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ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

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TABLE OF CONTENTS

MONDAY AFTERNOON SESSION (CONTINUED)

April 3, 1944

THE ACTING CHAIRMAN: Shall we proceed? I take it we are up to Rule 13. Is that correct? Has anyone any advice to offer on Rule 13?

PROFESSOR SUNDERLAND: It is all right.

THE ACTING CHAIRMAN: This change was particularly to meet the objection made by Justice Rutledge for the Court in the case cited in the note. The word "a" was left out in the first line, and that was sent to you in a correction sheet. "A pleading shall state as a counter-claim ...."

DEAN MORGAN: It is O.K., it seems to me. I move the adoption.

MR. DODGE: Second.

SENATOR LOFTIN: Second.

THE ACTING CHAIRMAN: It is moved that we adopt Rule 12, which I take it means both (a) and (1).

JUDGE DOBIE: With the "a".

THE ACTING CHAIRMAN: All those in favor will say "aye"; those opposed. It is so voted. (Carried)

DEAN MORGAN: Have we gone by anything of Tolman's? I don't know.

MR. DODGE: No.

DEAN MORGAN: The next comes under 15.

THE ACTING CHAIRMAN: I suppose you must have noticed

what we say on page 19, that we made a small change. I take it that is voted and approved.

DEAN MORGAN: Oh, yes. I think that was clear.

THE ACTING CHAIRMAN: Rule 14 is another old favorite, and I guess I shall just have to ask you to look it over and see what you think.

MR. LEMANN: In line 10, the third-party defendant may assert against the plaintiff any defenses which he has to the plaintiff's claim?

DEAN MORGAN: No.

MR. LEMANN: Which the third-party plaintiff has to the plaintiff's claim.

MR. DODGE: We had a lot of discussion about that.

MR. LEMANN: The third-party defendant may assert against the plaintiff. I suppose you thought he would make his defenses against the original defendant sufficiently under 7 and 8. I was just wondering whether it was clear that he could assert his defenses against the original defendant, but I suppose the idea is that that is covered by the preceding sentence.

DEAN MORGAN: Oh, yes.

JUDGE DOBIE: This just extends it to the plaintiff's claim.

DEAN MORGAN: But, you see, we are arguing whether the defendant didn't set up a defense.

MR. LEMANN: We had that in the original rule.

DEAN MORGAN: Yes.

MR. LEMANN: But it wasn't limited to the plaintiff.

DEAN MORGAN: No.

MR. HAMMOND: In connection with that, Mr. Lemann, that is one of the reasons that I suggested putting in line 7: "shall make his defenses to the third-party plaintiff's claim". It seems to me to make it a little clearer. But I had several suggestions about amending that preceding sentence, the first sentence of the rule, and we can take those up later. The Reporter put those in a special note.

THE ACTING CHAIRMAN: Yes, if you will on page 22.

JUDGE DOBIE: Is there anything materially different between Mr. Hammond's suggestion and that second sentence the way it is now?

THE ACTING CHAIRMAN: Aren't they all underlined? I think they are all underlined in his, so that you can see from looking at it.

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: Armistead, look at page 22, Mr. Hammond's suggestion. The underlining shows what he has added, and the brackets show what is left out.

JUDGE DOBIE: I see.

PROFESSOR SUNDERLAND: I thought Mr. Hammond's form was quite clear. I thought it was a little better than the

original.

MR. HAMMOND: The original doesn't seem to me to be clear.

MR. DODGE: We have left in the words, "his counter-claims and cross-claims against the third-party plaintiff". We have them in as to cross-claims.

PROFESSOR SUNDERLAND: I move that Mr. Hammond's form be substituted.

MR. DODGE: Is it necessary to repeat those words so many times, Mr. Hammond? We have said, "shall make his defenses as provided in Rule 12 and his counter-claims and cross-claims against the third-party plaintiff or any other party", without any commas. Doesn't that all go back to "against the third-party plaintiff"?

MR. HAMMOND: You don't make a cross-claim against a third-party plaintiff.

MR. DODGE: You might.

DEAN MORGAN: You might, surely.

MR. LEMANN: You change this rule only for the reasons stated at the top of page 22?

THE ACTING CHAIRMAN: What is that, Monte?

MR. LEMANN: Is that at the top of page 22 the only reason for changing this rule?

MR. DODGE: No.

THE ACTING CHAIRMAN: You know, the whole business is

a very substantial change.

MR. LEMANN: This is the last sentence, yes. I was overlooking the middle page.

MR. DODGE: We had a lot of discussion about this.

THE ACTING CHAIRMAN: The general purpose we have in mind in this change, Monte, is to eliminate the bringing in of a man answerable only to the plaintiff.

MR. LEMANN: Yes.

DEAN MORGAN: Yes.

PROFESSOR SUNDERLAND: I think it is a little bit complicated situation that is presented here, and I think this spelling out that Mr. Hammond gives it makes it very clear. It is very good.

JUDGE DOBIE: You have a lot of parties in there, and it may be well, as Hammond does, if you spell it out. You can't do it wrong. There is no question about his having spelled it out correctly, is there?

MR. DODGE: He has left out cross-claims against the third-party plaintiff.

PROFESSOR SUNDERLAND: There aren't such things.

DEAN MORGAN: That would be a counter-claim against the third-party plaintiff, wouldn't it? The cross-claim would be against another third-party defendant, wouldn't it?

MR. HAMMOND: Yes. A cross-claim is against a person who is on the same side that you are.

JUDGE DOBIE: Did you move that we adopt the Hammond language?

PROFESSOR SUNDERLAND: Yes.

JUDGE DOBIE: I second that.

MR. LEMANN: Why were the words "against the plaintiff" inserted in line 10? What else could it mean without that? He may assert that only against the plaintiff, as you see from the next line.

DEAN MORGAN: Ordinarily, he is not a party as against the plaintiff, where the plaintiff doesn't make his pleadings against him.

MR. LEMANN: I mean, what did you add by putting in those words, in view of the fact that you have the words "plaintiff's claim" in line 11? I wasn't sure I caught the significance of the change.

DEAN MORGAN: Oh. Well, I suppose that is to prevent a judgment from going against the defendant if such a defense were put in. I don't know.

MR. DODGE: It is really a defense that he sets up in the action between the plaintiff and the original defendant.

DEAN MORGAN: Yes.

MR. DODGE: In addition to the defense of his own.

MR. LEMANN: It says he may assert any defense which the defendant has to the plaintiff's claim. What do the words "against the plaintiff" add? They don't do any harm, but isn't

it implicit?

PROFESSOR SUNDERLAND: It makes clear who it is.

DEAN MORGAN: Ordinarily he puts in his answer to the third-party plaintiff, and not to the original plaintiff.

MR. LEMANN: Without these words added, you have: "The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim." Why did you put in those words?

DEAN MORGAN: He may not have any defense to the third-party plaintiff's claim.

THE ACTING CHAIRMAN: You see, Monte, it is a question of clarity, and it would seem to me it is needed a little. Perhaps you may imply it. If you go back, you may ask, "Why wasn't it in the original draft?" The reason it wasn't in there was that it wouldn't be necessary at all, because the third-party defendant could make claims against the plaintiff generally, the plaintiff could claim against him, and so on. That was quite clear. Now we have started restricting the impleader, the bringing in. So, if you left it out, it is a possible construction to say that the third-party defendant may assert any defense which the third-party plaintiff has to the plaintiff's claim in his (that is, the third-party defendant's) answer to the third-party plaintiff. You see, there is more reason for thinking that might be the intent if you didn't have it in than there was in the original rule.

MR. LEMANN: Now as I understand it, the main thing you wanted to get here was to avoid shoving on the plaintiff a defendant whom he didn't want. Plaintiff sues defendant. As we originally had it, the defendant could say to the plaintiff, "Here is the fellow who is liable to you. You sue him. I am out." We have eliminated that. The only way that new fellow can be brought in is for the defendant to say, "If I am liable to you, Mr. Plaintiff, this new fellow is liable to me." Is that right?

DEAN MORGAN: That is right.

MR. DODGE: That is one point.

MR. LEMANN: You can't bring him in merely by saying, "He is liable to you."

DEAN MORGAN: "He is liable, and I am not."

MR. LEMANN: "And I am not." You can bring him in only to the extent of saying, "If I am liable to you, he is liable to me."

DEAN MORGAN: Joint tort-feasor.

MR. LEMANN: Or, "He is liable with me."

DEAN MORGAN: Take the joint tort-feasor case.

MR. LEMANN: I don't quite see what you had in mind, what you thought you were putting in by adding the words "against the plaintiff", he "may assert against the plaintiff any defenses which" he "has to the plaintiff's claim."

DEAN MORGAN: No; which the original defendant had to

the plaintiff's claim.

MR. LEMANN: That is right. But wouldn't that necessarily be against the plaintiff? I wasn't sure what you were driving at.

THE ACTING CHAIRMAN: No.

DEAN MORGAN: Not necessarily.

THE ACTING CHAIRMAN: Monte, if you considered this an entirely separate battle between the original defendant and the new man he brought in, they would be fighting it out. This, however, says that the new man can fight the original claim.

MR. LEMANN: Oh. You thought that wasn't plain without these words?

THE ACTING CHAIRMAN: Yes, exactly.

MR. LEMANN: I would have thought it was plain enough by saying he can assert any defenses which he has to the plaintiff's claim.

DEAN MORGAN: No, no.

PROFESSOR CHERRY: This isn't his defense. He wants to state the other fellow's defense so the other fellow doesn't raise it.

MR. LEMANN: Do you mean the third-party defendant may assert against the plaintiff any defense which either the third-party plaintiff (the defendant) or the third-party defendant has to the plaintiff's claim? That is really what you mean, isn't it?

DEAN MORGAN: No.

PROFESSOR CHERRY: It comes to that.

MR. LEMANN: Yes. It is a little confusing.

MR. DODGE: It probably would be implied. We weren't quite insistent that he should have the right to knock out the liability of the defendant to the plaintiff, because in most cases his liability is secondary if the defendant is liable to the plaintiff. That is the main defense.

THE ACTING CHAIRMAN: Mr. Sunderland has moved Mr. Hammond's version for the second sentence.

DEAN MORGAN: You had some objection to that, Charles.

MR. LEMANN: That is the same sentence I was talking about.

THE ACTING CHAIRMAN: That isn't the thing that troubled us. What we don't like is the fourth sentence.

DEAN MORGAN: Oh, I see. All right.

THE ACTING CHAIRMAN: The fourth sentence, and again it is the last one.

DEAN MORGAN: Is that another one of Hammond's?

THE ACTING CHAIRMAN: No, I don't think that Hammond is the father or certainly not the sole father of the particular things I object to. That is a particular point later on.

MR. HAMMOND: May I say something about what Mr. Lemann has been talking about, "against the plaintiff"?

THE ACTING CHAIRMAN: Surely; go ahead.

MR. HAMMOND: That bothered me a little bit, too. Does that mean now that he has to file a pleading to the plaintiff's complaint? It would seem to tie him down to that.

THE ACTING CHAIRMAN: It says "may", and I think this is a case where, if he has anything he wants to make, he files it; if he doesn't have, he wouldn't. I should think that would be the interpretation.

MR. HAMMOND: It is just a question of how. Does he put it in his third-party answer or does he have to file a pleading?

MR. DODGE: Yes, it is a basic part of his defense, and frequently his own defense, that the defendant is not liable to the plaintiff; therefore, he is not liable to the defendant.

MR. HAMMOND: Yes, sir, I understand that; but if you put the words "against the plaintiff" in there, it seems to me that that might require that he file a pleading to the plaintiff's complaint.

MR. DODGE: Yes, there might be ambiguity about that.

MR. HAMMOND: If you left it out, he could do it either way. He would probably put it in his answer.

MR. DODGE: I think we meant here that it should go in his answer to the defendant.

DEAN MORGAN: It would have to be served on the plaintiff, too.

MR. DODGE: Yes, it has to be served on the plaintiff.

DEAN MORGAN: You wouldn't have to have two.

MR. LEMANN: I think it would be a little clearer on first reading if it read this way: "The third-party defendant may also assert any defenses which the defendant has to the plaintiff's claim." And take out the words "against the plaintiff", because that is bound to be so. I don't know who else that could be or whom it would be asserted against except the plaintiff, if they were defenses to the plaintiff's claim.

THE ACTING CHAIRMAN: Do you want to comment on that, Mr. Moore?

PROFESSOR MOORE: No.

MR. LEMANN: The redundancy made me wonder, what is there that I am not getting, you see, Mr. Moore. It seems to me you have a redundancy.

PROFESSOR MOORE: I don't think we put it in. I think the Committee voted it. Just why, I don't recall.

MR. LEMANN: That is one nice thing. If we all drew salaries here and had nothing else to do, we could keep busy forever, because we never could remember why we did a thing and we could come back and change our minds.

PROFESSOR MOORE: We didn't suggest it in our draft.

THE ACTING CHAIRMAN: We have what Judge Dobie calls a lullaby.

PROFESSOR CHERRY: I think the reason is this:

Asserting it against the plaintiff means preventing the plaintiff from recovering even from the defendant.

DEAN MORGAN: That is right.

PROFESSOR CHERRY: Instead of having him say, "He can recover from you. Now I have to show that it is against you, that you shouldn't have suffered that loss." It is admitting him to that extent to a share in the original battle. I think it was intended to be.

MR. LEHMANN: That is right. It does it without those words. When you say, "may assert any defenses which the original defendant has to the plaintiff's claim", that is bound to be against the plaintiff.

PROFESSOR CHERRY: The danger was that that might be thought to be subordinated to the main action, I think, that he has to stand by and wait until the plaintiff makes out his case against the defendant, and then as a defendant he can show that.

MR. DODGE: They didn't have those words in the original rule, and no trouble was caused by that omission.

THE ACTING CHAIRMAN: Shall we go back to sentence two? We haven't decided that yet. You recall it is Mr. Sunderland's motion to substitute Mr. Hammond's draft as it appears on page 22. Are you ready for the question? All those in favor will say "aye"; those opposed, "no." Well, the "ayes" have it, and that draft is substituted.

That brings us to the third sentence. Does anybody want to make a motion as to that?

PROFESSOR SUNDERLAND: I move we take it as it is.

MR. LEMANN: You mean this way or the way we originally had it?

PROFESSOR SUNDERLAND: With the words "against the plaintiff" in. I think that makes it clearer.

THE ACTING CHAIRMAN: Are you ready for the question on that?

MR. DODGE: It doesn't make much difference.

SENATOR LOFTIN: Question.

THE ACTING CHAIRMAN: All those in favor of the draft as is will say "aye"; those opposed, "no." The "ayes" have it, and it is so voted. (Carried)

I did raise a couple of questions, and I don't know that there is much use going over at least all of them again. I thought that the next sentence, number four, added some principles of substantive law. You will notice that we discussed them somewhat on page 22 at the bottom.

MR. LEMANN: You mean, "The third-party defendant may also assert against the plaintiff any claim he has against him"?

THE ACTING CHAIRMAN: Yes.

JUDGE DOBIE: I thought you were talking about the next sentence.

MR. LEMANN: Not the sentence beginning on line 11.

JUDGE DOBIE: No; on 14.

MR. LEMANN: Before you come to 14, as I read that sentence I wondered whether it was consistent with the rule of compulsory cross-claim. You are not implying that a defendant must assert against the plaintiff any claim growing out of the same transaction?

DEAN MORGAN: That would be the third-party plea.

MR. LEMANN: I realize that. I am just raising the question for consideration. Do you think it is perfectly plain that that shouldn't apply to the third-party plaintiff?

DEAN MORGAN: Oh, yes. Of course, there is no issue between the plaintiff and the third-party defendant unless the plaintiff amends his complaints and states it against him. That is the whole purpose of the amendments striking it out.

MR. LEMANN: He can make his counter-claims if he wants to, but he doesn't have to.

DEAN MORGAN: He can, if it arises out of the same transaction. That is, he can really begin another lawsuit against him (that is what it means) arising out of the same transaction. He can make him a party and sue him. The idea there was this, wasn't it, Charlie: that this would probably come in as an ancillary thing, so you wouldn't have to have any diversity, and so forth.

THE ACTING CHAIRMAN: Yes, that has been the general

theory of jurisdiction.

MR. LEMANN: That applies to all. I am just raising the question of the counter-claims.

DEAN MORGAN: It wouldn't apply if the plaintiff made the third-party defendant a party. You would have to have diversity between him and the third-party defendant.

MR. LEMANN: That is right; but here the third-party defendant can be brought in without diversity, we assume. Then, when he gets in he has permission to assert the counter-claim if he wants to.

DEAN MORGAN: Yes.

MR. LEMANN: He could never have had that heard in the Federal court originally because he and the plaintiff belong to the same state. On the theory that we have, he can do it, but he doesn't have to do it. He can say, "Well, it grows out of the same transaction, but I don't care to get all these things disposed of in this one proceeding."

DEAN MORGAN: That is right.

MR. LEMANN: "I would rather bring another suit, as far as that is concerned. I have a claim against the plaintiff growing out of this same occurrence, and I am called into this suit, but I think I will just save that and bring that up afterwards." It is not very likely to happen.

DEAN MORGAN: "I am hauled into this suit, but the plaintiff hasn't sued me."

PROFESSOR SUNDERLAND: But the third-party plaintiff has sued him.

DEAN MORGAN: If the plaintiff makes him a party, that is a different matter.

MR. LEMANN: It would be governed by the rules applicable to defendants.

DEAN MORGAN: I think there is a question whether the court is going to hold it is merely ancillary there.

MR. DODGE: Yes.

MR. LEMANN: Haven't they passed on it? I think some courts have.

DEAN MORGAN: Not in this kind of case.

MR. LEMANN: How about it, Mr. Moore? Haven't they passed on this third-party defendant thing?

PROFESSOR MOORE: I don't recall any on this precise point. They have that you have to have independent jurisdiction for plaintiff's claim against this fellow.

DEAN MORGAN: They say there has to be diversity there, don't they?

PROFESSOR MOORE: Yes.

DEAN MORGAN: But for the defendant's claim over, there doesn't have to be diversity.

PROFESSOR MOORE: That is right.

MR. LEMANN: The defendant's claim against this fellow, I mean.

DEAN MORGAN: That is right.

PROFESSOR MOORE: If the plaintiff wants to assert a claim against the third-party defendant, there has to be jurisdictional ground.

MR. LEMANN: In the very case where they decided that, didn't they decide there was jurisdiction over the third-party defendant on the claim over by the original defendant? because if they didn't assume that, that third-party defendant would be out altogether. Do you catch the point I am making?

PROFESSOR MOORE: Most of the cases hold that you don't need independent jurisdiction for the third party to claim against the third-party defendant.

MR. LEMANN: That is right. That is what I said to Mr. Morgan. I thought that had been decided. That is what I thought he was saying.

DEAN MORGAN: That is quite right, but we are talking about the third-party defendant asserting a claim over against the original plaintiff.

MR. DODGE: Or the plaintiff asserting a claim against him.

DEAN MORGAN: If the plaintiff asserts a claim against the third-party defendant, there has to be diversity.

MR. DODGE: Yes.

DEAN MORGAN: We are assuming that there doesn't have to be diversity here if the third-party defendant asserts a

claim against the plaintiff, and I don't know whether that is true or not.

MR. DODGE: Why doesn't it follow from the other?

DEAN MORGAN: I don't know.

MR. LEMANN: If it grows out of the same transaction.

DEAN MORGAN: Quite so, and he is improperly on that transaction with the third-party plaintiff, the original defendant.

MR. DODGE: And the plaintiff has elected to follow up, knowing that the third party may be brought in; yet he can't assert a claim against him.

THE ACTING CHAIRMAN: Of course, I am being illiberal here and I am raising a question about that, too; only I haven't raised the jurisdictional point.

JUDGE DOBIE: We can't do anything about that, either, can we?

THE ACTING CHAIRMAN: I don't want to stick our needle into constitutional jurisdiction on any of these technicalities.

DEAN MORGAN: I am glad to know how you regard the Constitution, Charlie.

THE ACTING CHAIRMAN: I don't think it is a very good thing, anyhow.

DEAN MORGAN: Why not? You don't want it all saddled up in one action? That is a reversal of form, Charlie, I must

say.

THE ACTING CHAIRMAN: I know it, and you told me so last time.

DEAN MORGAN: You are still stubborn?

THE ACTING CHAIRMAN: I am. I will say this, that unless I can get somebody like Monte interested, I won't raise the point again, but I just want to be sure. Monte, have you read the paragraphs on 22 and 23? If they don't strike fire from anybody, I shall not say any more.

MR. LEMANN: I did, and when we got down to that I wanted to ask you whether I understood your last sentence on page 22. Are we ready for it now? Have we gotten to that? I guess we have. "Seemingly an insurance company which by present law could only defend by admitting policy coverage to the insured may hereafter defend against the plaintiff and later on against the insured."

THE ACTING CHAIRMAN: Isn't that so?

MR. LEMANN: You can't do both now. I was not sure when I read it. With the present large allowances of inconsistent pleas and inconsistent defenses, and so on, I would have thought it at least possible that that insurance company might say, "Well, I don't think he has any claim, and if he has any claim, I am not liable to the defendant." You say he can't do it.

THE ACTING CHAIRMAN: Understand, I don't pretend to

be an insurance expert, but I understand there is some authority in insurance law (I am not talking now about pleading law; forget the Federal rules generally, but think of Erie Railroad v. Tompkins and state law and all that sort of bunk, but nevertheless it exists), that there is a rule of some standing at least, that to come in and take over the burden of the defense, you had to agree that you had a policy for the insured, unless you got him to stipulate to raise that question later. This is a question, you see, between the insured and the insurer.

MR. LEMANN: Here you are the insurance company. Plaintiff sues defendant. Defendant says, "I am not liable to the plaintiff, but if I am, the insurance company is liable to me." Now the insurance company is hauled in. He says, "I want them in." They don't get themselves in; they are yanked in. When they are yanked in, can't they say, "We don't think we are responsible (a) because the plaintiff has no claim and (b) because we are not liable on the policy"?

You say, no, you think that state law in many states, at least, say they can't do that, but I think that is rather hard on them if they can't do that, because they have to make their choice then between the two.

THE ACTING CHAIRMAN: Look, Monte, you practically stated my point, and I think that explains about all there is. I think it is hard on the insurance companies, but is the Rules Committee of the Federal courts the place to make the law

easier for insurance companies?

DEAN MORGAN: I don't think it is easier for insurance companies when you allow them to drag them in.

THE ACTING CHAIRMAN: I am quite sure I am right about the New York law, for example, because--

DEAN MORGAN (Interposing): Not when they are dragged in.

THE ACTING CHAIRMAN: Take the situation as you have stated it. There is a policy of liability insurance covering an automobile accident, and there has been some misrepresentation. If the insurance company takes hold of the defense, with nothing more (suppose there hasn't been any Rule 14), without any of this Rule 14, all the defendant has done is simply to notify the insurance company.

MR. LEMANN: That is different.

THE ACTING CHAIRMAN: Then the insurance company takes over and, as I understand the New York law, the insurance company cannot then raise the question of misrepresentation under the policy.

MR. LEMANN: That is right.

THE ACTING CHAIRMAN: Except that in some cases they do get an agreement.

MR. LEMANN: That is a somewhat different situation, isn't it?

DEAN MORGAN: I think you are right there, Charles.

MR. LEMANN: I run over a man on my way to the office, and I am sued for $10,000. I say to my insurance company (or what I think is my insurance company), "You come and defend against the claim." They have to make up their mind that they are going to come and defend that claim without my being in it at all or that they are going to take over the defense and relieve me or that they are going to say they are not responsible on the policy. If they say to me, "All right, Lemann, we will take over the case," and they take over the case and win it, that will end it; if they lose it, then they can't be heard and say afterwards, "Well, Lemann, it is just too bad. We lost the case, but we are not responsible to you, anyhow."

That is what you say is the New York law. Is that right?

THE ACTING CHAIRMAN: I am not trying to decide what would be true under a third-party practice as such. I am stating the New York law--

MR. LEMANN (Interposing): On that point.

THE ACTING CHAIRMAN: --of insurance as I understand it.

MR. LEMANN: Is that exactly this case, though?

DEAN MORGAN: That is a different proposition.

THE ACTING CHAIRMAN: I wonder if it is; and if it is very different, it means that a defendant is a damned fool if

he uses Rule 14, and if his lawyer knows his way around and knows his P's and Q's, he won't use it.

DEAN MORGAN: He may not.

THE ACTING CHAIRMAN: All he will do will be to notify the insurance company to come in, and that puts it up to the insurance company.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: Whereas, if the defendant thinks, "Now, let's have a short cut and go under Rule 14," then he finds he has given away something pretty valuable, and the reason he has given it away is that we here don't like that rule of law.

MR. LEMANN: I don't know that we don't like it, because they are two different things. In the case I put the insurance company goes ahead and fights that case, and I am not there at all. They are fighting it.

MR. DODGE: All the time.

MR. LEMANN: But in this case I am there, too, and I can do all I want to do to knock out the plaintiff. I don't have to rely on the insurance company to knock him out. They haven't misled me or said, "We will take charge of this." I am in there fighting, too. I don't have to rely on them. That would be my idea of the difference, you see.

MR. DODGE: Why do you say in your note on 22 that he might fight the plaintiff and later on contest his liability

to the defendant? Everything is in this case, isn't it?

THE ACTING CHAIRMAN: Later on means, of course, in the same action. I don't suppose you are going to go to the jury on both questions at the same time.

DEAN MORGAN: Why not?

THE ACTING CHAIRMAN: I don't believe in it. I suppose theoretically it is still possible.

DEAN MORGAN: They aren't going to take two bites at the cherry, are they? You are not going to give them two juries.

THE ACTING CHAIRMAN: Nevertheless, I don't want to battle over that issue. All I meant was that he would have the two separate issues. I think he probably could get them tried on different days.

MR. DODGE: This seems to be wholly different from the voluntary assuming of the defense and the waiver of any denial of liability to the defendant.

THE ACTING CHAIRMAN: I don't know. Of course, as I have stated before, if nobody is interested, that ends it. It seems to me you are allowing the insurance company a defense that it wouldn't have under ordinary rules of law.

Let's go on to the other point, the final one, that you have a new principle of joinder for the common question of law test in Rule 22.

DEAN MORGAN: What is that?

THE ACTING CHAIRMAN: You have only the common transaction test.

MR. DODGE: I don't think that is Rule 22. Isn't it Rule 20? Rule 22 is the interpleader rule.

THE ACTING CHAIRMAN: I guess that is right, isn't it?

MR. DODGE: I guess it is 20, on permissive joinder.

PROFESSOR SUNDERLAND: Rule 20 is right.

THE ACTING CHAIRMAN: That is right, isn't it? Yes, it should be 20.

MR. LEMANN: Let's see how that comes in, Charlie. Lines 20 and 23.

MR. DODGE: Lines 11, 14, and 23, isn't it?

MR. LEMANN: Your point is that the final addition is the same as the one before, is that it? Isn't the addition in 20 to 23 a limitation of the original language of the rule? The original rule, line 17, read: "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."

DEAN MORGAN: That is out.

MR. LEMANN: That is out. You say, however, we have substituted a broader rule when we say he may assert against the third-party defendant any claim which "he has against him which arises out of the transaction or occurrence which is the

subject matter of the plaintiff's claim against the third-party plaintiff and the third-party defendant thereupon shall assert his defenses", and so on.

DEAN MORGAN: I don't quite get your last objection, Charles.

THE ACTING CHAIRMAN: That is on line 17, where it was originally "The plaintiff may 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." Under the original rules of joinder, you could join defendants where there was a common question of law or fact. What has happened here is that there is in substance a joinder under this rule, first the original defendant and then this one.

Now we change it and say that the plaintiff may join any claim which arises out of the transaction or occurrence sued upon, and so on. We have left out of the joinder there at least the law part of it, the common question of law. We have changed the wording of the common question of fact, although it may be in substance much the same.

MR. LEMANN: We have limited it a little bit, if anything, because under 20 you could join them whether there was a question of law or fact in common.

THE ACTING CHAIRMAN: Yes, that is true; this is a limitation.

DEAN MORGAN: Yes. What is wrong with it?

MR. LEMANN: I don't see how it is, really.

THE ACTING CHAIRMAN: Why should you change it over from the original 17 to 19? I mean, what is there gained?

MR. LEMANN: That is worth asking always.

DEAN MORGAN: The point is that then you have the jurisdictional question there, haven't you?

THE ACTING CHAIRMAN: Have you really helped the jurisdictional question by this?

DEAN MORGAN: The only theory upon which you could say you have helped it is that by confining it to that particular transaction you have thereby made it just ancillary.

PROFESSOR MOORE: I don't think, when you put this in, that you are stating that in any particular case there is going to be jurisdiction. I think all you are saying is that procedurally, if there is jurisdiction, plaintiff may set up a claim.

MR. LEMANN: Have we had any kicks about this, Mr. Moore? No kicks about this.

DEAN MORGAN: This first one?

MR. LEMANN: No, these two sentences we are talking about. Mr. Moore and Judge Clark say on page 22 that they would suggest leaving out the fourth sentence, which begins on line 11, and also leaving out the stuff that is underlined in line 20. Is that right, Mr. Moore? You suggest leaving them both

out?

THE ACTING CHAIRMAN: That is what we suggested, yes.

MR. LEMANN: That would get you back to where we are now, and I ask, always being in favor of stare decisis, why we don't stay where we are now. Nobody has kicked about it.

THE ACTING CHAIRMAN: Of course, as to 11 you wouldn't have any kick about it because 11 is new, you see.

MR. LEMANN: I mean we have had no kick, no claim that we ought to expand the rule to cover this underlined material from line 17 on.

THE ACTING CHAIRMAN: Line 17 on. We haven't had any kick about that. I don't know that it is quite fair to separate the points. We have had a good deal of kicking about this main point of claims against plaintiff, and there is nothing to center any question on the last part, but maybe that isn't a fair way to look at it.

MR. LEMANN: What we are talking about now, as I understand it from your criticism, is whether we are going to give express permission to the third-party defendant to assert claims against the plaintiff and to the plaintiff to assert claims against the third-party defendant.

THE ACTING CHAIRMAN: There are two separate questions. As to the first one, the asserting by the third-party defendant of claims, you have all decided that he should. While I have not agreed, I take it that is settled. Now let's consider that

we have passed that. Lines 11 to 14, then, stay in.

Lines 17 on, are a somewhat different question and are unconnected in theory or otherwise with the other. Treating them separately, we suggest that it is simpler and more consistent with the other part of the rule (namely, Rule 20) to leave in 17 to 19 as it was originally than to add this substitute, which is a little complicated and is restrictive as far as it goes. Here there is no particular reason for being restrictive, except on the question of jurisdiction, and we don't think that the rule says yes or no on jurisdiction. The rule is subject to our general rule that we are not extending jurisdiction.

MR. LEMANN: If you can get by jurisdictionally on one of these things, on lines 20 to 23, I should think you could get by jurisdictionally on the other. I don't think your jurisdiction difficulties would be very different in one from the other. I thought from your language, the comment on page 23, that you wanted to change both these things.

MR. DODGE: If you added the last one, wouldn't it necessarily expand the scope of the third-party defendant's right against the plaintiff? If the plaintiff came in with some disconnected matters, certainly the defendant could open that up.

THE ACTING CHAIRMAN: Of course, every time the plaintiff expands, it is likely to expand the defense. That is

clear enough. That was clear enough under Rule 20. But if you are providing a general rule of joinder in 20 for a common question of law or fact, why do you say where the party is already in (brought in, it is true, on another ground), then your joinder is limited to only the same occurrence, which perhaps is equivalent to the common question of fact? Why make a different test there than you do under Rule 20 generally? It doesn't seem to me there is any reason for it, and it just adds a complication.

MR. DODGE: You would make it broader in the second question only or in the first place, too?

THE ACTING CHAIRMAN: I am not sure that I know what you mean by "second question."

MR. DODGE: These two successive underlined passages, the first and second.

THE ACTING CHAIRMAN: In the first one, line 11, I suppose you would say we are restricting it. We were suggesting a restriction over what you think should go in. Our trend that way is restrictive, yes, that is true; restrictive on what the insurance company can plead, if you will, yes.

MR. DODGE: As to the original matter, although it can plead anything if the second section is taken advantage of by the plaintiff.

THE ACTING CHAIRMAN: If the plaintiff once decides to step out, why not then, in that case, since the plaintiff

has opened the doors? But going on to the question you asked, in line 17 what we are suggesting I suppose in a way is a little expansion over what the lines would be in 20 to 23, but it is expansion of the same kind that was in originally, and we don't see the reason for the restriction over what was here originally. In addition, we think that consistent with the general joinder rule of Rule 20.

MR. LEMANN: I wonder in this discussion why you wouldn't go back to the idea of leaving the rule the way it was. Here are the reasons that you want to change it, as I read the notes: No. 1, it is futile to tell the plaintiff that he must sue the new person when he doesn't want to sue him and the court says he doesn't have to. It does no harm. If he doesn't want him, he doesn't want him. No. 2, you say there is a jurisdictional problem presented. The court says that he can't sue him on a new claim. Is that right, Mr. Moore?

PROFESSOR MOORE: The plaintiff couldn't sue.

MR. LEMANN: Yes, the plaintiff couldn't. So you say, "Now let's change the rule." I was listening to your objections to some of this language, and you make two objections. One is that you don't like the language in 19 to 23, but then you go on to say that also it would be better to leave out the language in 11 to 14. Don't you say that?

DEAN MORGAN: Surely.

THE ACTING CHAIRMAN: Are you raising the question as

to whether we shouldn't go back to Rule 14 as it exists today? Is that the question?

MR. LEMANN: Yes.

THE ACTING CHAIRMAN: On that you have to consider various things. One of them is that various parts of the bar are quite aroused by it. In particular, the insurance people are on my neck right along. They have even sent people out to interview me. There is a Mr. Benoy, of Ohio, head of the Insurance Section, who came out and visited Moore and me. I think he sent all of you (I think they have been distributed) the votes of the Section. They have been terribly upset about it. I would say that in itself was sufficient, but--

MR. LEMANN (Interposing): What part of the present rule don't they like?

THE ACTING CHAIRMAN: They don't like this idea that you can be forced to be a new defendant, so to speak. Of course, there are several things they don't like about it, anyway. They would like to have it made clear that the jurisdiction is quite limited, and some things like that. I mean, among others, that is one of the things they don't like. They don't want to have any thought that the insurance company could be brought in and that the plaintiff could sue directly over against the insurance company, except as it is provided in some cases by statute.

I was going to add that I don't think those objections

alone would count because, after all, every rule may hit some people favorably and others unfavorably. But I add to it that I think the rule was a trap before and that it covered more than it really could carry out.

In that connection, your friend and the now great exponent of the rules, Judge Porterie, has held definitely that we couldn't force a defendant on the plaintiff. He and one other district judge, Beaver, of Georgia, have both held that you can't do it; that is, that where the original defendant cites in a new person, ipso facto the plaintiff's claim is broadened to include that new defendant. He suggests that the plaintiff doesn't even need to amend his pleading. It is because of that.

In the first place, I didn't think it worked. We cite the Brown v. Cranston case where there was a question under the New York law of suits out of one automobile accident, and it involved the construction of the New York law of joint judgments and contribution. Under the New York law, you can only get contribution from a joint tort-feasor when the judgment is joined, and the judgment is a condition precedent. We struggled quite a while, and finally decided that we couldn't do anything under that and therefore allowed the man who had been cited in to answer.

It is a combination of the fact that we don't think the rule really works and that a lot of people do. Some who

do are worried about it, and some, like Judges Deaver and Poterie, just think they can make it work anyhow. I thought that was ground for taking it out. It clears up a complication, one that has caused a good deal of trouble.

MR. DODGE: Would you strike out both of these underlined passages?

THE ACTING CHAIRMAN: Yes, for somewhat different reasons. I had better make it a little stronger than that--for quite different reasons, I guess. The first reason is the one I have discussed, and it has been somewhat rejected, I guess definitely rejected. That was, I thought you were extending rights through a procedural guise. If you don't agree, that settles that, and that brings in 11.

The second one I suggest for quite a different approach. The second one is that it seems to me to make it more consistent with the general idea of our rules, and it is also less complicated in statement; partly because it would then be consistent and partly because of the mere manner of statement, too.

DEAN MORGAN: Four and five are consistent with themselves in that they are both based on the theory that you want to clear up everything in this transaction, as far as you can.

MR. LEMANN: Four and five?

DEAN MORGAN: The two underlined sentences that he is

talking about.

MR. DODGE: We don't want to force a litigant on the plaintiff, and what is the objection to leaving out any question of rights as between the plaintiff and the new party summoned in?

DEAN MORGAN: If a new party is summoned in, while he is in court there, why shouldn't the third-party defendant be able to clean up the whole transaction?

MR. DODGE: He should, as far as he is concerned.

DEAN MORGAN: That is what it says, any claim against the plaintiff which arises out of the transaction or occurrence.

MR. DODGE: That is between the third-party defendant and the plaintiff.

DEAN MORGAN: Yes. He should be able to clean it up right then. This was the theory of that fourth sentence, and then the fifth sentence gave the plaintiff the same privilege.

MR. HAMMOND: As I recall it, the Committee at the last meeting discussed this an awful lot, and they voted, except for Judge Clark, to adopt those two sentences.

MR. DODGE: The first one would be misleading to the bar because--well, no, it wouldn't be if these two stand just as they are here. If we restore the old lines 17 to 19, the first one becomes very misleading.

DEAN MORGAN: Yes, indeed, it does.

MR. DODGE: If we leave them as they are, that

misleading character is gone.

DEAN MORGAN: That is what happened here.

MR. LEMANN: The alternative would be to restore it and to leave out the first part, the first sentence we are talking about.

MR. DODGE: As being implied anyway.

MR. LEMANN: As not being very important, nobody having raised any point about it. That is the only point I had that we ought to consider. Then add here to the language as it stood.

In fact, I don't know how convincing the case has been made to change the rule, in view of the experience with it. Judge Clark says that it has given rise to diversity of opinion among the district judges as to whether you can force a defendant on the plaintiff. That is one thing.

DEAN MORGAN: We had a good deal of information on that when we first handled this.

MR. DODGE: I don't remember. I remember the discussions on the other points in this rule, Mr. Hammond, but I don't remember that this particular thing was discussed so much. Was it?

MR. HAMMOND: It really was, yes; very thoroughly.

THE ACTING CHAIRMAN: I will say that I think lines 11 to 14 were discussed quite a bit. There isn't any doubt about it. Mr. Morgan got quite excited and said I was getting

worried about something that wasn't so. I said this was substantive law, and Mr. Mitchell said that was the first thing he had ever heard me call substantive law, which I must say was a valid touch that time. That was discussed. I don't think very much was said about this latter. I don't recall that this was ever specifically discussed, that is, lines 19 to 23.

MR. LEMANN: The other point about not forcing another litigant on the plaintiff would be cared for by a little change in line 5.

MR. DODGE: That was taken care of. That was what we discussed so much.

MR. LEMANN: That is simple.

DEAN MORGAN: It was 10 and 11 that we discussed so much.

THE ACTING CHAIRMAN: Professor Moore says that we were making the whole fight on 10 and 11.

DEAN MORGAN: That is where you made most of your fight before, Charles.

THE ACTING CHAIRMAN: Yes.

DEAN MORGAN: That is where you said I got excited. I got vociferous, at any rate.

MR. LEMANN: Where is that? The sentence beginning in line 11, you mean?

THE ACTING CHAIRMAN: Lines 10 and 11. It doesn't

make much difference. I guess you don't like it, whichever place it comes.

MR. LEMANN: That doesn't change much that I can see that you didn't already have.

DEAN MORGAN: He wanted it stricken out.

MR. LEMANN: You want it taken out. You haven't made much change in that, to my way of thinking.

DEAN MORGAN: We didn't care much about that. He wanted to strike lines 10 and 11, and that is where I got excited.

THE ACTING CHAIRMAN: It seems to me that the point where we are is that, without a vote particularly, you have pretty thoroughly settled everything now, except the last suggestion from line 17 on. If you say you are not interested in that, we will call that done, too. I am simply saying that it is more consistent, as well as clearer. This one, I think, is no particular justification for it, but if you want the limitation there, of course I can't say any more.

PROFESSOR SUNDERLAND: Don't they belong together?

THE ACTING CHAIRMAN: Why do they belong together? I have heard that suggested.

PROFESSOR SUNDERLAND: There is a reciprocal relation. One says what the plaintiff states against the defendant, and the other says what the third-party defendant has against the plaintiff.

THE ACTING CHAIRMAN: They are entirely different things. There is no reciprocal relation except that one happens to follow the other as a sort of rhythm or chorister song. There is a different theory behind them.

PROFESSOR SUNDERLAND: The theory behind both is that you take care of all these matters arising out of the same transaction at once, isn't it?

DEAN MORGAN: I move that this be adopted as is.

MR. DODGE: With the underlined words?

DEAN MORGAN: Yes.

MR. DODGE: Second the motion.

THE ACTING CHAIRMAN: All those in favor say "aye"; those opposed, "no." It is adopted.

DEAN MORGAN: You are the lone dissenter this time.

THE ACTING CHAIRMAN: Well, I have been that before.

DEAN MORGAN: I like to see somebody there besides myself.

THE ACTING CHAIRMAN: I might say about this, which is a change in the existing rule, that I will adopt Mr. Justice Roberts' statement about changing things. A new generation of the Committee will come on after us, and they will change what we have done, and so on.

DEAN MORGAN: I hope they will.

THE ACTING CHAIRMAN: Rule 17. Is there any question about 17?

MR. HAMMOND: On the word "federal." We have never used that before.

DEAN MORGAN: Federal receiver.

MR. HAMMOND: "Federal court" in line 11.

DEAN MORGAN: Federal receiver, too. We have always said "Court of the United States" before.

THE ACTING CHAIRMAN: I guess that is so.

DEAN MORGAN: Don't you think that is better, Charles?

THE ACTING CHAIRMAN: I guess so. Don't you think we should make that change? "Federal court," I suppose, is a slang expression.

MR. HAMMOND: District Court of the United States; Federal District Court. I don't know.

PROFESSOR MOORE: It seems to me to be a very short way of saying precisely what you have in your mind.

THE ACTING CHAIRMAN: "and except (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Rules 66."

DEAN MORGAN: That is what I think we had better say, particularly if you are going to spell "federal" with a small "f."

THE ACTING CHAIRMAN: Do you want to move for a change?

DEAN MORGAN: I move that change.

JUDGE DOBIE: Rule 66 simply says that we follow the old practice, doesn't it?

PROFESSOR CHERRY: That is the old rule. We propose to amend it here.

JUDGE DOBIE: It is?

THE ACTING CHAIRMAN: All those in favor of the change striking out "federal" and inserting "a court of the United States" say "aye"; those opposed, "no." It is so voted. (Carried)

Class Actions is only a footnote. I hope you are keeping in mind the query I raised before that I would like to have some advice about the notes as you go along and at the end. Mr. Mitchell, I take it, felt the notes were inadequate. I think that is his view, although he doesn't discuss that in detail.

DEAN MORGAN: Did he mean that generally, Charles, or just that where we are suggesting changes we should explain more fully why we are suggesting the changes?

THE ACTING CHAIRMAN: That may be what he had in mind. I think perhaps it was. It isn't made very clear.

MR. HAMMOND: He also made the point that some of the notes ought to be to the Court and not to the bar, you see, and it has just struck me that my recollection is that this was to be a note just to the Court. I think he may have had this one in mind.

MR. LEMANN: I wondered why you wanted to say anything to anybody about it.

MR. HAMMOND: At the May meeting this is what Mr. Mitchell said, that the most we ought to do in any event is to give a note to the Supreme Court calling attention to it, and the Committee at that time thought that there ought to be that note.

MR. LEMANN: To the Court.

MR. HAMMOND: But it was to be just a note to the Supreme Court.

MR. LEMANN: I should think that is as far as we should go, and my notion is that I doubt that the Supreme Court are going to read these things, that they will say, "Let them go to the bar, and let's hear what the bar says." I just wonder whether it is worth putting in even for the Court. We have decided that we ought not to do anything about it, and I should think they would just as soon not be troubled with it.

THE ACTING CHAIRMAN: Let me suggest a little of what my reaction would be on this. It is a little along the line I suggested earlier. While I don't think that we can be expected to make a complete exegesis of the rules, after all, a part of our job is to trace ambiguities and to try to make the rules as clear as possible in certain situations where trouble has developed. It does seem to me that there is a little obligation

to try to do something about it, either directly pro or con. This is a standard case now, since Erie Railroad v. Tompkins. I say it is a standard case; it is a case upon which there have been several law review notes; it is a case upon which litigants raise the question every time. The courts have been worried about it, but to date they have dodged it.

MR. LEMANN: What could we do about it? If it is in Erie Railroad v. Tompkins, the rule is going out, and we can't stop it. The only thing we can do, it seems to me, is to say it is so clearly bad that we will take it out before the Court says so, and we don't want to do that, do we?

THE ACTING CHAIRMAN: As I understood Mr. Mitchell's original position, it was just about that, that it was now so clearly doubtful that it ought to go out. It seemed to me that that was pretty harsh when various courts, including my own Circuit, have upheld it, for us to say that they are all wrong, and also when you consider the history of the rule as established by the Supreme Court.

Furthermore, there is quite a social question involved here, too. The New York Legislature has just passed a law providing for this very thing, also providing other things. It provides that if a stockholder doesn't represent 5 per cent of the stock, he has to put up a pretty heavy bond for costs. That was before the Governor, and I haven't seen his action. All I have seen to date are some very warm arguments that he

ought to veto it. In fact, if any of you read the publication The Nation (probably you don't), the last number has a long editorial saying that this will be a test of Governor Dewey's social service, whether he vetoes the bill or not; that if he signs the bill, there will next be a drive in the Federal courts for the same rule, which of course was amusing under the circumstances.

But whatever be the past history, now to make a change is to make a change in substantive law. Hence, I thought--and I think the Committee agreed--that we ought not to take it back. Then, as Mr. Hammond says, Mr. Mitchell thought we ought to make some warning.

MR. LEMANN: That is the most we ought to do. Read it again.

MR. HAMMOND: "The most we ought to do in any event is to give a note to the Supreme Court calling attention to it."

MR. LEMANN: That is the most we ought to do. I don't think we ought to take a lot of time talking about it. We have more important things to do. If you think we ought to tell the Supreme Court that some people think this is no good and that every court that has passed on it so far thinks it is O.K.--

THE ACTING CHAIRMAN (Interposing): What Learned Hand said is that we will let the Supreme Court repeal its own rule.

That is what he said, practically. He made that offhand remark. In the actual case there is nothing except "Judgment affirmed." This was no written opinion.

DEAN MORGAN: Yes, that is the point. They dodged it.

PROFESSOR SUNDERLAND: There was some suggestion. Who made that suggestion? You don't cite any suggestion.

THE ACTING CHAIRMAN: Suggestion has been made, outside of litigants (of course, it has been made by them all along), in the law reviews, in the Columbia Law Review and maybe in the Virginia Law Review.

PROFESSOR SUNDERLAND: It seems to me you ought to cite those suggestions. This is just blue sky stuff as it stands, because we don't know who made the suggestions, or where. Then you should cite a few decisions, at least.

THE ACTING CHAIRMAN: That could be done easily enough, except that I suggest this: It again depends on whether this note is for the Court alone. If it is for the Court alone, we don't need to make any extensive suggestion. This is a kind of apology, so to speak, because, theoretically, when the case actually gets to them, they will get all the argument they should need from the briefs.

I might add, however, that I don't quite see why we should distinguish between the Court and the public here, if we are going to do anything. I shouldn't think that very often we would in this kind of note. That is, I should think, if

we are going to put anything in, we ought to put it in for everybody. The question is as open to the bench and bar of the country as it is to the Supreme Court.

PROFESSOR SUNDERLAND: But their opinion doesn't cut any figure. It is the opinion of the Supreme Court that counts. What do we care what the bar think about it? They may think one way or think another.

MR. LEMANN: Suppose the bar came in and said, "We think this rule is all wet. We like the rule, but we don't think you can maintain it."

THE ACTING CHAIRMAN: I don't think that quite hits the point, as I see it. The idea is, why didn't you, faced with Erie Railroad v. Tompkins, take out that rule? The answer is that the weight of judicial opinion so far upholds it, and we think it should stay in until the Court passes on it.

MR. LEMANN: I don't think it would ever occur to the average lawyer to take out the rule, and we can tell those who do ask about it that until the Court passes on it, it is O.K. I don't see any sense in sending it to the bar. If I were the Supreme Court, I wouldn't think it was worth anything to me, unless you were going to brief the point seriously and say to them, "We want you to debate it." If I were the Supreme Court, I would much rather not decide it on just a recommendation from the Committee. I would rather wait until it was argued before me.

THE ACTING CHAIRMAN: I think, as a note to the Supreme Court, this has decided limitations. As a matter of fact, I think, as a note for the public, it is quite useful, and I still think there is some importance. We have met now three or four times on the rules that were supposed to be troublesome. A lot of people think this rule is troublesome. I must confess that I do think so myself, for that matter.

MR. LEMANN: Troublesome or doubtful politically?

THE ACTING CHAIRMAN: I am using the word "troublesome" as covering a lot of ground. Yes, if you want to put it so. If you were to ask me what was going to be the fate of this rule in the Supreme Court, I don't know but that I would want the anti side rather than the pro side.

MR. LEMANN: You wouldn't favor taking it out, would you?

THE ACTING CHAIRMAN: No, I wouldn't, not when you consider the history and the present draft, and so on. But, after all, it seems to me a little odd that we don't even mention the question, because it is a real question. Somebody said that they didn't think the lawyers thought much about it. Of course, the lawyers who aren't in the business don't, but you don't see a lawyer who is in the business of defending a stockholders' suit, or vice versa, but that he brings it up every time.

MR. DODGE: There is no Federal statute on the subject?

THE ACTING CHAIRMAN: I beg your pardon?

MR. LEMANN: This was an equity rule.

THE ACTING CHAIRMAN: No, there is no Federal statute. This is an equity rule.

MR. LEMANN: This is almost verbatim an equity rule.

JUDGE DOBIE: What is that old case?

THE ACTING CHAIRMAN: Hawes v. Oakland.

JUDGE DOBIE: It is verbatim, the decision in Hawes v. Oakland in the equity rule.

THE ACTING CHAIRMAN: At that time they were taking further steps in the Piccard v. Sperry case. I can't say for sure now that I know of any specific cases in the Supreme Court. There are a lot of cases in the trial courts. We have one of ours now that we decided recently that I should think may go up, but at any rate I can't say now. At the time that we had the Piccard v. Sperry case they said they were going right on up. I don't know really what happened. I suppose they probably settled. That is what usually happens.

JUDGE DOBIE: We had one case in which I wrote the opinion, somebody against the National Cash Register Company, and we stood by the rule. There were several grounds for affirming Oakland, and that was one of them.

MR. LEMANN: We just govern rights of access to the Federal courts here. You can't come into the Federal courts under these circumstances without making this proof. If the

fellow says his local law permits him to go into his own court, he can go into his own court, and I would have thought it was perfectly all right, but I don't see any use in--what is that old statement?

JUDGE DOBIE: It is a dirty bird that fouls its own nest.

MR. LEMANN: It raises a doubt, but we don't think it is a good doubt. If we think it is a good doubt, let's say to the Court, "Let's take this rule out," but we don't think so. We think the rule is good. Wait until somebody questions the legitimacy of my child. But I want to tell you that some people don't think so.

THE ACTING CHAIRMAN: That isn't quite so. The Federal courts have been rather apologetic. Take this Gallup v. Caldwell case from the Third Circuit. As I remember, Judge Goodrich wrote that opinion, and he made quite a good deal of apology for it. He said two things, as I recall: first, that until it had been declared invalid, they shouldn't do anything, and second, that there was nothing to show that the state rule was to the contrary. I think you will find a considerably apologetic tone of voice in a good many of the Federal courts.

DEAN MORGAN: When they bring a stockholders' suit, they aren't relying on any Federal right or diversity of citizenship. How can the Federal court say, "You can't come in,"

if you have diversity of citizenship and over $3000 involved, if it is a substantive right?

MR. LEMANN: Substantive right. The Federal courts don't have to give anybody access to the Federal courts for every lapse.

DEAN MORGAN: Substantive rights of citizens of different states, where more than $3000 is involved. Why not, I should like to ask?

MR. LEMANN: Can't you abrogate the citizenship?

DEAN MORGAN: The Supreme Court can't.

MR. LEMANN: Congress has told us we can determine--

DEAN MORGAN (Interposing): They haven't said anything about jurisdiction. They say we haven't anything to do with jurisdiction.

PROFESSOR CHERRY: We started out in the equity rules, and when we had our own doubts, we felt that we shouldn't fail to keep in being what was in the Federal equity rules, isn't that right, even though we didn't know then what the Court might say about it if it came up.

MR. LEMANN: Mr. Morgan raises another doubt. I thought the whole doubt originally suggested was whether we ran into Erie Railroad v. Tompkins.

DEAN MORGAN: Surely. When we had this rule, Erie Railroad v. Tompkins didn't amount to anything, and matters of general law were decided by the Supreme Court as Federal law.

They had this as a settled rule, and consequently we took it. The same thing with reference to burden of pleading, with reference to contributory negligence, and so forth. We never tied it up with burden of proof, because we would have said, if we had thought of it at that time, that the Court would have said burden of proof was a matter to be decided by a general Federal law and that they didn't care anything about the state law. Then along came Erie v. Tompkins. Several rules that we have had in here might have caused lots more debate among us if Erie v. Tompkins had been decided. We have a brand-new question here now, and it isn't clear, by any means. I think it is very doubtful whether this isn't a clear case of substantive law.

THE ACTING CHAIRMAN: I don't want to overstate the position of anybody not here, but I think I am right that, if you go back, you will find that the Chairman was pretty definite about it. I thought, first off, that he was going to have the rule out by main strength, anyhow.

MR. LEMANN: He says there, "At the most, report it to the Supreme Court." That is the most he would do, if you want to go on what he is reported as saying. The way I feel is that we ought to make up our minds whether we think this rule is clearly bad, and if so, we ought to take it out; and if we don't think it is clearly bad, I wouldn't make any apologies for it. My own notion is that, if we don't say to

take it out, we ought not to say anything and let it stay.

THE ACTING CHAIRMAN: I think really, from the standpoint of the discussion, we attach a significance different from what the Chairman meant there.

MR. HAMMOND: I can get the transcript.

MR. LEMANN: I don't know that we ought to stop longer on this. The only point you have here is what you can do with that note.

DEAN MORGAN: Yes. That is quite a different thing.

MR. LEMANN: You vote either to leave it in for anybody or to leave it in for the Supreme Court or to leave it out.

THE ACTING CHAIRMAN: I don't want to insist too much on it. It just seems to me that we give the appearance of dodging one of the more important questions if we don't say something about it. It is in discussion one of the more important questions that have arisen under the rules, and I think it is only fair to say that in fact it is. Therefore, I should think it would be worth while to say that we at least know that something is going on in the world about the rule. I don't see much reason for making a note just for the Supreme Court. I think it is more important to make it to show to the public generally that we are trying to keep up with what is going on in our own subject.

PROFESSOR SUNDERLAND: Suppose we get a lot of advice

from the bar after we submit this to the bar, what will we do with it? We won't do anything about it.

DEAN MORGAN: That is what I think. We won't get any advice from the bar.

PROFESSOR SUNDERLAND: We won't get any, in the first place, and if we got it we wouldn't do anything about it.

MR. LEMANN: We will let people know that we are not asleep at the switch, that we know there is debate about this rule and debate about other rules, too.

DEAN MORGAN: I think you are right that the Supreme Court ought not to attempt to decide it until it is argued.

MR. LEMANN: With all they have to do, I think they would be very ill advised, Eddie.

DEAN MORGAN: They will have to hear argument on it.

MR. LEMANN: I don't think you are going to get anywhere on a note. I think they all know we know that. They all read Moore on Federal practice.

JUDGE DOBIE: Suppose we put this up to the Supreme Court with a little caveat. Do you think that, by approving the rule, they necessarily meant that when the case came before them they were going to hold the same way? Frankly, I don't.

MR. LEMANN: They never heard the arguments on the Federal rules.

JUDGE DOBIE: I say the mere fact that they approved the rule, even if we put a caveat in there, wouldn't mean that

they were going to decide that way when it came up before them. They could very well hold, on argument and all that, that this was substantive law.

MR. LEMANN: It is very embarrassing to put this note up and pass it and to have them say it wasn't good.

JUDGE DOBIE: I don't object to its being embarrassing. I have put things up to them before this, and it didn't embarrass me.

PROFESSOR SUNDERLAND: It doesn't seem to me that there is nearly as much obligation to submit a note to the Supreme Court on a rule which has already been adopted and is in operation as there is with a new rule that we are suggesting.

MR. LEMANN: I think you are right.

PROFESSOR SUNDERLAND: I am in favor of letting this rule ride as it now stands.

MR. LEMANN: I move we omit the note in sending out the material. I move we omit it from any public statement.

MR. DODGE: Second.

THE ACTING CHAIRMAN: It is moved and seconded that we omit any note to Rule 23.

JUDGE DOBIE: But keep the rule?

MR. LEMANN: Oh, yes.

THE ACTING CHAIRMAN: Retaining the rule. Any discussion? If not, all those in favor will say "aye"; those opposed, "no." The "ayes" have it, and it is so voted.

You might be interested in just a point that has come up, which we have just decided. We have had the question raised as to whether (b), being announced as a class action, is not subject to the representative requirements of (a). We had quite a debate on it, and I have gone with the majority of our court in holding that is not. I think Mr. Moore thinks that perhaps I made a mistake.

DEAN MORGAN: What rule is that?

THE ACTING CHAIRMAN: That is 23(a) and (b).

DEAN MORGAN: That is a son-of-a-gun. That is the worst rule in the business. It is lovely on its face. If anybody asks me anything about it, I tell them Bill Moore is the only one who knows anything about class actions, anyhow.

THE ACTING CHAIRMAN: It caused me to be a little worried when he said we might be wrong on 23(b). You can see how it comes up. It is called a class action in (c), and obviously it includes both (a) and (b) as class actions. In this case, a defendant said, "Here, this plaintiff has to show that he adequately represents the stockholders." But we have held that he doesn't need to. Of course, before the rule, take the Ashwander v. TVA case and the Carter Coal case, one poor little stockholder did sue all alone. That is what we held.

PROFESSOR MOORE: Hawes v. Oakland, however, was a class action.

DEAN MORGAN: It was a class action.

THE ACTING CHAIRMAN: Yes, but you can have a class action by a stockholder, and he can also go on his own. That is, there is a difference, I think. I think it was true in the Oakland case that there was a difference between derivative and representative action. Whereas the two might be together, they didn't need to be. The question is whether, by what we did in 23(b), we didn't make the requirement that derivative action must also be a representative action.

DEAN MORGAN: I see.

THE ACTING CHAIRMAN: I think there is a question there.

DEAN MORGAN: I am with you.

THE ACTING CHAIRMAN: That helps me out a little.

DEAN MORGAN: I am with you on that one. I am glad to find that Bill is wrong on one of these class actions. You know you are wrong now, when I am against you.

THE ACTING CHAIRMAN: I think it was an arguable point all right, but I don't think we made as much change in the shareholders' suits as that might mean.

Shall we pass, then, to Rule 24?

JUDGE DOBIE: That was really that case of Mitchell's, the Black Tom case.

THE ACTING CHAIRMAN: That is it, yes.

DEAN MORGAN: Have you any comment on that, Mr. Hammond? Has Mr. Mitchell any comment on 24?

MR. HAMMOND: No.

THE ACTING CHAIRMAN: I don't see that he has.

DEAN MORGAN: "or subject to the control of or disposition by".

THE ACTING CHAIRMAN: This was his suggestion, I think, originally.

JUDGE DOBIE: I think it ought to be adopted.

THE ACTING CHAIRMAN: Unless there is some objection, we will consider that Rule 24 as presented in the draft stands.

Now, Rule 26. Are there any suggestions? Mr. Morgan had a suggestion down at the bottom of the page. Are there any before we get to the bottom of the page? That is on (b). Are there any suggestions as to (a)? If not, we will pass to (b), and on (b) Mr. Morgan has some suggestion of wording.

DEAN MORGAN: I thought it might be "forbid or restrict the scope of inquiry into papers and documents", because you want to forbid in some cases.

MR. DODGE: Surely.

JUDGE DOBIE: "Forbid" instead of "limit".

DEAN MORGAN: "forbid or restrict the scope of inquiry into".

MR. DODGE: "Limit" and "restrict" mean about the same thing.

JUDGE DOBIE: You substitute "forbid" for "limit".

DEAN MORGAN: That is right.

MR. LEMANN: I suppose this is put in here for purposes of emphasis. As a matter of artistic arrangement, I just wondered, as I read it, why we should single this out, because section (b) right now will give you the right to limit the scope of examination. I suppose the thought is that this is something that needs emphasis.

MR. DODGE: Which would do that?

MR. LEMANN: Rule 30(b), generally. Wouldn't the court already have the right under 30(b) to do what the lines 24 to 26 say?

PROFESSOR SUNDERLAND: Rule 30(b) provides that they may make an order that the scope of the examination shall be limited to certain matters.

MR. LEMANN: Or that certain matters shall not be inquired into.

DEAN MORGAN: That is right.

MR. LEMANN: I just said to myself when I read it that this is already there, and it is not very artistic, it seems to me. It is like something else we had back here a while ago, when we took out on this go-around that the court must make these facts appear before it enters the order. You remember that. Didn't we take that out?

JUDGE DOBIE: We have a lot of specific enumerations in 30(b). There is no question about that.

THE ACTING CHAIRMAN: This was the product of a large

number of suggestions to the Committee, questions in some of the cases, and the product of quite a little debate here. You see, one of the questions which has been raised has been how far you could get discovery of the case which has been worked up by the other side, discovery of a claim agent's material, and so on. As a result of considerable discussion, we decided to handle it this way, and I think that it should be made very specific, and more specific than it is in 30.

I am not sure but that it is better for the sake of emphasis to have it here. Of course, you might ask the question whether perhaps more orderly procedure might be to put it in 30, and there is something to be said for that. There isn't a complete answer, except that this is the rule that gives the authority, and it upsets people now.

MR. LEMANN: Yes. Well, I think the only objection is an artistic one. I think the emphasis is good here.

THE ACTING CHAIRMAN: It is an emphasis that is important. Of course, a lot of people will be disappointed that we haven't gone much further. The suggestion is made definitely that we prohibit inquiry generally, but once you start prohibiting, it is pretty hard to know how far to go, and very likely the language you use can be used by some district judges to restrict it much further than we intended.

MR. LEMANN: The new sentence in 22 to 24 reads: "It is not ground for objection that the testimony will be

inadmissible at the trial if the testimony is sought for the purpose of discovering admissible evidence." I think that is clearly correct, and correct under the present rules.

DEAN MORGAN: But it has been held otherwise by a number of courts.

MR. LEMANN: I know it has, but you might put in there, "Always remember that under Rule 30(b) that may be restricted," because this is also subject to abuse. You could go into a good many things.

PROFESSOR SUNDERLAND: It seems to me that that whole sentence really is out of place, because it amounts to this: We state in one rule what you can do under another rule. In Rule 26 we say what you can do under Rule 30. It seems to me that Rule 30 is the one that ought to state what you can do under it.

Furthermore, I think there is another rule that is just as important as Rule 30(b), and that is Rule 34, dealing with documents. I think that Rule 34 ought to have the same provision that Rule 30(b) has with relation to these documents that are gotten up in preparation for trial.

I wonder whether the thing to do wouldn't be to cut out that last sentence and then introduce a specific reference to this sort of document in 30(b) and also in 34.

MR. LEMANN: Also note that in lines 15 and 16 of this page 27, you already have, "Unless otherwise ordered by the

court as provided by Rule 30(b) or (d)". So you are just repeating it right in the same paragraph.

PROFESSOR SUNDERLAND: Yes.

JUDGE DOBIE: Are you going to leave in that sentence, "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony is sought for the purpose of discovering admissible evidence"? I think you went to bat for that, didn't you?

PROFESSOR SUNDERLAND: I believe that ought to be in there.

JUDGE DOBIE: I think so, too.

MR. LEMANN: This other is a point that has given real trouble, as I understand it.

PROFESSOR SUNDERLAND: My suggestion would be that in Rule 30(b), in line 20, we introduce "or that designated restrictions shall be imposed upon inquiry into papers and documents prepared or obtained by the adverse party in the preparation of the case".

Then, in 34--

THE ACTING CHAIRMAN (Interposing): Edson, as you go along, might it not be just as well to say, "in the preparation of the case for trial"? That is an expression we use right along.

PROFESSOR SUNDERLAND: All right; yes.

THE ACTING CHAIRMAN: Did you say there had been some

question about that?

MR. LEMANN: Would you put it on page 32?

PROFESSOR SUNDERLAND: Page 32, line 20.

MR. LEMANN: You would insert it after the word "matters"?

PROFESSOR SUNDERLAND: At the beginning of that line, before the word "or", "or that designated restrictions ...."

MR. LEMANN: "or that inquiry into papers and documents prepared or obtained by the adverse party in the preparation of his case shall be prohibited or restricted"?

MR. DODGE: "forbidden or restricted".

PROFESSOR SUNDERLAND: Then the same thing, in substance, introduced in Rule 34, line 8, (that is on page 37) after the word "control". Add there: "subject to such restrictions as the court may deem just regarding inquiry into papers and documents prepared or obtained by the adverse party in the preparation of the case for trial".

MR. LEMANN: Why not say, "subject to limiting orders under Rule 30(b)"? because you might want to restrict it otherwise.

PROFESSOR SUNDERLAND: All right.

MR. LEMANN: I think you ought to expand that reference in 34 to make it harmonious with 30(b). Don't you think so?

PROFESSOR SUNDERLAND: I think that would be all right. Probably it would be better.

MR. DODGE: Yes. I agree to that.

JUDGE DOBIE: There is no question in your mind that the judge has power to forbid or restrict.

DEAN MORGAN: Oh, no, none at all.

MR. DODGE: What was that?

JUDGE DOBIE: I am of the opinion that, without this amendment, it is in the power of the judge in certain instances to say, "I forbid the inspection of that particular document. I don't think it will serve any useful purpose, and it is a confidential document," or any other good reason he wants to give.

MR. DODGE: As I remember it, a great many criticisms of the rule came to us because it didn't specifically refer to that, and there has been some trouble.

DEAN MORGAN: That part has been abused, going after the other fellow's preparation.

MR. DODGE: Not left to the discretion of the court, but forbidden.

THE ACTING CHAIRMAN: I should like to ask this, Edson: You don't feel that the judge should do it? I mean, you are not making it so that it is a kind of compulsion on the judge?

PROFESSOR SUNDERLAND: Not at all, no.

THE ACTING CHAIRMAN: I think your language ought to make it quite clear that it is in his discretion. I don't

think there should be the conclusion from the change made that every time a litigant comes up and says, "Why, this is going to affect the preparation of my case for trial," the judge must pass on that as a matter of fact and immediately so decide that it does and then restrict it.

PROFESSOR SUNDERLAND: It will come right along with these others in Rule 30(b) that certain matters shall not be inquired into or that the scope of the examination shall be limited to certain matters "or that designated restrictions shall be imposed upon inquiry into papers or documents prepared or obtained by the adverse party in the preparation of the case." It seems to me that the context makes it perfectly clear that it is discretionary in all these instances.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: I guess it does.

PROFESSOR SUNDERLAND: Then, in 34, if you make a reference back to 30(b), you are all right.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: What do you wish to do? Shall we so vote?

JUDGE DOBIE: Put that in the form of a motion.

PROFESSOR SUNDERLAND: I move that we strike out the last sentence in 26(b) and introduce in 30(b), line 20, the language that has been suggested.

DEAN MORGAN: The substance of the language.

PROFESSOR SUNDERLAND: The substance of the language that has been suggested. And that we introduce in 34, line 8, after the word "control", "subject to such protective orders as the court may make", or "subject to any protective order mentioned in Rule 30(b)".

MR. LEMANN: "subject to such protective order as the court may make, as provided in Rule 30(b)".

PROFESSOR SUNDERLAND: "any protective order mentioned in 30(b)".

MR. LEMANN: You will have to polish it up.

PROFESSOR SUNDERLAND: You see, 30(b) relates to oral examination and provides that the court may make the protective orders in the course of an oral examination, so it doesn't apply literally.

JUDGE DOBIE: You want to extend it to the documents.

PROFESSOR SUNDERLAND: I want to extend it to the documents, so "subject to any of the restrictive orders mentioned in 30(b)"--

MR. LEMANN (Interposing): "any applicable".

PROFESSOR SUNDERLAND: "subject to any applicable protective orders mentioned in Rule 30(b)".

MR. LEMANN: I think that covers it. You may have to polish it up, but you have the general idea.

Of course, it is a little tough to practice law these days because the other fellow can go through all your papers and

all your--

JUDGE DOBIE (Interposing): You can go through his.

MR. LEMANN: He can go through yours, and you can go through his, but he gets the benefit of all yours.

DEAN MORGAN: It is just like the English practice that you have to furnish the other side with copies.

MR. LEMANN: You furnish them with everything you do.

DEAN MORGAN: You furnish the other side with copies of all the papers that you are going to introduce.

MR. LEMANN: I had a case recently (I have mentioned it before) where I was made a witness so that I couldn't try the case, and I was examined. My deposition was taken for two weeks in my office, and all my private papers and all my letters to my clients were called for. I could have stood on privilege, but I didn't think I should under the circumstances of the case. They even got the memoranda that I had made for my own guidance in making arguments to the court, and, as the lawyer on the other side said, "That was your innermost thought, was it not, Mr. Lemann?" I said, "Yes, that was my innermost thought".

MR. DODGE: The court would probably have protected you on that.

DEAN MORGAN: I'll be darned if I'd have done that. I wouldn't have given him that stuff.

MR. DODGE: I think the court would have protected you

on that.

MR. LEMANN: It was a fraud case, in which he was accusing me of fraud.

JUDGE DOBIE: I don't think he ought to kidnap your brain child.

THE ACTING CHAIRMAN: Are you ready for the question? That involves the changes indicated in Rule 26(b), Rule 30(b), and Rule 34. Any further discussion? If not, all those in favor will say "aye"; those opposed. It is so voted. (Carried)

... The meeting adjourned at 6:00 p.m. ...
