking about section (iv) of (b)(2). Can't we leave this polishing to the Reporter?

DEAN MORGAN: Couldn't you say in all those cases, "an order under Rule 35," without going into all those details, because that is the only order you can make under 35. What is the use of repeating that?

CHAIRMAN MITCHELL: Suppose we leave that to the Reporter to fix up.

JUDGE DOBIE: I think that is a good idea.

CHAIRMAN MITCHELL: He will fix up the details and bring it back.

What is next, Charley?

JUDGE CLARK: Under 35(b)(1), Report of Findings, some question is made as to getting reports of prior findings. There is a slight gap there. I am not too sure how often it comes up.

Do you have a reference to some place where we discuss this?

PROFESSOR WRIGHT: At the bottom of page 63.

JUDGE CLARK: At the bottom of page 63. Under Rule 35(b)(1), a party who is ordered to submit to a physical examination is entitled, on request, to get a copy of the report of the

examination. If such request is made, the examining party then becomes entitled to get copies of reports of all examinations, previously or thereafter made, of the same mental or physical condition.

JUDGE DOBIE: Those that he can get don't have to be made under court order.

JUDGE CLARK: That is right. That is provided there, you see. It is in the second sentence of (b)(1), that the examining party is entitled to get that.

Rule-makers in Utah and Louisiana, however, have found a loophole in this rule, in that it makes no provision for the party examined to get copies of the reports of any earlier examinations which have been made at the behest of her adversary and to which she may have voluntarily submitted, and those states have made specific provision to cover this situation. That is described in that Law Review article.

The Utah one I looked at before I came down, and the Utah one is very extensive. It is an entirely separate provision. They have added an extra provision to make sure it was in.

In order to bring this up, I suggested merely the insertion at the end of the first sentence, where it provides for delivery of detailed written report of the examining physician:

", together with like reports of all earlier examinations of the same mental or physical condition."

Maybe, Monte, you can speak for the Louisiana people.

MR. LEMANN: No. Mr. Tolman asked me how this came up. I said I understood this hasn't come up, but Utah and Louisiana think it ought to come up. I think it just shows the painstaking efforts of the Louisiana draftsmen to paint the lily.

CHAIRMAN MITCHELL: As it reads, this entitles the person examined to the detailed original report of the examining physician. You want to add to that?

JUDGE CLARK: Together with all other examinations that he may have been able to squeeze out of the party before.

CHAIRMAN MITCHELL: Not the same physician, necessarily.

JUDGE CLARK: Not necessarily the same physician.

DEAN MORGAN: Is it the same mental or physical condition, or is it a matter of the physical condition of the same person?

JUDGE CLARK: It is the same person, yes.

DEAN MORGAN: Then that is what it should say, rather than "the same mental or physical condition."

MR. LEMANN: I suppose the idea is to make the rule as stated in the second sentence to apply in the corresponding opposite case. The next sentence of our rule says:

"* * * a like report of any examination, previously or thereafter made * * *"

I suppose the idea of this suggestion is to carry that thought into the other situation.

JUDGE CLARK: That is the idea, as I understand it. Those very diligent rule-makers saw the second sentence and thought that this other side of the picture wasn't covered. Professor Wright tells me that Louisiana has really gilded the lily somewhat more. Sjppose we have the Louisiana provision.

MR. LEHMANN: I am always willing to hear that. It is always timely.

PROFESSOR WRIGHT: "At the time of making an order to submit to a medical examination under subdivision (a) of this rule, the court shall, upon motion of the party to be examined, order the party asking such examination to furnish to the party to be examined a report of any examination previously made or medical treatment previously given by any physician employed directly or indirectly by the party seeking the order for an examination or at whose insistence or request such medical examination or treatment has previously been conducted. If the party seeking the examination refuses to deliver such report, the court, on motion and notice, may make an order requiring delivery on such terms as are just, and if the physician fails or refuses to make such a report, the court may exclude his testimony at the trial or make such other order as may be authorized by Rule 37."

JUDGE CLARK: How does that come into the picture?

PROFESSOR WRIGHT: That is 35(c), a separate section, entitled "Right of Party Examined to Other Medical Reports."

JUDGE CLARK: And in addition to all of this in the

Federal Rules?

PROFESSOR WRIGHT: Yes.

Utah and Louisiana are identical. I must say Louisiana took it from Utah.

MR. LEMANN: The credit may be due to Utah.

CHAIRMAN MITCHELL: I am wondering whether all our other rules about the production of documents, papers, and all that sort of thing, are not broad enough to allow a person to go after a medical report of that kind made by a doctor who examined on some previous date.

JUDGE DOBIE: Does the Louisiana one extend to reports made as to other things except physical and mental condition?

PROFESSOR WRIGHT: No, it does not.

JUDGE DOBIE: It has to be about that same condition?

PROFESSOR WRIGHT: It has to be about that same condition. Specifically, it doesn't, Judge Dobie. It requires the report of any examination previously made or medical treatment previously given by the other side or at the insistence of the other side.

JUDGE DOBIE: If it had been in another case? That is pretty broad.

PROFESSOR WRIGHT: There is nothing in the language that would prevent that.

MR. DODGE: Those would involve prior reports of experts, wouldn't they, which would come under the limitation on calling for them on depositions?

JUDGE CLARK: This is what the former provision, the Hickman rule provision, says on that:

"The court shall not order the conclusions, opinions, or legal theories," and so on. Then it goes on, "or, except as provided in Rule 35," this rule, "the conclusions of an expert."

So whatever is provided for here is taken out of that other provision.

MR. LEMANN: And if not provided for, you couldn't get it under the limitations imposed by the Hickman provision.

JUDGE CLARK: I guess that would follow.

MR. LEMANN: The limitation we are writing in on Hickman would preclude you from calling for earlier reports. The purpose of this situation is that if the defendant is asking for an examination, the defendant must furnish the plaintiff with copies of any earlier examinations which the plaintiff may have voluntarily permitted the defendant to make. Is that right?

JUDGE CLARK: That is right.

MR. LEMANN: Unless you put this language in, you wouldn't be permitted to ask for them because of the exclusion of the Hickman rule, is that right?

JUDGE CLARK: That would be, I think, very clearly the literal reading of the language. Some court might still say, "They couldn't possibly have meant that."

MR. LEMANN: Oh, no.

JUDGE CLARK: But I think you are right on the literal

meaning, and that is that this exclusion under the Hickman provision, read with this, would say that whatever is not expressly stated here is out.

MR. LEMANN: Wouldn't your language cover really everything which the long Louisiana paragraph covers? It seems to me it would.

JUDGE CLARK: I did it on the idea that this was very long, and that it could be summarized.

MR. LEMANN: It seems to me your language would cover it.

JUDGE CLARK: I think so.

DEAN MORGAN: Charles, don't you think you ought to say, "earlier examination of the mental or physical condition of the same person," instead of "of the same mental and physical condition"? You might have a previous examination not for this particular physical condition which would affect the particular matter.

JUDGE CLARK: I am not wholly sure at the moment. It would seem a little difficult to make an absolute requirement, wouldn't it, that a person's whole lifetime of examinations could be ordered.

DEAN MORGAN: "The same mental or physical condition." I don't know. I guess that hasn't caused any trouble so far.

JUDGE CLARK: Of course, that expression is the same.

DEAN MORGAN: Yes, it is in the present rule.

JUDGE CLARK: It is in there. To make it balance with

the second sentence, it would be limited this way.

DEAN MORGAN: O.K. It is all right with me if you want that in both of them.

JUDGE CLARK: I guess it is up to you gentlemen to decide the policy, but isn't it a little harsh to go back to a blood test taken when he was a baby, and so forth, or a cured condition of venereal disease in the past?

JUDGE DOBIE: Do you think the rule as now drawn really calls for this modification? I hate to make them unless it does. Is it really vital at all, or has it given any trouble?

JUDGE CLARK: Two great rule-making bodies have thought there was a definite lacuna here, so much so that they have drawn this long additional new subdivision (c). Who am I to say that they are wrong?

CHAIRMAN MITCHELL: My thought that I had in mind when I asked a minute ago was whether or not a lot of other rules we have, allowing a party to call for the production of a document or report, are broad enough to allow the person who is physically examined to move to get to see other reports of previous examinations. He can go and ask them to produce a statement that he has made previously and that he have a copy of it. Haven't we enough breadth in the rules to get a report of a physical examination?

JUDGE CLARK: Mr. Lemann and Mr. Dodge present very ingenious arguments worthy of Boston and New Orleans lawyers. They say the limitation we added to the Hickman rule is now so

definite as to prevent it, because that provision we added to Rule 30(b) says that you may not ask for the opinions of an expert except as provided in Rule 35. Therefore, the argument is that since this is not expressly provided in 35, it can't be done.

MR. LEMANN: Can't you hear some lawyers saying, "And that is supported by the conclusions of the eminent men who wrote the Louisiana and Utah rule. They think the federal rule doesn't cover it. Therefore, under the Hickman rule you can't get it."

CHAIRMAN MITCHELL: I would like to hear from a Philadelphia lawyer on that point.

JUDGE DOBIE: Well, we have a great one here.

MR. DODGE: I don't see why this isn't in substance a proper addition. What is covered is prior examination of the same person in the pending case.

MR. LEMANN: If you go into detail, I think it is a proper addition to make sentence No. 1 of Rule (b)(1) correspond with sentence No. 2. The only argument against it is that it isn't sufficiently important. There you have eminent testimony.

CHAIRMAN MITCHELL: Let's have the proposed addition formulated for our record here.

JUDGE CLARK: You don't want this longer one or don't need it, I take it? I refer to the longer one that comes from Louisiana. The way I thought was adequate to cover it and the

suggestion that I make is that there be added to the first sentence and as a part of the first sentence of Rule 35(b)(1) the following:

", together with like reports of all earlier examinations of the same mental or physical condition."

MR. PRYOR: I move the adoption.

DEAN MORGAN: Second.

CHAIRMAN MITCHELL: All in favor say "aye." That is agreed to.

JUDGE CLARK: Shall we go on?

CHAIRMAN MITCHELL: Yes.

JUDGE CLARK: In Rule 36(a), I suggest this as an addition at the end. Rule 36(a) is the Request for Admission, and it is a question whether one can simply deny any answer on the mere basis that he doesn't know, when he ought to know. I suggest that you add this sentence:

"If a request is refused because of lack of information or knowledge upon the part of the party to whom the request is directed, he shall also show in his sworn statement that the means of securing the information or knowledge are not reasonably within his power."

This is covered on page 63 of our comment.

JUDGE DOBIE: Like the president of a corporation, for example, says, "I don't know," but he could very easily find out. Is that the idea, Charley?

JUDGE CLARK: That is it. Professor Moore points out

there is a distinct split in decisions as to whether a party shall be required to admit or deny facts under Rule 36 which are not within his knowledge but where the means of information are reasonably within his power. Moore's Federal Practice, paragraph 36.04, citing five cases each way, and suggesting that the better rule is to require admission or denial of such facts.

JUDGE DOBIE: It sounds reasonable enough, don't you think so? A man is secretary of a corporation and says, "I don't know," which may be right, but he has the minutes there and he can get it in five minutes.

DEAN MORGAN: I move the adoption.

JUDGE DOBIE: I second the motion.

JUDGE CLARK: This is Professor Moore's edition. It shows quite a few changes that we made in 1946, you see.

CHAIRMAN MITCHELL: What is your pleasure?

DEAN MORGAN: I move the adoption.

JUDGE DOBIE: I second the motion.

CHAIRMAN MITCHELL: Is there any objection? Without objection, that is agreed to.

JUDGE CLARK: That is all I have on the subject of discovery. That has been an important section. I don't know whether any members of the committee have anything more they want to bring up on discovery.

I am a little worried, I may say, quite frankly, because you don't bring up more. I think it might be a little unfortunate if it appears that you are considering only the

amendments that I have suggested, because, after all, this is a ten-year examination, and we need to cover it. I would like to suggest that after you go home you perhaps could study some of these things.

I haven't known how to handle it except to bring in the things that I thought were important. I may be rejecting things that are of some importance.

DEAN MORGAN: Charles, let me say I resent the implication that I didn't go over them in the first place, because I did.

JUDGE CLARK; Then shall I say that I withdraw my suggestion as to Professor Morgan.

DEAN MORGAN; I have offered as many as you have, as a matter of fact.

MR. LEMANN; Haven't you read all of Professor Moore's volumes, and doesn't he keep up as well as you do with all the troubles that the courts have with these rules, and haven't we had the benefit of his counsel? If he hasn't expressed himself, if there has been something omitted, he ought to tell us about it.

JUDGE CLARK: The answer is, as far as I am concerned, yes, sir. I don't know whether Professor Moore wants to add to that or not.

MR. LEMANN: Or forever hold his peace.

JUDGE CLARK: At any rate, there are two or three things that I really think I ought to bring up. One of them

that I overlooked was as to Rules 12(h) and 41(b), that old chestnut of indispensable parties. This came in from Judge Mathes, who has written us a good letter on Rule 8(a), which I suppose has been distributed. It is around on the table. Some of these letters on that Rule 8(a), since that will be coming up soon, Mr. Wright will distribute now.

This is an additional suggestion that Judge Mathes made. It has to do with the indispensable parties. He says as to 12(h) that we have the indispensable party suggestion in the wrong place. If you will look at 12(h) you will see we have the provision that:

"A party waives all defenses and objections" and so forth, "except that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party," and so on, "may also be made by a later pleading * * * or at the trial * * * and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

Judge Mathes says that the "indispensable party" provision ought to be in (2) rather than in (1). He says that we should take out the reference under subdivision (1) to the defense of failure to join an indispensable party, and should make it read:

" * * * and except (2) whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction

of the subject matter, or an indispensable party is not joined, the court shall dismiss the action."

He carries that over to a like suggestion in 41(b), which is Involuntary Dismissal, and which is the provision at the end of (b):

"Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue" -- he would insert -- "or for failure to join an indispensable party" -- "operates as an adjudication upon the merits."

My feeling is that there is a great deal of theoretical soundness to what he says. I don't know whether we need to do it or not. It seems to me that what he is saying is correct, that this is like the defense of lack of jurisdiction and you just can't go ahead.

DEAN MORGAN: You started out with this rule by saying that if it appeared that an indispensable party had been omitted, the court must dismiss the action, and during the discussion we changed that because the indispensable party might be brought in, and so on. I still don't agree that an indispensable party comes in the same category as lack of jurisdiction over the subject matter. I don't believe that is true.

JUDGE CLARK: I presume that there is no doubt that if a court enters judgment in a case where it has no jurisdiction over the subject matter, the judgment is no good.

DEAN MORGAN: Yes. If there is an indispensable party omitted, I think the judgment is perfectly good. It couldn't affect the party who was not joined, but it would be perfectly good as between the parties who were joined, and the indispensable party who had any rights with reference to it could bring it up in later litigation. This judgment would not be void.

I think under 41 on dismissal, if dismissed for lack of an indispensable party, it ought not to be on the merits, of course. I agree on that, because the party could bring the action again if he brought in the indispensable party.

JUDGE CLARK: Your answer really to the first suggestion as to 12(h) is that you won't go along at all.

DEAN MORGAN: I won't go along at all. I think he is all wrong on that.

JUDGE CLARK: What do you say, Mr. Moore?

DEAN MORGAN: It is clear the judgment can't affect the indispensable party if he is not there.

MR. DODGE: Aren't you talking about a necessary party, not an indispensable party? You get into that definition of what is an indispensable party.

SENATOR PEPPER: I was just going to say that is the real question.

DEAN MORGAN: That is the whole proposition. You say generally he is indispensable if you couldn't give a fair and equitable decision without him. But that certainly doesn't go to jurisdiction.

SENATOR PEPPER: On the other hand, it does go to jurisdiction --

DEAN MORGAN: If you couldn't bind the parties who are there. But if you can bind the parties who are there, it doesn't go to jurisdiction.

SENATOR PEPPER: Aren't there cases in which binding the party who is there is affected by the fact that you haven't joined another person who is indispensable?

DEAN MORGAN: It may be, but those are the rarest kind of cases, and they don't fall within the definition of "indispensable" that the courts ordinarily give, where they dismiss the action when it is brought up because of lack of an indispensable party.

JUDGE DOBIE: In other words, if you have Boucher v. Bliss and the court dismisses for lack of jurisdiction, it is binding on Boucher and Bliss; but if you have Jorgens on the outside, who is an indispensable party, it is not in any way binding on Jorgens.

DEAN MORGAN: That will all be discovered at the trial, won't it? If you couldn't ajust relations between the parties within the action, of course you can't bind anybody who isn't a party unless he is in privy or unless you have a representative party under Rule 23.

CHAIRMAN MITCHELL: I suggest we adjourn until two o'clock.

... The meeting adjourned at one o'clock p.m. ...

Dudley
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TUESDAY AFTERNOON SESSION

May 19, 1953

The meeting reconvened at 2:15 p.m., William D. Mitchell, Chairman of the Committee, presiding.

CHAIRMAN MITCHELL: I see we have some gentlemen here from California who want to be heard on the rule about the statement of the complaint.

How do you want to go about that, Judge?

JUDGE HALL: Whatever your pleasure is. Mr. Rhyne is here representing the American Bar Association. Mr. Simpson, of the Los Angeles Bar, who expected to come, could not because he had a trial starting today. And Mr. Lasky expected to come from San Francisco, and he could not because his son has Bar Mizvah today.

SENATOR PEPPER: Some of the younger men here are a little hard of hearing. We older men hear perfectly. But if you will address yourself to them, it will be a help.

JUDGE HALL: Very well.

CHAIRMAN MITCHELL: We will leave it to you to decide how you want to proceed.

STATEMENT OF PEIRSON M. HALL, JUDGE,
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

JUDGE HALL: Very well. I will make a statement here.

The Conference of Judges of the Ninth Circuit in September 1952 adopted a resolution that Rule 8(a)(2) be amended to read

that the complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief," adding these words: "which statement shall contain the facts constituting a cause of action."

That resolution was the result of a resolution which I had proffered to the Conference of the Ninth Circuit in 1949. At that time the rules had been in force for some years, and we had had a great many motions to dismiss. I had granted several. The Circuit Court had reversed me on the motions to dismiss and stated, in effect, that if a defendant desired to know any of the facts, he could have discovery.

Later on, in some OPA or rent cases, the government attorney appeared in court and, on a motion to dismiss, made the statement that a complaint need not state a cause of action. I was rather surprised because, as I had read the rules and attempted to construe the phrase "claim for relief," it had seemed to me that a complaint should state a cause of action. I asked the gentleman to repeat his statement, and he did, and I was not surprised to see the lawyers who were present in the court room burst out in laughter.

Another subject matter, not related to that, which came up at the 1949 Conference of the 9th Circuit, was contempt.

So at the 1949 meeting, I introduced a resolution which is as follows:

"That the Chairman appoint a committee of judges and

lawyers of this Conference whose duty it shall be to study the need for amendment to Rule 8 of the Federal Rules of Civil Procedure in order to define or clarify the meaning of the term 'claim for relief' and which will look to the requirements in the Civil Rules for greater clarity in affirmative pleading."

As a result of that, Judge Denman appointed a committee of judges and lawyers, and the matter was referred to the Los Angeles Bar Association and the California State Bar Association.

A committee of the California State Bar Association recommended the adoption of a report which recommended the change of language which I have read to you at the beginning of my statement. That went before the House of Delegates of the California State Bar last August 26, 1952, and was adopted by an affirmative vote of 157. The vote against it was so negligible that they didn't even bother to announce the vote against it. The Los Angeles Bar Association adopted a report recommending the same change. The Oregon Bar Association adopted a report recommending that some change be made.

After that, it then went to the Conference of the Ninth Circuit. Judge Driver was there. We had very little discussion last fall because we had discussed it in 1949 and 1950 and 1951 and in the earlier meeting at Yosemite in 1952.

I want to say in passing that I have had some discussion with Judge Clark. He seems to think that Professor

McCaskill, who I understand had some difficulty with accepting the rules originally, was the originator of this idea. Professor McCaskill did not appear on the scene until 1951, which was two years after I had introduced the resolution, and subsequent to the meeting of the State Bar Committee of California and subsequent to the meeting of the Los Angeles Bar Committee.

Before that time -- I am sorry Judge McCaskill is dead -- I had never heard of him or seen him. So I want to assure you that Professor McCaskill had absolutely nothing to do with originating the idea of the study.

I will say also, I was rather surprised to find the large acceptance by the bar for some clarification. I think probably there was a great deal of misunderstanding.

A number of the judges in the Ninth Circuit voted against the adoption of the resolution for the reason that they had the attitude which was generally expressed by Judge Mathes of our district court, and they thought that the present language of Rule 8 required that the plaintiff should state facts sufficient to constitute a cause of action. In other words, their attitude is that a complaint has to state something; and if it doesn't state facts, what is it going to state? The judge is supposed to know the law and apply the law which would entitle the plaintiff to relief on the facts which are within the plaintiff's knowledge.

The confusion, I think, probably stems from two

schools of thought, one which is best expressed by the decision of Judge Clark of the Second circuit in Dioguardi v. Durning, 139 F 2d 774, where Judge Clark made the statement:

"Under the Rules of Civil Procedure there is no pleading requirement of stating facts sufficient to constitute a cause of action, but only that there be a short and plain statement of the claim showing that the pleader is entitled to relief."

I had expected that Mr. Simpson or Mr. Lasky would do all of this work on that case. I don't have any law clerk. So yesterday I took the pains to run that case down in Shepards Federal Citation. It is in Footnote 1 of that case, and Footnote 1 of that case is cited with approval in I think 37 other cases.

I took the pains yesterday afternoon to examine each one of them. I will say that 19 of the 37 cases are either in the Second Circuit, either in a majority opinion or a dissenting opinion, or in the districts which are within the Second Circuit.

Some of the statements which grow out of that citation are rather interesting. I rather doubt if anybody outside of those who have paid some particular attention to this is familiar with the tendency which has gone on.

Barron and Holtzoff (Vol. 1 p. 437) state that "the courts generally hold that the statement of a claim can no longer be condemned merely because it fails to state a cause of action. It is

generally agreed that the pleader need only make a short and plain statement of claim, showing that he is entitled to relief, and that the fact that the statement may contain matter which under the old procedure might have been considered a conclusion of law or a statement of evidence, will not of itself make the pleading improper." With that latter sentence, of course, I haven't any quarrel at all.

Mr. Moore in his work, 2nd Edition, Volume 2, 1949 Edition, beginning at page 1647:

"The Federal Rules have avoided one of the sore spots of code pleading. The federal courts are not hampered by the morass of decisions as to whether a particular allegation is one of fact, evidence or law."

And he states this:

"All that is required is a short and plain statement of the claim showing that the pleader is entitled to relief. There is no requirement that the pleading state facts or ultimate facts or facts sufficient to constitute a cause of action. The courts have recognized that the function of pleading under the Federal Rules is to give fair notice of the claim so as to enable the adverse party to answer, to prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought so that it may be assigned to the proper forum for trial."

"As Judge St. Sure said in one of the first decisions

under the rule:

"The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved. A generalized summary of the case that affords fair notice is all that is required." This viewpoint has been followed by the majority of cases."

Then he cites a great many cases in the footnotes in support of the proposition that he has just announced, and states further:

"Under the 'notice' theory of pleading, it is immaterial whether a pleading states 'conclusions' or facts, [cases are cited]

I am certainly not advocating, and I don't think anyone is, that a pleading should be verbose or prolix or make a distinction between conclusions or evidentiary facts or ultimate facts; but certainly as a trial judge -- and I have been on the federal bench for ten years -- every Monday morning we have a very busy docket, and I find there isn't any other rule that is invoked as much as Rule 8. In every case that is filed, the lawyer files a motion to dismiss. Whether he thinks he is right or he is wrong, he is going to preserve a point that he might later urge in the Court of Appeals, and sometimes he does, successfully after trial. But we have it time and time and time again.

So ~~there is~~ it is becoming a tendency generally for the lawyers, in practicing law, not to state facts or not to draw a pleading so that I, as a judge, can pick it up and tell what

Insert for page 339, 3rd paragraph---

as long as fair notice is given, and the statement of claim is short and plain. The courts have generally so held". He then again cites 10 cases in a footnote in support of that statement.

the plaintiff wants and why he thinks he is entitled to it; or, to put it another way, so that if a pleading is laid on the desk of a lawyer representing a defendant, the lawyer will know how to answer or how to plead to that pleading.

We have statements now in the decisions such as this one. Rhodes Pharmacal Company v. Dolcin, 91 Fed. Supp. 87, 89, from the Southern District of New York:

"The pleadings in the federal courts serve the purpose of mere notice pleading."

In Brooks v. Pennsylvania Railroad, from the Southern District of New York, 91 Fed. Supp. 101, 103, where they again cite the Dioguardi case:

"The defendant has now moved to dismiss the action on the ground that the plaintiff fails to state a cause of action upon which relief can be granted. Under the new Rules of Civil Procedure there is no pleading requirement that there be facts sufficient to constitute a cause of action, but only that there be a short and plain statement of claim showing that the pleader is entitled to relief."

We have a statement also such as this in Leggett v. Montgomery Ward in the Tenth Circuit in 1949, 178 F 2d 436, ~~438~~, an action for malicious prosecution. The defendants ~~They~~ made a motion to dismiss on the ground the complaint did not state a cause of action, and the circuit court upheld the district court in dismissing it and applying the law of Wyoming to the particular cause of action.

There was a dissenting opinion. I am not citing the dissent as controlling, but to show the tendency. I quote from it:

"The general rule in all federal courts, so far as I have been able to ascertain, is that complaints should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim."

He cites, Second Circuit, Dioguardi v. Durning, 139 F 2d 774; Third Circuit, Continental Collieries v. Shober, 130 F 2d 631; Fourth Circuit, Tahir Erk v. Glenn L. Martin Co., ~~140 F 2d 232~~, 116 F 2d 865; Fifth Circuit, Kohler, et al. v. Jacobs, et al., 138 F 2d 440; Seventh Circuit, Topping v. Fry, et al., 147 F 2d 715, ~~and Keefer v. United States~~; Eighth Circuit, Kiefer Nack. Co. v. U.S. Bottlers Mach. Co. 113 F 2d 356, Cohen v. United States, 129 F 2d 733, Dennis v. Village of Tonka Bay, 151 F 2d 411, Louisiana Farmers' Protective Union, Inc., v. Great Atlantic & Pacific Tea Co. of America, 131 F 2d 419, ~~63 Fed. Supp. 846~~, Publicity Building Realty Corporation, et al., v. Hannegan, 139 F 2d 583, and Leimer v. State Mutual Life Assurance Co. of Worcester, Mass., ~~127 F 2d 862, 1 FRD 386~~; 108 F 2d 302 and the Ninth Circuit, Hanney, et al., v. Franklin Fire Ins. Co. of Philadelphia, 142 F 2d 864 -- in support of the position which he has just stated.

As a judge ruling on a motion to dismiss a complaint before me, ~~I have~~ am I to apply this as a rule, that is to say, to determine to a certainty that plaintiff is entitled to no

relief under any state of facts which could be proved in support of the claim? You can imagine any state of facts. A person comes in and makes a claim against the defendant and claims merely money, that the defendant damaged him. You can imagine some state of facts which he may be able to prove in support of that claim, and some of the complaints are almost that bad.

The tendency
It has resulted in this statement in Bushey & Sons v. Hedger in the Second Circuit, 167 F 2d 9, where Judge Frank dissents in an admiralty case and says, at page 33

"Even if a petition is somewhat vague, nevertheless to sustain its dismissal without hearing evidence and on a demurrer is flatly inconsistent with several of our recent decisions in which we have held pleadings sufficient, on demurrers or motions to dismiss, which were far less clear."

And he cites again the Dioguardi case and Clark on Code Pleading, and Levenson v. B & M Furniture Co (2nd Cir) 120, F 2nd, 1009.

I don't think it would be of any particular addition for me to continue to quote the different cases which are cited not dissents and which the Dioguardi Case and which can be found in Shepards Federal Citation, or of which I have indicated there are 37 now.

I have not taken the time to find the other decisions on appeal which disagree with this doctrine. There are some. I recall that there is one in the Third Circuit. I would like to read a statement by Mr. Lasky, in view of the fact that he is not here, which indicates his view as a practicing lawyer.

He was a member of the Ninth Conference and a delegate to that conference appointed by one of the judges:

"There is nothing wrong with Rule 8(a) as it was written in 1938."

I don't know that I agree with his criticism of the courts. I will say that I share his view that a statement of a claim entitling a person to relief, in my judgment, requires the person to state facts which would constitute a cause of action. Continuing:

"Rule 8(a) does not state that a complaint need only set forth a claim for relief; that is, it does not say that it is sufficient merely to assert a claim. What it says is that a pleading which sets forth a claim for relief shall contain a short and plain statement of the claim showing that the pleader is entitled to relief. The California Code of Civil Procedure, Section 426, which is typical of the code in pleading states, requires a statement of facts constituting a cause of action in ordinary and concise language.

"Our California Code of Civil Procedure, Section 22, defines an action as a proceeding by which one prosecutes another for the declaration, enforcement, or protection of a right or prevention of a wrong. A cause of action consists of the grounds on which one is entitled to the declaration, enforcement, or protection of a right or prevention of a wrong. It consists, in short, of the grounds upon which one is entitled

to relief. Thus there is no real difference between Rule 8 and C.C.P. Section 426, and no sound justification for construing Rule 8 as creating notice pleading.

"Rule 8 and C.C.P. 426 both require more than a mere assertion or notice of assertion of a claim. Both require the assertion plus enough to establish the right to relief, if proved. Enough of what? Obviously, enough of whatever it is that the law deals with in deciding cases. Those who support what has happened to Rule 8 shy away from terms such as 'fact' and 'pleadings,' but any legal problem consists of law and fact. Presumably the courts know the law, but they have to be told the facts. The complaint should tell them and the adversary enough facts.

"Opponents of a change to Rule 8 as presently construed stress the difficulty of distinguishing between ultimate facts and evidentiary facts and between ultimate facts and conclusions of law. They assume that by adopting the new name 'claim for relief' in place of the old, 'cause of action,' these difficulties vanish.

"It may be granted that the difficulties sometimes exist, but they are inherent in the materials with which the law must deal. Supplanting 'cause of action' by 'claim for relief' and then construing 'claim for relief' as no more than a notice of disaffection on the part of the plaintiff, do not spirit the difficulties away. They merely defer the difficulties

to a later point in the litigation. Supplanting the term 'cause of action' by 'claim for relief' merely indulges a professorial foible and the common fallacy that changing labels achieves reform. They point to the many decisions that grapple with the concept of 'cause of action' as a reason for adopting the term.

"So we now have many cases dealing with claim for relief, but we have not thereby escaped the basic question which arises in many contexts such as the application of res judicata, statute of limitations, and the like.

"While there was no reason for the change of terms, similarly there would be no particular magic in changing facts. What is needed is to end the improper application of Rule 8. Since the books are now full of decisions leaving out of that rule what is there, something may well be added to make sure that it was read correctly. Perhaps the following addition would do:

"'A statement of the claim shall not be deemed sufficient to show that the pleader is entitled to relief unless its allegations of fact, if established, would support a judgment in favor of the pleader. Mere assertion of a claim or of a bare legal conclusion shall not be sufficient.'

"However, correction of Rule 8 is only the starting point, for what the courts have done to that rule is only an aspect of wider concern. The courts have fallen into a

tendency of deferring the accent in litigation to the last possible syllable. The cure is to move the accent back to the earliest, just as the Englishman tends to pronounce his words. Every controversy starts as an undigested, unorganized, diffused mass of facts. The human mind is not capable of reaching judgments on such a mass. It must first reduce the bulk. To do so, it must first determine what principles are relevant, organize the facts into categories, and discard those that are irrelevant.

"We often hear the plea that a piece of evidence should be received to complete the picture, and judges often let the evidence in for that purpose. But the job of the judge and the lawyer is the reverse of completing pictures. A photograph is full of detail, but before a controversy can be resolved, details must be washed out and the photograph reduced to a line drawing. From the moment a client drags the case into the office, the lawyer starts the task of defining, refining, and eliminating, and until he does so he can neither know what is pertinent nor how to present his case. From the moment the case comes into court the judge must start on the same job. Until he does so, he can not decide the case except by way of an emotional response to some fact that may bubble to the surface or attract his eye by its glitter. The sooner the job of defining, refining, and eliminating begins, the better.

"There are those who belittle issue pleading, but one can not decide a case until he knows what he has to decide. It

is not enough to know that he has to decide whether or not the plaintiff gets what he wants. The undigested mass must be broken down into specific questions that can be tested against specific facts and matched against specific legal principles. When this is done the case has been reduced to issues. This job can not be avoided. It can only be deferred. In the end, the deferment merely gives us new names for old jobs.

"For example, those who insist on notice pleading and the use of pre-trial conference to simplify, that is actually to discover the issue; particularly those who formalize the pre-trial procedure and pre-trial order, have discovered nothing new and are repeating an old experience.

"At early common law, a suit started with the issuance of one of a number of formal writs, which were in effect notices of disaffection stating in a vague way the general area of the law in which the grievance was set. Then the parties came before the judge and clerk and engaged in a dialogue to determine what the controversy was about, and what issue the court was to decide. The results of the dialogue were reduced to writing by the clerk. Call it what you will, this was a pre-trial order.

"Later, the waste of time involved in this process was obviated by requiring the parties to reduce their dialogue to a series of pleadings written at greater leisure in the lawyer's office.

"This development succeeded in the later common law

pleading and in equity practice, but I make so bold as to say that code pleading as practiced in the metropolitan areas of California has been a better system than federal practice under the Clark version of Rule 8."

I am reading the text as it is, sir.

"The conversion of Rule 8 to notice pleading is part of a broader tendency of deferring the inevitable necessity of thinking through a case. The pleadings are reduced to nothing. If the opponent's pleading is bare and sparse like OPA or OPS complaints, replete with recitals of what the statute says but empty of fact, one is told that he may not have a more definite statement. If a complaint is loaded with innuendoes and historical irrelevance, like an antitrust complaint, one is denied a motion to strike. In each instance the necessary job of coming to grips with the issue is deferred, with the consoling assurance to counsel that the issue can be found and framed by discovery procedure in the pre-trial conference.

"Consider this, too: Discovery practice does not define issues. It simply throws into the hopper the whole undigested mass of facts. Anything goes. Attorneys must inquire into everything and prepare for everything, because no court will tell them where to stop or permit them to stop an adversary. The waste of time and money is immense. Discovery is simply not an instrument to find issues. It is a process for finding facts or proving one's case, and it ought not to

be required until some preliminary definition of issues has occurred.

"Consider next the pre-trial conference. If the issues are simple, a simple pre-trial order can be prepared, but the job could be equally well done by proper pleading. If the issues are complicated, as much effort is involved in framing a pre-trial order as would be involved in framing pleadings. Instead of the judges sitting back and cutting Gordian knots when counsel find themselves at loggerheads, have the court rule at a pre-trial conference on whether an issue is relevant, instead of doing the same thing on a demurrer or motion to strike."

"Names are changed, but the task has only been deferred" and the task and decision ~~isn't a bit different~~ a bit more difficult. I have added that latter.

"As likely as not, the essential job of defining the issues and cutting out the irrelevant is once again deferred at pre-trial conference with the excuse that the court can better tell the significance of the thing after the whole picture has been completed at the trial. The attorney who sought the pre-trial conference goes away frustrated. Having failed to induce the court to come to the case on the pleadings, counsel may try again by motion for summary judgment, hoping in this way to strike at the jugular vein before time and money are squandered. As Judge Chase argued in Arnstein v. Porter,

154 F 2d 464, 479, there must be some procedure to avoid useless trials, and if courts will not use pleadings for the purpose, they ought to use the summary judgment procedure.

"But once again, courts defer the inevitable. Instead of exercising the powers of acumen to pierce to the core the case, they frequently exercise powers of imagination to turn up lurking issues of fact.

"So the parties come to trial. But objections to evidence will not be sustained. Everything goes in, either to complete the picture or subject to a motion to strike. If a motion to strike is made, counsel are told, likely as not, that it will be ruled on when the case is decided.

"The parties now come down to the home stretch, still entangled in an undigested mass of fact. Everything has to be discussed in the closing briefs and argument. At the very end the court will do what it should have been doing steadily throughout the litigation. No one would think of trying to refine gold from the base rock without having first subjected it to the several steps of crushing, concentrating, and milling. The refinery would break down if the ore were dumped into it directly. Yet courts reach final judgments in much this way.

"Nor is that all. If an attempt is made by counsel, whether victor or vanquished, to define and refine the case by adequate findings so that he may have the clear issue before the Court of Appeals, he is apt to be eluded entirely. The

court writes an opinion intermingling fact, law, and argument, as opinions ought to do, and then adopts its opinion as its findings, often more to the satisfaction of the appellant than the appellee.

"Thus the case goes up on appeal. The record is huge, for nothing has been winnowed out. Everything has to be briefed, albeit in 80 pages, because nothing has been defined. The Court of Appeals writes its opinion. It may find its own facts, and no one recognizes the case as the same one tried below."

I guess he had some bad experiences.

"The starting point is Rule 8. Good lawyers can adapt themselves to any kind of procedure. If loose and easy pleading is tolerated, indeed required, good lawyers will take advantage of it. Why not? But they would prefer to present a clean case. Rule 8 as now construed makes litigation expensive, ponderous, and amorphous. The alternative is not over-refined technical pleading. It is intelligent effort to use all the machinery available to the end of defining and redefining the case, beginning at the earliest possible moment and keeping at it at every stage.

"Stricter pleading plus motion for summary judgment plus the pre-trial conference would make an excellent system. Rule 8 should be amended, but this committee or another should consider and report on the whole problem of judicial deferment and the task of coming to grips with cases."

I want to state further in this connection that when the matter was referred to this committee and sent to Judge Clark as the Reporter, he sent to our court and asked that we make a list of all of the motions to dismiss which had come before us where we thought that the matter could have been improved by proper pleading. I told him that it would be absolutely impossible to do so. I have been on the federal bench for ten years. I have had a long motion calendar every Monday. Some Mondays we have as many as 40 to 60 matters to pass on. It would have been a completely impossible task for me to have gone back to the clerk's office and to have gathered together the many, many, many instances where time of the court and of counsel and great cost have resulted to the litigants because the complaints were not properly prepared and did not state the thing which was within the knowledge of the plaintiff and which the court should know and the defendant should know at the earliest opportunity; that is to say, the facts which occurred which entitle him to a judgment under the law.

I do have one experience that I want to relate which will illustrate the point of bad pleading, Kohler v. Glick Lumber Company, 146 F.2d 566. It was an OPA price ceiling case. They filed a motion to dismiss. I examined the complaint. It was exceedingly sketchy. Had I been a practicing lawyer, I would not have known how in the world to advise the client to answer it. It seemed to me that it did not state any facts. All of the facts

were on information and belief. It didn't seem to me that it stated a claim for relief under the Rules of Federal Procedure, and I granted a motion to dismiss. It went up to the Circuit Court of Appeals and, without making a statement in as strong language as Judge Clark has done, they nevertheless did state that it did state a claim for relief under the new rules, as the defendant could find out what the facts were by discovery proceedings. He could file a motion for a bill of particulars.

So the defendant filed a motion for a bill of particulars. The government came in and said they wanted some time to answer. Six years after the original complaint was filed, the government came in and confessed that they never could have furnished a bill of particulars. In other words, they never did have a cause of action and never could have stated facts sufficient to constitute a cause of action in that case.

I had another case here, but it would take too long to detail it. I think the plaintiff recited in one paragraph beginning with Runnymede in one paragraph and going on down through various Articles of the Constitution and numerous laws of the United States, and said he was entitled to relief under those or some of them. He had 74 printed pages -- he had taken the trouble to have it printed -- 74 printed pages of a conglomerate mass of facts, arguments, conclusions, evidentiary matter and suppositions,

I heard motions to dismiss. I heard arguments for three days. I finally granted the motion to dismiss on the condition that he amend and separately state his causes of

action. He finally got them down into five separate causes. I heard arguments again. It went on up to the Circuit and they affirmed my dismissal in that case.

There, had the plaintiff been required in the first instance and had he known in the first instance that he would have had to state facts sufficient to constitute a cause of action so that a judge in picking it up would know what he was talking about, all that time and money would have been saved.

One other thought. The rules have been in effect now I think fifteen years, and yet this provision of Rule 8 has never got to the Supreme Court for construction. It seldom gets to the appellate courts for construction. The battle-ground here is down in the trial courts.

In our circuit, a great many of the judges are reluctant at all ever to grant motions to dismiss on any ground, because they have had the experience of granting them, and they go up to the circuit and they come out with a statement similar to the one that was made here a while ago, that if any conceivable state of facts can be proved and the plaintiff is entitled to relief under any theory of law, whether it is disclosed or not, then it states a claim for relief.

I submit, gentlemen, that if that is to be the state of pleading, if that is all a lawyer has to do, then you are wasting your money on law schools and teaching lawyers how to practice law.

I thank you very much for listening to me.

Mr. Rhyne has a statement to make.

STATEMENT OF J. E. SIMPSON, ATTORNEY, LOS ANGELES, CALIFORNIA; CHAIRMAN, COMMITTEE ON FEDERAL RULES AND PRACTICE, LOS ANGELES BAR ASSOCIATION (PRESENTED BY CHARLES S. RHYNE, ATTORNEY, WASHINGTON, D. C.)

MR. RHYNE: Mr. Chairman and Members of the Committee:

First of all, I would like to explain that I appear here for Mr. J. E. Simpson, who is an attorney in Los Angeles, California, and Chairman of the Los Angeles Bar Association's Committee on Federal Rules and Practice. I myself am a member of the District of Columbia Bar and, as I explained to Mr. Simpson when he called me last week and said he was forwarding his file and a statement which he would like me to present to you, our experience here is somewhat different, but he said he thought that would illustrate the very problem.

I explained to him that I had many times argued motions to dismiss and had them granted on the ground that the particular claim did not state a cause of action.

Mr. Simpson's committee has filed a very exhaustive report. He himself has served as a lawyer delegate to the Ninth Federal Judicial Conference. He is also a member of the committee of the California State Bar on this subject. So he has followed it rather thoroughly for a considerable length of time.

He did give me a very short statement which, with your

permission, I think would summarize the whole thing and will present it in much better fashion than if I tried to summarize for you this very voluminous file which he forwarded. If I may, I would like to read that statement, Mr. Chairman. This is the statement prepared by Mr. Simpson:

"In 1949 Judge Peirson M. Hall of the Southern District of California introduced a resolution at the Federal Circuit Conference for the Ninth Judicial Circuit that a Committee be appointed to study whether a claim for relief under Rule 8(a) should be required to allege facts sufficient to constitute a cause of action. A Committee was appointed.

"Thereafter the matter was referred to and considered by the Federal Rules and Practice Committees of the State Bar of California, the Los Angeles Bar Association, and the State Bar of Oregon for study and report.

"On April 2, 1951 the Committee of the State Bar of California submitted a written report recommending that Rule 8(a)(2) be amended to provide that a claim for relief shall contain "(2) a short and plain statement of the claim showing that the pleader is entitled to relief, which statement shall contain the facts constituting a cause of action." This report pointed out that the opinion of the Court of Appeals for the Second Circuit in Dioguardi v. Durning, 139 F 2d 774, 775, stated that Rule 8 abolished the "pleading requirement of stating 'facts sufficient to constitute a cause of action'," and

that certain text writers had stated that this was the general holding of the courts. The Committee was of the opinion that the requirement that a claim for relief actually state the facts constituting the cause of action would aid the Court at every stage of the proceedings in clarifying the issues.

"This report of the Committee of the State Bar of California was submitted to and made a part of the Report of the Committee of the Ninth Circuit Conference. It was discussed at length at that Conference in June, 1951. The Committee was continued for further study and report.

"The Los Angeles Bar Association Committee rendered a report on February 19, 1952 which was thereafter adopted and approved by the Board of Trustees of that Association. That report pointed out that as a result of the statements made in the opinion in the Dioguardi case which had been cited with approval by a number of other courts, that there was a difference of opinion as to whether or not under Rule 8 a plaintiff or cross-plaintiff was required to allege facts sufficient to constitute a cause of action. It was the opinion of the Committee that if a plaintiff or cross-plaintiff has a cause of action he should be required in his pleading to allege the facts constituting that cause of action and that it should not be left to his adversary to discover by discovery proceedings the facts which should have been alleged in the plaintiff's pleading. The Committee pointed out that some teachers of

pleading and judges believed that the rule properly interpreted still required a claim for relief to allege facts sufficient to constitute a cause of action and that there was no necessity for amending the rule. It was the Committee's view, however, that since the trend of the court decisions was in accordance with the statement made in the Dioguardi case, that the quickest way of obtaining clarification of the matter was by an amendment of the rule.

"Thereafter, the Committee appointed by the Federal Judicial Conference for the Ninth Circuit submitted its report to the Conference recommending that Rule 8(a) be amended in substantial conformity with the recommendations of the State Bar of Oregon, and the Committees of the State Bar of California and the Los Angeles Bar Association. The conference of State Bar delegates of the State Bar of California, by an overwhelming vote, made a similar recommendation. The report of the Ninth Circuit Committee was adopted by the Judicial Conference for that Circuit."

Then Mr. Simpson, in the next part of his statement, lists the reasons for the proposed amendment to Rule 8(a), and the reasons he lists are as follows:

"Rule 8(a) provides in part that a claim for relief shall contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'

"California Code of Civil Procedure, Section 426,

subdivision 2, provides that a complaint must contain 'a statement of the facts constituting the cause of action, in ordinary and concise language.'

"When the Rules of Federal Civil Procedure were under consideration and after they were adopted, California lawyers generally believed that Rule 8(a) and California Code of Civil Procedure Section 426 had the same meaning. They believed that a claim for relief must state the facts constituting the cause of action. They did not understand that the requirement of pleading the facts constituting the cause of action was being abrogated. They did not understand that conclusions or arguments could be substituted for the pleading of the essential facts necessary to constitute a cause of action.

"There is nothing in the notes of the Advisory Committee indicating an intention to change the rule of pleading so as to eliminate the requirement that a complaint must plead sufficient facts to constitute a cause of action.

"Then came the case of Dioguardi v. Durning, 139 F 2d 774, in which the court stated:

"'Under the new rules of civil procedure, there is no pleading requirement of stating "facts sufficient to constitute a cause of action," but only that there be "a short and plain statement of the claim showing that the pleader is entitled to relief," Federal Rules of Civil Procedure, rule 8(a), 28 U.S.C.A. following section 723c; and the motion for dismissal

under Rule 12(b) is for failure to state "a claim upon which relief can be granted."

"It may be that this language of the Court was unnecessary to the Court's decision inasmuch as the Court held that the plaintiff's pleading sufficiently disclosed his claims that the defendant had converted his property. However, in reliance upon the language of this case, many other courts have cited the quoted language with approval as constituting the rule that it is no longer necessary to plead the facts sufficient to constitute a cause of action.

"If it was the intention of the Advisory Committee to abrogate the rule requiring the complaint to allege facts constituting the cause of action, that intention was not disclosed in the notes of the Committee. If that was the intention of the Committee, and that is what the rule means, then we believe that the rule should be amended to require a claim for relief to allege facts sufficient to constitute a cause of action.

"If it was not the intention to change this pleading requirement, and if the rule properly interpreted still requires the pleading of sufficient facts to constitute a cause of action, then the court decisions above mentioned have not correctly expressed the intent of the Committee or the Supreme Court.

"Since these court decisions are being cited as the general rule, we believe that steps should be taken to correctly interpret the rule so that it will be clear that a claim for

relief must still allege facts sufficient to constitute a cause of action.

"This result could, of course, be achieved by the decision of a higher court but the difficulty of obtaining a review by the Supreme Court on a question of pleading is well known.

"In the absence of such a decision by the Supreme Court an amendment of the rule would achieve the same result.

"If this Committee should be of the opinion that the rule, properly interpreted, now requires the pleading of facts sufficient to constitute a cause of action and does therefore not require amendment, the problem is presented of how such an opinion could be rendered, and if rendered what effect it would have upon the interpretation of the rule in view of the apparently contrary court decisions.

"In the interests of clarity and uniformity, we believe that the shortest and quickest way of effecting the result recommended is by amending the rule."

That is the end of Mr. Simpson's statement.

I may say that in reviewing his rather voluminous file on this, he has had correspondence with General Mitchell and Judge Clark and others.

In the light of my own personal experience, which is all I can speak for, here in the District of Columbia our judges will grant a motion to dismiss if your claim doesn't

state a cause of action.

The thing that appeals to me is that we here didn't know a lot about this difference of opinion which seems to be spreading all over the country, and in the interest of ending the confusion and clarifying the situation in these other courts and promoting uniformity, an amendment to the rule probably should be considered by this committee, which is the official body from which all amendments emanate.

I thank you very much for allowing me to appear in place of Mr. Simpson.

JUDGE HALL: May I have one more word.

New Jersey has adopted the Federal Rules of Civil Procedure. Having reference, however, to the Supreme Court Rules of New Jersey, I find that the statement of a claim or complaint as a pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or a third-party claim, "shall contain (1) a statement of facts on which the claim is based showing that the pleader is entitled to relief."

Judge Vanderbilt, who I guess was given credit for the adoption of those rules, in interpreting them the first time they got before the Supreme Court of New Jersey in Grobart v. Society for Establishing Useful Manufacturers, et al., 65 At. 2d 833, at 838 said with relation to pleadings:

"While the names of modern pleadings have changed,

among other reasons, to indicate that we have outgrown the legal technicalities and absurdities which, under the name of special pleading, brought disgrace on the common law in the 19th Century, the essentials of good pleading remain, and necessarily so, because the human mind has not been able to find over the centuries any other method of dealing on the merits with questions of law and fact express or implicit in an initial pleading."

The amendment that is recommended to Rule 8 was made in consideration of the fact that throughout the Federal Rules of Civil Procedure the term "claim for relief" occurs. So if the committee agrees that there should be ~~some clarification of~~ the amendment ~~to~~ as recommended by the 9th Circuit Conference the rule, it would not be necessary to amend any of the other rules, such as 12(b), ~~I think it is, on a motion to dismiss, or any of the other rules which relate to~~ which uses the phrase "claim for relief."

I could say a great deal more about pre-trial conferences and discovery proceedings, but I think perhaps I have said enough to convey the general idea to the committee.

MR. RHYNE: Mr. Chairman, could I add just a word. In reviewing Mr. Simpson's files, I think the committee here might be interested in this: The organizations which have taken formal action approving the amendment are these:

The Federal Judicial Conference of the Ninth Circuit; the State Bar of California; the Conference of State Bar Delegates of the State Bar of California, which I understand is

really sort of like the House of Delegates of the American Bar Association, and also part of the California State Bar; the State Bar of Oregon; and the Los Angeles Bar Association. Those are the organizations which, from Mr. Simpson's file, seem to have taken formal action approving the proposed amendment which he has suggested.

JUDGE HALL: In 13 Federal Rules Decisions No. 5 at page 253, Judge Yankwich of our court has set forth in article form the report of the California Bar Association, the Los Angeles Bar Association, the statements in opposition to the amendment, and the discussions at the Ninth Circuit Conference, if any of you are interested in reading the text of them.

Thank you.

Does anybody want to ask any questions?

CHAIRMAN MITCHELL: I would like to ask one question, and that is: What does our rule mean when it says there must be "a short and plain statement of a claim on which relief may be granted"? Doesn't that mean that there should be a sufficient statement from which the court can determine whether or not under established rules of law the plaintiff is entitled to recover?

JUDGE HALL: I had understood that that meant a statement of facts, because the plaintiff comes in, and it is on the basis of facts that he is entitled to have certain rules of law applied. But it doesn't seem to me that, under the

decisions that I have cited here, that is the way those courts are construing it.

CHAIRMAN MITCHELL: When I first had this case in the Second Circuit, Dioguardi v. Durning, the one that Judge Clark was the author of, called to my attention, I went to the library and got that case and I read it over very carefully. I got the impression from what the court said that all they meant when they said there is nothing in the pleading rules that requires a statement of facts constituting a cause of action was that the requirement of the rule wasn't stated in that language, and they quoted the language of the rule to show what it did state. I didn't get the impression from that opinion that --

JUDGE HALL: Apparently other courts have had the contrary impression, as have also the text writers, from the decisions which I have cited to you.

CHAIRMAN MITCHELL: Don't you think that, as a matter of fact, a good deal of the trouble which has arisen has been due to a misapprehension of what the Second Circuit meant when it said that there was no pleading requirement that you had to state facts constituting a cause of action, and what they really meant was that that wasn't the way the rule was expressed. They then stated how it was expressed.

JUDGE HALL: If that is what that decision means. But that isn't what the language says. It doesn't seem to me as

though that is the way it is being interpreted.

CHAIRMAN MITCHELL: That may be true. Of course, there is one difficulty about any opinion of the Second Circuit about these rules, that Judge Clark takes part in. It is examined with a microscope because he is the Reporter of this committee and has been on it for 18 years. I felt that a good deal of this misapprehension that is reflected in the statements of writers and the opinions of other courts has been due to what I think is the fact that the Second Circuit was merely quoting what the rule said when they said there is no pleading requirement in the rule in that form.

JUDGE CLARK: May I say something here.

JUDGE HALL: May I say this in response to the Chairman. I think probably that could be an interpretation of that opinion, because Judge Clark shows enough facts later on in the opinion to show he is entitled to some kind of relief, but that bare statement in the opinion is picked up and quoted. So if the rule means that a statement of claim must be a statement of facts showing that a man is entitled to legal relief, that is one thing.

CHAIRMAN MITCHELL: How can you show he is entitled to relief unless you do state the facts out of which the claim arose?

JUDGE HALL: I don't see how you can. How, then, do we have these decisions saying there is mere notice pleading;

that they don't have to give any statement of facts, but merely notice?

JUDGE CLARK: I want to say that my understanding of what I was trying to do is exactly what the Chairman says. That is what I thought I had said, and I thought I had said it many times. I said it as early as 1928 in the first edition of my book when I said that notice pleading in the federal courts was not likely to be followed. I have said that ever since. I said that in the second edition of my book. I have said it, as I understand, in the cases. I have held complaints insufficient. I really think that there has been a misinterpretation.

What we were dealing with in the main was to try to get away from something which really has never been defined, namely, the weasel term "cause of action." What we were discussing mainly was the difference between generality and detail. I know of no responsible decision anywhere which says that you do not have to convince the court that you are entitled to a judgment. I think that has been stated over and over. In the cases which cite the Dioguardi case there may be certain of the district court cases, but so far as I have read them, they all say the same thing.

I might say, Judge Hall, my own count was about 55 citations.

JUDGE HALL: There may have been 55 decisions, but there were 37 that referred to paragraph 1, this one point.

JUDGE CLARK: It has been quoted in various other jurisdictions, in Delaware, Arizona, and so on. I don't think it really has been widely misinterpreted. The first criticism I know of that was published was by Professor McCaskill in the ABA article. I don't want to make a long defense of my life. I do wish my book on Code Pleading, which antedated the rules and which also postdated them, the first edition before, the second edition afterwards, had only been read, because it seems to me that I went into this in some detail.

I do want to add one thought, that I think you and the Los Angeles lawyers might love me more than you really think. I have that feeling, because of the very persuasive remarks of Mr. Lasky which I read and which were published. Mr. Lasky quotes quite feelingly a decision of Judge Chase of our court in Arnstein v. Porter, pointing out the necessity of some way determining the facts in advance of trial, and suggesting that a very proper way to do it is by summary judgment.

I think that is a fine statement. The reason I think it is a fine statement is that I wrote it. Mr. Lasky has done me the honor of calling me Judge Chase. Judge Chase did not sit in that case. I wrote that statement in dissenting, as I have done quite a little, on the denial of summary judgment, because I think that lawyers are entitled to find out the merits to do away with a long trial.

When I suggest that you might love me more, I think

I have done a great deal in trying to establish that principle, not so much by the formal pleadings but by the various pre-trial steps.

Federal judges in general, however, have gone much farther than I in saying that you can not have a settlement of a case in that fashion. My colleague, Judge Frank, for example, has popularized the statement that you can not have a trial by affidavits. He recently said that a motion to dismiss was a very poor strategy by a defendant. I cite this as saying that those decisions really go much farther than I would like to go, and I would like to recommend, myself, the greater use of summary judgment.

The reason I do that is because I think the summary judgment is one way of directing the parties' attention to the merits, just as is the pre-trial and just as is the discovery method. The difficulty with putting too much on the pleadings is that the pleadings are not binding on anyone. I do think you can get certain things out of the pleadings, and that is why I have always opposed notice pleading in everything I have ever written.

I can cite that going back not only to my book, and so on, but to the memoranda that I gave this committee in 1935.

So I think that the situation is, as I said before, that you must convince the court that you are pleading that you are entitled to a judgment, that you are making a simple state-

ment showing that you are entitled to relief. But I would not stop then and try to polish up the pleadings and go over them. I would rather get the parties down to the merits on summary judgment or discovery or pre-trial.

I really felt that I was more of an exponent of reaching it that way than at least a good many of my colleagues, perhaps most of them.

JUDGE HALL: I think, Judge Clark, it is certainly true that many of the cases which cite the Dioguardi case have gone much further than you went in your statement. It seems to me that it is quite obvious that there is some dispute as to whether mere notice is sufficient, or whether a claim for relief shall be such a claim as, under a state of facts, a person is entitled to a judgment or relief under the law, and that this committee, if they do not adopt an amendment, may very well make a clarifying statement as to what was intended by the term "claim for relief."

It is true that that might not be binding on the courts, but it certainly would receive respectful consideration by everyone, and in my judgment would tend to clear up these two dividing lines of cases that are now going off in two opposite directions, ~~both the bar and the~~ and with lower courts -- ~~mind you, now, we are the~~ being the ones who do 99 per cent of the work on motions to dismiss -- ~~leaving~~ as it presently leaves us rather up in the air as to what is the law. If some statement could be made, if an

amendment can't be adopted, it would be appreciated.

Thank you.

CHAIRMAN MITCHELL: We are very much obliged to you for coming here. Thank you very much for your attention.

MR. LEMANN: Are motions for more definite statement used very much in your district?

JUDGE HALL: Yes, motions for more definite statement are used a great deal. One difficulty on discovery proceedings is that the discovery proceeding comes in, and they have interrogatories or demands for documents, and your complaint is a little vague and you don't know quite where to stop.

MR. LEMANN: But motions for more definite statement are served on the court.

JUDGE HALL: Yes, motions for more definite statement. For instance, on a motion for discovery the rules provide, in connection with discovery and depositions, that not only is it permitted to make discovery of things that are material, but things which may become material. You can't tell many times from the complaint what may become material, so the result is that you allow the widest latitude of discovery. Sometimes it costs a great deal of money.

I had a class action against Armour & Co. involving many millions of dollars, about dried eggs. They spent hundreds of dollars for accountants going over the country, and finally they came in the other day and settled it, fortunately. I could

not tell where to stop it or where it should end.

I thank you.

... Judge Hall and Mr. Rhyne left the meeting ...

CHAIRMAN MITCHELL: How do you define the term "notice pleading"? It is utterly meaningless to me. What do you mean by "notice pleading"? A man knows he is sued when the summons is served. Notice of what? That you have a claim against him, some kind of claim or a definite claim?

PROFESSOR SUNDERLAND: That is what I have always wondered, I don't think it means anything.

JUDGE CLARK: There has been a great difficulty over that because that has become a tag. As a matter of fact, I have tried to avoid use of the term because I thought it had been debased. The idea, as I understand it, developed first in the Municipal Court in Chicago, where there were mostly small claims. It was popularized many years ago in an article by Professor Clark Whittier entitled "Notice Pleading" many years ago, 30 or more years ago. It has been advocated extensively.

As I understand, notice pleading of that type really is simply a notice of the litigation. "Please take notice that So-and-So is making a claim for so many dollars," and I don't know that even the dollars are necessary, "against the defendant.

CHAIRMAN MITCHELL: Without saying why?

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: How could it be a claim upon which judgment could be rendered?

JUDGE CLARK: That seems to me to have no connection with anything we have done here. That is why, when the term "notice pleading" is used loosely as to the federal system, it seems to me entirely a misnomer.

It is justified, it seems to me, in certain courts which only have stereotyped issues. For example, in probate in a will case, you really wouldn't need to state any particular pleading for the probate of a will, because it is more or less worked out. In the small claims courts, where you are collecting claims, you might say that all you need to say is, "I want to claim a debt," although there, in general, before you get a judgment you are going to have the debt specified in some fashion by some affidavit of indebtedness or otherwise.

It has always seemed to me that notice pleading would be all right in a stereotyped court where you have certain definite situations. Notice pleading is not adequate in any general court. That is what I have said, really.

I don't want to make a defense, but I have said this right along, before and since Rule 8(a).

CHAIRMAN MITCHELL: I have had Mr. Tolman pick out of the records of the committee the transcript of the debates and proceedings of this committee at the time we adopted this

rule, and the discussion of this business of "cause of action and fact." I found I had been a little off the track. My recollection had been that the fight was based largely on the use of the phrase "cause of action" as unscientific and bad English and all the professors were against it, and that is all there was to it. But I found I was wrong about that; that there was another criticism made at the time about the use of the phrase "facts constituting a cause of action," because the courts had got themselves into a terrible snarl as to what you meant by "facts," "ultimate facts," "evidentiary facts," and all that sort of stuff. Conflicting decisions arose through the use of the word "facts."

Yet it always seemed to us that our phrase, "a claim showing that the plaintiff was entitled to relief," necessarily involved a statement of fact, because how can you say a man is entitled to a judgment which the court can render, that he has shown he is entitled to relief, without stating the facts?

There you are. It is evident to me -- I don't want to do all the talking here -- that a lot of confusion has arisen on this subject. The courts are grabbing up statements made in one opinion or another and misconstruing them. They have gotten themselves into a mess about it.

There is a good deal in what the bar out there say and have said here today. If we don't want to amend the rule,

at least have the committee make a note stating what they think the phrase "claim showing a man is entitled to relief" means. Correct the confusion which has arisen by a note.

They also suggest that we make some verbal change in the rule. It seems to me that is the problem that this committee has before it: which course to pursue.

DEAN MORGAN: Mr. Chairman, it seems to me if we went back to "facts" and "cause of action," we would necessarily bring with it all the gloss that has been on there. If you will remember, the New York Code was passed in 1848, and it wasn't until 1920 that it was decided that an allegation "for a valuable consideration the defendant promised" was a statement of fact. Before that, the appellate divisions were in conflict on it, some of them upholding the demurrer and some of them not.

You get the distinction between statements of fact and conclusions of law and statements of evidence. Statements of evidence are all right if, from all the evidence, you state the conclusion necessarily follows, and so forth. You just get into a terrible mess.

I have here an opinion by Learned Hand which would just go in the teeth of this particular thing right now. If you use "facts constituting a cause of action," Learned Hand says right here that the cause of action doesn't consist of facts. There you are. This is the Second Circuit.

CHAIRMAN MITCHELL: It depends on them, doesn't it?

DEAN MORGAN: It consists of a right which is infringed. Then you have theory pleadings.

CHAIRMAN MITCHELL: How can you have a right unless you have some facts?

DEAN MORGAN: I don't know, but that is what he says. All I am saying is that he is saying that a cause of action doesn't consist of facts. That is exactly what they want us to say.

MR. DODGE: It consists in part of facts and in part of law.

DEAN MORGAN: Yes, it consists of whatever you happen to think about. General Wickersham wanted to use "cause of action," and he said everybody knows what it means. We asked him to define it, and he was right up in the air.

We have used "cause of action" for years and years. The New York cases are full of distinctions between conclusions of law and statements of fact. Jerry Michael, in his book on Elements of a Legal Controversy, because he wanted to make the distinction between statements of fact and conclusions of law, has a whole series of cases just on that particular point.

It seems to me you are just making confusion worse confounded. The fact is this rule has worked well wherever the judge wants it to work well.

CHAIRMAN MITCHELL: There is no question about it.

A lot of the judges and lawyers of the country have reached the conclusion that our statement that you must show a claim upon which relief may be granted does not involve and definitely excludes any statement of fact as the basis for your claim. They have reached that conclusion. That is wrong, isn't it? You state a claim on which relief can be granted.

DEAN MORGAN: You can't do it without stating something; of course not.

CHAIRMAN MITCHELL: What are you stating?

DEAN MORGAN: He says if you throw an undigested mass of facts at them, that won't do. What he is arguing for is theory of pleading.

JUDGE CLARK: I think there must be some who have run into difficulties following that course. It always has been my conclusion -- and I have read every case that I can find on this -- that this has worked remarkably well. I certainly deny the statement of the gentlemen here that there has been very much confusion. There has not been. I think that I was justified in asking Judge Hall for particular instances, which he has not been able to give. He has given only two cases. One of them is the one that I wrote, and I have asked all these judges whether they would have decided that case differently. It is a question whether we should have thrown a poor illiterate Italian out on his ear when he had stated -- as a matter of fact, he stated to us -- I mean, what he had

actually there was a plethora, and we had to diagnose it and chew it to pieces. The chief reason for the opinion, as a matter of fact -- it may be too bad that a judge ever writes an opinion -- is for the circumstances. Of course, we weren't writing a treatise on pleading. We were trying to suggest to the government that they ought to proceed by summary judgment. If they had given us a hint what the merits were, by affidavit, we could have gone ahead, but they didn't. The opinion was directed to that specific thing.

The only cases that I can find are very limited, and they are mostly where Judge Hall was reversed by the Court of Appeals of the Ninth Circuit, as he said quite frankly.

There is another case that is quite well known, and I have cited it here. It is the Lane Bryant, Inc. v. Maternity Lane, Ltd. case. That is a case where the motion was to dismiss and the Third Circuit reversed him.

I have asked him for specific instances. I don't think you can go through the cases and find real cases of doubt about this. I don't see that the judges are stating a difficulty of this kind, except those who have decided that they dislike the rule. The rule is never going to be construed favorably by those who want to show that it is no good, but you take the generality of the cases and it seems to me that they have done really a splendid job.

I wonder if it would not be of some interest to you

to go back into history. I would like to take a minute or two to quote from our records as to the genesis of this phrase.

SENATOR PEPPER: Mr. Chairman, would it be agreeable to the Reporter if I asked him a question before he does that?

It is a great help to me in discussing a matter of this kind to think of how the question at issue is ultimately going to be decided by the court; in what state of mind the court will approach the question presented. I notice in Rule 12, where a claim has been filed and it is the desire of the defendant to get greater clarification or to have the case dismissed on motion for summary judgment, that one of the grounds upon which he may move is "failure to state a claim upon which relief can be granted." I am quoting from sub (b) in Rule 12.

Suppose you, sir, were sitting as a judge and a motion came on to be heard before you in which a statement of claim was submitted to you and defendant moved to have the action dismissed because a claim had not been stated upon which judicial relief could be granted, what considerations would move you in deciding that? Would you do what you would have done before modern pleading took place, if you had been Baron Parke sitting to hear argument on general demurrer to a declaration? Would your decision be that this declaration is good on general demurrer because it states the relief, the form of action which the plaintiff has invoked, and gives a sufficient body of factual matter to justify the statement the

plaintiff is entitled to relief?

CHAIRMAN MITCHELL: That is just what I would do.

SENATOR PEPPER: If so, I gathered through all this cloud of words that that is all that these gentlemen are after, and that the real difficulty we have is that we are engaged in breaking lenses over certain technical terms like "cause of action," as to which we have misgivings, or the distinction between law and fact, as to which we have doubts, and that what really ought to be done is to relate the rule that is under discussion, namely, subsection (2) of Rule 8(a), somehow or other to (b) under 12, so that a judge will know when that motion comes before him what he is expected to say.

If all that the plaintiff need do is to get up and say, "Your Honor, this is an improvident motion. I have stated clearly that I am entitled to relief by subrogation," or "I am entitled to relief by damages," and so on; "I have stated that clearly. You see it in my statement of claim," the judge says, "Then there is really nothing for me to do but to dismiss this motion, because the plaintiff has set forth what in his mind is a claim that is entitled to relief."

On the other hand, if we can shape our rule to protect ourselves in advance from that kind of insensate judicial action, it seems to me we would be true to the theory by which we framed this rule, but we also will spike the guns of those who want to blow it out of the water.

For instance, suppose subsection (2) of 8(b) read something like this: that the statement must show jurisdiction and the other things that are comprehended in (1), and then (2) "A statement of the claim such that it will appear to the court that upon the face of the pleadings the pleader is entitled to judicial relief."

That gets away from "cause of action," it gets away from any attempt on our part to draw distinctions between issues of fact and issues of law, and it puts it up to the court who, after all, is the boss of this proceeding. He is going to try the case. It puts it up to the court to decide whether this is a mere case in which a plaintiff comes in and cries on the shoulder of the court with no real basis for judicial consideration, or whether he has a claim which, if taken on the face of the pleading, shows that he is entitled to the relief which he has asked or, under a prayer for general relief, to whatever relief the court thinks is needed.

It does seem to me that we ought not just to dismiss all this on the ground that it makes trouble for us or that it is for an insignificant part of the bar or the country. There is something here that is wrong in our set-up, and I think the thing that is wrong is a failure to give to the court, who must pass on the motion to dismiss, because the statement doesn't contain sufficient to justify the claim, language relating to the rule affirmatively providing what the statement

shall contain so that the two things will work together.

Without departing a single bit from the sound theory on which we have proceeded, I think we can formulate a statement under Section (2) of Rule 8(a) which really meets the difficulties that these gentlemen have, and which really expresses the theory on which we think the controversy ought to be decided.

I wanted to get that off my chest before you proceeded.

DEAN MORGAN: Could I ask a question about that, Senator? What is the matter with the wording "showing that the pleader is entitled to relief"? What does that mean? That is exactly what you have said.

JUDGE CLARK: I was going to say, Senator, what you have done is to state just what you said originally. That is what I wanted to bring out. This is your language, as a matter of fact. You are stating it just the same as you did then. I think what you say is a fine statement, and if, by moving the pegs around a little, everybody would think they had something, there might be something to be said for it.

I can not believe for a moment, if the gentlemen know what they are doing, that they would take your statement at all, because it is no different. It seems to me that what is happening if we take your statement is that there is just enough variation so that the very considerable interpretive material that has grown up is now out the window and people will

wonder what has happened. They should say, I think without any question, that the cases should be decided just as they are now. Query: If you achieve enough. It would seem to me that even though your statement seems to me to state what we had in mind, it is a little designed to put everybody at loggerheads just because it comes in late. It is not what the gentlemen want. They show it is not what they want. It is what we have in mind, but everybody will say, "Why did you shift it around a little?"

If I could go back a little to the history, which it seems to me is important to have in mind --

SENATOR PEPPER: That is the reason I craved permission to make the statement, because I wanted you to have what I said in mind when you said what you are now going to say.

JUDGE CLARK: I was going to say, possibly you have forgotten, but you are the author of the original phrase.

This had a considerable history. We went into this at great length. From the beginning, those of us who had worked on the matter were upset by just the state of facts that Professor Morgan has related here: the meaning of facts, the question of cause of action, and so on. As a matter of fact, that decision of Learned Hand you could match with one of Mr. Stanley Reed's, American Fire & Casualty Co. v. Finn, where he had to deal with this because they brought it back into the removal section. Justice Reed does what great judges generally do. He states both. If you look in that decision, American

Fire & Casualty Co. v. Finn, he has in one place that the cause of action is law, legal rights; and in another he has facts.

One of my law clerks was his law clerk at the time, and I wrote down to him and said, "For the Lord's sake, can't you get him to change one or the other, because they can't both be so?" That is the way it is done. He has cited different authorities. He cited Mr. Moore for facts. He cited a previous Supreme Court decision for law.

I thought the decision was pretty good on the whole, and maybe he got there; but from the standpoint of definition, I really think that is an interesting example.

In my first draft for the committee in 1935, I tried to make it a statement of actual occurrences. I attempted to put precision into the old words "facts," and so on. That was discussed back and forth. The nearest thing that I had for a model that I was ready to use was the Equity Rule of 1912, which said "ultimate facts."

I said I thought that was objectionable, and that it had better be stated "actual occurrences." That was considered back and forth at meetings.

At our second meeting in December 1935, we came up with a statement of the right of action with another admonitory statement in another section that all pleadings must be precise, and so forth.

Then in January of 1936, we had various material

before the committee. There was a long memorandum prepared by my assistant, Joe Friedman, pointing out all these difficulties and arguing against using the old terms "facts" and "cause of action."

Another was a long memorandum of Major Tolman in which he made the same point and had a different set of language.

Another was a letter of mine to the committee in which I argued, among other things, against notice pleading.

I point that out just as a little historical memento. It was on that basis that we came to the meeting in February 1936, which was the first meeting attended by our distinguished Vice Chairman, Senator Pepper, who, as usual, had the perfect answer to our problem. This appears on page 253 of the proceedings on Thursday, February 20:

"MR. PEPPER: Mr. Chairman, just in order to have it on the notes for the consideration of the committee on drafting, may I dictate a brief suggestion as a substitute for Rule 10."

That was the one other complaint.

"THE CHAIRMAN: Yes.

"MR. PEPPER: It is as follows:

"'It shall be sufficient if the complaint contain, in addition to an appropriate caption, (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, (2) a short and simple statement of the claim showing that the plaintiff is entitled to relief, and (3) a demand for the relief

to which he deems himself entitled.'

"I do not want to discuss it. I just want to have that suggestion on the notes. It seemed to me there was something to be said in favor of that condensed statement."

That is repeated throughout the discussion.

"MR. DOBIE: I like very much Senator Pepper's restatement, in that it avoids the objectionable term 'right of action.'

"SENATOR PEPPER: And it also omits subject matter in connection with jurisdiction."

Mr. Lemann discusses it, and Mr. Clark says:

"We have before us two things: The pleading of facts or something better than facts. (Laughter)

"MR. DODGE: I would suggest reference to the simple Equity Rule 25," which is the one I have said I first considered, "in which a bill of complaint is described and the third requirement is a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence."

Then here is Mr. Pepper. This, I think, is interesting to get the connection, because Senator Pepper then goes to another rule, which was then Rule 11, stating the details of pleading. We had a sort of backing-up statement in Rule 11 that there should be a short, simple, and concise statement of facts there. That wasn't the provision as to pleading in the

complaint. That was a general admonition as to complaint. Mr. Pepper suggests here that that be condensed. He says:

"For instance, in (d) here in Rule 11 we have this very interesting controversy as to whether facts and law is a true antithesis and whether you shall substitute for 'facts' the words 'acts, omissions, and occurrences.'"

That had been my suggestion.

"It occurs to me that the real trouble is that we seem to be of the opinion that we have to use one or the other of those expressions when I should suppose that if they were both left out the thing would be fairly clear. If (d) read, 'Each averment of the pleading shall be set forth as simply, concisely, and directly as the circumstances permit,' it would go just about as far as I should suppose a rule can go in guiding pleaders and directing the attention of the court to the principle involved. If we then go on and say 'and shall state the facts or acts, omissions, and occurrences,' without detail, we get involved in this endless discussion as to the distinction between facts and law, and I do not think it adds anything in the way of clarity."

You will notice that we followed that suggestion also in the other part of this rule. In other words, that suggestion now appears in Rule 8(e). Instead of there saying "acts, occurrences, facts," and so on, we there say, just as Senator Pepper suggested, "Each averment of the pleading shall be

simple, concise, and direct." We left out the immediate references to facts, and so on.

SENATOR PEPPER: I gather from all this that I am responsible for having gotten the committee into trouble. I will admit it. All I am trying to do is not to backtrack on anything that I said then, but to try and see what it is that, in the minds of some of the bar, creates what I think is a failure to understand us and a failure on our part to understand them. I can't believe that two sets of people are just going to be perversely each insisting on his own course, unless there is some real misunderstanding that can be cleared away.

All I am suggesting is that we should make it clear in the rule. If we don't change it at all, that is that; but if we change it at all, I don't want any "cause of action," I don't want any "facts," or the difference between facts and law. But I would like, if we are going to change it at all, to make it clear that when under Rule 12 the judge has to pass on a motion to dismiss for an insufficient statement, he shall have two thoughts in his mind. One is, "I am asked to dismiss this complaint because there is a bare assertion of a right to recover, and nothing more." The other is, it is not perfectly clear in the original statement of what the statement of claim shall contain that the relief spoken of must be strictly reducible to a category of judicial relief, either legal or equitable. All I hoped to do was to focus attention upon the

thought that a motion for judgment based upon the insufficiency of the statement of claim should emphasize, first, that the court must be satisfied that there is a claim upon which recovery can be had; and, in the second place, that it is judicial relief which the pleader is entitled to, if he is entitled to anything. In other words, I am not trying to backtrack on anything I said 15 or 20 years ago, although that is perhaps a good reason for not accepting it. I am trying to implement it by giving the court some guidance as to what he should do when a motion for summary judgment comes before him.

MR. PRYOR: While I don't think Senator Pepper needs any defense, I do feel that the rule as it was stated, at his suggestion, was an ideal statement of what shall be contained in a complaint. To me it has always meant just what it says: that you have to state the claim in such a way that it would show that you were entitled to relief. I don't care whether you use the words "cause of action" or "claim for relief."

It has been suggested here that "cause of action" are weasel words. How much more weasel words are there than "claim for relief"? It seems to me that in view of all this bluster that has been occasioned by apparent misconstruction of the language, there may be some implication from our doing nothing about it that would encourage further misconstruction. It seems to me that Senator Pepper's idea is very good here, and I support it.

CHAIRMAN MITCHELL: I don't want to be understood, by anything that I said on the theory that I was proposing that we use the phrase "cause of action," that we go back to it or something of that kind. Nothing of the kind. My conviction about this situation is that, aside from the question of confusion about what are ultimate facts, evidentiary facts, and all that, the statement in our rules, "state a claim on which relief can be granted," is the substantial equivalent in substance to the old rule that you must state facts constituting a cause of action. I think the people in the West have gotten off the track. I am not criticizing Judge Clark, but that opinion of his in the Second Circuit I think has been misconstrued when he said flatly there is nothing in these rules that required them to state facts constituting a cause of action. That has been misconstrued, and I think they thought that that means that the claim we provide for is not the equivalent of that.

All he was doing, I am sure after reading the opinion, was simply to say that specifically the language of the rule, in terms, didn't call for facts constituting a cause of action. He didn't mean to say that our rule wasn't the substantial equivalent of that.

When these fellows pounded me with all this material over the years, I have written them to that effect. I think it is Tweedledum and Tweedledee. I told them I thought the Committee's rule meant exactly what I understand it to mean: that

you have to state some facts, I don't care what they are, from which a judge can determine on the face of the statement that you have a good claim.

I said, "You have misconstrued the thing, and the best thing you ought to get and expect from this committee is not to alter this language of the rule, which is good, but to get a note from the committee appended to our report, without any change in the rule, which explains what we mean by claim on which relief can be granted, and to dispel this confusion or mistake that occurs through the statement of the Second Circuit."

MR. PRYOR: Maybe a statement by the committee would do it.

CHAIRMAN MITCHELL: I don't see how we can change the language of the rule or how we would be justified in it.

MR. PRYOR: My attention was first called to this matter a couple of years ago when a former district judge of a federal court in Iowa, when presented a motion for more specific statement, said, "According to the latest rulings, all a complaint has to do is to give notice."

I was amazed at such a statement as that. There is danger of that idea prevailing, it seems to me, unless there is some statement from the committee.

JUDGE CLARK: They can find no basis for that in any authority that I know of. I don't know quite how you avoid

misconstruction of what judges say if people won't read it.

DEAN MORGAN: I think if we put in a note, Mr. Mitchell, what we ought to do is to tell why we avoided the use of "facts" because of all this gloss, and why we have avoided "cause of action" because of all the gloss of reference to it.

CHAIRMAN MITCHELL: Then state exactly what we did mean by this rule.

DEAN MORGAN: That we mean just what we say, as a matter of fact. You have to show a ground for relief.

MR. DODGE: Mr. Chairman, I agree exactly with what you said. I can't conceive of those words meaning anything except facts constituting a cause of action. I am not afraid of the word "facts" or afraid of the familiar words "cause of action." That is what we meant. That was the whole discussion when the rule was adopted, and Senator Pepper's words were put in. That is exactly what we meant. It ought not to confuse anybody.

Every one of our specimen forms annexed to this set of rules states "facts constituting a cause of action," every one of them. Looking at those specimens annexed, no one should have had any doubt but that facts must be recited briefly, and it must appear that they state a right of action.

That is what these words as now used mean. If there is doubt about it, the fact that Chief Justice Vanderbilt has evidently thought the same doubt existed might make it worth

while to put in a note showing in substance that that is what those words mean.

CHAIRMAN MITCHELL: I told these people in a letter twice that I thought that was the most you could expect from this committee, because we were perfectly satisfied with the language of the rule and what it meant.

JUDGE CLARK: I think that is the solution. I want to say I am perfectly willing to draft a note, but I should be very glad to retire in favor of Mr. Moore or Mr. Morgan.

DEAN MORGAN: You can do it, Charles. You have written on the damned thing so often.

JUDGE CLARK: I have the feeling I can't get the committee to read what I have actually written.

DEAN MORGAN: If anybody had to wade through all those articles on "cause of action" to find out what the hell it means --

JUDGE CLARK: The only thing is when they want to follow me, they call me Judge Chase. That was the greatest insult of all.

JUDGE DRIVER: I think perhaps I might be able to contribute something that would be helpful. I have attended these conferences at which the resolution of the Ninth Circuit Conference arose, and it was discussed. I have read all this correspondence back and forth between the Los Angeles lawyers and Judge Clark, and I am amazed at the difficulty they have in

understanding each other. A great deal of the difficulty in understanding each other I think stems basically from the difficulty and failure of the western lawyers to understand Judge Clark's objection and the committee's objection to the use of the terms "facts" and "cause of action." You must remember that those lawyers practice code pleading, and most of them are in state court with their code pleading nine times to one when they are in federal court with notice pleading. Most of their work is in state courts.

They happen to have the difficulty that apparently other jurisdictions have had with the requirement that a complaint state facts sufficient to constitute a cause of action. They can't see why in the world you object to those terms, because they are terms that they live with and work with all the time from day to day, and apparently have no difficulty with in Washington and California and other code states.

I think they would be satisfied with a clarification by way of amendment to the rule or preferably a committee note that assures them that this rule means what you say it means, General, and what Senator Pepper and Judge Clark say it means. They would like that assurance.

I am sure most of them are sincere, and they can't understand why you shouldn't say "cause of action" and why you shouldn't say "facts," because they don't have the difficulty with them that other jurisdictions have had. I just

wanted to point that out.

MR. LEMANN: I think part of the difficulty is because many of the practicing lawyers want more facts than we really contemplated they should get. Reading this discussion which has taken place in Louisiana, I can see the leading critic of the Federal Rules refers to our forms as proving his point. He refers to the forms and says that shows that you don't have to plead enough facts under the Federal Rules and "I don't like it." He wants more facts.

That is really what is at the bottom of the complaint of many of the men at the bar. They want more facts than we contemplate. I think it might help. I don't think that anything we did would eliminate all confusion and get everybody in the ideal heaven where everybody agrees and there are no differences of opinion. We might then all retire from practice, because there wouldn't be any more arguments.

I don't think we can accomplish that by anything we do if we change the rules. We would create new views of what we said. I do think it would be worth while and wise, perhaps, in view of the extent of the discussion, to have a note written saying that we have taken notice of what we believe to be a misunderstanding of Rule 8. As we see it, it probably proceeds from either a misapprehension of the rule or a tendency on the part of the bar to overweigh the number of facts that need to be stated in order to protect the complaint, pointing

out that a man has his remedy by a motion for more definite statement, as well as by discovery, but chiefly by motion for more definite statement, if the statement of facts is too attenuated. He doesn't have to resort to discovery. He can go to a motion for that.

I would be inclined to see this note written, not by Judge Clark or even Professor Morgan or Professor Moore, but by practicing lawyers, and then submitted to them, so it doesn't make their blood run too cold. I think the practicing lawyers might be more likely to understand.

CHAIRMAN MITCHELL: What I was starting to do was to ask the committee to make a decision, if they are ready to make it, whether they will let the rule stand as is, and meet this movement from the Coast by a carefully drawn explanatory note which ought to straighten them out.

All those who believe the note method of approach would be adequate, say "aye"; opposed. That is agreed to.

JUDGE DOBIE: We have had very little trouble in our circuit with it. I cited two Fourth Circuit opinions. One of them was Erk v. Glenn L. Martin. There wasn't any question there about this thing at all. It was a question of whether it was a lobbying contract, whether this fellow was going to use influence with the powers that be in Turkey for a contract.

CHAIRMAN MITCHELL: I practiced for years in a state that had this phrase "facts constituting a cause of action,"

and I am not conscious to this day, in thousands of cases, that I ever had any trouble with it.

This rule was adopted and I came to New York, and I have been in practice here for 20 years, and every time there is a suit brought in my office in the federal court, the lawyer will run to me as an expert on Federal Rules and want to know if he has complied with them. And not once in the 20 years I have been here has any lawyer in my office -- and there are about 50 or 60 of them -- drawn a complaint in a federal court and come to me with any doubt as to what it means. No one of them would think of drawing a complaint without stating, whatever you want to call it, ultimate facts or what-not, facts upon which a court can say, "Applying the law to what you state, you are entitled to relief." There has been no trouble about it at all.

MR. PRYOR: I would like to suggest that the note be drawn by the Chairman.

CHAIRMAN MITCHELL: I would like, if I may, to ask somebody to draw it and then have it initially submitted to a group of lawyers, not necessarily all of you, maybe just to two or three, and whittled into shape, and then distributed generally to the members of the committee.

MR. LEMANN: I move we leave this to the Chairman. We will ask the Chairman to draw it. If he wants any help --

SENATOR PEPPER: You can confer with Charley Clark.

CHAIRMAN MITCHELL: Yes, I want Charley to state exactly what we mean by the rule.

MR. LEMANN: Don't ask Charley to do it. You are a practicing lawyer. I think you ought to do it, and then submit it to Charley and Eddie.

DEAN MORGAN: He doesn't know about those couple of hundred cases in the appellate division where they fight over whether this is a conclusion of law or a statement of evidence and not ultimate facts, and so on.

MR. LEMANN: I don't want to reflect on you gentlemen, but I really think he would come nearer using language that would hit the lawyers.

JUDGE DOBIE: May I make one suggestion. I don't like the adjective "ultimate" in connection with "facts." In the first place, it is very confusing; and, in the second place, like the old nigger said when he saw the giraffe, "There ain't no such animal."

I don't object to "evidentiary facts" which prove, and "operative facts" which determine, but "ultimate facts" leave me cold.

CHAIRMAN MITCHELL: My purpose is to avoid that mess by not making any change in the rule. I don't suppose the committee cares how you word the note as long as you make it clear what the rule means.

MR. LEMANN: I wouldn't undertake in a note to lay

down any formula. I would say something like this: The committee has taken note of the criticisms and the committee thinks it is due to a misapprehension about the meaning of the rule. We don't mean to say a man mustn't plead any facts. On the other hand, we don't mean to say he must plead everything that he pleaded back under code pleading. That it is a matter of balance in every case, which is dependent upon the decision of the trial judge.

CHAIRMAN MITCHELL: You want to look out, because I may appoint you to make the original draft.

MR. LEMANN: No. I was just illustrating what I think personally we should do in a note; not try to formulate any exact rule itself in the note.

JUDGE DOBIE: Do you think the suggestion would be helpful to the bar all over the country and to judges such as Judge Hall, if something be said in the note about why we did not use those terms "cause of action" and "facts"?

MR. LEMANN: Yes.

MR. TOLMAN: Yes.

CHAIRMAN MITCHELL: That is all in our record of 20 years ago.

JUDGE DOBIE: They are not familiar with that.

CHAIRMAN MITCHELL: They sent this up to me and I spent two days reading over our discussion about this rule. I remember it.

JUDGE DOBIE: They are not going to be satisfied out there if you don't use in the rule those terms "facts" and "cause of action." At least that is my interpretation.

CHAIRMAN MITCHELL: I am not sure. From the things they said here today, I think they said in view of the fact that I had suggested to them the most they could get out of the committee would be a note of comment, they indicated and Judge Hall especially mentioned the idea of a note instead of a change in the rule. So I don't think they would be shocked by that.

There is another thing about it. Take states like Minnesota and Nevada, which just have a new set of rules, old code states which have had causes of action. They have adopted verbatim our rules of "claim upon which relief may be granted." They are not worried about it. That is one reason I don't want to change the rule. It means that these fellows have copied our rule, and the next day we throw our rule in the waste basket and remodel it. That is a mistake. We are going to have trouble if we make too many amendments to these rules, and should look out that we don't destroy the progress that is being made toward uniformity.

The states are going to get sick of copying our rules if we change fundamental provisions every few weeks. That is why I have always been slow about calling meetings to consider amendments.

I think we ought to avoid that as much as we can instead of getting busy all the time and tinkering with them.

Let's pass on to what we have left here, Charles.

JUDGE CLARK: Let me say first that Professor Wright has dug up a statement of this Rule 8(a) in the states now. We didn't have it out in time to distribute.

CHAIRMAN MITCHELL: You mean what the states have done when they have adopted the Federal Rules. I asked for that.

JUDGE CLARK: We didn't get time to get it distributed. He got it to me on Friday, and I left my bag at the New Haven station, so that delayed it.

CHAIRMAN MITCHELL: That would be very valuable stuff for the note.

JUDGE CLARK: I should think it would be a good idea if we got Leland to Stenofax it and send it on.

MR. TOLMAN: I will be glad to do that.

JUDGE CLARK: I want to say it, omitted are Arizona rule which quoted the Dioguardi case, and we must put that in. You can correct that in a day or two. It gives the provisions in each of the states which are following the Federal Rules.

Let me suggest this. I don't want to delay you unduly. I would hate to rush through. I wonder if it wouldn't be possible to meet a little while in the morning. If you must close down tonight, I will try to hit only the high spots. It really seems to me it would be rather desirable if we went

through it a little more slowly and got through tomorrow noon.

JUDGE DOBIE: Poll the committee. Let's find out how many of us can stay.

CHAIRMAN MITCHELL: All those who feel that they could attend in the morning, raise their hands.

... There was a show of hands ...

CHAIRMAN MITCHELL: Let us go ahead.

DEAN MORGAN: Suppose we go ahead with what you have considered important, and then take up the intervening things later.

JUDGE CLARK: I will go ahead the best I can. I don't very much like to pick out these things and say they are important to me. I am afraid I have done that too much already.

CHAIRMAN MITCHELL: Suppose we go right along in the routine way, regardless of that, taking up everything, and what we can't do tonight we will finish up tomorrow afternoon. We can decide better about that after we get through with this meeting and find out what we have done.

JUDGE CLARK: We were considering the suggestion of Judge Mathes as to indispensable party in Rule 12(h) and 41(b). Judge Mathes' letter of May 13, which was at the same time as this letter on Rule 8(a), states:

"I have taken the liberty of enclosing with this letter proposal to amend F.R. 12(h) and 41(b). The changes proposed as to 12(h) are companion to those suggested with

respect to the last sentence of 41(b)."

He has another proposed amendment to 41(b). I don't see that he has explained it more than what I read to you, which was the addition in a manner which will make the complaint dismissable at any time, the provision as to indispensable parties.

CHAIRMAN MITCHELL: What rule is it you are dealing with, Charley?

JUDGE CLARK: Rule 12(h). I am inclined to think, in the light of what Professor Morgan said, that we had better not make (h) but make the change in 41(b) when we get there.

That is your idea?

DEAN MORGAN: That is my idea, exactly.

JUDGE CLARK: You remember the suggestion of Judge Mathes was that you take out of (h)(1) the reference to "indispensable parties" and put it in (2), the effect of which would be to make the objection of "indispensable party" of the same nature, in our judgment, as the objection to subject matter jurisdiction of the court.

Mr. Morgan says -- and I should think he was probably right, as he usually is, and perhaps always -- that the situation is not the same, and that a judgment rendered where there is an error as to indispensable parties would still be a valid judgment; whereas, of course, a judgment without subject matter jurisdiction would not be valid.

CHAIRMAN MITCHELL: If you are not prepared to propose an amendment to (h) and are going to wait until we reach 41(b), suppose we pass on to the next one.

JUDGE CLARK: I want to make a brief reference to Rule 13(a) and say that there has been some rather strong support for a different conception of compulsory counterclaim.

JUDGE DOBIE: That is admiralty?

JUDGE CLARK: No. The admiralty mentioned it, but it comes up most directly by Mr. Millar, and also it is mentioned by Mr. Youngquist of the Minnesota rules.

The general thesis is that this is the wrong approach to the question of compulsory counterclaim; that the compulsory counterclaim should be merely the case of an offsetting debt. In other words, you should cut down recovery and not have it here one arising out of the same facts. That is a different concept entirely than we have had.

JUDGE DOBIE: That is the difference between recoupment, isn't it?

JUDGE CLARK: Yes. That is discussed on page 26, and there I cite Millar's comments and objections to the rule. I am bringing it up. I do think we should consider these things.

I was a little disturbed about passing them over without considering them. I do not suggest the change. I went over this a little hurriedly before. Did you go over it too, Eddie?

DEAN MORGAN: Yes, I went over it. I have "why?" all over the place. I don't see any reason for it. I don't agree with the theory at all.

JUDGE CLARK: I shall have done my duty in at least having brought it up for consideration. Is anybody interested?

Professor Millar has written an excellent book, one of the best in recent years. That doesn't mean, of course, that everything in it needs to be followed. I don't believe he is right on this.

I will pass on to Rule 15(a). I should have brought this up. The recommendation was made that the time for pleading after the amendment ought to be the same as the time after the original pleading; that there was no reason for the difference that we had.

In Rule 15(a), Amendments, you will see that the ordinary time limit is 20 days. At the end it says:

"A party shall plead in response to an amended pleading within the time remaining * * * or within 10 days after service of the amended pleading * * *."

The recommendation has been made that that ought to be a uniform 20 days.

I don't know whether that is important or not. Our usual rule for pleading to the answer is, of course, 20 days.

JUDGE DOBIE: Isn't the idea there that in case of amended pleading, the man is familiar with the case and he has

only to reckon with the differences between the original pleading and the amended pleading, and 10 days is enough?

JUDGE CLARK: Is that all anyone wants to observe?

Next, I think I ought to bring up Rule 17(a), which is the Real Party in Interest, a famous old provision. I bring that up mainly because Senator Pepper seems to have raised some question about it.

That is referred to on pages 37 and 38. Senator Pepper has suggested in the original drafting of 17(a), "No very adequate reason was given for changing the rule of the common law * * * and the rule without much thought found its way into its present form and has turned up to vex us and does vex us * * *."

I don't believe that quite fully states the background. This provision was not ours. The provision was the one of the code. It was the code way of especially taking care of suit by an assignee which was not permitted by the code. You had to sue in the name of the assignor.

The device used in the original code and in code pleading generally was to use the expression, "the real party in interest." When we came to work on the rules, I originally suggested that the term was not very descriptive, and I wanted to say in substance that the one to sue as plaintiff was the one who had the substantive right of action, to throw it back to the rule of substantive law.

I was met with the objection, which seemed sound at the time -- I think General Wickersham made it, because he made that generally, but I am not sure who it was -- that that would be to reject a well known word of our code pleading and substitute something new that wasn't any better, and that we had better retain the old provision. So this is a retention of the familiar language of the code.

Somebody ought to give us credit for it out in California and elsewhere as taking some of their code phrasing. That is what this is, Senator Pepper.

DEAN MORGAN: The case that Hays raised the row about was where a person had been given power of attorney to sue and the court construed it as power of attorney to sue in the name of the party, the obligee, we will say. He was kicking because the real party in interest rule prevented that person from suing in his own name instead of in the name of the party.

It didn't seem to me important enough to bother about. If I give you power of attorney to sue in my name, I want you to sue in my name rather than yours.

JUDGE DOBIE: You can't do that unless you transfer the claim, can you?

DEAN MORGAN: You could assign it if you wanted to.

JUDGE DOBIE: I can't assign to you the right to sue.

DEAN MORGAN: You had a distinction between that kind of case and an assignee for collection. How did he want it

stated, Charley? Either the legal title or the beneficial interest?

JUDGE CLARK: I don't know. I think it is something along that line.

DEAN MORGAN: That wouldn't have helped out in the power of attorney case.

JUDGE CLARK: Senator, I am told you were discussing some insurance cases, and the question came up in insurance litigation.

SENATOR PEPPER: I confess, Charley, that I have forgotten about that. I probably had some case in mind at the time. The Bar Association took something up, but it is nothing that I care to press. You know how one hundred things come across your desk like that. You pass them on to people who have the ultimate decision.

JUDGE CLARK: You are lucky that you don't have my situation. A poor judge writes something, and in another eight or nine years the courts find it and go wild over it.

SENATOR PEPPER: I don't know anything about <u>poor</u> judges.

JUDGE CLARK: One thing more. This is all I have in going back over this, because I thought we ought to refer somewhat back to this. On the intervention rule there has been quite a little criticism by various of the text writers. It would seem to me that at least I ought to bring it to your

attention.

CHAIRMAN MITCHELL: This is Rule 24?

JUDGE CLARK: Rule 24. The commentary on that is on page 44 of my commentary, and over on page 45 is the suggestion of Professor Hays of Columbia, who is quite a good man. What was it that Judge Hall said about professors? He may be a doctrinaire. Anyway, he is a man of standing, at least.

He says that the categories of (a) and (b) are misleading and he proposes a single rule which is as quoted on page 45:

"A third party shall be permitted to intervene whenever he shows that there are issues in which he is concerned which may be conveniently tried together with the issues already before the court, unless his intervention would unduly delay the trial or in some other way prejudice the rights of the other parties. Where the intervenor shows not only that there are such common issues, but that his rights will be factually impaired unless he is permitted to participate, the court should grant such permission unless the parties in the action are able to demonstrate that their rights would be gravely affected."

CHAIRMAN MITCHELL: You are wiping out the old rule?

JUDGE CLARK: Yes. He wants to substitute this general idea of what he calls liberal intervention for a rule which now, according to his idea, contains limitations of categories of (1) intervention of right, and (2) permissive

intervention.

CHAIRMAN MITCHELL: Does he mix the two up together? Does he make them all matters of right, or all matters of permission? What does he do about it?

JUDGE CLARK: He would put them together and make the general rule one which I think might be termed of convenience. He would provide that intervention always be allowed unless the intervention would unduly delay the trial or in some other way prejudice the rights of the parties. He tries to make it a greater push for intervention, I take it, and anyone objecting to intervention must show some definite prohibition, so to speak.

CHAIRMAN MITCHELL: You have in the existing rule a provision for permissive intervention when a statute of the United States confers a conditional right of intervention. What happens to that under his provision, for instance?

JUDGE CLARK: I take it he would say that that would be covered by his more generalized statement.

MR. PRYOR: Is there any substantial demand for a change in this? Is that the only criticism?

JUDGE CLARK: That is a little hard to say. I don't see any substantial demand in the cases. As a matter of fact, I should think the cases were going along pretty well. These are commentators who think that the rule is rather restrictive. That is the real basis of it.

I presume that there might be some question as to the recent decision of the Supreme Court in Sutphen Estates v. United States, 342 U. S. 19. That is a case where intervention was refused below, and the Supreme Court upheld it.

On the other hand, that was a case of what I termed, and I think properly, minor interests in reorganization, and the court held that they didn't need to be allowed to come in and perhaps delay the main litigation. I don't think it was an undesirable result, but it was a decision against intervention.

CHAIRMAN MITCHELL: The only thing about that rule that I know is in subdivision (a) which used to read, in (3):

"Intervention as a matter of right when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody of the court."

As a result of the experience I had in the Black Tom case, I had the committee in 1948 add "subject to the control or disposition of the court or an officer thereof."

That was a case where there had been an award of damages to American claimants for the Black Tom explosion, and the money was in the hands of the Treasury Department. Some of the other claimants who had claims that had been paid in full brought a suit for an injunction against the Secretary of the Treasury to enjoin him from paying the claims.

There were my clients, standing around, who had gotten

an award of $50 million, and this would have prevented them from getting any money out of the Treasury.

This rule limited our right to intervention to cases of the disposition of property in the custody of the court, and the money wasn't in the custody of the court. So we added at that time the provision, "which is in the custody or subject to the control or disposition of the court."

What becomes of a thing like that?

JUDGE CLARK: It would not be covered in specific language.

CHAIRMAN MITCHELL: "* * * issues in which he is concerned * * *." Is that where it would come in? "A third party shall be permitted to intervene whenever he shows that there are issues in which he is concerned * * *."

JUDGE CLARK: You see, the general attempt is to make a very broad and general, liberal rule, and to say in effect that anybody who wants to, may object to intervention. The last line says that "the court should grant such permission unless the parties in the action are able to demonstrate that their rights would be gravely affected."

JUDGE DOBIE: It puts the burden on the other side. It is practically compulsory intervention, intervention as a matter of right, unless the other side can show that it will hurt them.

JUDGE CLARK: That is right.

CHAIRMAN MITCHELL: Have we any showing that there have been any cases in which the rule has worked badly, or is this just somebody's idea for improvement on theory?

JUDGE CLARK: I don't know that it has worked badly. The best example I can give is this case in the Supreme Court where they denied intervention. I don't think it was a bad idea to deny intervention there.

MR. LEMANN: I move we pass the suggestion.

JUDGE DOBIE: I second that.

JUDGE CLARK: The next suggestion comes along after the discovery material, and I make a suggestion as to Rule 38(b) dealing with trial. I suggest at the end of (b), dealing with demand and the time when you may make the demand, that this be added as a clarifying statement:

"When the right to make such demand is lost by failure to make it within the time here stated, an amendment thereafter allowed to a pleading shall enable a party to make a new demand within 10 days after its allowance only when the claim or defense asserted in the amended pleading did not arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

I think one can say that many cases, the more numerous cases so construe the rule already. We have had quite a series of cases of that kind. I should think that ought to be the construction.

There have been two or three rather striking cases where an amendment merely changing the theory of the action which has been termed by the judge allowing amendment as nothing but a change in theory, have then been used to extend the time for claiming jury trial.

It seems to me that that was a misapplication of the rule itself; and in addition, it works out a little unfairly in that under certain precedents, parties have gotten this trial by jury, whereas in others it has been declined. It seems to me that this is a rather useful clarifying statement.

CHAIRMAN MITCHELL: As it stands now, you can make a demand for a jury not later than 10 days after service of the last pleading directed to such issue. How do you propose to change that?

JUDGE CLARK: Suppose the time has entirely run and jury trial is all waived. Then the party conceives the bright idea of getting an amendment which doesn't change any essential. He puts the amendment in. The amendment is granted. Does that give him ten new days to make his claim?

CHAIRMAN MITCHELL: Is that ten days after the service of that amended pleading?

JUDGE CLARK: That is it.

CHAIRMAN MITCHELL: What are you going to do with that? Say he can't do it?

JUDGE CLARK: Yes.

JUDGE DOBIE: Unless it arises, if it did arise, out of the same conduct, transaction, or occurrence.

JUDGE CLARK: If it is a little polishing up of the same thing, it seems to me it is a little unfair to be able to waive this rule in that fashion.

JUDGE DOBIE: Yes, but if it does arise out of a different one, the man might want a jury trial when he didn't want it before.

MR. PRYOR: I move the approval of it.

DEAN MORGAN: What about an amendment that raises a new issue? That is all you are talking about.

JUDGE CLARK: When you have a definitely new issue, you get a new time.

CHAIRMAN MITCHELL: Isn't there a question there whether you know whether you have a new issue or whether you have a right to extension of time? Isn't there some confusion about that? This is absolute here now. If an amended pleading is served at any stage of the proceeding, the other party has ten days after that amendment is served to demand a jury trial. That does not involve any question of whether there was a fundamental change.

JUDGE CLARK: Here is the type of case that comes up. There are two cases on this. A plaintiff had sued for patent infringement, and he claimed an accounting and an injunction. After all time for claiming jury trial had gone by, he then

asked to amend to strike out the claim for accounting and injunction and to claim damages. As a matter of fact, in the particular case the objection was made that the amendment was unnecessary and that it was probably going to be used to claim a trial by jury. The trial judge in that case held that he didn't have to pass on any question of trial by jury, because it wasn't up to him. He also stated the amendment was quite unnecessary because they could change their legal theory without any more. But since it would do no harm, he granted the amendment.

So he granted the amendment. The party making the amendment then claimed trial by jury.

JUDGE DOBIE: In a patent case?

JUDGE CLARK: Yes.

Another trial judge then held that he had waived the right of trial by jury. That went to the appellate court, and the appellate court reversed and said he got a trial by jury.

CHAIRMAN MITCHELL: What issue in a patent case entitled him to a trial by jury?

JUDGE CLARK: There are two different provisions of the statutes dealing with patent infringement.

JUDGE DOBIE: Juries don't pass on infringements to patents, do they?

JUDGE CLARK: They can. We get some jury cases. That is getting to be quite a favorite.

JUDGE DOBIE: You submit to a jury whether a patent is valid or whether it is infringed?

JUDGE CLARK: You can get a jury trial on the patent issues, yes.

PROFESSOR MOORE: All you are suing for is damages. There is no action of trespass in the case.

JUDGE DOBIE: I never heard of a patent case in our circuit in which they had a jury to determine whether a patent is valid.

JUDGE CLARK: I bet you will get some down there, because we get quite a few now, the theory being the judges are very hard on the patents, and if you get to a jury you will do better. We have had a certain number of jury trials.

DEAN MORGAN: This is just to clarify the interpretation of the original, I suppose. I second the motion.

JUDGE CLARK: It seems to me not only is it wrong to reach that result, but also it is unfair to other litigants who have been denied it.

PROFESSOR MOORE: Mr. Chairman, Judge Clark refers to Bereslavsky v. Caffey, which I think it well to cite. The complaint started out in an equity suit to enjoin an infringement, and due to the war and the possibility of disclosing secrets, the case was continued until his patent had expired, and hence he couldn't get an injunction. He asked leave and was granted leave to amend to claim only damages. When it was so

granted, it was essentially an action at law. If it had been instituted that way to begin with, he clearly would have had a right to jury trial.

I don't see why, if a man is permitted to amend from a so-called equity suit to an action at law -- remember, the court has to give him permission to amend after the answer -- he should not be able to get a right to jury trial.

MR. PRYOR: Did he ask for damages in the first place, in addition to the injunction?

PROFESSOR MOORE: Yes.

JUDGE CLARK: He asked for an accounting.

I want to say that what Mr. Moore says I think illustrates the point and suggests to me that Mr. Moore has gone back a little on the union of law and equity. I thought our theory was that there were no longer equity sides and law sides. The claim was essentially one that the patent was infringed. That is the claim in either case. It is the same patent throughout. There is only a difference in the relief claimed. There was no need for the amendment, and I think the judge should not have granted the amendment, particularly when it was pointed out to him that it was probably going to be used for this purpose.

MR. LEMANN: Suppose he hadn't amended and had brought a suit for infringement of patent and asked for damages. Would he have been entitled to jury trial?

JUDGE CLARK: He would have been entitled to damages under Rule 54(c), whether he asked for them or not.

MR. LEMANN: I say, would he have been entitled to jury trial as of right under the Seventh Amendment in a suit of that category? Isn't this one of the few cases where you have to still advert to the old distinction between a common law action and an equity suit in order to determine whether the constitutional guarantee of jury is applicable?

JUDGE CLARK: I think he should have brought that up originally and made his claim to trial by jury then, and had the court rule on it. The court would have had to decide, according to the theories we worked out, what it considered the prevailing issue, which was the more important issue. The court probably would have held, because it usually does, that the legal claim is the prevailing one. If he wanted a jury he would have gotten it then.

The courts have ruled rather extensively on waiver. As a matter of fact, in our cases we have held that where one starts in admiralty and the case is transferred to law and it is the same case, and he hasn't made his claim, he has waived it. We have also ruled in this very kind of case, the Gulbenkian case in New York; in an opinion by Judge Swan, where originally a claim was made for specific performance, the court decided that on the equities he had not shown a case for specific performance; he had shown a case for damages. But he

couldn't get a jury trial on it because he hadn't made the claim within the time we had provided.

In this particular series of cases on patents -- there were two, going back to what the trial judge did -- the trial judge said that the amendment was unnecessary, and you are certainly quite right about that, but he granted it just because it wouldn't do any harm. And then it turned out to do the harm of sending the case to the jury. There were two cases involved. One of them was in the Sixth Circuit.

The Sixth Circuit wrote an interesting opinion, in one sense, allowing the trial by jury but allowing it on the analysis that it was a new cause of action.

Again I say, how in the world is that a new cause of action on any theory of fact pleading, because it is the same patent and the same breach, namely, an infringement by the defendant. I think in that situation where you are dealing with the same thing, only on a different theory of recovery, you ought to have one shot at the jury, and only one.

MR. LEMANN: Is this the only case that has come up that creates this difficulty? You don't cite any cases on this in your material, not at page 73. I don't recognize it.

JUDGE CLARK: No, I haven't cited material because I was working up this under a good deal of pressure, and I didn't get that covered until I came to it and went over it. I have cases here if you want them.

MR. LEMANN: I was just wondering, if there were only two cases, whether this was something we could pass.

CHAIRMAN MITCHELL: Do I understand that under the federal decisions, a suit for damages for infringement of a patent is an action at common law under the Seventh Amendment which entitles you to a jury trial?

JUDGE CLARK: That is right. It can be in a patent infringement case, on an old action, as Mr. Moore says, which is actually trespass upon the case, claim for damages to get a jury trial.

JUDGE DOBIE: And they pass on the validity of the patent?

JUDGE CLARK: Yes.

JUDGE DOBIE: I can imagine an ordinary jury passing on the validity of a complicated patent such as the one you argued before us, General.

PROFESSOR MOORE: They don't knock out so many. That is why the patentee claims jury.

JUDGE DOBIE: What constitutes invention? Having a jury decide that.

PROFESSOR MOORE: There was another case in the Third Circuit which held essentially as the Bereslavsky case did. The plaintiff started for specific performance and claimed damages as an incident to his claim for specific performance, the issue to be tried by the court. Neither he nor the defendant

is entitled to jury. With leave of the district court, he was permitted to amend to withdraw his claim for specific performance and to seek only damages. The Third Circuit held that after the district court had permitted such an amendment, it was then for the first time a so-called action at law for purposes of the Seventh Amendment, and the party was entitled to demand jury trial.

DEAN MORGAN: At what stage of the game was that done?

PROFESSOR MOORE: After the amendment.

DEAN MORGAN: When was the amendment made, before trial or after trial?

PROFESSOR MOORE: After the trial of the issue of liability before the trial of the issue of damages.

CHAIRMAN MITCHELL: There was no question of damages which went to the jury?

PROFESSOR MOORE: This was specific performance.

JUDGE CLARK: You understand, as I think this makes clear, when there is a really different cause of action, of course he is entitled to a jury, as my suggestion here provides. The question is that by merely changing the theory of recovery you can get a delayed trial by jury. I suggest that the cases pretty much have ruled the other way. The two cases which have granted trial by jury that belatedly are the Bereslavsky v. Caffey case, Second Circuit, 161 F.2d 499, and Bereslavsky v. Caffey, 162 F.2d 802.

Cases to the contrary are Gulbenkian v. Gulbenkian, 147 F 2d 173; Fidelity Deposit Co. of Maryland v. Krout, 157 F 2d 912; and this line of admiralty cases which seemed to me to represent essentially the same thing, of which examples are James Richardson & Sons, Ltd. v. Connors Marine Co., Inc., 141 F 2d 226; U. S. v. The John R. Williams, 144 F 2d 451, and some earlier ones going back.

MR. DODGE: Are they where jury was denied?

JUDGE CLARK: Yes.

MR. DODGE: They treated the amendment as not a pleading under our original rule,

JUDGE CLARK: We have ruled lately, in an opinion by Judge Frank, that an amendment of this kind should not be granted, and I think that is a correct solution. I think if the district judges weren't easygoing, they wouldn't have the question come up.

MR. LEMANN: If your last statement is correct that the judges should deny the motion, and when it comes up it has been decided correctly by about five-to-one from the cases you have just read, is it necessary to make a change?

JUDGE CLARK: I don't know. It seems to me a little unfair when some people get the result and others do not.

MR. DODGE: You say the court disallowed the amendment?

JUDGE CLARK: I say that lately, in a case that we had

this winter, the case of Juan C. Couto v. United Fruit Co., decided in the Second Circuit on April 6, 1953, we said there should be no amendment when it is merely a change in the form of relief you ask for, which I think is a necessary conclusion of our Rule 54(c). Rule 54(c), you may recall, procides that the demand for judgment limits recovery when there is no appearance by the other side. When the party comes in, the court should grant the relief which he is entitled to, whether it has been demanded or not.

So in the Couto case we held that an amendment was improper. I think that should have been the ruling made in the trial court here, but it wasn't. The ruling in the trial court in the Bereslavsky case, Bereslavsky v. Socony Vacuum Oil Co., 7 F.R.D. 444, where Judge Mendelbaum said that "The amendment sought is unnecessary since the request for injunctive relief could be abandoned at trial and the issue of damages tried to the court. However, I see no harm in granting the amendment, which leaves the complaint as it was in every respect except for the elimination of the request for an injunction."

MR. DODGE: Then he allowed a jury trial?

JUDGE CLARK: He didn't. Then the request came before Judge Caffey to get a jury trial, and Judge Caffey, passing on this, held that they were not entitled to a jury trial. That is still Bereslavsky v. Socony Vacuum, 7 F.R.D. 445, 447. It went to the Court of Appeals, which mandamused him to grant a jury

trial.

MR. DODGE: Was the question of jury trial involved in the appeal?

JUDGE CLARK: Yes. It was the only question. It was not strictly an appeal. It was a petition for a mandamus to the upper court to force jury trial.

MR. DODGE: To grant a jury trial?

JUDGE CLARK: Yes.

MR. DODGE: The amendment was a pleading under our old rule?

JUDGE CLARK: Judge Mendelbaum allowed the amendment, which he said was unnecessary but would do no hurt because it left the complaint as it was except for the elimination of the claim for injunction.

DEAN MORGAN: Where you get upstairs on this is where the jury has been denied, isn't it? Otherwise, the court would grant a jury anyhow.

JUDGE CLARK: Yes.

MR. DODGE: Under our present rule, there is a right to demand a jury trial within 10 days after amendment if that is a pleading. That is what our rule now says.

JUDGE CLARK: I can say if it brought in a new and different legal issue, yes. But the point is that this does not under our rules, because it is simply a variation in the kind of relief you get, which is not a different legal issue.

CHAIRMAN MITCHELL: When a court makes an order allowing to strike from the complaint a demand for specific performance or injunction, you don't serve any pleading after that.

JUDGE CLARK: No. All you serve is a demand for a jury trial.

CHAIRMAN MITCHELL: I know. But the rule says "not later than 10 days after the service of the last pleading directed to such issue." Your 10 days have already gone by under the main rule. Now the court makes an order amending the complaint. The request is to strike out a claim for equitable relief. He doesn't make any order requiring you to serve an amended complaint on the other fellow when he does that. How does your rule apply? By its words, the time is fixed by the service of the last pleading.

JUDGE CLARK: What you are doing, I think, is to suggest another ground on which the court of appeals was erroneous, because they held you got 10 days more after the granting of the amendment.

CHAIRMAN MITCHELL: The rule says "service of the pleading."

MR. DODGE: It must be directed to the issue. Striking out a paragraph wouldn't relate to an issue to be tried by the jury.

CHAIRMAN MITCHELL: I don't see how our rule grants an extension if there is no pleading served. If the court

orders striking out a claim for relief of a certain kind, he doesn't make an order requiring drawing of a new complaint.

JUDGE CLARK: All that happened, as I say, is that Judge Mendelbaum granted the amendment making the statement that I quoted, and then within 10 days after the grant of the amendment the person making the amendment made a claim for jury trial. The trial judge before whom that came refused to hold the jury trial, and the court of appeals mandamused him to grant a jury trial.

CHAIRMAN MITCHELL: In the face of a rule that says there will be an extension of 10 days after the service of the last pleading. There wasn't any service of any pleading at all. It was just an order striking out a claim for relief.

MR. PRYOR: Then you file an answer.

JUDGE CLARK: He didn't have to file an answer. I can't find in the record which I looked up that they ever did anything more than I have just said. I looked up the record in New York.

CHAIRMAN MITCHELL: It seems to me the court of appeals distorted the rule.

JUDGE CLARK: That is just what I think. That is what I am suggesting. I was wondering if it could be clarified.

CHAIRMAN MITCHELL: It is clear enough here, isn't it?

JUDGE CLARK: I should have said it was, but there seem to have been great minds that have been mystified by it.

CHAIRMAN MITCHELL: I think it is perfectly clear that the filing of an order striking out something from the complaint was not a service of the last pleading directed to that issue at all.

DEAN MORGAN: I think you could debate that.

CHAIRMAN MITCHELL: I don't know why we should amend the rules to make that any clearer, just because some court of appeals has gone haywire. Was it your court, Charley?

JUDGE CLARK: It was my court, and approved by Moore's Federal Practice. We have settled that the decisions are wrong, anyway.

Now Rule 41. I didn't directly suggest an amendment myself. Professor Wright suggested one. The question has come up in my court.

I think they did probably correctly, although they got to talking about indispensable parties, which was perhaps too bad. The case is a recent one, stated on page 74.

The question first is as to voluntary dismissal. That is the point here involved. Originally we provided that an action might be dismissed voluntarily by the plaintiff without court order by filing his notice at any time before the answer came in. In 1946 we had some cases which indicated that was allowing too much, and therefore we put in the addition "before service of answer or motion for summary judgment"; framing of the issue on the merits, so to speak. That was

certainly a desirable and good step.

Now along comes this case in the Second Circuit, the Harvey Aluminum case, which was a terrific battle on the issue of preliminary injunction. They were trying to get a preliminary injunction against opening the mines in British Guiana. When the court showed that it was going to give an injunction for the defendant, not for the plaintiff -- both sides wanted some relief -- the plaintiff then up and withdrew, dismissed.

Then the question came up, could the plaintiff voluntarily dismiss? I wasn't sitting in the case, but the Court of Appeals held it could not. They had to do some little stretching of the rule. They read the equity rule, so to speak. They said that the purpose of the rule is that you may dismiss until the parties are at issue, so to speak. Here they certainly were at issue, as everybody saw, because they were having this terrific battle which came up on the issue of the temporary injunction.

It is a little difficult to work out something on this, but what Professor Wright suggests is that there be put in after "motion for summary judgment," "or before a hearing on any preliminary matter in which the adverse party has participated."

Do you have the situation in mind? It was an interesting case, and it was a little surprising after what might be

termed the terrific battle, the defendant winning and the plaintiff says, "I don't like this case," and filed a notice of voluntary dismissal.

DEAN MORGAN: Do you think he ought to be allowed to quit then? He started in and the wind is blowing against him pretty strongly, and he wants to wait for a more favorable wind. I just wonder if we want to extend that.

MR. LEMANN: You agree with the result. You just think they strained the rule to reach it. Isn't that correct?

JUDGE CLARK: I think if I had been sitting I would have decided the way the court did. I think it was a good result.

MR. LEMANN: I thought your point was not that they should have done anything different, but they had a hard time making it out of the language exactly.

JUDGE CLARK: Yes.

MR. LEMANN: Why doesn't that prove you can trust the courts occasionally, and not have to change these rules all the time?

JUDGE CLARK: Of course, Monte, if you really press me, I would say that I can trust certain of my colleagues and not others. In the Bereslavsky case, some of my colleagues were untrustworthy, and in the Harvey Aluminum case were trustworthy. Might I say Augustus Hand wrote the Harvey case.

I really haven't written a proposed amendment. The

one I gave you was one that Professor Wright wrote. His suggestion is in Rule 41(a)(1)(i). After the words now appearing there "of an answer or of a motion for summary judgment," insert the words "or before a hearing on any preliminary matter in which the adverse party has participated".

JUDGE DOBIE: That is dismissal without an order of court, isn't it?

PROFESSOR WRIGHT: Yes, sir.

JUDGE CLARK: That is it, yes.

CHAIRMAN MITCHELL: In the title of that subdivision (1) you have the words "By Plaintiff; by Stipulation."

JUDGE CLARK: There are two alternatives. The stipulation is the second one. "Involuntary Dismissal: Effect Thereof." One is by plaintiff and the other by stipulation.

CHAIRMAN MITCHELL: I see. All right. In that case the court refused to allow dismissal?

JUDGE CLARK: That is right. It did.

CHAIRMAN MITCHELL: Has any court held the other way? You want it that way, don't you?

JUDGE CLARK: Yes. This would state the result of the case, as a matter of fact. I suppose that case was trying --

JUDGE DOBIE: Hadn't there been an answer in that case?

JUDGE CLARK: No. That was the very point.

JUDGE DOBIE: The other party jumped right in without answering and asked for an injunction?

JUDGE CLARK: He should have filed an answer. If they had foreseen, you know, they probably would have filed an answer. But you don't ordinarily file an answer, you know, when you are up on a preliminary injunction. You go to bat on the preliminary injunction, which is what was done here. Then the defendant was successful and found the case eluding his grasp. I think it was a case they were trying to get to the Supreme Court. I think the Supreme Court is not very much interested in matters of private litigation, so there isn't too much change of its getting there.

MR. LEMANN: It doesn't seem to me it is sufficient to warrant a change in the rule. It was correctly decided. Judge Hand decided it. If it comes up again, he probably will be followed. If he weren't followed, it wouldn't be terrible. If the guy did succeed in dismissing, he probably wouldn't get very far with another case, anyway.

I guess it is just that you want to try to do everything you can to meet any technical literal defect in the rule. If we do, I think we ought to adopt this suggestion. Unless you embark on that counsel of perfection and we are going to choose among suggestions, I think we wouldn't consider this important enough to make the change.

JUDGE CLARK: Of course, there is a balance in each case. I would say if you can see a real defect in the rules or a loophole that people can take advantage of, which a case helps

to illustrate -- one case, I would agree, ought not itself or alone be decisive. We can't correct every case or support every case. But if it points to a loophole which is one that the lawyers can take advantage of, query: If this doesn't prevent more trouble.

CHAIRMAN MITCHELL: Here is a loophole the defendant himself could have avoided.

MR. LEMANN: Any time you make a change in these rules you suggest to all the people who have copied our rules that we think there has been a serious omission here and they had better go back and change all the rules which they have based on our rules. I don't think anybody has discovered this hiatus in our rule.

CHAIRMAN MITCHELL: What strikes me about this is that we are trying to prevent the defendant from having the chance, after he learns the case is going against him, to run out.

JUDGE CLARK: It was the plaintiff, actually.

CHAIRMAN MITCHELL: But the defendant could have prevented his running out by filing an answer. Do you want to change the rule so you don't have to serve an answer? I don't think that is worth while, is it? It isn't as if there was anything wrong with the rule. The difficulty was that the party didn't take advantage of his opportunity to prevent the run-out. The rule didn't prevent him from taking advantage of his opportunity. He could easily have prevented that outcome if he had

wanted to serve an answer or take certain action.

I must confess that I am rather prejudiced against making amendments, if you can avoid it, which are not absolutely necessary, because it will affect the states that are trying to unify the practice. It seems to me the quickest way we can discourage it --

JUDGE DOBIE: I don't think it will come up very often.

MR. PRYOR: Our state adopted this rule practically verbatim.

CHAIRMAN MITCHELL: Most of the States are doing that. If they wake up tomorrow when this is printed in the new rules and find that they are different from the Federal Rules because we have altered them, that is bad. It is bad on one of the things that we have bragged about, about this system, that it has the effect of assimilating the practice of the state and federal courts and of producing uniformity.

Of course, on the other hand is the argument there is always the temptation to polish up the rules and improve them. If we don't have a standing committee that jumps in every once in a while, we are not doing the job. On the other hand is that bad effect on states that may otherwise have followed the Federal Rules and thought they were.

I am on the side of being against amendments unless there is some definite call for them.

JUDGE DOBIE: I don't believe it is vital enough. If we were writing the rule the first time I would put it in, but I don't believe it will come up once in every five years.

MR. TOLMAN: Has this question come up in any other case at all?

JUDGE CLARK: Apparently not, because the counsel didn't seem to be able to get anything very direct on it. All they got was analogy in summary judgment procedure and other things.

I will pass, then, to the next one. Rule 41(b), the Involuntary Dismissal. Now we come back again to Judge Mathes' alternative or perhaps complementary suggestion, which is in the last sentence:

"Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue," -- and he suggests adding: "or for lack of an indispensable party," -- "operates as an adjudication upon the merits."

DEAN MORGAN: I move that amendment.

MR. DODGE: I second the motion.

JUDGE CLARK: The actual language he used is "or for failure to join an indispensable party."

DEAN MORGAN: No. I think the way you put it is better.

JUDGE CLARK: " * * * or for lack of an indispensable party * * *."

All right.

CHAIRMAN MITCHELL: What is your pleasure on that? All in favor say "aye"; opposed. That is agreed to.

JUDGE CLARK: The next subject that we come to in ordinary course is Rule 43, on Evidence, and I wonder if somebody other than the Reporter would like to make a little speech on this. I should think Judge Driver and Professor Morgan both would want to join in suggesting amendments.

Judge Driver wrote me at some length a year ago, saying that he thought something should be done on Evidence. The actual rule has been a great deal criticized. The text writers go to town on the idea that there is confusion and uncertainty and everything else.

I actually think that we can get more out of the rule. We were faced with a situation where we needed something, and I think the rule had some loosening effect. It was not complete. There isn't any question about that.

One of the great weaknesses of the rule is that we provided, among other things, for the broadest rule of admissibility. Formerly, at law or at equity or in the state courts there didn't seem to be much of any equity material at all. So that didn't seem to add much. There are deficiencies in it.

Judge Driver, how about making a little speech?

JUDGE DRIVER: I don't think we should take it up this afternoon, Judge Clark. I think sometime the committee should, but not at this meeting, certainly.

MR. DODGE: What is the question, Judge?

JUDGE DRIVER: Whether the committee should consider the rule on Evidence. I told Judge Clark I didn't think we should consider it this afternoon.

MR. LEMANN: It came up at the Council of the American Law Institute in March, and some of the members inquired what the intentions of the committee were.

MR. PRYOR: The National Conference of Commissioners on Uniform Law, at the request of the American Law Institute, is now working on a set of uniform rules of evidence. Professor Morgan and I happen to be on the committee. It is our hope, of course, that eventually we will get out a good enough job that they can be adopted for use in the federal courts as well as the state courts.

Our work is based on the Model Code of Evidence which was prepared by the American Law Institute. The work is not completed. It probably won't be done this year. There is a lot of confusion, undoubtedly, in the present situation, but there is hope for the future.

DEAN MORGAN: I was hoping if the Uniform Commissioners get through and have the ABA, and so forth, approve these rules, then our committee might very well take them up as a basis for

consideration, because they do not accept the most radical of the ALI code, but they are a tremendous advantage over the present hodgepodge that we have. Don't you think that is right?

MR. PRYOR: On the whole they are much more liberal than the present state rules.

DEAN MORGAN: Yes. It would give us a basis for work on rules of evidence that have some chance of acceptance at the bar. The code, of course, is just nothing at all, as you know.

CHAIRMAN MITCHELL: There are so many different controversial points.

DEAN MORGAN: Yes. It has been used in citations time and again to buttress a liberal rule that the court was using, but there has been practically no legislation on it to amount to anything. They have taken a little section here and there. The code of Missouri has accepted a number of them.

JUDGE DOBIE: Your code is a pretty liberal code, isn't it, Eddie?

DEAN MORGAN: Oh, yes. It is reasonably liberal. In this code, if the Uniform Commissioners accept the work of the committee and then it all goes through, I think we will have something that this committee could work with very well.

CHAIRMAN MITCHELL: Not only that, but they might have something that, if we adopted it, the state courts would, and we would have uniformity.

DEAN MORGAN: That is the point. The history of these

rules has shown that state courts gradually want to conform, and I think you will find that particularly true of the younger members of the bar. They just don't want to have to learn two systems and be on their guard each time that they are taking the right step.

As I told the commissioners, it is the most hopeful thing I have seen with reference to the model code that has happened yet.

JUDGE DOBIE: There is nothing we can do this afternoon.

DEAN MORGAN: We put this on the agenda sometime before, you remember, for the future.

CHAIRMAN MITCHELL: I have the feeling that in the Institute code they have done fine work on a great many controversial problems. If we try to get it through, we are going to have trouble with Congress, maybe, and the Supreme Court, and we wouldn't be headed for any kind of uniformity.

If this commission does the business and fixes the uniformity up for us --

DEAN MORGAN: That would show, I think, that we have a very large segment of the bar ready for this particular thing.

JUDGE CLARK: When is the commission likely to reach a result?

MR. PRYOR: The committee will make its report, the first complete report that has been made will be made in August.

It probably will not get final approval until next year. Things move rather slowly through the conference because they take these proposed drafts up section by section, and the commissioners of practically all the states consider them. You get a very good cross-section of opinion over the country as a whole in respect to controversial matters. I would expect that the work would be completed next year.

CHAIRMAN MITCHELL: What is the next item, Charley?

JUDGE CLARK: Rule 44. I want to speak a little about this. I don't know that we can do anything about it. That is Proof of Official Record.

Will you do anything in your code about this matter of proof of official records from other places, particularly from abroad?

MR. PRYOR: I don't know that we have.

JUDGE CLARK: I want to say there is a man in the Department of Justice who has worked on this a great deal. He is chairman of a committee of the Comparative Law people, I think. He has a very fine article in the Yale Law Journal on International Judicial Assistance. He shows that really you can't go very far in proving a lot of things when you have to do it through commissions. There are a lot more difficulties than I ever knew existed. He says, among other things, some of these commissions rogatory, and that sort of thing, we send over are insulting to the foreign governments, who don't realize

we expect their courts to accept such things as personal service and all that sort of thing, when their ideas are entirely different. They have no conception of matters like personal service.

Also, on the authentication of records behind the Iron Curtain, you can't get any authentication such as we have.

He has quite a substantial committee, and they are trying to get the State Department to propose, in effect, an international advisory committee.

MR. TOLMAN: I understand, Judge Clark, that matter is now being negotiated between the State Department and the Department of Justice. I talked to Mr. Jones on the phone the other day about another aspect of the problem, and he said he had hopes that something would happen pretty soon in connection with the appointment of that international advisory committee to deal with it.

JUDGE CLARK: I should think it would be a marvelous thing. Perhaps the way the world is now, it sounds a little utopian, but certainly it is something that should be done.

I don't suppose there is anything we could try to do on this, but imagine trying to get authentication of a record from Lithuania or Poland now. You have to get the authentication of some official. I take it as it stands you simply can not comply with the rule. Whether a court will take something less -- I suppose then if they couldn't get the official record,

secondary evidence might do.

I have been in correspondence with Mr. Jones. He said he hopes that our committee will lend moral support to his proposal of an international advisory committee. I told him so far as I was concerned I would lend all the moral support I could. It is a fine general idea if it could be accomplished.

CHAIRMAN MITCHELL: Do they mean to get an international advisory committee to draft a treaty which the United States would become a party to, which would facilitate the getting of evidence abroad in controversies? That is a long ways off yet.

MR. TOLMAN: I understand it involves the preparation of a sort of model treaty which would be adopted by the United States and any other country.

CHAIRMAN MITCHELL: When such procedure is adopted, we might have occasion to alter our rules, but there is nothing we can do about it tonight.

JUDGE CLARK: I think perhaps we don't need to discuss whether it would be a treaty or an executive agreement.

JUDGE DOBIE: Talk to Senator Bricker.

CHAIRMAN MITCHELL: Or whether it is self-executing or needs an enabling statute.

What do you have next?

JUDGE CLARK: Rule 45(e). I just comment in passing that that is one of the difficulties that occurred as to the

poor admiralty people. 45(e) is a very good rule of subpoena. It was so good that the revisers of Title 28 U. S. Code said it was lovely, and since it was so good they didn't need any statute. They abolished the statute, and then we had the question what to do in admiralty, because these rules do not apply in admiralty.

We held, therefore, that you couldn't send a subpoena 100 miles. Everything has been upset over that ever since.

I just mention that. There isn't anything for us to do here. The admiralty people, of course, want to get this rule adopted in admiralty.

Rule 47(a), Examination of Jurors. There has been some criticism of this according to style, and I am wondering if it is important.

Professor Millar criticizes this rule because in each of its two sentences it states as the first alternative, and thus apparently prefers, the examination of prospective jurors by counsel rather than by the court. He reminds us that in 1924 the Conference of Senior Circuit Judges recommended that examination be entirely by the court. Apparently some judges are not influenced by the order of the phrases, and they go ahead and take over.

On February 26, 1952, the Board of Trustees of the Los Angeles Bar Association, at the same time that they adopted a recommendation as to Rule 8(a) about which we have been hearing,

also adopted the recommendation that Rule 47 be amended to make it mandatory that the court permit reasonable examination by counsel. In Minnesota they have had to loosen up on this rule because of pressure from the bar.

You see, there are suggestions either way. The professor suggests that this isn't strong enough for the court examination. The Bar Association of Los Angeles and the action in Minnesota is that the lawyers themselves should be entitled to examine.

DEAN MORGAN: I move we pass it.

JUDGE DOBIE: I second that.

JUDGE CLARK: Next is the question of Special Verdicts and Interrogatories, Rule 49.

My colleague, Judge Frank, has urged that this rule be made stronger and more or less mandatory. I think Judge Driver has taken up the question somewhat. He has written on it, as pointed out here on page 78.

I don't believe, myself, we should do much more. I think special verdicts are things for strong men, and unless the judges are strong enough to understand and control them, they are likely to get hung on them. Nevertheless, that is just a feeling.

Judge Driver, do you want to comment?

JUDGE DRIVER: I think there should be a selection of the cases, too. Professor Moore isn't here, but as he has

pointed out, where a case is extremely complex and has numerous fact issues, I don't think it is at all practical to try to submit 15 or 20 questions to a jury. I think you have to select your cases, and it should be left discretionary and not made mandatory.

JUDGE DOBIE: It is certainly very useful, though.

JUDGE DRIVER: Yes, it is.

JUDGE DOBIE: I remember one case I had which we supposed was going to be complicated, and I said, "If you answer one question in the negative, that ends it." The jury was out four minutes.

JUDGE DRIVER: I think you get fairer results in many cases. Juries bring in verdicts for railroad companies where there are special verdicts, and they are not too sure what they are doing. I find some results that I agree with.

JUDGE DOBIE: It is sometimes very useful in appellate courts because you know really what the jury is deciding.

JUDGE DRIVER: Yes, that is true.

DEAN MORGAN: You wouldn't want it made mandatory.

JUDGE DRIVER: No, I think it should be left discretionary.

DEAN MORGAN: I think Frank is extreme in his views on that. I move we pass that.

JUDGE CLARK: All right.

Now we come to Rule 50(b). Rule 50(b), although in

part quite a successful rule, has had additional complications which have presented real issues.

Rule 50(b) is where we created a new idea that took very well, the reservation of a motion on directed verdict. This rule has been adopted in a lot of jurisdictions beyond those which adopted the ordinary rule. This has been quite a favorite rule. It has been adopted in states which follow the federal practice. It has been separately adopted, for example, in states like New York and Connecticut.

This is the third amendment in that series of Hickman v. Taylor and the substitution of parties rule, the Tungsaw case, where we made extensive recommendations for amendment in 1946 and the Supreme Court didn't accept them. Here, too, they have had cases pending.

The situation is in many ways rather unfortunate because our amendment in 1946 was reasonably extensive. It was one of the longer ones we made. But its general purpose was to make this clear and straightforward and allow the upper court to dispose of the matter finally. The upper court could say to the trial court, "You made a mistake. You should have entered judgment for the defendant."

In the last case of all, the Supreme Court in the middle of the winter here, in the case of Johnson v. New York, New Haven & Hartford Railroad Co., 344 U.S. 48, held five to four, since there was no showing of the lawyer moving in so

many words for a judgment for his client, judgment notwithstanding the verdict, even though the court had reserved decision on the motion for directed verdict according to the rule, you could not have the final entry of judgment as the court had done below -- it happened to be my court, Judge Swan -- and that therefore the case must go back for a new trial.

JUDGE DOBIE: That reaffirms the Cone case.

JUDGE CLARK: It really carried it further, in a way.

CHAIRMAN MITCHELL: They held you couldn't get a judgment notwithstanding the verdict in the appellate court if you hadn't made, within 10 days after the verdict, a motion for that kind of judgment below.

JUDGE DOBIE: I wrote the opinion in the Cone case.

DEAN MORGAN: But the court took up the reserved motion at the same time under the New York practice, practically. It took up the reserved motion and the motion for new trial and passed on both of them, because it didn't use the magic words.

MR. DODGE: What was the defense in the proceedings in the lower court?

CHAIRMAN MITCHELL: The parties didn't move in the lower court for judgment notwithstanding the verdict.

JUDGE CLARK: They had moved for a directed verdict, and the judge had reserved decision on the directed verdict and was going to pass on it. He passed on it in a way that the

appellate court thought was erroneous. The appellate court, the Second Circuit, did say that he should have granted the directed verdict.

It goes to the Supreme Court, and the Supreme Court five to four says that because there is no additional motion for judgment notwithstanding the verdict, it has to go back for new trial.

CHAIRMAN MITCHELL: You don't propose to change that, to upset that?

DEAN MORGAN: He didn't just ask for a new trial, either. He moved to set aside that verdict, and on that motion the judge said, "The motion for new trial is before me and the motion which I reserved is before me, and I pass on both of them."

JUDGE CLARK: I would like to carry this along a little further. This provoked one of the bitterest dissents, I think, of recent times when Justice Frankfurter said that this was going back to the archaic formalities of pleading, that this was the kind of thing one should get away from, and so on. He said that if this was the rule, it certainly ought to be changed.

CHAIRMAN MITCHELL: He was one of the four.

JUDGE CLARK: He wrote the dissent.

CHAIRMAN MITCHELL: We don't propose to mix up in that row, do we?

MR. DODGE: Was the case decided on the ground that our rule, as they construed it, was not complied with?

CHAIRMAN MITCHELL: That is it; that the rule required that the party who moved for a directed verdict should, after verdict, within 10 days, move for judgment notwithstanding the verdict, which he hadn't done.

MR. DODGE: Could we modify the rule so as to get away from that difficulty?

CHAIRMAN MITCHELL: I wouldn't want to try it as long as the heat is on up here.

MR. LEMANN: If they had adopted the amendment that we proposed, which they declined to adopt, would that not have avoided the results in this last case?

JUDGE CLARK: I don't see how in the world, in the light of our amendment, they could possibly have inserted it. Of course, I think the decision is really amazing. I think that is one reason why maybe we don't want to mix in it, but let's think about it just a moment, because it is really the greatest hocus-pocus you ever saw.

MR. DODGE: What was our amendment?

MR. LEMANN: Wouldn't our amendment have precluded it?

JUDGE CLARK: Our amendment did cover this.

MR. LEMANN: And they refused to adopt the amendment because they had a case pending before them at the time, as I recall it, and this is one of the three proposals that they

declined to adopt.

MR. DODGE: What was our amendment?

MR. LEMANN: It is shown here.

JUDGE CLARK: We provided that "the making of a motion for judgment in conformity with a motion for directed verdict shall not be necessary for the purpose of raising on review the question whether the verdict should have been directed or whether judgment in conformity with the motion for directed verdict should be entered,"

That was not all we provided.

MR. DODGE: Why don't we suggest that again? The reason for their disallowance of it being what it was, why not suggest it again?

JUDGE CLARK: That is really what I am asking. Why don't we suggest it again.

MR. LEMANN: The reason for their disallowance, as I recall, was merely that they had a case under advisement at the time. Instead of deciding as they did the Hickman case practically as we would have done it with our amendment, they decided it the old way. They were practically telling us then, some years ago, "We like it the way it always has been." This last case, decided only last year, is a later case, the Johnson case, 1952.

Then they had the gall to rely on us as a precedent for the 1952 case. That was certainly nerve, because we would

have changed the rule if they had let us.

JUDGE DOBIE: I would like to put that up to them again. I am prejudiced, because I wrote the opinion in the Cone case which they slapped down.

MR. TOLMAN: That is the one that was under advisement at the time.

JUDGE DOBIE: Incidentally, the Cone case went back for new trial and the judge gave a directed verdict, and it was sustained by us and the Supreme Court.

I would like to suggest it again. I would like to put the responsibility up to the Supreme Court if we can.

MR. LEMANN: If at first you don't succeed, try try again.

JUDGE CLARK: Our proposal was at the time that Judge Dobie's case was up at the Supreme Court, and they turned down these three amendments, all involving pending cases. I think we are entitled to say that they turned them down because there were pending cases.

MR. DODGE: Call it to their attention again.

MR. PRYOR: Would you mind reading that proposed amendment again?

JUDGE CLARK: We went into it in some detail. Leland, could you get the exact words? The amendment was quite extensive. The sentence I read you was only one part of it.

JUDGE DOBIE: What I want to do is to give the

appellate court the power to dispose of the case absolutely, without the necessity of requiring the n.o.v.

MR. DODGE: I move that we recommend the amendment.

JUDGE CLARK: Do you want to recommend it all, or portions of it? Have you clearly in mind that there were three different objectives we had in mind? They are not all of the same importance.

I am perfectly willing to recommend it all, but, after all, you had better have in mind they are different. This is Mr. Moore's analysis, and he says this:

"By proposed revision the committee sought to accomplish three objectives: First, the committee believed that the provision in the rule that the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion to direct the verdict resulted from an over-meticulous effort to stay within the limits of the old Redman case," and that "deemed reserved," and so on, was an awkward expression and it would be better to come out and say directly what we were doing. So we took out the first sentence. That is not too necessary to the rest of it. That is more clarifying and straightforward and doing away with the hocus-pocus than anything else. I believe some commentators have been worried because they didn't know whether we could do away with the hocus-pocus or not.

"The second objective was embodied in the following

process sentence: 'The making of a motion for judgment in conformity with motion for directed verdict shall not be necessary for the purpose of raising on review the question whether the verdict should have been directed or whether judgment in conformity with motion for directed verdict should be entered.'"

That, I think, hits the Johnson case and these other cases squarely.

"The third objective of the committee's revision, proposed to be secured by adding a new concluding paragraph to subdivision (b), was to state the proper practice where a motion for new trial as an alternative is joined with a motion for judgment under Rule 50(b)."

That is, therefore, a detailed procedural statement. That is the paragraph at the end.

Those are the three allied but not quite the same objectives.

CHAIRMAN MITCHELL: I don't understand that last one.

JUDGE CLARK: The last one is the detailed statement which I have not read because it is fairly long. That says:

"A motion for a new trial as an alternative may be joined with a motion for judgment. If a motion for judgment is granted the court in its discretion may either refrain from ruling upon a motion for new trial or rule upon it by determining whether it shall be granted if the judgment is thereafter vacated or reversed. The making of a conditional order on a

motion for new trial does not affect the finality of the judgment."

It goes on and says:

"In case the alternative motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court shall have otherwise ordered. In case the alternative motion for a new trial has been conditionally denied and the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court. In case the district court has refrained from ruling upon the motion for a new trial when granting a motion for judgment and the judgment is reversed on appeal, the district court shall then dispose of the motion for a new trial unless the appellate court shall have otherwise ordered."

MR. PRYOR: That is quite an involved thing. I would be in favor of submitting the first two propositions.

CHAIRMAN MITCHELL: I think that third provision had to do with Justice Roberts' handing down an opinion. I think he got it all tangled up. It is a question of joining a motion for new trial with a motion for judgment, and all that. He got tangled up on it. I think this rule came from Minnesota originally.

MR. TOLMAN: Wasn't that the Montgomery Ward case?

JUDGE CLARK: The Montgomery Ward case.

CHAIRMAN MITCHELL: We had it rigged up to correspond with the Minnesota rule and the Minnesota practice, and his opinion just went haywire as far as the Minnesota practice was concerned.

MR. LEMANN: What did Minnesota do about the new rules? Did they take the suggestion or leave it out?

JUDGE CLARK: Professor Wright says they followed the Federal Rule as it is.

MR. LEMANN: They didn't adopt this? Didn't they adopt the Hickman amendment?

PROFESSOR WRIGHT: Mr. Lemann, in connection with our amendments to Rule 30(b) ~~any of our amendments~~ that were not adopted, they took some language of their own to express a more drastic rule than we have adopted or many of the states have adopted, and they inserted the provision of expense as one of the grounds of protective orders as we have done today.

Other than they, they did not adopt any of the unadopted federal amendments.

MR. LEMANN: I am under the impression that some of the states have adopted an amendment covering the Hickman decision.

PROFESSOR WRIGHT: Every state which has adopted the rules since 1947 has adopted some form of language for it, but they vary in their forms. Minnesota chose some language of its own considerably more drastic. Washington, on the other

hand, has some more liberal language than this committee has adopted.

MR. LEMANN: But no state has adopted the recommendation which we made as a committee and which the court rejected, on Rule 50(b)?

PROFESSOR WRIGHT: I know of none.

JUDGE CLARK: I don't think they have.

The idea was just as Chairman Mitchell says. The Montgomery Ward v. Duncan case attempted to state a procedure which was pretty confused. This is an attempt to state a procedure which, while it may sound involved, covers every contingency, and we thought it was not confusing. Mr. Moore goes on in the discussion. He says:

"The Supreme Court has indicated in Montgomery Ward v. Duncan that where the alternative prayers or motions are presented to the district court for a judgment n.o.v. and new trial, the trial judge rules on the motion for new judgment and, whatever his ruling therein may be, he should rule on the motion for new trial indicating the grounds of his decision. The Advisory Committee proposed to qualify the rule of the Montgomery Ward case by giving the district court discretion to decline to make an alternative ruling on the motion for new trial."

Mr. Moore goes on with some more explanation which I won't stop to read.

CHAIRMAN MITCHELL: I remember that case. It was Montgomery Ward, and Roberts wrote the opinion, I know. It was so totally at variance with what the Minnesota bar and the courts had always held under the same rule that it just wasn't understandable. He thought he had fixed it all up beautifully, but he made a mess of it, really.

Gentlemen, are we ready to quit for today? Do you want to meet tomorrow morning or tomorrow afternoon?

MR. PRYOR: I would rather meet tomorrow afternoon.

MR. DODGE: In Kentucky they seem to have adopted our amendments to section (b).

JUDGE CLARK: I haven't seen that in detail.

MR. TOLMAN: They didn't adopt the added subdivision, did they, the long paragraph?

MR. DODGE: Why don't we suggest modification of (b), then? Why don't we suggest our amendment of paragraph (b) so far as the first long paragraph is concerned, and omit that long discussion of a motion for new trial combined with it.

JUDGE CLARK: I should think that is all right. That would be the first two suggestions.

MR. DODGE: Yes.

JUDGE CLARK: That would be striking out the first sentence, in effect, and adding this sentence that I read.

CHAIRMAN MITCHELL: Do it that way, and we can take a look at it when we get the draft out.

MR. LEMANN: What time should we meet in the afternoon, if we meet in the afternoon?

CHAIRMAN MITCHELL: Is there anything going on tomorrow afternoon in the American Law Institute?

MR. LEMANN: There are discussions of some of their tentative drafts, but I take it there are some people who would rather be there in the morning.

CHAIRMAN MITCHELL: What is your pleasure?

JUDGE DOBIE: Is 2:00 o'clock too early?

CHAIRMAN MITCHELL: The question is whether we want to meet in the morning or the afternoon.

MR. DODGE: I couldn't come in the morning.

CHAIRMAN MITCHELL: Let's make it in the afternoon. Suppose we meet at 2:00 p.m. tomorrow.

JUDGE CLARK: I don't ask Professor Morgan because he says he has done it, but the material on 54(b) is fairly important, and I would like to ask you to look at it. That is on the interlocutory appeals. Judge Parker, of the committee which was acting on it, has asked us to consider it particularly.

CHAIRMAN MITCHELL: You mean to decide whether there ought to be a statute on interlocutory judgments?

JUDGE CLARK: He is considering the question whether the rule of interlocutory appeals should be extended by statute. Leland can answer this more directly because he is secretary of

that, too, but as I understand it Judge Parker asks us to see if by considering Rule 54(b) we perhaps might make a statute unnecessary.

MR. TOLMAN: That is the gist of it, yes. I haven't given out all that material, Judge Clark, that great, huge bunch of papers that the committee produced. I would be glad to do it if you would like me to. We have copies of it.

JUDGE CLARK: I think I won't urge it. I tried to summarize it here. But if anybody wants the firsthand material that Judge Parker's committee has had and which has been distributed to federal judges, Leland will be glad to supply it in full.

JUDGE DOBIE: We can have that tomorrow, can we, Leland?

JUDGE CLARK: You can have it tonight to read all night if you want to.

MR. TOLMAN: You know the material I mean.

JUDGE DOBIE: Yes. We have talked this over.

JUDGE CLARK: I want to say, too, that I have suggested on my own hook, so to speak, an addition to Rule 56, attempting to bring out the discovery features of Rule 56, and I should hope that that ought to be the kind of thing that I was referring to with Judge Hall when I said I thought 56 could be used for discovery. That is new, but I am a little proud of it. At least now I am. I may not be when I get through. I may ask

you to glance at the end of the summary judgment provision and see what you think of my suggestion.

The other thing of some importance, I think, is Rule 60(b). I have the feeling that the things I am now referring to are probably the most important of what is left.

... The meeting adjourned at 6:00 o'clock p.m. until 2:00 p.m., Wednesday, May 20, 1953 ...