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TUESDAY MORNING SESSION

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The committee reconvened at 9:30 a.m., Chairman Mitchell presiding.

THE CHAIRMAN: The hour has struck. We will come to order. We are considering Rule 14, Third Party Practice.

JUDGE DOBIE: You are still using the June 8 draft?

JUDGE CLARK: Yes. Stay on the June 8 draft from now on, indefinitely.

THE CHAIRMAN: There wasn't any later draft on these others.

JUDGE CLARK: No; that is true.

THE CHAIRMAN: State now just what you want us to do.

JUDGE CLARK: You will recall that last evening we were discussing how three-cornered the fight still may be if we eliminate the citing in of a new third-party defendant liable only to the defendant. The point pretty much concerns lines 12 and 13. I think, if I may, I will try to state first my own view and second, as far as I can, Mr. Hammond's view. Then you will have to consider it.

My own view, the view Mr. Moore and I worked on, is that now the intent is to make this strictly a contest between the original defendant and the cited-in defendant (that is, the now third-party plaintiff and the third-party defendant) and that until the plaintiff amends as is provided toward the

latter part of the rule, there should be no other connection between the third-party defendant and the case. That is why it was our general idea that that was all covered in lines 6 to 12, providing for the framing of issues between those two defendants, and there is nothing to do with the plaintiff as yet on that theory.

Hence, my own idea would be simply to strike out lines 12 and 13 and, as I construe it, that would still leave it up to the third-party defendant, the new person brought in, to make any defenses he has as against the person who brought him in, which would mean that if the person who brought him in hadn't properly defended the case or hadn't done any of the multitudinous things he should, then he may make the proper defense, but the third-party defendant has nothing to do with the plaintiff until the plaintiff acts by amending as provided in lines 16 to 18.

I may not state Mr. Hammond's position correctly, and he can come to the rescue if I don't. Mr. Hammond, I think, more or less agrees with that, but does add that, if there is any question raised as between the third-party defendant and the original plaintiff, it ought to be limited to this same claim or transaction, and that not until the plaintiff amends to make the new defendant a full defendant in every sense of the word should that new defendant be entitled to counterclaim generally.

So Mr. Hammond has suggested those changes, which, among other things, would limit all the new third-party defendant's contentions against the plaintiff as arising out of the same claim or occurrence upon which the original suit was brought.

I think that perhaps states as briefly as I can the point here involved. Mr. Hammond can add to it.

THE CHAIRMAN: May I clear my own mind up on one thing? The rule as now written in our book provides that if the third-party defendant is brought into the case, he may, as it were, step into the shoes of the third-party plaintiff and try to beat the original plaintiff, defend the third-party plaintiff against the plaintiff by asserting any defense which the original defendant, third-party plaintiff, could have asserted against the plaintiff. In other words, if the original defendant isn't adequately resisting the plaintiff's claim and the third-party defendant is brought in and is liable over to the defendant, he can jump in and make the original defendant's defense adequate.

That is expressly provided for in lines 12 and 13. "The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim." That means he may assert against the plaintiff any defenses. Why do we strike that out? Why do we refuse to allow the interpleaded third-party defendant, whose liability may depend upon

the fact that the original defendant is liable to the plaintiff, to step into this case and say, "Here is a defense the original defendant hasn't raised. I am dragged into this thing, liable over. I am here in the case, and I am going to see that he does raise it. I would just as soon beat the plaintiff as I would to beat the defendant on the ground that the defendant hasn't adequately defended or complied with the terms of his contract"? Why do you do that? I don't understand.

JUDGE CLARK: I will make an answer. There are two reasons which perhaps come to the same thing. The first is what we now intend to do by our amendment. As we have more or less decided, it hasn't worked well to allow a battle between the party brought in and the plaintiff. The plaintiff doesn't want to accept him, and he shouldn't be required to. Therefore, our logical theory was that the only citing in which could be done would be of a defendant liable over to the defendant, not to the plaintiff. If we follow that out logically, it would seem that the controversy must still remain between these two defendants and that, once you start mixing it up with the plaintiff's claim, you are getting back somewhat to the old trouble we had. That is from the logical and perhaps the procedural point of view.

The other reason, which perhaps is an aspect of the same thing, is the one that I suggested before; namely, that,

whatever the relations between the two defendants, we ought not to allow them to be buried by simply a rule of procedure, that if the original defendant can control, as he can, the litigation against him, subject, of course, to any private contract he may have made (he may not be able to control it if his insurance contract so provides, but otherwise he can), we ought not to try to vary those rights in a mere procedural rule which is designed not to do that but is designed merely as a quicker way of remedy by one defendant against somebody who is liable over to him.

It would seem a little unfair that in the State of New York, for example (or you can take almost all the states for example), in this kind of thing the new third-party defendant can get greater rights in the federal court than he could have in the state court, because in the state court, where you wouldn't have this kind of citing in, you couldn't do that, subject, of course, to any private agreements.

That is a suggestion which I think is partly the logic of our amendment and partly the substantive law back of it.

DEAN MORGAN: Your notion, though, Charlie, is that it wouldn't make any difference in the actual conduct of the case so far as evidence is concerned. If, in one lawsuit, we are going to settle this whole controversy, suppose the original defendant has a defense which he does not want asserted.

The third-party defendant will be permitted to put that evidence in, will he not? You aren't going to have two trials here, are you?

JUDGE CLARK: Oh, no, you wouldn't have two trials.

DEAN MORGAN: So he would be able to put that evidence in to stop the defendant from getting a right over against him, wouldn't he?

JUDGE CLARK: Yes.

DEAN MORGAN: Then what harm does this do?

JUDGE CLARK: The harm to him, it seems to me, is the twofold one I put up. In the first place you are now making the controversy one between the plaintiff and this defendant, which is the evil that we have been trying to hit.

THE CHAIRMAN: Not making it a controversy in the sense that there is a question whether that interpleaded third-party defendant is liable to the plaintiff. The thing that you stuck on the pickets on before was bringing in a third-party defendant who may be liable to the plaintiff and then trying to lead the horse to the trough and make him drink. The plaintiff didn't want to sue him, and you couldn't force him to try to get a judgment against him. That is the evil you are trying to get rid of. You have done that all right by striking out "or to the plaintiff" in line 5, but this isn't a case where there is any question raised whether the third-party defendant is liable to the plaintiff or not.

He has an assertion to make against the original

defendant. He says, "Here, you can't recover over against me because you haven't adequately asserted all your defense against the plaintiff." In order to prove that, he has to prove, as against the original defendant, the existence of this defense and his failure to assert it.

When that is brought into the case, you are not dealing with the question of whether the original plaintiff has a claim against the third-party defendant which the defendant has to assert. You have brought out that there is a defense which the original defendant hasn't asserted, but if it has been proved, if it is a good defense, and if it is sustained, there is no liability over from the third-party defendant to the original defendant, because if he defeats the plaintiff there is nothing to be liable over for.

MR. DODGE: If you covenant to protect me against liabilities, to indemnify me against liabilities, and I make a payment voluntarily in your defense and then sue you, saying that I wasn't liable, that defense is my only defense. Is that taken away if, instead of suing you after I made the payment, I summoned you in as a defendant when I am sued?

THE CHAIRMAN: No. They don't claim it is taken away. They say that the third-party defendant summoned in can prove it.

MR. DODGE: He can't set up his only defense, which is that there is no liability.

THE CHAIRMAN: Oh, yes, he can against the defendant, but he can't assert in behalf of the defendant against the plaintiff.

MR. DODGE: He produces evidence tending to show that the defendant is not liable to the plaintiff.

THE CHAIRMAN: That is it, and yet he can't defeat the plaintiff's claim because he has been dragged in. I just don't get it.

DEAN MORGAN: If you are going to have a jury on this and tell the jury that they can find the plaintiff contributorily negligent as against the third-party defendant but they can't find him contributorily negligent against the original defendant, you are going to have all that kind of damned nonsense that we have now with evidence.

JUDGE CLARK: I still can't see why you are so anxious to have this a greater right than you get in the ordinary process. This is supposed to be a short-cut, and not an extra right to the insurance company. That seems to be the point. You want to give the insurance company something more than the insurance company can get in the ordinary course of litigation.

THE CHAIRMAN: You don't give them anything. You drag them in by the scruff of the neck. The defendant is responsible for their being in.

JUDGE CLARK: He isn't dragged in, because the insurance company is liable anyway.

THE CHAIRMAN: This isn't an interpleader. He doesn't come in voluntarily and interplead. He is brought in against his will by summons, and when he gets in, the fellow who is responsible for it is this defendant.

JUDGE CLARK: He isn't brought into the main case until the plaintiff brings him in by amending. The way this is I don't see that you can really say he is brought into anything, anyway. He is liable to be sued, and instead of having a separate service of summons and a separate suit pending against Mr. Insurance Company, you have a collateral side suit here, and with all--

PROFESSOR SUNDERLAND (Interposing): He might prefer to be in a case where he is the whole show, and here he is brought in as a sideshow, which is a prejudice to him.

JUDGE CLARK: Let me say with all deference--you suggested that I don't get your point--I don't get your point of why you want to change it. It gives the man brought in an advantage he doesn't get, and you give it to him because of a short-cut in litigation. I don't see why a short-cut in litigation should be given an advantage that way.

In response to what Edson said now, I don't see that it is any particular hardship to have a case of this kind. You can get separate trials of any issue of this kind. You ask the judge for a separate trial.

THE CHAIRMAN: What is the use of draging him in it

at all, then?

DEAN MORGAN: Suppose the original defendant is insolvent, and the only answer he has for the payment of this particular thing is the right over against the third-party defendant who is brought in. What are you going to do?

JUDGE CLARK: Suppose that you were in New York in the state court and you didn't have any diversity of citizenship, what then?

DEAN MORGAN: I mean in a kind of case where you have jurisdiction, and so forth, what are you going to do under those circumstances?

JUDGE CLARK: I don't see that the mere fact that the parties are citizens of different states should give them an advantage.

DEAN MORGAN: I am not talking about that. You are just simply saying, aren't you, that the state doesn't have this procedural device for bringing in the third party who is liable over. But if you are going to bring him in because he is liable over in the federal court, you ought not to put him at a greater disadvantage than he would be if he could be brought in in the state court. That is the thing.

JUDGE DOBIE: Doesn't it come down, really, to this? We are bringing this man in, and isn't the real question whether or not practically we are going to give him the same liberties and the same privileges of setting up defenses that the

defendant himself can set up.

JUDGE CLARK: Let me say this. In line 12 and 13 I should see no objection to saying, "The third-party defendant may assert as against the third-party plaintiff any defense", and so forth.

THE CHAIRMAN: That isn't the point.

JUDGE CLARK: But I don't think it is necessary, because it is already covered. When you get beyond it, I think you are making an insurance company law.

THE CHAIRMAN: Let me ask you this, Charlie. It has been pointed out here that, under this system that you want, the original defendant, we will say, has a good defense against the plaintiff which he doesn't choose to assert, you bring in this third-party defendant who is supposed to be liable over, and he isn't liable over if the original defendant neglects to assert the defense that he has against the original defendant. So he comes into court, is brought in (doesn't try to get in), and judgment is attempted against him on the ground that he is liable over. He says, "No, I am not liable over to this defendant. He has neglected to assert a good defense he had against the plaintiff, and that releases me." So, in this very suit, as you want it drawn, the proof is taken and the question is litigated whether the original defendant has a good defense against the plaintiff, and also the question whether he has failed to assert it.

JUDGE CLARK: Oh, yes, that is true, no doubt.

THE CHAIRMAN: Now you are gagging at the idea of what we want to suggest. It being established in the case by the third-party defendant that the defendant has a good defense against the plaintiff, then that defense shall stand as a real defense against the plaintiff, asserted and exhibited, it is true, by the third party, but really a defense not only against the plaintiff, so the third party wins his case against the defendant by helping him beat the plaintiff instead of by merely showing that he has neglected to assert one defense which he ought to have asserted. When that issue is being tried in the same case, as to whether the defendant has a defense against the plaintiff, and it is established that he has, why shouldn't the court throw the plaintiff out on the ground that a good defense has been shown?

JUDGE DOBIE: That cleans up the whole mess, doesn't it?

THE CHAIRMAN: Is it true that that situation could arise here?

JUDGE CLARK: I am still not sure what judgment you want to have. Let me put a case of this kind: A sues B, and B cites in his insurer with whom he has a contract covering the situation. There is a defense of the statute of limitations. B declines to make it, for various reasons. It may be that he is a member of the family, or it may be he doesn't believe

in the statute of limitations, or whatnot, and is willing to let judgment go against him. C, the insurer, wants to make the defense not as against B, that the defense was improper and that therefore he is relieved, but as against A. What judgment is finally entered there as between A, B, and C? B is ready to confess judgment against him.

THE CHAIRMAN: The judgment is that the plaintiff can't recover against the defendant, and therefore neither the defendant nor the insurer is liable.

JUDGE DOBIE: That cleans up the whole mess.

THE CHAIRMAN: Your idea is that the insurer is ordinarily liable over to the insured in a case like that even though the insured has a good defense, even if the statute of limitations applies and he doesn't assert it?

JUDGE CLARK: No, that isn't my idea at all. I tell you what I think the proper judgment in that case should be. I think the proper judgment should be that A recovers from B the amount of judgment that B is ready to confess, that C has judgment for his costs against B, and the whole thing is cleaned up and, it would seem to me cleaned up as the legal situation indicates. I don't quite see yet how you can justify refusing A the judgment against B that B is ready to have entered.

JUDGE DONWORTH: I had supposed this sentence that is now under discussion, "Third-party defendant may assert any

defenses", and so forth, was analagous to the common law practice of vouching in. A suit is brought against me to foreclose a mortgage on real estate. I hold a warranty deed from Smith. I vouch in Smith and notify Smith of this, and I say, "You are liable over to me because you have given me a warranty deed." If, when I vouch in this man, he cannot set up defenses, I am trying to bind him by something that he is powerless to govern. It seems to me this is in accordance with well-known principles.

DEAN MORGAN: Judge Donworth, Judge Clark would answer that that it isn't like vouching in, because when you vouch in a person, you try to establish his liability to the plaintiff, and the plaintiff has to proceed against him, as I understand, in the vouching in, but the very thing that caused the Reporter to make this change was that the plaintiff cannot be compelled to assert any claim against the third party.

JUDGE DONWORTH: I admit that, but what you are trying to do here, corresponding to vouching in, is so that my warrantor would not be able to say, "You didn't properly defend that case."

DEAN MORGAN: That is right.

JUDGE DONWORTH: "If you had properly defended, it would have been different." This gives the warrantor an opportunity to defend. It seems to be entirely logical to leave it in.

JUDGE CLARK: I might state the way this came up. If

you will look at the original rule, you will see that we had in a specific rule as to the binding force of the judgment. The reason this sentence went in originally was because of the next sentence, which we are taking out, "The third-party defendant is bound by the adjudication", and so on. When that was the case, when he was bound, of course it might well have been a denial of due process if he couldn't make the claim. He is no longer bound, partly because we don't--

DEAN MORGAN (Interposing): Because you don't let him be bound. That is the reason.

JUDGE CLARK: Yes, exactly.

DEAN MORGAN: Because you don't let him litigate the thing.

PROFESSOR CHERRY: Mr. Chairman, isn't there an answer to the Reporter? He is supposing a case where the defendant wants to confess judgment or wants to limit the issue between himself and the plaintiff. Would he call in the person who is going to raise those things? He has a simple way of controlling that. He doesn't have to bring in this insurer or other person at all, and if he doesn't, he has the case tried the way he wants it tried. We are not doing anything to prevent it. If he brings him in, then I think all that has been said here by you and Mr. Morgan is valid, that you can't practically have a trial with one jury that involves their trying to make those distinctions, applying the evidence to the issue between two

parties and not as between the other two, and you are bringing the man in to no purpose. It seems to me the Reporter's illustration just falls of its own weight. He is assuming a defendant who doesn't want this issue raised. All right, it doesn't have to be.

JUDGE DOBIE: Leave the other party out. Go ahead and try it his own way, and then he is absolutely dominus litis.

PROFESSOR CHERRY: Yes; he is the man who decides to bring the party in.

THE CHAIRMAN: Leave him out and take his chances of getting judgment over against him in another suit.

JUDGE CLARK: Of course, you all deal with lawyers who seem to have these things more at their fingertips than the lawyers we run into. I think it is a plain trap, and I don't think that many lawyers would understand it. I think that if you are going to do this, you really ought to restore the sentence you took out and make it a complete job, so that no lawyer ought possibly to be fooled.

THE CHAIRMAN: You won't fool the lawyers if your rule is clearly drawn. If we decide what effect we want, and if we agree on that, I don't think we ought to have any trouble making clearly explicit just what we mean. I admit the thing is vague as the rule stands today. You have stricken out the words "or to the plaintiff" in line 5, and I think, therefore, if you are going to leave 12 and 13 in, you ought, by

unambiguous words, to make it perfectly clear that the third-party defendant may assert, as against the plaintiff's right to recover against the original defendant, any defenses. It is all a matter of clarity of statement. I don't think the lawyers are going to be mixed up. The question is what we ought to do in principle.

JUDGE DOBIE: Mr. Chairman, if it is in order, I would like to make a motion that the rule be redrafted to present, as clearly as it can be presented, the ideas that have been advanced of giving the third-party defendant the right to make a defense against the plaintiff.

JUDGE DONWORTH: Isn't that already here in the existing rule?

THE CHAIRMAN: Lines 12 and 13: "may assert any defenses which the third-party plaintiff has to the plaintiff's claim." I think that is fairly clear.

JUDGE CLARK: It hasn't been clear yet as against whom the defense is to be made. I should think it ought to be made clear that it is to be against the plaintiff, although I--

THE CHAIRMAN (Interposing): I agree with that.

JUDGE DONWORTH: Isn't that clear in the printed rule as it exists?

THE CHAIRMAN: I am afraid not.

JUDGE CLARK: It was clearer before because it was backed up by the next sentence, which comes out now. I wonder

if the next sentence should go back in if you are going to have that rule.

THE CHAIRMAN: What sentence?

JUDGE CLARK: "The third-party defendant is bound by the adjudication".

THE CHAIRMAN: I don't think we ever ought to have had that in. It is a question of substantive law, isn't it?

JUDGE CLARK: I know, but we have now gone into substantive law, and if we have, I think we ought so to state.

THE CHAIRMAN: I don't agree at all. I think the question of whether the defendant brings a third party in to a case and makes him liable over in that same suit, as it seems to me, is not substantive. There is nothing substantive about giving the third-party defendant a right to raise all these defenses that the defendant could raise against the plaintiff. It is to save his own skin he is doing that.

JUDGE CLARK: I don't want to press this any more. It is obvious that the committee doesn't agree with me. That doesn't mean anything in particular. I think you are making a substantive law here. Let that go and wait for events. However, before you settle it, I think you ought to take up Mr. Hammond's point as to restricting the kind of claim.

SENATOR PEPPER: You mean Mr. Hammond's suggestion would cover a case where A, the plaintiff, sues B, the defendant, and C is brought in by the defendant as a third party; C

then undertakes to assert as against A a counterclaim or a claim in the nature of a counterclaim, which he has against B on a transaction wholly unrelated to the one to which A and B are parties. Is that Mr. Hammond's case?

MR. HAMMOND: No. The point was that, the way the rule reads now, I think if C is brought in, he can assert any claim, whether it arises out of the same transaction or not.

SENATOR PEPPER: Yes.

THE CHAIRMAN: You mean against the plaintiff.

MR. HAMMOND: Against the plaintiff.

THE CHAIRMAN: Common claim and judgment against the plaintiff. Is that what you want?

MR. HAMMOND: Yes, against the plaintiff.

SENATOR PEPPER: That is what I am trying to state. It happens that C has a claim against A for money borrowed, we will say, in a transaction wholly unrelated to the matter between A and B. B brings C in, and C says, "Now that I am on the record by the action of B, I want not merely to settle the issue between A and B, but I want to settle my claim against A."

MR. HAMMOND: That is right.

SENATOR PEPPER: And you object to that?

MR. HAMMOND: I object to that. I think it can be done under the rule.

SENATOR PEPPER: Yes.

DEAN MORGAN: But if A makes C a party, then you are going to allow it, are you?

MR. HAMMOND: Oh, yes, then; and also this point: From reading the transcript of the last meeting, it seemed to be the consensus of opinion of the members that C should be able to assert, even before A asserted a claim against him, any claim that arose out of the same transaction or occurrence.

DEAN MORGAN: Yes, I think that is correct.

MR. HAMMOND: On the general theory that as long as you are going into that transaction--

DEAN MORGAN (Interposing): Let it be cleaned up.

MR. HAMMOND: --you might as well clean it up. So if there is such a situation, where C would have a claim against A which did arise out of the same transaction, C ought to be able to assert that even before A asserted any claim against him.

MR. DODGE: That isn't so provided in our rule as it appears here.

MR. HAMMOND: That is what I thought. It seemed to me that the difficulty with the rule as redrafted as that it did permit C to assert a claim that did not arise out of the same transaction.

MR. DODGE: Not against A?

MR. HAMMOND: Against A.

MR. DODGE: That is expressly eliminated by the

amendment of the rule we made last time.

MR. HAMMOND: I don't think it is. If you will take the draft of the rule as amended, it is not clear to me at all.

THE CHAIRMAN: Don't you think we had better take the hypothesis or premise or assumption that you redrafted Rule 14 in line with Judge Dobie's motion to allow the third-party defendant to assert on behalf of the original defendant defenses against the plaintiff? Let's start with that assumption.

MR. HAMMOND: Yes.

THE CHAIRMAN: Because this rule is ambiguous about that. If we do start with that assumption, that we have adopted that principle, what kind of cases have we? First, we have a third-party defendant brought in when plaintiff wants to and is willing to try to pursue him directly and get a judgment against him, even if he has to amend his complaint as provided in 16. If the plaintiff does tackle directly the new defendant and wants to get a judgment against him, then your proposal is that defendant can assert, by way of counterclaim or whatnot, any offsetting counterclaim he may have against the plaintiff, whether it arises out of the same--

MR. HAMMOND (Interposing): Yes.

THE CHAIRMAN: That is point one. That is clear. Suppose the plaintiff doesn't want to go after this new defendant, doesn't assert any claim against him, and won't amend his complaint, then under our proposal that third-party defendant

may assert against the plaintiff, but really on behalf of the original defendant, any defenses which that original defendant has against the plaintiff but is failing to state. That is agreed.

MR. HAMMOND: Yes.

THE CHAIRMAN: But he can't assert any direct claims of his own for direct recovery against the plaintiff, except in one situation, if you want to provide for it, and that is when the third party's claim against the plaintiff arises out of the same transaction. Do I understand your proposal?

MR. HAMMOND: That is it.

JUDGE DOBIE: Let me see if I understand, by an example. Let's suppose this third-party insurance company comes in, and A, the original plaintiff, holds a premium with the insurance company on an entirely separate policy, of $10,000. Is it the idea that we want to say he can't set that up?

DEAN MORGAN: That is right.

MR. HAMMOND: Not unless A asserts some claim against the insurance company.

JUDGE DOBIE: Yes.

MR. DODGE: I don't see why he should be allowed to set up any cross-claim whatever against the plaintiff unless the plaintiff comes in and makes him a defendant.

THE CHAIRMAN: You favor the last proposal that he

can assert claims directly against the plaintiff, although the plaintiff isn't after him, but provided it arises out of the same transaction. What about that, Mr. Hammond? Why do you allow him to do it?

MR. HAMMOND: I did it because that seemed to be what the Committee wanted to do at the last meeting, and of course the reason for doing it is the general one that, if the court is dealing with a transaction, we ought to get in there all the evidence as to all claims arising out of that transaction.

DEAN MORGAN: Suppose you had a personal injury case where a plaintiff and two defendants were involved, and the plaintiff sues, and defendant No. 1 is claiming that, as between them, No. 2 is primarily responsible, but No. 2 says, "No, the plaintiff is primarily responsible, and I want to recover for my injuries from the plaintiff." If you don't allow him to assert that, you don't get that action all cleaned up in one action.

THE CHAIRMAN: I see.

JUDGE DOBIE: The second defendant is injured in the same action. It seems logical to me to clean up that transaction, but not to bring up extraneous things on the outside. If the third-party defendant has some independent claim against the original defendant, which has nothing whatever to do with this, he can't drag that in. Let's clean up that

transaction and then stop. That sounds logical to me.

SENATOR PEPPER: I suppose, Mr. Chairman, there is no ambiguity about what constitutes the same transaction. We, all of us, have worried over that in the res gestae rule of evidence, and so on. What are the limits of a single transaction? But I fancy that wouldn't be--

PROFESSOR CHERRY (Interposing): We are committed to that in another rule.

THE CHAIRMAN: We have another rule.

SENATOR PEPPER: I guess we are committed to that.

JUDGE CLARK: If I may make a suggestion on this, I want to make one or two suggestions on this.

It seems to me that what Mr. Hammond says is very logical, and it is good argument, and I think that certainly there should be the chance to make the claim out of the same transaction. I want to raise the question (I am not very sure about it) if the restriction is really of enough consequence to be worth while. Is there any great harm in just letting the rule stand that the new defendant can make any claim against the plaintiff?

Notice two or three things in that connection. In the first place, he can't do it very much unless he has jurisdiction; he can't make an independent claim unless he has jurisdiction, so it probably won't happen very often. In the second place, it is always easy for the court to separate and

order separate trials. If he has anything that is itching to be sued, why not let him bring it in?

Perhaps the chief reason is that it really makes quite an awkward and involved rule to achieve what I think practically is going to be very little. It is perfectly logical, as I said, but you have to put in this "same transaction or occurrence" thing here, and then you take it out later on, after the plaintiff has amended. It is going to make a very cumbersome rule, and it doesn't do any great hurt.

Another thing: Theoretically, I suppose we wouldn't want to have the plaintiff amend. Originally we thought there was some way of forcing him to do it. That didn't work out very well, but we still think it would be a better thing to make him amend. If this pushes him a little--

DEAN MORGAN (Interposing): Then he would amend.

JUDGE CLARK: That is the question I throw out. Admitting the perfect logic of Mr. Hammond's position, as a practical matter is it worth the candle?

THE CHAIRMAN: Let me ask you a question that will help me answer that in my own mind. It says in lines 16-19 as the rule is now worded: "The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant." Am I right in assuming that there is a restriction there? If the

third-party defendant has been joined originally as a defendant (there is one action against two defendants), and the plaintiff has set up a cause or claim against one of those and then has, in his claim, set up another one against the other defendant, and the two have no relation, then there would be in effect a misjoinder. Neither of the defendants would be interested at all in the other defendant's case, and they would have no connection. Is that what that means there, Charlie?

JUDGE CLARK: I suppose that is true; that is, to join defendants there has to be a common question of law or fact.

THE CHAIRMAN: That is right. So the only restriction on the plaintiff here is a restriction on the right of the plaintiff to go after this third-party defendant.

DEAN MORGAN: Only if there is a common question of law or fact, it might not arise out of the same transaction.

THE CHAIRMAN: That is right. My idea was that if there is a restriction on the plaintiff, then it is all right to have a restriction on the third-party defendant as against the plaintiff. He may assert a claim against the plaintiff either where it arises out of the same transaction or where there is a common question of law or fact involved.

MR. HAMMOND: In my redraft I took care of that. I said that he ought to be able to assert, that it ought to be cleared up, and that he ought not to be able to assert against

the third-party defendant any claim except one which did arise out of the same transaction.

MR. DODGE: It works both ways, in other words.

JUDGE CLARK: I think, Mr. Hammond, you haven't stated it quite completely, have you, if this is your redraft? That is, you do provide in your redraft that the plaintiff may amend to assert against the third-party defendant any claims which he has which arise out of the transaction, and so on, but then you go on, "When such amendment is made, the third-party defendant shall assert his defenses as provided in Rule 12 and his counterclaims or cross-claims as provided in Rule 13." There isn't a restriction in Rule 13, and I was going to say, in response to Mr. Mitchell's suggestion, that as it stands now there is a restriction on the plaintiff's joining defendants, not an extensive restriction, but there is the common question of law or fact restriction. On the counter-claiming by those defendants there is no restriction. If you carry the analogy over here, there wouldn't be the restriction on this new defendant.

DEAN MORGAN: You see, on joinder of claim, we went on the theory that it didn't matter how many you joined in the same pleading. The convenience of trial, and so forth, would be taken care of by the judge in determining how the case should be tried, because we had a very, very broad provision for joinder and counterclaim and then provided that the judge might

order separate trials where it would be inconvenient and confusing, and so on. When you tie this up with our regular rules of joinder and counterclaims, you may get a very complicated situation.

THE CHAIRMAN: Let's see if we can focus the thing on questions to act on. In the first place, can you vote on the question of whether this draft should be so prepared that the third-party defendant brought into the case may not only assert any defenses he has against the third-party plaintiff, the original defendant, but can assert as against the plaintiff (really on behalf of the original defendant and incidentally on behalf of himself) any defenses which the defendant has and might assert against the plaintiff. That is point one. I think that was Judge Dobie's motion, wasn't it?

JUDGE DOBIE: Yes.

THE CHAIRMAN: Do you want to vote on that and then settle the question of details one by one afterwards?

DEAN MORGAN: I second Judge Dobie's motion.

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

Now that brings us down to Mr. Hammond's situation, and I tried to state his proposition. Did I state it?

MR. HAMMOND: I think you did.

THE CHAIRMAN: Let me see if we have that idea right now. Assuming the original plaintiff does not go after the

third-party defendant and won't go after him, then, aside from the thing we have just voted on, the next motion relates to the question of what rights you want the third-party defendant to have against the plaintiff, whether he shall have the right to assert against the original plaintiff any claims arising out of the same transaction, regardless of whether the plaintiff is suing the third-party defendant or not. Is that right?

MR. HAMMOND: That is right.

JUDGE DONWORTH: You have the words "transaction or occurrence."

MR. HAMMOND: Yes, I have.

THE CHAIRMAN: What is your pleasure about that? All in favor of that proposal say "aye." That is agreed to.

JUDGE CLARK: I don't know whether we have thoroughly considered it or not. Maybe it is settled. If so, it is all right. I just was wondering whether it was worth making a restriction, intending to make a restriction; that is, whether it did any great harm in allowing--

DEAN MORGAN (Interposing): I should like to be recorded against that last motion, Mr. Chairman, because I don't see any reason why, if you have the plaintiff there and it is subject to the jurisdiction of the court, the third-party defendant ought not to be allowed to treat him in just the same way as anybody else who is in the jurisdiction of the

court; and it will help and, in my opinion, make the plaintiff amend his complaint and get the whole thing settled up at once.

JUDGE DONWORTH: Dean Morgan, I didn't get your reason. Will you make that plain?

DEAN MORGAN: What I have in mind is this, Judge: If the plaintiff is before the court in this particular case, and the third-party defendant really has a claim against him--

JUDGE DONWORTH (Interposing): Of any nature.

DEAN MORGAN: --of any nature, I don't see any reason why it shouldn't be tried out in this kind of case any more than in any other case where the party is before the court. It isn't a question of jamming them all into one trial, because they don't have to be jammed into one trial. The court can give as many separate trials as it wants or thinks convenient in this particular case, and it can hold up whatever judgment there may be so that one party won't have to pay while the other party is under obligation to him. I think it is helpful in the federal courts particularly, where it is awfully hard to get jurisdiction by service of process.

THE CHAIRMAN: It seems rather accidental, doesn't it, if the original defendant summons in a third party who is liable over to him, and the original plaintiff recovers, and that is the way we have it now. It seems to me that it would be a pure accident--

DEAN MORGAN (Interposing): It is.

THE CHAIRMAN: --if the third-party defendant summoned in should happen to have a promissory note signed by the plaintiff when they are talking about a personal injury suit.

DEAN MORGAN: You are right.

THE CHAIRMAN: He has some claim against him that has no relation to the thing on which he has been brought in. I can't imagine a case like that.

PROFESSOR CHERRY: We can't stop there if we are going to amend it. This plaintiff may then have a counterclaim on still another transaction against this newcomer and get that in, too.

THE CHAIRMAN: Yes.

PROFESSOR CHERRY: He is now claimed against by this newcomer, and he ought to be able to counterclaim.

THE CHAIRMAN: You start with a personal injury accident, with an insurance company or somebody liable over, and wind up with an action for breach of promise:

DEAN MORGAN: Or for alienation of affection.

JUDGE CLARK: Why not? That can happen in the ordinary case; why not in this case? That is a very unusual case; it doesn't happen very much, but when it can happen, why shouldn't it?

PROFESSOR CHERRY: This is a couple of other fellows, though.

JUDGE CLARK: Furthermore, there is this, I think, that is of some importance: Here is a rule which is new and is worth while, but has some difficulties, and we have got to build a kind of jerry-built structure in order to take out in one part and put in in another, when for this very occasional case, when it arises, it might just as well be in.

THE CHAIRMAN: Let's vote on this.

DEAN MORGAN: All this could happen, Mr. Mitchell, if the plaintiff can amend his complaint, anyway, so as to bring the defendant in.

THE CHAIRMAN: Yes.

MR. HAMMOND: May I say something?

THE CHAIRMAN: Yes.

MR. HAMMOND: Don't you think it is a little unfair to the plaintiff, who didn't bring this fellow in, to have somebody else bring him in and then have him make a claim against him which didn't arise out of that transaction at all? It seems to me to be going a little bit far.

DEAN MORGAN: What is unfair about it? If he has an obligation, why shouldn't he pay it?

PROFESSOR CHERRY: Suppose what that plaintiff has is a counterclaim that he could be compelled to assert. Now you have forced him, haven't you?

DEAN MORGAN: Yes.

PROFESSOR CHERRY: Yes. I would like to continue the

vote on Mr. Hammond's proposal.

MR. DODGE: That seems to be the English rule. "The third party who is brought in can counterclaim against the defendant who brought him in but cannot counterclaim against the plaintiff," unless the plaintiff, I suppose, makes him a party by amending.

THE CHAIRMAN: Under the English rule, does the third-party defendant brought in have a right, as it were, to step into the shoes of the defendant and assert on behalf of the defendant against the plaintiff the defenses which the defendant isn't going to assert?

MR. DODGE: I gather so, because the rule explicitly provides that he can make any defense that he could make if sued in an independent action, and that question of nonliability would, of course, be the main question.

JUDGE CLARK: It is just a little different from that. Do you remember the page where it is? With the permission of the court he may make a defense which would otherwise prejudice him. It is a special provision, but--

THE CHAIRMAN (Interposing): Otherwise prejudice whom?

JUDGE CLARK: The new third-party defendant. Mr. Moore will find it.

PROFESSOR MOORE: It only indicates that "The third party may not defend against the plaintiff, although the court may allow the defense if it shall appear desirable to do so."

Some of the cases are given.

THE CHAIRMAN: That is where, I suppose, the court sees that the defendant is putting up a sham defense and is not sincerely defending; so in his discretion he allows the third-party defendant to do so.

MR. DODGE: I don't think his right is dependent upon whether the first defendant sets it up or not. He can set it up himself. He isn't limited to cases where the defendant declines to set up the defense, I take it, in his answer which he files before anybody knows what the defendant is going to do, except as his answer discloses. In his answer he may set it up, it is true, I agree, to indemnify. There is no liability here because he isn't liable to the plaintiff.

THE CHAIRMAN: We voted clearly on that proposition. Now we are up to the question, when the third party defendant is brought in and the plaintiff hasn't seen fit to amend his complaint and go after him, has asked no relief against him, or whether the third-party defendant, in asserting claims for direct recovery against the plaintiff, is limited to claims arising out of the same transaction or occurrence or whether he can take advantage of the fact that the two of them are in court together and really sue the plaintiff on something that has no relation to the original suit. We haven't really voted on that.

MR. DODGE: Has it been voted that if it arises out

of the same set of circumstances, he can counterclaim against the plaintiff?

THE CHAIRMAN: He can?

MR. DODGE: Yes.

THE CHAIRMAN: We really hadn't gotten to it, although the impression that I had was that we would let him do that. The question was whether we would go a step further and allow him to assert a claim that has no relation to the transaction.

SENATOR PEPPER: How would you decide a case like this? A has a claim for negligence against B. B says, "If I am negligent, C is also liable for concurrent negligence." Before suit is brought, A, B, and C engage in an angry colloquy in the course of which A beats C up, commits an assault and battery against him. Subsequently, A sues B for original negligence. B brings in C. Can C set up against A his claim for damages for the assault and battery? Is that part of the same transaction or isn't it?

THE CHAIRMAN: No. It is a subsequent event.

DEAN MORGAN: Suppose they were quarreling about the action, though.

SENATOR PEPPER: Oh, yes.

THE CHAIRMAN: The motive back of the event, the occasion for the fight was the original thing, but it isn't a part of it.

JUDGE DOBIE: I don't believe this would arise once

in a coon's age. I don't think it is very vital either way.

THE CHAIRMAN: Are you ready to vote on this question of whether the third-party defendant is to be permitted to assert against the plaintiff, even though the plaintiff is not suing him, claims that have no relation to the original transaction?

MR. DODGE: I should make the motion broader than that and say that he not be allowed to set up any cross-claim against the plaintiff.

DEAN MORGAN: Let's get this other one first.

THE CHAIRMAN: We can decide this thing, and then we can take up the other question. It may settle the whole thing. If it doesn't, we can take up the question of whether we should allow him to set up claims arising out of the same transaction.

SENATOR PEPPER: Logically, Mr. Dodge's motion is the more radical, and it seems to me, if that were voted on and we decided there wasn't going to be any counterclaim right on C's part, then we wouldn't have to discuss the identity of the transaction.

THE CHAIRMAN: All right, we will put it that way, then. It has been moved and seconded that, when the third-party defendant is brought into the case in this way under Rule 14, he shall not have the privilege of asserting directly against the plaintiff any claim for judgment arising out of any matter whatsoever, unless the plaintiff is pursuing him

and asking for judgment against him.

MR. DODGE: That, as I understand it, is the way the rule reads now, because it expresses the right to set up a cross-claim against the original defendant, inferentially excluding any other cross-claim.

JUDGE CLARK: I shouldn't think so. It says against the third-party plaintiff (that is, the original defendant) or any other party.

MR. DODGE: We struck out the words "or to the plaintiff".

JUDGE CLARK: Not down there.

MR. GAMBLE: That is in line 10, Mr. Dodge, with reference to Rule 13, which gives him the right to assert that claim.

SENATOR PEPPER: I suggest that we are confusing an otherwise simple question by raising the question of its identity with the present rule.

THE CHAIRMAN: I am trying to avoid that. You can argue both ways on what the present rule means.

SENATOR PEPPER: Why not vote on the issue as to whether the third-party defendant is to be allowed to set up any counterclaims against the original plaintiff?

JUDGE DOBIE: That is Mr. Dodge's motion.

THE CHAIRMAN: It may not be a counterclaim, Senator, because he couldn't counterclaim unless the plaintiff were

suing him in his claim.

SENATOR PEPPER: Any claim.

THE CHAIRMAN: All in favor of the motion to forbid any such claim by the defendant against the plaintiff say "aye"; opposed, "no." It seems to be clearly lost.

SENATOR PEPPER: We have settled Mr. Dodge's motion.

THE CHAIRMAN: The next question is whether we shall allow the defendant, if he is so brought in, to assert any direct claim he may have against the plaintiff, whether or not it arises out of the same transaction.

SENATOR PEPPER: I make a motion to that effect.

DEAN MORGAN: I second it.

THE CHAIRMAN: All in favor raise their hands. Four. Opposed? Four.

JUDGE DONWORTH: I thought we had already voted on that proposition. As you state the motion, Mr. Chairman, it is whether or not it arises of the same transaction. I thought it was Mr. Dodges motion to exclude whether or not.

DEAN MORGAN: No.

JUDGE DOBIE: Dodge wanted to exclude all counter-claims.

JUDGE DONWORTH: Yes, whether or not.

THE CHAIRMAN: He wanted to exclude all; and this motion now is to include all, whether or not arising out of the same transaction.

JUDGE DONWORTH: Then if we are in favor of letting in those arising out of the same transaction and none other, we haven't as yet voted--

SENATOR PEPPER (Interposing): Vote "no" on this motion.

THE CHAIRMAN: Let's have a vote again on it. The question here is whether we will allow the third-party defendant to assert against the plaintiff, if he is so brought into the case, any claim he may have against the plaintiff, without regard to its origin or connection with the cause of action. All in favor of allowing him to make such a broad assertion raise their hands. Three. Opposed? Six. That is clearly lost.

The remaining question is whether, not giving him the broad right, we shall allow this third-party defendant to assert against the original plaintiff, without regard to whether the plaintiff is suing him or not or wants recovery, any claim that the third-party defendant may have against the original plaintiff arising out of the same transaction or occurrence. All in favor of allowing him at least to do that raise their hands. Seven. Opposed? Two. That is carried.

I guess you have all you want now.

JUDGE CLARK: I should think so. I suppose that means, in effect, that Mr. Hammond's draft is the one to follow.

THE CHAIRMAN: I don't know. I haven't had time to

study it.

JUDGE CLARK: There may be some details.

THE CHAIRMAN: May I suggest, if we are going to recast this rule and you think there is any fundamental recasting, it may be better to stick this rule down in the gutter and take a fresh start? I always find if you have a rule that starts out on one theory and you amend it to reach another, then you get a little confused. I think that was the trouble with our Rule 12 originally. We started out on one theory and tried to amend it. I think the Senator's example yesterday, where he threw everything overboard and tried to make a new statement of the thing we were dealing with under 12, illustrates what I mean.

Are we through with 14 for the present? We have gotten now up to Rule 17(b), Capacity to Sue or Be Sued. Is there any revision of that draft that anybody has to suggest?

JUDGE CLARK: Do you think I ought to explain these as we go along?

THE CHAIRMAN: Not unless somebody wants it explained. This is the way we did it last spring, and if anybody doesn't understand what we did, he may want to have it explained.

JUDGE DOBIE: All you did there was to add that thing to make it clear. As he says, 66 governs. It seems all right to me.

THE CHAIRMAN: Well, if nobody has anything--

DEAN MORGAN (Interposing): I just suggested that he might phrase it a little differently, but I don't know that that makes a difference. I just put that as a suggestion to the Reporter. I don't want to make a motion on it.

THE CHAIRMAN: If you want to make a change in phraseology, we had better consider it.

DEAN MORGAN: I don't like "except (1) as provided" and "except (2) that". It strikes me as mixing construction. If I were doing it, I would say, "except (1) that a partnership and except (2) that the capacity of a receiver is determined by Rule 66."

THE CHAIRMAN: What do you think about that? Do you have his suggestion before you?

JUDGE CLARK: Yes.

JUDGE DOBIE: I think that is better.

DEAN MORGAN: Just phrasing it. I don't think anybody could misunderstand it as it is.

SENATOR PEPPER: You just move to translate to new English.

DEAN MORGAN: That is all.

JUDGE CLARK: You didn't rephrase it in your letter.

DEAN MORGAN: No, I didn't, Charlie.

THE CHAIRMAN: You advocate a rephrasing of the clause now.

DEAN MORGAN: "except that the capacity of a receiver

is governed by Rule 66".

THE CHAIRMAN: You make that (2)?

DEAN MORGAN: And then, "and (2) that a partnership", and so forth. Put it either way you wish. I don't care.

JUDGE DOBIE: Do you accept the phraseology in the note there, "except that the capacity of a federal receiver to sue or be sued in a federal court is governed by Rule 66"?

DEAN MORGAN: That is it.

THE CHAIRMAN: Put the note up in the rule, to make it understandable. That is what he is doing.

JUDGE DOBIE: I think it is a good thing to state the suitability of a receiver, because that calls it to a man's attention more quickly than as it is.

THE CHAIRMAN: I think the sense of the meeting is that the suggestion of Mr. Morgan be adopted.

That brings us on to Rule 23.

JUDGE CLARK: This is just a note, you see.

THE CHAIRMAN: We didn't make any change. We will not stop on that, because there was no suggestion made here this spring that we change the rule, and there is none now, as I understand.

JUDGE CLARK: Perhaps I ought to say just this much: The thought was that perhaps we ought to let people in on the question. This is the Erie Railroad v. Tompkins question. The Reporter was directed to prepare a note which would open the

question, and we think we have done it all we need to. There it is. This is the real prize question. This is our note that gives a hint of what is going on, but it says that we are not trying to change anything now.

DEAN MORGAN: Judge Hand said he was going to let the Supreme Court change it, or something.

JUDGE CLARK: Yes, that is what he said from the bench, and I went along with him.

THE CHAIRMAN: All right, we will pass to 24.

JUDGE DOBIE: That simply broadens, as I understand, and I think the note indicates that pretty clearly. In other words, the property may be subject to the control of the court, in gremio leges, right in the lap of the court.

THE CHAIRMAN: In 24, you remember, we made a change in line 8 to make it clear that a situation might exist where the court had control or power of disposition of a fund in which the intervenor was interested, as well as in a case where he had technical judicial custody.

JUDGE DOBIE: We had exactly that case last week. The property, a money fund, was in the hands of the Treasury of the United States, but it was awaiting orders of the court.

THE CHAIRMAN: I see.

JUDGE DOBIE: Something like your Black Tom case.

THE CHAIRMAN: Exactly. Rule 26.

JUDGE CLARK: There is quite a little that has come

up on this. I think, first, the draft you have before you is what was actually voted. Several of us have made chops at this on the theory that it didn't quite cover the situation. Then Mr. Hammond has made an approach that perhaps covers it too much in a different aspect. I am not just sure the best way to approach it.

THE CHAIRMAN: Let's take subdivision (a) and just get our noses down on the changes, and you explain just what we have done there. Isn't that a good way to do it?

DEAN MORGAN: You had a letter or communication on that, didn't you, Charlie?

JUDGE CLARK: Yes, we sent out one. Mr. Sunderland has discussed it. I think probably you discussed it. I am not sure you did.

DEAN MORGAN: Yes, I did. I am sure I said something about it, but not much.

JUDGE CLARK: I am not sure but that it may be just as well, as the Chairman suggests, to go over the different suggestions as we go along.

THE CHAIRMAN: The first subdivision is when they may be taken, and the second subdivision is scope; so they seem to be separate. Now explain what we did.

JUDGE CLARK: The chief question is as to (b), on the scope. Coming back to (a), what we did in the main was to take out the limitation as to the time of taking and whether you had

to apply to the court or not. The requirement that you had to apply to the court for leave before the answer was filed was something of a nuisance and sometimes was rather hard on the plaintiff. Objections were made by lawyers that in certain places they had real difficulty in getting jurisdiction. One lawyer (this is a case I reported before) reported that he wanted to take a deposition in a case pending in the District Court of Connecticut, and he found that the fellow was leaving on a boat about to sail from Seattle. He telegraphed out to Seattle lawyers, and they raised the question of getting an order of court. He got one immediately from the Connecticut court. Then they thought that was inadequate because he ought to have one from the court in Washington. So they never did get the deposition.

We took that out and put it any time "after the commencement of the action".

I might say that I just got a communication from Mr. Hammond, who rather wonders if it isn't going too far to say any time after commencement of the action and suggesting that that might be even before you got jurisdiction over the defendant. But I still don't believe it is too soon myself. Of course, our rules provide that the action is commenced by filing the complaint, and the defendant conceivably may not have been served, but nevertheless by the time you get a deposition going--

THE CHAIRMAN (Interposing): He has to have service

of notice of taking the deposition, even though the original summons has never been served on him.

JUDGE CLARK: That is it.

THE CHAIRMAN: So he knows about it.

JUDGE CLARK: Yes. I shouldn't think it was objectionable.

JUDGE DOBIE: Mr. Hammond's point is something like this: There has been no service of process on the defendant, and in some cases there never will be. It may be legally or practically impossible. What is the sense of taking a lot of depositions when you really never are going to have him subject to the jurisdiction of the court? Is that the idea?

MR. HAMMOND: I think he could say, "Well, I just won't pay any attention to this notice." I think he could get away with it. "I haven't been served with a summons. I don't have to do anything until I have been served with a summons.

THE CHAIRMAN: If you changed the rule, he certainly would have to do something. You are talking about a subpoena or summons.

MR. HAMMOND: No; I am talking about the notice. Suppose he got the notice, do you think he would have to do something?

THE CHAIRMAN: If he merely got a notice, all right; but suppose they served a subpoena on him ordering him to appear right away?

JUDGE DOBIE: He couldn't just disregard it, could he? He couldn't say, "I am really not before the court."

THE CHAIRMAN: If he had a subpoena served on him, he would have a summons served on him before that or simultaneously.

JUDGE CLARK: I think what you say, Mr. Chairman, is correct, and if you are going to stop here I think you are going to postpone it too far. If you are going to raise a question of this kind, that you ought not to be able to take depositions until you are sure you have caught the defendant, that means that, even if you served notice of process, you have to give him a chance to say, "Why, I am not properly served," "I am not a resident," or "There isn't venue," and so on. I think it is that kind of thing that we want to get away from. I mean the long delay while the defendant can fight the thing off.

It may well be that the plaintiff will have gone to considerable expense that will come to nothing, but what hurt does that do? It won't happen very often. It is the plaintiff's own funeral if he takes a deposition before he has hold of any defendant and he can't get it in the court. The objection seems to me very rarely to mean any real hardship, and occasionally, as in the kind of case I put, it may be hard on the plaintiff not to be able to move quickly.

THE CHAIRMAN: How about the defendant? Sometimes

the defendant is right. Suppose the plaintiff starts a suit and files a complaint, but he hasn't yet made service on the defendant. The defendant is away in the East or somewhere, but he hears about the case, and a vital witness for the defense is just boarding a steamer to go to South Africa. The defendant might be interested in jumping in and taking a deposition immediately, without regard to whether jurisdiction has been obtained or whether anything more has been done than filing a complaint. I think it works both ways.

This is the way we voted it last spring. Unless you want to make a motion--

SENATOR PEPPER (Interposing): No, I was just going to inquire of the Reporter, under his theory, why we should limit the right to take a deposition to a period after the commencement of the action. Why not make a rule that anybody can take anybody's deposition on any subject at any time?

THE CHAIRMAN: Of course, that is perpetuation of evidence.

JUDGE CLARK: As a matter of fact, that is a real question, Senator.

SENATOR PEPPER: Yes, I think it is.

JUDGE CLARK: I want to say right now it is not only a real question, but it is one that has troubled our court. I wasn't on it. Some of them asked me what to do, and I sidestepped it. You see, in New York you can take a deposition to

prepare your complaint, and Judge Learned Hand asked me a while ago (as I said, I don't know what he did about it, but I think he sidestepped it), "Can you now, under the rules, take a deposition to frame a complaint?"

DEAN MORGAN: In New York you can do it.

THE CHAIRMAN: You can frame one, then take a deposition, and then reframe it. That is the way it works today.

JUDGE DOBIE: I think that is the answer there. After he files his complaint. He can put in a complaint that is the best he can do. It may not be very good. Then in the light of these depositions he can reframe it and amend it.

THE CHAIRMAN: When you have a complaint, of course, the defendant can move to dismiss or for summary judgment on the ground that it is a sham case and block the whole deposition right away.

JUDGE DOBIE: I am willing to let it stand this way, but I certainly wouldn't extend it, I don't think, to where anybody could take anybody's deposition at any time.

JUDGE CLARK: I think we decided against it. Of course, it works in New York. They have it there, and they don't have any too broad depositions, anyway, but in that respect they do have it.

THE CHAIRMAN: If there is no motion on 26(a), we will proceed to 26(b). Will you explain to us what we did there?

JUDGE CLARK: You will see that the general idea was to broaden the right or make it clear, to clarify certain decisions. There has been a question how far this was restricted. You will notice that there is put in in line 19 that the deponent may be examined in regard to any matter "which is relevant to the subject matter involved in the pending action or which discloses any information that will facilitate the discovery of relevant matter, whether it relates to the claim". And in line 25, "It is not ground for objection that the testimony would be inadmissible at the trial if the testimony is sought for the purpose of discovering sources of admissible evidence."

We clearly voted to let that in, and a deposition was not to be refused on the ground that it was really for discovering relevant matters.

THE CHAIRMAN: That is the way we drew it five years ago, but some of the courts have not accepted that interpretation, and we are cramming our original views down the throats of the courts. That is all that is, isn't it?

JUDGE CLARK: Yes, that is it.

THE CHAIRMAN: We are insisting on requiring what we did in '39.

MR. GAMBLE: That was voted in June?

JUDGE CLARK: Yes.

THE CHAIRMAN: It is not a change in the rule as

published in 1938, a change in effect. It is simply an emphasis on our original purpose in Rule 26(b).

JUDGE DOBIE: In other words, you are making it so clear that not even a judge can misunderstand it.

JUDGE CLARK: Both Mr. Sunderland and I raise a question whether we have gone that far. That was the intent.

THE CHAIRMAN: You mean whether you have gone far enough.

JUDGE CLARK: Yes, whether we have gone far enough in our language to carry out the Committee's intent.

MR. GAMBLE: I wasn't present at the June meeting. If I had been, I would have voted against that amendment.

THE CHAIRMAN: You would have voted to amend the rule and restrict it, then?

MR. GAMBLE: Yes, sir. I think that that provision is very unfair, and I know that recourse has been had in pretty much fishing expeditions to procure information that was not rightfully evidence. I should like to be recorded, although of course the Committee has already acted, as expressing that view.

JUDGE DOBIE: Mr. Wickersham objected to this whole discovery thing on that ground. It was a fishing expedition, black mail, a strike suit, and all that.

MR. GAMBLE: I don't object to that, but I don't think that a plaintiff ought to have a right to go in and

make a defendant disclose a claim file, for instance.

THE CHAIRMAN: We are getting down to the question of whether this does or not.

MR. GAMBLE: Or to disclose any information which will facilitate the discovery of relevant matter. I happen to know that an effort has been made, where there has been a suit and the defendant undertakes to make an investigation for the purpose of ascertaining facts to enable him to make an answer, to require under our rules that the defendant disclose what investigation he has made, whether it is relevant or whether it isn't. It seems to me that that is not conducive to the proper examination of issues.

JUDGE DOBIE: You mean plaintiff will lie back and let the defendant make an investigation and then, after he has gone to the time, expense, and trouble, say, "I would much rather have you take this time, trouble, and expense than myself, but now that you have got it, turn it over"?

MR. GAMBLE: He just wants to see what it is.

JUDGE DOBIE: I see.

MR. DODGE: I agree with that. Have we provided in any rule for a discovery that would go as far as that?

THE CHAIRMAN: I should like to ask the Reporter if it isn't a fact that the question has been up before the courts, and the majority of the courts have held that under our existing rules you are not allowed to go in and ask to get the

defendant's claim file of investigation, either from him or his lawyer. Some courts have allowed it, and some haven't. Is that the situation?

JUDGE CLARK: I think I will ask Mr. Sunderland. Do you want to answer that? That has been a matter of a good deal of discussion in the courts, and I know that some of the courts have held that you could not get that.

THE CHAIRMAN: Do you intend to allow them by this amendment?

JUDGE CLARK: That isn't the chief purpose of this.

THE CHAIRMAN: Is it any purpose of it?

JUDGE CLARK: I don't think so. Mr. Sunderland, you had better speak up on this. This is your baby.

PROFESSOR SUNDERLAND: I think that claim file has caused trouble. Usually the only obstacle they have thrown in the way of that is that their privilege can't be shown, but I think that is as far as they have gone except where they have said you can't have hearsay. If the claim file shows that somebody said something, that can't go in, because it is hearsay. We wanted to get rid of the hearsay objections.

As to whether on that broader question this would allow a claim file to be asked for, I don't know. That has caused a lot of trouble, and no clear statement has been made by anybody on the subject.

DEAN MORGAN: For the discovery of documents don't we

require an order of the court?

PROFESSOR SUNDERLAND: Yes.

DEAN MORGAN: You can't go on a fishing expedition in documents without an order of the court, anyhow.

PROFESSOR SUNDERLAND: No, but if you make your application for an order, then the only question is, are you asking for something that is privileged? If so, they won't give it. But if it isn't privileged, apparently--

DEAN MORGAN (Interposing): You don't mean to say that the court is obliged to give an order for what you ask for unless it is privileged.

PROFESSOR SUNDERLAND: It isn't obliged to, but it ordinarily will.

DEAN MORGAN: But they might not in a case such as has been suggested. As I understand it, the courts are always reluctant to allow one attorney to get the advantage of the preparatory work of the other.

PROFESSOR SUNDERLAND: Yes.

DEAN MORGAN: If that is all you are after, you ordinarily don't get it, unless you can show that there is something there that you can't get any other way. But when you are trying to get discovery for the purpose of getting information as to where material is that you can go after, then the mere question of whether that would be admissible in evidence certainly ought to be beside the point.

MR. GAMBLE: That isn't my point, Mr. Morgan.

DEAN MORGAN: That is what I should have said was a ground for objection, that the testimony which will facilitate the discovery of relevant matter would be inadmissible at the trial. I think admissibility or inadmissibility at the trial should be entirely outside the scope of this question of whether we are going to get this material or not.

SENATOR PEPPER: May I ask Mr. Morgan what the criterion of relevancy is if you subjoin a provision that it has no relation to any issue pending between the parties or which anybody has suggested.

DEAN MORGAN: The material you are after has got to have some--

MR. GAMBLE (Interposing): This is whether it relates to the claim or defense of the examining party.

SENATOR PEPPER: What is the criterion for relevancy if we adopt this rule? The court is asked, for instance, as to documents, or the proposal is to take an oral deposition. The party moving for the deposition says, "I want it to facilitate the discovery of relevant matter."

You ask, "Is it relevant to any issue raised by the plaintiff?

"No."

"Relevant to any issue raised by yourself?"

"Not so far."

Well, what then? How can it be decided?

PROFESSOR SUNDERLAND: You have to show it is relevant to the subject matter of the suit.

THE CHAIRMAN: Either to the claim or defense of one party or to the claim or defense of the other. It says that in lines 21 and 22.

SENATOR PEPPER: But it says, "whether it relates to the claim or defense of the examining party or to the claim or defense of any other party".

DEAN MORGAN: Yes, but not "whether or not".

THE CHAIRMAN: Any other party, you see, Senator.

DEAN MORGAN: I want to change that to "either to".

SENATOR PEPPER: Oh, well, that is all right; but as it stands, it is susceptible of the interpretation that it really means "whether or not".

DEAN MORGAN: No, no. It is "either or". I agree that that ought to be changed.

SENATOR PEPPER: Yes.

DEAN MORGAN: It relates either to or to.

MR. DODGE: There isn't any provision that in taking a deposition you can't summon documents. You don't have to get an order of court before you issue a subpoena <u>duces tecum</u> in connection with a deposition.

MR. GAMBLE: I call your attention to the first clause. It says, "Unless otherwise ordered by the court" .....

"the deponent may be examined".

THE CHAIRMAN: This question of going into the investigation of trials is a serious problem. One sort of shrinks from that idea. I have the same impression that Mr. Sunderland has. I read quite a few of the cases. I don't claim to have read them all or to have weighed the strength of one side or the other. I think, under our rules as they stand in this amendment, the courts have really been forced, first, to say that our discovery allows us to get discovery of information and even the names of witnesses who saw the action. That is pretty generally agreed to. We have always agreed to that. The next step is that you go to the other side and demand the names of the witnesses that he has discovered by his investigation. His investigation file names witnesses. There you are right up against the problem of using the investigation file of one side or the other to discover witnesses.

I must confess that as our Rule is drawn in 30(a), if that situation exists I don't see how the court can stop that inquiry and order it discontinued, except on the ground that there is some particular privilege of some kind there in putting a lawyer on the stand and asking him to disclose what his client told him about the case.

DEAN MORGAN: You wouldn't want to prevent a person from ascertaining from the opponent the name of a witness the opponent had discovered, would you?

THE CHAIRMAN: I am not suggesting that, but I am showing my understanding of what the necessary consequence of our original rule was.

DEAN MORGAN: Oh, yes.

THE CHAIRMAN: And it makes you gag; it makes everybody gag. When one fellow gets busy and gets going and scurries around and gets a lot of information and digs up information and has a confidential file with his preparation in it, if then the other fellow can walk in and say, "Let's have it all," it doesn't set well.

JUDGE DOBIE: I had this case, General, when I was district judge. There was a coroner's inquest (and in Virginia that testimony is not stenographically reported) where one of the lawyers had a stenographer there who took down this inquest. It was the very sad case of a drunken mountain boy who got run over by three hearses and killed. The lawyer on the other side wanted to get hold of that, and he sent for it. They both came to my office and disclosed fair feeling between them. The lawyer who went to all that trouble and expense said, "I'll tell you what I'll do. I will give it to you, and you can read any relevant part that you want to to the jury," and we finally compromised on that.

How would you handle a case like that? Here is a man who spent $300 to get the testimony at the coroner's inquest. He has it, and the man on the other side wants it. Nowhere

else can he get it. Would you make him give that to him?

PROFESSOR SUNDERLAND: I don't think you could.

JUDGE DOBIE: I think what he wanted it for was to check up on his witnesses.

THE CHAIRMAN: He wanted it to impeach the witnesses?

JUDGE DOBIE: To impeach the witnesses.

DEAN MORGAN: He has to show that there is something in it, under the rule that they apply in New York, at any rate, without this statute. According to Cardozo, if he could show to the court that there was something in that that would be relevant to the lawsuit, then the court would require a disclosure.

JUDGE DOBIE: What really happened, as frequently does happen in those cases, was that the coroner had this inquest very quickly, before there were any lawyers in it whatever on either side, before the defendant knew that he was going to be sued or before he could get to his laywer. Of course, the witnesses did talk pretty freely and with practically no prompting at all. A coroner's inquest with us is usually no case.

This boy got drunk and laid down right in the middle of a road, and these three hearses ran over him--all three--a terrible death!

THE CHAIRMAN: Suppose, instead of going to the fellow who put up the $300, asking him to dig up his file, the

lawyer who wanted this information took the deposition before trial of the shorthand reporter and asked, "You were present at that hearing?"

"Yes."

"Did you make notes of what the witnesses said?"

"Yes."

"Please tell us what they said."

JUDGE DOBIE: Get it from the shorthand reporter?

THE CHAIRMAN: How could you prevent it?

JUDGE DOBIE: I suppose the shorthand reporter would have his notes, and you could make him read from his notes, of course.

THE CHAIRMAN: I think so, make him read them.

DEAN MORGAN: Make him read them to refresh his recollection.

THE CHAIRMAN: In that case he may not have known about the shorthand reporter, and if he went in and got the confidential investigation file, he might then discover that there was a reporter who took the shorthand notes of what was said in the coroner's inquest. There is a case where you are using the investigation file to lead you to the reporter.

JUDGE CLARK: Mr. Chairman, if those of you who have the material which was presented at the May meeting will look back to that, there are some references to cases in the notes there. In that material that was presented at the May meeting

there was rather a complete collection of cases covering all this.

There are two slightly different questions, of course. The first one is as to whether the inquiry is limited to matters within the inquirer's own knowledge, and most courts have held on that that it is not, but some have held that it is so limited. Of course, that would be very restricted. In fact, it takes away a good deal of the effect of discovery if you want discovery about matters which are within your own knowledge. The main purpose of the amendment here was to clear up that point.

On the other point as to the use of material collected by the other side, I don't think we intended to do anything more with that than to let it stand as it was. I don't recall that we made any exact decision. The law is sort of developing, and we thought we would let it develop.

What the case material says on that is this: "It has been held that oral depositions or interrogatories may not be directed towards matters of materials secured by the other party through independent investigation incident to the preparation of the latter's case for trial." The McCarthy v. Palmer case is cited, where the judge said, "To use them in such a manner would penalize the diligent and place a premium on laziness." There are quite a number of cases so holding, a lot of them in the Southern District of New York.

It says here: "Other cases, however, have permitted such an inquiry. ..... The same problem has arisen under Rule 34 and a considerable number of courts have restricted discovery so as to deny its use where the documents or papers desired consist of statement, photographs or documents prepared or obtained by the adverse party in the preparation of his case."

There is a Pennsylvania opinion on a case, among others, decided by Judge Otis, and it was refused there. Other cases have allowed it there.

MR. DODGE: Don't you think we should make it plain that that is not to be allowed?

JUDGE CLARK: Personally, I am not so sure, really. I think if you start making restrictions, it is pretty hard to refrain from a restriction that is not pretty restrictive. We have had the view, I think, that you ought to be able to discover the names of witnesses. In fact, I think the only thing that we are hesitating about is statements obtained by the other side from the witnesses, but the courts in general find one way or another of not allowing those, anyhow. But shouldn't you get practically everything else, the names of the witnesses, and so on?

THE CHAIRMAN: Let me ask this: Am I right in my statement a few minutes ago that your amendments to subdivision (b) as drafted in June, according to your view, are not alterations in the rule at all as originally drawn in '38, but

they are brought up simply to clarify and emphasize our original purpose so as to wipe out this conflict in the decisions and disprove by explicit statement the interpretation that has been adopted by one group of judges?' Is that it?

JUDGE CLARK: Yes, that is as I understand it.

JUDGE DOBIE: I don't understand that this touches the particular problem that we have just been discussing. As I understand it, it does two things. It says that you can get on these depositions information not if it is relevant but which will facilitate the discovery of other things that are relevant. Second, it says that the mere fact that the testimony is inadmissible is not enough to keep you from getting it, if it enables you to discover admissible evidence. In other words, it pushes you back one step from admissible and relevant evidence to enable you to get stuff that will enable you to get it.

JUDGE CLARK: Yes.

JUDGE DOBIE: I think that is very good. I am heartily in favor of it.

PROFESSOR SUNDERLAND: We could eliminate the point you made, Charlie, that this is restrictive language, by cutting out the words "sources of" in the last sentence there; "if the testimony is sought for the purpose of discovering admissible evidence." You thought "sources of" was a restrictive limitation, because you might want to get the admissible evidence

but not to discover the source of it. You know the source, but you want to get it.

JUDGE CLARK: Yes. I think that is true.

PROFESSOR SUNDERLAND: So if we just cut out those words, "sources of", that would really clear up your point.

JUDGE DONWORTH: How are you going to interpret these new clauses that we have here? If the plaintiff's attorney, say in a personal injury suit, has a right to examine these papers, he will not confine himself to any particular feature. He will look at the papers, and he will know all that you have got.

PROFESSOR SUNDERLAND: Our rules provide that you can't get papers without an order. Whether it is a subpoena duces tecum or not, you have to have an order. That is our present rule.

THE CHAIRMAN: Under depositions?

PROFESSOR SUNDERLAND: Yes; discovery depositions.

THE CHAIRMAN: With a subpoena duces tecum, where you are asking a witness to bring the papers before the trial judge--

PROFESSOR SUNDERLAND (Interposing): You have to get an order there.

THE CHAIRMAN: No.

PROFESSOR SUNDERLAND: Yes.

THE CHAIRMAN: No.

PROFESSOR SUNDERLAND: That is Rule 45.

THE CHAIRMAN: Not as I understand it.

PROFESSOR SUNDERLAND: Rule 45(d). "A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be used without an order of the court."

THE CHAIRMAN: That is what I said, on the taking of a deposition, but you can issue a subpoena duces tecum without an order to bring a witness before a judge at a trial.

PROFESSOR SUNDERLAND: Oh, yes.

THE CHAIRMAN: And bring papers.

PROFESSOR SUNDERLAND: Oh, yes. I didn't know you were talking about that.

MR. DODGE: What rule is that that excludes the use of the papers?

PROFESSOR SUNDERLAND: Rule 45(d). You see, you can get an order direct for the production of papers under our discovery rules, or you can give a notice of the taking of a deposition, and in connection with that taking of deposition you can use a subpoena duces tecum.

THE CHAIRMAN: No, you can't. You have to get an order.

PROFESSOR SUNDERLAND: If you get an order.

THE CHAIRMAN: But don't forget the order. The point is this: If the witness who is to produce the documents is going to be haled before the trial judge himself, who can

rule on the propriety of the production and his being required to produce, that is one thing, and we will let the subpoena duces tecum be issued by the clerk and put the other side up to the job of either moving the court to quash or coming into court with papers and objecting to the exhibition.

In the case of the deposition, where we realize the witness with his papers is being haled before a notary public, we put the added qualification that you can't be compelled to bring any documents before a commissioner or notary at the taking of a deposition unless you have gone to the judge and gotten an order requiring the production.

MR. DODGE: That is on depositions, as distinguished from at the trial.

THE CHAIRMAN: That is it.

JUDGE DONWORTH: On that point, Mr. Chairman, there is a New York local rule that says that the judge may make that order ex parte, and it is the custom in New York, when you want to take a deposition and get documents, to get an ex parte order from the judge. I wrote to the Reporter about that. I thought that New York local rule was vicious. This rule really contemplates a hearing, but that is not the practice. In New York it is granted ex parte, and it is so provided by the New York rule.

JUDGE CLARK: I might say on that that I don't believe the order there is going to be very effective as a

protection either way, and we voted to take it out, didn't we?

PROFESSOR SUNDERLAND: Yes, we did. We voted to take that out.

MR. DODGE: Our rule as amended does not contain that preliminary requirement of an order.

JUDGE CLARK: The judges objected to it because it meant coming to them for what seemed like a pure formality, tying things up.

THE CHAIRMAN: Leave it to the party to move to quash now and raise an objection.

JUDGE CLARK: It is just a different way of getting at the thing. On this, I do think that if we were going to hit it, we would have to hit it directly by a prohibition. I think the question has been in the rules from the beginning, and I don't think what we are doing now affects it either way. It wasn't intended to, and I don't see that it does. Whether there should be a prohibition or not is subject to question itself.

THE CHAIRMAN: What do you mean by a "prohibition"? A prohibition of what?

JUDGE CLARK: Against using material in the secret files of a party.

THE CHAIRMAN: As it stands, the probabilities are that--

JUDGE CLARK (Interposing): They won't get it.

JUDGE DONWORTH: They would get it.

JUDGE CLARK: I don't think they would get it.

PROFESSOR SUNDERLAND: They would get it.

JUDGE CLARK: They are not getting it now from the judges.

JUDGE DONWORTH: The purpose of this change, though, is to let them get it.

PROFESSOR SUNDERLAND: They are getting a good deal of it now.

THE CHAIRMAN: A good many judges.

PROFESSOR SUNDERLAND: The only clear obstacle that the cases show is privilege. When you run up against privilege, they will say you can't have it, but short of privilege, it seems to me they are getting it now, unless the judge can figure out some fantastic reason for not allowing it, like hearsay testimony, as Judge Otis did.

JUDGE CLARK: I think they are certainly getting the names of the witnesses and things like that.

DEAN MORGAN: Oh, yes.

JUDGE CLARK: But suppose they say, "We want the report that you took when you talked with this witness." I don't think they are actually getting that very much.

PROFESSOR SUNDERLAND: They are getting the information.

JUDGE CLARK: They are getting the information, yes.

They are getting the information that there was this witness, and so on, and shouldn't they get that?

THE CHAIRMAN: Isn't that an arbitrary distinction that the judges are making? When you put your nose down on your rule, what legal ground is there for a judge to say you can get the name of the witness from the other fellow, but you can't find out from him what the other fellow said about the accident? Where do you get any logical ground for that distinction?

PROFESSOR SUNDERLAND: You don't.

THE CHAIRMAN: Except natural shrinking.

PROFESSOR SUNDERLAND: Just reluctance. They go as far as they feel they are forced to go, and they hold back as much as they can.

DEAN MORGAN: Minnesota has held that kind of thing privileged comparatively recently.

PROFESSOR CHERRY: Yes.

JUDGE CLARK: Wouldn't it be a little unfortunate to put in a provision that you shall not ask the other fellow for what he knows about the witnesses?

PROFESSOR SUNDERLAND: Or anything he has discovered through his own efforts? I think that would be fatal.

JUDGE CLARK: Yes, I think that would be too bad, and that is one reason that I shrink from putting in a prohibition.

THE CHAIRMAN: Of course, if there is a file with a statement of what one of the parties has said about the case to his lawyer, that is privileged, too.

PROFESSOR SUNDERLAND: Yes. That can't be had.

THE CHAIRMAN: Even if he said it to somebody who wasn't a lawyer, it ought not to be allowed.

SENATOR PEPPER: May I inquire of the Reporter whether this general language to facilitate the discovery of relevant matter, and so on, is in his judgement intended to deal with particular questions such as the naming of witnesses or whether it is intentionally left vague so that there is little or no criterion except privilege. It seems to me, as Mr. Sunderland says, privilege is one thing that is fairly definite. Short of privilege, it seems to me we have either got to contemplate that everything where there isn't a privilege may be permitted by the court under the rule as proposed or to modify the rule not by way of prohibition but by way of permission, as, for instance, to facilitate the discovery of the names of witnesses or whatever it is that we mean.

DEAN MORGAN: You have that now.

JUDGE CLARK: Let me say I think this was designed to hit a rather specific point that appeared in the decisions. Some of the decisions were saying that you could get here only evidence which was actually admissible in evidence, and the chief thing where the difficulty arose was that you couldn't

ask for any matter that was hearsay, and now hearsay is often important as helping you to other things. The chief thing that I think this does, to make it concrete, is to allow you to discover hearsay matters which may not themselves be admissible in evidence but which lead you to things that are. It is that rather specific thing that appeared in the decisions that we were trying to get here, not the more general thing.

SENATOR PEPPER: In other to deal with that question which has arisen in the decisions, are we not going very much further than merely relieving against the hearsay restriction? Are we not throwing the door perfectly wide open in the class of things that you are to get information about, even if the element of hearsay is eliminated?

PROFESSOR SUNDERLAND: That is true. I think that is what we ought to do, and I think that is what we do do, as amended.

SENATOR PEPPER: If so, I think we ought to have our eyes open to the fact that those courts are acting logically. We should limit the inquiry only in the case of privilege. I can't think of anything else which would guide a judgment, except his own whim or reluctance or some non-judicial state of mind. I can't think of anything that would guide a judge under this rule in determining whether or not the information sought was proper, except privilege.

JUDGE CLARK: Let me add one thing, so that you will

have this before you. You remember that there is a rule, 30(b), which is pretty broad, but which slaps on a limitation.

THE CHAIRMAN: Our rule to prevent harassment, and so on? Is that it?

JUDGE CLARK: Yes, that is the general thing. But if you look at the specific details, you will see that among the list of things that the court may act to prevent, going down the list, is that the deposition may be taken only--

JUDGE DOBIE (Interposing): What rule is this?

JUDGE CLARK: Existing Rule 30(b), Orders for the Protection of Parties and Deponents. One of the things there is: "or that certain matters shall not be inquired into, or that the scope of the examination shall be limited", and so on. That is undefined there, and I take it that it is pretty largely a matter of discretion.

Have the courts used this?

PROFESSOR MOORE: Yes.

JUDGE CLARK: Mr. Moore tells me that some of the courts have relied on this particular phrase in this connection as a ground for saying you are not to get this kind of information.

MR. DODGE: What is the objection to making it perfectly plain that you can't get at the confidential files of the other side, accumulated in the preparation of the case?

THE CHAIRMAN: Suppose he puts the names of all the

witnesses that he knows about in his confidential file. It is in the file, and you never can find out who they are.

MR. DODGE: You can inquire about that without seeing the names in writing.

JUDGE DOBIE: In other words, you wouldn't object to his getting the names from him personally.

MR. DODGE: That is a different thing from getting at the confidential papers.

PROFESSOR SUNDERLAND: You would make a point, Mr. Dodge, between the case of a fellow who finds out the facts in an informal way, has them in his head, and a fellow who does it systematically and gets a memorandum on it? You say if he is systematic and has a memorandum and puts it in a file, that couldn't be discovered, but if he is unsystematic and just goes around and keeps it all in his head, you could get all that out of him by deposition. I don't believe that is a sound basis for that, is it?

THE CHAIRMAN: Suppose the fellow has the names of several witnesses he knows about and has them recorded in his confidential file. Suppose you call him up and ask him, as you suggest, to tell you orally who his witnesses are and not to let you look at the file. Suppose he says, "I don't know of any." Then your next question is, "Haven't you got some record of witnesses' names that you dug up?" He may lie about it, you know.

MR. DODGE: The mere disclosure of the names of witnesses is very much less objectionable than the disclosure of papers, documents, and other material gathered in connection with the preparation of the case.

PROFESSOR CHERRY: We have the names of witnesses already.

DEAN MORGAN: You have documents, too.

PROFESSOR CHERRY: Yes.

DEAN MORGAN: "description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge or relevant facts." We covered those specifically, 26(b).

PROFESSOR CHERRY: Doesn't our difficulty arise out of the proposed new language in lines 19 and 20? The language in 25 to 27 takes care of the Judge Otis case.

THE CHAIRMAN: That is my impression.

PROFESSOR CHERRY: If we left out this proposed new language in 1920, it would seem to me that we had accomplished all we intended at the May meeting. I confess that under lines 19 and 20 as they are now proposed, it would seem to me very doubtful that you could keep a confidential file out of it, but I can't see just what we would accomplish otherwise by making this point. We have our list of things, and then we take the relevances, admissibility, and other things out of the picture by 25 to 27.

PROFESSOR SUNDERLAND: You can get the information under our rules. As they now read, you can get that confidential file so far as it relates to relevant matters, but you can't get that confidential file so far as it relates to matters which merely lead to the discovery of relevant matter.

MR. DODGE: It seems to me you ought not to get it for any purpose.

PROFESSOR SUNDERLAND: I think you can get it at the present time so far as it pertains to relevant matter.

PROFESSOR CHERRY: I should say that by putting in 19 and 20 we decided that confidential file matter.

JUDGE CLARK: Look over the cases cited in the notes. They give an idea. What would you do with those cases? That is, if you took out the material in 19 and 20, would you still want to say whether admissible in evidence or not? You see the reference there to the cases. "Under Rule 26(b) as previously worded, several cases, however, erroneously limited discovery on the basis of admissibility, holding that the word 'relevant' in effect meant 'material and competent under the rules of evidence." The first is Judge Otis' decision. "Thus it was said that inquiry might not be made into statements or other matters which, when disclosed, amounted only to hearsay."

THE CHAIRMAN: We covered that in lines 25 and 26. He proposes to leave that in and cut this out.

JUDGE CLARK: Yes. That is possible.

PROFESSOR CHERRY: That is what I think would happen there.

JUDGE CLARK: Both Mr. Sunderland and we have suggested at different times that that phrase be brought up into the text in 19 and 20.

THE CHAIRMAN: What?

JUDGE CLARK: Instead of making a separate sentence, that you put it, "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether admissible in evidence or not".

MR. GAMBLE: Surely we don't want to make a provision, keeping in mind the language in (a), that these depositions may be taken for the purpose of discovery or for the purpose of adducing evidence in the action, provided the court may receive it as evidence.

JUDGE CLARK: No. Of course, the question of admissibility is later provided for in this rule. The scope of examination doesn't cover that, but I think your suggestion might do it. It does look a little odd when you say it must be evidence, but it need not be admissible. It may be just a question of a little surprise when we look at it.

PROFESSOR CHERRY: I don't think so. If the courts had stuck to "relevant" in the sense that we thought it bore, we wouldn't have had the difficulty.

JUDGE CLARK: That is correct.

PROFESSOR CHERRY: I thought that 25 to 27 did that job. I didn't suppose we were intending to go beyond that point.

THE CHAIRMAN: Your motion is to strike out the underlined sentence in lines 19 and 20 and leave in the underlined sentence in lines 25 to 27?

PROFESSOR CHERRY: That is right.

PROFESSOR SUNDERLAND: Substantially, then, that is the Reporter's final draft that he gives under note to the Committee on Rule 26.

JUDGE CLARK: Yes. That is what I sent out. Do you have this diarrhea of things that came out? You will find that under June 24. What we wanted to do, among other things, was first to take out that limitation on source of material. That is what we have suggested, and Professor Sunderland, in a letter, himself had something very similar. This is that way we suggested it, if you can find that. I will read it to you, if you wish. It starts out, "We question whether Rule 26(b) .... achieves the purposes which the Committee had in mind."

THE CHAIRMAN: I have it. It says:

"We question whether Rule 26(b), as amended pursuant to the Committee's vote, achieves the purposes which the Committee had in mind. It will be recalled that one reason for amending the rule was to make certain that a deponent could be examined touching hearsay matters. The amendments do not make

this clear; for example, if you ask deponent A what X said concerning the accident, you are not taking A's testimony for the purpose of discovering the 'source' of admissible evidence, since you already know the source, namely X. We suggest that the following draft will attain the objectives desired:

"Unless otherwise ordered by the court as provided in Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether or not the testimony sought would be admissible in evidence, and whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, 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."

That leaves out 19 and 20, and it carries the amendment in lines 25 to 27 up and embodies it in an earlier part of the paragraph. That is Mr. Cherry's proposition coupled with a rearrangement, isn't it?

JUDGE CLARK: Yes, and it does one other thing, too. It takes out the words "sources of".

THE CHAIRMAN: The words "sources of" at the bottom in line 27. I see.

DEAN MORGAN: I thought if you wanted it as a separate sentence, you could say, "It is not ground for objection that

testimony which will facilitate the discovery of relevant matter would be inadmissible at the trial."

PROFESSOR SUNDERLAND: We don't have that word "facilitate." We don't have that in this draft. Anything which will facilitate the discovery of relevant matter is out in this particular draft.

DEAN MORGAN: I see. It is out.

JUDGE DONWORTH: I second Mr. Cherry's motion to strike out the underscored matter in the first clause, lines 19 and 20.

JUDGE DOBIE: May I ask, Judge, whether you do that on the ground that you think that relates to confidential files or that it may be interpreted too broadly or that you do not think that they ought to have discovery which will facilitate information that leads to discovery of relevant matter.

JUDGE DONWORTH: I have in mind particularly the claim file, and I think, as this is worded here, the courts will have to allow the examination of the claim file. If you use the word "confidential," of course that is a very loose term. If it means privileged, the courts will take care of that, but if it is confidential just because the claim agent, and so on, is not imparting the information outside generally, I don't think the word "confidential" really is a very expressive word there.

MR. DODGE: Weren't we supplied somewhere with notes

showing the extent to which the courts have gone in allowing or compelling the production of preparation files? Where are those cases?

JUDGE CLARK: Those were in the material sent out before the May meeting, and I have some papers here. That is what I was reading a little earlier.

DEAN MORGAN: Is it the one where it starts with the comment by Arnold?

JUDGE CLARK: It starts with a comment by Arnold, but that isn't the one. You read beyond that by Arnold. I guess we don't need the comment by Arnold at the moment. Under (b), page 65, on Rule 26. Pages 65,66, 67, and 69. It is all there in those notes; 65 to 70, really.

JUDGE DOBIE: I should like to ask Mr. Sunderland, you or the Reporter didn't draw that with the idea of making any very great broadening or without any reference at all. You just wanted to push it back to just matter that is relevant and, back of that, matter that discloses matter that is relevant.

PROFESSOR SUNDERLAND: That is all, and I think that was really intended to be implicit before, but it wasn't clearly stated.

SENATOR PEPPER: May I inquire, Mr. Chairman, about Judge Donworth's motion, would it or would it not be satisfied by the adoption of that matter which was read by the Reporter

as having been promulgated on June 24? Is not that really the substance of Mr. Cherry's motion?

JUDGE CLARK: Yes.

THE CHAIRMAN: I think it is the substance, but I think it is a real question whether the alternative suggestion made by the Reporter of June 24 is really as clear as the present arrangement, which would leave that sentence at the bottom, in lines 25 to 27.

SENATOR PEPPER: I see.

THE CHAIRMAN: In one case we have it in as part of a sentence, and in this case we stick it out as a sore thumb.

PROFESSOR CHERRY: I like it better in that form.

THE CHAIRMAN: That is how I understood Judge Donworth.

JUDGE DONWORTH: You like it better in the form of the early June draft?

PROFESSOR CHERRY: Yes.

JUDGE DONWORTH: So do I.

JUDGE CLARK: That is all right. But, Judge Donworth, you intended to include the last sentence of the earlier June draft?

JUDGE DONWORTH: I intended to leave it in.

JUDGE CLARK: I wanted to make that clear. I wasn't clear whether you did or not.

JUDGE DONWORTH: That would be the subject of another

motion about the sources.

THE CHAIRMAN: All right.

JUDGE DONWORTH: At present the notion is confined to lines 19 and 20.

THE CHAIRMAN: Are you ready for the question striking out the underlined matter in lines 19 and 20 of Rule 26(b) as drafted June 8?

JUDGE DONWORTH: Just for clarity, there is some underlined matter in line 20 that we don't disturb, you know.

THE CHAIRMAN: The words "it relates" at the end of line 20 are not disturbed.

JUDGE DONWORTH: That is right.

THE CHAIRMAN: All in favor of that motion say "aye"; opposed, "no."

JUDGE DOBIE: No.

THE CHAIRMAN: That seems to be agreed to.

Now there is a question of--

MR. HAMMOND (Interposing): Pardon me, sir. Do you need "it relates" if that other is stricken out?

THE CHAIRMAN: You are substituting "it relates" for "relating". That is all. You have to leave one or the other in there.

MR. HAMMOND: Yes, you have to leave one or the other.

DEAN MORGAN: But to clear up what the Senator said--

MR. HAMMOND (Interposing): Put in the word "either".

DEAN MORGAN: "relating either to the claim or to", and so forth. Then you couldn't read "whether or not" into it.

JUDGE CLARK: I suppose Mr. Hammond's point is that we don't need to make any change. The fewer changes you make, the better. Is that it?

MR. HAMMOND: Yes, but we do want to put in the word "either" before the word "to".

JUDGE CLARK: Put in the word "either".

MR. HAMMOND: I guess that is right.

JUDGE CLARK: In other words, you could just leave it as it was. We don't need to change it. Even though the grammar might not be as good as this, there is some object, I suppose in not making any changes unless you really feel there is need. But if you want to put "either" in, I suppose you should change it.

MR. DODGE: The authorities which you cited to us before make it plain that there is a great disagreement between the courts as to this matter of the files of the other party, and I think the rule ought to make it plain that those papers or the results of a party's preparation cannot be inquired into.

THE CHAIRMAN: That would involve a special addition to the rule. Suppose we check up on this clause in line 20 while we are on it. I don't think, Senator, that there is any ambiguity about that. It says, "which is relevant to the subject matter involved in the pending action" .... "whether it

relates to the claim or defense of the examining party or to the claim or defense of any other party". If it is relevant, whether it relates to one or the other--

SENATOR PEPPER: I think it becomes clearer if you strike out the matter which is the subject of the pending motion. I thought it needed clarification if the underlined matter was going to be retained, but I agree, if that goes out, it might stand as is.

THE CHAIRMAN: As is. Now let's go down to lines 25 to 27.

JUDGE DOBIE: I move that that be adopted, with the words "sources of" stricken out.

THE CHAIRMAN: That is the issue. Are you ready to vote on that?

MR. GAMBLE: If you strike out the words "sources of", I should like to ask your consideration again of the question whether or not that would permit or require the reception of the depositions as evidence in the aoton, having in mind the provision of lines 6 and 7 of (a). If you are going to permit this discovery in the action, that is one thing, but having once gotten the deposition, do you mean to say that a deposition which plainly shows that it is hearsay is admissible as evidence at the trial?

THE CHAIRMAN: No, no. That is all clearly covered. What section is that?

JUDGE CLARK: Rule 26(d).

THE CHAIRMAN: Rule 26(d) expressly provides what depositions are admissible at the trial and what are not, and it makes it perfectly clear in the first place that a deposition can't be used at all if the witness is within a hundred miles and you can get a subpoena; just the way the existing federal rule and the federal statutes are.

JUDGE DOBIE: It doesn't touch that.

PROFESSOR SUNDERLAND: You can't introduce any hearsay. The rules of evidence apply entirely to these depositions when offered at the trial.

THE CHAIRMAN: To answer your question, you would have to go to Rule 26(d), which may not be before you.

JUDGE CLARK: Page 33 of this official draft.

THE CHAIRMAN: That says: "Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party", and so on.

DEAN MORGAN: Subdivision (e): "Subject to the provisions of Rule 32(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying."

THE CHAIRMAN: That is all covered by restrictions

there, I think.

Now the question is on striking the words "sources of" in line 27. All in favor of that say "aye." It is agreed to.

MR. GAMBLE: I should like to be recorded as opposed to that.

THE CHAIRMAN: To striking out the words "sources of"?

MR. GAMBLE: Yes.

THE CHAIRMAN: My idea is that our friends think that striking it out broadens the rule, and I think it narrows it, so I voted for it. You can discover only admissible evidence. You can't discover sources of admissible evidence.

Mr. Dodge, you had a proposal to add an amendment to (b) which explicitly dealt with the subject of confidential files?

MR. DODGE: Yes. The notes show that a considerable number of cases have denied discovery where the documents or papers desired consisted of statements, photographs, or documents prepared or obtained by the adverse party in the preparation of his case. Other cases take a more liberal view and permit him discovery, and I presume that means they allowed that kind of thing. It has come up very much, and on pages 68 and 69 of this documentary material there is evidence that there has been a great conflict of authority between the courts on this question, and I think the rules should make it plain.

So I move that it be made plain that what the Reporter calls the less liberal view is the view of the Committee, that you cannot get at the material collected by the adverse party in the preparation of his case for trial.

SENATOR PEPPER: That could be made the subject of an addition at the end of the sentence as we now have it, by adding after the words "for the purpose of discovering admissible evidence" a clause beginning with "other than for the purpose of discovering admissible evidence other than documents or other material prepared by the adverse party." Isn't that where it would come?

MR. DODGE: Yes.

JUDGE CLARK: I wish you would go further, Senator, because I think the language here is pretty important.

SENATOR PEPPER: I didn't mean to suggest the language but merely the place where the language would come in, and I think that the proper place is in qualifying the scope of the words "admissible evidence". That is all I was saying.

MR. DODGE: Here is a statement made on page 68 of this memorandum of decisions which I should like to see us affirm, the position of those courts which "have restricted discovery so as to deny its use where the documents or papers desired consist of statements, photographs or documents prepared or obtained by the adverse party in the preparation of his case."

SENATOR PEPPER: I was thinking of just substituting "material" for that catalog.

THE CHAIRMAN: What was the exact wording of your proposal? I didn't understand it.

SENATOR PEPPER: Just exactly what Mr. Dodge has read, excepting instead of an inventory of the things, you substitute the word "material".

THE CHAIRMAN: "material collected for the purpose".

SENATOR PEPPER: That is right.

MR. DODGE: So it will read, "Discovery may not be had where the material desired is such as prepared or obtained by the adverse party."

PROFESSOR SUNDERLAND: Under that, if the party hunted up the names of witnesses and had them in a file, you couldn't get those names from him, could you?

DEAN MORGAN: Or, if he took the only fresh photograph of the accident, you couldn't get it.

MR. DODGE: Exclude the names of witnesses expressly, if you want to do that.

DEAN MORGAN: No.

JUDGE CLARK: There is a further problem. I think probably Mr. Dodge doesn't intend it, but the language does go pretty far. You see, not only "prepared", but "materials obtained". Suppose that you got the document in question, if the case involved a document, and you obtained it for your

defense, the other side, strictly, according to the words, couldn't get it. I suppose you don't intend to go that far, but I just bring that out as showing some difficulty.

MR. DODGE: I think the exact phraseology need not be determined now, but the idea is to follow the line of those decisions which you first cite there.

THE CHAIRMAN: The trouble is that the exact phraseology is the rock you are going to get wrecked on.

JUDGE CLARK: It is the important thing.

THE CHAIRMAN: That is what rubs.

JUDGE DOBIE: I have a lot of sympathy for this motion in connection with not penalizing the diligent, and so on, but we have had a lot of cases like this before our courts, and I am sure all you have had this same experience. If there is an automobile accident, usually the attorney representing the defendant or the insurance company gets there first. He takes photographs of the cars, the skid marks on the road, and things of that kind which are very germane and very relevant. The other man doesn't get there until the cars have been moved, and the rains and all have removed the skid marks. You are going to rule those out. I don't think you ought to do it.

THE CHAIRMAN: It is the truth that you are getting at.

JUDGE DOBIE: True, he has been more diligent, but the plaintiff is injured, and usually the plaintiff doesn't get

a lawyer. He is taken to the hospital. We had exactly that case in North Carolina, and the defense was that this testimony was impossible under the laws of physics in connection with these photographs and all. It seems to me to be bad to rule things of that kind out. True, the defendant has been more diligent, but he has more facilities, we know. Yet these skid marks and things like that are terribly important, and the pictures of the cars showing the position on the road before any of them were moved are important to the question of which one was on the right side of the road and the speed at which they were going and things of that kind. I wouldn't want to rule those out. I think if the defendant gets those, the other side is entitled to have them.

THE CHAIRMAN: Suppose it is a case where the insurance company or defendant has been very diligent and located a witness who observed the accident and obtained a statement from him as to what he saw of the accident. The other side, the plaintiff, under the proposal would be allowed to get the name of that witness that the defendant had dug up, but he wouldn't be allowed to find out what that witness had told. Then at the trial, we will say that witness whose name has been disclosed goes on the stand and tells an entirely different story from what he put in the statement that the insurance company dug up; there has been a shift in facts, and he lies, and the statement that was originally obtained from him by

the insurance company is thrown down the sewer and nobody sees it. It is suppressed. That doesn't hit me as being the way to get at the truth.

Of course, the plaintiff may get the statement, and then, it is true, getting the information and finding out what that fellow is going to testify to, he might get busy and try to get some witnesses to perjure themselves and say it is a lie, but that is true of all this discovery matter. If the adversary discovers the other fellow's case and all his facts, it gives him a chance to do some dirty work at the cross-roads and prepare to swear him out of court. I don't know how you can avoid that in this discovery business.

JUDGE CLARK: Of course, there is another kind of difficulty, just as the kind you mentioned, that I used to run into when I tried to investigate. If you get to a person first or very early, he may talk when later he wouldn't. What would happen if you go to a witness and he said, "Oh, there was a fellow around here, and I signed a statement. I don't want to do anything more. You go see my statement," or something like that? The other fellow has the statement, and you can't get anything out of him.

JUDGE DOBIE: Very frequently the claim agents have told them not to talk to anybody else. I have known that to happen, because I was once a claim agent, and the stronger I worked for the companies, the more strongly my sympathies were

for the other side.

PROFESSOR SUNDERLAND: I don't see why we should consider that discovery penalizes the diligent. I don't think that the whole thing is a poker game. We are trying to establish the facts or the truth of a situation, and there is no penalty on a fellow who is diligent. He is simply contributing to the administration of justice.

THE CHAIRMAN: Is it a fact that the numerical weight of the cases, really, under one power or another of the courts, does exercise reasonable restraint on allowing one fellow to dig into the other fellow's investigation file?

PROFESSOR SUNDERLAND: I think they do.

THE CHAIRMAN: They are working that way, I think. They are finding reasons to do it.

PROFESSOR SUNDERLAND: Yes.

THE CHAIRMAN: Justice.

PROFESSOR SUNDERLAND: In particular cases, I think so.

THE CHAIRMAN: Under that other rule, it gives them a sort of power to look into all of it. Why not let them keep on at that? It seems to work the thing out.

SENATOR PEPPER: May I ask Judge Dobie, in regard to the type of case that he suggested, whether the situation is not adequately covered if the photograph or the other fruits of special diligence are immune from production for purposes of deposition but may be called for at the time of the trial

and, if not produced, examining counsel for the plaintiff can ask whether the defendant didn't have photographs taken, whether they are not available, and why they are not produced. Their non-production can be commented upon to the jury. I don't see why there is any special aid to the administration of justice in enabling the plaintiff to get the benefit of the fruits of the defendant's diligence for the purposes of a deposition. That is for the purpose of preparing a case against the defendant. It seems to me that the defendant might properly be protected in respect of the fruits of his own diligence as a matter of preparation for trial, because it is quite within the power of the plaintiff at the trial to get the material that Judge Dobie quite rightly thinks ought either to be produced or its non-production explained.

MR. DODGE: The cases that are cited in this memorandum seem to stand six to four. Six cases are cited against the admissibility of evidence on deposition, and the other four apparently permitted it.

DEAN MORGAN: With the Southern District of New York in conflict.

MR. DODGE: On both sides

JUDGE DONWORTH: I wonder if the difficulty could be solved by striking out the words "sources of" as now suggested, but adding this--

MR. DODGE (Interposing): I don't think that would do

it.

THE CHAIRMAN: What were you going to add, Judge?

JUDGE DONWORTH: I was wondering if the difficulty could be solved--and I make this with timidity--by striking out the words "sources of", as now suggested, and adding at the end the following: "but the court, by order made under Rule 30(b), may limit or restrict inquiry into papers and documents prepared or secured by the adverse party in the preparation of his case." Of course, that puts a little duty on the court, but it solves our difficulty and will enable the court to protect the party.

JUDGE CLARK: That might be done. Of course, we put in the exception at the beginning. You will notice, Judge Donworth, if you will look back at (b), it is at the beginning. Maybe it would be wiser to spell that out more than we have done by just the "unless" clause. Really what you are doing is to spell out that beginning. I don't think there is any reason that you shouldn't, if it is a good thing to bring home to the parties, put it in a separate sentence instead of an "unless" clause.

THE CHAIRMAN: I confess that the words, "Unless otherwise ordered by the court", haven't made any impression on me, and it is pretty vital. If it is intended to do just what Judge Donworth wants, give the court express authority certainly as to these confidential files to exercise discretion in a par-

ticular case as to what should be disclosed and what should not, I like Judge Donworth's phrasing much better than this "Unless otherwise".

JUDGE DONWORTH: The trouble with relying on the introductory clause is that by the final clause we seem to limit what the court can do, unless we speak to the contrary.

SENATOR PEPPER: Wouldn't Judge Donworth's motion be perfected if he moved to strike out the phrase, "Unless otherwise ordered by the court as provided", and so on, so that the sentence would begin, "The deponent may be examined", and then transfer that grant of discretion to the court to the end of the subsection as he originally proposed?

JUDGE DONWORTH: Possibly right, but your suggestion is open to this objection: My clause is only for the protection of papers and documents secured in the preparation of a case, whereas as it now reads the power of the court is much more general than that. Do you follow me?

SENATOR PEPPER: Yes, I do, but I was wondering whether you couldn't make it as general as you think proper but locate it at the end of the section rather than in what seems to me to be rather an inept position at the beginning of the subsection. That is all I meant.

THE CHAIRMAN: Of course, under that first line or two that the court may unless otherwise ordered covers the situation where you have already taken a deposition and you

ought not to be harassing him with another. That is quite a distinct matter from Judge Donworth's. There is something to be said for keeping the two apart.

DEAN MORGAN: Keeping them both.

THE CHAIRMAN: Judge Donworth's motion, as I take it, is to add to the end of line 27 as it now stands with the words "sources of" stricken out, a sentence, which you dictated to the Reporter.

JUDGE DONWORTH: "but the court, by order may under Rule 30(b)" (or (d)) "limit or restrict inquiry into papers and documents prepared or secured by the adverse party in the preparation of"--would you say his case or the case?

DEAN MORGAN: His case.

JUDGE DONWORTH: His case, then.

SENATOR PEPPER: Why not say, "prepared by the adverse party"?

JUDGE DONWORTH: "prepared or secured by the adverse party".

THE CHAIRMAN: "for the purposes of litigation". You would have to hook it up. It might have been for a period long before the suit had ever started.

SENATOR PEPPER: Yes, that is right.

JUDGE DONWORTH: What the court is troubled about is what he does in preparing his case.

SENATOR PEPPER: That is right.

JUDGE DONWORTH: In the preparation of the case.

MR. DODGE: The courts have that power now, and apparently, with that power existing, they have disagreed as to the matter. I would rather exclude it as a subject matter of inquiry and not make it necessary to get an order of the court on the subject.

PROFESSOR SUNDERLAND: The suggestion of Judge Donworth ought not to be a part of that sentence, I should think, but a separate sentence, because this sentence relates only to matter that is inadmissible at the trial, and Judge Donworth's provision relates to matter which may be admissible at the trial. Put it as a limitation, a restrictive sentence there that applies only to inadmissible things.

JUDGE DONWORTH: Put it in a separate sentence that the court may, under Rule 30, and so forth. That would put us in line with cases that have held a confidential file not proper for inquiry. Does that suit you better?

MR. DODGE: How does your motion read now?

JUDGE DONWORTH: I would change the motion so that after the word "evidence" at the bottom of the page, line 27, we would start a new sentence: "The court, by order made under Rule 30(b) or (d), may limit or restrict inquiry into papers and documents prepared or secured by the adverse party in the preparation of the case." That shows what they are shooting at and makes it very clear.

MR. DODGE: That merely expresses again what power the court now has under your other rule, which was 30 what?

DEAN MORGAN: Rule 30(b) and 30(d).

THE CHAIRMAN: But rather emphasizes the use of it in this case.

JUDGE DONWORTH: The answer to that, Mr. Dodge, is that by lines 25 to 27 we have seemed to adopt the conservative or illiberal rule, whatever you call it.

MR. DODGE: I move to amend that motion by excluding that material from the subject matter of inquiry.

JUDGE DOBIE: Eliminating the idea of court discretion?

MR. DODGE: Eliminating it, yes.

PROFESSOR SUNDERLAND: All you have to do then to protect yourself absolutely against discovery is to chuck your material into a so-called confidential file, and then you are perfectly safe. Nobody can get it out of you. I don't think you ought to have that privilege.

THE CHAIRMAN: We have discussed it. I think we know pretty well what we have to vote on. The motion is on the amendment of Mr. Dodge that we so draft the rule that anything in the file prepared for the defense or prosecution of a case cannot be gone into at all, what we call an investigation file.

JUDGE CLARK: You stated it just a little differently from Mr. Dodge.

THE CHAIRMAN: He is not wording it, and neither am I. That is where your difficulty is going to come, if it is adopted.

JUDGE CLARK: May I ask about that?

THE CHAIRMAN: Yes.

JUDGE CLARK: You limited it to the word "prepared". He made it "prepared or obtained". I should think the "obtained" is particularly questionable. "Prepared" does limit it to something which wasn't in existence until they started defending, but "prepared or obtained" is awfully broad.

THE CHAIRMAN: Mr. Dodge hasn't worded his amendment explicitly as to what is cut out and what is not. The general tenor of it is that we draw this rule so that what is commonly known as your investigation file, which your agents and people have gotten up for the defense or prosecution of the case, shall be absolutely confidential under this rule. That is the gist of it, isn't it?

MR. DODGE: They can be extracted at the trial if they are really material, as Mr. Pepper points out.

THE CHAIRMAN: They are confidential in so far as depositions before trial are concerned, then.

DEAN MORGAN: Yes.

MR. DODGE: I took the phrase "prepared or obtained" from the statement of what those six courts had held.

JUDGE DONWORTH: My motion will come up later? Is

that your idea?

THE CHAIRMAN: We have to vote on the amendment. Is there a second to the amendment?

SENATOR PEPPER: Seconded.

THE CHAIRMAN: All in favor of Mr. Dodge's amendment say "aye"; opposed, "no." I think the "noes" have it. Do you want a show of hands?

Now we will take a vote on Judge Donworth's motion, which is to add that sentence in line 27. All in favor of his motion say "aye"; opposed. That is carried.

Is there anything else on (b)?

JUDGE CLARK: I think there is nothing there. There was a question, Mr. Mitchell, that you raised as to restricting the taking of testimony of a managing agent or agent without giving him some expenses. That was your suggestion, and Mr. Sunderland's comment brought it up later on a later rule on subpoenas.

THE CHAIRMAN: I don't care where you change it. Do you think it can be taken up later, Mr. Sunderland?

PROFESSOR SUNDERLAND: Yes, I think it properly belongs under the subpoena rule.

THE CHAIRMAN: Let's not delay things by taking it up here, then.

DEAN MORGAN: I have a suggestion on the next rule, 28(a), which hasn't been made.

THE CHAIRMAN: What rule is this?

DEAN MORGAN: Rule 28(a).

THE CHAIRMAN: We are on 27 now.

DEAN MORGAN: I thought you had changed 27.

JUDGE CLARK: No; 26.

THE CHAIRMAN: Is there any suggestion on Rule 27? That has just a slight change or addition that we made last June in line 8.

DEAN MORGAN: Just making a perpetuation effect.

JUDGE DOBIE: I move that be adopted.

THE CHAIRMAN: It is adopted already, unless you want to make a motion to alter the draft.

JUDGE DOBIE: All right.

THE CHAIRMAN: It was adopted last June. If there is no motion to alter Rule 27 as it now stands in this draft, we will go to Rule 30.

DEAN MORGAN: If you don't mind, I want to take up a suggestion on Rule 28.

THE CHAIRMAN: An intermediate rule, Rule 28.

DEAN MORGAN: Miss Elizabeth O'Keefe, of Boston, Massachusetts, called my attention to this at the suggestion of Judge Wyzanski. A deposition in the United States can be taken only before an officer authorized to administer oath by the laws of the United States in the place where the examination is held, and it doesn't provide at all for the appointment of

a commissioner. She said that she had had to take a tremendous number of depositions in small places in Massachusetts, and sometimes elsewhere, where there was nobody who was authorized to administer an oath, and in patent cases the lawyers wouldn't stipulate that she might administer the oath herself or she wasn't authorized to administer in that particular place. It caused a tremendous amount of delay and inconvenience, and so forth.

PROFESSOR SUNDERLAND: No notary in the place?

DEAN MORGAN: A country place. You have to go to a factory and take the deposition of a factory man in a patent case as to what is going on there, and so on.

MR. DODGE: Couldn't she take oaths all through the Commonwealth?

DEAN MORGAN: She might have been taking them outside, on both sides of the line, you see, Connecticut and Massachusetts. It had been a very real problem with her, and the whole question was whether you should have out out--she tried to get a commissioner appointed, you see, to take this whole series or to be appointed herself as commissioner to take it. The clerk of the court said that you can't do this under Rule 28(a). You can have a commissioner appointed only in cases in a foreign country.

JUDGE DOBIE: You just want to add "before a commissioner"?

DEAN MORGAN: Appointed by the court before which the action is pending. I don't see how it could hurt anything.

MR. DODGE: Can the court appoint a commissioner with authority to take oaths?

DEAN MORGAN: I don't know that. To take a deposition, anyhow, he could. They always did.

MR. DODGE: In foreign countries with the regular commissioners holding office under appointment.

DEAN MORGAN: Couldn't he do it? They used to do it before.

SENATOR PEPPER: Could a prosecution for perjury be sustained in such a case?

DEAN MORGAN: Before a commissioner?

SENATOR PEPPER: Yes.

DEAN MORGAN: I should suppose so. That is the reason these persons wouldn't accept.

JUDGE DOBIE: I think it must have been before somebody qualified to administer an oath.

SENATOR PEPPER: That is what I thought.

JUDGE DOBIE: But that has been changed now, I think, by statute in practically every state of the Union.

JUDGE DONWORTH: Would the thing be aided by calling him a "master"?

DEAN MORGAN: I don't suppose so. I don't know.

JUDGE CLARK: If you are going to do it--

SENATOR PEPPER (Interposing): Or a "mistress" in this case. (Laughter)

JUDGE CLARK: --there might be a technical question about using the word "commissioner."

DEAN MORGAN: That is a point. I don't know whether that could be covered by using "master" or whatever you want to call it.

JUDGE DOBIE: Or a person designated by the court.

DEAN MORGAN: Anybody who is appointed by the court could do it.

JUDGE CLARK: It seems strange. I didn't suppose that Massachusetts was so backward!

DEAN MORGAN: Well, how are you going to handle it if you don't have a notary in a particular place?

PROFESSOR SUNDERLAND: Is the notary limited to the township or county where he is appointed? Couldn't she take a notary around with her?

DEAN MORGAN: Suppose Miss O'Keefe were a notary, in a patent case she might have some depositions across the line in Connecticut, some in New Hampshire, and some in other New England States, and she wouldn't have any authority to take the depositions there.

MR. HAMMOND: She could get a notary there, then.

DEAN MORGAN: She couldn't get a notary. There was no notary around there.

JUDGE CLARK: She could go in to the next city and bring one back. "Place" doesn't mean the town.

DEAN MORGAN: That is the whole trouble. It takes so much time. You have to wait twenty-four hours to get a train.

MR. DODGE: You would add at the end of that paragraph the words, "or by the court in which the action is pending."

DEAN MORGAN: No; "a commissioner appointed by the court in which the action is pending."

MR. DODGE: It says an officer authorized from various sources.

THE CHAIRMAN: I should like to ask, if the court appoints a commissioner, whether he has the right to confer on that commissioner the power to administer oaths or whether the statutes of the United States say that he may do it or whether he is bound to select a commissioner who has authority to administer oaths. I haven't heard that answered yet.

DEAN MORGAN: I don't know anything about it.

JUDGE DONWORTH: There is a statute of the United States relating to the appointment of the United States commissioners, and it involves a little red tape; not very much, but some. I don't want to get mixed up with that and have here appointed a United States commissioner, because the commissioners already in office would object to another one.

THE CHAIRMAN: We mean a commissioner to take testi-

mony. That is what we are talking about, not about the magistrate who has hearings in a preliminary criminal proceeding.

MR. GAMBLE: Why wouldn't some language like that under (2) in paragraph (b) on page 38 give some information on it? "before such person or officer as may be appointed by commission".

JUDGE DONWORTH: The words "or under letters rogatory" would not be applicable, of course.

MR. GAMBLE: I mean to adapt that language.

JUDGE DONWORTH: Yes.

JUDGE CLARK: I take it that under that a commission is a rather formal thing, isn't it, to go to a foreign country? Of course, you could have a formal appointment here. I suppose it could be done.

DEAN MORGAN: That is what it would be. For the particular case there would be an appointment. But she seemed to think that that was a very routine matter under the old practice and that this new practice just cut it out. That is what she said.

MR. GAMBLE: I think it was a routine matter.

DEAN MORGAN: That is what she said. I don't know.

MR. GAMBLE: I don't know, either.

DEAN MORGAN: I should have thought it was, and in the patent cases she says it is very important.

MR. DODGE: These commissioners provided for by the

statutes are designated, I think, by the governor to take oath in foreign countries.

DEAN MORGAN: I don't know about that.

MR. DODGE: Has the court power to authorize anybody to take an oath?

DEAN MORGAN: That would be binding in that particular court?

THE CHAIRMAN: I was looking at the master's rule, and under that there is no doubt at all that in the case you speak of, this woman, if she had been smart, could have gone to the master's rule and gotten the court to appoint a master to take all this testimony and report it. Under Rule 53(c), under the powers of such a master, it says he has power to call witnesses, put them on oath, and may himself examine them upon oath. So we have taken it upon ourselves in Rule 53(c) to authorize the appointment of so-called masters who do nothing but record the testimony, who may be deprived of the power to rule on the evidence, who may report the testimony without any findings, and who may be given the power to administer oaths. So the truth is that we had in the rules all the time a means of appointing a so-called master, who is really the old-fashioned commissioner, to take a deposition, and she didn't know it.

The master's rule gives the court power, by the order of appointment, to limit the power, to say he mustn't

rule on evidence, he mustn't make any findings, but he shall simply take down the testimony as given and swear the witnesses and return the transcript of the evidence to the court. That is nothing but a commissioner to take a deposition.

SENATOR PEPPER: Under the old equity practice, it was called an "examiner" as distinguished from a "master."

THE CHAIRMAN: That is it, and the thing was there. The lady didn't see it, and I don't know that I blame her. But I think that Rule 28(a) might very well be amended to provide in some proper form that there may be a person appointed by the court to take testimony.

JUDGE CLARK: Why not call him a "master," then? That lines up with this.

JUDGE DONWORTH: Rule 53 relates to standing masters. It is a permanent thing, as you see in 53(a).

DEAN MORGAN: We don't want a standing master.

JUDGE CLARK: The court may appoint a special master.

DEAN MORGAN: You don't want a standing master, because you want to be able to have the person who is really going to take these, the traveling stenographer, really take them.

THE CHAIRMAN: I like the word "commissioner" because it is in common usage at the bar and has been for as long as I have practiced, to speak of a man appointed by the court to take a deposition as a "commissioner" to take a deposition, and

there is no confusion if you say that here between the commissioner to take a deposition and the so-called U. S. commissioner who is a magistrate and conducts preliminary hearings in criminal cases.

JUDGE CLARK: The only question I had was in the next paragraph, that if the commissioner weren't a special thing we might create some confusion there.

THE CHAIRMAN: What is that?

JUDGE CLARK: You see, in the next paragraph we have a special kind of commissioner, and I don't know but that the word, when used locally, might be confused with the one under (b).

SENATOR PEPPER: Am I not right in thinking that the term "examiner" is pretty familiar to the bar?

JUDGE CLARK: In our Rule 53(a) you will see that we say, "As used in these rules the word 'master' includes a referee, an auditor, and an examiner."

SENATOR PEPPER: And under these circumstances wouldn't it be clearer to distinguish between the examiner appointed pro hac vice and the commissioner who is a standing officer?

THE CHAIRMAN: What you want is an addition in 28(a) to provide that the court, upon application made to it, shall appoint an examiner, or whatever you may want to call him, for for the purpose of merely taking the testimony and returning it,

with no power to rule on admissibility.

DEAN MORGAN: That is right.

THE CHAIRMAN: And with the power to put people on oath. If you have a short sentence that does that, you will have it.

JUDGE CLARK: I suggest that we add after the word "held", "or persons specially designated by the court for the purpose."

SENATOR PEPPER: I move it.

JUDGE DOBIE: Seconded.

MR. GAMBLE: I should like to make this suggestion, Mr. Reporter. Wouldn't you add language similar to that included on page 67, " and who shall have authority to put witnesses on oath"? Is there is any question about the lack of authority to administer an oath, can't we give that authority here?

THE CHAIRMAN: As you stated it, Charlie, it might mean that this examiner could go and take and record the testimony, but he would have to call in a notary every time he brought in a new witness on the stand and have the notary put him under oath, and it wouldn't necessarily follow that he had authority to put people on. I think we know what we want. Do you make that motion?

DEAN MORGAN: I make a motion, yes, sir.

THE CHAIRMAN: All in favor of putting such a

provision in Rule 23(a) say "aye"; opposed. Carried.

If you don't satisfy us when we look at your draft when we meet again, you will get a yell, probably.

Now we are up to Rule 30. Is there anything there? We made only one change in that rule as it stands in our book, and that was to insert "time or", "some designated time or place".

PROFESSOR SUNDERLAND: I thought we made one other change. If we didn't make it, I should like to have it made. At the last, in line 17, introduce the word "expense" just ahead of "annoyance".

JUDGE CLARK: May I say what did happen there? Professor Sunderland suggested it last time and, I am sorry to say, he was voted down. I rather supported him, and I am willing to support him again, but I think that is actually what happened.

MR. GAMBLE: What is the word he wants to put in?

THE CHAIRMAN: You mean "unreasonable expense".

PROFESSOR SUNDERLAND: In Rule 30, "the court may make any other order which justice requires to protect the party or witness from expense, annoyance, embarrassment, or oppression." In this traveling long distances by witnesses and counsel, I think the expense ought to be a matter which the court could take into consideration and should take into consideration in making the order.

DEAN MORGAN: Didn't you write a letter on that?

THE CHAIRMAN: I wrote a letter on this point. I think this relates to it.

DEAN MORGAN: Yes.

THE CHAIRMAN: We have a provision that you can call upon a party to appear and give his deposition by merely giving a notice; you don't have to serve a subpoena on him, and if he fails to respond to the mere notice, you can dismiss him or strike his pleading or something. But in the case of a witness who is not a party, you have to serve a subpoena and, of course, you have to give him his mileage and per diem. There is nothing in our rules that says, if you serve a notice on an adverse party to take his deposition, if he lives in Chicago and you specify New York as the place of taking the testimony, that you have got to pay his mileage or his per diem.

There was a case in the United States District Court of New York in which the court said that some concern out in Chicago had been forced to bring a suit in the United States District Court of New York because that was the only place to get jurisdiction over the defendant. The moment they brought the suit, the defendant, instead of going out to Chicago with their lawyers and putting the plaintiff's officers agents on examination before trial and taking their depositions, served a mere notice on them that they must travel to New York. So not only the plaintiff, the parties, but the managing agent and

servants of the plaintiff corporation were required to travel all the way to New York to have their depositions taken, and they didn't get a penny of expense money, mileage or anything else.

I called it to Edson's attention, and I think he agreed that that probably was an oversight on our part. We certainly didn't intend that the power to compel people to attend by notice was intended to drag people around.

JUDGE DOBIE: Yet it wouldn't do any harm to put it in, would it?

JUDGE CLARK: I think there may be two questions involved there. One is the question of putting in the words "undue expense" here, and the other is putting in a provision requiring that the subpoena be required and tender, and they are not necessarily the same. Putting in "undue expense" here would only clarify the matter of discretion, and I don't see any reason that that shouldn't be in. There might be a question whether they already don't have that power, and I guess that is the main ground we went on.

Just to make it clear, Professor Sunderland made the suggestion before.

"Mr. Lemann: I think that is another detail of improvement that we have had no demand for, and I don't think we ought to make that sort of thing."

THE CHAIRMAN: What is he referring to?

JUDGE CLARK: This "undue expense" insertion.

"Professor Sunderland: I thought it would be a good thing to emphasize that matter of expense. That is my point.

"The Chairman: If we haven't had any trouble with it, why do we fool with it?

"Senator Pepper: I move we don't fool with it."

That is the way that particular provision went. The motion then was lost on that point.

THE CHAIRMAN: If you had had the words "expense or", this judge in New York, on application, would have said, "I won't allow those people to come in unless you pay, in advance, their traveling expenses."

PROFESSOR SUNDERLAND: I think so.

JUDGE CLARK: I want to continue there. I should think it is a good thing to have the court to have control under "undue expense". I am not quite so sure about the other angle which comes up with reference to the later rule as to the requirement that you must tender the party travel money. I wonder if the discretion as to the undue expense doesn't cover it.

THE CHAIRMAN: I am quite willing to agree to putting in an express clause that when people are called on notice, without subpoena, the question of allowance of their expenses of traveling, per diem, and so on, is a matter in the discretion of the court. It is all right with me.

PROFESSOR SUNDERLAND: I think in your case, under

such a wording as this, the court could hardly have failed to make an order which would save that expense.

THE CHAIRMAN: I am not sure. He said, "Well, the plaintiff chose New York as his jurisdiction. Therefore, it can't complain if it has to come here and testify on deposition." But he lost sight of the fact that the plaintiff didn't choose it; he was forced to come here.

PROFESSOR SUNDERLAND: He was really rationalizing there, I think, trying to put up an excuse for what he thought the rule required.

THE CHAIRMAN: He got an idea the case was crooked, that is all. He wanted to put the plaintiff to some expense.

JUDGE CLARK: The case we are discussing is stated at some length in the last draft of material I sent around to you, the one that was sent October 21, if that is the date.

THE CHAIRMAN: October 21?

JUDGE CLARK: Wait a minute. October 16.

DEAN MORGAN: Yes.

JUDGE CLARK: Look at the October 16 material under Rules 26 and 37. There the case is stated at some length, and the matter is discussed. That is Fruit Growers Cooperative v. California Pie and Baking Co. case. If you will look over on page 7, there I rather made the suggestion that I don't know that I want to take away all power from the court. You will see certain cases there stated where the court has

suggested tempering the wool to the shorn lamb, and so on.

SENATOR PEPPER: Suggested tempering the wool to the shorn lamb?

JUDGE CLARK: Yes. It is a metaphor that I rather like. It is like "the fruit of the illegal tree," and I always wondered what it meant.

SENATOR PEPPER: I thought it was "temper the wind to the shorn lamb."

DEAN MORGAN: That is what I thought it was. Charlie, I think you get some heavier wool in the winter.

JUDGE CLARK: What I am suggesting is that you put in the words "undue expense" here to make it clear, but I am questioning whether you want to put the restriction that they must be subpoenaed.

THE CHAIRMAN: I haven't suggested that they have to issue a subpoena. You can still use a notice, and the only penalty for not appearing is not contempt of court, but dismissal of your case. But on the question of expense, I think it ought to be made perfectly clear in express words that under that notice neither party (employees, if it is a corporation) ought to be required to travel outside of their residences to give depositions in the interest of the other party unless the court has required it.

PROFESSOR SUNDERLAND: In that case the court went wrong on the managing agent, too, didn't it?

THE CHAIRMAN: Yes. He assumed that you could compel an ordinary employee to appear by notice, when our rule applies only to a party.

PROFESSOR SUNDERLAND: Yes.

THE CHAIRMAN: It wasn't worded "officer" or "managing agent" at all.

PROFESSOR SUNDERLAND: Would this provision about "undue expense" put in here take care of such a case as yours?

THE CHAIRMAN: I am not sure it is enough. It is too vague. "undue expense". It isn't undue. The question is whether, under all the circumstances, it is just to let one party or the other party bear it or to divide it. That is a little bit different.

PROFESSOR SUNDERLAND: That same rule provides that the court may make an order that it be taken at some designated time or place other than that stated in the notice. We cover that.

THE CHAIRMAN: That is the time and place. Suppose he doesn't want to change the place. He is willing to make these men come to New York. The next step is, if they are going to have traveling expenses, railroad fare, that isn't quite covered by fixing the place, is it?

PROFESSOR SUNDERLAND: No, but probably in that very case, if they had fixed the place in New York, the scalded party could have made a showing that the expense would be very

great going to New York and asked for an order fixing the place at Chicago in order to protect him from undue expense.

MR. DODGE: What is the rule that differentiates between the party and the ordinary witness?

JUDGE CLARK: You would have to tender the ordinary witness.

THE CHAIRMAN: You would have to subpoena him and pay his mileage.

MR. DODGE: What is the rule that differentiates him from the plaintiff?

DEAN MORGAN: Why wasn't this fellow a witness, anyhow, and entitled to it?

THE CHAIRMAN: The court held that this fellow was the managing agent, because there was no one else around who seemed to be the managing agent.

DEAN MORGAN: But the point is, suppose he had been a managing officer, is there any provision that a managing officer has to appear merely on notice, without a subpoena, that the managing officer isn't a witness?

PROFESSOR SUNDERLAND: It is the party who has to appear on notice.

DEAN MORGAN: Where is that? I don't see anything that says a party has to appear without a subpoena. He has to appear at the examination of a witness, but if the witness doesn't show up, without subpoena, what?

PROFESSOR MOORE: It is over in 37(d).

PROFESSOR SUNDERLAND: Yes.

THE CHAIRMAN: "If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party."

This assumes that you can do it by a notice. Where is the rule that says that the notice shall be served?

DEAN MORGAN: "wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice".

THE CHAIRMAN: There is something more than that.

MR. DODGE: That is the only thing I found.

THE CHAIRMAN: Here we are. Rule 30, isn't it? "A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action." That isn't it.

JUDGE CLARK: I think, Mr. Mitchell, that does help out, coupled with 26(a). Rule 26(a) says, "The attendance of witnesses may be compelled by the use of subpoena". That is

limited to witnesses.

DEAN MORGAN: I always thought when a party had his deposition taken he was in the position of a witness and that he was treated as a witness for that purpose except where you say otherwise. I don't quite see anything that you could do with this person except dismiss the action.

MR. DODGE: Summon him just the same.

JUDGE CLARK: Rule 26(a) says, "the testimony of any person, whether a party or not, may be taken".

DEAN MORGAN: That is right.

JUDGE CLARK: And then, "The attendance of witnesses may be compelled".

DEAN MORGAN: That is right.

MR. DODGE: The party is a witness. I should think, under the subpoena provision in Rule 45, that you would have to subpoena the officer of the corporation.

DEAN MORGAN: So should I. Surely it is a thing that ought to be cleared up, Edson, as to how you get a party before the officer if you are going to take his deposition. It is only by implication that you get him by a mere notice, the implication in (d).

SENATOR PEPPER: And it isn't perfectly clear that his refusal to come or his failure to come on mere notice from Chicago to New York would constitute a willful disregard of the notice. It might be a reasonable thing under the circumstances.

JUDGE CLARK: I thought we had an express provision somewhere that in the case of an outsider you could get him up by subpoena, but if he was a party, all you had to serve on him was a notice, and if he didn't obey the notice you could strike his complaint and default him.

DEAN MORGAN: It is by implication in that that you can strike if he doesn't show up after proper notice.

MR. GAMBLE: I observe that in this memorandum it is said that it has been "held that when the deposition of a party to the action is to be taken it is not necessary to serve a subpoena or to pay fees and mileage." McFadden Publications and two or three other cases are cited.

JUDGE CLARK: That is true, yes.

MR. DODGE: Look at 37(d).

JUDGE CLARK: That is the one we had.

PROFESSOR SUNDERLAND: That provides a penalty for failure to appear under a notice.

DEAN MORGAN: Upon proper notice.

JUDGE DOBIE: That certainly indicates that a notice is enough.

DEAN MORGAN: By implication I think it does.

MR. DODGE: "after being served with a proper notice and subpoena", it might read.

JUDGE DOBIE: He couldn't enter judgment by default, certainly, unless the notice was enough. I say the court has

power here. If a party willfully fails to appear after being served with a proper notice, the court can do all kinds of things, including entering judgment by default against him. He certainly wouldn't have extreme power such as that unless the notice was sufficient to obligate him to appear.

PROFESSOR SUNDERLAND: There is no contempt there.

JUDGE DOBIE: No. It doesn't say anything about contempt.

MR. DODGE: Under 45(d) the notice is presumably to be followed by a subpoena.

JUDGE CLARK: Judge Patterson held in the Whittaker case that it is not necessary to serve a subpoena or to pay fees and mileage upon examination of a party to the action. There seem to be other cases of that kind.

THE CHAIRMAN: That has always been my understanding of it.

JUDGE CLARK: That was also held by Judge Hulbert in the Spaeth case. "It is not necessary to serve a subpoena on a party. A remedy upon his failure to appear, is a motion to strike out his pleading. (Rule 37(d)) The attendance of other persons can only be compelled by the use of a subpoena as provided in Rule 45."

SENATOR PEPPER: The rule at common law, as I remember it, was that a party was expected to be in court at the trial of the action, whether he was plaintiff or defendant, and

therefore you didn't have to subpoena him. All you had to do was to call him at the time of the trial, and if he wasn't present, you could have him sent for and brought in by a bench warrant or you could get a continuance. But it does seem to me to be pretty drastic to require a man, merely because he is a party, to lose whatever safeguards the law throws around the calling of witnesses. That is the only purpose of calling him. He oughtn't to be penalized because he is a party.

DEAN MORGAN: Yes, but when you have just made him competent as a witness, if you wanted him as a witness, to be sure he would be there you would have to subpoena him.

MR. DODGE: Yes, I have had to do that.

SENATOR PEPPER: You mean at the trial.

MR. DODGE: Yes.

SENATOR PEPPER: With us, the court would send out just as if he had disobeyed a subpoena.

JUDGE CLARK: This is what Judge Peters says, up in Maine: "It is true that he was not served with a subpoena and therefore is not in contempt for not appearing (Rule 45(f)) but the only notice required to be given was given (Rule 30(a)) Although a witness cannot be compelled to attend without the service of a subpoena, he can be subjected to the penalties for willfully failing to attend if he is one of the parties and has been promptly notified."

Thus, you can't hold him in contempt, but you can do

these other things to him.

MR. DODGE: It is suggested in your communication of October 16 that Professor Sunderland and Mr. Mitchell agree that the difficulty could be cured by substituting for the word "notice" the word "subpoena" in Rule 37(d).

THE CHAIRMAN: I didn't make a suggestion of that kind. I don't think there is any need of serving a subpoena on a man who is a party. A notice is enough. All I say is that if you serve a notice on him, your notice isn't any good if it makes him travel from California to New York, unless you also tender him the same mileage and per diem that you would if you had subpoenaed him, because, you see, even if you don't subpoena him, if he fails to obey the notice he loses his lawsuit. He is forced to travel unless he is relieved from it.

DEAN MORGAN: He wouldn't be if you had made the suggested change in 37(d).

MR. DODGE: You give him all the protection of the subpoena.

THE CHAIRMAN: What would you do there?

JUDGE DONWORTH: You are limited by the distance at which you can subpoena him, but you are not limited by the notice to a party.

THE CHAIRMAN: That is the joke about it. If you serve a subpoena, you can't make him travel more than a certain distance even if you pay his mileage. If you take the notice

method, there is no restriction at all on how far he can be compelled to go. In that particular case he was compelled to travel from Chicago to New York and to bring all his employees and managing agents and everything else with him.

MR. DODGE: How would you favor curing the difficulty?

THE CHAIRMAN: My idea is that there ought to be an express provision that if a party is required by notice to give a deposition, he should be entitled to the same traveling and per diem as if he were served with a subpoena, unless the court in his discretion makes some other arrangement. I think the court ought to have discretion. The plaintiff may be as rich as the devil and the defendant very poor, or vice versa--usually vice versa. It may be prohibitory to require the poor man to do all the traveling at his own expense.

SENATOR PEPPER: We just had the experience in the Pullman case where the Government brought an anti-trust suit against the Pullman Company in the Eastern District of Pennsylvania, against a corporation all of whose records and personnel were in Chicago. The only purpose was that the Government, quite properly, liked our court. Of course, that required an immense transportation of personnel and books and everything from Chicago, and when various conferences of counsel were requested, the government counsel took the position that they were sorry they couldn't go to Chicago for a conference with Chicago counsel, because there was no available appropriation

for their expenses. So counsel had to come out from Chicago to confer with government counsel here.

It does work hardship, not in that case, of course, because that is the case of a very wealthy defendant, but it might easily do so in a case where, as you say, it was vice versa.

THE CHAIRMAN: There is clearly a hiatus in our rules. There is no doubt about that. We have provided that if you subpoena a party to appear before a notary, you have to pay him fees, mileage, and per diem; if you don't subpoena him but serve a notice on him, you pay him nothing. If you subpoena him, you are limited as to the distance you can compel him to travel; you can't make him go outside the district of his residence. But if you "notice" the party, you can compel him to travel from California to New York, all without paying or tendering in advance.

I think the rule ought to provide that if a party is called on by his adversary to travel away from his residence to give a deposition, he ought to have his per diem and his traveling expenses paid or tendered in advance.

SENATOR PEPPER: We have a provision, haven't we, in the case of the preparation of documents and getting documentary material together, that the court has discretionary authority to make the summoning party post a reasonable cost of complying with the notice?

THE CHAIRMAN: I don't remember that it is worded just that way.

SENATOR PEPPER: I think there is such a provision.

THE CHAIRMAN: I would also add to my suggestion that that would be the rule in the first instance, to pay or tender fees and mileage and to give notice to the parties to travel out away from their residence to give depositions at a deposition before trial, but that the court might in its discretion, in the interest of justice, relieve in whole or in part from paying those.

I didn't attempt to draft it. I brought this to the attention of the Reporter and Mr. Sunderland some months ago. I should suggest that we refer it to Mr. Sunderland and the Reporter and let them work out a draft and stick it in here that carries out that idea.

You don't object to the principle.

PROFESSOR SUNDERLAND: No. I think that is right.

JUDGE CLARK: I raised a question about taking away the discretion, but I understand now that Mr. Mitchell doesn't want to take it away.

THE CHAIRMAN: I don't know.

JUDGE CLARK: I thought the court ought to have discretion.

DEAN MORGAN: I think that is right.

JUDGE CLARK: But I don't know that there is any

objection to stating it affirmatively, that unless the court acts, they should pay the expenses. Have you any suggestion on that?

PROFESSOR MOORE: No.

PROFESSOR SUNDERLAND: I think it will make them a little more cautious about giving notice to travel long distances if they have to put up the money.

THE CHAIRMAN: In other words, before they serve the notice, they have to go to the judge and get him to relieve them from tendering fees. That is quite an obstacle.

JUDGE DONWORTH: I assume that the United States would not be required to put up any money.

DEAN MORGAN: No, no.

THE CHAIRMAN: I delivered an address before Robert Dodge up in Boston last fall in which I raised cain with the Government for dragging people, in both criminal and civil suits, all over the United States away from their residences, their homes, for a choice of a judge supposed to be favorable to the Government, just because somebody wrote a letter in some district or committed some tiny act alleged to be party to a conspiracy. They are certaingly ringing in the changes on that, and I think they are doing it deliberately, too, without any restriction on it.

JUDGE CLARK: I don't suppose it is very important here, but did you really think it would be necessary, when the

fellows are right in the same district, to go around and give them sixty cents when they are parties, as you would have to do with witnesses?

THE CHAIRMAN: I just said it is only when you compel them to travel away from their residence.

PROFESSOR SUNDERLAND: Out of the district of their residence, would you say, or out of the county of their residence?

THE CHAIRMAN: If you subpoenaed, what would you have to do?

JUDGE CLARK: You would have to do it everywhere, I suppose, even when it is really in the same place. If you bring him downtown in New York, I suppose you have to go--

JUDGE DONWORTH (Interposing): You can subpoena him only a short distance, and the fees are not very extensive, but I am afraid of the result on the poor man if you make this too onerous in the ordinary case.

THE CHAIRMAN: Suppose the poor man is the fellow you are serving the notice on, and you are compelling him to travel somewhere within the district, to pay his own traveling fees and hotel bills, and be dragged away from his home, even if it is only a hundred miles, to give his deposition at the instance of a wealthy defendant?

Do you mean to make it a flat rule that he should get the same fees and mileage as on subpoena, and let it go at that?

JUDGE CLARK: It seems a little silly, when you call a party down to the office, first to say, "Now, here is your sixty cents." I suppose it is all right, but it is a kind of thing I don't think you ordinarily think of doing.

PROFESSOR SUNDERLAND: If you didn't think of it, probably the other fellow would come down anyhow, and no trouble would arise. If you got into trouble, then you would know how to fix it.

JUDGE DONWORTH: If you issued a subpoena and had to put up the money, it would be a very limited amount, but in the case mentioned by Chairman Mitchell the limitations as to distance on a subpoena did not apply, and that seems to be the trouble. The limitations of distance in the subpoena statute don't apply to this notice business. I suppose it is an unusual case, isn't it, where a man is required to go from one district to another under this rule?

THE CHAIRMAN: It might not be.

DEAN MORGAN: No. The plaintiff can get the defendant only in the particular jurisdiction where he can get service on him. That is what we have in this Wisconsin case. The plaintiff could get the defendant only in that particular district. He had no choice of venue.

THE CHAIRMAN: He had to go to New York to bring his suit at all.

DEAN MORGAN: Yes, to bring any action.

THE CHAIRMAN: The motion, I guess, is to refer this to Mr. Sunderland and the Reporter for agreement on a detailed provision. We haven't any draft here.

JUDGE DOBIE: Did you put that "expense" in? Was there any action on Sunderland's motion about "expense, annoyance", and so on?

PROFESSOR SUNDERLAND: Didn't we carry that? Did we vote on it?

THE CHAIRMAN: I am afraid we didn't vote on it.

JUDGE DOBIE: I think when we were talking about that we got off on the other.

THE CHAIRMAN: I beg his pardon.

JUDGE DOBIE: I think that ought to be in.

THE CHAIRMAN: We will take Mr. Sunderland's idea first. The vote is on the question of whether you put in the word "expense" in line 17 of Rule 30(b) as drafted. All in favor of that say "aye"; opposed. That is agreed to.

The other question is whether we will adopt some provision requiring a party who calls upon another party on notice to give a deposition, to pay him fees and mileage. You have left in the air the question of whether it should be precisely the same as in a subpoena or whether there should be some variation. What is your pleasure about that?

My suggestion was that a party required by notice to travel away from his place of residence (I would put it that

way as that is very definite, I think--town, city, village, whatever you want to say) to make a deposition should be paid his expenses.

JUDGE DOBIE: Shouldn't you make it more definite than place; county, district, or something like that?

SENATOR PEPPER: In the case of Rule 30, subsection (d), if the taking of a deposition is to be terminated by order and then the taking is resumed by order, it is provided that, in granting or refusing the order to resume, "the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable."

That is the same idea with respect to expense after the taking of the deposition has been begun, and it would seem logical to make a provision for reasonable expense where you are asking a man to comply with a notice to attend, I should think.

THE CHAIRMAN: If you are taking a party's testimony in the very city in which he lives, for instance, if you subpoenaed him you would have to give him per diem, but I wouldn't suggest that, if you "noticed" him, you would have to give him per diem, testifying right in his home city. It is a question of forcing a party to give his testimony on a mere notice when traveling a substantial distance. The question is whether you want to put a limit. The district doesn't mean

much. Look at little Delaware. But in Minnesota, you can say only one district and make a man travel from Lake of the Woods down to Owatonna, a distance of something like 600 miles, I think.

SENATOR PEPPER: All I meant was that the provision in the rule that I cited might be repeated, such expenses as the court may deem reasonable, without undertaking to state a formula.

THE CHAIRMAN: You mean simply to say that, if notice is required, before you serve the notice you have to get the court to say what the expense is?

SENATOR PEPPER: No; that the person served with the notice shall have the right to ask for an allowance of such expenses incident to compliance with the notice.

THE CHAIRMAN: Take the very case we spoke of. The person serving the notice is in Illinois. Suppose he is a man of moderate or small means. If he is the fellow who has to make the motion to get allowance, he would have to hire a lawyer to come to New York to make the motion to get an allowance before he should be compelled to travel. That might cost him more than the trip. I would put it the other way around. I would say he would have absolutely to pay the expenses in advance when he serves the notice unless he previously had applied to the court and gotten some different rule.

SENATOR PEPPER: That is all right.

THE CHAIRMAN: That is the only way to protect a man. I agree with leaving the discretion in--

SENATOR PEPPER (Interposing): Yes, that is what I wanted.

THE CHAIRMAN: --but I want the fellow who is trying to get out of paying the traveling expense of the other fellow to make the move that relieves him.

SENATOR PEPPER: How should that be accomplished as a matter of draftsmanship?

THE CHAIRMAN: I say, I hadn't tried to draft any. I am not prepared to do it right now.

SENATOR PEPPER: I move that such a provision be added to the authorization requiring attendance of a party on notice as will condition the notice upon either the tender or the payment of expenses incident to compliance with it, or get an order of court dispensing with that requirement.

JUDGE DONWORTH: You mean traveling expenses, not lawyer's fees.

SENATOR PEPPER: I meant expenses incident to complying with the notice; that is, travel and mileage.

THE CHAIRMAN: Hadn't you better limit it, say, to the per diem and mileage required in the case of subpoena, to fix it right down there?

SENATOR PEPPER: That would be a good way to do it.

THE CHAIRMAN: Yes. With that suggestion, all in

favor of the motion say "aye"; opposed. Carried.

Have we anything else on 30? I think not. Does anybody want to bring up anything more?

We are up now to Rule 33. Rule 33 is the next one that we changed.

JUDGE DOBIE: What is the date of this? That is the end of the June 8 draft, isn't it?

THE CHAIRMAN: Yes. I had forgotten that this came in a little later. It came in in sections.

MR. GAMBLE: What is the date of that?

JUDGE CLARK: You want to go back to the June draft.

THE CHAIRMAN: We are through the June 8 draft. It didn't all come out on June 8, did it, Charlie? The letter accompanying would show that.

DEAN MORGAN: Charlie, you sent it out in two sections, 1 to 30 the first time and 31 afterwards. This is in the second.

JUDGE CLARK: That is true. We sent out Rules 1 to 30 first.

THE CHAIRMAN: Then 33 to 65 is the next one.

JUDGE CLARK: That is right.

THE CHAIRMAN: What is the date that you actually mailed that? Do you know? I have it. It came out under date of June 14, 1943.

JUDGE CLARK: That is correct, yes.

DEAN MORGAN: Then the June 17 draft is from 66 on.

THE CHAIRMAN: Now we are up to the second section, dealing with Rules 33 to 65, which was promulgated by the Reporter under date of June 14. Has anybody anything to say about Rule 33 as amended?

MR. DODGE: In the ninth line, shouldn't that word "delivery" be "service"?

JUDGE CLARK: That is the way it was before, but that, of course, doesn't settle it in particular. Let's see. The first paragraph, you see, we didn't change at all. That is the way it was. I can't say whether we used "delivery" originally.

MR. DODGE: You talk about service twice before.

JUDGE CLARK: I shouldn't wonder if service would be a better word. How about it, Edson? This is something that goes back to the original rule.

JUDGE DOBIE: What line is that?

JUDGE CLARK: The first paragraph we didn't change at all.

DEAN MORGAN: Rule 33, first paragraph, line 9.

JUDGE DOBIE: You mean change "delivery" to "service"?

DEAN MORGAN: "within 15 days after the delivery of the interrogatories". Mr. Dodge suggested it should be "within 15 days after the service of the interrogatories".

JUDGE DOBIE: Yes.

THE CHAIRMAN: Because we have up above that any party may serve interrogatories, and nothing is said about delivery up above. If there is no objection, we will strike out "delivery" and put "service" in line 9.

JUDGE CLARK: Where did you get "delivery" originally, Edson? You drew this.

PROFESSOR SUNDERLAND: This thing was amended about forty times during the process, and I guess that word just got in.

THE CHAIRMAN: I think I can tell you a story that may explain it.

There was a Scotchman who was the assistant professional at the golf course, and he had a nice little cottage in town where he had lived for some time. One day one of the golfers in the club saw Sandy, the Scotchman, getting a moving van out, getting ready to move from the house. He said, "Sandy, why are you moving from your house?" Sandy said, "Well, the wife is going to have a baby, and we are moving out in the country where we can get this rural free delivery." (Laughter)

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

TUESDAY AFTERNOON SESSION

October 26, 1943

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

THE CHAIRMAN: We are considering Rule 33. Any suggestions? We struck out "delivery" and substituted the word "service" in line 9. The new matter which has been added is underlined in lines 17 to28.

Mr. Dodge has made a suggestion, a new one that isn't covered here, and I am trying to state it. He probably could do it better than I can. In line 13, "Objections to any interrogatories may be presented", and so on, "and answers shall be deferred until the objections are determined". As that is worded, it allows you to withhold answers to all the interrogatories, even though you don't object to part of them, until the objections are determined with respect to those that you do object to, and Mr. Dodge thinks that the phrase, "and answers shall be deferred until the objections are determined", should be so worded that it is confined only to the interrogatories to which objections have been made, and make it clear that you have to answer the other interrogatories as provided in this rule, without waiting for the decision on your objection.

He thinks that would do two things. You would expedite the matter a great deal. He thinks if a party is forced

to answer a lot of interrogatories that he has to answer and knows he can't beat, he will reckon a little bit on framing objections to the others. And he thinks that if most or a good many of the interrogatories are answered, the man who propounds them may not be very anxious to scrap around about the objections to the others.

Does that state your position?

MR. DODGE: Yes, that is it exactly, and it is based on Massachusetts practice. In Massachusetts this form of interrogating is the common form, not oral depositions, which can't be taken except on order of the court. So we have these a great deal. The party answers all that he does not object to and answers the others by saying that he is advised that he doesn't have to answer them. Then the whole thing comes up on the motion of the interrogating party for further answers to the interrogatories, if he cares to press it. If he does, he then brings up not only those interrogatories which are not answered at all, but others which he claims are inadequately answered.

It seemed to me that speeded up the thing, because on this basis you may well have two hearings in court; one on the objections and then a later one on a motion for further and better answer.

THE CHAIRMAN: You haven't any draft of your proposal. It is just a general statement of its purpose.

MR. DODGE: It just occurred to me when reading this that perhaps the Massachusetts practice was better than this. This man holds up the answers to all by filing an objection to one, doesn't he?

THE CHAIRMAN: Yes. It is common practice.

Let's consider Mr. Dodge's statement of a motion to amend Rule 33 by making it clear and stating the objective. "The filing of objections shall defer only the answers to those interrogatories that are objected to, and the ones not objected to must be answered as provided in the rule, without waiting for the objection."

SENATOR PEPPER: I take it that would mean judgment for an amount admitted to be due.

THE CHAIRMAN: Yes, part of the judgment, so to speak. What is your thought about that.

MR. DODGE: "Objections to any interrogatories may be filed with the answers to those not objected to, and the question of their competency or materiality may be raised on a motion for further answers."

THE CHAIRMAN: What do you think about the idea? I think the Reporter could draw it later on, if you want the change made.

PROFESSOR SUNDERLAND: I think that is a very good idea. You don't have to hold them all up when there is some one objection.

SENATOR PEPPER: As Mr. Dodge says, it may well be that if the interrogating party gets his answers to 75 per cent of his interrogatories, he may not think it worth scrapping over the remaining 25.

THE CHAIRMAN: I should like to ask one thing. Either party could bring on the objection for hearing, couldn't he, under our existing rule? That would be your proposal?

MR. DODGE: Yes.

THE CHAIRMAN: If he wanted to have the objections overruled, the party propounding the interrogatories could bring it on for hearing. Our rule doesn't state which party should make the motion to have the question decided as to whether the objections are good or bad. I don't think that is necessary.

Is there any further discussion of the proposal? All in favor say "aye"; opposed. It is agreed to.

Is there any other suggestion as to Rule 33? If not, we will pass on--

PROFESSOR SUNDERLAND (Interposing): In line 21 I thought that the word "subsequent" was superfluous, because it couldn't be anything else but subsequent.

DEAN MORGAN: In line 23, the word "entry", "is not of itself ground for the entry of an order".

THE CHAIRMAN: We agree to that, don't we? Did you get notice of those?

JUDGE CLARK: Yes. "subsequent" comes out in line 21.

SENATOR PEPPER: And "the entry of" in line 23.

JUDGE CLARK: "the entry of" in line 23.

DEAN MORGAN: In line 26 I don't see why you have an "And" there at the beginning of the last sentence; just, "In other respects".

THE CHAIRMAN: Strike out "and" and put a capital "I" on "in".

I should like to ask whether the words in line 26 are necessary after it says, "The number of interrogatories to be served is not limited except as justice requires to protect the party from oppression."

SENATOR PEPPER: What is added by the words "In other respects"? Wouldn't it be just as well to say, "The court in ruling on objections", and so forth?

DEAN MORGAN: I think 30(b) probably doesn't have the provision.

JUDGE DOBIE: "In other respects", I take it, means things not covered by what we have just said. As to those things just covered, that is the rule. In other situations the court makes an order under Rule 30(b).

SENATOR PEPPER: In both cases the court makes an order.

THE CHAIRMAN: There is this thought I had in my head

about this change from line 17 on. It says, "The fact that the deposition of a party has been taken is not of itself ground for objection to the service of interrogatories upon the party;" and vice versa, if you serve interrogatories on them, that is not an absolute defeat of their right to ask for oral examination. But it seems to me that the thing may not be fortunately worded because one of the questions the court is going to decide is whether it is oppression or annoyance or something under the other rule it is operating under.

The fact is that we have sort of obliterated, in lines 17 to 24, by inference, the idea that the court can give any consideration to the fact, when you ask for answers to interrogatories, that you have already examined him orally, or vice versa. Doesn't that have the same impression on the rest of you, that that is sort of obliterated? The truth is that there ought to be consideration for the trial court to take into account.

What we really mean is that the election to examine a man on oral examination is not a waiver of the right to serve interrogatories, and vice versa, but where both methods are used the court may consider whether the proceedings are oppressive, and so on, under rule so-and-so. Isn't that what we really mean?

JUDGE DONWORTH: The words "of itself" help your thought a little.

THE CHAIRMAN: I agree to that. Then it says, "The number of interrogatories to be served" (that is the mere number of them) "is not limited except as justice requires to protect the party from oppression." I think the word "oppression" ought to be enlarged by the other four terms we have in the statute. You might say, "Well, this is oppression, but under the other rule it is annoyance and harassment and what-not."

JUDGE CLARK: I suppose that is included in the last sentence, although it may be a bit blind. I mean that sort of refers you back.

MR. DODGE: A party comes into court and says, "I have no objection whatever to his interrogatories except that my deposition has been taken and I have answered every one of those questions before." The court turns to this rule and says, "If that is your only objection, it is barred by this rule as written."

THE CHAIRMAN: Subject to the other interpretations, true, Robert, but still the way we are leaving that I think a good many judges might grab hold of it just as you say.

MR. DODGE: I think so, too, and you mean it is not necessarily or may or may not be.

THE CHAIRMAN: That is it, depending on whether it is a useless or harassing or oppressing procedure to go over the ground again in another way.

SENATOR PEPPER: May I suggest that it might be clearer and the point in issue covered if we didn't have the sentence beginning with "The number of interrogatories to be served is not limited except as justice requires to protect the party from oppression", and if the final sentence were to stand, "The court in ruling on objections to interrogatories may make any order specified in Rule 30(b)"?

That seems to me to give the court a plenary jurisdiction to deal with objections that interrogatories are not necessary because the deposition has already been taken or to say, "I think this is oppressive," or to say, "There are 500 interrogatories here when 10 would suffice." Any reasonable objection would be covered, it seems to me, by limiting it to objections for the protection of deponents in 30(b), and that is what the last sentence does.

I think the thing that is bothering us a little is the collocation of a specific provision for relief where the number of interrogatories is great and a general provision which is broad enough to cover that and a lot of other things.

JUDGE CLARK: I might say on that one particular thing, as to the number of interrogatories, I think we had something a little more in mind. Some state rules definitely limit the number, and there has been some feeling, on the part of some of the judges at least, that there should be some arbitrary number stated. This, I think, was intended to carry

the idea that there should be none. I mean it has an affirmative purpose, too, and if you take it out and allow it to be entirely covered by 30(b), you have still the ambiguity that the judge saw existed.

SENATOR PEPPER: What is the basis of the judicial feeling in those cases? If a man feels that he is being harassed with too many interrogatories, he moves, as under 30(b), for protection, and the court can say, "Why, ten interrogatories are all that anybody ought to need in this case." If he feels that the man is being harassed because his deposition has already been taken and there is no occasion to interrogate him further, the court can relieve against that.

JUDGE CLARK: I suppose it goes back to the fact that some codes do make a definite limitation. Do you have in mind any of those specific provisions?

PROFESSOR MOORE: No.

PROFESSOR SUNDERLAND: Massachusetts had a provision limiting the number. Didn't you limit the number of interrogatories in Massachusetts at one time?

MR. DODGE: Six by statute, and not exceeding thirty, unless the court allows more.

DEAN MORGAN: Then you have 1A, B, C, D, and E.

MR. DODGE: You can't get away with that.

JUDGE CLARK: What is the limitation?

PROFESSOR SUNDERLAND: I don't remember.

JUDGE DOBIE: The judges haven't stated, have they? I know Chesnut said in that Baltimore case that there were entirely too many. Isn't that right, Charlie? They haven't hesitated to crack down on them if they think they are putting in too many.

JUDGE CLARK: I think that is so. Let's see what we had on this before.

DEAN MORGAN: Page 87.

JUDGE DOBIE: I know in the Byers Theaters case I called the lawyers before me and told them it was perfect nonsense to have all these interrogatories, and we cut them down about two-thirds.

PROFESSOR SUNDERLAND: In that Coca-Cola case before Judge Chesnut I think they had about 270.

DEAN MORGAN: On page 84 you have Holtzoff's statement that several district judges are limiting the number in a way probably not contemplated by the committee.

JUDGE CLARK: Yes.

THE CHAIRMAN: I should like to see the sentence ending in line 24 to stand as you have it, and then say the fact that the depositions of the parties have been taken is not in itself ground for objection to the interrogatories, and vice versa, and not in itself ground for an order that the deposition of a party is not to be taken, but if resort to both operates to cause unreasonable annoyance, embarrassment,

or oppression, it may be prohibited by order as provided in Rule 30(b).

That sort of brings out the idea that I had. What did you say, Senator?

SENATOR PEPPER: I was going to inquire whether it ought not to be an objection to interrogatories that they do in fact cover the same ground as the deposition, and vice versa.

THE CHAIRMAN: I agree to that.

SENATOR PEPPER: Wouldn't it be more intelligent to say the fact that the deposition of a party has been taken is not ground for objection to supplementary interrogatories? That is really what justice requires, that the fellow who has omitted something in taking the deposition should have the right to supplement the deposition by interrogatories.

But the other difficulty, if you put in, as here, the fact that the deposition has been taken is not of itself ground for objection, is that when interrogatories come in that are precisely duplicate and objection is made, as you said, Mr. Chairman, the answer of the court would be, "Our hands are tied by the rule."

THE CHAIRMAN: It wouldn't be if we put the clause in that if the resort to both methods operates to cause unreasonable oppression, annoynace, or harassment, it may be stopped by the court; and I would say, in a case where you already have taken his deposition and then were trying to go

over the same ground again on written interrogatory, nothing new, no reasonable excuse for saying you forgot something on the first examination, that the court would stop it and say that that is an unreasonable harassment.

I don't care about the details, but I just have the feeling that, as it is worded, some judges are going to say that is the end of it, that you can't even look to see whether you are covering the same ground in the interrogatories that you did in the deposition.

JUDGE CLARK: The way this developed was a little from the opposite direction, and it may be that the expression is the author. The way it developed under 30(b), the court may stop all these things, and I think there was a rather definite feeling (I don't know whether that is the way our preliminary notes were or not) that perhaps there was a little too much tendency to stop. There is that Coca-Cola case where the suggestion was made that under normal conditions fifteen to twenty interrogatories ought to be enough.

So originally the rule went on the theory of not going as far as the various things under Rule 30(b). You can do everything else permitted by Rule 30(b), but don't go too far, as there indicated. Rule 30(b) does contain all these restrictions, but this was an attempt to loosen up a bit on the restrictions that might be put on the interrogatories.

THE CHAIRMAN: The result is that they are susceptible

of interpretation. The only thing that saves is the words "of itself". Of course, if it weren't for that, it would be flat, and that raises the inference that there must be some other reason than the mere fact that you are resorting to both that justifies interference with the step you want to take.

I won't quarrel over it if it doesn't impress the rest of you that way.

DEAN MORGAN: Instead of "ground for objection", say "of itself should not prevent". You could rephrase the matter so as to show it was not an absolute prohibition.

THE CHAIRMAN: You could say it just as you have here, but say it with the provision that where resort to both methods is an unreasonable annoyance, harassment, or oppression, it may be dealt with by the court under Rule 30(b). That is the point I want to bring out. I don't know how to word it. I don't think this is the place to draw a fine draft that may be accurate. I can't do it. That thought just occurred to me as I read it.

Have you any motions to make?

DEAN MORGAN: What are you going to do? Leave it this way?

THE CHAIRMAN: As far as I am concerned.

SENATOR PEPPER: I don't feel satisfied with it. I would rather have it read somewhat thus: "If interrogatories are served after a deposition has been taken, or if a deposition

is sought after interrogatories have been answered, the court may, on motion of the deponent or the party interrogating, make such protective order as justice may require."

That is not an attempt at drafting, but it is a simple statement of the point.

In other words, the point is that where there has been a deposition and then interrogatories are asked, or where interrogatories have been answered and a deposition is sought, then the court is given a discretionary authority to make such orders as it thinks proper, without objection.

I would move that that thought be referred to the Reporter for consideration and phrasing, if he approves of it.

MR. DODGE: I second the motion. That suggests, also, the affirmative, that it is not of itself ground for objection.

SENATOR PEPPER: That is right, exactly.

JUDGE CLARK: If you want to put it in that form, would you think it necessary to put in anything, then? That is shifting the purpose a little, and maybe it would be just enough to say that the whole thing is subject to 30(b), without specifying.

SENATOR PEPPER: I think we ought to spell it out a little in view of the fact that the decisions have discussed it. I think that suggestion of the Reporter was proper on the original consideration, but in view of the fact that there are decisions and there is doubt, I think it is just as well to say

specifically what we mean and that it be done in this way.

THE CHAIRMAN: Some courts have held specifically that the resort to one method precludes the other, just flatly.

SENATOR PEPPER: Yes, and that is clearly wrong.

THE CHAIRMAN: I think it is clear enough. Is there any further discussion? All those in favor of the motion by Senator Pepper say "aye." It seems to be agreed to.

JUDGE DONWORTH: Did we tacitly agree to leave out the words "in other respects"?

THE CHAIRMAN: Yes, I think "And in other respects" goes out in line 26, and the words "The court" begin the sentence. Of course, when the Reporter gets to redrafting this thing as the Senator has moved, he may chop that sentence up and rearrange it.

MR. GAMBLE: Mr. Chairman, what did we do with that sentence about the number of interrogatories?

THE CHAIRMAN: We left that the same way. In the redraft we can either leave that separate or weave it into the general statement. It goes in, as I understand, but it may be rearranged or covered in some other phraseology. Was it your idea that we ought to place a limit on the number?

MR. GAMBLE: No. I don't think we can place a limit on the number, but I do think that we should give the court discretion to place a limit on the number where the court finds that the number in and of itself would constitute an

annoyance or harassment.

THE CHAIRMAN: I made the suggestion myself, which the Reporter will probably take note of in the record, that maybe you haven't gone far enough in using only the word "oppression" when you have three or four other words in 30(b).

MR. GAMBLE: That is what I had in mind.

THE CHAIRMAN: He had better look that over.

Now let's go on to Rule 34. Is there any misunderstanding at all about that or what we have done, or is there any motion for change?

MR. DODGE: The insurance group made an interesting suggestion there. They said, whether or not originally so intended, several of the courts have adopted the view that this rule authorized the courts to order produced for inspection and for copying confidential investigation files, because the word "privileged" is not broad enough to exclude those.

MR. GAMBLE: Mr. Dodge, isn't that taken care of by what we did this morning to 26(b)?

MR. DODGE: But is it, without an additional reference to the prior rule?

PROFESSOR SUNDERLAND: We have the reference. We put in a reference to the prior rule in May, so we now hook this up with the prior rule. We have changed the prior rule so that this goes with it.

MR. DODGE: But does it? "relating to any of the

matters" is the only reference to 26(b).

DEAN MORGAN: That won't do.

PROFESSOR SUNDERLAND: Some of the matters you take care of in the other rule now--those memoranda.

MR. DODGE: Which are not privileged or excluded under the provisions of 26(b).

PROFESSOR SUNDERLAND: Made in the preparation of a case.

MR. DODGE: I think a reference to 26(b) in the proper place would cover it.

JUDGE CLARK: We adopted Judge Donworth's motion as to 26(b), which related to this very thing. This refers back to 26(b).

MR. DODGE: It doesn't now refer back to 26(b) in that connection.

JUDGE CLARK: Yes.

DEAN MORGAN: No. It is subject matter "which constitute or contain evidence relating to any of the matters mentioned in Rule 26(b)."

MR. DODGE: Yes. If you insert something after the words "not privileged" in line 6, "not privileged or excluded under 26(b)", you then get it.

JUDGE CLARK: Mr. Dodge, you are likely to run into difficulty if you start rephrasing that, because Judge Donworth's motion, which carried, was not an absolute rule of exclusion.

It was a matter for the discretion of the court.

SENATOR PEPPER: Really what we mean is to supplement the language in 7, "relating to any of the matters mentioned in Rule 26(b) and subject to the provisions thereof".

DEAN MORGAN: Yes, that is what you would have to do.

JUDGE CLARK: Yes.

SENATOR PEPPER: I would suggest that for the Reporter's consideration.

THE CHAIRMAN: Is there any other suggestion for 34?

DEAN MORGAN: I suggested that in line 13 you don't quite see what the antecedent is of the pronoun "it".

THE CHAIRMAN: I suppose it refers to the property or object, doesn't it?

DEAN MORGAN: What is "it"? "permit entry upon designated land or other property in his possession or control" .... "so far as" the entry relates to?

JUDGE CLARK: "so far as" such purpose "relates to any of the matters".

DEAN MORGAN: I thought it should be "in so far as necessary or convenient to discover anything relevant to any of the matters". It was before. I don't know what we have done. I don't know how much we have narrowed 26(b) now.

THE CHAIRMAN: What does the word "it" relate back to in line 13?

PROFESSOR SUNDERLAND: Back to property, object, and

operation in 12, I should think.

DEAN MORGAN: What about the measuring, and so forth? I can't quite see what "it" refers to.

PROFESSOR SUNDERLAND: It refers back only to property.

THE CHAIRMAN: I think it refers to "the property or any designated object or operation".

DEAN MORGAN: "so far as the property relates to any of the matters"?

THE CHAIRMAN: "so far as the property or the object or the operation thereon relates to any of the matters mentioned in Rule 26(b)." The general rule is that it relates back to the last preceding possible reference, and under that rule it would be limited to what is said in line 12, "the property or any designated object or operation thereon so far as it" (the property or object or operation on the property) "relates to any of the matters mentioned in Rule 26(b)." Where does that get us?

DEAN MORGAN: I don't know where it gets us. That is what my trouble is. I thought it meant you could order this so far as necessary or convenient to discover any of the matters mentioned in Rule 26(b).

JUDGE DOBIE: Would it help if you cut out "so far as it relates" and put "relating"? That is the style used up above there. "relating to any of the matters".

PROFESSOR SUNDERLAND: Mr. Moore suggests that "it"

should refer to "purpose", "so far as such purpose relates to any of the matters mentioned.

JUDGE DOBIE: I agree with that.

PROFESSOR SUNDERLAND: So, instead of "it", introduce "such purpose".

JUDGE DOBIE: In other words, what you want to do is to inspect it or maybe measure it. If that measuring relates to any of the matters in any other rule.

THE CHAIRMAN: You mean the word "it" means "the purpose of inspecting, measuring, surveying, or photographing", and that it is "so far as that purpose relates to any of the matters mentioned in Rule 26(b)." Is that it?

PROFESSOR SUNDERLAND: Purpose is the relevant matter.

DEAN MORGAN: Really, what I thought was, was "inspecting, measuring, surveying, or photographing so far as necessary or convenient to discover anything relevant to the matters mentioned in Rule 26(b)." That is what I thought it was. Was that the idea?

THE CHAIRMAN: Why not say, "for the purpose of discovering any matters within the scope of the examination permitted by Rule 26(b)"?

DEAN MORGAN: That is all right.

THE CHAIRMAN: That brings into play all the restrictions and permissions.

DEAN MORGAN: That is right. I think that is the thing to do.

JUDGE CLARK: In 13, then, instead of the underlined matter, you substitute "within the scope of the examination permitted under Rule 26(b)."

THE CHAIRMAN: I will have to ask the reporter to go back and read my suggestion. I have forgotten what it was.

... The reporter read the suggestion of the Chairman, appearing near the bottom of the preceding page ...

THE CHAIRMAN: That would be a substitute for the words now underlined in lines 13 and 14.

JUDGE CLARK: That was my point. You don't want to repeat the few words you had at the beginning, "for the purpose of" and so on, in line 11. I should think you would take out those few preliminary words and then go on, "or operation thereon within the scope of the examination permitted by Rule 26(b)."

THE CHAIRMAN: You can improve it.

SENATOR PEPPER: I make a motion to the effect suggested by the Chairman and formulated by the Reporter.

DEAN MORGAN: All in favor say "aye." That is agreed to.

PROFESSOR MOORE: May I raise a point?

THE CHAIRMAN: Yes.

PROFESSOR MOORE: Then shouldn't a conforming change be made in line 7? Shouldn't the phraseology in 7 and 13 be essentially the same?

THE CHAIRMAN: I think so. "relating to any matters within the scope of the examination permitted by that".

DEAN MORGAN: That is right.

THE CHAIRMAN: I suppose that goes with the other motion, but if it doesn't agree with it, you draft it so that it does.

Anything else? If not, we will go to Rule 36. You made a few minor changes in that. Has anybody any criticism of it?

DEAN MORGAN: Sunderland had something, I know, on that.

MR. DODGE: I don't quite see why the word "either" was transposed from line 13 to 12. "serves upon the party either a sworn statement" or what?

DEAN MORGAN: "or a motion to strike".

PROFESSOR SUNDERLAND: I suggested putting in (1) and (2) there.

DEAN MORGAN: "either (1) .... or (2)".

PROFESSOR SUNDERLAND: To call attention to that alternative.

DEAN MORGAN: You haven't got it right.

JUDGE DOBIE: Because there is another "or" up there between "requested" and "setting".

DEAN MORGAN: But Sunderland suggested that if you inserted "(1)" after "either" in line 12 and "(2)" after "or"

in line 15, it would make that stand out, and I think that is a good suggestion.

JUDGE DOBIE: I think that is better. And there is another "or" there that is not relevant.

MR. DODGE: There are so many or's there that I couldn't read it straight.

THE CHAIRMAN: Then, without objection, we will insert in line 12 after the word "either" a (1) in brackets, and after the underlined word "or" in line 15 insert (2) in brackets.

DEAN MORGAN: And strike out the first "either" in 15. You see, "either" in 13 and 15 in brackets are to be omitted.

THE CHAIRMAN: That is already stricken out. It is in brackets.

MR. DODGE: That clarifies it.

THE CHAIRMAN: It is already bracketed, so it is out.

DEAN MORGAN: Yes.

THE CHAIRMAN: Any further suggestion about Rule 36?

PROFESSOR SUNDERLAND: In the first line, should that be limited to "answer has been served" or should it include motion?

THE CHAIRMAN: You mean suppose the other party is coming in with a motion for summary judgment, and he hasn't answered?

PROFESSOR SUNDERLAND: Yes.

THE CHAIRMAN: Then you want to serve a demand on him for admission of facts that will bear on the motion for summary judgment. That is an illustration.

PROFESSOR SUNDERLAND: Yes.

JUDGE DOBIE: The other said after the pleadings are closed, and that is ambiguous. This tells him whether the pleadings are closed.

DEAN MORGAN: You want to say, "At any time after the answer or motion"?

PROFESSOR SUNDERLAND: Yes.

THE CHAIRMAN: I suppose the purpose of requiring an answer is to show what the issues are and whether the demands are relevant.

JUDGE CLARK: This particular change came from Senator Loftin. What has happened to the Senator? He is missing.

THE CHAIRMAN: He had to go to New York.

MR. GAMBLE: You wouldn't want this provision after one of the preliminary motions, would you?

DEAN MORGAN: You might. If you had a motion to quash, you might ask for an admission as to the facts with reference to the service, might you not?

JUDGE CLARK: Mr. Loftin suggested originally that the phrase "after the pleadings are closed" at the beginning

of Rule 36 be changed to "after the answer has been filed", thus eliminating the ambiguity created by outstandings which in reality do not keep the pleadings from being closed.

DEAN MORGAN: Do you think it was the purpose, Charlie, to get the answer in, and then say you might not close your pleadings with the answer, as there might be a reply or might not be a reply?

MR. GAMBLE: There might be a motion to be answered.

JUDGE CLARK: I rather suppose our original idea was that you wouldn't know until the issues had been framed what you needed to admit. I am not sure that was a sound theory, but I rather think that is what we went on. After the issues have been framed, then you can prepare for trial by getting admissions of things that you won't need to prove, and so on. I guess that is the theory we went on.

JUDGE DOBIE: A lot of things may be admitted in the answer. There is no sense in having them admitted again.

DEAN MORGAN: That is true with reference to the merits, but if you have some of the motions that could be made in motions (1) to (5), a motion attacking the jurisdiction, attacking service of process, and so forth, interrogatories there might settle some of the questions.

JUDGE DOBIE: Would it cover it to say, "or at such other time as the court may deem fitting", or something of that kind?

PROFESSOR SUNDERLAND: You would have to go to the court then.

JUDGE DOBIE: Yes.

PROFESSOR SUNDERLAND: Make it any time after defendant has appeared.

JUDGE CLARK: Or at any time after the commencement of the action.

PROFESSOR SUNDERLAND: Or at any time. (Laughter)

THE CHAIRMAN: We have drawn the rule now so that a deposition may be taken after the commencement of the action If we have done that, if we say we don't have to wait for answer or anything else, that we may take an oral deposition as soon as the action has begun, why in the world do we place any restrictions about written interrogatories? Why don't we say "after the action has been begun"?

SENATOR PEPPER: It strikes me, Mr. Chairman, that that suggestion is very good, that we ought to leave out "At any time after the answer has been served" or "pleadings are closed", and let the sentence begin, "A party may serve", and then when we come to this reference to the documents or to the facts, say, "documents relevant to any issue raised by the pleadings or to any facts relevant to the pleadings or the motion", so that the only reason for fixing a time is in order to describe what the documents in fact are that you are going to ask for admissions on, and they presuppose that there shall

have been pleadings or a motion. It isn't important when the thing is, provided you know what facts and documents you are talking about.

Do I make myself clear?

THE CHAIRMAN: I get what you are driving at, but I was just wondering why a man shouldn't be allowed to take a deposition of his adversary as soon as the action is begun. Why shouldn't he be allowed to submit to interrogatories as soon as the suit is commenced, and why shouldn't he be allowed under this rule to demand submission?

JUDGE DOBIE: He doesn't have to.

THE CHAIRMAN: To save him from having to take an oral deposition.

SENATOR PEPPER: But he has to have some criterion for determining the relevancy of the things, of the documents, the genuineness of which there is a request to admit.

DEAN MORGAN: The action has begun when the complaint is filed. It would have to be relevant to the complaint.

THE CHAIRMAN: I think my notion was that if you demanded an admission as to a document, if it wasn't something honestly material in the case, the party on whom you made the demand would go before the court and say, "Here, you asked me to make an admission as to whether I am the man named in the marriage certificate, and this is a suit for a personal injury in an automobile accident." He could stop it that way. If he

tried to get improper admissions that haven't any relation to the case, even if you haven't any pleadings or motions, yet you could still raise that question by asking the court to relieve you from making the admission unless the other party made some kind of showing that it had something to do with the lawsuit.

DEAN MORGAN: And the complaint would be the thing.

THE CHAIRMAN: You would be in just the same situation if you started taking a man's oral deposition when the suit started. It is exactly the same problem. You are going in and asking him about his private affairs, which may or may not have anything to do with the case. There are no pleadings yet, maybe just the complaint, but nothing else. There would at least be that in this case.

JUDGE CLARK: I suggest that it be made after the commencement of the action. I don't see why this shouldn't be uniform with the rest.

DEAN MORGAN: I so move.

JUDGE DOBIE: Just strike out, then, "At any time after the answer has been served", and just say, "A party may".

JUDGE CLARK: "at any time after commencement of the action".

JUDGE DOBIE: That is right.

THE CHAIRMAN: Anything else on 36?

MR. DODGE: Again in line 6 there is the word

"delivered" where perhaps the word should be "served". The reference just above is as to service of the request.

JUDGE DONWORTH: It may be "served", that is true. This is copies of the documents, a little different transaction. "Copies of the documents shall be delivered with the request". Perhaps "served" would be better. I don't know.

THE CHAIRMAN: Line 4, "any relevant documents described in and exhibited with the request", and line 6, "Copies of the documents shall be delivered with the request". It seems to me to be a repetition of the idea. One is exhibited with, and the other is delivered with. Why do you have both?

PROFESSOR CHERRY: Unless copies have already been furnished.

THE CHAIRMAN: Why say "exhibited" if you are later requiring them to be served or delivered?

PROFESSOR CHERRY: They have to exhibit them because the question may be of a signature on them, and so on.

THE CHAIRMAN: Oh, I see. One is dealing with the original and the other with copies. I see. I missed that. I take it all back. You want the word "delivered" made--

DEAN MORGAN (Interposing): "served".

THE CHAIRMAN: --"served" in line 6.

MR. DODGE: Yes.

THE CHAIRMAN: With no objection, that is agreed to.

JUDGE CLARK: Mr. Morgan objected to the word

"impertinent", a nice little word in line 17.

DEAN MORGAN: I was just trying to save printing.

JUDGE CLARK: I might say that in the discussion this was Mr. Monte Lemann's word. I don't mean to say that he framed this--

DEAN MORGAN (Interposing): "irrelevant or otherwise improper".

JUDGE CLARK: --but he gave a circumlocution of words which contained this.

DEAN MORGAN: Why don't you put "scandalous" in there also?

SENATOR PEPPER: Or "privileged".

JUDGE DONWORTH: "otherwise improper" is a pretty good expression.

PROFESSOR SUNDERLAND: "Irrelevant" and "impertinent" are the same thing, I think.

THE CHAIRMAN: I always thought so. That is the first time that word "impertinent" appears in the rules. I don't remember it anywhere else.

SENATOR PEPPER: Why don't you say, "privileged or otherwise improper", and economize your adjectives?

PROFESSOR MOORE: "Impertinent" is in the rules, Mr. Chairman.

JUDGE CLARK: Rule 12(f).

THE CHAIRMAN: I don't like this thing. Line 16

says, "or a motion to strike the request, in whole or in part, because some or all of the requested admissions are privileged, irrelevant, impertinent, or otherwise improper", but the request is improper. What you mean is that the requests for admissions are improper.

DEAN MORGAN: The request won't be privileged.

THE CHAIRMAN: Then I agree to that. I think it just won't work.

DEAN MORGAN: You are right.

THE CHAIRMAN: You can't say the requested admissions are improper. It is the request that is improper. The matter may be irrelevant.

DEAN MORGAN: Yes.

THE CHAIRMAN: The request wouldn't be irrelevant.

DEAN MORGAN: The admission may be irrelevant.

PROFESSOR SUNDERLAND: I would say the matters contained in the request are privileged.

THE CHAIRMAN: Contained in what?

PROFESSOR SUNDERLAND: "a motion to strike the request," .... "because some or all of the matters contained therein are privileged, irrelevant, or otherwise improper."

THE CHAIRMAN: It is obvious that the Reporter better tone that up a little bit. He has heard our various suggestions. I suggest we refer it to him to draw a really good provision. It is just a matter of grammar more than anything else.

Rule 41. Any suggestion there?

All right, he made no change in 43 or 44. There is a note there.

Rule 45, Subpoena.

DEAN MORGAN: Didn't you have a suggestion on 41 as to the dismissal of counterclaim. I see Clark's suggestion as to the addition of counterclaim with reference to 41. That is what we are on, isn't it?

SENATOR PEPPER: We inserted a cross-reference to Rule 66. Isn't that all?

THE CHAIRMAN: That hooked in the receivership business.

SENATOR PEPPER: "Subject to the provisions of Rule 23(d), Rule 66, and of any state of the United States".

DEAN MORGAN: What have I got this note here for, then? I got this bunch of suggestions from Charlie very recently, and I have been looking at them.

JUDGE DONWORTH: Isn't it common in the state rules and practice that, if a counterclaim is filed, the plaintiff may not dismiss? What about that, Mr. Reporter? Do we allow the plaintiff to dismiss even though a counterclaim is in? This says dismiss the action. Rule 41, as redrawn here now, is a voluntary dismissal. This says, the plaintiff may dismiss the action, and so forth, and there is no safegaurd about the case where there is a counterclaim in. Does that need any

attention?

MR. HAMMOND: Isn't that covered by paragraph (c)?

THE CHAIRMAN: That is covered by a reference to 23(c), isn't it?

JUDGE DONWORTH: I don't know.

PROFESSOR MOORE: This is a voluntary dismissal.

MR. HAMMOND: It is (c) under this rule, (c) under Rule 41.

MR. DODGE: In the communication of June 24 there is a further amendment to 41 suggested.

DEAN MORGAN: That is what I thought.

JUDGE CLARK: Yes, there is. We sent it out. I have it here; that is right. But that is for an addition at the end. Before we get to that, on this matter you will notice 41(c) provides for the voluntary dismissal that we are now referring to in paragraph (1). It is made before the responsible pleading is served.

THE CHAIRMAN: We are not talking about counterclaims in subdivision (1).

JUDGE CLARK: There won't be any counterclaim in (1) because the dismissal there is by the plaintiff before the answer has been served, that is, before the counterclaim appears, or it is by stipulation of the parties.

THE CHAIRMAN: That is right.

JUDGE CLARK: So I think Judge Donworth's question

won't really come up practically.

JUDGE DONWORTH: That seems correct.

JUDGE CLARK: We did make a suggestion for tying this in further with Rule 54(b), and we made it a bit later. We made it under date of June 24, I think it is.

DEAN MORGAN: Yes, that is right. It is headed "Committee Notes."

JUDGE CLARK: "Note to the Committee on Rule 41."

DEAN MORGAN: Page 2 of that.

JUDGE CLARK: Originally we called attention to a decision of the 7th Circuit Court in the Jefferson Electric case, with which we disagreed, and we thought it might be covered. What we have done here is to say that perhaps, in order to make it perfectly clear, we had better nullify the effects of the 7th Circuit case. It was held in that 7th Circuit case, the Jefferson Electric case, that the dismissal of a counterclaim of a compulsory type was prejudiced and that the dismissal was there final and appealable.

We ventured the suggestion that the case was wrongly decided as to the latter point and that under Rule 54(b) the judgment there contemplated would be entered at the time when the plaintiff's claim and defendant's counterclaim were both disposed of, and not immediately upon the dismissal of the counterclaim. Accordingly, no change was recommended in Rule 41 on this score, and the Committee took no action regarding

the problem involved, although Mr. Lemann expressed the opinion that he would have decided it as did the 7th Circuit.

A recent decision of the 2nd Circuit makes the following statement concerning the Sola case: "Before the adoption of the federal rules, it was clear that the dismissal of a counterclaim where the action was left pending would not be a final judgment. In the Jefferson case it was held that this rule had been changed by Rule 41(b) and (c), allowing dismissal of a counterclaim, though 'we think this is an unfortunate result of the rule for the reason that it requires separate appeals from very closely related cases which would much better be combined for hearing on one appeal.'" That is a quotation from the 7th Circuit case.

Then we went on with the 2nd Circuit: "But the decision fails to note that this rule dealt with the district court's control over the dismissal of actions, not with the time of entry of final judgment, which is governed by Rule 54(b) quoted above; and hence it did not consider the background of this latter rule. .... Rule 54(b) purports only to modify the previously existing law that a final judgment must finally dispose of all matters at issue in the case," and so forth.

What we are wondering now is if, in view of that case and perhaps even more because Mr. Lemann said that he would have decided it the same way, there isn't sufficient ambiguity that we ought to hit the matter directly. If we hit

the matter directly, we suggest two forms of ways of doing it at the foot of that same page.

One form is by adding a new subdivision (e), "JUDGMENT: WHEN ENTERED. When the court has ordered a dismissal, judgment thereon shall be entered only in accordance with Rule 54(b)."

The other--

THE CHAIRMAN (Interposing): I have just awakened to the fact that you are not talking about 41(a) at all any more.

JUDGE CLARK: That is right.

THE CHAIRMAN: You have switched to something else. I have just found it out. I didn't have that 41 note before me. I don't really know what you have been talking about, and I apologize for it, but I would really like to know what the point is now. What provision of Rule 41 are you talking about?

DEAN MORGAN: We are going to add a section.

JUDGE CLARK: Add a new one at the end of the whole section, providing, in effect, that you don't enter final judgment except as 54(b) so provides, and you remember that 54(b) in effect says that until you have disposed of all the questions arising out of one claim, and so on, the ruling of the court is provisional only and subject to revision.

THE CHAIRMAN: What subdivision of Rule 41 are you talking about, what letter subdivision?

JUDGE CLARK: This is a suggestion to add a new one,

(e), but the question has come up because the 7th Circuit, under Rules 41(b) and (c)--

THE CHAIRMAN (Interposing): (b) and (c). That is involuntary dismissal.

DEAN MORGAN: That is right.

JUDGE CLARK: They held that when a compulsory counterclaim was dismissed--

THE CHAIRMAN (Interposing): Involuntarily dismissed?

JUDGE CLARK: Yes. --with the main question still at issue on the main claim, nevertheless the decision on the counterclaim was final and appealable, even though the main question in the case itself hadn't been decided.

THE CHAIRMAN: I see.

DEAN MORGAN: So you couldn't save that until the main case, because then your time to appeal would be expired, would it not?

JUDGE CLARK: Yes.

THE CHAIRMAN: Is there any way to cure that except to forbid the entry of a preliminary judgment? How can you say he enters it but it isn't final?

DEAN MORGAN: Shall be preliminary only.

THE CHAIRMAN: You mean to make it interlocutory and give the court power to alter at will?

DEAN MORGAN: That is right.

JUDGE CLARK: We have a provision we put in 54(b) to

that general effect, that a judgment which does not dispose of all questions is provisional only.

DEAN MORGAN: You stuck in the adjective "all" there, as I remember.

JUDGE CLARK: That is added in our new draft. That is what we voted before. You won't find it in the original. It is added under 54(b).

THE CHAIRMAN: The whole purpose of this thing relates, then, to the question of partial judgments, finality of those, and the question of the right to appeal.

JUDGE CLARK: That is it.

THE CHAIRMAN: I see.

JUDGE CLARK: And the 7th Circuit said that Rules 41(b) and (c) compelled them, even though unfortunately it made them take two bites at the cherry--

THE CHAIRMAN (Interposing): To take an appeal.

JUDGE CLARK: Yes.

THE CHAIRMAN: To save the rights they had to appeal.

DEAN MORGAN: Otherwise, there would be a res judicata with reference to the other case.

JUDGE CLARK: We ruled other than the 7th Circuit.

THE CHAIRMAN: Why did you say it wasn't final? You mean it was interlocutory in substance, in essence?

JUDGE CLARK: Yes.

THE CHAIRMAN: Did the court recant and allow it to

be prosecuted?

DEAN MORGAN: Reviewed the whole thing on the final judgment is what you mean.

JUDGE CLARK: Yes, that is it.

THE CHAIRMAN: Why don't you hit the whole subject by just simply saying in 54(b) that any partial or preliminary judgment of that kind is interlocutory?

JUDGE CLARK: About all we suggest doing here is to refer you forward to 54(b), to say that the same rules apply to dismissals as apply generally.

DEAN MORGAN: To a counterclaim dismissal particularly, yes.

JUDGE CLARK: Yes. That was the decision we took in our case in the 2nd Circuit.

DEAN MORGAN: I think your second alternative there makes that clearer, Charlie.

MR. DODGE: Doesn't 54(b) cover it, as we have proposed to amend it here?

JUDGE CLARK: I think so. Of course, we did our best on it. Have you got 54(b) before you? If you will look at 54(b), you will see that we added a separate statement that a determination which does not cover everything (I am not quoting literally, but generally) shall be provisional only.

MR. DODGE: Yes, and then in Rule 41 as it stands you haven't referred to judgments at all in the first four

paragraphs, and why inject a reference to judgment on the counterclaim matter only?

JUDGE CLARK: I think you are making the same criticism we made of the 7th Circuit case, that there wasn't anything said about judgments in those rules, and they ought not to have held it was a judgment. The only answer I can make to that is that they did.

DEAN MORGAN: But then, you see, they said your rule says that the dismissal operates as an adjudication upon the merits, and that is what they seized upon.

JUDGE CLARK: Yes.

DEAN MORGAN: That it was an adjudication upon the merits and that the judgment was final and appealable.

MR. DODGE: Would they have said that if our 54(b) as amended had been in effect then?

DEAN MORGAN: I doubt it. I don't know.

JUDGE CLARK: That, of course, I don't know. They might not, and I hope they wouldn't have. This in a way tells them not to do it without looking at 54(b). This may be quite unnecessary, but there it is. If it is there, it brings the thing up.

MR. DODGE: It seems to me to be inartistic and inadvisable to refer to judgments only in that final paragraph of 41, the proposed new paragraph.

DEAN MORGAN: Is it any more inappropriate than to

provide that the involuntary dismissal shall be an adjudication upon the merits?

MR. DODGE: Yes. That doesn't say anything about entry of judgment.

DEAN MORGAN: It says adjudication.

MR. DODGE: It injects for the first time a reference to the entry of judgment, which should be reserved to Rule 54.

JUDGE CLARK: As a matter of fact, Mr. Dodge, this one isn't going to be the first one we are going to refer forward to 54(b). We have been sort of tying up previous sections to 54(b). We have made rather a practice of it in this draft, you remember, just in the hope of tying this all together.

JUDGE DONWORTH: It is rather hard on the defendant to say that, although he is dismissed out of the case, he can not say a word in an appellate court until this litigation, which may be protracted, comes to a final conclusion, and no doubt that line of reasoning had its effect in the 7th Circuit.

JUDGE CLARK: Of course, there is always that question; I mean the whole idea of taking up matters on appeal all together. My colleague, Judge Frank, you know, didn't like the general idea. He thought you should be entitled to take up matters more than that. But I think there is a good deal to be said on both sides, and I think it is not unsound practice. On the other hand, it is sound practice generally to require that the whole matter be appealed at once, not piecemeal. Here,

you see, the main claim on the main transaction is still standing.

DEAN MORGAN: And usually a counterclaim would diminish the relief in that kind of case, wouldn't it? Not necessarily, but it would usually.

JUDGE CLARK: Usually, I suppose, yes.

THE CHAIRMAN: I don't see why there should be any kick about appeals, because if the disposition of the counterclaim doesn't establish any rule of law that is going to settle the main claim, it may not, and whether the main claim is successful and judgment is entered on it or the defendant wins, still there is a counterclaim staring you in the face, either rightly or wrongly decided.

DEAN MORGAN: But take it the other way around. Suppose the defendant doesn't want to go up piecemeal. You can't raise this question now on the final judgment because it is res judicata and decided against him; his time for appeal has gone by, and he is stuck on his final judgment.

THE CHAIRMAN: He has to raise it. He can't wait.

DEAN MORGAN: If he can, he has to within ninety days.

THE CHAIRMAN: Suppose the plaintiff is insolvent, his counterclaim isn't worth anything except as a set-off, and he doesn't want to bother with going up on it until he finds whether he needs it to set off his claim. I can see that.

DEAN MORGAN: Yes.

THE CHAIRMAN: What is your pleasure with it? Do you think it is covered by your proposed amendment to Rule 54 or do you want to suggest a change in 41?

DEAN MORGAN: In order to get it before the Committee, I move that the alternative (e), as suggested by the Reporter on page 2 of his Preliminary Draft of Amendments be inserted.

JUDGE CLARK: Do you have that?

DEAN MORGAN: I can read it for you, if you wish.

JUDGE DONWORTH: I wish you would read that. I don't have that.

DEAN MORGAN: "(e) JUDGMENT: WHEN ENTERED. A judgment shall be entered upon the dismissal by the court of a claim, counterclaim, cross-claim, or third-party claim only in accordance with Rule 54(b)."

MR. DODGE: It seems to me this is unnecessary. I don't see why Rule 54(b), which says that all such judgments are provisional and not final, doesn't answer the matter.

THE CHAIRMAN: I don't think that it does what you want it to, anyway. You say a judgment may be entered in accordance with Rule 54(b), but what you really mean is that the effect of it shall be as fixed in Rule 54(b). "Entered in accordance" seems to me to relate to the machinery and method of causing it to be entered and bringing it about. But the effect of it, whether entered as final judgment or not, I am not sure is covered by those words "entered in accordance".

MR. DODGE: All this really means is that the judgment on the dismissal of the counterclaim shall be provisional and not final, and we have said that of all judgments of that character.

JUDGE CLARK: That is true. What Mr. Dodge says is true, if the admonition would be heeded.

THE CHAIRMAN: It would be heeded if it were seen. It seems to me that "Judgment at Various Stages" is the proper place to put that in. You have got it there. I don't think we have got to refer to Rule 54(b) in every other rule that we have that relates to this subject.

MR. HAMMOND: The only thing is whether some other court will follow the 7th Circuit. They apparently didn't even look at Rule 54(b).

MR. GAMBLE: Aren't you proposing to change 54(b) to spell it out?

THE CHAIRMAN: Rule 54(b) as we originally had it didn't make that entry provisional or interlocutory. It was final. Now we put a clause in there saying, "A determination of, or order concerning, some, but not all, of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim is provisional and subject to revision by the court until all of such issues are adjudicated." That is something that wasn't in there before.

JUDGE CLARK: I think we rather thought it was in there. It wasn't spelled out. You are quite right, it wasn't spelled out, but we thought it was in there, and, in fact, that is what we so held in our 2nd Circuit case.

THE CHAIRMAN: I am not sure that it is in there.

JUDGE DONWORTH: Wouldn't you have to say that this preliminary dismissal shall be an order only and shall not be a judgment?

DEAN MORGAN: He is very careful in this phrase not to make it a judgment. He calls it a "determination" each time.

THE CHAIRMAN: But the rule starts out in subdivision (b), "Judgment at Various Stages." You have to strain a point to say the dismissal of that counterclaim on the merits isn't a judgment.

JUDGE DONWORTH: If we leave the thing exactly as it is, it will work out in this way: The plaintiff will not move to dismiss an involuntary counterclaim because that sends him up to the higher court at once, if he gets his motion granted. He will wait until the trial of the main issue, and then at the trial, move to dismiss the counterclaim. In that way he can accomplish what we have in mind.

THE CHAIRMAN: Is it the sense of the meeting that what we have done or propose to have done to Rule 54 fits the case and that we don't have to make any amendment to 41, or do you want to make an amendment to 41? Let's have a vote on that.

JUDGE DONWORTH: Excuse me. I don't think the thing ought to be called a judgment, and I think you can get around an appeal by treating it as interlocutory. I think if it is a judgment, the statutes of the United States about appeals apply. I think that should be borne in mind. I think you will have to call it an order.

JUDGE CLARK: I thought we had avoided that, had taken care of it in the form of the statement. The suggestion for a new rule, 41(e), is that a judgment shall be entered only in accordance with Rule 54(b), and Rule 54(b) provides for a judgment only when it is final. Where it has done something else, the court may have called it a judgment, but it is only a provisional determination. That is the way we tried to hit it as far as language goes.

We have a provision in the rules that an order is a judgment. That is farther on some place here.

DEAN MORGAN: Yes, I know.

JUDGE CLARK: Eighty-something, I think.

THE CHAIRMAN: The question is whether you want to add to 41, subdivision (e), which reads as follows: "JUDGMENT: WHEN ENTERED. A judgment shall be entered upon the dismissal by the court of a claim, counterclaim, cross-claim, or third-party claim only in accordance with Rule 54(b)."

JUDGE CLARK: The whole significance of that is in the word "only".

JUDGE DONWORTH: I would say, "only at the time".

THE CHAIRMAN: "and with the effect specified in 54(b)." My objection to the diction of the provision is that you are talking about entry made in accordance. Isn't that it? We don't care about the machinery of entry. We want to know what the operation of the thing is after it is entered. Why don't you make some suggestion or change that rule, subdivision (e), so as to cover that?

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

THE CHAIRMAN: I would say, "only in accordance with and to the effects specified in Rule 54(b)." That is the idea. That may be bad draftsmanship, but that is the idea.

JUDGE CLARK: Isn't that all right?

PROFESSOR MOORE: Yes.

JUDGE CLARK: "only in accordance with and with the effect of Rule 54(b)." Is that all right?

JUDGE DONWORTH: It makes you put in "at the time". Unless you put in "at the time", I think you are going to have an appealable judgment when entered.

MR. DODGE: Doesn't that leave some other kind of dismissal under Rule 41 as to which we have not said this?

DEAN MORGAN: Dismissal without prejudice.

MR. DODGE: Haven't you got to say, as to every paragraph, that any dismissal under this paragraph shall be in accordance with 54(b), all of which is implied anyway, I think.

THE CHAIRMAN: I should like somebody to make a motion now to do something or not to do it to Rule 41.

DEAN MORGAN: I made a motion.

THE CHAIRMAN: What is the motion.

DEAN MORGAN: I made a motion to insert that which you just read.

THE CHAIRMAN: To adopt subdivision (e) as a part of the rule?

DEAN MORGAN: That is right, as a part of Rule 41.

THE CHAIRMAN: Do I hear a second?

JUDGE DOBIE: I second it.

PROFESSOR CHERRY: Mr. Chairman, on that motion, in the proposed new matter in 54, instead of saying "A determination of, or order concerning," we added somewhere there (I am not clear where), "including any dismissal", because it doesn't quite fit under determination or order, maybe. It may be by stipulation, and so forth.

THE CHAIRMAN: You mean that this addition, (e), be changed?

PROFESSOR CHERRY: Instead of doing it as now proposed in the motion in 41, do nothing in 41, and in the new matter which we have submitted to us on 54, starting "A determination of, or order concerning, some, but not all," put in some words such as, "including any dismissal".

MR. DODGE: That is the place where it ought to be,

if any addition is needed.

PROFESSOR CHERRY: Yes. Then you have dismissal of every sort hooked up with determination, order, and so on. I think the difficulty is that "determination or order" doesn't quite suggest dismissal. If we did suggest to put it there by some such language, wouldn't that do the whole thing?

JUDGE CLARK: I suppose it would, yes.

PROFESSOR CHERRY: Then we don't talk about judgments under 41. I agree, I don't like that.

JUDGE DONWORTH: Don't you expect that there will be dismissals in an important case with numerous defendants, that will be voluntary dismissals, and so on, as the case goes along, and parties will be let out of the case permanently? That usually happens. If you are going to suspend all dismissals until the final judgment, I am not sure that is going to work. However, I admit the matter is complicated, and I would acquiesce in it.

DEAN MORGAN: I would just as soon have it all put in in 54 if you are making that so clear that he who runs may read. I don't like the 7th Circuit decision, and I think we ought to make it clear.

MR. DODGE: Do you substitute for your motion one that we defer that matter until we come to 54?

DEAN MORGAN: I am perfectly content to do it that way.

THE CHAIRMAN: Then you move that we make no change in 41, but do whatever is necessary in 54.

DEAN MORGAN: I would just as soon do it that way.

THE CHAIRMAN: Any discussion of that? All in favor say "aye." That is agreed to.

Do you want to hit 54 while it is fresh in your minds or put it off until we get there?

SENATOR PEPPER: Do it while it is fresh in our minds.

THE CHAIRMAN: Yes. Let's take up 54 out of order now. We have been chewing it. Let's see what we want to do to that. You have inserted the word "all" in line 3, and you have added that underlined provision in lines 13 to 17.

JUDGE CLARK: It seemed to me that in general the approach we took here was good, and I hope it will be somewhat effective. I should think it might help. Mr. Hammond has raised some question as to whether we have made what we said complete or not. He is trying to visualize a situation. We have used the expression "all the issues material to a particular claim", and so on. He has said that there may be several claims for relief arising out of a single transaction, and he wants to expand it so that the several claims for relief arising out of a single transaction would all be covered by this rule.

He makes some changes to bring that out in the first part, and then in this new part, in line with what he said, he

makes it read something like this: "A determination or order concerning some, but not all, of the claims, counterclaims, cross-claims, and third-party claims arising out of a single transaction or occurrence is provisional and subject to revision by the court until all such claims, counterclaims, cross-claims, and third-party claims are determined."

What he has done, you see, is to put in full the various claims that arise out of a single transaction. What he has in mind and what we had in mind in drawing this originally are the same thing. This is a question of wording and of construction of what we have done.

My answer (which would be inadequate, of course, unless the courts would agree with the way I am looking at it), the way I would look at it, is that we have used "claim" here practically as a substitute for the old cause of action, and the cause of action is the legal situation arising out of this particular claim and transaction. That is, you don't need to call attention to all the separate rights of action.

THE CHAIRMAN: Are you criticizing his use of the words cross-claim and all that sort of thing?

JUDGE CLARK: Yes.

THE CHAIRMAN: Is that what your point is?

JUDGE CLARK: Yes.

THE CHAIRMAN: I don't think it is necessary to refer to all these different kinds of cross-claims and cross-crosses

and third-party claims and whatnot. It is enough to say "claim or counterclaim." Is that your point?

JUDGE CLARK: Yes; or, as we put it, it is better to say, "A determination of, or order concerning, some, but not all, of the issues material to a particular claim", and so on. "the issues to a particular claim" I should say is the same as saying, "all claims for relief arising out of a single transaction or occurrence".

Here again, I suppose, it is the idea that is conveyed. I should think that we conveyed the idea of a unitary cause, so to speak, a little more clearly than Mr. Hammond's version by putting in the references to all the various claims that may arise out of a single transaction. Perhaps I can define it this way: This draft makes the unit the claim. Mr. Hammond's unit is, in effect, the transaction, and he adds some specifications to make that clear. I suppose the question is which conveys the idea better to an outsider. To my mind, the particular claim does it, but if it doesn't to an outsider, that would be an objection.

DEAN MORGAN: Have you any concrete cases, specific cases, Mr. Hammond, that you had in mind for that sort of thing?

MR. HAMMOND: I was just wondering if the rule as written covers the case where a plaintiff has two or three claims arising out of the same transaction.

DEAN MORGAN: That is, he puts it as three different

counts, is that it, in the same declaration or complaint?

MR. HAMMOND: Yes, he might do it that way. Yes, he could do it that way.

DEAN MORGAN: They would be consistent or inconsistent with each other? What do you have in mind? A case where he is claiming an infringement of a patent and at the same time unfair competition arising out of the same transaction?

MR. HAMMOND: Yes, something like that or like the case I believe you had in New York.

JUDGE CLARK: Yes; that suit against The New Yorker. You remember, in one edition of The New Yorker there was a description of this mathematical genius. There were three different counts, as I remember. One was the statutory right of privacy, one was a claim of common law right of privacy, and the third was statutory libel.

MR. HAMMOND: Three different theories of recovery for the same set of facts.

JUDGE CLARK: That is what I called it, but my colleagues held it to be a different cause of action and held it appealable, you remember.

MR. HAMMOND: I would say that perhaps the matter has been interpreted the way I would redraft it in the Reeves v. Beardall case by the Supreme Court. There there were three separate claims by the same plaintiff, and there Mr. Justice Douglas interepreted the rule to read, "all claims arising out

of the same transaction by the same plaintiff," you see. That was the situation. So maybe it isn't necessary to amend the rule in view of that fact, but it does seem to me, if you are dealing with the subject of entering a judgment, that it ought to cover clearly for res judicata purposes all claims by the same plaintiff arising out of the same transaction.

I think what caused all the trouble was that we didn't word the rule that way in the first place. The way the rule was, as you remember, it ordinarily would be that it had to do only with a case where there was a claim and a counterclaim. If we had had it, "all claims arising out of the same transaction or occurrence, and all counterclaims and crossclaims to those claims," a lot of these cases would never have come up.

THE CHAIRMAN: You say the Supreme Court has placed a certain interpretation on the rule as it stands. I am wondering whether this addition in lines 13 to 17, supplied by the Supreme Court itself, after its decision might be now construed as an attempt to alter the rule and make a rule different from that which they considered in their opinion. Would there be any possibility of that?

MR. HAMMOND: I don't think it has any relationship to that.

THE CHAIRMAN: You said that they have held that it related or construed it as if it related to the claim in a

particular transaction instead of a particular claim.

MR. HAMMOND: I hadn't considered it in connection with this decision.

THE CHAIRMAN: Now you make a distinction pinning it right down to the claim instead of the transaction.

MR. HAMMOND: I see what you mean.

THE CHAIRMAN: I am wondering whether that might be thought by the Supreme Court to say that they had interpreted it so as to make some changes.

MR. HAMMOND: There is that possibility.

DEAN MORGAN: Mr. Hammond, do you suppose the reason Douglas did that was that he was educated by Charlie about cause of action before he got on the bench and did it unconsciously?

JUDGE CLARK: No. I don't know whether I ought to add anything about that or not, but perhaps I can say this. I was going to say that when I saw this case was coming up, it was a case that I didn't know anything about, except I think Mr. Leland Tolman called my attention to it--somebody did. I just tucked two or three decisions raising the point in an envelope and sent them to Douglas. I heard nothing.

DEAN MORGAN: Worse than prior education, then.

JUDGE CLARK: I heard nothing about it for some time, until after the decision, when I got a note from Douglas, not referring to any prior communication of mine, to which I had

made no reference, of course, enclosing a copy of the decision, and he had written on the top of it: "How is this for one educated in the Yale procedure?" or something like that. So that is all I can tell you about it.

MR. HAMMOND: I think you were pretty lucky to get by with the wording of the rule as it is, with the Reeves v. Beardall case.

JUDGE DONWORTH: This discussion leads me to think that perhaps the best way would be to leave everything just as it is. We have here in Rule 54(b) provision that separate judgments may be entered. "The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims." I think that is a wise and salutary provision and quite important in view of the complicated issues and parties that may get into a case.

I am afraid that, in order to avoid the effect of one decision, we are complicating the freedom of the courts to dispose of the different issues, which freedom exists under the rule as it now stands. The 7th Circuit decision can be obviated by any plaintiff by not moving to dismiss the counterclaim until he gets ready to dispose of his final claim himself in the court. The more I think about it, the more I fear that we are introducing a complicated provision restricting the power of the court, to avoid a minor point which, after all, depends upon the statutes of the United States relating to

appeal.

JUDGE CLARK: May I say on that that I think I view what Judge Donworth says with a great deal of care, as it needs to be, but also with a great deal of regret bordering on consternation, because this has been a very difficult and disagreeable thing which has been partly raised by our rules. The main question, of course, is inherent in any system of jurisprudence. It has become important, however, because of the wide range of joinder permitted. I do think our rule is a great step in advance, and it is not a matter that is quite so minor as he puts it. It seems to me it is very clarifying, and I should hate to have it changed.

Let me say again that, as to this suggestion that Mr. Hammond is making, he and I are in the utmost accord as to what we want to do. This is just a matter of expression.

The reason I think this is so important is not merely the number of cases. We get many more cases than go into the reports. We have this up, and we sidestep it a good deal. We get more motions of this kind, and the reported cases, which are quite numerous, don't begin to cover the number of times it comes up.

The main difficulty is that there is a great lack of understanding of the situation on the part of district judges. I have spoken to several of the district judges, and I think in general they have felt it would be helpful as really telling

them something that is going on.

To my way of thinking, this provision was inherent in the rule as it was drawn and, in fact, that is the way we more or less decided. The decisions may not be entirely consistent, but it has been more on definition of details than on this fundamental point. It is because of the thought that this rule originally had changed the existing law, which is what the 7th Circuit said of the dismissal rule. They said that the previous rule was clear enough but that the dismissal rule had changed it.

I think it is desirable to put this in. I don't think this is anything but suppositive, but I think it is suppositive in a good way.

MR. DODGE: You are referring just to the new matter at the end?

JUDGE CLARK: Yes.

DEAN MORGAN: You also are referring, incidentally, aren't you, to the dispute in phraseology between you and Mr. Hammond as to whether "claim" really covers the whole business?

JUDGE CLARK: Yes.

DEAN MORGAN: You make "claim" what you have always contended "cause of action" was, the group of operative facts out of which the various claims for relief might grow?

JUDGE CLARK: Yes. I think the small difference between Mr. Hammond and I depends on that sort of thing. I am

not insistent on the form. That is why I brought it up rather tentatively. It is what the words convey. Do these words as written convey the meaning or do the words that he suggests do it better? I am just wanting light on it.

DEAN MORGAN: I must say I think the words Mr. Hammond suggests would do it better to people who weren't conversant with this whole dispute as to what constitutes cause of action and the development which the Supreme Court has taken with reference to that.

JUDGE CLARK: I shall not object. I think this is more a question of what words best convey the meaning. I just don't want the whole business going out.

DEAN MORGAN: I hope it won't go out.

JUDGE CLARK: It is just whichever the Committee thinks hits the thing better.

THE CHAIRMAN: We haven't seen Mr. Hammond's draft.

DEAN MORGAN: After reading Mr. Hammond's slowly, I could tell better. I couldn't get it from hearing it.

THE CHAIRMAN: I should like to ask a question. There has been some reference here to a decision by Mr. Justice Douglas and the Supreme Court involving this, and you made the statement that we were lucky to get by in the case. What was the question before that court, and what did it decide? Was it a question of the finality of judgment?

JUDGE CLARK: That is just it, yes.

MR. HAMMOND: Yes. There were three different claims by the same plaintiff.

THE CHAIRMAN: All connected in some way?

MR. HAMMOND: No, they arose out of different transactions, the court held, and therefore the appeal was allowed as to one of them.

THE CHAIRMAN: The disposition of one of them was allowed as a separate judgment and a separate controversy in the final judgment. I don't quite see how that helps us much in the kind of case we are dealing with. We are talking about claims arising out of the same transaction or occurrence.

JUDGE CLARK: It helps because that is the very point that Justice Douglas discussed.

THE CHAIRMAN: What did he say the rule meant?

JUDGE CLARK: Let's get the case. As a matter of fact, he quoted the definition I made of "claim," as meaning the facts, and so on.

MR. HAMMOND: The Court decision may have cured the thing sufficiently, but I think it ought to be stated in the rules.

THE CHAIRMAN: I don't get it in my mind. I don't know why the Court's decision had to do with this question.

MR. DODGE: What does the head note say?

THE CHAIRMAN: What does the opinion say about it?

JUDGE CLARK: This is the decision holding that the

dismissal of one point was appealable. He says:

"Rule 54(b). The joinder provision (see Rules 13, 14, 18, 20) and the provision of Rule 42 which permits the court to order a separate trial of any claim or issue, indicates a 'definite policy' (Collins v. Metro-Goldwyn Pictures Corporation, 106 F.2d 85) to permit the entry of separate judgments where the claims are 'entirely distinct.' 3 Moore, Federal Practice, Cum. Supp. 1941, page 96. Such a separate judgment will frequently be a final judgment and appealable, though no disposition has been made of the other claims in the action. Bowles v. Commercial Casualty Insurance Company, 4 Cir., 107, F.2d 169, 170. That result promotes the policy of the Rules in expediting appeals from judgments which 'terminate the action with respect to the claim so disposed of,' though the trial court has not finished with the rest of the litigation. See Federal Rules of Civil Procedure, Proceedings of Institute, Washington and New York (1938) page 329.

"The rules make it clear that it is 'differing occurrences or transactions, which form the basis of separate units of judicial action.' Atwater v. North American Coal Corporation, 2 Cir., 111 F.2d, 125, 126." (That quotation is one that I wrote. "And see Moore op. cit., 92-101; 49 Yale Law Journal, 1476. If a judgment has been entered which terminates the action with respect to such a claim, it is final for purposes of appeal under paragraph 128 of the Judicial

Code. The judgment here in question meets that test. The claim ... on promissory note was unrelated to the claim on the contract not to change the will. Those two claims arose out of wholly separate and distinct transactions or engagements. And the question as to Hamer's liability (third count) ... would arise only in the event the claim on the contract not to change the will was sustained. Hence no question is presented here as respects the appealability of a judgment dismissing a complaint as to one of several defendants alleged to be jointly liable on the same claim. See Hunteman v. New Orleans Public Service Inc., 5 Cir., 119 F.2d 465."

THE CHAIRMAN: You construe that opinion as holding that there is no authority for preliminary separate judgment where the claim dealt with is not wholly disconnected in the facts and circumstances?

JUDGE CLARK: Yes, because he makes the inquiry whether this is disconnected in order to reach the decision that it is appealable.

THE CHAIRMAN: Where there is more than one claim.

JUDGE CLARK: So I think it bears out this whole idea.

THE CHAIRMAN: Mr. Hammond I have interrupted you long enough. Will you please read your proposal in place of lines 13 to 17 here?

MR. HAMMOND: I should like to make the change up in the first part of the rule.

JUDGE DONWORTH: The first part of the printed rule as it now is?

MR. HAMMOND: Yes.

JUDGE DONWORTH: What subdivision?

MR. HAMMOND: (b).

JUDGE DONWORTH: All right, I have the original before me.

THE CHAIRMAN: What change do you make?

MR. HAMMOND: I say: "When more than one claim for relief arising out of a single transaction or occurrence is presented in an action, the court, upon the determination of all the claims, counterclaims, cross-claims, and third-party claims arising out of the same transaction or occurrence, may enter judgments disposing of them. The judgments shall terminate the action with respect to the claims, counterclaims, cross-claims, and third-party claims so disposed of, and the action shall proceed as to any remaining claims. In case separate judgments are so entered, the court by order may stay their enforcement until the entry of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to a party in whose favor a judgment is entered."

Then I redrafted the added clause this way: "A determination or order concerning some, but not all, claims, counterclaims, cross-claims, and third-party claims arising

out of a single transaction or occurrence is provisional and subject to revision by the court until all such claims, counter-claims, cross-claims, and third-party claims are determined."

MR. GAMBLE: That would still permit an appeal just the same as in the case the Reporter read.

DEAN MORGAN: This one that the Reporter read, yes.

MR. GAMBLE: Your language would make that case operate.

MR. HAMMOND: Oh, yes.

MR. DODGE: I couldn't clearly get the difference without studying it.

THE CHAIRMAN: Mr. Hammond, here is something I don't understand. You say, "When more than one claim for relief arising out of a single transaction is presented, the court, upon the determination of all the claims arising out of the same transaction, may enter judgment". Suppose there is not more than one, but there is only a claim for relief arising out of a certain transaction. There is no objection to the court's entering final judgment on that, is there?

MR. HAMMOND: No; because the judgment wasn't for more than one claim.

THE CHAIRMAN: I know, but you don't deal with a case where there is only one claim for relief arising out of the transaction. You say that the partial judgment that you talk about may issue only if there is more than one claim arising

out of the same transaction and all those numerous claims arising out of the transaction have been determined.

DEAN MORGAN: That is the only situation that (b) covered originally, when more than one claim for relief is presented.

THE CHAIRMAN: No. That points to the view of the original draft. We weren't talking about arising out of the same transaction. We were talking about the existence of more than one claim which might arise out of different transactions. Now we are switching around and talking about more than one claim arising out of a single transaction. This is all right as it is stated, but it eliminates the case of a partial judgment in case there is only one claim arising out of a particular transaction, and that claim is finally adjudicated and all the issues relating to it. There is no provision for a separate judgment for that. Isn't that so?

DEAN MORGAN: I don't see anything in 54 about a judgment on a single claim.

THE CHAIRMAN: Under 54 as it stands today, if there is more than one claim involved, that doesn't mean more than one claim arising out of the same transaction. It means two or more claims that may be wholly unrelated transactions. It says when all the issues relating to a particular one of those claims are disposed of, you may enter a partial preliminary judgment.

DEAN MORGAN: Right.

THE CHAIRMAN: But now I contend that that first line in the present Rule 54(b) isn't talking about more than one claim arising out of the same transaction. It means a case where there is more than one claim involved, without regard to whether they arise out of the same transaction. They may be out of different transactions. The proposed redraft, as I see it, deals only with the case where there is more than one claim arising out of the same transaction.

DEAN MORGAN: You are right.

MR. HAMMOND: I think you are right.

DEAN MORGAN: It makes an omission.

THE CHAIRMAN: It doesn't deal with the case where there is more than one claim in the action, but only with the case where there is more than one claim arising out of the same transaction. So I think we will have to settle the question of principle here, and we haven't gotten very far with the details of draftsmanship if that is what we are struggling for.

We did decide that we didn't want the thing dealt with in 41, that we did want it put in 54. Is there any other question now as to what we should do, except questions of draftsmanship on 54?

JUDGE CLARK: No. I still think that this does everything Mr. Hammond wants to do, and I am satisfied with it except that now we want to put in something about dismissal.

I haven't quite worked that out. Have you any idea on that, Mr. Moore?

PROFESSOR MOORE: No.

JUDGE CLARK: I should think we could work that into line 13. What we want to get in there is "which includes dismissal". I haven't quite seen how to put the words together, but I don't think it is impossible. I think it is just a question of getting dismissal into that sentence. Outside of that, I really thought we had made some progress with this.

THE CHAIRMAN: Let's see if we are agreed on the principle. We want to provide here that a partial judgment is the only provision that shall not be final.

JUDGE CLARK: It shall be final--

THE CHAIRMAN: --where it is perfectly clear that there isn't any other claim in the case, but not final where it is not clear, involving the same transaction.

JUDGE CLARK: That is it exactly.

THE CHAIRMAN: A common issue of fact or law.

JUDGE CLARK: That may be a little too broad, I suppose.

THE CHAIRMAN: I suggest that we refer this to the Reporter, with the discussion. I think the best thing to do is to take a new shot at it, by mail or otherwise.

MR. DODGE: I should like to ask one question along the line of your last comment. Suppose there are two different

claims arising out of the transaction and a third claim which does not, and the court has determined all the issues material to one of the two claims and the counterclaims relating to it, but hasn't determined the other issue arising out of the same circumstances or the outside claim. Is that kind of situation covered by the first sentence of (b)?

JUDGE CLARK: I should think it would be. Let me say first, as to intent, of course there we don't want to have it final. We want to say it is provisional. That is what we intend to do. The next question is whether the language does it or not. I think it does. Mr. Hammond raises the question that he thinks probably it doesn't. The reason I think it does is that where you say two claims out of the same transaction, you mean two different forms of relief in the alternative, or something of that kind.

MR. DODGE: Yes.

JUDGE CLARK: I think that when you use the words "particular claim" arising out of the transaction, you cover all that. A particular claim means all the kinds of relief you can get out of the transaction.

MR. DODGE: That is, you lump counts one and two together in the word, singular, "claim."

JUDGE CLARK: That is true.

MR. DODGE: I should think that is doubtful as a matter of construction of that language.

JUDGE CLARK: That is about the issue Mr. Hammond is raising. I don't want to be insistent on it. I have tried to set forth this view of claim, and it has taken somewheres, and somewheres it hasn't.

MR. DODGE: Mr. Hammond left out count three, which is the extraneous one.

DEAN MORGAN: That is it. It seems to me we ought to have a sentence dealing with the case with a separate and distinct claim, and then have Mr. Hammond's for the claims that arise out of the same transaction. I think you can't make that too clear. That is my point.

JUDGE CLARK: As a matter of fact, I think it would almost do it on Mr. Hammond's theory, wouldn't it, if you put in line 3, after the words "particular claim", "all claims and all counterclaims which arise out of" or "arising out of" the court "may enter a judgment disposing of such claims." You have just broadened the particular claim. You have broadened "a particular claim and all counterclaims arising out of the transaction".

MR. DODGE: That is just what I had in mind, some such language as that.

JUDGE CLARK: I think you have to do it in line 14, down below. I don't see why that doesn't practically cover what Mr. Hammond wanted and what you have in mind.

MR. DODGE: I should think it would.

JUDGE CLARK: You have to be sure the punctuation is correct, and so on.

DEAN MORGAN: You don't want the court to rely on punctuation, do you? At least, I don't. I would rather have it so clear that you don't have to depend upon a comma or a semicolon or a colon.

JUDGE DONWORTH: I should like to ask Mr. Hammond what is the mischief that his amendment is intended to guard against. As I understand it, the Supreme Court has sustained this by a decision that is satisfactory. Why disturb this?

MR. HAMMOND: As I said, I think probably the Supreme Court decision has taken care of it, but it did seem to me, if you were stating a rule on the subject of entering judgments separately, it was something that ought to be stated in the rule.

MR. DODGE: The Supreme Court case didn't cover a case where there are three claims, such as I suggested, two correlated and one outside. They had one claim and others that were entirely distinct from it.

MR. HAMMOND: Yes.

MR. DODGE: Which arose out of different circumstances.

MR. HAMMOND: Yes, by the same plaintiff.

MR. DODGE: So it didn't deal with the same point that you and I have been discussing.

MR. HAMMOND: No.

JUDGE CLARK: You see, the Supreme Court decided affirmatively on what is really now the first sentence of the rule, that you could enter a separate judgment. Inferentially, the Supreme Court really said that if you didn't have those conditions, you couldn't enter a final judgment. That is the inference. What we have done here is to strengthen the rule and thus make complete that negative inference that the Supreme Court suggests, and I think that was in the original rule. The desirability of having it in is that there has been so much misconstruction of it. You see, the Supreme Court's decision is not affirmative. It is the matter of the inference you draw from it, and it is a good inference. I mean it is clearly in the decision, but nevertheless there is that step. What we are trying to do now is to spell it out and make the rule complete on both sides. Before, it was complete on only one side. My language perhaps isn't gramatically very sound. Before, the rule was lopsided, and this adds the other half of the rule.

SENATOR PEPPER: Mr. Hammond's idea is that instead of saying, "For an interpretation of this rule see decision of the Supreme Court," the thing to do is to make the rule self-sustaining in accord with the decision of the Court.

THE CHAIRMAN: So that you don't have to hunt up the decision to see what the rule means.

JUDGE CLARK: I think that is true. I think Mr.

Hammond and I agree on that. Then what we are doing, I want to state also, is to see what language best carries that out.

THE CHAIRMAN: I am getting more befuddled here as I sit and read this added clause. "A determination of, or order concerning, some, but not all, of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim is provisional". On the very face of it, it seems to refer to a case where you haven't decided all the issues that are material, the decision of which has to be made in order to reach a judgment. That is the way it reads to me. "A determination of ... some, but not all, of the issues material to a particular claim". If you try to enter a judgment on that, it is a provisional order of judgment.

JUDGE CLARK: That is it, yes.

THE CHAIRMAN: But you are not really entering a judgment on the claim, because there are some issues remaining to be decided, material issues, before you can say the judgment ought to run, as I get it. I don't know.

JUDGE CLARK: That is true, but it is a more real question than the way you have stated would imply. You see, what happens, I find, in the district courts is that every time the court says anything, somebody writes up an order, and that is entered. The most usual way this thing comes up is that a plaintiff will have made three alternative statements

of one cause of action. He will put it in three different forms. There will be a motion to dismiss one of those, and the court, without thinking much about it, will mark down, "Motion granted." Then somebody, probably the defendant, writes up an order which says, "Upon hearing all the parties," and so forth and so on, "the motion is granted." Then the plaintiff is in a dither about what to do. Must he appeal then, is it a final judgment, or what?

THE CHAIRMAN: You are dealing, aren't you, with a case where the use of an order dealing with one claim incidentally decides an issue in another one. Isn't that the kind of situation you have in mind? I gathered from your illustration that you were talking about a situation where the court had to decide on one claim, which might be a full order of judgment for plaintiff or for defendant, and incidentally necessarily decided one of the issues in another claim that was still pending and not considered; one of the issues, but not all. Therefore, this order for judgment on one claim is a provisional judgment, not final, and can't be appealed under the terms of this rule.

JUDGE CLARK: Of course, that would be one situation, but I had hoped that we had said a little more than that, too. I should hope that was not the only situation.

THE CHAIRMAN: Maybe not, but I had been thinking of it in terms of the order, an order or determination that

entered into the matter of the very particular claim you are talking about, concerning some, but not all, of the issues material to a particular claim. I was wrong about that, because the order we are referring to may not be an order entered in connection with the particular claim. It may be an order entered relating to some other claim but involving one of the same issues. I am getting more muddled about this every minute.

JUDGE CLARK: I really think what you are doing is rather favoring Mr. Hammond's version of it. I mean by what you said. We were using the words "particular claim" here as being a little broader than that, as the particular legal controversy out of one transaction or occurrence. Of course, Mr. Hammond has said that that language isn't quite broad enough to include a particular claim stated in various ways and for various kinds of relief.

THE CHAIRMAN: Suppose you have a claim and a counterclaim, and the decision of the counterclaim involves the decision, we sill say, of one of the issues in the chief claim. The counterclaim is tried, and an order is made on it, judgment for the defense. That judgment, that order, is the decision of some, but not all, of the issues in the main claim. Under the explicit language of this, it is interlocutory and provisional all along the line. It doesn't even settle the counterclaim, and no judgment will be entered on the counterclaim. Is that a possible case?

JUDGE CLARK: Yes, that is a very actual case, and that is really the Audi Vision case, which was just such a situation.

THE CHAIRMAN: I don't read the rule as making that clear. As I read it over and over again, I thought it meant an order in the chief claim settling one of the issues in the chief claim, but I was wrong about that.

JUDGE CLARK: It means more than that.

THE CHAIRMAN: Yes.

JUDGE CLARK: It could mean that, but that is only one possible situation. We wanted to cover more than that, really.

THE CHAIRMAN: What is your pleasure about this rule?

DEAN MORGAN: Mr. Chairman, I think you ought to have one paragraph that deals with a claim arising out of a single transaction that is joined with one or more claims arising out of other transactions, providing that when the single transaction and all counterclaims, and so forth, connected with it are disposed of, then you may have a separate judgment at any stage; but that when you have several claims arising out of the same transaction, then you can't enter the judgment until the whole transaction is cleaned up.

THE CHAIRMAN: I am afraid the only benefit I am getting out of this argument is that, if you keep it up much longer, we are going to have either a poem or a lyric.

DEAN MORGAN: What Mr. Hammond has done is to deal

with the second situation. I think the first situation hasn't been dealt with and ought to be dealt with. I think maybe the Reporter's draft does do it, but it does it in such a compressed form and using the term "claim" as meaning all the claims that arise out of a single transaction.

THE CHAIRMAN: Do you think we had better try to make a draft at this meeting or refer the matter back to the Reporter?

DEAN MORGAN: I would rather have the Reporter struggle with it some more, in the light of the suggestions we have had here. The Reporter, you see, comes to this with a long background which began way back in the Yale Law School, that institution down at New Haven that is so handsomely housed. They began way back there, before it was handsomely housed, to talk about cause of action. He stirred up more controversy. I can give you reams of stuff with people disagreeing with him on cause of action. With Thurman Arnold finally saying that, the Supreme Court came around to Clark's way of dealing with the thing.

JUDGE CLARK: It is cited six times in one opinion.

DEAN MORGAN: With that in mind, "claim" seems to have a fairly clear concept to the Reporter, and it doesn't have a fairly clear concept to anybody who isn't acquainted with that.

SENATOR PEPPER: No.

DEAN MORGAN: I am at Harvard Law School, but, remember, I was a Yale Law School man at that time. I may have forgotten it since.

JUDGE CLARK: I hope you remember what Mr. George Wickersham said about it at the first meeting of the Committee. He wanted to know what "cause of action" was. I said, "We have left it out because no one seems to know what it is." He said, "You define it," and he got the idea. He wasn't a Yale man.

But let me say in all seriousness that I see the point, and I am not going to try to insist here on my definition of this and make a controversy. I have the feeling that, if you would rather have it done this way, as Mr. Morgan suggests, it can be done, and it won't take so much space.

SENATOR PEPPER: I move that we proceed along the lines of the handsome concession just made by the Reporter.

DEAN MORGAN: I second the motion.

THE CHAIRMAN: I think it is perfectly clear that at least some of us won't be able to pass judgment on this thing until we see the new, concrete draft and get our noses down on it. I talk in the air unless I have something typed before me. So, unless there is objection, we will refer the matter to the Reporter for redraft along any lines that he spells out of our discussion, and let us then take that as the basis and see whether we like it. Maybe we will have to meet again.

I am beginning to think we will have to meet again before we hand these rules out for discussion of the bar, but there is no great harm if we do.

JUDGE DONWORTH: I should like to make the observation, Mr. Chairman, that I think we will be very lucky if we emerge with a new draft that is as good as what we have here and as free from adverse criticism in the courts as what we have here.

THE CHAIRMAN: You mean as what we have in our present rules?

JUDGE DONWORTH: Yes.

THE CHAIRMAN: Oh, yes. Well, there is something in that. We are going to have a chance, if we get kicked in the tail end on this, to change our minds before they go into effect.

JUDGE CLARK: I myself should want to aim higher than that even if I didn't succeed, because this rule may not have had direct criticism, but certainly in the indirect ambiguity that is raised I think it is one of the most difficult of all the rules. The situation initially was a difficult one, of course. At any rate, I am going to aim higher than that.

... Brief recess ...

THE CHAIRMAN: We are on Rule 45, Subpoena, and an amendment has been made to that, in the first place, to provide what clerk shall issue the subpoena, according to the

location of where the witness is to be examined. The other amendment is one which allows the subpoena to be issued for duces tecum, to produce a document without a preliminary order, in the taking of a deposition, subject to the right of the fellow subpoenaed to apply to the court for relief on the ground that it is oppressive or improper.

Does anybody want to make any further suggestions on Rule 45?

DEAN MORGAN: I want to know, as a matter of policy, whether the rule should extend the statute to cover witnesses found but not residing within the hundred-mile limit. Judge Clark had a memo on that.

JUDGE CLARK: Yes. We were asked the question specifically as to whether the existing rule and, in fact, the redraft, too, extends the statutory right of subpoena, and I think the answer is that it clearly does. If you want to look at the note we wrote on that, it is another one of those under date of June 24. We have a long comment on the law.

JUDGE DOBIE: That hundred miles coordinates it with the witness, isn't that right, Charlie? Isn't it the rule about subpoenas in civil cases that you can get a man outside of the district if he is within a hundred miles of the place?

PROFESSOR MOORE: That is correct.

JUDGE DOBIE: So this coordinates this with that. Of course, criminal subpoenas run all over the United States.

SENATOR PEPPER: Mr. Chairman, do we need "also" in line 12 of this proposed amendment? What it means is that in addition to there being a subpoena to attend, there may be a subpoena duces tecum, but it doesn't refer to anything that is preceding.

THE CHAIRMAN: In line 12, the word "also" is to be stricken, Mr. Reporter. That doesn't mean anything.

JUDGE CLARK: Yes.

MR. DODGE: Shouldn't there be some qualification of that statement about 26(b), as we made in the other rule?

DEAN MORGAN: "within the scope of 26(b)."

THE CHAIRMAN: What phrase did we use before, as a substitute for that?

DEAN MORGAN: "within the scope", I think it is.

THE CHAIRMAN: "any of the matters required to be disclosed", or something, "by Rule 26(b)".

SENATOR PEPPER: We used "within the scope" before, and that is the running head note to the subdivision in the rule. It makes it convenient for cross-reference.

THE CHAIRMAN: The suggestion, Mr. Reporter, is that the phrase, "relating to any of the matters mentioned in Rule 26(b)," be modified according to the way it is being modified in the like phrase in the previous rule. Do you remember?

JUDGE CLARK: Yes.

THE CHAIRMAN: Can you make the wording conform?

JUDGE CLARK: Yes.

THE CHAIRMAN: I have forgotten how the change was made. We had it originally that the district court in the district in which the deposition was to be taken issued the subpoena. Now we say the clerk where it is to be served. Why did we make that change?

JUDGE CLARK: We recommended in the supplement that it not be made. I am told--I say it with great deference to Senator Pepper, who said I shouldn't bring such things up--that we made it because the Chairman urged it.

THE CHAIRMAN: I urged it?

JUDGE CLARK: That is what my assistants tell me.

THE CHAIRMAN: I must have been asleep at the switch, because I can't even remember why we made the change.

JUDGE CLARK: I am frank to say I don't remember it. Maybe it isn't important, but that is--

THE CHAIRMAN (Interposing): We switched from the clerk of the district where the deposition is to be taken to the clerk of the district where it is to be served. I don't see any point in that.

SENATOR PEPPER: I think I see, Mr. Chairman. The provision is that where the subpoena is to be served within the district, then it is the clerk of the district court where the action is pending who issues the subpoena; but in all other cases it is the clerk of the district court for the district in

which the deposition is to be taken. So there is the initial statement that it is to be done by the clerk of the district court, and the following matter specifies the cases in which it is to be done by the one clerk and by the other.

THE CHAIRMAN: "Where a subpoena is to be served within the district where the action is pending or without such district but within 100 miles of the place of ultimate hearing or trial, the clerk of the district court where the action is pending shall issue the subpoena."

I suppose that corresponds with the present rule as to that court's power to issue a subpoena for a witness to appear at the trial.

SENATOR PEPPER: That is right.

JUDGE CLARK: That is true.

THE CHAIRMAN: It corresponds exactly with it.

JUDGE CLARK: That is correct.

THE CHAIRMAN: We did that because we thought that the judge in the court where the case was going to be tried was in a much better position to know whether the subpoena was being abused or whether the material was competent.

SENATOR PEPPER: That is right. That is the point.

THE CHAIRMAN: So we made that change. For instance, instead of having a district judge over in New Jersey issue a subpoena in a case pending in New York, we had the New York district clerk do it, because the judge in New York would

consider it a contempt proceeding, and he would know all about the case pending in court.

SENATOR PEPPER: That is right.

THE CHAIRMAN: I am beginning to think I wasn't such a fool as I thought I was, if I suggested this thing.

JUDGE CLARK: Yes, you suggested it. You suggested it on that ground.

THE CHAIRMAN: Well, what is the objection to it? It shows I am not very hot about it because I couldn't even remember it.

"In all other cases the clerk of the district court for the district in which the deposition is to be taken shall issue the subpoena."

What we do is to make the trial court issue the subpoena whenever it is to be served within a range where he could serve it on a trial of the merits; in other cases, the local court.

SENATOR PEPPER: That is right. I think that is good.

DEAN MORGAN: Let's see....

JUDGE CLARK: I don't know that there is any conclusive answer against it, but I will suggest that all the statutes existing before didn't have this. It went the other way. All the deposition and discovery and de bene esse, and so on--the whole practice before this has been the other way, and you will find reference to the cases before.

THE CHAIRMAN: You mean that the statutes always expressly provided as we had it in the first place?

JUDGE CLARK: That is it, yes; that the clerk of the federal court in the district where the witness was to be examined should issue the subpoena.

THE CHAIRMAN: That is pretty bad.

MR. GAMBLE: What power would the court where the action is pending have to punish the witness who was served without the district, but within 100 miles, if he failed to respond?

THE CHAIRMAN: The statutes now give the court power to issue a subpoena within a hundred miles of the district and to compel a witness to attend, even though it is outside of the district, if it is within a hundred miles of the place of trial. Am I not right about that?

JUDGE CLARK: Yes.

DEAN MORGAN: They can make him come to the place of trial, all right.

THE CHAIRMAN: We are not enlarging the jurisdiction or power to issue writs of subpoena here. We are just recognizing--

JUDGE DOBIE (Interposing): It is just the same as in a civil case.

JUDGE CLARK: You have in mind, Mr. Gamble, that the statute covers witnesses for trial, and the old deposition

statute contained this provision. The suggestion that we went on before was to build by analogy to the witnesses for trial. There is an argument there, of course, for the contrary mainly (you may say because of inertia) because the depositions statutes were all the other way. I don't see that any great question has arisen about it.

THE CHAIRMAN: My position now is this: The existing statutes are the same as our existing rule, to wit: Subpoena for a deposition should be issued by the clerk in the district where the examination is to take place. That is the end of it to me. I oppose the changes here, although you may accuse me of changing my position. I have an idea it wouldn't have been a bad thing if the statute had always read that way, but as it doesn't, I wouldn't move to change a practice that is satisfactory enough, on some theory that the judge in the home court is better able to deal with contempt, and so on.

I suggest (I don't move, because I am Chairman) that this rule, subdivision (1), be allowed to stand as it is down to line 12.

JUDGE CLARK: There is another point.

SENATOR PEPPER: May I inquire, in case the rule were amended as here proposed, which would be the court which would grant the protection specified in the latter part of the rule? It seems to me that there is something to be said in favor of the convenience of having the court with local juris-

diction as the court out of which the subpoena shall have issued if, during the taking of the deposition in that jurisdiction, you have to have recourse to the court to control the course of the hearing.

THE CHAIRMAN: What is the rule about that now under our rules? Here is a case where the subpoena is issued by the clerk of the United States District Court in Ohio for the taking of the testimony of a witness there for use in a case pending in New York. A question arises in the course of the examination of that witness whether he is being harassed or whether the examination is going to questions that ought not to be asked him and whether he ought to be punished for contempt for not answering. Under our rules, what court passes on that?

PROFESSOR MOORE: If the motion is made before the hearing, it is made to the court where the action is pending. That is 30(b). If the motion is made during the taking of the deposition, to terminate or limit, it can be made either to the court where the action is pending or to the court where the deposition is being taken.

THE CHAIRMAN: Does that answer your question?

SENATOR PEPPER: I was just struggling to sustain the suggestion that you made at the former meeting and saying that I think the reason that you made it was that, in the event objection to something that was happening in the course

of the taking of the depositions was to be made the subject of recourse to the court, it was more convenient to have had the subpoena issued by the clerk of that court, so that you could go before the court and say, "Under the statute your clerk has issued this subpoena, and it is being abused, and we want relief against it," rather than to have to ask that judge to give protection in the course of something that is being done in response to a subpoena issued by another court.

I remember that question was pretty well discussed before.

THE CHAIRMAN: You can say that the reason for departing from the present statute is now found in our discovery rules, in the need for supervising discovery.

SENATOR PEPPER: Precisely.

JUDGE DONWORTH: As Mr. Moore has just pointed out, speaking of our existing rule, it is very plain on the subject, as no doubt Senator Pepper has in mind. But just to bring it out, Rule 30, subdivision (b), provides for the case. After the service of the notice, "the court in which the action is pending may make an order limiting, and so forth. That is before the deposition begins usually, I suppose. Then in subdivsion (d) of the same rule, about the middle of (d), in case the taking of the deposition appears to be embarrassing or oppressive, "the court in which the action is pending or the court in the district where the deposition is being taken may

order", and so on. I suppose the reason for giving the alternative there is that the witness, if he is being embarrassed, may be at a long distance from where the court is sitting, where the case is, and so that he may get immediate and local redress.

SENATOR PEPPER: My recollection is that, with that thought in mind, we thought it would be more congruous to have the protection asked of the court out of which the subpoena had issued then to ask for protection against the abuse of a subpoena issued out of another court.

JUDGE DONWORTH: Wouldn't it embarrass the witness if the deposition is taken at a distance from the place where the action is brought?

SENATOR PEPPER: But this provision is that if it is taken at a distance from the place where the action is pending, then it is the clerk of the local court where the deposition is being taken who issues the subpoena.

JUDGE DONWORTH: Yes.

SENATOR PEPPER: Then it would be to that local district court that recourse would be had for protection against the abuse of the subpoena.

MR. DODGE: That is the prior practice, isn't it?

SENATOR PEPPER: Yes, I think so.

MR. DODGE: I remember doing it that way.

PROFESSOR SUNDERLAND: Isn't there an option there,

Senator, that at any time during the taking of the deposition, no matter where it is taken, you can apply to either court, whichever is more convenient? You have a choice.

SENATOR PEPPER: Oh, yes.

THE CHAIRMAN: You see, this proposal is to have a subpoena issued by the court in which the action is pending even if it is without the district, as long as it is within a hundred miles. The idea may be to correlate the subpoenas with the supervision, but it doesn't really get very far with it, because it goes out only a hundred miles; and it is only a very partial meeting of the problem, because as soon as you get over in another state, taking a deposition there, the court in which the action is pending doesn't issue the subpoena. So I don't think a very valuable function is performed as far as supervision. It doesn't go far enough, and it can't.

SENATOR PEPPER: If you insist on not supporting your original position, I don't feel bound to do it any further, sir. (Laughter)

THE CHAIRMAN: You remind me of the time when McCarl was trying to get me to take a writ of certiorari on a case he had in the Supreme Court. My office was under Attorney General Sargent's. I was Solicitor General. I heard a hell of a racket up there. I was called up finally, and there was old McCarl yelling for a writ of certiorari, and the old man, Sargent, was fighting tooth and nail with the solicitor. He

wouldn't give in at all. His face was red. I looked the situation over a little bit, and the Comptroller General had no case at all. I thought I wouldn't apply for a writ, but then I thought, "Oh, the devil, what's the difference? The old man here is pretty worked up." So I spoke up and said, "Mr. Attorney General, if the Comptroller General feels as badly as all this about it, I will authorize him to file a petition for certiorari." But the Attorney General decided, to my relief, that he didn't have to give him an order. (Laughter)

I am conservative about changing existing practice in this thing because of some theoretical idea. I don't believe I was right about it.

Is it agreed, then, that I may retire on this and that the new language in line 6 down to the first three words in line 12 be stricken out?

That leaves, "The subpoena may command the person to whom it is directed to produce documents or tangible things which constitute or contain evidence relating to any of the matters mentioned in Rule 26(b)," (that reference to 26(b) is to be amended to correspond to a similar change in that phrase which we made in the earlier rule) "but in such event", and so forth.

The effect of this in 12 to 16 is to require the subpoena duces tecum to be issued in the first instance without an order of the court, and if a man complains of it, he then

goes to the court for relief. Under the existing rule, if you wanted to have production of documents on the taking of deposition, you would have to apply to the court in the first instance for an order.

MR. GAMBLE: Mr. Chairman, would you not want to restore the clause, "for the district in which the deposition is to be taken", in lines 4 and 5?

THE CHAIRMAN: Yes, surely. The bracket would go out. You are right. If you are striking out what I suggested to strike out, you would also restore the language now in the brackets in lines 4 and 5.

Is there any other change you want to make in 45?

JUDGE CLARK: There is no change that has been voted. There is that other question which comes up with respect to 45(e)(1), as to whether 45(e)(1) enlarges the substance of 28 U.S.C., section 654. I was asked to produce some study of it. I produced the study, and I don't believe there is any question but that it does extend the statute.

DEAN MORGAN: If you could catch a California man within a hundred miles and put a subpoena on him, he would have to stay around and give his deposition.

JUDGE CLARK: That is right.

DEAN MORGAN: He would have to come to trial, too, wouldn't he, on this?

JUDGE CLARK: Yes, that is it, I think. Before, the

the statute limited it to residence. Under the statute, 28 U.S.C., section 654, subpoenas were allowed to run outside of the district, "provided that in civil causes the witnesses living outside of the district in which the court is held do not live at a greater distance than one hundred miles of holding the same."

THE CHAIRMAN: Where does our language differ from that statute?

JUDGE CLARK: "A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena".

THE CHAIRMAN: I see the statute deals with the place of trial, 100 miles from the place of trial, and this deals with 100 miles from the place of the deposition, which may be 500 miles from the place of trial. Is that the point?

JUDGE CLARK: No, it is a little more than that. The statute restricts the hundred miles to the place of living.

DEAN MORGAN: You have to reside within it. This fellow just has to be caught within it.

JUDGE CLARK: This way it is just the place of service.

THE CHAIRMAN: Oh. There is some protection for him beyond that, isn't there? Yes. Subdivision (2).

JUDGE DOBIE: In other words, under the old statute if he lives more than a hundred miles but happens to be within a hundred miles you can't grab him; isn't that right, Charlie?

DEAN MORGAN: You can under the rules, yes.

MR. DODGE: But you couldn't under the statute. The rule broadened the statute, didn't it?

DEAN MORGAN: Yes. Have there been any decisions under it?

JUDGE CLARK: It has been referred to. I don't know that any question has been made about it. Mr. Chlinger, the commentator, in 2 Chlinger's Federal Practice 227, says, "The Advisory Committee states that Rule 45(e)(1) continues the substance of the present section. See volume 3, page 576. It may be pointed out, however, that the rule is in terms of the distance of the place of service rather than of the witness' residence from the place of the hearing or trial. The effect of the rule seems to be to drop the limitation placed upon the place of residence."

I referred to it in the course of one decision. I don't know that it is very important. I don't know that there has been any particular discussion about it as such.

MR. DODGE: What is the situation where a resident of California happens to be in Providence, Rhode Island, and is summoned there to testify in a trial to take place two months hence in Boston?

DEAN MORGAN: He is stuck, under this rule.

MR. HAMMOND: That is what Mr. Lemann was worried about.

DEAN MORGAN: That is right.

JUDGE DOBIE: He is stuck under our rules, but not under the other.

THE CHAIRMAN: Not under this rule, because we are dealing with depositions here.

MR. DODGE: At the trial.

DEAN MORGAN: This is 45(e)(1).

MR. DODGE: Rule 45(e)(1). We have a similar question under 45(d)(2).

JUDGE CLARK: Rule 45(d)(2) has a limitation, I think, hasn't it?

MR. DODGE: (d)(2) is dependent upon the place of service. Did we mean to make that change in the prior statutory provision?

JUDGE CLARK: Did we mean to make the change in (e)?

MR. DODGE: Yes. Did we mean to make this change to increase greatly the--

JUDGE CLARK (Interposing): I don't know, really. As a matter of fact, I can't remember back to the time when we originally did it, whether it was inadvertent or intentional.

DEAN MORGAN: I think it was inadvertent. I don't think we meant it. You drew the rule, Edson.

PROFESSOR SUNDERLAND: I don't think there was any discussion.

DEAN MORGAN: I don't think so.

JUDGE CLARK: We could go back and look up the transcript.

THE CHAIRMAN: You mean in the case of a deposition, suppose a witness is traveling around, he is in New York, and you want to take his deposition. He is spending a month up at Saratoga Springs. Under our rule, if you made the hundred-mile limit from his residence, you could make him appear for a deposition only within a hundred miles of his residence in California; but under our rules, being a nonresident, under Rule 45(d)(2), you could subpoena him in New York to give his deposition in New York, provided you don't make him travel more than forty miles from the place of service.

DEAN MORGAN: Yes.

THE CHAIRMAN: You still give the court leave also to relieve him further, if he wants to.

"A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service".

That is a deposition rule, not a trial rule.

MR. DODGE: That isn't the place. It ought to depend upon either where he lives, has his domicile, or where he happens, in matter of fact, to be living at the time of the

taking of the proposed deposition.

THE CHAIRMAN: Your point is that if you catch him traveling in another state, you ought not to hold him up.

DEAN MORGAN: That is the idea.

THE CHAIRMAN: To take a deposition, to give testimony.

DEAN MORGAN: Since you can take a deposition any place. It doesn't have to be at the place of trial.

THE CHAIRMAN: This rule would give the court power to relieve him if he squealed about being interrupted in his travels. He could go before the court and have some other place fixed.

DEAN MORGAN: Right.

THE CHAIRMAN: Back home, if he wanted it.

DEAN MORGAN: Time or place; that is right.

THE CHAIRMAN: The court can help him out there.

MR. DODGE: You would be content to leave it to the discretion of the court.

THE CHAIRMAN: Yes. If you subpoena a California man here in New York because he is temporarily here, and he says, "I am not supposed to give this deposition until next week, and I want to go back home," he can go to the judge and say, "I am willing to give my deposition, but I ought not to be tied up here in New York for a week," or "Let me go back home and let them take it out there." So the judge, under

Rule (d)(2), fixes some other place.

MR. DODGE: (d)(2) applies only to subpoena duces tecum. Where is the general provision?

THE CHAIRMAN: (d)(2) is not limited to subpoena duces tecum.

MR. DODGE: "or at such other place".

JUDGE CLARK: I should say that 45(d)(2) was all right or as near all right as we can make it.

THE CHAIRMAN: The question is really as to the other one, the testimony at trial.

JUDGE CLARK: That is right.

THE CHAIRMAN: Subpoenaing a witness.

JUDGE CLARK: Yes, that is it.

THE CHAIRMAN: When you catch him in one place and make him travel more than a hundred miles from the place of his residence, has there been any bad result from that rule?

JUDGE CLARK: No. It doesn't seem to have been litigated, really.

THE CHAIRMAN: They fix it up some way, don't they? If they catch a fellow and he is subpoenaed in a state where he happens to be, to be present for a trial, and he wants to go out to California, probably the lawyers get together and fix it up some way and say, "Here, we will take this deposition," or something of that kind. I don't think we ought to be tampering with that unless some trouble has come up about it.

Let's wait until it is tried out a little and see what is wrong with it.

JUDGE CLARK: I am not making a suggestion either way. Mr. Lemann raised the question, and I was directed to make a search of the authorities and the past history, and so on. I say that I don't believe there is any question but that Ohlinger is correct. It does change the previous existing law. I let it stand there. I don't know that Mr. Lemann definitely objected. He simply asked the question. My recollection is that he asked it in a surprised way. He asked, if a resident of New Orleans were traveling in New York, could you catch him in New York and make him stay there and testify, and the answer is that under this, yes, you could.

THE CHAIRMAN: It is a very good thing as long as the judge has power to relieve him of undue hardship and to fix it up some way.

If there is no amendment proposed to 45(e), we will pass on to Rule 50. We made a change there. It says, "If a party does not make a motion under this subdivision," (that is a motion for judgment notwithstanding the verdict) "the failure of the court to enter a judgment as required by the motion for directed verdict shall constitute a determination of the legal questions raised by the motion."

The first thing that occurred to me there was, how soon after the trial is over does that situation arise? There

is no time limit here. Do you wait a week or a month or a year before you say that the failure of the court to enter a judgment as required by the motion for directed verdict is a determination of the legal questions raised by the motion?

JUDGE CLARK: This is also a place, Mr. Chairman, where you thought we ought to try a straightforward attack. If you will turn over the pages, you will see that we tried to make an alternative in a straightforward fashion.

THE CHAIRMAN: My fear is that, as you are doing in the alternative version, it is unsafe business to take another rule that has another theory and try to revamp it. What I am in favor of doing is to patch up Rule 50 on its present basis, with all this bunk about "deemed to have reserved the question" and all that, and do the best we can with it, making any changes we need to or think we need to to that kind of rule, and then stick it up to the Court and just forget all about these decisions that we are worrying about, Redman and one thing and another. Just go right back to the fundamentals and adopt the theory that there is nothing unconstitutional about the old state practice. The trial court doesn't have to be actually reserving the question, and it doesn't have to do it by a fiction.

The old practice that I am familiar with is just this: The party made a motion for an instructed verdict. The court denied it. I don't care whether he said, "I will deny it and

take the verdict of the juryand think it over" or whether he just denied it. If the judge was wrong, that was an error in his failure to direct the verdict, and if you took an appeal from the judgment, you could assign his failure to direct a verdict as an error.

But you couldn't get a judgment notwithstanding the verdict unless you followed up the trial by a motion for a judgment notwithstanding <u>veredictum</u>. If you did that, the trial court might grant judgment notwithstanding the verdict, might reconsider his failure to direct. He might, in his discretion, say, "Well, on the record you had no case, and your verdict ought to have been the other way, but it is the kind of case where additional proof may be supplied, and therefore, instead of granting judgment notwithstanding the verdict, I will grant you a new trial." Then when the case was on appeal, if you had made your motion for a judgment notwithstanding the verdict in the trial court and it had been denied, the upper court could give you that relief, judgment notwithstanding the verdict. If you hadn't made that motion for judgment notwithstanding the verdict but had simply moved for a direction, which had not been granted, but denied, then all the upper court could say is, "The court committed an error. I will reverse." If it were a case where it was perfectly obvious that the defect couldn't be cured, they might order judgment, but if that weren't the case, they would

just reverse, and the lower court would grant a new trial or would operate to grant a new trial.

SENATOR PEPPER: In that latter case, they would reverse with a new venire.

THE CHAIRMAN: That is it. I feel that the trouble with this business that we devised to hit the Redman case is this: For instance, it says that the court shall be deemed to have reserved the question and not decided it. You start out with the presumption, whether he says so or not, that the court has made no determination of that, and if no motion was made for directed judgment notwithstanding the verdict, it isn't brought back to him again; and when you go up on appeal I say you haven't even got an error committed by the trial court, because he never decided the question. He has reserved it. The law says he has reserved it. Unless you force him to a decision, you haven't got an error on him.

As to these cases that hold otherwise, just forget them. It is a fictitious and absurd thing. I don't believe the original decisions, the Redman and Slocum cases, would stand up today in the Supreme Court. I don't know.

JUDGE DOBIE: The Slocum case?

THE CHAIRMAN: Yes.

JUDGE DOBIE: There isn't a man on the Court who sat on the Slocum case. The last one who went off was Hughes, who wrote the dissenting opinion.

THE CHAIRMAN: Yes. I say that we are fooling with a lot of hocus-pocus and fiction, and we are getting into a snarl because we are trying to make an error out of something where the judge hasn't, presumably, acted at all. I think this patchwork at the end, where we now say that if the motion for a judgment notwithstanding the verdict isn't granted, the lower court just doesn't think about it again, he is presumed to have decided it, to have committed an error, is bunk. It may be the best we can do if they stick to Slocum.

I am in favor of not trying to patch this rule up, trying to chop it up and make it read some other way. We just get into that business of changing the purpose of the rule and getting a confused result. I say, for an alternative, throw this into a wastepaper basket and start with a fresh mind as if Redman and the other case had never been decided. Take the old rule that we thought was the law before those cases were decided and draw a simple, clear rule along those lines and shove it up to the Supreme Court and to the bar with our tentative report.

JUDGE CLARK: I think our alternative does it.

MR. DODGE: Are you against the rule as we had it?

THE CHAIRMAN: I am against it, yes; I am against a rule with this business about a fiction, about his having reserved a decision when he hasn't in fact. It gets you into all kinds of snarls. The only reason I voted for this rule

(in fact, I believe the record will show I was the fellow who suggested that fiction of assuming that he reserved it, even though he didn't say so) is that I thought the old Court believed in Slocum and Redman and wouldn't consent to any rule that assumed the error in those cases. Now we are not in that boat, are we?

MR. DODGE: The Supreme Court has adopted this rule. Why should we ask them to abrogate it?

MR. TOLMAN: Have we taken into account Judge Roberts' decision where he tried to make a formula to carry out this rule?

THE CHAIRMAN: We have. I have read that thing four times. I am not quite sure yet what he did. The Court was in difficulty, trying to make something out of that hocus-pocus we have in here.

JUDGE CLARK: I suggest that you look at the alternative, and I recommend the alternative.

MR. GAMBLE: Where is the alternative?

DEAN MORGAN: It follows the other in your notes. One thing you have to remember, Mr. Mitchell, is that this rule goes beyond any of the state court rules, because the judgment notwithstanding the verdict can be made only in case the jury reaches a verdict under the state rules. Here we have a provision that the judge may enter the judgment after a disagreement, which I think is a great improvement on the state or

orthodox state practice.

THE CHAIRMAN: I agree that that ought to be taken care of.

MR. DODGE: As this stands, it is strictly in accordance with the Massachusetts practice, except that there the judge must reserve the question with the consent of the jury, a mere formality.

DEAN MORGAN: You give them two verdicts, don't you?

MR. DODGE: No, not necessarily. "With the consent of the jury, I reserve the question."

DEAN MORGAN: Is that what he says? In the Great Northern case there were two verdicts. One was a verdict such as the jury would ordinarily give for the plaintiff. Then, by direction of the court, they had another verdict in which they said, "If the court shall be of the opinion that the evidence is not sufficient to sustain a verdict for the plaintiff, then we find a verdict for the defendant." You see?

MR. DODGE: Yes.

DEAN MORGAN: There you didn't have any judgment notwithstanding the verdict. You had a question of which verdict you should enter the judgment on, and that went to the Supreme Court all right, but no point was raised on it. Mr. Justice Butler wrote the opinion, and he just said that the court rendered judgment notwithstanding the verdict, practically. He was familiar with the Minnesota practice. But the point

wasn't raised in the Supreme Court. I suppose that that is the regular Massachusetts practice.

JUDGE DOBIE: I should like to do whatever we can do to give the appellate court the power. I like the alternative better. I have some of Attorney General Mitchell's feeling there. That deemed reservation I think we all know was a lot of hocus-pocus and bunk and shadow boxing by the Supreme Court to refuse to set aside the ruling in the old Slocum case, as they should have done. They indulged in that hocus-pocus to kill it in the dark instead of leading it out and executing it. The more we can get away from that kind of stuff, the better I am pleased.

I wrote the opinion in the Halliday case, and one of the reasons we held that way, it is fair to say, was that we were hoping the Supreme Court would decide it, but they dodged it again. They held that there was sufficient evidence there, considering one-third of the evidence and executing the other two-thirds.

THE CHAIRMAN: Suppose the district court denies a motion to direct, and then there is never a motion made for judgment notwithstanding the verdict, and it rests that way. We say he was in error, that he ought to have directed the verdict. The case goes up to the circuit court of appeals. Are we sure that we are on safe grounds constitutionally if we try to have the theory that the circuit court of appeals can

remand, with instructions to render judgment for the person against whom the verdict went, on the theory that the matter of law is perfectly clear that the other fellow couldn't in any event recover? Are we safe in that case where the party moving to direct has not made a motion for judgment notwithstanding the verdict?

MR. DODGE: Where he made no motion?

DEAN MORGAN: No. You assume that he made a motion for directed verdict, don't you?

THE CHAIRMAN: Yes, of course. I am just wondering how far you can go without running afoul of something even more than Slocum.

DEAN MORGAN: The error in failure to direct the verdict can be taken advantage of, certainly.

THE CHAIRMAN: That is so. You can reverse.

DEAN MORGAN: Yes.

THE CHAIRMAN: Now the question is whether the upper court may order an affirmative judgment for the other party without a new trial.

DEAN MORGAN: Right. Of course, that really raises the same question as the re-examination under the Seventh Amendment which is raised in the Slocum case. Of course, the appellate court had no such power at common law.

MR. DODGE: The 8th Circuit held that they could not do it under this rule as it stood where there was no motion.

THE CHAIRMAN: That is not the constitutional reason. They simply said the rule presupposed a motion, and that was always my understanding of what we really meant. We said the party making the motion to direct may make a motion for judgment notwithstanding the verdict. I think we all understood that, if he didn't do it, he might claim an error for failure to direct, but he wasn't in position to get a judgment notwithstanding the verdict unless he moved it. But some of the courts have held that you don't have to make that motion, that it is just an idle ceremony.

DEAN MORGAN: I think that is a sensible rule.

THE CHAIRMAN: What?

DEAN MORGAN: Is there any objection that you could make to the power of the trial court to direct judgment notwithstanding the verdict? I mean any objection that wouldn't be applicable to that, that would be applicable to the appellate court's direction to the trial court to do what the trial court ought to have done in the first instance.

THE CHAIRMAN: I don't think so. You see, the trouble and the fault of the ruling of some courts that the motion for judgment notwithstanding the verdict was unnecessary was that the rule had already said that the trial court hadn't made any decision.

DEAN MORGAN: That is the trouble.

THE CHAIRMAN: In order to pin him down to a decision

which would be in error one way or another, you had to make the motion, and the courts that said that you didn't have to make a motion entirely forgot that under the rule, without that motion, unless the judge acted on his own motion, you didn't have any ruling even to take an appeal from as an error.

DEAN MORGAN: That is quite right, absolutely.

THE CHAIRMAN: So the whole thing is wrong. The rule really meant that you had to make that motion before you could charge the lower court with even an error, because the rule said he hadn't decided it; he had reserved.

I am not sure whether this alternative rule is in form such as we--

JUDGE DONWORTH (Interposing): This new additional matter in lines 19 to 22 strikes me as not being properly worded even if the idea is correct. Now we understand that there must be a motion during the trial or at its close for a directed verdict by whichever party it is. We will say the defendant. There must be a motion. We go on to say that within ten days the party who made that motion may renew it or do the equivalent of renewing by making a motion. Then we say that on appeal (we mean it, of course, but I don't know how plainly we say it) the appellate court may enter a judgment disposing the matter in favor of the party who made that motion.

I think that lines 19 to 22, in dispensing with the determination by the district court, overlook the fact that

the entry of a judgment is a determination. If there is no judgment entered, there couldn't be an appeal. So what this really means is that the entry of a judgment by the trial court contrary to the motion for directed verdict is a determination, and no other determination is needed. That is what it means.

Isn't that so, Mr. Reporter?

JUDGE CLARK: Yes, that is true. I mean the substance of it is true, however you expressed it.

THE CHAIRMAN: We are hanging on too much, it seems to me, to the old rule. It says: "Whenever a motion for a directed verdict made at the close of all the evidence", and so on, "the legal questions raised by the motion are subject to a later determination." That makes it provisional and indecisive. I say they are decisive in this unless you make a motion for judgment afterwards. If you leave in this business they are subject to later determination, and again you raise the difficulty that I have stated, that really the lower court hasn't determined.

JUDGE DONWORTH: I don't think so, Mr. Chairman. If the court enters judgment, there couldn't be any better evidence of his determination than the entry of a judgment contrary to the motion that was originally made during the trial.

THE CHAIRMAN: Why not say that "Whenever a motion for directed verdict made at the close of all the evidence is denied, the party who made the motion for directed verdict

may, within ten days, make a motion for judgment notwithstanding the verdict"? He may then get judgment notwithstanding the verdict. That puts him in a position to claim he is entitled to it, and the lower court may either grant that motion or grant him a new trial or deny it, whichever he wants. Then the record goes up on that state of affairs, and there is no hocus-pocus about a later determination or any hocus-pocus about "A determination by the district court is not a prerequisite to a determination by an appellate court".

MR. GAMBLE: What will happen if the party originally moving for the directed verdict doesn't make a motion for judgment notwithstanding the verdict?

THE CHAIRMAN: Then if he takes his case up on the record, the most he can get is a reversal for error and a new trial.

MR. GAMBLE: That doesn't give the appellate court the authority to determine the issue without sending it back.

THE CHAIRMAN: That is right. It leaves us where we used to be.

JUDGE DONWORTH: That is true.

DEAN MORGAN: Then you would have to have another provision to the effect that the appellate court might order the verdict rendered which the trial court should have directed. You would have to have a separate provision for that, I should think.

THE CHAIRMAN: It is a little bit difficult getting up to the court of appeals and telling them what they can or cannot do under the statute.

DEAN MORGAN: That is really outside our function.

THE CHAIRMAN: Mr. Gamble, you are familiar with the practice of motions for directed verdict and motions for judgment notwithstanding under the codes out West. What is your understanding. Let's forget all this hocus-pocus we have been having in our rules here. What is your understanding about how it works in Minnesota or Iowa?

MR. GAMBLE: Our practice is to move for directed verdict. If it is overruled, we have no such thing as a reservation--didn't have until this.

THE CHAIRMAN: No, no. Nobody ever had until we invented it.

MR. GAMBLE: If it is overruled, then the verdict is against the mover, and he moves again for judgment notwithstanding the verdict.

THE CHAIRMAN: He has to?

MR. GAMBLE: He has to.

THE CHAIRMAN: If he doesn't, what happens?

MR. GAMBLE: The appellate court hasn't any right.

THE CHAIRMAN: That is it. That is the old practice generally. I know it is so in the code states I have practiced in. That is what I say we ought to do.

DEAN MORGAN: But there are a number of code states in which the appellate court may direct the judgment to be entered which should have been entered.

THE CHAIRMAN: Even without a motion for judgment notwithstanding?

DEAN MORGAN: As I understand it, on the error of refusing to direct the verdict.

JUDGE DONWORTH: The appellate court may enter judgment for the defendant or for the unsuccessful party, correct.

THE CHAIRMAN: That was the thing about which I was wondering if there would be a constitutional difficulty and whether, if there is a constitutional difficulty, our idea of having a motion for judgment notwithstanding the verdict made in the trial court would help matters.

DEAN MORGAN: It is no more an interference with a jury trial than the other is. It is an interference with the old common law practice, but so is judgment notwithstanding the verdict.

MR. TOLMAN: Not only so, but in the law of Illinois it was the common law, precisely as you stated. You make your motion for a directed verdict and then follow it by a motion for a judgment notwithstanding the verdict. Then, on appeal, the court could enter either a new trial or a judgment notwithstanding the verdict. It is a very old common law practice, and I know that it existed a long time in Pennsylvania, because

I had it in a very important case there.

SENATOR PEPPER: Certainly.

THE CHAIRMAN: In Illinois, if the moving party failed to make his motion for judgment after verdict, he couldn't get it lower or above, could he? He would get a new trial on the error.

MR. TOLMAN: He would have to put it in, just as you stated it, exactly. That is the Illinois practice--was the Illinois practice.

THE CHAIRMAN: That is why this rule took for granted, when it said you may make a motion, that you had to make it in order to save the right to get a judgment contrary to the verdict.

MR. TOLMAN: The old English statement was "Judgment subject to a point reserved." That is what the old English cases called it.

THE CHAIRMAN: I don't like this phrase, "are subject to a later determination", because that is a good deal like saying the question is reserved, it hasn't been decided, and that is one of the things that gets us into trouble under the existing rule.

SENATOR PEPPER: May I make an attempt to state the situation as I understand it, not in draft form, but merely to express my own thought? It would be this: Strike out the first five lines of the alternative and proceed as follows:

"Within ten days after the reception of the verdict rendered after the court has refused a motion for a directed verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. A motion for a new trial, as an alternative, may be joined with this motion. Thereupon, the court may allow the judgment to stand or may reopen it and either order a new trial or direct an entry of judgment for the moving party. If no verdict was returned, the court may, on motion, direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

JUDGE CLARK: If I may raise some questions about that, there are several things that you haven't put in, and it may be, of course, that you don't want to put them in. Nevertheless, let me state them.

In the first place (perhaps quite a technical point), now, in view of the Redman case, the practice of the courts is not to deny the motion for the directed verdict, but simply to reserve it, and you haven't covered that explicitly.

Next, there is the situation--

THE CHAIRMAN (Interposing): But we are wiping that out.

PROFESSOR CHERRY: We can wipe it out expressly, can't we? If we want the rule to say so, we can say the court

shall either grant it or deny it.

JUDGE CLARK: You have to have it in.

PROFESSOR CHERRY: I say, if we want to.

JUDGE CLARK: Senator Pepper hasn't it in.

THE CHAIRMAN: Hasn't what in?

JUDGE CLARK: In the first place, you can't wipe out what a district judge may do. The district judge has a habit of reserving. If he says, "I reserve," then you have to put that in the rule.

PROFESSOR CHERRY: Yes, we would.

JUDGE CLARK: All right. Then Senator Pepper's rule is amended by adding that a reservation is a denial.

THE CHAIRMAN: Or he says a directed verdict is refused.

DEAN MORGAN: That is what he says.

THE CHAIRMAN: Then you make a motion for directed verdict; the jury is in the room, and if you don't grant it, whether you say you are reserving it or not, you are refusing it. As far as that jury is concerned, it is out of court as far as anything that happens again.

JUDGE CLARK: All right. I think there is a technical objection there, but I want to go on. You specifically required the renewal of the motion after the verdict in your rule.

SENATOR PEPPER: I did.

JUDGE CLARK: That is the point that we have been

discussing here. The circuit courts of appeal so far have been saying that that is an unnecessary formality, and they just say that there isn't any particular reason for renewing the motion, that it should be held over, and that the entry of judgment settles it.

DEAN MORGAN: Is that in the case, Charlie, where the trial judge has entered a judgment notwithstanding, without a motion?

JUDGE CLARK: The original motion--

DEAN MORGAN (Interposing): No. I say the original motion for directed verdict was made; there was no motion for judgment notwithstanding the verdict, but the trial judge entered judgment notwithstanding the verdict without a repetition of the motion.

JUDGE CLARK: That is it.

THE CHAIRMAN: That is a rare case.

DEAN MORGAN: Are those the cases that you are talking about?

JUDGE CLARK: Yes.

DEAN MORGAN: I didn't know that a trial judge had ever done that. I thought he just refused to do it, and there had been no intervening motion. Then the question was whether that was subject to review.

SENATOR PEPPER: That is what I understood.

JUDGE DOBIE: The man who moved for the directed

verdict just hasn't moved again after the verdict has been handed down against him.

DEAN MORGAN: You could say, "On motion or on his own motion".

SENATOR PEPPER: May I ask the Reporter whether the alternative provides for the case in which, after the court has refused or has failed to act upon a motion for directed and there is judgment for his adversary, he does not make a motion for judgment subsequently? I was simply trying to state what I understood to be the meaning of the alternative proposition.

JUDGE CLARK: Let me answer that in this way: First we thought it did. We drew it on that basis. Now Judge Donworth says he doesn't think we have done it. Maybe we haven't.

SENATOR PEPPER: Where have you done it? That ought to be a clear question. What language do you rely on in the alternative as dealing with the case in which no motion is made after the verdict and judgment?

DEAN MORGAN: Lines 19 to 22.

JUDGE CLARK: That is it, yes, at the end.

SENATOR PEPPER: I didn't see that blackletter. I didn't disturb that. I intended to leave that just as it stands.

JUDGE CLARK: If you turn back to our original 50, you will see that the last lines added there cover that

explicitly. That is what the circuit courts have been doing. I haven't been guilty of it myself, but my colleague, Judge Learned Hand, I think invented it. Judge Dobie has done it, I believe. It has been suggested to be an unusual case, but, rather curiously, there are several circuit court cases that seem to have come up.

SENATOR PEPPER: Mr. Reporter, I didn't mean to ignore lines 19 to 22. I didn't attempt to restate them. I thought, if we decided to stand by them, they might stand as here stated. What I was trying to do was to restate the matter now contained in the lines from 1 to 18, inclusive, suggesting the omission of the first five with the words that the Chairman has objected to, namely, "are subject to a later determination." Then once more let me read what I have tried to say.

"Within ten days after the reception of the verdict rendered after the court has refused a motion for a directed verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. A motion for a new trial, as an alternative, may be joined with this motion. Thereupon, the court may allow the judgment to stand or may reopen it and either order a new trial or direct the entry of judgment for the moving party. If no verdict was returned, the court may, on motion, direct the entry of judgment as if the requested

verdict had been directed or may order a new trial."

Striking out the first five lines and the redundancy of twice providing for the case in which no verdict is returned, it seems to me that I have gotten exactly what lines 1 to 18 have provided. Then this question of the underlined matter in 19 to 22 stands on its own footing, and we can either adopt it or not.

JUDGE CLARK: There is no question that you have shortened it. You have left out, as you say, the two statements of when a verdict is not returned at all.

SENATOR PEPPER: That is right.

MR. DODGE: Have there been cases where the district judge, without any motion, has entered the contrary judgment to what he had directed before, and the circuit court of appeals has sustained it?

JUDGE CLARK: There has been the converse of that. I would have to look back to make sure. What has apparently usually happened is this: The motion for directed verdict is made, decision is reserved, the verdict is rendered, and then the party forgets to renew his motion, but the court enters his judgment on the verdict. That is the situation where Judge Learned Hand and Judge A. M. Dobie and other distinguished judges have said it was a mere formality to have renewed the motion, that the entry of judgment showed he wasn't going to grant it, and that the appellate court could act on the theory

that he had refused it.

THE CHAIRMAN: What happens in the case where the trial judge, instead of saying, "I refuse the motion to direct," says, "Well, I would like to think this thing over. I don't want to make a ruling on this thing. I think I will take the verdict of the jury and then decide afterwards whether it is a case for a directed verdict or not"? That is a perfectly plain case of reserving the question, which he has a right to do at common law.

The problem with me then is, if you don't make a motion for judgment notwithstanding the verdict afterward, how do you get a determination which is subject to error on appeal by the district judge on that motion?

DEAN MORGAN: The only ground would be what Judge Donworth said. He says, "I have reserved the motion, and now I will let judgment be entered," or order judgment to be entered, if he has to, "on the verdict," and that is a virtual denial of the motion.

THE CHAIRMAN: But the trouble with that is that under our rules he doesn't order any judgment. The rules direct the clerk to enter it the moment the verdict is in. So it is a fiction to say that judgment means--

DEAN MORGAN (Interposing): He doesn't reserve the entry of judgment. That is the trouble, isn't it?

THE CHAIRMAN: No. He reserves the question, and he

doesn't stay the entry of judgment.

DEAN MORGAN: Of course, in our state practice he always would stay the entry of judgment until he determined that reserved motion, but I notice here we don't do that.

SENATOR PEPPER: I proceeded upon the theory that where the rules require the entry of prompt pro forma judgment upon the verdict without action by the court, he may talk until he is black in the face about reserving the question whether he will grant the motion for directed verdict or not, but the ground has been cut out from under his feet. The judgment has been entered in accordance with the verdict. He may talk about reservation, but all he can do is to have a twinge of conscience later.

JUDGE CLARK: That is the point.

SENATOR PEPPER: That seems to me clear, and therefore it seems to me that we ought to deal first with the case, get the rule in shape as to the case in which the motion for judgment is made. Then when we get that behind us, we can discuss this question of what we will do where no motion for judgment is made (and that is adequately presented by the lines 19 to 22) as a separate question. It really is separate, Mr. Chairman.

THE CHAIRMAN: Well, what is your pleasure, to accept Senator Pepper's redraft of the rule down to line 18?

SENATOR PEPPER: I am not sure that that redraft is

in shape to be accepted, but I do think it might with advanta e be referred to the Reporter for criticism. I think that he will find, excepting the one point, the highly technical point, that I have treated, that the failure to grant the motion is a refusal of it, excepting that, it covers all the points in the draft of the alternative.

I would move that it is the sense of the Committee that the alternative be preferred to the matter first presented to us, and that in connection with the alternative, the restatement, as I have attempted to make it, be considered by the Reporter, reserving for further discussion and separate action this question of what happens when no motion has been made after verdict and judgment.

DEAN MORGAN: I second the motion.

THE CHAIRMAN: All in favor of that say "aye"; opposed, "no."

JUDGE DOBIE: No.

THE CHAIRMAN: Carried. Do you want to take up 19 to 22 now?

JUDGE CLARK: I think that ought to be considered.

SENATOR PEPPER: Yes, surely. That is very important.

JUDGE CLARK: It is an important thing. Understand, I wouldn't insist on 19 to 22 as such. Perhaps you might contrast it with what is in the original Rule 50, lines 18 to 21. Judge Donworth raises some question about 19 to 22. Judge

Donworth, do you like the original form we put in? Go back not to the rule itself but to our draft which appears on the previous two pages.

DEAN MORGAN: Yes. You can say, "If a party does not make a motion for judgment under this subdivision, the failure of the court to order a judgment entered in conformity with the motion for directed verdict constitutes a denial of the motion."

JUDGE DONWORTH: You used the word "order". Did you intend to change the word "enter" as written here, to "order" a judgment? This says "enter".

DEAN MORGAN: "enter a judgment".

JUDGE DONWORTH: You read that "order a judgment".

DEAN MORGAN: That is the failure of the court to order a judgment, because that is what he would have to do. He would have to order a judgment notwithstanding the verdict.

JUDGE DONWORTH: "If a party does not make a motion--"

DEAN MORGAN: "--failure of the court to enter a judgment entered in conformity with the motion for directed verdict shall constitute a denial of the motion for judgment notwithstanding the verdict."

JUDGE DONWORTH: I didn't quite get it. "If a party does not make a motion under this subdivision, the failure of the court to order a judgment as required by the motion for directed verdict shall constitute a determination of the legal

questions raised by the motion." I think that is all right.

I make only this further suggestion: "If a party does not make a motion under this subdivision" is ambiguous, isn't it?

THE CHAIRMAN: Yes. You mean a motion for judgment notwithstanding.

JUDGE DONWORTH: The original motion must be made, of course. With that qualification, I like this.

JUDGE DOBIE: Would it be too forward to come right out and say that "If a motion for directed verdict has been made and it has not been taken from the jury, the mere fact that no motion for judgment notwithstanding the verdict has been made shall not prevent the appellate court from making a final disposition of the case"?

JUDGE DONWORTH: I think Senator Pepper has covered that in better form.

JUDGE DOBIE: I don't care much about form, if you give the appellate court power to take final action.

THE CHAIRMAN: It seems to me that the quick way to do it is to say that the motion for judgment after the verdict is not a prerequisite to the upper court's granting that relief or anything else.

JUDGE DONWORTH: You must also make it cover the point of no verdict.

THE CHAIRMAN: No verdict, yes. I criticized this

language in 18, 19, 20, and 21, because it says that the judge doesn't grant the motion to direct. He treats it any way he likes. He may say, "Well, I will just take the verdict subject to motion," or he may say simply, "I will deny it," if you don't make a motion for judgment notwithstanding.

This says, "If a party does not make a motion under this subdivision, the failure of the court to enter a judgment as required by the motion for directed verdict shall constitute a determination of the legal questions raised by the motion for directed verdict."

It says the question whether the court has made a determination is settled by the court's failure to enter a judgment as required by the motion for direction, not the motion for judgment notwithstanding. My point, made ten minutes ago, was, how long do you sit around and wait before the court has made a failure? There is no time limit. If you said that if the court doesn't enter the judgment you want within ten days or twenty days, then he has determined it, there would be a time limit; but according to this, the court's failure to do it in one day is a determination and you can take an immediate appeal.

Then it is also mussed up by the fact that there is a judgment entered in that court room the moment the verdict is in.

JUDGE DONWORTH: Perhaps yes, perhaps no. The rule

expressly gives the judge the right to order no judgment entered if he wants to.

THE CHAIRMAN: That is right.

JUDGE DONWORTH: Coming back to the first alternative, to which my attention has just been directed, insert after the word "If" these words: "after the determination of the jury's deliberations". Then it would read: "If, after the determination of the jury's deliberations, a party does not make a motion under this subdivision, the failure of the court to order a judgment as required by the motion for directed verdict shall constitute a determination of the legal questions raised by the motion."

JUDGE CLARK: Of course, you could do it the other way, to meet the Chairman's suggestion: make your suggestion down to the word "failure" and instead of that, make it this way: "the order by the court for the entry of judgment upon the verdict shall constitute a denial of the motion, also shall constitute a determination of the legal questions raised by the motion."

THE CHAIRMAN: He doesn't make an order.

JUDGE CLARK: No.

DEAN MORGAN: But is there an order, Charlie? That is the point the Chairman is raising. We don't have an order for entry of judgment on the verdict, according to our statute on judgments, our rule on judgments, do we?

JUDGE CLARK: It is the entry of judgment, the entry of judgment on the verdict.

PROFESSOR CHERRY: That has taken place before he could have considered the matter.

JUDGE DONWORTH: Unless the court otherwise directs, the judgment shall be entered upon the verdict. The court always controls the entry of judgment.

PROFESSOR CHERRY: Suppose he does nothing.

DEAN MORGAN: That is the orthodox federal practice, isn't it, to enter the judgment immediately upon the rendition of the verdict?

THE CHAIRMAN: In most districts. A few haven't done it and growled about our rule, but most of them have.

DEAN MORGAN: You could provide, of course, that a motion for a directed verdict should operate as a stay of entry of judgment, unless the judge otherwise ordered.

MR. GAMBLE: Would it be proper to provide that a motion for directed verdict, when overruled, could stand as a motion for judgment notwithstanding?

THE CHAIRMAN: That is just another way of saying that you don't have to make a motion for judgment notwithstanding the verdict. If you make your motion to direct and it isn't granted, then you can get from the upper court (certainly you wouldn't get it from the lower court, because you don't go back to him and ask him to do it) an order for reversal and for

judgment in accordance with your original motion to direct.

MR. GAMBLE: What we are trying to do is to have the appellate court, really, enter a contrary judgment even though the mover doesn't make the second motion.

THE CHAIRMAN: That is it; that is right.

PROFESSOR CHERRY: Suppose we said that the moving party, the party who moved for directed verdict, may, but need not, move for judgment notwithstanding.

JUDGE DOBIE: And the appellate court shall have the same power as if there had been.

THE CHAIRMAN: If you have an ironclad rule of that kind, it fits all right in a case where the trial judge doesn't say anything about reserving anything, just says, "Motion denied," but suppose the trial judge in the particular case says, "Gentlemen, I am in doubt about this. I think I will take the verdict of the jury and not grant your motion now, and we will consider that point later." Then the rules say you don't have to make the motion. You never bring it back to him. What happens to you?

PROFESSOR CHERRY: When Senator Pepper's proposal was up for consideration, I suggested that there be considered with that a statement that failure to grant is a denial of the motion for directed verdict. I think our purpose is two-fold. First, the reservation we put in there is for the purpose you explained. If we cut the reservation out, we are

talking in terms of "deeming." We deem that he denied it when he reserved it.

THE CHAIRMAN: He just reversed it. It is a fiction.

PROFESSOR CHERRY: Yes. I wouldn't put in any "deeming" at all.

THE CHAIRMAN: But these state codes don't have any stuff about the judges having treated it as a denial or anything of that kind.

PROFESSOR CHERRY: No.

THE CHAIRMAN: They don't have to make any declaration of whether it shall be deemed to be or whether it shall not be.

PROFESSOR CHERRY: No.

THE CHAIRMAN: Why can't we go back to the simple practice prescribed in those practices, without any of this artificial assumption business, and do just what we thought we could do before Slocum was decided?

PROFESSOR CHERRY: But the Reporter thought we had to negative the idea of reserving it because the judges are doing it.

THE CHAIRMAN: You mean they got started to doing it.

PROFESSOR CHERRY: We invited them to.

JUDGE CLARK: Yes.

PROFESSOR CHERRY: And they felt they had to.

THE CHAIRMAN: I suppose if these rules went out with a complete abandonment of the Slocum and Redman theory, straight

stuff just the way we had it twenty or thirty years ago, accompanied by a note saying that the original rule was drafted on the theory that that was still the law and that this rule is drafted on the theory that it isn't, so we don't need to make any reservation any more, they would be quick to catch on. I don't think we would be in trouble because we got into bad habits.

MR. DODGE: Has this rule as adopted caused any trouble at all except in that one case where the party neglected to move after verdict?

THE CHAIRMAN: The Supreme Court tried to clear it up.

DEAN MORGAN: That is what I say.

THE CHAIRMAN: But they didn't succeed, because they forgot, I think, that under the rule the presumption is that the judge hasn't made any decision, so how can he make an error?

DEAN MORGAN: I have another attempt here. Don't laugh this time, Cherry.

PROFESSOR CHERRY: I wouldn't, ever.

DEAN MORGAN: "If, after the discharge of the jury, a party does not make a motion under this subdivision, the court's failure to order judgment in conformity with the motion for a directed verdict is the equivalent of a denial of a motion for judgment notwithstanding the verdict."

THE CHAIRMAN: That dodges our automatic judgment difficulties, doesn't it?

MR. GAMBLE: Do you want to make that rule, Morgan, deprive the trial court of making judgment?

DEAN MORGAN: If he does not, I ought to have said, within ten days or twenty days.

SENATOR PEPPER: May I inquire whether I am right in understand that automatically, unless the court otherwise directs, the clerk under our rules enters judgment upon the verdict as soon as the jury has returned its verdict?

That being so, I should think, approving generally of what Mr. Morgan has suggested, that what constitutes the refusal of the motion for a directed verdict is the failure of the court to stay the entry of judgment on the verdict.

THE CHAIRMAN: Failure to enter judgment the other way.

SENATOR PEPPER: No, but you see, it is a little different from that, because our rule says that unless the court otherwise directs, the clerk shall enter judgment. It is failure to stay the entry of judgment on the verdict, letting nature take its course and letting judgment be entered by the clerk, which seems to me to constitute the determination of the motion for a directed verdict.

JUDGE DONWORTH: Should there not be a time limit in that in order to make the action of the trial court final?

SENATOR PEPPER: I shouldn't think so, because there is no time limit within which the clerk suspends his action. The clerk with us in the District Court in Philadelphia sits

there with his judgment book, and when the court has received the verdict of the jury, "We find for the plaintiff" or "for the defendant," as the case may be, and the court has it recorded, thereupon it is entered by the clerk, then and there. It is at that point that it is up to the court either to permit that to be done or to say, "In view of the motion for a directed verdict, which I have reserved, I direct the clerk not to enter the judgment on the verdict." It is his failure to do that thing which seems to me to constitute reversible error, if there be error.

JUDGE DONWORTH: I thought it would be better to give the trial judge an actual opportunity, and I am afraid that your suggestion doesn't encourage him to act judicially upon the matter. I thought that the idea of Dean Morgan of naming a time limit, ten days or something, might be helpful in that matter.

THE CHAIRMAN: Ten days in which to vacate his clerk's judgment and grant judgment the other way, to take affirmative action.

SENATOR PEPPER: But that is something which it is almost impossible to conceive of happening, because we are dealing only with the case where the adverse party fails to make his motion. I have seldom seen a judge who, without being there to move subsequent to the coming in of the verdict, would of his own motion say, "I have had a locus poenitentiae

given to me. I have changed my mind. I now direct the opening of the judgment which was automatically entered and the substitution of the first judgment." It doesn't seem real to me.

JUDGE DONWORTH: Well, Senator Pepper, the trial court might split the difference and order a new trial, you know.

SENATOR PEPPER: Oh, yes.

JUDGE DONWORTH: He does that of his own motion rather frequently, I think. The locus poenitentiae operates to shake the conscience of a judge.

THE CHAIRMAN: It operates to decide the verdict, or something like that.

SENATOR PEPPER: Yes, that may be.

JUDGE DONWORTH: I think the time limit is a good idea, unless there is some reason that I don't grasp.

THE CHAIRMAN: I still don't see why, to clear up all this stuff we are talking about, you don't say that in order to stick to your point, you have to make a motion for judgment notwithstanding within ten days. That settles all this rigmarole about deeming to have decided anything, and all that. You have to put it up to him again. That is the way the old practice was.

MR. GAMBLE: That doesn't meet Judge Dobie's desire to have the appellate court act even in a case where the motion

isn't made.

DEAN MORGAN: That is the trouble. If you make it the equivalent of a denial, then you have a final determination which you can appeal and put in this as an error.

MR. GAMBLE: I think this alternative provision that the Reporter has presented really presents the equivalent of a motion for judgment notwithstanding the verdict.

JUDGE CLARK: Yes.

MR. GAMBLE: If they make the motion, I don't see that there is any trouble; but it is in those rare cases that the party just fails to make the motion.

PROFESSOR CHERRY: We still have one more question. Suppose the judge dies after the judgment is entered, and doesn't do anything and can't do anything. He still has denied a directed verdict. Isn't the real idea of one alternative here to permit the review on appeal of that situation as it was presented to him by the motion for directed verdict? That is my trouble with all that we are doing about after verdict and after judgment. If we are going to require consideration after judgment, then I should prefer to require the motion for judgment notwithstanding, and not deem anything; but I am rather inclined to argue for the contrary view.

I am now suggesting that we take the motion for directed verdict and its refusal as the decision of the thing and as a reviewable matter, too.

MR. GAMBLE: It would be reviewable.

PROFESSOR CHERRY: We are going to get into complications by a thing--we don't call it a presumption, but that is really what we are indulging in here. By inaction for ten days, the man I am supposing to have died in the meantime hasn't entered a different judgment, and I can see some other trouble there.

After all, getting back to the code states, in Minnesota certainly, the old definition of judgment notwithstanding is that the judge should now do what he ought to have done at the trial. It is his ruling at the trial that was wrong, and he is given a chance to correct it. Isn't that the whole idea of judgment notwithstanding?

THE CHAIRMAN: Oh, yes. Suppose you didn't give him a chance when he thought he was going to have it?

PROFESSOR CHERRY: In the federal system, you don't have to make your motion for new trial.

THE CHAIRMAN: Yes. That is another thing. You see, our judge in the federal court will tell a lawyer, "I won't grant a motion for judgment notwithstanding the verdict, but I will grant you a new trial." But the lawyer doesn't want a new trial. If he can't get judgment, he is perfectly satisfied with that judgment. So your motion for judgment doesn't have to be made under your new plan here, and he shies away and doesn't make anything. He takes his appeal from the

judgment. He gets up there, and there is no motion for a new trial, but the district court has, of his own choice, granted it. He convinces the circuit court that the judge ought to have directed the verdict. The circuit court orders judgment the other way as if the verdict had been directed.

DEAN MORGAN: The appellate court would be very loath to grant judgment notwithstanding if the defect were one that they thought could be cured on a new trial.

THE CHAIRMAN: That is right.

DEAN MORGAN: So they would be in the same situation as the trial judge.

THE CHAIRMAN: Honestly cured, you mean.

PROFESSOR CHERRY: I am only suggesting that we ought to take one of those two. I don't like our now doing some fictitious presuming about the trial judge after verdict any more than we were formerly compelled to do.

DEAN MORGAN: That is quite right.

PROFESSOR CHERRY: I don't think we have to do either. If we want to make that motion compulsory, so that the trial judge actually passes on it, it is clear enough how to do that. If we don't want to, it seems to me it is equally clear. We can tell him he can make it, he may make it, but he doesn't have to make it, and the whole question is as much before the appellate court as it could possibly be, because he has made his motion for directed verdict. Personally I should prefer

that way out, but I should prefer either to the indulging in new presumption.

THE CHAIRMAN: That is why I didn't like this rule myself, because we were still plagued with ideas of making assumptions as to whether you were deemed to have determined something or not. We carried that old idea over here in this draft to a modified extent.

DEAN MORGAN: Are you going practically to put it that the trial judge may, on motion of the party or on his own motion, correct the error, his refusal to grant the motion for a directed verdict?

PROFESSOR CHERRY: I don't know that you need to invite him to do that. You don't invite him to order a new trial, but he can.

DEAN MORGAN: Surely, but I suppose that ordinarily the trial judge doesn't have an authority to grant judgment notwithstanding the verdict of his own motion.

PROFESSOR SUNDERLAND: That is a way of correcting the error that he has to get through a statute or rule. He can't get it any other way.

DEAN MORGAN: The point is simply this: I think this Committee hasn't any power or authority to make rules to affect the appellate court, the action of the court of appeals, but we have the authority to handle this judgment in the trial court. Now we are saying that his failure to act is the

equivalent of a denial, so that you get a judgment there based upon the record in the trial court, to which error can be assigned.

PROFESSOR CHERRY: I am only undertaking to put in the consequences of the failure of the moving party, the party who moves for a directed verdict, to act.

MR. DODGE: Do you have it phrased?

PROFESSOR CHERRY: No.

DEAN MORGAN: Why don't you try phrasing it, and see if you can do anything with it?

MR. DODGE: What was your phraseology once more, Mr. Morgan?

DEAN MORGAN: I got this partly from Judge Donworth and partly from Senator Pepper.

"If, after the discharge of the jury, a party does not make a motion under this subdivision, the court's failure within twenty days to order judgment in conformity with the motion for a directed verdict is the equivalent of a denial of the motion for directed verdict and of a motion for judgment notwithstanding the verdict."

MR. DODGE: Do you assume that the court has power of his own motion?

DEAN MORGAN: Yes.

PROFESSOR CHERRY: That continues the reservation idea.

THE CHAIRMAN: This is the way we deal backhandedly with the appellate court.

DEAN MORGAN: That is exactly it.

THE CHAIRMAN: Rule 52(a), "Requests for findings are not necessary for purposes of review."

PROFESSOR CHERRY: We have done that.

THE CHAIRMAN: We can say, "A motion for judgment notwithstanding is not necessary for purposes of reviewing the action of the trial court in denying the direction."

DEAN MORGAN: I think we can. All right, let's say it.

THE CHAIRMAN: It is six o'clock. Let's meet fifteen minutes earlier in the morning; make it nine-fifteen. Most of us were here then.

SENATOR PEPPER: Couldn't we just end today by acting one way or the other on Mr. Morgan's suggestion? It seems to me to be admirable.

THE CHAIRMAN: I should be pleased to have you make a motion.

SENATOR PEPPER: I will second his motion.

DEAN MORGAN: I move it.

MR. DODGE: In substance.

THE CHAIRMAN: That the matter be referred to the Reporter, with the request to redraft the alternative accordingly.

SENATOR PEPPER: Certainly. I don't think any of us want to have the Committee adopt language that we penned while we were in debate.

MR. GAMBLE: I should like an opportunity to think about it a little more after I see the language that the Reporter drafts.

THE CHAIRMAN: I suppose we agree that we have now gotten in a position where we have had a great many questions come up here where we haven't been able, naturally, to agree on the exact wording of proposals. We have referred matter after matter to the Reporter after general discussions, with the details of draftsmanship not disclosed. It has been my idea, and I am wondering whether it is the sense of the Committee, that when this redraft comes back, the Secretary shall not just hand it to the Supreme Court and ask that it be printed, but that it go back to you gentlemen and that all steps towards printing or submitting it to the Court be withheld until you have all had a chance to study it. Then you can decide whether you can make your corrections by mail or whether you think I ought to call another meeting. That is a safeguard that would meet the situation, if it is carried out, isn't it?

MR. GAMBLE: Yes, it would.

THE CHAIRMAN: Suppose it be understood that, unless somebody objects, that is what the officials will do here in

Washington.

SENATOR PEPPER: Then, on that understanding, I second Mr. Morgan's motion as respects this matter of the case in which no motion is made by the unsuccessful party after verdict and judgment.

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

PROFESSOR CHERRY: I vote no, for the reasons I stated.

THE CHAIRMAN: The motion is agreed to.

JUDGE DONWORTH: What point, may I inquire, do you disagree on, Mr. Cherry?

PROFESSOR CHERRY: I stated that at length. I don't want to repeat it.

... The committee adjourned at 6:00 p.m. ...

WEDNESDAY MORNING SESSION

October 27, 1943

The committee reconvened at 9:17 a.m., Chairman Mitchell presiding.

THE CHAIRMAN: The meeting will come to order.

Before we pass from Rule 50, we did all we could with it yesterday, I think, but I want to ask about this business of the situation where the lower court has a motion for judgment after the verdict coupled with a motion for new trial, and he grants the motion for judgment notwithstanding the verdict and ignores the motion for new trial, naturally. It goes up, and the upper court reverses and says that he was not right in directing a judgment notwithstanding the verdict. Then the question comes up whether the lower court ought to reinstate the old verdict and let it go or whether they ought to remand to give the district court a chance to exercise his discretion on a motion for a new trial which he never has exercised.

There is a little quirk about that, and my recollection is that Justice Roberts tried to straighten it out for us in his decision in one case. I am not sure but that he had some trouble about it.

I am wondering (I am asking, now) whether there is anything we ought to do about that to make it clear just what the practice is. It always seemed to me that this matter of a

new trial was a matter very largely or discretion in the district judge, and that if a man makes a motion alternatively for judgment or for a new trial, he gets his motion for judgment and that is knocked out on appeal, he ought at least to have an opportunity to go before the district judge again and say, "Here, I invoke your discretion. The upper court said that I am not entitled to the judgment as a matter of law, but certainly I don't think the other fellow ought to keep the judgment. I think you ought to exercise your discretion as a judge and give me a new whack at a new trial."

What is the situation about that?

JUDGE CLARK: That case of Justice Roberts is the Duncan case, 311 U.S. 243. We had a note on it in the material we presented to the Committee at the May meeting at page 134. Our notes said the Supreme Court clarified the practice to be followed where the party against whom verdict has been rendered makes a motion for judgment n.o.v., together with a motion, joint or alternate, for a new trial. Prior to this decision the proper procedure was in doubt.

"According to the rule laid down in the Duncan case, if alternative prayers or motions are presented for judgment n.o.v., and for a new trial, the trial judge should rule on the motion for judgment, and whatever his ruling thereon may be he should also rule on the motion for a new trial, indicating the grounds of his decision. However, if the motion for judgment

notwithstanding the verdict is sustained, the court should take care that the contemporaneous order for a new trial should be on the express condition that it becomes effective only if the judgment notwithstanding the verdict should be reversed."

Then we go on: "The Supreme Court's determination, therefore, seems to obviate any need for a change in Rule 50(b)."

THE CHAIRMAN: That has cleared it up very much in my mind. Justice Roberts was forced to that thing because of the deficiencies of the rule, and the result he arrived at, it seems to me, is a result that we ought to get rid of, because he said that when those two motions were joined together, even though the trial judge granted the motion for judgment notwithstanding the verdict, which made the motion for new trial wastepaper as far as he was concerned, it forced the judge to go on and say, "Well, I may consider the motion for a new trial, and if the upper court says the judgment as a matter of law isn't right, I will at least decide that the moving party is entitled to a motion for new trial."

Why make a district judge decide two motions when they are made in the alternative and the granting of the one makes the second one, as far as he is concerned, just an idle gesture?

I had in mind at the time, I remember, that maybe we could fix this rule so that if that situation occurred and the upper court set aside the lower court's order granting judgment

notwithstanding the verdict, the upper court could or should (I don't know how; it might be optional with him) remand the case, setting aside the judgment notwithstanding the verdict, but subject to the right of the lower court to consider then the motion for new trial and to exercise his discretion on that.

SENATOR PEPPER: Isn't it a mere question as to the tribunal which is to decide the question? If the upper court thinks that the lower court erred in granting the motion for judgment non obstante, then the upper court faces the problem: "Shall we reinstate the judgment or shall we send the case back with a new venire, with a direction for a new trial?"

THE CHAIRMAN: There is a third possibility. They may do neither. They may not reinstate the judgment, and they may not order a new trial, but they may send it back and let the district court exercise his discretion on the motion for new trial.

SENATOR PEPPER: That is what I say. It is a mere question of which tribunal is to decide that question.

THE CHAIRMAN: You are right.

SENATOR PEPPER: The appellate court might decide, might say, "We reverse the judgment and send the case back for new trial," or "We reverse the judgment and reinstate the original judgment"; or, in the alternative, you might have the situation which Roberts is contemplating, where that element of discretion is within the scope of the duty of the trial

judge.

THE CHAIRMAN: You have stated that beautifully, and I am wondering if we couldn't put a clause in here. We have to tamper with the court of appeals, though. That is the difficulty.

DEAN MORGAN: I should like to ask, Mr. Mitchell, what your objection to Roberts' solution was. It seemed to me that it was a great time saver, because that motion for a new trial may be based not only on the insufficiency of the evidence but on errors of law that occurred during the trial; and if the trial judge passes upon both the same, then when you get up on appeal once, you can settle the case all together, and if the judge passes on the motion for a new trial in the alternative, just as it is made in the alternative. I don't see why that isn't a good time-saving device.

MR. GAMBLE: It occurs to me that that might avoid the possibility of a second appeal.

DEAN MORGAN: Yes, that is exactly what had occurred to me.

MR. GAMBLE: Because the denial of a motion for new trial after remand might afford a basis for an appeal either because of errors of law committed in the course of the trial or because of a gross abuse. It seems to me that the suggestion of Justice Roberts is sound.

DEAN MORGAN: I think it would be a good thing to

write it into the rule that the judge shall pass on both motions.

JUDGE DOBIE: It can't do any harm, can it?

DEAN MORGAN: That is, if he grants judgment notwithstanding the verdict, he should pass also on the motion for a new trial, in case the judgment notwithstanding the verdict is not sustained, just as Justice Roberts suggested. Then, if he grants a new trial on the ground of insufficiency of the evidence, as I suppose he would in ninety-nine cases out of a hundred if he thought there wasn't enough evidence to support the verdict, when the case comes back it will automatically come back for a new trial.

THE CHAIRMAN: You see, there are cases that arise where the court orders a judgment notwithstanding the verdict not on the question of law as to whether there is any evidence to support it, but on some pure question of law on admitted facts.

DEAN MORGAN: That is right.

THE CHAIRMAN: Suppose he is wrong about his law. Then he is confronted with the question: "If I am wrong about the law, then on the matter of discretion on the proof of the evidence, ought I to grant a new trial?" I don't see why he couldn't do both. It struck me as rather awkward, though, if the trial judge had to decide what he would do with a motion if it ever came before him.

DEAN MORGAN: That is true, but it is now before him; it is in his lap.

THE CHAIRMAN: Yes.

DEAN MORGAN: It is while he has the case there, with the facts fresher in his mind than he will ever have them later.

THE CHAIRMAN: Your suggestion is that the Reporter consider a short sentence writing Judge Roberts' practice into the rules, so that the lawyer won't have to hunt for the decision.

DEAN MORGAN: That is it.

SENATOR PEPPER: Yes.

THE CHAIRMAN: That is all I want to say about that.

JUDGE CLARK: That is all right. We can write it in, I guess. We originally suggested that we thought the Supreme Court had covered it, but I guess we can put it in without difficulty. Don't you think so?

THE CHAIRMAN: They have covered it, but the question is whether, if the rule is blind on the thing and the lawyer isn't familiar with the Supreme Court decisions, we ought to take the decision now and put it in the rules, so that the fellow could read as he runs.

PROFESSOR MOORE: Mr. Chairman, Justice Roberts in that opinion talks about the cross-assignment of errors. Do you want to try to deal with that subject, too?

THE CHAIRMAN: I don't think so. I don't think that

comes in. We are beginning to deal squarely then with nothing in the district court but something in the court of appeals. I have always supposed that the person who doesn't appeal isn't supposed to make any cross-assignment of error. Suppose the appellant assigns error and respondent doesn't appeal from the judgment, there is no such thing as an assignment of error.

The point is this: The respondent might, if he felt he was right in his errors, that they were points of error well taken, but respondent says, conceding all that, there were other grounds on which the trial court should have decided the case in my favor, and didn't. Call it a cross-assignment of error, but what it really is is to advance to the court of appeals a ground on which the judgment ought to go to the respondent even though the errors assigned by the appellant are well taken.

PROFESSOR MOORE: There is one other point there, though. The plaintiff who has gotten the verdict may contend that, "If the evidence wasn't sufficient to support my verdict, nevertheless the appellate court ought to remand for a new trial because the trial court erroneously excluded some of my evidence." He needs to bring that to the attention of the appellate court so that they wouldn't reverse the direction to enter an absolute judgment.

THE CHAIRMAN: I agree that he can bring it to his attention as a reason for either affirming the judgment or

giving him a chance for a new trial, but I don't call it an assignment of error or a cross-assignment of error, because it really isn't. It is just a reason advanced why the upper court should take a certain course. It seems to me that the idea of a man's making assignments when he isn't taking an appeal is just incongruous, is a paradox.

I don't find in the decisions any difficulty about that. The lawyers sometimes are confused about it. I have had lawyers write me and say, "Under these rules, if the reason given by the lower court for a decision is wrong, and my adversary appeals and has the upper court say it is wrong, what do I have to do? Do I have to make a cross-assignment in order to bring to the attention of the upper court the fact that there was another ground on which I should have won the case which the lower court rejected?"

I have always answered, "Why, you don't have to make any assignments of error. You are not the appellant. Your object is to write it in your brief and say, 'Here, even if you think these are errors that the appellant assigned, still there was a good ground on which the case ought to have been decided my way.'"

That isn't an assignment of error. It is invoking a familiar rule, isn't it?

PROFESSOR MOORE: I agree with you. Really, what I wondered was whether, over in the appeal court rule, we ought

to have something, as long as we are going to cite the Montgomery Ward & Co. v. Duncan rule here, to clarify that point. In effect, you really want to say that perhaps Justice Roberts shouldn't have invoked the term "cross-assignment of error."

THE CHAIRMAN: Yes, I think it is a matter of phraseology. Here we are dealing with an alternative motion that is actually made in the district court, and it is proper enough for us to deal with it, but when we get into the subject which we were just talking about, it is purely and solely a matter in the court of appeals. It is one thing for us to make rules for district court procedure that will ultimately affect the result in the court of appeals, and it is another thing baldly to go into the court of appeals practice without reference to what is done in the district court. I don't see any reason for doing that.

Now we have gotten to Rule 52. Is there any reason that we should reconsider what we have done in Rule 52? There were two amendments there, you remember. One was making clear that where a case was tried with an advisory jury, the court itself ought to make findings, either adopting or rejecting the jury's findings. The other amendment was to provide that the findings need not be separately stated, but they could be embodied in the court's opinion.

JUDGE DOBIE: A great many judges were very strong for that, and that is particularly helpful to the judges in

patent cases, where they practically incorporate every finding in their opinion and yet don't have to go over it separately and make it.

THE CHAIRMAN: The 2nd Circuit, among others, doesn't like what they call "lawyer's findings," either. They think the findings you get in an opinion are really the judge's views. This stuff that is numbered 1 to 60 in an outside finding are usually prepared by the lawyers, and the judges don't always have the time to sift them very carefully. Isn't that a fact? Isn't that your reaction up there?

JUDGE CLARK: That is our reaction. I think we may still be hopeful, merely hopeful, but at least we can hope some. I think this helps out.

THE CHAIRMAN: There is no motion to make any change in 52.

MR. HAMMOND: May I mention this point? A lot of the district judges don't want to have to make these findings in a lot of cases. Do we cut it down any by this amendment?

JUDGE CLARK: I don't think we actually do. Of course, they like to have it cut down a good deal. I have always had a good deal of sympathy with it. It does a little harm. I think we are sort of cutting down on the rule by degrees.

MR. HAMMOND: I was wondering if it has cut it down under this wording at all. I mean, it just seems to me you

throw into the opinion--

THE CHAIRMAN (Interposing): How can you cut it down?

MR. HAMMOND: I realize that.

THE CHAIRMAN: You either make findings or you don't.

MR. HAMMOND: I realize that. Judge Chesnut spoke to me about it and asked if we could do anything about it.

DEAN MORGAN: If the judge is so muddy in his mind and his findings of fact and must give his decision on a hunch, I think he should give it some more consideration.

MR. HAMMOND: I know all the discussion that went on, and I just mention that. There have been several other district judges who wanted to do it.

THE CHAIRMAN: They don't like to be cross-examined with respect to findings. But I noticed in the 2nd Circuit that Judge Frank, I think, or somebody has written an opinion, with the approval of the lower court, I think, that points out the desirability of having the district judge get his nose down on the record and make findings. He not only emphasizes that it is necessary to aid the court of appeals on an appeal in those cases which are appealed, but he says it is a very helpful thing for a district judge to do.

We all know that there are here and there trial judges who may be a little bit loose in their mental operations, who are rather inclined to decide a case on general principles, as a jury would, and if you put them up to specific findings on

matters of fact, it may guide them in the right direction. That is what the 2nd Circuit says. We never dared in any note to tell any district judge that that was one reason for this rule, but it has done that for us.

DEAN MORGAN: I have seen it happen in Connecticut. The judge gives a decision right from the bench on a hunch, and then afterwards the lawyer draws the findings of fact for him when the question is on appeal, so as to support the judge's hunch.

JUDGE CLARK: I don't think it is nearly as hard work as the judges think it is. I have done it. I sat in the district court quite a little. The judges make a great load that they don't need to. First, they get a little foolish about it. You can temper your findings to the shorn lamb, if I may use that metaphor again. In some cases you can make elaborate findings, but you don't need to do it in every case.

THE CHAIRMAN: I think in some of the busy districts the judges get together and talk it over and sort of edge each other on and tell each other what a dreadful job this is, and they work themselves up to the point where they don't approach the job in a pleasant spirit.

JUDGE CLARK: There is no doubt about that. Judge Caffey, in New York, sort of chokes up, and even at the lunch table, if you mention findings, he can hardly eat.

THE CHAIRMAN: Let's go to Rule 54. There is nothing

more to say about that.

JUDGE CLARK: Rule 55 is only a note.

THE CHAIRMAN: Rule 56.

JUDGE CLARK: We have already discussed 56 in connection with 12.

MR. HAMMOND: May I go back to 55 just a minute? I was just wondering whether the note ought not to be incorporated in the rules. We might consider that.

JUDGE CLARK: Of course, that may be. We hope this war will be over sometime. It seems a little too bad to put what ought to be a temporary thing in a permanent rule, but I don't know. What does the Committee think about that?

JUDGE DOBIE: What is the point?

THE CHAIRMAN: You see, we provide in 55 certain conditions for the entry of judgment. Now the Soldiers' and Sailors' Civil Relief Act comes along and says you can't get a judgment against a soldier or sailor unless you do something else. Mr. Hammond says that we ought to state in the rule itself rather than in a note, the provisions for entry of judgment subject to the Soldiers' and Sailors' Civil Relief Act of 1940.

JUDGE CLARK: It is my understanding that these notes, while not official, would be published so that the lawyers would see them. We prepared these notes on the theory that they would be like the former notes, that they would be published.

THE CHAIRMAN: They are not usually published. They are not published in the U. S. Code, are they?

JUDGE CLARK: Yes, I think they are. They are not published everywhere. They are not published in the Supreme Court official reports, but I think they are in the Code, aren't they?

DEAN MORGAN: They are in the Indiana code.

SENATOR PEPPER: What is our practice where a rule states a proposition which on its face is universal and in fact it isn't universal because of the operation of the statute, whether permanent in its nature or temporary? Has it been our custom to let the universal proposition stand unmodified in the rule?

THE CHAIRMAN: I think not.

SENATOR PEPPER: I think not, either.

JUDGE CLARK: I think that is correct.

PROFESSOR CHERRY: This is the only instance of what we think of as a temporary statute.

SENATOR PEPPER: But after all, while in force, it is enormously important for the lawyer to know that it is a qualification of our universal proposition.

MR. HAMMOND: There are a great many cases on it, too. There has been one up in the Supreme Court already.

SENATOR PEPPER: Yes.

THE CHAIRMAN: I think there is one little quirk about

your statement that you ought to bear in mind. If a rule states a general proposition, and at the time the rule is adopted there is a statute that makes some special provision in a particular case, it has been our practice from the beginning to state in the rule: "We are not repealing this statute. You still have to comply with those special conditions."

Here is a case where, at the time the rule was adopted, there weren't any of those special conditions, and the rule was all right. We weren't repealing anything, and therefore we didn't have to mention it. So we have a case where, after the rule is adopted, Congress comes along with a statute which supersedes the rule, in part.

DEAN MORGAN: That is right.

THE CHAIRMAN: Are we going to make a practice of going back through these rules and, wherever they have been in part superseded or qualified by later statute, when amendments are up--

MR. DODGE (Interposing): Is this the only rule the operation of which is affected by that Act?

THE CHAIRMAN: I think so.

MR. DODGE: Aren't there various other provisions as to time, and so forth, that would not operate against a man in the armed services?

PROFESSOR CHERRY: That is true.

THE CHAIRMAN: There would be defaults, naturally.

Well, the question for you to decide is whether you want to amend the rule by referring to this statute as qualifying it or whether you want to leave it in a note and say that it has been qualified by the subsequent law.

DEAN MORGAN: My question, Mr. Mitchell, is whether or not the re-promulgation of the rule would have any effect on the statute, because the theory was that our rules, in so far as they were adopted and approved, superseded any conflicting statutes unless we actually accepted them.

THE CHAIRMAN: We are not re-promulgating 55. We are making an amendment to 55. If we did re-promulgate that, the point would be good.

DEAN MORGAN: That is exactly it. The rules we don't amend stand as they were, and then any modifying statute would, of course, modify it.

PROFESSOR CHERRY: I was going to ask, Mr. Chairman, what action the court is likely to take if it adopts what we propose. Will it re-promulgate the rules as a whole?

THE CHAIRMAN: I should think they will make an order just making those amendments that they decide to make.

PROFESSOR CHERRY: If that is the action, I think it is appropriate in a note.

THE CHAIRMAN: It would be very dangerous to re-promulgate the rules.

PROFESSOR SUNDERLAND: And open everything up to

Congress again.

THE CHAIRMAN: Yes. The whole thing would have to go up.

PROFESSOR CHERRY: I had supposed they would do that, and that is why I asked the question, to clear it up.

SENATOR LOFTIN: Mr. Chairman, I think this is a general rule, and the statute is a war emergency measure. I move that it be taken care of by a note.

MR. DODGE: I second the motion.

THE CHAIRMAN: Any further discussion?

MR. GAMBLE: Would it not be better to include a provision in Rule 81 with respect to applicability, as we have in relation to certain other statutes, that the rules do not alter the facts as provided by the Soldiers' and Sailors' Civil Relief Act?

THE CHAIRMAN: That is on the theory that the Soldiers' and Sailors' Relief Act was not in force when the rule was adopted. If you follow that practice in the case of this Act, then I think in order to be safe, you would have to go through the entire statutory enactments since these rules were adopted and make up your mind whether the rules had been modified in any particular since they were adopted by statute, and then follow the same course there, to be consistent.

SENATOR PEPPER: It seems to me that everything depends on the point developed by the Chairman and Mr. Morgan.

If the effect of what we are now doing is a re-promulgation of the rules, then I think we ought to put this statute in the body of the rule, but if there is to be no opening up of the whole subject and only an amendment of specified rules, then I should think that we couldn't afford to put it otherwise than within a note because that would require us to go through the whole body of statutory law over again.

THE CHAIRMAN: Aren't you quite clear that it would not be a re-promulgation of a rule if it isn't amended?

SENATOR PEPPER: I wasn't clear when I first spoke, but it has been made clear by what has been said here, and I am in favor of Mr. Loftin's motion.

THE CHAIRMAN: Any further discussion? All in favor say "aye"; opposed. Carried.

Now we are up to 56.

JUDGE CLARK: Rule 56 was intimately tied up with 12, and I don't believe there is anything more to say here.

DEAN MORGAN: May I ask, with reference to 55 again, to go back, have you examined that Act, Charles, to see whether it affects any other section of the rules, such as time for answer, and all that sort of thing?

PROFESSOR CHERRY: Extension of time.

JUDGE CLARK: Haven't we made a note somewhere about that fact? I have forgotten just at the moment.

THE CHAIRMAN: Your point is that it ought to be made

a note to every rule that is--

DEAN MORGAN (Interposing): To every rule that is affected by it, if you are going to do it once.

THE CHAIRMAN: It deals with vacation of judgment. You might have some other section. The point is to check up and make a note wherever it is pertinent.

JUDGE CLARK: Yes.

THE CHAIRMAN: Anything in 56? I think we have gone over that. Now, 58. There was a clarification amendment in line 7. Down in lines 11 and 12, you remember, a question arose in some districts, particularly in the Southern District of New York, about entering a judgment forthwith on a verdict with a blank space in the judgment for the costs to be taxed in the future. That is the common practice in a great many districts of the United States and has been to my knowledge for half a century, but in the District of New York they sometimes want to record judgment in the state and county office to make them liens on real estate. Under the state law, you can't record a judgment to make it a lien on real estate if the judgment is incomplete and in doubt. The District Court of New York has a rule now, notwithstanding our rule, one which they say really is not in conflict with our Rule 58, which says that the judgment can't be entered forthwith after verdict until the costs have been taxed or the taxation has been waived.

I am just wondering whether we ought, under the

circumstances now, to put a clause in here that abolishes or wipes out that district court rule, whether we might not say here in this rule where it says "shall enter judgment forthwith" that the district court may delay or postpone the entry of judgment until costs are taxed or taxation is waived. That would leave it optional with the district court whether they entered the judgment forthwith or waited two or three days until the costs were taxed. It would leave New York going on the way they now are under their local rule, and it would leave all the other districts that have the practice of entering judgment forthwith with a blank space for the costs to follow their present practice.

DEAN MORGAN: There would be no temptation for the prevailing party not to tax so as to extend the time for appeal, because he wouldn't want that, anyhow.

JUDGE DOBIE: If you delayed the entry of judgment, might not that be important sometimes in connection with a priority of separate judgments?

DEAN MORGAN: Oh, yes.

JUDGE DOBIE: Might there not be a case in which the plaintiff would be anxious that the judgment be entered now because he foresees judgments in other cases and wants his to be prior, and he thinks he is entitled to have it recorded when he gets it?

THE CHAIRMAN: It takes only about two or three days

to tax the costs, and if he is worried about that, he can file a waiver and relinquish his costs, if it is a matter of hours.

JUDGE DOBIE: Would he have to have a waiver by the defendant?

THE CHAIRMAN: No; by the prevailing party.

JUDGE CLARK: When this came up before, I had a study made of the cases, and the cases were stronger than I realized. They are very strong that the judgment should be entered at once, and that there should not be a delay for taxing costs. I was interested to see how strong they have been in my own court. Maybe it doesn't make any difference what we say, the district court goes ahead and does what it wishes. But in this case that I cite here in 1926 from Washington, we went so far as to say that the failure of the clerk to enter judgment was not to be excused. There are several other 2nd Circuit cases that bear on the point. I don't know what the teaching of that is. The appellate court may talk and the district court keep going on the same way. I am quite clear that the district court practice is very bad, indeed. It is very unfortunate.

THE CHAIRMAN: You mean the New York District.

JUDGE CLARK: Yes.

THE CHAIRMAN: If you feel that way about it, I have nothing more to say.

JUDGE CLARK: They don't do anything about it.

DEAN MORGAN: They do that in New York.

MR. DODGE: You can't get a judgment until the costs are taxed.

DEAN MORGAN: You mean the federal courts.

MR. DODGE: I was thinking of cases in equity.

THE CHAIRMAN: The state court, you mean.

MR. DODGE: Yes.

JUDGE CLARK: What I mean in New York is that it is all a part of the general system they have. They never will enter anything in New York until the parties do it. It is not merely a matter of delaying for costs. The consequence is that the clerk never enters anything until the party does. Then the parties run around with all sorts of orders. We had a system of no orders for a long while, and then there was a plethora of orders. I think they had a perfect diarrhea of orders there. They had some cases where there were three different orders, and the question was which was the final judgment.

On the other hand, when I sat in the district court, I wasn't able to get the clerk to enter an order. I sat in a case that involved that post office site in New York, the cost of the building. I wrote a little memorandum and sent it to the clerk, saying, "The clerk is directed forthwith to enter so many dollars judgment in damages." Two months later the parties called up and said, "We would like to get judgment

entered." I said, "I directed the clerk two months ago to enter judgment forthwith." They said, "Oh, no; the clerk never does it until we draw our file and get it approved by the judge."

THE CHAIRMAN: Let me ask you this. It says here, "The entry of the judgment shall not be delayed for the taxing of costs." That means that there is a judgment entered, "The plaintiff do have and recover from the defendant the sum of blank dollars, together with costs and disbursements," not stating the amount. It states the amount of the main recovery but it doesn't state the costs. Is there any question about when the time for appeal commences to run? Is your judgment the final and complete judgment before the costs are taxed and the amount entered, or does your time for appeal run from the date the half-baked judgment or partial judgment is entered? How about that?

JUDGE CLARK: It is my understanding that these cases make it clear that the one without the costs is the final judgment.

THE CHAIRMAN: When the costs are entered, it relates back; is that it?

JUDGE CLARK: Yes.

SENATOR PEPPER: May I ask whether this rule applies only to cases where an issue has been tried by jury and there is a verdict or whether it applies, as I think it does, also to

cases of an equitable sort tried by the court without a jury. It seems to me possible that you might have a different situation in the one case and in the other. I can understand that where there is a verdict and the clerk's business is to enter judgment upon the verdict, it would be a very good rule if he should not hold up his entry of judgment until costs are taxed; but, on the other hand, if it is an application for an injunction or for equitable relief of any sort, then I should think that the court who has to order the judgment entered might say, "Judgment shall be entered upon payment of costs."

I think we ought to have in mind that there are two factual situations.

THE CHAIRMAN: I think your point is a good one, and I think this clause, "The entry of judgment shall not be delayed for the taxing of costs", was intended to cover only the case--

DEAN MORGAN (Interposing): This talks only about verdict.

PROFESSOR CHERRY: Yes; it starts right out about verdict.

DEAN MORGAN: The entry of judgment on the verdict.

THE CHAIRMAN: It refers to both.

JUDGE CLARK: There is a differentiation made. There is a careful differentiation made between certain kinds of cases. It seems to me that Senator Pepper's point is really

covered in the original rule, lines 5 to 11, which make that very differentiation. Although they don't make it between verdicts and other cases, they do make it between simple money judgment cases and other cases.

THE CHAIRMAN: I guess that is so.

JUDGE DOBIE: You say in the rule there that the judge shall promptly approve and direct that it be entered by the clerk, and I take the rule to be that after the decree in the equity case (you can use the word "decree" now) has been in proper form and has been signed by the judge, it is the duty of the clerk to enter that right away. It then becomes a judgment, and due costs are fixed.

JUDGE DONWORTH: You will find, I am satisfied, that every court that has adopted a set of local rules has made specific provision as to how the costs shall be taxed, and there is quite a bit of machinery about it. I have here the local rules of the Western District of Washington, and the machinery for taxing costs takes up practically a page and a half. I shall not read it except to give you the introductory part.

"A. The party in whose favor a judgment is rendered who claims his costs shall within five days after the entry of the judgment serve on the attorney of the adverse party and file with the clerk a memorandum of his costs."

Then there is provision for objections and a hearing

by the clerk. I think that is well recognized generally throughout all the districts as the machinery that is pursued.

I think the suggestion that is contained in the Reporter's draft is all right. I don't think that you could delay the entry of the judgment in spite of the difficulty in New York is the matter of a lien of judgment. I don't think that that should be a dominating feature in view of the fact that parties do often have a contest, and a real contest, over witness fees and master's fees and a lot of other things. So I think this suggestion is as near as we can hit it.

THE CHAIRMAN: I imagine that the district court in that district has repealed our Rule 54(d), hasn't it? We have said that "Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court." It is a plain case of disagreeing with our rule.

That raises a question in my mind about this. I am wondering whether the Reporter and his staff have gone through the local rules that have been adopted by the federal district courts from every district in the country to see whether any of them, by variations of practice in the various districts, are getting back to defeat uniformity and whether there are any situations that they have dealt with by local rule that we ought now to deal with specifically by general rules so as to abolish all the local rules and make the practice uniform.

Have you gone through that?

JUDGE CLARK: You mean on costs or generally on all?

THE CHAIRMAN: Anything.

JUDGE CLARK: We haven't done it systematically. We have done it in what you might call "here and there." As a matter of fact, we would have to do a lot of amending if we did all that I know, because, frankly, I think that a good share of the rules of the Southern District of New York are invalid, as I have told Judge Knox directly, and I have made some suggestions on it. I think probably the Southern District and the Eastern District (which is practically part of the Southern District) may be the worst offenders. Maybe these rules in Washington go pretty far, too, because I have made some independent study of those. I don't know whether it is desirable to attempt to correct all the Southern District's actions. I should have a little doubt. They have a lot of things. When you spoke at the Institute in New York you referred to some, and I have referred to some.

THE CHAIRMAN: Yes, I charged it with having a rule--I have forgotten what it was, but it had something to do with appeals.

JUDGE CLARK: Yes, it did. I have forgotten what it was.

THE CHAIRMAN: They were deliberately, in a rule, requiring certain things to be done that our rules do not

require and were never intended to require.

JUDGE CLARK: They have all sorts of detail rules, and they turn up every little while. In several opinions I have raised direct issue with several of the rules. Still they stand. I am not sure whether we can do much more. I don't suppose it does much good if we reiterate our rule.

Take this very rule with reference to which Judge Donworth read the Washington rule. What can we say more than, "Please, Mr. District Court Judge, watch this rule"?

JUDGE DONWORTH: I should like to ask the Chairman what rule he has in mind on the one-day rule for the clerk to tax costs.

MR. HAMMOND: Rule 54(d), on page 70.

THE CHAIRMAN: It sounded to me as if our rule was inconsistent with the district court rule that you read, in view of the fact that that rule says five days' notice before the clerk, and our rule says one day's notice before the clerk.

JUDGE DONWORTH: I don't find that.

THE CHAIRMAN: Page 71 of what?

MR. HAMMOND: Of the rules.

DEAN MORGAN: Rule 54(d), the last couple of lines.

THE CHAIRMAN: Yes.

JUDGE DONWORTH: "Costs may be taxed by the clerk on one day's notice." Yes, sir, you are right.

JUDGE CLARK: When these district courts adopt these very voluminous rules, they are pretty sure, I think, to transgress. What happened in New York, after all, was that they created a committee, and a gentleman by the name of Mr. Nathan April was named chairman. He has written a book on procedure, and he, among other things, thinks that we don't have enough cases go up on appeal to settle questions of procedure. That is, he is almost a procedure hound and wants various details. So, as he thought, he filled in all the gaps and some more that we hadn't done. So they are very long, very extensive, rules.

JUDGE DOBIE: What is his name?

JUDGE CLARK: Nathan April. You know the April book on apellate procedure.

SENATOR PEPPER: Issued on the first of the month?

JUDGE DOBIE: How do you spell it?

JUDGE CLARK: A-p-r-i-l-e, I think.

MR. TOLMAN: No; that is Chaucer when you put an "e" on it.

SENATOR PEPPER: Judge Donworth moved that the rule stand as drafted, and I second that motion.

JUDGE DONWORTH: You are a mind reader. You interpreted my motion.

THE CHAIRMAN: As long as there is no change intended, no motion is necessary.

SENATOR PEPPER: May I ask one question? This provision

that "The entry of the judgment shall not be delayed for the taxing of costs" is important only in those cases where the court does not make its own direction for the entry of judgment, isn't it?

DEAN MORGAN: That is right.

SENATOR PEPPER: That being so, ought it not to follow rather than precede this sentence on the notation of a judgment? Isn't the order of thought that the notation of the judgment constitutes the entry? "The judgment is not effective before such entry, and the entry of the judgment should not be delayed for the taxing of costs." That is really an instruction to the clerk.

JUDGE CLARK: I really should think so.

SENATOR PEPPER: I suggest to the Reporter considering the shifting of that underlined matter to the end of the section. Subject to that, I second Judge Donworth's motion. You don't have to put a motion, though, because there is no motion to amend.

THE CHAIRMAN: Your idea is that the sentence, "The entry of the judgment shall not be delayed for the taxing of costs", be the last line in the rule.

SENATOR PEPPER: On the theory that that is really an instruction to the clerk.

THE CHAIRMAN: Any objection to that? It is agreed to. Now, Mr. Hammond.

MR. HAMMOND: In connection with the matter of local district court rules, there was a committee appointed by the Judicial Conference, of which Judge Knox was the chairman, and on which Mr. Tolman did a lot of work, that went over all the district court rules, and they got out a very full report on the subject.

JUDGE CLARK: Yes, that is true. I have a copy of the report.

MR. DODGE: Did you consider the suggestion made by the American Bar Association committee (I presume you did) that the entry of judgment before the disposition of a motion for new trial was a bad thing, calling attention to some case that had caused trouble?

JUDGE CLARK: Yes, I considered that and, as a matter of fact, that was tied up with other things. As I wrote Mr. Benoy, the chairman, I thought that this rule ought not to be changed. What they say is that they want to make it clear that various proceedings could be had, as a motion to amend the findings, and so on, and that it be made clear that the judgment should not be entered until everything had been done.

There are two answers that I made to Mr. Benoy in writing. In the first place, it is now quite clear, after the Leishman decision of the Supreme Court last year, that certain kinds of motions that most interested them did delay the judgment. That is the motion for a new trial and the motion--

THE CHAIRMAN (Interposing): Doesn't delay it, but suspends the appeal time.

JUDGE CLARK: Yes.

THE CHAIRMAN: When it is a question of priority of judgments, as between a judgment in a state court and a judgment in a federal court running neck and neck to see who wins, the date of the entry of the judgment in the federal court does the business, and that is important. You can imagine the question in other cases. A motion for a new trial after judgment is entered prevents the time for appeal from running until the motion is decided and, if that judgment isn't finally vacated, it dates from the date of entry.

MR. DODGE: Do we provide in our rules that the time for appeal shall be delayed?

THE CHAIRMAN: Oh, no. That is the established rule in the decisions, and we can't regulate the right of appeal, anyway. We proceed under that theory.

JUDGE CLARK: We called attention specifically in the notes to the fact that under the motion for new trial, there might have been some doubt as to whether the motion to direct went with the new trial, but the Supreme Court definitely so held in the Leishman case last February.

I think that the insurance people were mostly interested in that end. They thought that the matter was still in doubt. But it seems to me the thing they most wanted was

not particularly the delay here, but they wanted to take care of the suspending of the appeal down there. That is all taken care of. I think it would be a little dangerous now to try to add something on top holding up the entry of judgment here.

MR. DODGE: I merely wanted to be sure that that had been considered.

JUDGE CLARK: That is what I wrote Mr. Benoy, and he didn't make any answer, not yet, at any rate. He may make it later.

DEAN MORGAN: The motion for new trial or amended findings merely suspends the running of the time, doesn't it?

THE CHAIRMAN: It knocks it out, and it has to start de novo. If it has partly run when you make your motion, the time that has run doesn't count. The judgment loses its finality.

DEAN MORGAN: That makes all the more important our provision for prompt motion.

THE CHAIRMAN: Surely, because if you don't enter the judgment promptly, and the losing party can suspend the entry by a motion for new trial, he can extend indefinitely. That is one advantage in this prompt entry business.

We are up to Rule 60, Relief from Judgment or Order. Is anybody dissatisfied with what we have done in subdivision (a). If certain clerical mistakes have been made, it is provided here that even after an appeal is taken, such mistakes

may be corrected in the district court, after notice of appeal is filed, before the record on appeal is filed with the appellate court. I guess that is all right.

In subdivision (b) we inserted the word "fraud" in the title of that subdivision. That is the clause, you remember, that is copied after the California statute, with six months' limitation. Isn't that the one?

JUDGE CLARK: That is the one, yes.

THE CHAIRMAN: Which allows the court, in the very court in which the judgment was rendered, to entertain a proceeding to set aside the judgment because it was taken by mistake, surprise, excusable neglect, and we should have said "fraud" in the original rule and didn't.

DEAN MORGAN: I wonder how we forgot or omitted that? I couldn't understand that.

THE CHAIRMAN: We followed the language of the statutes in some cases.

JUDGE DONWORTH: It is stirring up an old matter, but just to show that we haven't forgotten it, the case that I thought went wrong was the one where the district court vacated a judgment because no notice had been given of it and entered a new judgment in identical terms so that an appeal could be taken, and the appellate court of the District of Columbia ruled that the action of the district court in vacating the judgment and entering a new one was void because it wasn't, as

I understood it, within the strict letter of this section. I don't know that it can be helped, but I think we should have it in mind to see if it should be helped.

THE CHAIRMAN: Of course, it seems to me that it is not only not within the strict letter of this rule, but it isn't within the purpose or object of it at all in that case you speak of. It wasn't obtained by surprise, inadvertence, excusable neglect, fraud, or misrepresentation. The entry of the judgment was in the ordinary course. There wasn't any surprise about it. The point was that the other side didn't have notice of the fact that it had been entered, not that it was originally obtained by surprise, but that he was surprised because he wasn't informed that it had already been entered. I think that is plain enough within the terms of this rule.

I had some discussion with the Chief Justice about it. I said the federal statutes explicitly say the time for appeal shall run from the date of judgment, not from the date of notice. Our Committee has always felt that we ought not to be tampering with the statute that regulates the time for right of appeal. If we try to abrogate the statute and say the time for appeal shall run from the date of notice instead of from the date of entry, immediately we are laying a trap for lawyers if we are acting beyond our power. The Chief Justice wrote back in a letter as if he hadn't realized all that before and withdrew his suggestion about fixing up the

rule.

There is a question whether we ought to require more notice than a postal card.

JUDGE DONWORTH: I concur with what the Chairman has said in regard to appeal, but the only point I criticize is the action of the district court in saying the second judgment was void, whereas the trial court had a right, I thought, to vacate the judgment and enter a new one. However, I won't press the point. We have other important matters.

MR. HAMMOND: Didn't we strike out the word "his" to bring in that case?

JUDGE DONWORTH: Have we done that? Oh, yes. That is good.

THE CHAIRMAN: I say the judgment wasn't entered by mistake in that case, or by inadvertence or surprise or fraud, and that you can't make this rule apply. If you want to make a rule to say that a judgment that is not entered by mistake, inadvertence, surprise, neglect, or fraud may be vacated by a district judge because the other fellow hasn't been told that it has been entered and loses his right of appeal, what you are doing is to give to the district court power, by indirection, by a fiction or device that isn't justified, to extend the time for appeal. If we have a right to change the law as to the time for appeal, we ought to consider very seriously whether we ought to provide that the time commences

to run from the date the winning party serves on the other a formal notice of entry of judgment.

The Supreme Court itself is committed to the idea that you can't tamper with the time for appeal by rule. When it came to the criminal rules that they are authorized to make, they got a statute expressly allowing the Supreme Court by a rule to fix the time for appeal, and they have always, as I understand it, recognized the proposition that they can't tamper by rule with the time fixed by statute for the filing of appeal or petition for certiorari or anything of that kind.

JUDGE DONWORTH: The Chair insists on harking back to the matter of appeal. I concur in everything on that point, but at common law it was the custom that within a term of court every judgment entered could be changed. Until the term terminated, a judgment was presumed to be in the breast of the court. It is along that line, not at all about the appeal, that I am bothered. As I said, I won't delay the matter, however.

THE CHAIRMAN: Is that true, though, Judge, even though the term hasn't ended if the time for appeal has finished? Haven't we express provision in these rules that you can't tamper with a judgment after the time for appeal has ended? The question of the term expiring has nothing to do with it.

JUDGE DONWORTH: It is true we abolished the effect of the term.

DEAN MORGAN: Could he have brought an independent action to get that judgment set aside on the ground of mistake of the clerk?

THE CHAIRMAN: No; that wasn't anybody's mistake.

JUDGE CLARK: I should like you all to consider what we put here in the note. Will you look, Judge Donworth, at the last paragraph of the note? Read the first part if you wish, but it is the last paragraph I am calling to your attention.

JUDGE DONWORTH: The word "his" was eliminated. Oh, yes.

THE CHAIRMAN: I don't think you have helped the case that Judge Donworth has.

JUDGE CLARK: We may not have. I don't know that we have.

THE CHAIRMAN: That wasn't anybody's mistake.

JUDGE CLARK: Is that allright with "his" out and everything?

JUDGE DONWORTH: I withdraw my objection.

JUDGE CLARK: That case, of course, is before the Supreme Court now. Certiorari was granted, and they put it over and didn't hear it last spring. They are hearing it this fall.

THE CHAIRMAN: Let's let it ride, and maybe they will give us some light and tell us how to fix it up.

Are we down to Rule 65? What we have done there is to make the same provision for an injunction bond as we have in the case of supersedeas and other bonds, to wit: that the person giving the bond can be subjected to judgment in the original suit instead of having an independent suit.

JUDGE DOBIE: May I ask a question there. Judge Parker is very much interested in connection with bail bonds. As I understand it, that matter has been taken up in the criminal rules. Isn't that correct?

JUDGE CLARK: Yes, it has been. There is a provision. I can't say at the moment how extensive.

JUDGE DOBIE: That is all right. It has been taken care of there. Action on a bail bond is a civil action.

THE CHAIRMAN: If it is agreeable, we will pass on to Rule 66. That begins the third and last batch from the Reporter.

JUDGE DOBIE: What is the date of that?

THE CHAIRMAN: This batch was entered under date of June 17. At least, the letter from the Reporter to the members of the Advisory Committee, sending on this draft of Rules 66 and so on, was dated June 17.

We have stricken out the paragraph that all appeals in receivership proceedings are subject to these rules.

JUDGE CLARK: That goes down and is covered now by the last sentence.

THE CHAIRMAN: We also covered here the point that

a proceeding in which a receiver has been appointed shall not be dismissed by one of the parties without an order of the court.

Then we have settled the question of the capacity to sue. What is that? What did you do there?

"A receiver shall have the capacity to sue in any district court without the necessity for ancillary appointment; but actions against a receiver may not be commenced without leave of the court appointing him except when authorized by a statute of the United States."

JUDGE DONWORTH: There is a statute which says that when a receiver is operating property, he may be sued with respect to his acts in the operation, and so forth, without leave of court. It saves that clause.

THE CHAIRMAN: Are you satisfied? If so, we will pass on to rule--

MR. GAMBLE (Interposing): Mr. Chairman, before you pass to 68, I should like to inquire about the elimination of the clause in lines 1 and 2, "or by other similar officers". I have in mind particularly trustees appointed under Section 77 of the Bankruptcy Act. There are provisions of the Bankruptcy Act that give rights and impose duties similar to those of receivers on trustees. I wonder if we are wise in doing that in view of that law.

THE CHAIRMAN: Isn't there something about that in

the bankruptcy rules?

MR. GAMBLE: No. It is in the Act.

THE CHAIRMAN: Yes, I know. If it is a matter to be dealt with by rule, isn't it a matter of the bankruptcy rules rather than by civil action rules?

MR. GAMBLE: What I had in mind is that I don't think there is a bankruptcy rule that permits the party to sue a trustee in a proceeding under Section 77.

THE CHAIRMAN: The Reporter says the phrase "or by other similar officers" has been stricken as being inadvertent and of no significance.

MR. GAMBLE: I observed what the Reporter said, but I am questioning his statement.

THE CHAIRMAN: Yes. What about it?

JUDGE CLARK: Let me say first that as to the practice under 77(b), I should suppose that that was all covered by the Bankruptcy Act. Of course, as we all know, that is very extensive. We are fighting over details of that Act all the while in all the courts. We never think of looking to these rules for any power in that regard. We always look to the Act, and sometimes we fill in the Act, of course. I should suppose there wouldn't be any question that nothing we say here would affect the Bankruptcy Act or the procedure under it.

What do you say, Mr. Moore? Here is Mr. Collier's supporting decision right here; as Judge Hutchison said, "As

Collier so well said in his 14th Edition."

THE CHAIRMAN: It says here, "The practice in the administration of estates by receivers appointed by the court shall be in accordance with the practice heretofore followed". If we leave in "or by other similar officers" you say a receiver or trustee in bankruptcy proceedings is covered by the rule and by an order in a civil action which doesn't include bankruptcy cases and regulate the practice in a bankruptcy proceeding. If it isn't done by the bankruptcy statute itself, it must be done by the bankruptcy rules especially governing bankruptcy proceedings and the administration of bankruptcy estates, and not by these rules. That is the theory, isn't it?

JUDGE CLARK: Yes.

PROFESSOR CHERRY: May I ask, Mr. Gamble, in the first place you are referring to 77 and not 77(b).

MR. GAMBLE: Yes.

PROFESSOR CHERRY: In the second place, isn't your point really directed to line 10 rather than to the beginning, not the practice in the administration of estates, but actions against a receiver or other similar officers. Isn't that the situation you had in mind?

MR. GAMBLE: That is what I have in mind; and also the last clause beginning on line 12, "In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these

rules." I have in mind an institutional action against a trustee under 77 by a third party. That is a civil action.

JUDGE CLARK: May I just add this? This rule, as I understood it from the beginning, was directed to what we would call chancery receivers or equity receivers, which, of course, are actually less and less important nowadays in view of the wide provisions of the Bankruptcy Act.

I don't see that the question is changed if you refer to 77 rather than to 77(b). Section 77 is railroad reorganization, which is a bankruptcy measure. We always treat it as part of the bankruptcy measures.

I don't think we have any business here trying to deal with the administration of the Bankruptcy Act. If there are gaps in the bankruptcy administration which can and should be properly taken over from the civil rules into the bankruptcy rules, that is already covered by the kind of omnibus provision of the bankruptcy rules that in all other respects the civil rules shall be followed, or they shall be followed as nearly as may be. Therefore, it doesn't seem to me that it is proper, and I should think it might be very doubtful as to the effect. It would be confusing rather than otherwise for us to say anything here about any of the bankruptcy officials.

MR. GAMBLE: Mr. Reporter, let me make this observation. The rule as it now stands refers to "other similar officers". We are amending that rule to delete it. Will the

bench and bar be led to believe that we mean that these rules don't apply to a civil action brought against a trustee in bankruptcy under 77?

THE CHAIRMAN: We certainly do. If you are dealing with suits by or against receivers or trustees in bankruptcy in their capacity to sue, to sue them, and all that, you have to resort to the bankruptcy statute or the orders in bankruptcy.

MR. GAMBLE: There are provisions in the bankruptcy statute, Mr. Chairman, which refer expressly to rights and liabilities of the trustees as being the same as the rights and liabilities of receivers. The Act is not all-inclusive. It makes some provisions by reference.

THE CHAIRMAN: Listen to this. This is the thing I am trying to make the point about. "Rule 81. Applicability in General. (a) To What Proceedings Applicable. (1) These rules do not apply to proceedings in admiralty. They do not apply to proceedings in bankruptcy".

MR. GAMBLE: I am not talking about that.

THE CHAIRMAN: "--or proceedings in copyright" ..... "except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States."

That would mean bankruptcy rules or copyright rules. I don't quite see how any provision we make about suing receivers or not suing receivers has anything to do with the bankruptcy receiver, except in so far as the Supreme Court

by a bankruptcy rule imports our civil rules over into the bankruptcy practice, which they have done in some respects.

MR. GAMBLE: Let me see if I can make my point a little clearer. Assume there is a provision in Section 77 that the trustees are subject to suit the same as receivers by a third party, growing out of a transaction not particularly involved in the bankruptcy itself, not involved in the questions that ordinarily inhere in the administration of the estate by the bankruptcy court.

JUDGE DOBIE: A sort of plenary proceeding, as they call it?

MR. GAMBLE: No, a suit for damages. Suppose the trustee of a bankrupt railroad runs over somebody, and they bring a suit for damages in a federal court. What rules control that suit for damages?

You said in this rule before that "In all other respects the action" .... "which is brought by or against a receiver is governed by these rules."

If the Bankruptcy Act, based on the assumption I asked you to make because I don't have the language before me, does render a trustee subject to the liability of a receiver and he may be sued in a certain jurisdiction or he may be sued under the same circumstances, will we not confuse the bench and bar by the deletion of this language by not making this rule applicable, and what rule of procedure would apply?

THE CHAIRMAN: The deletion you complain of is in the top line, "or by other similar officers"?

MR. GAMBLE: Yes.

THE CHAIRMAN: That deletion is in a sentence which is confined to practice in the administration of estates.

MR. GAMBLE: No, no. I am not talking about matters that inhere in the administration of estates.

THE CHAIRMAN: That is what the sentence deals with where the deletion was made.

MR. GAMBLE: I know, but this is an amendment to Rule 66, and Rule 66 as it now stands does refer to "other similar officers". We have added this second provision, it is true, but I am afraid that it may be confusing. I only make the suggestion. I don't press the point.

SENATOR PEPPER: May I ask Mr. Gamble this question through you, Mr. Chairman? Would it or would it not clarify the situation if the final sentence in lines 12, 13, and 14, the sentence beginning, "In all other respects", were removed physically up into the position of the matter which it it is proposed to be deleted in line 5? Then you would have a clear statement that "The practice in the administration of estates by receivers appointed by the court shall be in accordance with the practice", and so forth. "In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these

rules."

MR. GAMBLE: I should like to say that I think that is inaccurate, because I don't think these rules govern the appointment of a trustee in bankruptcy, but I do think that some rules ought to govern the action against the trustee in bankruptcy by a third party, once he is appointed.

JUDGE CLARK: Let me say first that, so far as I can understand, the chief problem is not to make the lawyers be fooled by what we have done. It would be very easy to add something in a note and say that this doesn't apply to that situation. But I think that I am correct (here is the authority on bankruptcy behind me) that that is entirely regulated by the Bankruptcy Act, and if we tried to regulate it here, we would be running into difficulty.

As I understand the law, among other things, you can not sue a trustee in bankruptcy without going to a referee and getting permission. When you get permission, the suit normally is in a state court. As to whether you can get it in a--

MR. GAMBLE (Interposing): You are mistaken in that. I have suits that are brought almost every week against a trustee in bankruptcy of a railroad, and they don't have to get an order from anybody to do it.

SENATOR LOFTIN: As a trustee in bankruptcy of a railroad, I am sued every day.

DEAN MORGAN: Did anybody have to get permission to

sue you?

SENATOR LOFTIN: No.

JUDGE CLARK: I don't understand that, because I have substituted for Judge Hincks and I have signed orders permitting suits against the New Haven Railroad. Apparently he does it differently. I think you must have a general order, then, of the judge that permits it, because I know that Judge Hincks does it by separate order every time. The other day he went downtown on a little vacation, and I signed several orders. I must say I did it as a matter of course. I asked the clerk, "Shouldn't we have some hearing or something?"

He said, "No; the Judge signs it as a matter of course."

But there was a specific order in each case.

MR. GAMBLE: Mr. Chairman, may I make this suggestion? I don't want to take any more time on the subject. May we not ask the Reporter to give consideration to the subject?

JUDGE DONWORTH: I should like to ask Mr. Gamble this question. I sympathize with his goal here. It seems to me that leaving out in line 2 those bracketed words is correct because if it is the administration of estates by trustees in bankruptcy, that is governed by the bankruptcy rules.

Down below, in lines 12 to 14, "In all other respects the action in which the appointment of a receiver is sought", and so forth, "is governed by these rules." That is put in

because we have a special clause on receivers.

Without any reference here at all, isn't it obvious that an inter-party suit by or against a trustee in bankruptcy must be governed by these rules, without our saying so?

MR. GAMBLE: I would think so, unless we misled people by deleting this language.

THE CHAIRMAN: I am upset, because I had an idea if you were going to regulate the practice of suits by or against receivers in bankruptcy, it would be done by the Supreme Court under the statute making rules in bankruptcy proceedings, and that in a bankruptcy order or rule the Supreme Court might, instead of reiterating our practice in the bankruptcy order, say that the rules of federal civil practice shall apply in such-and-such suits against receivers in bankruptcy.

I am digging now into the orders because I think there is a bankruptcy rule or order, a general order in bankruptcy, that does import a good part of our civil practice rules and make them applicable to plenary actions brought by or against the receiver or trustee in bankruptcy.

JUDGE DONWORTH: Mr. Chairman, are you sure you are right in that?

THE CHAIRMAN: I am not sure at all. That is why I am looking.

JUDGE DONWORTH: Here are eighty-odd rules. When a suit is brought by or against a trustee in bankruptcy, where

are you going to find your practice except in these eighty-odd rules? So they do apply, simply because there is no exclusion.

THE CHAIRMAN: That is probably so. I am not quarreling with you, but I am just muddy about it in my own mind. That is all.

SENATOR PEPPER: May I ask the Reporter a question through you, Mr. Chairman?

THE CHAIRMAN: Yes.

SENATOR PEPPER: Assuming that we omit the matter in brackets in line 1, "or by other similar officers", am I right or wrong in thinking that the rule would be clearer if the proposed addition as we have it in lines 7 and subsequent lines were put at the beginning of the rule, because that is the statement of certain general propositions, much more general than the limited statement respecting the administration of estates?

If the rule began, "Any action wherein a receiver has been appointed", and so forth, running down to "authorized by a statute of the United States", and then you had the provision for practice in the administration of estates, and then after the provision for administration of estates and in lieu of the bracketed matter in line 5, were to insert the last sentence in the proposed addition, the sentence, "In all other respects", it seems to me you would have a coherent rule. It would then read:

"Any action wherein a receiver has been appointed shall not be dismissed except by order of the court. A receiver shall have the capacity to sue in any district court without the necessity for ancillary appointment; but actions against a receiver may not be commenced without leave of the court appointing him except when authorized by a statute of the United States.

"The practice in the administration of estates shall be as heretofore, but in all other respects the action shall be subject to these rules."

JUDGE CLARK: I should rather think that is a better arrangement. It seems to me so. Of course, that doesn't, I suppose, hit Mr. Gamble's point.

SENATOR PEPPER: No, it doesn't, but I understood Mr. Gamble just to say he hoped the Reporter would give consideration--

MR. GAMBLE (Interposing): Yes.

SENATOR PEPPER: --to the question that he raises as respects the proceedings in bankruptcy. Subject to that consideration, I am suggesting that this rule would be clarified if you began with the statement of the general, then descended to the statement of the particular, which is the administration, and ended up by saying that in other respects (that is, in other respects than this particular case of administration) the action is to be governed by these rules.

JUDGE CLARK: Yes. There is only one suggestion, which probably doesn't go very far to the contrary, but I bring it up. Of course, we are amending a rule. If we started over again, I think your order would clearly be better, but we are amending a rule. There is a question whether we should amend by building on it so that the lawyers can see where it is or whether we should rewrite it or rearrange it. I don't know that that is very important. I think from the standpoint of mere construction, your suggestion is a good one.

DEAN MORGAN: If you are going to amend it, Charles, don't you think it should be in the form you have just last suggested, that the last sentence should be lifted to the end of the first paragraph?

JUDGE CLARK: You mean if you don't follow Senator Pepper's suggestion. If you follow that, it is different.

DEAN MORGAN: That is what I mean, yes.

SENATOR PEPPER: That is part of my suggestion. My suggestion is that, under any circumstances, the sentence beginning "In all other respects" should be moved up into line 5 to take the place of the matter which is there to be deleted. Then it is a matter of separate consideration whether you will invert the order of the particular phrase of the old rule and and the general proposition to be amended. That is still a different question, and it may be, seeing that we are doing an amending job, that we should follow a different order from that

which we would if we were proceeding de novo.

JUDGE DOBIE: I have an added objection to that phrase. I don't like that "other similar officers". I think that is going to cause a good deal of trouble. What is a similar officer?

SENATOR PEPPER: That is to go out.

JUDGE DOBIE: I say I have that added objection to it, Senator.

JUDGE CLARK: We have these two suggestions. I would like to have Mr. Moore comment on Mr. Gamble's suggestion before we let it go, and then perhaps we can come back to this.

Will you comment on that?

PROFESSOR MOORE: I supposed this rule dealt solely and was aimed to deal solely with equity receivers.

THE CHAIRMAN: Yes; not with bankruptcy at all.

PROFESSOR MOORE: We never intended and don't now intend to deal with suits by or against bankruptcy receivers or trustees. If a bankruptcy trustee or receiver brings a suit or is sued in federal court, he would be just like any other litigant. At least, that action would be just like any other action--the complaint, pleading, and so on--but the rule would not affect him at all.

MR. GAMBLE: That is the way I would like to have it, but the thought occurred to me that, having made this reference to "other similar officers" and deleting it, if we say nothing

about it now we may cause confusion. That is the sole point that I am trying to make.

PROFESSOR MOORE: I think we ought to try to add some reference that this is dealing with a chancery receiver. Would that meet your point? Perhaps you don't like that word.

MR. GAMBLE: It doesn't quite meet my point because of the fact that we perhaps inadvertently employed this phrase in the rule in the first place.

JUDGE CLARK: How about expanding the first paragraph of our note?

MR. GAMBLE: I think that would be all right.

JUDGE CLARK: Say in the note that this rule does not deal with the entire question of bankruptcy officers, which is otherwise taken care of; perhaps something more than I have put, but I mean a warning of that kind.

PROFESSOR MOORE: Do you agree, Mr. Gamble, that this rule is to deal solely with equity receivers?

MR. GAMBLE: That it should deal solely with equity? In so far as the appointment and administration of the estate is concerned, of course. I don't think we have a right to interfere with that. But in so far as the control of a suit which by law is authorized to be brought in a federal court against a receiver or a trustee, I think these rules ought to be made to apply.

PROFESSOR MOORE: Don't you think they would? If the

rule is made clear that it deals only with chancery receivers, don't you think that any suit by or against a bankruptcy receiver or trustee in a federal court, a plenary suit, must necessarily be within the other rules?

MR. GAMBLE: I would say so, Mr. Moore, except for the fact that you employed this language. Now we are amending and saying nothing about it, which somebody, some judge, might say, "Well, you have dropped this rule out. It is applicable."

THE CHAIRMAN: I think I am not so far off the track as I seemed to be. Before these rules were adopted, the old equity rules, a bankruptcy order read this way when the equity rules were in effect: "In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the Act," (that would be a suit by a bankruptcy receiver or trustee in an equity case, plenary suit, to sue somebody to recover property or evenfor his rights) "the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be."

You see what they have done. They have assumed that that the equity rules of practice didn't apply to a suit by or against a trustee or receiver in bankruptcy unless the court by a bankruptcy order said so.

Then they say, "In proceedings at law," (this is before our rules were adopted) "instituted for the same purpose, the practice and procedure in cases at law" (for the

purpose of enforcing rights or remedies under the bankruptcy law) "shall be followed as nearly as may be." That is the ordinary procedure in civil actions, which was under the Conformity Act at that time.

"But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing."

Before our rules were adopted, the court proceeded on just the theory stated a while ago. The general rules of practice prescribed by a rule of the Supreme Court in equity or whatnot didn't apply in an action brought by a receiver or trustee in bankruptcy in a federal court unless a bankruptcy general order said so.

After our rules were adopted, this was issued in 1939: "In proceedings under the Act" (that is a little vague because you don't know whether that is the internal administration or an outside plenary suit) "the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. But the court may shorten the limitations of time prescribed so as to expedite hearings, and may otherwise modify the rules for the preparation or hearings of any particular proceedings."

I might add that I am uncertain about what they mean by "proceedings under the Act", but I notice, for instance, there are a lot of decisions here.

"This order providing that in proceedings in bankruptcy the Federal Rules of Civil Procedure shall, in so far as they are not inconsistent with Section 1 of this Title or with General Order No. 53, be followd as nearly as may be, refers only to proceedings other than proceedings in bankruptcy themselves, such as proceedings brought in federal court in aid of bankruptcy proceedings."

That is a district court case. I haven't followed the rest, but the district court there construed this general order to be limited to independent proceedings in the federal court brought by a trustee and receiver in bankruptcy to enforce rights or something of that kind.

That is the way I grasp it. It isn't very clear, but I still think that there is a very considerable prospect that you will find that no rule of practice about the rights or suits by or against receivers or trustees in a bankruptcy proceeding that is adopted by the Supreme Court under our Enabling Act under these rules would apply to such a proceeding by a trustee or receiver in bankruptcy in the federal courts unless by a bankruptcy order the federal practice rules were made to apply, or unless, by the old bankruptcy order, the equity rules, and the common law conformity practice, were

imported by a special bankruptcy order and made applicable to those plenary suits. At least I think it is a thing that ought to be looked into.

I have an idea that maybe our Rule 81 was a little vague where we said these rules do not apply to proceedings in bankruptcy "except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States." I think we are a little blind in using the phrase "proceedings in bankruptcy " Do we refer to internal administration of a bankruptcy estate or do we refer to what the judge called a plenary suit by a trustee or receiver against a third party to recover things, or a suit brought by a third party with the permission of the bankruptcy court against a trustee or receiver?

JUDGE CLARK: Under Rule 81 maybe we ought to make it the words which the Supreme Court has used, which are still ambiguous, but it would not be our ambiguity. Instead of saying "proceedings in bankruptcy," say "proceedings under the Bankruptcy Act."

THE CHAIRMAN: I wouldn't tamper with it now. I still think I am on the right track. I say that these civil rules aren't supposed to say that any rule we have shall apply in a bankruptcy proceeding or in a plenary suit by or against a trustee in bankruptcy. We have left it to the Supreme Court to make their order on that as an order in bankruptcy.

MR. GAMBLE: Perhaps you are right, Mr. Chairman.

THE CHAIRMAN: That confirms Mr. Moore's suggestion that we are talking about receivers in Rule 66, and proceedings, and so on, and are not talking about bankruptcy receivers at all. Are we?

PROFESSOR MOORE: I don't think so.

THE CHAIRMAN: That is where that rule is a little blind, because the word "receiver" is a pretty broad term. But I think that is the truth of it. I don't think 66 was ever intended to apply to any receiver in a bankruptcy proceeding but only to so-called equity receivers.

JUDGE DONWORTH: I should like to make a suggestion with regard to Professor Moore's comment. I agree entirely with the substance of what he said. I think in the case of a note or the wording of a rule that is inserted to cover the point, we should be careful not to say anything about equity or chancery receivers. We have abolished the distinction between law and equity, and it is a fact that courts do appoint receivers in law actions, for instance to take charge of property, and so on. So the language should be an exclusion of bankruptcy rather than confining our rules only to equity or chancery.

THE CHAIRMAN: It might be solved, if I am right. Of course, it ought to be checked. There is a good deal of confusion about this in my mind, and I haven't proved the case,

but I have suggested that maybe it is right. I should think the way to handle it, if it turns out to be as I said, would be to put a note under Rule 66 stating that this rule was never intended to cover receivers or officers in bankruptcy, that we have assumed, at least so far as these rules are made to apply in bankruptcy proceedings or in suits by bankruptcy officers, it will be done by the Supreme Court by a bankruptcy order, as the original order in bankruptcy did before our rules were adopted and as our Supreme Court has done now since these rules were adopted, and just let it go at that.

That would be a good deal better than stating in the rules that we are not dealing with the bankruptcy rules.

MR. GAMBLE: I agree to that. I don't care to press my point any further.

SENATOR PEPPER: Would it take too much time if I were to follow up a suggestion I made a while ago by just dictating for the convenience of the Reporter a summary of the rule as it seems to me it ought to be?

THE CHAIRMAN: We would be delighted to have it. That is what we are looking for.

SENATOR PEPPER: I make this suggestion for the consideration of the Reporter: that Rule 66 should read thus:

"No action wherein a receiver has been appointed shall be dismissed without order of the court. A receiver shall have the capacity to sue in any district court without

ancillary appointment, but actions against a receiver may not be begun without leave of the court, except when otherwise provided by statute. The practice in the administration of estates by receivers other than in bankruptcy shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district court. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules, except in the extent to which receivership proceedings are in bankruptcy, in which case these rules shall be applicable to the extent determined by orders in bankruptcy issued by the Supreme Court of the United States."

That is just an attempt to sum up what has been said here today. I think that would cover Mr. Gamble's point.

MR. GAMBLE: It will if the Court makes the order, and it probably will make the order, because you have to have some rules.

THE CHAIRMAN: I add only one little thing to this suggestion, and that is that this be a new rule promulgated by the Supreme Court. We want to look out that this new rule doesn't in whole or in part abrogate the general order in bankruptcy.

SENATOR PEPPER: What I intended to do was to make it in effect subject to that rule promulgated in 1939.

THE CHAIRMAN: Yes. You meant orders heretofore or hereafter made.

SENATOR PEPPER: Orders heretofore or hereafter made.

JUDGE CLARK: That is all right if we want to do it. I think, personally, I would rather not tamper that much with what is here. What are we going to do then with 81, which talks about bankruptcy? Are we going to let 81 stand as it is? You remember, 81 has a lot of material on bankruptcy, that it shall not apply unless the Supreme Court orders, and so on. I don't object to it if the Committee wishes it, of course.

THE CHAIRMAN: My suggestion was a bit different. I appreciate the danger of talking about bankruptcy receivers in the body of the rule. I deal with it by making no mention of bankruptcy here. We mention that in 81. Simply put a note to the rule stating that in so far as these rules have application to bankruptcy receivers, and so on, it is only by virtue not of this rule but of general order so-and-so in bankruptcy.

JUDGE CLARK: That is true.

MR. DODGE: It seems to me that is a better way to do it, rather than to refer to bankruptcy in this rule at all. Put in a note.

THE CHAIRMAN: Yes. We have attempted to exclude bankruptcy matters by 81, by a general, sweeping clause.

SENATOR PEPPER: With the permission of the Committee, I will let my suggestion stand, with the understanding that it

may be entirely ignored by the Reporter or that, if considered, it may be determined whether the reference to the bankruptcy proceeding shall be embodied in the rule or relegated to a note.

THE CHAIRMAN: That will be understood.

Do we have anything more on Rule 66? If not, we are up to Rule 68, aren't we?

JUDGE CLARK: On Rule 68 perhaps I ought to say this, out of excessive caution: The last sentence in particular caused quite a little discussion, and the transcript is a little in doubt. I don't know that I can say absolutely that this is what you voted. I think it is what was intended. I simply say that maybe you want to consider it anew. I can't say that we have correctly reflected what you wanted, although I think we have.

DEAN MORGAN: I understood it the other way, as you know, Charles. I thought the sense of the Committee was that if the defendant, for example, offered $10,000 and then it was rejected, then later, after certain negotiations or what-not, offered $12,000, and the verdict of the jury was $11,000, then the plaintiff got no costs; and if the verdict were $9000--no. How did I have that?

MR. DODGE: Less than 10.

DEAN MORGAN: Suppose he raises his offer the second time. Then of course he gets no costs from the time of the second offer. But suppose the verdict were less than the first

offer, then he should get no costs after the date of the first offer. That was my understanding. This sentence, of course, doesn't do that. This sentence says that if an offer is not accepted, it is dead for all purposes. I know that is what we discussed, and I had just the other impression.

JUDGE CLARK: I suggest, therefore, that perhaps you might well look at it afresh anyway. There was a good deal of discussion back and forth before, and there is the problem. Mr. Morgan's suggestion, you see, has in mind (perhaps I might put it this way) that each offer protects you as far as it goes.

DEAN MORGAN: Yes.

JUDGE DONWORTH: Does Dean Morgan have in mind that there might be two offers?

DEAN MORGAN: Yes, that is what it says.

JUDGE DONWORTH: I didn't think it was a practicable situation to have two offers.

DEAN MORGAN: That is what we have here. "The fact that an offer is made but not accepted does not preclude a subsequent offer".

JUDGE DONWORTH: But it is implied here, I think, and it says, "but a subsequent offer renders any prior unaccepted offer ineffective."

DEAN MORGAN: Yes.

JUDGE DONWORTH: That is what you object to?

DEAN MORGAN: I don't object to it. I just say that

that isn't what I understood we did last time. I thought, really, what we meant was that if an offer is not accepted, it shall be deemed withdrawn and evidence thereof is not admissible. The fact that an offer is made but not accepted does not preclude a subsequent offer. "If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the district court from the time of the offer but shall pay costs from that time."

THE CHAIRMAN: I think, myself, that line 15 nullifies the prior offer is questionable. Suppose I make an offer of $10,000 and it is refused. Then later on I get a little scared and I raise the offer to $15,000 and that is refused. Then the judgment is for $9000.

DEAN MORGAN: That is it.

THE CHAIRMAN: Under this rule, I wouldn't save the costs after my $10,000 offer was made, but only the costs after my later $15,000 offer was made.

DEAN MORGAN: That is exactly the point.

THE CHAIRMAN: I don't see anything in that. If I keep raising my offer, and they refuse all of them, the offer I made that is most favorable to me ought to govern.

DEAN MORGAN: I thought that was what our opinion was last time.

JUDGE CLARK: What would happen the opposite way, Eddie? Suppose you first offer $10,000, and then you come along

and offer $8000.

DEAN MORGAN: Yes.

THE CHAIRMAN: Then the verdict is what?

DEAN MORGAN: The verdict is $9000.

THE CHAIRMAN: The first one would be no good on its face because it was more than--no, I am wrong about that. You offered $10,000, then reduced it to $8000, and the verdict was $9000.

DEAN MORGAN: Then the defendant doesn't get any costs.

THE CHAIRMAN: After the date of the $10,000.

DEAN MORGAN: Yes.

PROFESSOR CHERRY: You had the wording there, Eddie, the first time.

DEAN MORGAN: I had the wording for it, but I didn't know what the Committee decided. "If the adverse party fails to obtain a judgment more favorable than one offered, he shall not recover costs in the district court from the time of the offer but shall pay costs from that time," from the time of that offer.

PROFESSOR CHERRY: Yes.

JUDGE CLARK: Do you want to comment (To Professor Moore)? I don't believe we have any feeling about it, just so we settle it here now.

JUDGE DONWORTH: Dean Morgan, in your phrasing you

have used the expression "one offer". Don't you mean "any offer"?

DEAN MORGAN: "than one offered".

JUDGE DONWORTH: Don't you mean "any offer"?

PROFESSOR CHERRY: He has "ed" on the end of "offer".

DEAN MORGAN: "fails to obtain a judgment more favorable than one offered, he shall not recover costs in the district court from the time of that offer."

JUDGE DONWORTH: I thought the use of the expression "one offer" seemed to interfere with there being two offers at the same time.

DEAN MORGAN: No, no.

JUDGE CLARK: Then strike out that in line 15 after the word "offer". Do you think that does it?

THE CHAIRMAN: Yes. That would be your start, anyway.

DEAN MORGAN: Lift "The fact that an offer is made but not accepted does not preclude a subsequent offer" to the end of line 10.

JUDGE CLARK: I should think that is all right. I don't see why that doesn't do it.

THE CHAIRMAN: There is a little quirk about 9 and 10. It says, "If the offer is not so accepted it shall be deemed withdrawn and evidence thereof is not admissible." What we mean is that the party to whom it is made can't put in evidence of it.

DEAN MORGAN: That is right.

THE CHAIRMAN: You can't prove that you have made it, and therefore you can't.

PROFESSOR CHERRY: That is a standard provision, isn't it?

JUDGE DONWORTH: It relates to evidence at the trial.

PROFESSOR CHERRY: That is merely at the trial.

THE CHAIRMAN: Why don't you say so? If you mean that it shall not be offered in evidence prejudicial to the party who made it, that is one thing; but if it shall be deemed withdrawn from evidence for any purpose, you can't put it in for the purpose of saving your costs.

JUDGE DOBIE: And the lawyer for the defendant couldn't refer to it, could he? He couldn't say, "Gentlemen of the Jury: Ten thousand dollars is utterly absurd here. Why, he offered to take six."

THE CHAIRMAN: No, he couldn't, but suppose he wants to prove it, after the judgment is rendered and the verdict is in, for the purpose of showing the offer, this says that evidence thereof is not admissible.

MR. DODGE: Insert the words "at the trial."

THE CHAIRMAN: All right.

DEAN MORGAN: Then it should be "subject to acceptance", I suppose, instead of "shall be withdrawn".

THE CHAIRMAN: That part of it is all right. I don't

know.

DEAN MORGAN: I don't know, either.

THE CHAIRMAN: What we are doing now is to give a party who makes an offer the benefit of it even though he has made higher offers later.

DEAN MORGAN: Yes.

THE CHAIRMAN: Yet you have taken away from the other fellow the right to change his mind and accept that offer.

DEAN MORGAN: That is right.

PROFESSOR MOORE: Of course, he can accept the higher offer.

THE CHAIRMAN: Oh, yes. But if he made a lower offer, as this thing reads he can't then accept the previous higher offer.

DEAN MORGAN: As Charlie says, I offer him 10 and then cut it down to 8.

THE CHAIRMAN: Who is going to get the benefit of that higher offer if it turns out the judgment is less? There is a quirk there that you have to look out for. Suppose we refer that to the Reporter. I don't know that we are getting anywhere trying to go into the details of the draft here. Let's decide what we want to do, the principle, and then the Reporter can make the draft. What is your purpose now? What do you want to do? First, you want to allow him to make more than one.

DEAN MORGAN: We determined that last time, I think. I suppose it is all right to allow him to make more than one offer.

MR. DODGE: You want to keep prior offers alive on the question of costs.

DEAN MORGAN: That is what I thought.

MR. DODGE: The last line should clearly be stricken out, I think.

DEAN MORGAN: Oh, yes. There is no doubt about that, but the question Mr. Mitchell had relates to: "If the offer is not so accepted it shall be deemed withdrawn and evidence thereof is not admissible at the trial." We add that last. The part that he is questioning is "it shall be deemed withdrawn".

MR. TOLMAN: Yes.

JUDGE CLARK: Couldn't that just be taken out?

DEAN MORGAN: Yes. Take that out.

JUDGE CLARK: Let it read: "If the offer is not so accepted, evidence thereof is not admissible at the trial."

DEAN MORGAN: That is right.

THE CHAIRMAN: If it is accepted, you don't have any trial. That is rather absurd.

JUDGE DONWORTH: I thought that "withdrawn" simply meant that it is not a standing offer.

DEAN MORGAN: That it couldn't be accepted thereafter

is what it means. That is the point that is now raised by the Reporter and by the Chairman, I believe, that you give the offerer an undue advantage there. Suppose that the offeree later is willing to accept. I offer him 10 first, and he doesn't take it. Then I offer him 8, and he comes back and says, "I will take the 10 now."

THE CHAIRMAN: You say he can't do it?

DEAN MORGAN: I say he can't.

THE CHAIRMAN: Still you, who made the offer of 10, get the benefit of that offer for all the costs subsequent to that change of heart.

DEAN MORGAN: That is right.

THE CHAIRMAN: I don't know how to work it out.

MR. GAMBLE: I suppose this matter was considered last summer, but it seems to me to be complicating the rule by providing for more than one offer.

THE CHAIRMAN: You mean that if a man at a certain stage of the case wants to make an offer, and he makes it and it is not accepted, then he is barred at any later stage in the case before trial from changing his mind and saying, "I will offer more," and being saved the costs from that date on? Would you say he ought not to be allowed to do that?

MR. GAMBLE: I think it does complicate it.

THE CHAIRMAN: It does, all right.

JUDGE DOBIE: It leads to bickering and negotiations

rather than a man's trying to make an offer that he thinks there is a pretty good chance of being accepted. Isn't one offer substantially enough? Do you think we really accomplish anything by putting in a second one?

JUDGE DONWORTH: It seems to me it is right to let him make a second offer. Dean Morgan's criticism was about the final dozen words there that the subsequent offer annuls the prior one. That is the debatable point. But I do think he should have a right to make a second offer.

THE CHAIRMAN: You might say he may make a second offer, but if he makes one he will get no benefit from having made an earlier one.

JUDGE DONWORTH: That is what this means, as written.

THE CHAIRMAN: It does.

JUDGE CLARK: That has the virtue of simplicity. It may be unfair once in a while; it may be unfair where he increases. Of course, I don't suppose it is going to make very much difference. It might if the case went up on appeal, I suppose, and then came back for new trial. That is the time when it would be important.

PROFESSOR CHERRY: That is the time that you would be likely to get another offer.

MR. TOLMAN: Dean Clark, did not this question arise in one of the Supreme Court cases, a patent case where an offer was made on the question of infringement. When that was

decided, an accounting was ordered and a new offer was made to pay a certain amount on accounting. I have a recollection that that very thing was done either in the Supreme Court or the circuit court of appeals.

THE CHAIRMAN: And they allowed it, gave the man the benefit of the second unaccepted offer?

MR. TOLMAN: In my recollection, they never got to the point of the effect of the second. They were dealing with the effect of the first and only with the right to make the second. That is my recollection of it. I haven't it very clearly in mind.

JUDGE CLARK: The point as to making an offer up until the time of accounting, and so on, is covered by the first sentence, and that has definitely arisen in a case or two.

JUDGE DOBIE: I can very well understand how a man would make a different offer in a patent case after the validity and infringement had been decided from what he would before. As a matter of fact, we had exactly that case. It was very bitterly fought, but after we decided that the patent was valid and was infringed, then the parties did get together very quickly. It wasn't one of these offers, but they never could have gotten together before.

JUDGE DONWORTH: Does Dean Morgan make a motion on this?

DEAN MORGAN: No. I hadn't any particular conviction

about it. I did think that last time we voted that, if the verdict was less or not more than any offer, there should be no cost from the time that offer was made. So my motion would have been only to make it in accordance with that. I didn't feel particularly strong one way or another about it.

THE CHAIRMAN: In other words, suppose a man makes three offers, starts in at $10,000 and goes up with each succeeding one. The principle you want is that, after the verdict is in, he can go back to the earliest offer that was as much as the verdict and use that as a basis for relieving him of costs.

DEAN MORGAN: That is right.

THE CHAIRMAN: That is the principle you want.

DEAN MORGAN: I am willing to settle that thing right then and there, and you can pay my costs since then.

JUDGE CLARK: Let me give you two forms of my words and see if one or the other of these may not carry out your idea. This would be in place of that material at the end of 15, after "offer". One form might be this: "A subsequent lower offer renders any prior unaccepted offer ineffective." Another way of stating it is just the opposite.

THE CHAIRMAN: That won't carry out his purpose at all.

JUDGE CLARK: It doesn't expressly state it. The other would be: "A subsequent higher offer does not render a prior unaccepted offer ineffective."

THE CHAIRMAN: But take the first instance. You say a subsequent lower offer renders the prior offer ineffective. Suppose the prior offer, though bigger than the second offer, was more than the amount of the ultimate judgment. You would prevent the man who made that offer from saving his costs from the date of that offer. You would say it was ineffective and that he saved his costs only from the date of the second offer. You are not carrying out Mr. Morgan's idea.

PROFESSOR CHERRY: I think Mr. Morgan's wording does what he intends.

THE CHAIRMAN: Should we bother now to try to draft this thing?

PROFESSOR CHERRY: No.

THE CHAIRMAN: I am trying to get out the objective and the result, and let the Reporter do that. He can do it, if he has the leisure and the time to concentrate on it.

DEAN MORGAN: You don't get costs from the time of the offer which equals or is greater than the verdict. That is really what you are saying.

THE CHAIRMAN: That is what you are trying to get at.

SENATOR PEPPER: I second a motion to that effect.

THE CHAIRMAN: I guess that covers our principle, doesn't it?

JUDGE CLARK: I should think so.

THE CHAIRMAN: Is there any objection to that? If

not, it is agreed to in principle, and the Reporter can work it out.

MR. TOLMAN: In another class of cases, these cases like the patent case and accounting or the receivership and accounting, I think the person should have the benefit of each offer. For that reason, I thought the words "shall be deemed withdrawn" ought not to be in the rule. In determining that question I should like the Reporter to consider those cases which present two different subject matters for litigation.

THE CHAIRMAN: Have you any cases, or would you like Major Tolman to give you the citations?

JUDGE CLARK: I think I have the cases.

MR. TOLMAN: He has them.

JUDGE CLARK: A couple of district court cases recently; one from the 7th Circuit, Cover v. Chicago Eye Shield Co., 136 F.2d. 374.

MR. HAMMOND: Certiorari has been granted on the Cover case.

JUDGE CLARK: It has been granted?

MR. HAMMOND: Yes. I have copies of the briefs here.

JUDGE CLARK: Oh, have you? Could we take them? That would be fine.

JUDGE DOBIE: Mr. Chairman, did we decide to insert the words "evidence thereof at the trial is not admissible"?

THE CHAIRMAN: I think so. The purpose of that was

merely to say that when a man made an offer, you couldn't flaunt it in his face before the jury.

JUDGE DOBIE: Yes.

THE CHAIRMAN: I made the point that, as it was worded, it might prevent your giving any evidence of the offer for the purpose of saving costs after the verdict was rendered.

PROFESSOR SUNDERLAND: You couldn't show in evidence that you said or didn't say anything. The general rule of evidence would exclude it. It is the same thing as an offer for settlement, which wouldn't be admissible, anyway.

THE CHAIRMAN: I don't think you need say anything about its being admissible in evidence, because as soon as you say that you have to draw a distinction between an offer in evidence to show you admitted your guilt and liability and an offer in evidence at some stage of the case for the purpose of showing that the costs ought to be taxed against him. You have to make that distinction. Otherwise, the rule would be ambiguous. Why is it necessary to say anything about offering in evidence?

PROFESSOR SUNDERLAND: I don't think it is necessary to say anything at all. I think the general rules of evidence apply.

DEAN MORGAN: As a general rule of evidence, it wouldn't be admissible ordinarily.

PROFESSOR CHERRY: But the rule has said it. If we

take it out now, won't we confuse?

THE CHAIRMAN: That is the trouble. Let's make it clear. It has been suggested that it shall not be offered in evidence at the trial.

JUDGE DONWORTH: Trial or hearing.

JUDGE DOBIE: Before a master, for example, for damages.

THE CHAIRMAN: You might say, "shall not be offered in evidence for any purpose other than the determination of liability for costs."

DEAN MORGAN: Yes, that would be it. That would be the way to fix it.

JUDGE DOBIE: We have adopted that last suggestion?

THE CHAIRMAN: We have put it up to the Reporter and told him what we want.

JUDGE DOBIE: And that would include the comment by the Chairman?

THE CHAIRMAN: Yes. Rule 73, subdivision (a). You remember, we gave the district court power to dismiss an appeal on stipulation or motion of the appellant, even after notice of appeal had been filed, provided the record hadn't been filed and docketed in the upper court, which is essential, we think.

PROFESSOR SUNDERLAND: I was wondering about the use of those terms, "filing and docketing". You can't docket

without filing, can you? Why not make "docketing" the turning point instead of saying "filing and docketing" each time?

THE CHAIRMAN: It ought to read here, "before the record on appeal has been filed and the appeal docketed." They really are different things. The fellow may file the record up above, and yet he may not pay his docket fees.

PROFESSOR SUNDERLAND: The filing always precedes the docketing. If you say "filing and docketing", it means the same thing, as far as time goes, as docketing.

THE CHAIRMAN: Why don't we say, "before the appeal has been docketed, as provided in Rule 75"?

JUDGE DOBIE: You file the record and docket the appeal. You want to get your verbs straight.

PROFESSOR SUNDERLAND: But you don't need to say anything about filing the record. It is docketing the appeal.

JUDGE DOBIE: I agree to that.

THE CHAIRMAN: Don't you think it would be all right if you simply said, "before notice of appeal has been filed but before the appeal has been docketed as provided in Rule 73(d) in the upper court, the district court". Wouldn't that do it?

JUDGE CLARK: I guess that is all right.

THE CHAIRMAN: The thing that vests the upper court with jurisdiction is the docketing of appeal, and not the filing of some papers.

JUDGE DOBIE: When they don't do that, of course,

the motion for dismissal of the appeal is always for failure to docket, not for failure to file.

THE CHAIRMAN: Yes.

JUDGE CLARK: That I think is clear. The word used before is "served". Here it is "filed". It isn't serving. There is a difference. You only file notice of appeal, and then the clerk sends out any notices.

THE CHAIRMAN: Yes, that is right.

DEAN MORGAN: We did away with serving.

MR. DODGE: There is one point I should like to raise at this time, although I am not sure that this is the proper rule. That is with reference to the suggestion made by Judge Frank in that dissenting opinion which Major Tolman had sent to us, and a similar point was also suggested to me by our senior district judge. That relates to a method of getting up occasionally an interlocutory matter before final judgment, and I want to call attention to that very valuable feature in our Massachusetts practice, which we have had for a great many years, to the great advantage of litigants.

It doesn't provide for an appeal to a higher court to exercise a discretion in favor of allowing an interlocutory appeal, but gives the trial judge the right, generally exercised with the consent of both parties, to report to the higher court an interlocutory matter, if it is one of vital importance which may stop further litigation and may make unnecessary a

long trial. If the trial judge believes that an interlocutory ruling is of such importance that it may settle the whole case, he may report that question and stay proceedings until the higher court has decided that.

That has proved a very valuable feature of our practice for a great many years. It hasn't caused any burdening of the higher court by a mass of reports of that sort.

Take an illustration. If there is a claim made by the defendant that the plaintiff obviously hasn't any cause of action, and the judge is very much in doubt about it, if it is left to him he will overrule the motion to dismiss and let the case go to trial, which may be long and which may prove to be utterly futile. He may say, "I overrule the demurrer or the motion to dismiss, but being of the opinion that this question ought to be determined before further proceedings, I stay proceedings and report the case."

That is a very valuable instrument in the interest of clients and the speeding of determination of litigation, and it often saves, as I said before, a long trial on the merits which comes to nothing.

Judge Frank suggested that a statute might be required, but he also suggested that this Committee should consider it. Congressman Sumners said he thought there was an important question involved which may fall within the power delegated to the court to regulate their procedure, but it may require a

statute. He was in doubt about it.

It seems to me that the method that we have in Massachusetts is very much better than burdening the appellate court, which knows nothing about the case, with the question of whether an interlocutory appeal should be allowed. In my view, much the best way is to commit it to the trial court, as we do, who knows all about the case and can determine right off that question of whether it ought to be sent up. Generally, he does it only with the consent of both parties, but he has the power to do it and sometimes does it, although one party objects.

JUDGE DONWORTH: My understanding is that the federal appellate courts, through a uniform force of decision, have always declined to review a matter that has not been passed upon by the trial court. Originally there had to be a final judgment. Then Congress provided that there could be interlocutory appeals in certain cases, but in all those cases there is a ruling and determination by the trial court.

MR. DODGE: There is under our practice.

JUDGE DONWORTH: Not as you stated it. You said the court reports the matter to the higher court.

MR. DODGE: He does after overruling the demurrer. He reports the question. That is one instance.

JUDGE DONWORTH: There would have to be an order to make the case appealable. There must be a ruling.

MR. DODGE: Yes.

THE CHAIRMAN: Judge Frank wrote me about it and sent me a copy of that opinion. I don't know whether I was right or not, but I wrote back to him and said that there would be a whole lot of merit in having discretion, the right to appeal on interlocutory order, provided the judges in their discretion, lower or upper court, thought it ought to be taken up on petition of certiorari. I suggested first that I didn't know whether, if the discretionary right to allow an appeal of an interlocutory order was given to the court, they might be swamped with petitions for leave to appeal, that I didn't know how much volume there might be. I also said that it was my impression that this matter of finding judgment in which a party has or has not a right of appeal is a matter of substantive right and, if it isn't that, it is certainly a matter of jurisdiction of the upper court. My own impression was that it wasn't a matter susceptible of change by rule of practice under this Enabling Statute.

If we have a right to say appeals may be taken on certain kinds of orders where the law doesn't now allow it, we have an equal right by these rules (the Supreme Court has) to take away all right of appeal that now exists. I, for one, don't believe that we ought to proceed on the theory that that right of appeal is a matter that can be determined by procedural rule. When the right exists, we can make a rule and prescribe

the form of getting the appeal up.

MR. DODGE: According to my suggestion, we are dealing only with the power of the district court, the practice in the district court. Incidentally it throws the case at the court of appeals, but it is primarily concerned with the district court, because I departed from Judge Frank's petition for certiorari or something of that sort.

THE CHAIRMAN: You would leave it to the lower court.

MR. DODGE: Leave it to the lower court. If you follow the idea of allowing a petition to the appellate court, you encourage counsel to do that all the time. If it is committed to the trial judge, he settles it once for all, and it is comparatively rarely done, but I suppose that there probably would be two or three cases in every volume of reports which came up that way. It is so advantageous and such a good method of expediting litigation that it seems to me well worth considering.

... Brief recess ...

THE CHAIRMAN: Mr. Dodge, do you want to present a resolution or anything for action about this matter of allowing interlocutory appeals from the district court?

MR. DODGE: Yes. I was just waiting for the Massachusetts statute, which in a few words defines the power.

JUDGE DOBIE: Mr. Chairman, I don't mean to choke off Brother Dodge at all, but I think it is quite a serious question

whether we ought to interfere in this matter at all; in other words, whether we ought to do a thing like that, even though, as Mr. Dodge says, we adopt the Massachusetts practice of putting up to the district judge the question of deciding in the first instance whether it ought to come up.

THE CHAIRMAN: I am firmly of the opinion that it ought not to be done by rule, and the only question in my mind is whether, we being a body dealing with federal practice, finding a situation that may not be within the powers of the Court under the statute, we ought to go outside of our strict functions and make a recommendation to the Judicial Conference and the Director or the Administrator of the Federal Courts, and so on, to consider this. That is, I think, all we can do. I should be opposed to our trying to make a rule on the subject, as I am convinced in my own mind it is a matter of enlarging the jurisdiction of the circuit court of appeals, and I don't think the Enabling Act allows that.

SENATOR PEPPER: I hope we may at least make the recommendation, because the principle involved is closely analogous to the separation in a patent case between the determination of the question of liability and the question of damages. As was pointed out today by somebody, after the question of the validity of a patent has been determined, it is a simple matter for the parties to agree on the damages.

Everything that can be said in favor of a declaratory

judgment can be said in favor of this procedure. The cases are manifold in the experience of all of us that the obstacle to settlement is not the question of damage if liability is determined, but the real issue is the existence or nonexistence of the pure question of liability. If we can recommend a proceeding to determine liability without having to spend the immense amount of time and money involved in determining damages, if there is liability, and then having finally determined that there was no liability, it seems to me that we are on the right track.

THE CHAIRMAN: Judge Dobie, how would you feel about the general proposition that we ought to favor the consideration of this thing and that we ought to call it to the attention of the Judicial Conference and the Administrator of the Courts?

JUDGE DOBIE: I wouldn't object to that at all. I don't mean to say that I am against it at all. As a matter of fact, I am in favor of it. Particularly I didn't want it thought that I was voting for it, being a federal judge, to make a lot of work for us, which it unquestionably will. I do believe that probably some such scheme as Mr. Dodge suggests would be preferable to just the open one of allowing appeals in all these judgments in the discretion of the circuit court of appeals, because I think that would result in just a flood of these petitions.

SENATOR PEPPER: I didn't mean to suggest an approval

of Judge Frank's recommendation, which would have exactly the effect that Judge Dobie specifies, but it seems to me that if the Massachusetts practice could be authorized, it wouldn't increase the work of the circuit court of appeals at all. The only difference would be that when the case finally came to the circuit court of appeals, it would come encumbered with all the factual matter which was irrelevant if there was no initial liability, and if the case went up first on the question of liability, it is doubtful whether the case would ever come back to the circuit court of appeals on a mere question of the amount of damage.

MR. DODGE: That is exactly the practice. That has been the result in Massachusetts. It is very seldom that a case reported in this way gets up to the highest court a second time.

I find that the whole thing is covered by a single sentence in Section 111 of Chapter 231 of the general laws: "If a justice of the Superior Court is of the opinion that an interlocutory finding or order made by him ought to be determined by the full court before any further proceedings in the trial court, he may report the case for that purpose and stay all further proceedings except such as are necessary to preserve the rights of the parties."

JUDGE DOBIE: "Court" means the Supreme Court?

MR. DODGE: That means the supreme judicial court.

That is one sentence in Section 111. If you feel that we are not entitled to call it a question of practice within our function, I should certainly like to have it in some way recommended to the proper authorities.

THE CHAIRMAN: How would it do if I were authorized to appoint a committee, you and anybody else of the Committee that you want, to draw up a brief report stating our feeling about the thing and how we think it ought to be done, if done, and to direct it to the Judicial Conference, to the Supreme Court itself, and to the Administrator of the United States Courts, with the suggestion that we feel that it is doubtful that it is wise to attempt to do it by a rule because there is doubt of the power to do it by rule, but that we think it certainly ought to be considered, that we approve of the idea as a matter of legislation; something of that kind.

MR. DODGE: I think that would be all right.

THE CHAIRMAN: Then that report of the subcommittee will come back to us. I am sure we are going to have to have another meeting before we finally dish up our draft here. We can have the material all before us then, and if anybody wants any changes in the report or disagrees with the conclusion, we can vote on it then, after we see the whole picture.

MR. DODGE: I move that the matter be handled in accordance with the Chairman's suggestion.

JUDGE DOBIE: I second the motion.

THE CHAIRMAN: All in favor say "aye"; opposed. Carried. I will appoint a committee--

JUDGE DOBIE (Interposing): In that connection, before you appoint anybody, let me interpose this question. Don't you think probably it would be better not to put Judge Clark and me on that committee? I don't know that you were going to do that, but somebody might say, "Here these boys are messing with something in which they are selfishly interested."

THE CHAIRMAN: That is a good idea.

JUDGE DOBIE: I do approve of it.

THE CHAIRMAN: It would get you in wrong with your fellow circuit judges if you agreed to that.

JUDGE DOBIE: I just made that suggestion.

THE CHAIRMAN: I think it is a good one. I will appoint Mr. Dodge. I should like Senator Pepper to go over your suggestions and agree with you on your report, if that is agreeable to you.

SENATOR PEPPER: By and with the consent of Mr. Dodge, it is all right with me.

MR. DODGE: I consent, but I am not quite clear what the committee is.

THE CHAIRMAN: You are chairman, and the Senator is a member of your committee.

MR. DODGE: Vice chairman.

THE CHAIRMAN: You are supposed to draw up a report telling the story and making your recommendation. Then you have to send it to him and give him a chance to disagree or agree with you. Your report then will be brought before this meeting. You can have it mimeographed and send it out by mail, and we can consider it the next time we get together.

MR. DODGE: All right.

THE CHAIRMAN: That will, I think, enable us to get to the law.

Now we are up to Rule 73(g).

JUDGE CLARK: I thought we had covered that.

THE CHAIRMAN: Yes. We are up to 75.

JUDGE CLARK: May I speak a little about that? A suggestion was made to add a provision that the appellee might docket the appeal. That is contained here in lines 8 to 16, and that, as I understand, is the way the Committee voted. I am not at all sure. My own feeling would be a little doubtful as to how really desirable it is. I will bring up two or three things.

In the first place, I don't suppose that practically it would happen very often. I can't imagine that an appellee would want to do it very often. It is a kind of cumbersome thing to put in here. There are various circuit court rules now. The circuit court rules generally provide for docketing to dismiss. Some of them do say that you can docket and call

for argument or dismiss, which is practically this. There is a little curious quirk there. My colleagues, against my own conclusions, held that where the appellant, even in a case that we had before us, even in argument, withdrew a point, we had no jurisdiction in the matter. They stuck to it pretty well, and the Supreme Court denied certiorari, although that wasn't very closely in point. I don't think the denial of certiorari would mean very much. I rather doubt that decision, but nevertheless, as I read it, there might even be a question of our jurisdiction.

THE CHAIRMAN: You mean where the appellant serves notice of appeal, and the respondent is the one who gets the transcript ready, files it and dockets it?

JUDGE CLARK: Yes. Of course, our case was a little different, but I wonder if the theory isn't the same. In our case the appellant was a kind of dumb egg, and I always thought he did it a little under the pressure of our distinguished senior judge. In the argument he admitted in a patent case that there was no infringement but asked us to go ahead and decide on the validity of the patent. I thought we still had authority to affirm the decision of the trial court, which was that the patent was invalid and, therefore, helped out the defendant. I thought it was a little unfortunate for us to back away and say that we wouldn't then consider it, but my colleagues held that we had no jurisdiction where the appellant

had made the question moot.

THE CHAIRMAN: How does that have any relation to this question?

DEAN MORGAN: I don't see it.

JUDGE CLARK: If the appellant doesn't question the point before him, how can the appellee do it?

THE CHAIRMAN: He is not questioning any point. The appellee gets the record up there in a hurry, files it there, and lays it in the lap of the appellant. He says, "Go on and raise your points, press your points, and get the case on for hearing." The appellant then has to file his brief and get his case ready for hearing. But the appellee doesn't press anything except to get the papers up there so that the case can be promptly heard.

DEAN MORGAN: It is quite all right with him to have it go off in his favor.

THE CHAIRMAN: Why, surely.

PROFESSOR SUNDERLAND: How can the appellee tell what is to go into the record? He doesn't know what points the appellant will make.

THE CHAIRMAN: I have that marked on the margin here. Under the present system, when the appellant wants to appeal he designates the record. If he doesn't designate the whole record, he has to file a statement of the points he is going to rely on, so that the respondent may decide what other parts of

the record are needed. Here we have the reverse procedure. It is the respondent who is making the first designation. Of course he doesn't have to file any statement of the points he proposes to raise, because that is inappropriate. Now we get back to the appellant, who makes the second designation, and it is too late for him to file his statement of points to help the other side because the other fellow has already made his designation.

I think that is just a chance that the respondent has got to take if he wants to expedite the appeal this way. He has to take his chances on designating all the parts of the record that he guesses he is going to need.

PROFESSOR SUNDERLAND: He really has to put up the whole record.

THE CHAIRMAN: Not necessarily at all.

PROFESSOR SUNDERLAND: I would say he has to put it all up.

THE CHAIRMAN: Not necessarily.

PROFESSOR SUNDERLAND: Because he doesn't know what part of the record the appellant eventually may rely upon to press his points. He has to have everything.

THE CHAIRMAN: He knows pretty well what the points are as a result of the trial in the district court.

JUDGE CLARK: I don't believe this will ever be used. That is a complicated thing.

THE CHAIRMAN: Why did the circuit courts have a rule? There is a rule in one circuit which I read (is it the District of Columbia) that gives this very right.

MR. HAMMOND: I have sent for it.

THE CHAIRMAN: You say it is never used. It won't be used except in cases where the appellant is taking an appeal from judgment against him and wants to delay.

JUDGE CLARK: The usual provision is to docket and dismiss.

THE CHAIRMAN: Oh, no.

JUDGE CLARK: That is all right.

THE CHAIRMAN: Docket and dismiss? How can you dismiss if the appellant is proceeding in accordance with the rules. The mere fact that he takes his full forty days to file his transcript doesn't give the other side any right to dismiss.

PROFESSOR SUNDERLAND: Would it give him any right to accelerate if he is taking the time that he is entitled to?

THE CHAIRMAN: Suppose it isn't necessary.

PROFESSOR SUNDERLAND: Then you get into an argument as to what is necessary and what isn't necessary and you get before the court in a wrangle.

THE CHAIRMAN: I noticed that there are rules to that effect in some of the circuits, and when you say it is never the rule, I have an old friend in the Black Tom case again.

There was an appeal from a summary judgment we got in the case. The other side appealed and then filed notice of appeal. Then they sat back and began to count the days, how long they could string along the matter of getting the record up. They had it figured out that they could carry this appeal along by that sort of dilatory practice about a year and a half or two years, and thereby we were losing several hundred thousand dollars of interest every three or four months. They were forcing us to make a settlement. So, instead of standing for that sort of thing, we told the clerk in that case that we needed the whole record. There was no rule about it, but we ordered the clerk to get up a transcript of the whole record on a motion for summary judgment. We filed the case and docketed it in the circuit court of appeals within a week.

Do you mean to say that the other side has any right to object to that? The record was there. The whole thing was there.

JUDGE DOBIE: They ought to have been very grateful to you for printing the record and saving them that expense.

THE CHAIRMAN: Sure, we paid it. We printed the record, paid the bills, and had the record up there within a week, and were stumped on their dilatory practice.

PROFESSOR SUNDERLAND: But you had to put up the whole record. If you had had less, they could have objected that you had to have other parts.

THE CHAIRMAN: That is what this rule provides for. The appellant can add to what the appellee designates anything that the appellant wants.

PROFESSOR SUNDERLAND: When it came to the point of designating, they would have the time to make designation.

THE CHAIRMAN: Ten days under this rule, just the same as it is for the respondent today. Our rule now says that if the appellant designates his record, the respondent shall have ten days to designate the part he wants; and under this proposed amendment, if the respondent makes the first designation, the appellant has ten days to designate his parts. He can get it extended if there is any trouble.

There isn't any doubt that some appeals are taken for purposes of delay, and the limits of time fixed are taken advantage of to the limit. It is another case where I have had practical experience, and I have known many cases in my practice over forty years where the other side took an appeal and tied up the execution of my judgment for months, sometimes lost me a term of court by taking the full rule time to take all the intermediate steps that affected it. This is a means of putting a stop to that.

There is no harm done, because if the appellant is being hustled too hard for his comfort, all he has to do is to say to the circuit court of appeals, "Gentlemen, I am being hustled along here. Under your rules I would have to file my

brief within thirty days, and since I am being hustled, I wish you would allow me sixty days to do it instead of thirty." It doesn't hurt him any. The fact that some circuit courts have rules allowing the appellee to expedite the appeal that way makes me think there is something in the idea.

PROFESSOR SUNDERLAND: Is the suggestion that the appellee, when he prepares that record, shall make designation for the appellant?

THE CHAIRMAN: For himself.

PROFESSOR SUNDERLAND: But his designation is only to meet what the appellant raises, and the appellant hasn't raised anything, so how can he designate even for himself?

THE CHAIRMAN: He knows perfectly well what the case is about. He can designate as little or as much as he likes. Then the appellant turns around and says, "If the part the respondent has designated doesn't raise all the questions I want to raise, I will add something to it." I will admit that the respondent is taking some chances, because under this kind of procedure he hasn't any final notice of what the other side is going to raise.

SENATOR PEPPER: The great thing, Mr. Chairman, is to get before the district court a suitable designation. This is merely the mechanical process for doing it. It doesn't make much difference who files the designation if the outcome of the matter is such a record on appeal as does justice to both

sides. I would make this suggestion to shorten the matter and bring the question to a vote: that the second as amended should read thus:

"Promptly after an appeal to a circuit court of appeals is taken, there shall be filed with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal. Either appellant or appellee may file such a designation. Within ten days thereafter any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included. If the appellee files the designation, the parties shall proceed under subdivision (b) of this rule as if the appellee were the appellant."

THE CHAIRMAN: That wouldn't quite fit, because under (b) if there was a partial record designated only by the appellant, the appellant has to file a statement of the points he is going to raise on appeal, and as you have literally worded it, you would be allowing the appellee to designate the questions that are going to be heard on the appeal.

SENATOR PEPPER: No. I have said within ten days after either party files the designation, which means that if the appellee does it, then within ten days any other party to the appeal may make his motion for supplementary matter. But when those ten days are up, the mere procedure to be followed is settled by subdivision (b), and it doesn't make any difference

there whether the moving party is appellant or appellee.

THE CHAIRMAN: I am afraid you will have doubt with a situation where the appellant is the one who first designates the record and designates only a part. That calls on him, under (b), to file a statement of the points which he expects to raise on the appeal.

DEAN MORGAN: Subdivision (b) doesn't do that, does it?

THE CHAIRMAN: Doesn't it?

SENATOR PEPPER: I don't think so.

DEAN MORGAN: That has to do only with the parts of the record.

THE CHAIRMAN: Well, (d) does it.

DEAN MORGAN: I know, but the only place where it would make any difference is in subdivision (b), as to who filed the record.

THE CHAIRMAN: I see. It may be that that covers it. I agree with the idea that the thing can be greatly shortened and improved.

SENATOR PEPPER: It does seem to me that it is a mistake to adopt the idea that it is really important which of the parties does the thing, because what you are after is to get a proper designation, and whichever one of them does it, there ought to be ten days for anybody else to make the amendments. When that has been done, then the procedure in (b)

becomes operative. I offer that just for the consideration of the Reporter.

JUDGE DOBIE: I don't know whether it throws any light on this rule or not in that connection, but I will say from my experience--and I should like to hear Judge Clark's--in forty-nine cases out of fifty they designate far, far too much. It is the rarest thing in the world that they ever designate too little. In a number of instances we have thrown the costs around the other way, and very frequently a very able lawyer, a very distinguished one, a very busy one, will say, "I left that to my clerk."

JUDGE CLARK: I think that is true, and I think probably it is worse with us, where we still have the no-printing rule, and it may be with you. It doesn't do much hurt if they designate too much with you, does it?

JUDGE DOBIE: No.

JUDGE CLARK: Of course, we have voted sometime since to adopt your rule, but we just haven't gotten around actually to putting it into effect.

THE CHAIRMAN: There is some question about the machinery of this proposal. One judges these things by his own practical experience, and if anybody tells me that quite often an appellant isn't deliberately, dilatorily trying to stay the execution of a judgment by dilatory proceedings on appeal, the statement doesn't correspond with my experience at all.

DEAN MORGAN: Nor with mine, either.

THE CHAIRMAN: Where a circuit court has recognized and has dignified that danger by a circuit court rule, it seems to me that probably other people think the way I do about it.

MR. HAMMOND: Do you want to see the rule of the Court of Appeals of the District of Columbia?

JUDGE CLARK: There is no question about it; there are several circuit court rules.

THE CHAIRMAN: "Should the appellant fail to file the record promptly, the appellee, in order to expedite appeal, may file with the clerk a complete record on appeal..... Appellee may at his option docket the case and file a copy of the record."

This thing isn't just a freak idea.

SENATOR PEPPER: No.

JUDGE CLARK: I think there is a 2nd Circuit rule. I think it can be done under the 2nd Circuit. I have never seen it done, but I think the rules provide for it.

THE CHAIRMAN: I was going to change the thing. You say, "Provided, however, that nothing herein shall prevent". Saying "nothing shall prevent" doesn't affirmatively grant. I struck that out in line 8 and suggested: "The appellee, to expedite disposition of the appeal," (that is explaining why he is allowed to do it) "may first serve and file a designation of the portions of the record", and so on,

"whereupon the appellant shall have the right within 10 days thereafter to serve and file a designation of the additional portions of the record". Then I change it and, instead of saying "the parties may", which looks like joint action, say, "either party may then proceed to perfect the appeal under this rule".

DEAN MORGAN: I don't like that expression, "perfect the appeal", because we haven't used it any place.

THE CHAIRMAN: That is the language that the Reporter used, and I didn't strike it out. It may be objectionable. That is the idea I have, to stick something like this in it, such as the circuits have done. It isn't necessary in those circuits where they have adopted such a rule, because they take care of it already, but a good many of them haven't. What is your rule in the 2nd Circuit?

JUDGE CLARK: Rule 15. I think you will probably find it.

THE CHAIRMAN: That is where the appellant fails to comply with this rule, any appellee may docket and file the record to prevent ..... and stand for argument or may have the action docketed and dismissed." That allows the appellee to act only when the other fellow is in default, but I am not dealing with that situation.

JUDGE DOBIE: Under this rule, right off the bat the appellee may say, "I want this stuff up there, and I am going to

get busy right away." I am heartily in favor of anything like that that expedites appeals. I think it is a good thing, and I don't think the appellant has any kick.

THE CHAIRMAN: Suppose we take a vote on whether we want to do it or not.

DEAN MORGAN: Yes.

THE CHAIRMAN: Then in the course of the next few weeks the Reporter and I will talk it over, and we will try to work this thing out agreeably to him, and it may simplify it.

SENATOR PEPPER: I move that there be such an amendment of subsection (a) as will result in an opportunity to the appellee to file a designation, the machinery to be worked out in the phraseology of the draft.

JUDGE DOBIE: I second the motion.

JUDGE CLARK: Of course, you have already voted that. I raised the question, but I don't suppose you really need the motion unless you want it. You did vote this before.

SENATOR PEPPER: Oh, we did? I didn't realize that.

DEAN MORGAN: We voted this, and this is a phrasing of it.

THE CHAIRMAN: But it is reopened.

DEAN MORGAN: The Reporter sent a note around questioning the advisability of it.

JUDGE CLARK: That is right.

SENATOR PEPPER: Then I withdraw my motion as surplus-

age, and the matter can stand on the suggestion of the Chairman.

THE CHAIRMAN: I will go over it with the Reporter and make a new draft.

DEAN MORGAN: I suggest that in doing that, you consider Senator Pepper's proposed phrasing, because I think it is very concise.

THE CHAIRMAN: Yes; the old story that if you make a real, fundamental change in a rule, instead of trying to patch up the old one, you had better throw it overboard and start afresh and get a clearer result.

DEAN MORGAN: That is right.

THE CHAIRMAN: Under subdivision (b), Mr. Reporter, there is a question about these copies, filing a stenographic transcript. The rule now provides for two copies of the reporter's transcript, and our intention was that one should be the copy which the clerk certified up, and the other copy was supposed to be handed out to the adversary, so he could look it over and see what he wanted to designate. After he got through with it, it would also be sent to the circuit court of appeals. So they would have one original certified copy and one typewritten copy which they could use for printing or whatnot.

We find that there is a good deal of confusion, and the clerks don't all correspond in it. Some of them think that two copies are necessary, and some don't. Some of them have

said that one of these copies has to be filed with the district court and kept there personally as part of their record, and they won't certify that up, making the party supply him a copy of it. We never intended that. We never intended that either of these copies should be permanent records in the district court. Their filing and reposing in the clerk's office was a temporary thing.

I think the members have seen all these letters, haven't they, about the practice?

JUDGE CLARK: I wrote résumés of them which I think covered it. I have the original letters, if you wish, but I sent out résumés.

DEAN MORGAN: Under date of June 4.

JUDGE CLARK: Is that the date? Fine.

THE CHAIRMAN: Your rule now cuts it down to one copy.

JUDGE CLARK: Except that we did put in the power to the circuit court to order another copy. You see, at the very end we have thrown out a sop to those clerks who thought it necessary.

THE CHAIRMAN: Why isn't that all right. You say one copy ordinarily, but if the rules of the circuit courts of appeals want two or three or four, then that number has to be furnished. Is that all right?

Oughtn't we to say, Charlie, as to this one copy that is filed, that the clerk has no right to grab it and keep it

permanently on file and require the appellant to pay a stenographer to copy it in order to produce a copy for certification? Why shouldn't we say here that this one copy that is filed shall be the one used by the clerk in certifying the record up? Why let him keep that document on file? It is practically useless for the future.

JUDGE CLARK: Of course that is the intent. Maybe we should say it expressly--I mean if we haven't.

THE CHAIRMAN: You haven't said it, and some of the clerks are doing that. They are just grabbing one of those copies for the permanent file of the district court, and they never certify the original copy up. They have been billing the appellant for another copy, or he has had to go out and buy another copy and give it to the clerk. I don't think that is right.

Suppose you put a clause in there that the copy filed should be the copy used by the clerk in certifying the record.

MR. HAMMOND: May I say something about this?

THE CHAIRMAN: Yes.

MR. HAMMOND: I have one or two things I want to bring up, and that reminds me of them.

One of the reasons for the extra copy, as you yourself pointed out, was for the use of the defendant. One of the reasons that you required the extra copy was, you said, as I recall it, that the appellee should have available to him a

copy so he wouldn't have to go around to the clerk's office, you see.

THE CHAIRMAN: That was the idea.

MR. HAMMOND: That was one idea. Now let me point out to you another practical consideration in connection with this, especially in the circuit courts of appeals where they have the no-printing of record rule. You are all familiar with that no-printing of record rule. On the printing proposition, the appellant designates. This is another designation. It is not the designation of what goes into the record, but it is an entirely different designation. It is a designation of what shall be printed. The typewritten transcript goes up. Those rules require that the appellant shall tell the appellee what parts he intends to have printed within a certain time after the typewritten transcript gets up there. Then the appellee designates what parts he wants printed.

The practical problem is this: If the one record in the case goes up to the circuit court of appeals, there is nothing left in the district court. The lawyer for the appellee has to go to the circuit court of appeals, wherever that may be, take the typewritten transcript there, examine it there, and determine what he wants to print. I say that is a bad thing, a great inconvenience, and it ought not to be done. We ought to have the two copies, to avoid that.

But it seems to me there is another angle to the

thing, and it is something that we haven't got statistics on. I understand that where a party orders the testimony to be written up by a reporter in the district court, it is almost the universal practice for the reporter to file a copy with the clerk or give it to the judge.

DEAN MORGAN: You mean as part of the job.

MR. HAMMOND: I don't know. They are not required to do it, but it has been the practice.

THE CHAIRMAN: So you really have one copy in the clerk's hand before you start this thing. That is your point.

MR. HAMMOND: That is my point. If we are sure that that is one, then I say, have the one copy and it will take care of the situation which I spoke of, about not having to go to the circuit court of appeals.

THE CHAIRMAN: In any case, you see, your argument has the thought that one of these copies ought to be dished out to the other side.

DEAN MORGAN: You say right here, "One of the copies .... shall be .... for the use of the other parties", and "The copy shall be for the use of the parties" is left in this rule as it is now.

THE CHAIRMAN: You have to have two copies, then. One is to be certified up, and the other is to be given to the other side. The clerks haven't been agreeing to that. They say, "It is on file with me. If it is for the use of the other

party, the other party has to come up to the court and get an order allowing him to remove it from the files. If he doesn't get an order, I won't let him take it." That seems sort of ridiculous.

JUDGE CLARK: There is something of a difference, of course, where you have the no-printing rule and where you don't have it. Where you have the printing rule I don't believe there is any reason, really, for the copy except so that the district court can claim its file isn't complete, which is an unnecessary thing. Just see the way it operates in our court at the present time. You have all these printed books which are freely available to the other side by the time he needs to file his briefs. Under our rule, the printed book (that is, the record) is filed by the appellant with his brief at the time the case is docketed with us, and the answering brief is made with that printed book. It is really too bad there to have two copies made up and the expense of it.

DEAN MORGAN: This means, then, that the typewritten copy doesn't go up until after the parts have been designated, both for the record and for the printing.

JUDGE CLARK: It is a curious and interesting thing that in our court the typewritten copy never goes up. What actually goes up is only the book.

THE CHAIRMAN: As a matter of fact, if the record is printed, the clerk has certified the printed record.

JUDGE CLARK: In the book.

DEAN MORGAN: That is it. He does that.

THE CHAIRMAN: Is there a rule that requires it to be printed before it is certified?

JUDGE CLARK: I guess so. I guess we have a rule. I can't even be sure. I know that is the way it is invariably done. The district court clerk signs the printed record, and I suppose we must have a rule on it. I really don't know. It works very efficiently where you have the printing, but you have to have the printing there. Really, I don't know how many records they print, but that means that there are something like forty copies of everything that is needed.

THE CHAIRMAN: Under your rules do you automatically print everything that is designated to be sent up?

JUDGE CLARK: Yes.

THE CHAIRMAN: I see.

JUDGE CLARK: Except as they come to us and ask us for leave not to print, and actually, since we are tending toward this 4th Circuit rule, we almost always grant any request now not to print. But except as they get special permission from us, they have to print everything that is designated.

THE CHAIRMAN: The result is that in your Circuit, whenever a man designates a part of the record on appeal, he is at the same time designating what he wishes printed.

JUDGE CLARK: Yes.

THE CHAIRMAN: So there is no subsequent action.

JUDGE CLARK: That is what happens, actually. You see how useless an extra copy is there. Nobody ever uses it, I am quite sure.

THE CHAIRMAN: Suppose the respondent wants to designate additional parts of the record before printing?

JUDGE CLARK: He has to look at that.

THE CHAIRMAN: What does he look at?

JUDGE CLARK: I presume he goes to the clerk's office and looks at it.

THE CHAIRMAN: I see.

JUDGE CLARK: Or he may have sufficient notes so that he doesn't need to look specifically. But if he wants to look at it, he can go to the clerk's office and look.

Let me add a couple more things. First as to Mr. Hammond's suggestion that there probably is an extra copy anyway, I suppose that may be so, but I should suppose that the usual way or the natural way it happens is that the district judge at the time of the hearing asks for an extra copy. Very often, the parties get out the record then and there. I know Judge Hincks has a rule that whenever the parties ask for a transcript of the hearings, he wants a copy, and they furnish it to him. Then, of course, when he is through he files it with the clerk. But that is not an automatic thing, and it is not done by the clerk. It is really done through the judge, and it

goes back to the fact that the parties at the hearing, at the trial, order copies as they go along in order to write a brief in the trial court. That is all right. That is a matter of agreement. But I don't believe it quite covers the whole situation.

On the matter of where there is non-printing, there is of course a more serious question. It might be a little more difficult to require somebody in South Carolina to go up to Richmond and look up the file. That is why we put in the rule that the circuit court can cover that. So far as the Southern District of New York is concerned, of course, it would be just as easy for the lawyers to go up to the circuit court clerk's office as to the district court clerk's office--and I think they probably would get better treatment. But that is just because of the differences in distances. I quite agree that in the 4th Circuit the copy might be more easily made available for the parties in the district court clerk's office than in the circuit court clerk's office, but that is covered by the last lines here.

DEAN MORGAN: What did Claude Dean say about that from the 4th Circuit? I thought he said he didn't want the extra copy, or something of the sort.

MR. HAMMOND: He said you ought to take it up with the district court clerks. I think he is right, that those are the people you ought to circularize to find out the one

point as to whether always, when the testimony is ordered written up, the court reporter files a copy either with the judge or with the clerk.

MR. GAMBLE: That is not true always, as I recall it.

THE CHAIRMAN: Of course, that is a separate thing. Of course, if you want to provide here that your requirement of filing copies, whatever it is, should be diminished to the extent that there is already a copy in the hands of the clerk, you can do that. The first thing is to decide how many copies have to be there, and then you can add another rule that, if the parties have already got copies, the ones in the clerk's office, that shall reduce the number required to be filed. That is another matter. Let's settle the question of how many copies there ought to be. I am in great confusion about that. I don't see much help we get from these clerks.

DEAN MORGAN: I don't, either.

THE CHAIRMAN: I am set on one thing. I don't see any reason that any copy filed there should be kept permanently in the records of the clerk's office. The parties are obliged to duplicate it for certification.

PROFESSOR SUNDERLAND: Mr. Chairman, wouldn't Mr. Hammond's point be taken care of if the district clerk merely held that transcript, without sending it up, until the parties had decided what they wanted to print, instead of sending it up there where no one makes any use of it? Just hold it until the

parties have decided what they want to print, and send the record up after that decision has been made.

THE CHAIRMAN: The trouble is that the decision is made in the circuit court of appeals and filed there, and you haven't any record up there to make your decision on. You get into conflict or difficulty with the circuit court rules. You have to have the record up there before you designate the printing up there.

PROFESSOR SUNDERLAND: I don't see why you have to do that. You have it on file there with the district court, and he hasn't sent it up yet physically. You can designate your portions for printing while the thing is still in the district court office.

MR. HAMMOND: It is entirely a circuit court of appeals matter under the rules of the circuit court of appeals.

PROFESSOR SUNDERLAND: But the physical presence of the transcript in the district office doesn't interfere at all, does it?

JUDGE DONWORTH: The clerk of the 9th Circuit says: "It is the general practice of the clerks of the district court in this circuit to send the original reporter's transcript, properly certified, for use upon the appeal, thus avoiding the recopying of the reporter's transcript and the cost involved."

He is opposed to any requirement of copies and says it is just the throwing away of money. I don't know how general

this practice is, but he says when there is a reporter's transcript, it is filed in the court and is sent up.

THE CHAIRMAN: He agrees with my view that that record ought not to be permanently captured by the district court clerk, compelling the parties to pay for having it copied. He agrees with that, but I am wondering how sound the judgment of a clerk of a circuit court of appeals may be as to whether down in the district court it isn't right that the adversary respondent be supplied with a copy. The clerk up above doesn't see what is going on down there. The whole theory of this second copy was that it enabled the respondent to have a copy to work with and select his part for the record without going and sitting in the clerk's office and looking at the file copy. If the reporter does not make a carbon copy, it is certainly a very serious expense to have a new copy made de novo of the reporter's transcript.

DEAN MORGAN: Three times as much.

THE CHAIRMAN: That is true. Your idea is that a man may have a copy already and then decide to appeal, which would make it necessary for him to have another one made.

JUDGE DONWORTH: Yes.

THE CHAIRMAN: I don't know what the answer is.

MR. DODGE: Where is the printing ordinarily done, in the district court or the circuit court of appeals?

THE CHAIRMAN: In the 2nd Circuit they have a habit

of having it done down below. The district judges and clerks used to hang on to the printing. We made it clear in these rules that the control over the printing is in the circuit court of appeals, and not in the district court. If the circuit courts want the printing to be done under the supervision of their clerk, they have a right to do it. I don't know how it happens that it is printed below in the 2nd Circuit except through the inertia they may have stuck to their own practice of allowing the district clerks to handle the printing. Is that it?

JUDGE CLARK: As I understand it, the parties really do it. The parties take it to a printer, and they get the stuff from the clerk.

THE CHAIRMAN: I see.

JUDGE CLARK: Then they bring it back, and the clerk certifies it. As long as it complies with the rule as to general size, format, and so on, our clerk receives it.

MR. HAMMOND: Your court just permits them to do it the old way, you see. That is about what it amounts to. The parties do do it, as I understand, in the district court.

THE CHAIRMAN: The clerk of the circuit court of appeals doesn't exercise his prerogative and step in and say, "I want to control this printing and select the printer and all that."

JUDGE CLARK: We found a few years ago that the clerk

of the circuit court of appeals was doing a lot of work. I used to go to him to correct the proof, and he used to charge a fee for it. That was the old clerk. We stopped that and said he couldn't charge a fee for it. So I don't think they go to him any more for correcting the print.

MR. HAMMOND: In answer to your question, Mr. Dodge, (you were asking about how many courts had the printing done below and how many had it done above) the no-printing of record rule is now in force in the 3rd, 4th, and 8th Circuits and in the Court of Appeals for the District of Columbia. I understand there is some movement to adopt it in the 2nd Circuit. They have it under advisement.

JUDGE CLARK: There is a kind of limited proceeding in the 1st Circuit.

MR. HAMMOND: Yes. In the 1st Circuit, by an order of the court. I had a case up there in which that was done. He got an order of the court not to print the entire record but to print the parts wanted in an appendix to the brief.

MR. DODGE: Did he get an order of the circuit court of appeals?

MR. HAMMOND: Yes.

MR. DODGE: I had never known of that being done. I think the printing there is all done in the district court, isn't it?

MR. HAMMOND: No, sir.

THE CHAIRMAN: To bring this to a head, I would suggest this as a matter of principle, not of detail of draftsmanship: About these copies, first we should say that one copy is all that has to be filed. Second, we should make it clear that that copy need not be filed if there is already one on file, that it isn't an additional copy. Often, you know, they procure copies during the course of the trial, and one of them gets into the hands of the clerk or the judge. If there is one there already, even that one doesn't have to be filed. Then we should provide that the one copy which is filed is to be used for certification and not for permanent record in the district clerk's office, to avoid this idea that the clerk can hold on to that and then force people to supply and pay for a new typewritten copy.

The result would be that the apellee will have to rely on a single copy, unless he has already been provided with an extra, and that copy that he is going to resort to is going to be on file with the clerk. If he wants to look at it, he has to go up there and sit in the clerk's office and do it, unless he gets an order from the judge to let him borrow it. That won't work well in some districts, but on the whole that is the general consensus among the clerks.

I would provide,also, that where the rules of the circuit court require more copies to be filed and sent up, that rule is to be obeyed. If the circuit courts want, say,

three typewritten copies sent up and made available to them, they have a right so to require.

That would be my general idea.

JUDGE DONWORTH: I move that the course just outlined by the Chairman be made the judgment of the Committee.

MR. HAMMOND: Before you take a vote on it, I just want to call your attention again to one fact, in order to take care of it, not that it makes any difference to me. It won't take care of that one situation where you have the no-printing rule in the circuit court of appeals and the lawyer for the apellee will have to go wherever the circuit court of appeals is to decide what parts he wants printed.

DEAN MORGAN: Don't they always have more than one copy?

MR. HAMMOND: No, they don't always have in the circuit courts of appeals.

THE CHAIRMAN: Of course, he can settle that question before the record goes up, if he is diligent. There is a typewritten copy down below that has been certified, and before it is certified and sent up, he can go to the district clerk's office and look through and make a list of the pages that he wants to be sure to have printed. Then when it goes up, he doesn't have to chase it up.

MR. HAMMOND: The trouble with that is that he doesn't know what the appellant is going to designate until afterwards.

THE CHAIRMAN: That is all right. He designates what he wants. It is on his list, and he checks that against what the appellant finally designates. He finds what is covered and supplies the difference.

MR. HAMMOND: It can be done. That was Professor Sunderland's suggestion.

THE CHAIRMAN: The other solution of it, if a man finally lets the typewritten record get away from him and up to the circuit court before he has finally decided what he wants printed, is to get a typewritten copy instead of traveling to the circuit clerk's office. They usually have them, you know.

MR. HAMMOND: I just wanted to call that to your attention. Now, the motion.

THE CHAIRMAN: The trouble is, if you required two copies, the majority of the clerks don't think they are necessary. They are desirable in some instances such as you speak of. Let's try it that way and issue the rule that way, and see what the lawyers and the district clerks have to say about it. I am not sure we have combed the district clerks enough. We have relied on the circuit clerks, who don't see the milling that is going on down below.

SENATOR PEPPER: May I inquire--it is all quite obscure to me. I am trying to think of some good reason that we should attempt to unify practice on a subject which isn't of

any general interest but is controlled so largely by local custom. Why isn't this matter of the number of copies a thing for the district court rules to settle rather than for the federal rules of procedure?

THE CHAIRMAN: Your idea makes me think of this suggestion: Speaking about these copies, we shall lay down the general rule and say, "Except as otherwise provided by the local rule of the district court."

SENATOR PEPPER: That is all right.

THE CHAIRMAN: We would have a standard rule of minimum requirements.

DEAN MORGAN: That is exactly right.

THE CHAIRMAN: Then the district judge can make a local rule saying they will have two copies or three copies. Why isn't that agreeable?

DEAN MORGAN: I think that is the best idea.

SENATOR PEPPER: I think that is the proper way to do it. Where questions of distances and all that are not involved, one rule is convenient; but where questions of distance and inaccessibility are involved, it is otherwise. In some cases the printing is done, as in the Eastern District of Pennsylvania, as a prerequisite of the district court. In other cases it is done by the clerk of the circuit court of appeals, and so on. Those things are all variations that have a reason behind them.

I think the suggestion that we make a standard rule

of minimum requirements is all right, but recognition that departures from this rule in conformity with local convenience can be made by the rules of the district courts should be added.

THE CHAIRMAN: Then, my statement of the general minimum requirements, plus this suggestion that there be a clause that with respect to the number of copies to be furnished, a local district rule may be made to cover the ground.

JUDGE CLARK: The provision we have here is that the rule be made by the local circuit court. You said district court. Isn't it the circuit court that would make the rule for the whole circuit?

THE CHAIRMAN: No. I would leave in your proviso that our minimum requirement may be fixed by the circuit court. We have fixed a minimum requirement of one copy. The circuit court of appeals may fix a minimum of three. The district rule may go beyond that minimum, either our minimum or the circuit court's minimum, and make it four. The district court rule may require additional copies if the circuit court rule hasn't already done it. I think both the courts ought to be allowed to dip in. A circuit court, if it is hearing cases on typewritten records, wants at least three, doesn't it? Judge Dobie?

JUDGE DOBIE: No. We have a full transcript of records always on the bench when it is heard, and the judges have only the part of it that is designated, which is printed

in the appendix.

THE CHAIRMAN: You hear cases with no printing at all, just on typewritten record?

JUDGE DOBIE: We do permit that. I hope we still do it, although it is an infernal nuisance where you have three or four copies. They are sometimes very illegible, but we permit it. We haven't as much money in our part of the country as we have had, as is the case with a good many others.

JUDGE DONWORTH: Wouldn't you provide that the district court rules to which you refer may be superseded or supplemented by the circuit court of appeals rule, so that the circuit court of appeals really will be the dominating authority?

THE CHAIRMAN: That is all right. I don't think it makes much difference which way you go at it. My idea was that we are establishing a minimum. The circuit court of appeals might increase that minimum. But whatever the minimum was, whether it was what we fixed or whether it was what the circuit court of appeals fixed, if they fixed any, the district court by rule could add to it.

PROFESSOR SUNDERLAND: The district court has no inherent interest in it at all. It is just a way station to the circuit court of appeals.

THE CHAIRMAN: They have an interest in serving the convenience of the lawyers in their court in trying to get up

the transcript, if the lawyers say, "Here, I don't know whether I have to trot up to your office and look at this transcript on file. I ought to have a copy that I can use at my desk."

SENATOR PEPPER: Isn't the principle this? We are making rules for district courts, not circuit courts of appeals. We provide a standard rule for district courts, with a proviso that it shall be competent for a district court to make modifications in the local practice in regard to copies not inconsistent with the rules of the circuit court of appeals.

DEAN MORGAN: Yes.

THE CHAIRMAN: That is another way of stating it. I think we have the principle. Is that agreed to?

SENATOR PEPPER: Mr. Chairman, may I ask a question of personal privilege? The Committee will probably be glad to know that I have to go home this evening; that is, I have to go to New York. Would it be possible after the luncheon hour to take up the Condemnation Rule before taking up the next rules subsequent to the one we have been discussing? I should very much like to hear the discussion on that subject, and you have to do it some time. Possibly you won't find it inconvenient to do it after the lunch hour.

THE CHAIRMAN: Is there any objection to taking it up right after lunch? If there is no objection, it is agreed to.

JUDGE DOBIE: I think it ought to be done. I don't think there is any objection to taking it out of order. I think it is probably more important than the formal rules at the end, and we should like very much to have Senator Pepper here for that discussion.

THE CHAIRMAN: I think it is a good plan, not only unobjectionable, but desirable.

SENATOR PEPPER: Thank you, sir.

JUDGE DOBIE: Senator Loftin has to leave, too, and he says he should like very much to take part in the Condemnation Rule discussion.

MR. DODGE: I have to go, also.

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