P R O C E E D I N G S

ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

VOLUME I

April 3-5, 1944
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Washington, D. C.

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TABLE OF CONTENTS

TABLE OF CONTENTS

MONDAY MORNING SESSION

April 3, 1944

The meeting of the Advisory Committee on Rules for Civil Procedure, held April 3-5, 1944, in the West Conference Room, Supreme Court of the United States Building, Washington, D. C., convened at 10:00 a.m., Judge Charles E. Clark, Reporter, presiding.

... The following were in attendance:

Charles E. Clark, Reporter (Acting Chairman)
Wilbur H. Cherry
Armistead M. Dobie
Robert G. Dodge *
Monte M. Lemann
Scott M. Loftin
Edmund M. Morgan
Edson R. Sunderland
James Wm. Moore
Robert S. Oglebay
Edward H. Hammond ...

JUDGE CLARK: I shall take the responsibility of calling the meeting to order, because I guess I am the oldest veteran, in point of service at least. I am sorry to say that I didn't know until I got here that the Chairman and the Vice-Chairman and the Secretary are all absent and, I am afraid, won't be here.

* Not present at the final session.

JUDGE DOBIE: How about Major Tolman?

JUDGE CLARK: He is in Arizona. He is said to be marooned in Arizona. Mr. Gamble, I understand, is not coming. Judge Donworth is expected. I guess Judge Donworth is the only one who is expected and who is not here now.

The Chairman writes this on March 31 to the Advisory Committee, "Attention of the Acting Chairman."

"Gentlemen:

"I regret that I am unable to attend the meeting. The reason I am absent is that some fifty-five years ago, catching behind the bat without a mask in a sand lot baseball game, I was hit on the nose by the bat thrower. Nothing was done about it at the time, but the injury drove the cartilage into one nostril and I have had more or less trouble breathing ever since, and finally in my old age I decided I needed a little more wind and to have the darn thing fixed, which has required a minor operation in the nasal passages. I thought I had allowed enough time between the operation and the Committee's meeting to be able to attend the meeting, but the swelling resulting from the operation has not subsided enough so that the doctor feels I should go to Washington now. If the meeting were just a few days later, I could have made it. However, it is not very important that I be there.

"I have written out some notes with suggestions as to various rules, which is all I could present if I were present.

As each rule comes up, I would like to have my suggestion read to the Committee.

"There are only two new matters to come up which have arisen since our last meeting. One is the revision of the court reporter rules resulting from the passage of the court reporter's act, which is a minor matter and ought to be easily done; and the other is the situation resulting from the decision in Hill v. Hawes, where the Court in effect held that our rule requiring the clerk to give informal mailed notice of orders gave a party a right to rely on the receipt of the notice, and the clerk's failure to send it justified a court in exercising his discretion to extend the time for appeal by the subterfuge of vacating the judgment and immediately reentering it. The Reporter's proposals on this subject seem to acquiesce reluctantly in the decision and tinker the rules somewhat to mitigate it. I think this is the wrong approach. I wrote a letter to the Chief Justice about the case, which is attached to my notes, and I would like to have it read to the Committee; also, the Chief Justice's reply, in which he said the Court would not grant a rehearing, but invited any amendments the Committee wanted to suggest, which I interpret as an invitation to present amendments that repeal Hill v. Hawes, if we think it desirable. I have in my notes presented two alternatives. One is to make amendments reiterating more clearly our original intent and repealing, as far as express language can do so, the

decision in Hill v. Hawes. The other alternative is to assume that the Court has power to make rules affecting the time for appeal and fixing the time at thirty days from the date of notice of the judgment, instead of the date of entry, and requiring a formally served notice to start the time for appeal. My preference is for the latter. I think both should be incorporated in the draft to be printed and distributed, and let the courts and the bar comment on both.

"The Reporter has considerable more work to do on this subject and other rules in the way of preparing additional notes for the consideration of the bar and the courts. I would like to see that draft before it is submitted to the Court, as I may have some suggestions to make about the notes.

"Sincerely yours,

"William D. Mitchell"

Mr. Hammond, Senator Pepper won't be here at any time? Is that the situation? Did you have a letter from the Senator?

MR. HAMMOND: I had a letter from him. First he said he was coming, and I got a room for him at the hotel. Later, I just had a short note from him in which he said he would be unable to be here at the meeting, and to cancel the reservation.

JUDGE CLARK: Then I take it the Major won't be here.

MR. HAMMOND: The Major will not be here. He is out in Arizona, and he plans to stay there. He had his reservations

back on the 6th of April, and he said he didn't think he could get them changed.

MR. LEMANN: Is Judge Donworth coming?

MR. HAMMOND: I haven't heard that he is not coming.

MR. LEMANN: I saw a letter from him in another connection saying that he was having difficulty arranging his plans to come both to this and to the Institute meeting, and it left me rather uncertain whether he was coming.

MR. HAMMOND: As far as I know, he is coming; and as far as Mr. Mitchell's secretary knows, he is coming, because she did not mention him as one of the ones that were not coming as far as she knew.

JUDGE CLARK: I think, then, that we had better name an Acting Chairman and do the best we can. I am sorry things have developed this way, but I didn't realize it until I got down here.

JUDGE DOBIE: I believe it would save a little time if the Reporter would act as Chairman. I suggest that the Reporter act as Chairman of the meeting. I think that will probably save some time.

MR. LEMANN: He probably will do as much talking, whether he is in the chair or isn't.

SENATOR LOFTIN: With the idea of limiting the amount he can talk.

DEAN MORGAN: I think you had better do it, Charlie.

JUDGE CLARK: If you all think it would expedite matters, I will. I am afraid I will be talking all the while.

PROFESSOR SUNDERLAND: You must always ask the Chair and get permission before you say anything, Charlie.

JUDGE DOBIE: I make that motion with the idea that you don't do a Pooh-Bah stunt on us and say, "I make this speech as Chairman," and then answer it as Reporter, but I think that would expedite matters.

SENATOR LOFTIN: I will second the motion.

JUDGE CLARK: It has been moved and seconded that the Reporter act temporarily as Acting Chairman. All those in favor will say "aye"; opposed. (Carried) We will go ahead on that basis. If it doesn't work out, we can change during the course of the meeting.

... Judge Clark assumed the chair as the Acting Chairman ...

THE ACTING CHAIRMAN: Mr. Hammond, have you any announcements? I suppose we ought to decide some preliminaries.

... Off the record ...

MR. HAMMOND: I am having mimeographed Mr. Mitchell's letter and also his suggestions. He has submitted suggestions as to certain of the rules. A copy of those will be available very shortly. I have also noted in my own notes the rules as to which he has made suggestions and, if the Committee would like me to, I can read his suggestion as each rule comes up

rather than read his long list of suggestions.

Also, I have had Mr. Tolman's suggestions mimeographed, which you already have, and I have likewise made a note under each rule in my notes that he has made a suggestion, and I can present that as each rule comes up.

DEAN MORGAN: You haven't anything from Senator Pepper?

MR. HAMMOND: No, we have no suggestion from him.

THE ACTING CHAIRMAN: I might add that sometime ago I had suggestions from Dean Morgan, and those have been mimeographed. I guess those had better be put around the table.

MR. HAMMOND: Yes, they have been mimeographed.

THE ACTING CHAIRMAN: I guess they are over on the table.

MR. HAMMOND: I will see that they are distributed. I had figured on that, though, of course, that he, being here, would bring up his own suggestion under each rule.

THE ACTING CHAIRMAN: I might add that a little later today I shall have distributed some material that we prepared on very recent cases. There aren't so very many of them, but we thought you would like to have them to bring everything down to date, as far as we know. Probably the most important of the cases that we have noted here is the case a week ago on summary judgment in the Supreme Court. Then, when we get as far as Rule 75, Judge Maris, of the Third Circuit, has a very

interesting suggestion of sending up the original papers rather than copies. When we get there, I will bring that up.

I think that is all I have in a preliminary way. How shall we proceed with the rules? What is the status of the condemnation rule, Mr. Hammond?

MR. HAMMOND: All the material has been sent out, and there has been nothing further, other than what has been sent out to the Committee sometime ago.

JUDGE DOBIE: I thought (not necessarily that we are bound by it) that Mr. Littell and the Committee had gotten together on everything except the right of the Government to dismiss after the jury verdict had been brought in.

MR. HAMMOND: Yes, with the exception of the matter of the jury trial. They are together on everything, really, except the dismissal rule.

DEAN MORGAN: Yes, that is right.

MR. HAMMOND: Whenever you get ready to take that up, I shall be glad to discuss the amendment with the Committee. I know all about them and, as I said, everything has been agreed on except that dismissal rule, but we also have the problem as to jury trial or court trial. There is no disagreement between the Lands Division and this Committee, but it is a question of what this Committee wants to do as to providing for a court trial.

MR. DODGE: I would suggest leaving that until

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MR. DODGE: I would suggest leaving that until

tomorrow and going ahead with the rules in regular order today.

THE ACTING CHAIRMAN: Very well. Unless there is objection, we will follow that course. Suppose we start in, then, with the rules and with the draft. I suppose the thing to do is to take the rules now before you. We don't want to go back over anything else, do we? I suppose there is no rule of exclusion definitely, is there, but the way to approach this is to take the rules that we have here. Unless there is objection, we will go ahead, then, and the first rule is Rule 4, page 1 of Preliminary Draft III. Rule 4(e). Have we anything from the Major?

DEAN MORGAN: Rule 4(e) is the only one that you have changed, isn't it, Charlie?

THE ACTING CHAIRMAN: Yes.

MR. HAMMOND: The Major favors the second draft at the bottom of the page.

DEAN MORGAN: Yes. I think we have to have that if we are going to insert this rule on condemnation.

MR. HAMMOND: Yes.

SENATOR LOFTIN: I suggest we pass that over until we decide what we are going to do with the condemnation rule.

MR. LEMANN: Aren't we going to adopt the condemnation rule? It is just a question of what form it is going to take. If so, I think perhaps we had better take the suggestion of the Reporter, which Major Tolman recommends also. We would have to

have a rule of court in here if we had a condemnation rule, wouldn't we?

MR. HAMMOND: Yes, sir.

MR. LEMANN: The only question is whether there is any possibility that we won't adopt some condemnation rule.

MR. HAMMOND: We are going to adopt some rule, as I understand it. There is no question about that. We are practically together with the Lands Division on all the amendments except the one about dismissal.

MR. DODGE: I move we adopt the alternative rule, subject only to reverting to the first suggestion if we do not adopt any condemnation rule.

DEAN MORGAN: I second the motion.

JUDGE DOBIE: That is, put in "a rule of court," as suggested by the Reporter. I second that.

MR. DODGE: That is right.

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

We next go on to Rule 6. Let me say that, as we go along, I wish the members of the Committee would look at the notes, if you haven't done so already, and at the end I should like to have some suggestions on the notes. I am just a little disturbed that Mr. Mitchell thinks the notes are not correct. He says that some of them are directed to the Committee, which of course is true, but I think in every case we have labeled

them as such. Would you be thinking about that? If you want to, bring it up at any time under a particular rule, but at the end I should like to have a little further instruction about the notes. We had contemplated that these notes, except for those directed to the Committee, were the ones that would go out with the final draft. That is what we worked on.

Now let's turn to Rule 6(b). What are the suggestions?

MR. HAMMOND: Mr. Mitchell says this:

"The revision (said to be favored by the majority) would give the Court power to entertain a motion for new trial at any time, and as the end of the term does not under our rule affect the court's power, it seems to me there would be no limit of time on the court's power to grant a new trial--and no finality to a judgment, the very thing of which we complain in the decision in Hill v. Hawes.

"If the Committee does adopt this revision, I think the note ought to state what the result is, to wit, that there would be no time limit on granting a new trial, and no finality to any judgment. I think I know what the bar would say if such a note were attached.

"I favor the alternative. If it is desirable to give some power to the court to enlarge the time for granting new trials, would it not be better to adopt the alternative, and then amend Rule 59 to place a more generous limit on time for

motions for new trial--but always with the restriction that such a motion cannot be made after the time for appeal has expired?"

THE ACTING CHAIRMAN: The Major has something, hasn't he?

DEAN MORGAN: He favors your original.

MR. HAMMOND: Yes, he favors the original.

THE ACTING CHAIRMAN: You will recall, I am quite sure, that it was the Major who brought up the proposal originally; I mean at the last meeting. Of course, I am on record as favoring the alternative, but I am not quite sure what we will do about this because the Major and Judge Donworth, among others, I think supported the change. But at least the first thing we should do is to find out the sentiment of us here present.

PROFESSOR SUNDERLAND: What is the present status of the equity doctrine of applying in equity for a new trial at law? Is that employed in practice at the present time or has that jurisdiction of equity rather disappeared?

THE ACTING CHAIRMAN: I am not sure that I know. What have you in mind?

PROFESSOR SUNDERLAND: You can apply in equity for a new trial at law.

THE ACTING CHAIRMAN: You mean a bill of review?

PROFESSOR SUNDERLAND: Yes; a bill in equity for a new

trial at law. That is the old equity practice.

JUDGE DOBIE: Haven't we a six-month limit on that in either 59 or 60, in which to move to set aside an order?

THE ACTING CHAIRMAN: No, I don't think so. Rule 60(b), you know, is a motion which is more extensive than the original law, but that provides in itself, in 60(b), that you may still have the bill for review. Mr. Moore, you might explain that.

JUDGE DOBIE: There is no time limit on that?

PROFESSOR MOORE: Three months.

JUDGE DOBIE: That is what I thought. There was a six months' limit on it.

DEAN MORGAN: But in no case exceeding six months.

PROFESSOR SUNDERLAND: A bill in equity for a new trial.

JUDGE DOBIE: Any motion to set aside an order or judgment. Isn't that the idea?

PROFESSOR MOORE: Any proceeding in equity or at law, such as the old writ of alter requiro.

DEAN MORGAN: The last sentence in 60(b) says it doesn't limit the power of the court to entertain an action to relieve a party from a judgment, order, or proceeding. That is your equity action that you are talking about.

PROFESSOR SUNDERLAND: That is the equity I had in mind. If there is no limitation on that now, if we take off

this limitation of new trials, we are really not changing the practice very much except the method of doing it.

DEAN MORGAN: Yes, but you don't get a bill in equity setting aside a judgment sustained except in very extraordinary circumstances.

PROFESSOR SUNDERLAND: Wouldn't that be true with the administration of this new trial?

DEAN MORGAN: I don't think so. I think the minute you begin to extend the time in which you can fool around for a new trial, you are going to have it happen time and time and time again. When you bring a bill in equity to do this sort of thing or a complaint starting a new action to set aside a judgment, the court will require you to make a showing. It is just a motion, the way most courts grant an extension of time for motions, at least in my experience.

PROFESSOR SUNDERLAND: How would it do to suggest that the time limit could be exceeded only in cases where, under the prior practice, we had this sort of method of going at it? I don't like to see an absolutely ironclad rule put down there for limiting the time. It seems as though there ought to be a possibility in a suitable case to extend it.

MR. LEMANN: Most states have limits, Professor Sunderland, I think, on motions for a new trial, and I don't know that there is any provision in most states to extend it. In my state you have to apply for it in three days, and of

course the lawyers, automatically almost, apply for the new trial right away. They immediately do it. That doesn't mean they have to argue it in three days.

DEAN MORGAN: No.

MR. LEMANN: That motion for new trial sometimes is not set down for hearing for thirty days. You get the time you need to present it, but it has to be immediately filed. Here it is ten days as it now stands, without any extension. When I first read this amendment, I didn't see any objection to the way the majority voted the last time, to let the judge extend it, but Mr. Mitchell is apprehensive that it may mean an definite extension.

MR. DODGE: We discussed that a good deal at the last meeting, and we added, I think, only three rules to the three that are already in the rule as adopted last time. One is the new trial motion. What were the other two?

MR. LEMANN: Rule 52(b) is the amendment of findings, and 50 is the reservation of decision on motion for directed verdict. I made a little index of it. Didn't we have new trial in the original edition?

THE ACTING CHAIRMAN: What is that, Mr. Lemann?

MR. LEMANN: In the original rule we prohibited any extension of the time for new trial.

DEAN MORGAN: We certainly did.

THE ACTING CHAIRMAN: Yes, we did.

THE ACTING CHAIRMAN: Yes, we did.

MR. DODGE: Subdivision (c).

THE ACTING CHAIRMAN: That has been ruled regularly in Supreme Court decisions as well as trial court decisions.

MR. LEMANN: So the effect of this majority vote last time is to grant an extension that we ourselves haven't previously given.

THE ACTING CHAIRMAN: And nothing is said about how far it goes, either. Some of the state provisions appear on page 4, at the bottom of the page in the footnote.

JUDGE DOBIE: We are still keeping the ten-day motion for new trial; isn't that true?

THE ACTING CHAIRMAN: We haven't taken any action yet. We are discussing it, Armistead.

MR. LEMANN: What he means, I understand, is that ten days is the standard provision now permitted by the rules for motion for new trial, under 59.

THE ACTING CHAIRMAN: Ten days is the existing rule. The question now is whether we modify to extend.

MR. LEMANN: You wouldn't cut it down in any rule.

THE ACTING CHAIRMAN: No. There was no suggestion to that effect.

JUDGE DOBIE: The only exception we now make is newly discovered evidence, isn't it?

DEAN MORGAN: Doesn't both your proposals except

60(b), which is the time for making a motion for a new trial?

MR. LEMANN: No; 60(b) is not the new trial provision.

DEAN MORGAN: What does it say? "A motion for a new trial shall be served not later than 10 days after the entry of the judgment". That is 59(b). I am sorry.

MR. LEMANN: That is 59.

THE ACTING CHAIRMAN: Rule 60(b) is the provision for motion to modify the judgment for inadvertence, excusable neglect, and so on. Of course, that still operates, and may operate in this case.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: It doesn't operate on quite the same grounds.

MR. LEMANN: Oh, very different grounds.

THE ACTING CHAIRMAN: That is true.

MR. LEMANN: This is a rather unusual provision that Judge Olney persuaded us to take over from a California Code provision in 60(b).

THE ACTING CHAIRMAN: That is correct.

MR. LEMANN: But that is not the normal case. The new trial is the normal case.

DEAN MORGAN: Absolutely.

MR. LEMANN: What was the rule in equity generally? If I brought a suit for specific performance and the judge decided against me, how long did I have to go in there and ask

for a new trial in equity?

MR. HAMMOND: Here is the equity rule, Mr. Lemann. I have it here before me.

"No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court; but if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court."

JUDGE DOBIE: That is the old equity rule.

MR. HAMMOND: That is true.

MR. LEMANN: That is tied up with the terms that we want to get away from.

JUDGE DOBIE: I am against anything that ties in with the terms. We have abolished that and, for God's sake, let's let that stay. With that exception, I am open minded on almost anything.

THE ACTING CHAIRMAN: Let me state the connection of this problem with the problem raised by Hill v. Hawes. You may consider the two separately, of course, but if you take action to modify the rules as the Supreme Court has already done in Hill v. Hawes, then you may not want to do this at the same time. You don't want to make two modifications, all looking to making a judgment uncertain.

I suppose you all remember Hill v. Hawes. That was

a case down here in the District of Columbia. Judgment was entered; the appellant claimed that he didn't get notice of it from the clerk, and he got the trial judge to re-enter the judgment, and nothing more. The Court of Appeals held that that did not extend the time, and in the Supreme Court the majority held that it did, that the appeal was within the time.

Mr. Mitchell, you see, wants to go against the rule of the case directly. My suggestion, which he says is only reluctantly accepting and tinkering with it, is found under 60(b), pages 56 and 57 here, in which we put in a provision in effect allowing the district judge to modify the judgment during the six months' period, and Mr. Mitchell has other alternatives which are stricter than that.

I just wanted to bring that to your attention.

MR. LEMANN: There is no necessary connection between this rule and the Hill v. Hawes situation.

THE ACTING CHAIRMAN: Shall I put it this way: There is no theoretical connection between the two. Practically, isn't there this connection, that you don't want to extend the time of finality of judgment in two different ways at the same time? Do you?

MR. LEMANN: Of course, I think maybe the trouble in Hill v. Hawes is the exceptional situation prevailing in the District of Columbia. I was startled to find that in the District of Columbia the time for appeal was provided by rule of

the appellate court instead of by statute. Everywhere else in the country it is provided by statute, and you have ninety days; but in the District of Columbia it is provided by rule, and the rulewas twenty days. If that chap had had ninety days, he would have found out that a judgment had been rendered against him, in all probability, and he would have gotten in in time in the original entry, but he had only twenty days. I think now they have extended it to thirty, haven't they?

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: I thought they had extended it to three months. I think they have.

MR. HAMMOND: Thirty days is the last.

MR. LEMANN: My impression is that they extended it to thirty days. You really have only one-third of the time to appeal in the District of Columbia that you have anywhere else in the country. I don't see much reason for that, but I suppose that is up to the Court of Appeals for the District of Columbia, isn't it?

MR. HAMMOND: Yes, sir. As Mr. Mitchell says, the Congress gave the Court of Appeals of the District of Columbia the power to fix the time for appeal to that court by a special act.

MR. LEMANN: It is the only court of appeals that has the power.

MR. HAMMOND: Yes, sir.

THE ACTING CHAIRMAN: Do you want to take up further Hill v. Hawes at this time or to postpone it? Mr. Mitchell has put in all his suggestions as to Hill v. Hawes in connection with the next subdivision here, (c).

MR. HAMMOND: May I suggest on that that I think it would be advisable to postpone it until I can distribute to the members of the Committee what Mr. Mitchell has to say about it. He has quite a lot to say about it and has specific recommendations in regard to it. Not only that, he has quite a lengthy letter which he wrote to the Chief Justice about Hill v. Hawes after the case was decided, suggesting that they ought to have a rehearing of the case, and he has the reply from the Chief Justice.

JUDGE DOBIE: We certainly ought to have that before us, I think, before we consider it.

MR. HAMMOND: That is my suggestion, Judge Dobie. We will have those pretty soon.

JUDGE DOBIE: Suppose we pass that. I move we pass that.

MR. HAMMOND: It will require, I think, the consideration of reading them by the individual members of the Committee before you act on it. I think you can act much quicker if you do have it that way.

THE ACTING CHAIRMAN: There is no question that we must have Mr. Mitchell's material before us. That was a great

letter he wrote. He told the Supreme Court what was what.

The present question is on 6(b). Do you want to postpone that, too. As we said, it is not necessarily connected. It all affects the general idea.

DEAN MORGAN: I don't see that the two are tied together at all.

THE ACTING CHAIRMAN: Then, will you take some action on this?

DEAN MORGAN: You remember the history of this. The original amendment that was voted by the Committee was practically the alternative, wasn't it, and then on the second meeting they cut out a lot of these places where we prevented denying the enlargement.

THE ACTING CHAIRMAN: Yes.

DEAN MORGAN: One of them that they cut out was 59, which had to do with new trial. Of course, I am not in a very good position to speak on this because I vigorously opposed the cutting out of these various matters and wanted all the lists that were in the alternative at the time.

THE ACTING CHAIRMAN: Yes, that is a correct history. I think it is only fair to say that this specific issue wasn't particularly considered at the first Committee meeting last May. What we were considering then was meeting some cases that had raised the question how far Rule 6(b) would apply in certain cases not indicated.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: There wasn't any question of the new trial particularly as such. At any rate, we voted to insert something definite to make it very clear.

MR. DODGE: I understand that the substitute rule takes away the power of the court to extend the time in three cases. First, motions for a new trial, as far as concerns paragraphs (a) and (b). That is, we had in before the time for serving affidavits.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: That is right.

MR. HAMMOND: Opposing affidavits.

MR. DODGE: Yes; opposing affidavits, where there might be a reasonable ground for it, of course. Rules 60(b) and 52(b) are the other two. Rule 50(b) is the time for filing a motion for verdict after decision reserved, or whatever you call it, which doesn't seem to me very important; but the other one is more important, and that is the possible time for amending the findings of the judge.

Those are the three things, aren't they?

THE ACTING CHAIRMAN: Yes. I don't know that it is important whether you use the expression "takes away" or not. I might just say, however, that the holding is very definite that the time cannot now be extended under 59. So, in that case you will not be taking away power; you will be adding.

MR. DODGE: Except as to 59(c).

THE ACTING CHAIRMAN: No; in 59(a) and (b).

MR. DODGE: Yes. In 59(c) you left the power of the court existing.

MR. LEMANN: In the rules as now existing, but not under this proposed alternate change.

DEAN MORGAN: Oh, yes.

MR. DODGE: First, on 59 you have two questions. The first is whether we shall take out or leave it as it was before, which gave the court power not to extend the time for filing motion, but only the time for filing opposing affidavits where there might be reason for doing it.

THE ACTING CHAIRMAN: Yes, that is correct.

MR. LEMANN: I understand, Mr. Dodge, that is as left in the original rule.

THE ACTING CHAIRMAN: That is only left in by the alternative rule. The rule voted by the Committee, you see, extends (c).

MR. LEMANN: Altogether.

MR. DODGE: You haven't changed that at all in your amendment.

THE ACTING CHAIRMAN: In the alternative rule?

MR. DODGE: Yes.

THE ACTING CHAIRMAN: We have not changed it. We leave 59 as it is now.

MR. DODGE: True; 59(c).

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the proposed change. You are taking out the limitation on 59.

MR. DODGE: No; he is leaving 59 in.

MR. LEMANN: Not in the majority vote, as I understand it.

THE ACTING CHAIRMAN: I think I understand you, Monte. Of course, it depends on the way you are looking at it whether you say leaving it in or taking it out. I think you are quite correct that what the majority vote is doing is in what was the former rule--the former rule as worded, not necessarily as it stands.

MR. LEMANN: The rule as it now stands.

THE ACTING CHAIRMAN: The former rule was 59, and that is taken out now, and these other three rules are put in the place of it. That is correct as a matter of wording.

MR. LEMANN: I think that weakens the rule, because you had a limitation in there on the power of the court, that it must not extend the time in 59 except as permitted in 59(c). You have that in the rule now. Now you are going to take that out, and that, I think, is a weakening of the rule. What are you putting in instead? You are putting in a reference to say that he must not extend it in three other cases which aren't of much practical importance, I think. Personally, I think I would rather see the rule stay as it is.

PROFESSOR SUNDERLAND: Your suggestion really is that a fellow can always just automatically make a motion for new

trial, whether he wants really to rely upon it or not. If he doesn't know, he can just do it anyhow, and then he has the point saved.

MR. LEMANN: That is right. I asked Mr. Dodge how long they allow in Massachusetts, and he said three days, which is what they allow in Louisiana. He says he never knew anyone to try to get an extension. With us, I think it would be very doubtful that the court had the power to give an extension. What is it in Florida, Senator?

SENATOR LOFTIN: I think six days.

MR. LEMANN: What is it in Minnesota?

PROFESSOR CHERRY: Thirty.

MR. LEMANN: What is it in Virginia, Judge?

JUDGE DOBIE: I don't know just what it is in Virginia.

THE ACTING CHAIRMAN: It is six days in Connecticut.

MR. LEMANN: It is ten days here as it is, and we have had no kick about it. My own general feeling has been that where we have had no kick after six or seven years, why do we change something? As far as painting the lily with these other things, which is what I think they are--25, 60(b), and 73(g)--you are never going to get these rules absolutely perfect. You are never going to get them where judges aren't going to construe them. You don't want them that way, anyhow. I should think you haven't much popular clamor to change it from the way it now stands.

DEAN MORGAN: I don't see your point, Monte, at all that you are gilding the lily when you are clearing up an ambiguity, because 6(b), as it now stands with that single exception in it, seems very clear to me to mean that all the rest can be extended.

MR. LEMANN: That is right, and there is no ambiguity at all.

DEAN MORGAN: But otherwise, the court on 25--

MR. LEMANN (Interposing): You are not going to get any rule, I think, but that some judge will see something in it that you and I won't see. The minute you pick up one little thing like that, you will have some others. It is just a question of general policy. You have had one judge who said that rule permitted him to do what the statute forbade. Is that right? Is that what he said?

THE ACTING CHAIRMAN: On the substitution rule?

MR. LEMANN: Twenty-five.

THE ACTING CHAIRMAN: The matter first came up on 76(g); that is, the filing of the record on appeal, and it was presented chiefly by the Ainsworth case, which was from the Third Circuit. This is given on the footnote on page 2. There it was held that the district court, on a motion made after the expiration of the forty-day period stated in Rule 73(g) but before the termination of the ninety-day period, could permit docketing; and if you look at 73(g), it says the

contrary. In other words, the court found a conflict between the two, and then took 6(b). That was the first of the direct queries raising the conflict.

Then, 60(b) is the six months rule, and that has been raised in a district court case, at least, and you can see that that is of some importance.

Those are the cases that have come up. They have found some difficulty. They haven't found any question about 59, which is the new trial one. That was clear, and they followed it. They found doubt about these other cases.

Then, as to 50 and 52, the Supreme Court in the Leishman case held that Rule 6(b) governed, and I guess that is all right. At least, there is nothing in either 50 or 52 against it, and therefore 6(b) comes in. That is the background.

SENATOR LOFTIN: Mr. Chairman, who proposed the change, do you remember?

THE ACTING CHAIRMAN: Who proposed the change? Yes, I will give you a little history, which is along the line Mr. Morgan was stating.

Before the May meeting, we (that is, the Reporter and Mr. Moore and Mr. Oglebay) were troubled by the Ainsworth case because that did seem to be a fairly clear conflict in the rules itself. There were two statements that looked different ways. So we then brought in a recommendation that the matter

be made definite by adding the rules where the time could not be changed. As a result of the May meeting, it was so voted. Have you got that, Mr. Moore? I haven't the exact wording, but it was, I think, very much like the alternative rule. I am not sure we had all those provisions in, because I think we hadn't discovered all the cases then, but it was much like the alternative rule.

Then, at the meeting last fall, Major Tolman, I am quite sure, was the active man who brought up the question and said that there should be greater power in the court. I think his chief interest was in the new trial order, although I think he pressed it rather generally. We had quite a discussion, in which the Committee took part quite broadly. Then, at the end we did have the vote which, as I said, was six to four. There were certain absentees, and I think one gentleman did not vote, and the Chairman did not vote. He was not counted in the six to four. That was the result.

That is the history.

MR. DODGE: You want to prevent the court from doing what the Circuit Court of Appeals for the Third Circuit evidently thought justice to the parties required, and the decision which you are objecting to is a decision where justice evidently required that there should be a motion after the forty days, because of excusable neglect.

MR. LEMANN: After all, it doesn't seem to be a very

terrible result. The main argument I understand Mr. Morgan to make, Mr. Clark, is that we have an ambiguity in our rules, and there is a conflict between them because 6(b) was held to control when it wasn't clear that it should have controlled. I shouldn't think there was any conflict. It seems to me the Third Circuit was right.

THE ACTING CHAIRMAN: You think what?

MR. LEMANN: That the Third Circuit was right, and that the result wasn't very unfortunate. You know, it is rather common practice with us to get an order extending the time limit to ninety days immediately. Just so that you won't get caught in any of this kind of argument, as soon as you take an appeal you go to the district judge and get him to extend the order for the full time of ninety days. Here was a fellow in this case who wasn't as much on his toes as that. He let these forty days run by, and then he went in and said, "Give me the ninety days," which he could have got, because I think all the district judges give it. The Third Circuit said, "All right, we will give it to him."

Now we are going to say that he can't have it, that he must be on his toes and ask for the ninety days before the forty are over. I don't see much reason that that should be singled out and that we should say the district judge can't enlarge the time.

THE ACTING CHAIRMAN: May I say still that I don't

think so. In the first place, you understand that this is how far they shall go in the district court. There is no suggestion here as to limitation on the appeal itself. As an actual matter, so far as I know, every circuit court grants mercy as it sees fit. We thought, in drafting the original rules, that there was some desirability of pressing the parties to complete their appeal papers. Otherwise, why did we put in the over-all limit of ninety days? If that is true as to anything else, it might well be true that they can extend the period beyond the ninety days. Therefore, it seemed that it was a sensible way to work it out to provide limitations on going to the district judge. It was all right to go to the district judge for temporary and immediate extension, but after there had been delay, then the whole matter should be in the hands of the circuit court of appeals. From such experience as I have had, it seems to me that that is rather desirable on the whole.

The circuit court cannot avoid a good deal of responsibility in the case of the record. I had hoped at one time that it could be done, but it is impossible. Nevertheless, the circuit court can condition its grant of remedy by getting the case on. What happens in a case of this kind where delay is started is that you then go to the circuit court of appeals, and the circuit court of appeals in my experience provides conditions, whatever may fit the circumstances. It usually is: "How soon can you get this on? If you can get this on in

thirty days and we can get it on in such-and-such session of court, we will grant it." This, of course, puts it all back in the hands of the district court.

As to the meaning of the rule, you will notice that two circuit courts of appeals have ruled contrary to the Ainsworth case. That is stated in the footnote on page 2: Mutual Benefit Health & Accident, in the Sixth Circuit; and Burke v. Canfield in D. C. Appeals.

Of course, I think all through the rules there is a public demand that the judges should do something to have justice expeditiously carried out. Our Rule 1 so states, and the provisions for the circuit court counsel in the statute for the Administrative Director require the circuit court counsel to meet twice each year to try to get business expeditiously done. Yet, without any demand, really, our whole tendency is to push the thing farther and farther away.

I find that the thing you have most freely in the courts is time. Even now, these cases come up a couple of years after. I don't quite see how they do it under our rules. I usually inquire, and counsel are very much surprised, and they find they have had various extensions, and so on. It is usually within the rules.

A week or so ago I was working on this kind of case. A judge in a patent case had decided it fairly promptly in 1941, in the winter of '41, and he wrote a good, complete

opinion which should have settled the case immediately for appeal. A year later, in the winter of 1942, he signed findings of fact and conclusions of law which were merely his opinion chopped up into paragraphs. Another year later, in 1943, he signed the judgment, and then they got up on appeal in still another year. I asked him what had happened. He said, why he didn't know. He guessed the counsel didn't seem to be in very much of a hurry, and they didn't care.

But he got into some trouble, because it was a patent for a sadiron, and when the time came, they accused him of going off with the sadirons. He couldn't find the exhibits. But that is neither here nor there.

With the public assuming the courts are responsible for the delays, that is the situation we have, and it doesn't seem to me that, in the absence of any demand from any of the bench or the bar, it is very necessary.

I should like to read something generally that Judge Chesnut said in an address before the Connecticut Bar Association which has been printed in the Connecticut Bar Journal, which I think is a pretty good statement. He said:

"My own comment from experience is that in five years of observation of the rules and their operation in a large metropolitan area, I have yet to note an instance in which they have been found lacking. Particularly it should be impressive to lawyers that no case has come under my notice in

which any lawyer or client has suffered ultimate disadvantage from default or ignorance. There are literally no pitfalls or traps from which they cannot be extricated by the reasonable discretion of the judge, where the parties and their counsel have exercised good faith and the most ordinary diligence. The reason for this remarkable result is the flexibility of the rules in giving large discretion to the judge to relieve against inadvertent mistakes, and the simplicity and clarity of the rules."

MR. DODGE: That is an argument not for cutting down the discretion of the judge, but for leaving it as it is.

THE ACTING CHAIRMAN: It is an argument that there is nothing wrong with the rules, I should think. That is the argument he made.

MR. LEMANN: Did Mr. Mitchell express any views about this, Mr. Chairman?

THE ACTING CHAIRMAN: Yes, this time he does.

JUDGE DOBIE: You might remember, too, that when the Chief Justice came in that time, Charlie, he said some very complimentary things about the rules and expressed the hope that we would tinker with them just as little as humanly possible.

SENATOR LOFTIN: I had lunch with our District Judge last week, Judge Strum. I told him we were having a meeting this week, and he made the statement that he thought the rules

were fine and had worked very satisfactorily, and he hoped that we wouldn't tinker with them any more than we absolutely had to. He thought it would be a mistake to make too many changes or modifications in the rules at this time.

THE ACTING CHAIRMAN: Mr. Mitchell's statement was the one we read before. He said this would make no finality to a judgment--the very thing of which we complain in the decision in Hill v. Hawes.

"If the Committee does adopt this revision, I think the note ought to state what the result is, to wit, that there would be no time limit on granting a new trial, and no finality to any judgment. I think I know what the bar would say if such a note were attached.

"I favor the alternative. If it is desirable to give some power to the court to enlarge the time for granting new trials, would it not be better to adopt the alternative, and then amend Rule 59 to place a more generous limit on time for motions for new trial--but always with the restriction that such a motion cannot be made after the time for appeal has expired?"

MR. LEMANN: Getting back to the necessity for a change here, it has been my thinking to make a motion to leave it as it is, not to change the rule, but then you say you have some conflict of judicial opinion here. Under 73(g) one court of appeals has held that you can't extend the time after the

forty days have run, and two have held the contrary. You ought to smooth that out. How about the others that are put in the alternative here? Have you had any judicial conflict on 50(b) and 52(b)?

THE ACTING CHAIRMAN: On 50 and 52(b), so far as I know, there is no conflict. There is a Supreme Court decision, the Leishman case.

MR. LEMANN: Which is right.

THE ACTING CHAIRMAN: I suppose it is, yes.

MR. LEMANN: Then why not leave it, especially if it is right?

Then, in 25, you have one decision that reached a correct result. The judge refused to extend the two-year period, but he gave a bad reason for it. Am I right on that story?

THE ACTING CHAIRMAN: Well, I guess so.

MR. LEMANN: He said that the statute won't permit it. What he should have said is that the statute was repealed by the rules, but I don't see why I should give a fellow more than two years. That is what he should have said. At any rate, he didn't give him any more time. It doesn't seem to me you have made much of a case for the necessity of a chance.

As far as the new trial limitation is concerned, if we left the rule as it is we would be free of Mr. Mitchell's point and your point. As it is, I think you would rather leave

it as it is than take this new rule.

THE ACTING CHAIRMAN: Yes, I would.

MR. LEMANN: Because you have given your birthright for a mess of porridge on this alternative. Isn't that right, Eddie?

DEAN MORGAN: Yes, I go with you that far.

THE ACTING CHAIRMAN: If it is a choice, yes.

JUDGE DOBIE: Do I understand you to move, then, that we--

MR. LEMANN (Interposing): I move that we make no change in 6(b).

JUDGE DOBIE: I second that motion, to get something before the Committee.

MR. LEMANN: When we come to 73(g), if you think it needs clarification, we can take it up then.

PROFESSOR SUNDERLAND: Would this imply the change Mr. Mitchell suggests in 59(b)?

PROFESSOR CHERRY: No.

MR. LEMANN: No change. Leave the rule just as it stands. That would mean that you can't extend the time for new trial, and all you can do is to handle affidavits in the way provided in 59(c).

PROFESSOR SUNDERLAND: Mr. Mitchell suggested that we might change that ten-day limit, enlarge it, if we made this thing rigid.

MR. LEMANN: I don't see why we should. I think a fellow can go in and ask for a new trial in ten days. It would carry out the general idea of Judge Strum and Lemann (a committeeman) for no changes in the rules.

MR. DODGE: It seems to carry out Mitchell's idea.

THE ACTING CHAIRMAN: Are you ready to vote on the motion or do you want to discuss it further?

MR. HAMMOND: You are going to vote not to make any change at all?

MR. DODGE: That original Rule 6 stand; that is right.

THE ACTING CHAIRMAN: That is the motion.

MR. LEMANN: As far as I can see, it hasn't given any serious trouble.

THE ACTING CHAIRMAN: I think the chief question has been 73(g), it is true. I think that is the one that the most direct authority is on.

MR. HAMMOND: I thought that the Committee was pretty unanimous before that that provision as to Rule 73(g) should go in here in Rule 6.

MR. LEMANN: To clarify this conflict.

MR. HAMMOND: Yes; because there, Mr. Lemann, the Court in the Third Circuit practically disregarded the provision of 73(g).

MR. LEMANN: They said 73(g) was controlled by 6(b).

MR. HAMMOND: Yes.

MR. LEMANN: And I think that is the logical result.

MR. HAMMOND: If you read 73(g), it has an express provision against extending the time, unless the motion to extend it is made before the original order or an extended order.

THE ACTING CHAIRMAN: That is it, yes.

MR. LEMANN: That is all right. Rule 6(b) says where there is excusable neglect, you can do it. Rule 73(g) applies to the case where there is no excusable neglect, where there is neglect that is not excusable. That is the only way that it can be done, under 6(b). Wouldn't you agree with that, Mr. Dodge?

MR. DODGE: Yes, exactly.

DEAN MORGAN: All right, Monte, but you are just saying you had better leave an ambiguity. That is all you are saying. Because you think it is too clear for dispute doesn't alter the fact at all that there was a dispute and that good courts went different ways on it.

MR. LEMANN: That is right.

DEAN MORGAN: It doesn't seem to me that that argument amounts to anything on legislative drafting, Monte.

MR. LEMANN: How would you like to change 73(g)? I was coming to that. I know you won't like it at all, but I would take care of that by changing 73(g).

DEAN MORGAN: Say that Rule 6(c) should not apply here?

MR. LEMANN: Make it apply except in cases where Rule 6(b) applies; that you are not going to change Rule 73(g) otherwise. I guess that just comes down to the question of which rule you are going to change.

MR. DODGE: Did they find in that Mutual Benefit case that there was excusable neglect for not doing it?

THE ACTING CHAIRMAN: I don't think they considered it, did they? That is the contrary case.

PROFESSOR MOORE: As I recall it, they just held that, forty days having expired, it was too late, that you had to go to the court of appeals.

MR. DODGE: In other words, they may have done an injustice to the party through not recognizing that power in 6(b).

PROFESSOR MOORE: Mr. Dodge, he could go to the appellate court, which is perhaps a little more effort, but he isn't shut off.

THE ACTING CHAIRMAN: It is just a question, when you delay should you have to get the grant of favor from the appellate court, which then controls both the grant of favor and the conditions under which it shall be exercised.

DEAN MORGAN: I think Monte must have been used to practicing before very firm judges, because the judges I practiced before and knew, if I went to them for a substitution on 25 after two years, and they had discretion, would find it

pretty hard not to grant it, but they could say, "Well, I haven't got any discretion in this matter. I would like to help you out, but I can't."

THE ACTING CHAIRMAN: The question is on the motion to continue the original form of 6(b) with no amendment. Will you discuss it further? All those in favor of the motion will say "aye"; all those opposed, "no."

I think we had better have a show of hands. All those in favor will please raise their hands.

PROFESSOR SUNDERLAND: There is no change in the original rule?

THE ACTING CHAIRMAN: That it remain just as it is. Four. Am I right now? It is four.

MR. LEMANN: Where is Senator Loftin?

MR. HAMMOND: You have to get him.

THE ACTING CHAIRMAN: Are you voting for the motion?

SENATOR LOFTIN: Yes.

THE ACTING CHAIRMAN: Five in favor. All those opposed? Two.

MR. LEMANN: It does seem a pity that we haven't got a majority of the Committee.

THE ACTING CHAIRMAN: I think I would vote against it. Six to three, was it?

MR. HAMMOND: Five to three.

MR. LEMANN: You gentlemen on the minority, if we put

in 73(g), would that make you happy?

PROFESSOR SUNDERLAND: Is that what you want?

DEAN MORGAN: I want the whole works in.

THE ACTING CHAIRMAN: I would be happier. While I don't think I would quite do it that way, yet I think probably if 73(g) were in, I would take the half loaf and let it go.

DEAN MORGAN: I want to go back to the history of the whole thing. When the whole Committee was here at the first meeting, they put in a whole string of them, and when they were here last time there were only six who wanted to cut it down to the three that now remain.

THE ACTING CHAIRMAN: That is correct.

DEAN MORGAN: So it seems to me the sentiment of the whole Committee was clearly for at least as many substitutes as you have in the proposal here.

MR. LEMANN: What rule did the Supreme Court have, 52?

THE ACTING CHAIRMAN: Their case was particularly on 52(a). That is the findings case. Where did 50 come from, Bill? Fifty is the directed verdict case.

MR. MOORE: They didn't discuss that rule.

THE ACTING CHAIRMAN: That wasn't discussed. The Leishman case--

MR. LEMANN (Interposing): What is the rule?

MR. MOORE: A motion under 50(b) can be joined in the

alternative with a motion for new trial under 59. Logically, if you keep a limitation on 59, it would seem you ought to keep a limitation on 50(b).

MR. LEMANN: Because it might be joined with a motion for a new trial.

DEAN MORGAN: That is it.

MR. LEMANN: It becomes largely a question of what your general attitude is toward changes, I think, whether your attitude is to make every desirable change or whether your attitude is to make no change unless it is important. That is what controls me in my vote. I can see the other point of view, of course.

DEAN MORGAN: My position is that certainly all ambiguities should be cleared up. It may be because I tried to teach this once or twice, and I couldn't tell the students what it meant.

MR. LEMANN: I can see that it would make trouble there.

THE ACTING CHAIRMAN: I don't know what we could do except take our vote as we go along. There is a question of policy. How final shall we consider our votes to be? Of course, this situation brings it out. We have taken a different view at every Committee meeting, and there has been quite a division, a division which I think you could say grows.

Shall we take the final majority view? Might it not

really be better to have more than one view put out? After all, we are supposed to get the advice of the bench and bar, and that is what we are planning to do. If there is a matter about which we are pretty well divided, wouldn't it after all be better to have the various views put out? State which is the majority view, but at least have them put out.

MR. DODGE: Why do that? You might say, "Several of the members of the Committee think that some or all of the following rules should be placed in the exception."

MR. LEMANN: You would have three possible views to put before them at the present moment.

THE ACTING CHAIRMAN: That is it.

MR. LEMANN: You would have to say that some of the Committee feel the rule should stay as it is, that there is not enough necessity to change it; some of the Committee think that the rule should be altered to put in all these limitations that you have in the alternative rule; and some of the Committee think that the limitation now existing as to 59 should go out but that the other limitations could go in. Those are the three views that have been taken up to now.

THE ACTING CHAIRMAN: Yes, I think so, and I am frank to say that I think, unless there is some change in Committee view, it would be wise to have them all out. Why not? We are divided, and if there is any sense in taking the opinion of the bench and bar, isn't it on this type of thing?

MR. LEMANN: It would give us more time to think about it, too, perhaps.

THE ACTING CHAIRMAN: I should be perfectly willing, however, Monte, to have stated, and I think it might be worth while to have stated, what is the majority vote finally, whenever we do establish it.

PROFESSOR CHERRY: We are not going to get any.

THE ACTING CHAIRMAN: That may be.

PROFESSOR CHERRY: We can't very well now.

JUDGE DOBIE: We are not going to have another meeting of the Committee before this goes to the Court, are we?

THE ACTING CHAIRMAN: The idea was not to have one. It will go to the Court just for permission to be sent out. It isn't intended to be adopted finally, you understand.

DEAN MORGAN: Right.

THE ACTING CHAIRMAN: The plan was that we get authority so that, before the Court adjourns for the term, we would have authority to have the material printed.

PROFESSOR SUNDERLAND: Why couldn't we list all these rules for the opinion of the bar as to which ones, taking the whole list, ought to be beyond any extension? There is 59, which is already in. Of course, I suppose there is no use talking about that period for appeal. That is statutory and settled. That is the end of it as far as 59. That is one, and then list 25, 60, 50(b), 52(b), 60(b), and 73(g). List

them all out and get the opinion of the bar as to which ones, if any, should be put in that rule beyond the extension.

THE ACTING CHAIRMAN: I should think that might be all right, but I still think it would be a good idea to have the Committee view. You could state the various views of the Committee.

PROFESSOR SUNDERLAND: You can't get the Committee view because we haven't any view. We are so divided, we should see what the bar thinks about it. We don't need to follow them.

THE ACTING CHAIRMAN: I would be afraid you wouldn't get much of a vote unless it was somewhat directed. You would get a vote from someone who was interested, who had been hit by one rule or another. I should think most people would be more or less overwhelmed by it. I should think that would be the case.

It would seem to me desirable, if you want to, that you pass some motion as to how this rule would be submitted. It would certainly be helpful if we had some guidance.

MR. DODGE: The Committee votes today in favor of retaining Rule 6 as it originally stood.

THE ACTING CHAIRMAN: That is correct.

MR. DODGE: In the light of all that has been said in prior meetings--at least all that we remember of it. Senator Loftin didn't vote--

DEAN MORGAN (Interposing): Yes, he voted.

SENATOR LOFTIN: I did vote.

MR. DODGE: Did he vote out in the corridor?

JUDGE DOBIE: He voted from the telephone booth.

THE ACTING CHAIRMAN: I saw his hand.

JUDGE DOBIE: He showed his hand.

MR. LEMANN: The pity is that we have so many absentees.

THE ACTING CHAIRMAN: Do you want to take any further action about submitting alternatives, or shall we go ahead?

PROFESSOR CHERRY: It stands on the suggestion of three possibilities, doesn't it?

THE ACTING CHAIRMAN: Do you want to make that as a motion, then?

PROFESSOR CHERRY: I understood you to state that as a suggestion a while ago, and I thought it a good one. We voted three different ways.

THE ACTING CHAIRMAN: Yes.

PROFESSOR CHERRY: It is now voted by a majority of those here present to keep 6 as it is.

MR. LEMANN: We voted really only two different ways officially, and the minority has voted another way.

PROFESSOR CHERRY: I mean groups of us have voted different ways.

MR. LEMANN: Three different groups.

PROFESSOR CHERRY: Then, there is the present proposal,

which represents the majority of the meeting last time, and there is the one representing the position of the minority the last time. I think all three should go out.

THE ACTING CHAIRMAN: Do you want to put that as a motion?

PROFESSOR CHERRY: I make it as a motion.

THE ACTING CHAIRMAN: That the three different views which have been supported--

PROFESSOR CHERRY: That have been expressed by vote at our different meetings.

THE ACTING CHAIRMAN: That the three different views which have been expressed by vote shall be submitted as alternatives when the rules are submitted for consideration of the bench and bar. Any discussion of that motion?

MR. LEMMAN: Is there any tactical objection to that? I just wonder.

DEAN MORGAN: It was previously done with the two before, and Mr. Mitchell says he favors the alternative amendment and letting the bench and bar and the Court decide which to accept. I don't know whether he would want to go with three or not.

PROFESSOR CHERRY: The third one is really to leave it as it is, with no change.

MR. DODGE: That is the first one.

PROFESSOR CHERRY: The third one, it seems, in

chronological sequence. It came up first today.

THE ACTING CHAIRMAN: Are you ready for the question on this motion, which is that the three views be submitted? Any discussion? If not, all those in favor will say "aye"; those opposed, "no." The "ayes" have it, and it is our present view that the three views be submitted.

DEAN MORGAN: We will change that next time.

JUDGE DOBIE: I should like to make the suggestion that when that goes out, there be no disparaging remarks made by the minority of the majority, or vice versa.

PROFESSOR CHERRY: No unusually disparaging remarks.

JUDGE DOBIE: We won't say that Monte Lemann over here is interpreting the rule according to his moral standards.

THE ACTING CHAIRMAN: Rule 6(c) is the next listed here. That, however, is tied up with the Hill v. Hawes situation. Mr. Mitchell's suggestions are before you. Do you want to pass them and look at them some, or shall we consider them all?

DEAN MORGAN: We had better consider his suggestion on 6(c), hadn't we?

THE ACTING CHAIRMAN: He doesn't like the 6(c) suggested change. He has something more far-reaching that he wants to go into.

MR. HAMMOND: I notice that Mrs. Dennis has put on the table before each member Mr. Mitchell's suggestions as to the

amendments, but she hasn't yet put on the table the letter to the Chief Justice in regard to Hill v. Hawes and the Chief Justice's reply. I think it would be better to defer consideration of 6(c) until we get all that material.

MR. DODGE: He says that it should be done by amendment of Rule 73, and not here, and that he opposes the addition of these words to Rule 6(c).

MR. HAMMOND: Yes, that is true.

MR. DODGE: Which seems to me to be a sensible view.

THE ACTING CHAIRMAN: He requests that his letter to the Chief Justice be read. We might stop sometime and have Mr. Hammond read it. It is a very forceful letter. I think it is not a bad idea.

DEAN MORGAN: Have you the letter?

MR. HAMMOND: I have the letter here.

DEAN MORGAN: Why don't you read it?

MR. LEMANN: May I ask a question? I took a look at Hill v. Hawes before I left New Orleans, but I didn't remember that the term of court had anything to do with that decision.

DEAN MORGAN: Oh, surely.

THE ACTING CHAIRMAN: They drag in the term of court.

PROFESSOR SUNDERLAND: After deciding the thing, they said, "Besides, the term hasn't expired."

THE ACTING CHAIRMAN: Mr. Sunderland practically

states the case. Let's have Mr. Hammond read it. It is a good letter. If we want to, we can have it read again later.

MR. LEMANN: I didn't recall that that was the ground for the decision.

PROFESSOR SUNDERLAND: They first decided it, and then they dragged that thing in.

MR. HAMMOND: This letter is dated January 27, which was after the decision of the Hawes case.

"Dear Mr. Chief Justice:

"I have examined the opinion of the Supreme Court in Hill v. Hawes, No. 4 October Term 1943, delivered January 3rd, a copy of which you handed me last Sunday at your chambers.

"This decision produces a result which the Advisory Committee in drafting the rules did its best to prevent. It also produces a situation relating to finality of judgments which cannot be permitted to endure, and if the Court does not reconsider the case, lays a difficult problem in the lap of the Advisory Committee. The Committee gave careful attention to this subject. Its records show it gave careful attention to the question whether the rules should make a change in federal practice by making the time for appeal run from the date of the notice of the judgment instead of from the date of its entry. From time immemorial the federal statues have provided that the time for appeal runs from the date of entry, not from the date of notice. Lawyers with any knowledge of federal procedure

were familiar with that.

"The Committee thought it unsafe to proceed on the theory that the statutory provision as to the right of appeal and as to the time of taking an appeal could be altered by rule, especially as the matter is one affecting the jurisdiction of the United States Circuit Courts of Appeals. The rules were drafted accordingly, and there can seem to be no mistake about the fact that the statutes providing that the time should run from entry were left undisturbed. No provision of the rules states otherwise. On the contrary, Rule 73 expressly states that the right of appeal and the time for appeal are prescribed by law. The published notes of the Advisory Committee to Rule 73 state:

> 'This rule continues in effect the statutes providing for the time for taking an appeal.'

"All the works on the new federal practice advise the bar that the time runs from the date of entry, not from the time of notice of the entry, and that the statutes on this question were still in effect. See, Moore's Federal Practice, Vol. 3, pp. 3390, 3393. He says:

> 'The time for taking an appeal runs from the entry of the judgment.'

"The bar were given other repeated warnings. At the Cleveland Institute, held by the American Bar Association and published and distributed to its members in 1938, the following appears (p. 370):

March 25-28, 1946
Vols 1, 3, 4.

Have other manuscripts of the Committee.

BW
5-6-60

'Mr. Mitchell. The statutes regulate that, and the federal statutes in all cases prescribe that the appeal must be taken within a specified date from the entry of the judgment and that is what I wanted to warn you about.'

And on page 360:

'and I will ask you to remember also that under the federal statutes which govern the right of appeal, the time for taking an appeal commences to run from the date of judgment, and not from the date of notice of the judgment. These rules prescribe in another place relating to judgments that the clerk shall mail an informal notice of the entry of the judgment to the parties. But the giving of that notice is not the thing that starts running the time for appeal; the failure to give it would not save you if you let your three months go by.'

"In a similar 'institute' in New York, it was said to the bar:

'Bear in mind that under the federal statutes which regulate the right of appeal, the time for taking the appeal runs not from the notice of the judgment but from the date of its entry.' (Proceedings published by American Bar Association in 1938, p. 318)

"It is clear enough that under these rules the time runs from the date of entry of judgment, not from the notice. Indeed, the opinion in Hill v. Hawes seems to conclude that, but it also states that counsel have a right to rely on receiving notice of entry from the clerk. The above material, coupled with the long established practice in the federal court, suggests to me that no counsel had any justification for failing to make his own inquiry at the clerk's office on the nineteenth day after the case was submitted and every twenty days

thereafter. The opinion says:

> 'It is true that Rule 77(d) does not purport to attach any consequence to the failure of the clerk to give the prescribed notice but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may well be that the effect to be given to the rule is that although the judgment is final for other purposes it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule.'

"It is hard to believe that Rule 77 could be so construed. I should suppose that to repeal federal statutes providing that the time for appeal runs from date of entry, there would have to be something definitely to that effect in the rules. To my mind the rules make it clear that the statutes remain in effect. In so important a matter as fixing time for appeal, if it had been the purpose to make the date of service of notice the critical date, it would hardly have been left to a mere informal notice by mail from the clerk, possibly by postal card, with no filing of definite proof of actual delivery to or receipt by the party served. It has generally been the practice in the federal courts for the clerk to mail informal notice to all parties of the entry of orders. This includes intermediate and unappealable orders. It is an accommodation service furnished counsel. The old equity rules provided for such notices by the clerk, and the provision for such service in Rule 77 was a mere continuation of the old equity rule. For example, the Revised Equity Rules, adopted in 1912, contained

in Rule 4 the following:

> '4. NOTICE OF ORDERS. Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor, and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order.'

"No one ever suggested that the equity rule abolished the statutory rule as to running of the time for appeal, or that the giving of the notice was necessary to start the time running, or that any litigant or lawyer had a right to rely on the notice or that he could get relief after the time for appeal expired, by showing he had not received the notice. As to lack of power in a district court to enlarge or revive the time for appeal, that is made clear by Rule 6(b), which states that a district court 'may not enlarge * * * * the period for taking an appeal.' If the court may not make an order enlarging the time, either before or after the time expires, it cannot make an order reviving it. The device of vacating and immediately reentering the judgment, for the sole purpose of reviving the right of appeal, is the equivalent of an order enlarging or reviving.

"Rule 60(b) that a court, within six months, may relieve a party from a judgment 'taken against him through his mistake, inadvertence, surprise, or excusable neglect' has no

sole purpose of reviving the right of appeal) continues for an indefinite time after a term expires. No one now can be certain of the finality of a judgment. If it can be vacated because the lawyer was guilty of excusable neglect, as a result of the clerk's failure, it may on principle be vacated and reentered during or after the term because of some other excusable neglect.

"The Court's opinion does not mention Rule 6(b) or 6(c). I have not seen the briefs, but it is hard to believe the Court could have reached the conclusion it did if the case was thoroughly argued or it had not overlooked 6(b) forbidding enlargement of time for appeal, or 6(c) about the effect of expiration of the term. It certainly overlooked 6(c) and as that is part of the same rule that contains the prohibition against enlarging time for appeal, I infer neither provision was considered when the opinion was agreed to. This may justify a reconsideration of the case by the Court. My humble opinion is that it ought to be reheard--on the Court's own motion, if necessary. If it is not reconsidered, the Advisory Committee's problem is a tough one. In that case, we surely must recommend some alteration in the rules. We already have one express and clear prohibition against enlarging time for appeal. Reiterating that statement will not help matters. We might add a provision that the district court may not evade the prohibition against enlargement by the device of vacating

and reentering the judgment, but we would hesitate to publish a recommendation that the Court adopt a rule labeling as an evasive device a course of action it has judicially approved.

"This is a long screed, and it is doubtless asking too much of you to give it any consideration, but I am somewhat at a loss to know what our Committee should do, and disturbed at being 'convicted' as one of a committee which drafted rules opening the door to discretionary revival of the expired right of appeal, even after the term is over, and of having failed so completely to express in the rules the purpose of the Committee.

"Sincerely,

"William D. Mitchell"

MR. LEMANN: How long was this after the opinion?

THE ACTING CHAIRMAN: Very soon.

MR. HAMMOND: Very shortly. The opinion was on January 3, and the letter was written on January 27.

MR. LEMANN: Did Stone and Murphy dissent? Stone dissented, I know.

THE ACTING CHAIRMAN: Stone and Murphy, yes.

MR. LEMANN: I thought it was Murphy. I wondered how that happened.

MR. HAMMOND: There was a petition for rehearing filed, and I think Mr. Justice Douglas voted in favor of granting the rehearing.

THE ACTING CHAIRMAN: Yes. The almost immediate response to this letter, I could see, was the petition denied. The letter went in between, before the petition for rehearing was denied, but the statement that came down when the petition for rehearing was denied was that Mr. Justice Douglas is of the opinion the petition should be granted.

MR. LEMANN: Not the Chief Justice.

THE ACTING CHAIRMAN: As you will see from the Chief Justice's letter, he says it is their custom not to participate in the consideration of reargument when they have been in the minority.

MR. LEMANN: Who wrote the opinion, again?

THE ACTING CHAIRMAN: Justice Roberts, Chief Justice Stone writing the dissenting opinion. You are not through yet.

MR. HAMMOND: There is a postscript.

"P.S. It happens that Hill v. Hawes arose in the District of Columbia, where the time for appeal is fixed by rule adopted by the Court of Appeals under authority of Act of Congress. This does not seem to affect the case. The district court in enlarging the time (or reviving the right of appeal by the vacation and reentry) was not setting aside one of its own rules but a rule formulated by the Court of Appeals affecting the jurisdiction of that court, with which, under no conditions, could the district court tamper. Furthermore, the fact that only twenty days were allowed in which to appeal, makes it even

more incumbent on counsel to be on the alert as to entry of a judgment, than would be the case in the states where three months was the period."

Here is the Chief Justice's reply of February 22.

"Dear Mr. Mitchell:

"This is to supplement my last letter to you on the subject of the Civil Rules, and particularly those rules which were dealt with in Hill v. Hawes.

"There will not be a reargument in the case so far as I am now advised. Being in the minority I took no part in the consideration of the question whether there should be a reargument, that being the tradition of the Court. But I am instructed by the Court to assure you that the Committee should feel entirely free to propose rules which it deems appropriate with respect both to the date or event from which the time to appeal runs, and the power of the Court to extend the statutory period of appeal by entering a new order.

"At the time the Court handed down Hill v. Hawes it put down another opinion in No. 83, United States v. Hark & Yaffe, decided January 3rd last, which also has some bearing on the question. In case you have not seen it you might do well to take a look at it.

"I hear you and Mrs. Mitchell have been down south. I wish we could have joined you.

"With kind regards, I am

"Yours sincerely,

(Sd.) "Harlan F. Stone."

Mr. Mitchell has his detailed and specific suggestions as to what to do about it, which we can take up.

THE ACTING CHAIRMAN: Of course, we want to take them up in detail when the time comes, but I can say that, broadly, he suggests two alternatives, and they are interesting alternatives. I think I can state the first by saying that its intent is to say in so many words that Hill v. Hawes is wrong, and to do it by additions to the rules involved, including the rule on appeals. The other alternative is to shorten the time for appeal to thirty days and then to provide that the time dates from notice. I think that is a short statement of it.

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: I should say that I would be quite interested in the latter. As I understand the background, there has been quite a little agitation for shortening the time. It seems to me impossibly long, really, to have ninety days for doing the very simple thing of filing a notice of appeal. It would seem to me that thirty days was appropriate. I understood that the Conference of Senior Circuit Judges had voted in favor of it. The last time I was down here, Mr. Hammond informed me that there was objection from the Department of Justice--objection somewhat led or assisted by my brother, who is the Assistant Attorney General in charge of tax work--and

they felt it would be very difficult. Be that as it may, I haven't discussed it with my brother, but I think I still would feel that thirty days was appropriate. I hadn't thought that we dared claim that much, however, and it is interesting to me that Mr. Mitchell now thinks that we should or that at least we should propose it as an alternative and takes the statement in the Chief Justice's letter as some feeling that the Court would agree.

MR. LEMANN: Are we ready to discuss that yet?

MR. HAMMOND: I would still suggest, if I may, that the members read Mr. Mitchell's suggestions before we take it up.

MR. LEMANN: We wouldn't be to these points yet, would we? These are amendments to Rule 73, both of them, aren't they?

DEAN MORGAN: And 77(d).

MR. HAMMOND: And 77(d). The only thing is that he does discuss it here under Rule 6(c).

DEAN MORGAN: The term.

MR. HAMMOND: The term. He would not change that. Judge Clark had a proposal for an addition to 6(c) to help take care of the Hawes case, but Mr. Mitchell doesn't think that is the way to do it. I also have a note from Mr. Tolman that he doesn't feel so.

MR. LEMANN: Offhand, I should think that that change

in 6(c) wouldn't be a sufficient way to do it. What would be the objection to that change, anyhow, if anybody thinks that 6(c) isn't plain enough as it is?

THE ACTING CHAIRMAN: Monte, let me just state generally the line that we were following; that is, Mr. Moore and I in particular. Rule 6(c) is a very unimportant part of it; in fact, perhaps not even necessary. Our general theory was that this decision showed that courts were always going to break down the rules, and we might as well accept it and then try to see that they did it in an orderly way.

The heart of our proposal is in 60(b), when we get there, and in general it is a granting of power to the court to act within six months. We pointed out that a court did have that power under the old rules during the term of court, and when we abolished the term and the other provisions, we took away that much power. The term of court, depending on the time when the judgment is entered, might last more than six months, you see. So we suggested that as a way of doing it, really codifying Hill and Hawes, so to speak, but limiting it to six months.

MR. LEMANN: Suppose we do this: Pass this and get the whole thing before us, until we get to 60(b), and then take up 73(g) and have all three rules. By that time we can have read Mr. Mitchell's memorandum.

THE ACTING CHAIRMAN: That is quite all right, but I

do want to take it up before any of you get away because, outside of whatever questions there may be raised on the draft, this is by all odds the most important question. This is a very important question.

MR. DODGE: This is no way to correct that decision.

MR. LEMANN: No.

MR. DODGE: It is just a platitude. Of course the continuation of the term doesn't enlarge the court's power. All they said was, "We have the power, and anyway the term hasn't expired," and they continued to execute it. They weren't enlarging it because the term had not expired, but assuming its continued existence, Mr. Mitchell says that this proposed amendment to 6(c) is not the way to do it. Let's see how he describes this on page 2 of his memorandum.

MR. LEMANN: "I think it is an awkward and improper way to deal with it," he says.

MR. DODGE: I would agree with that. Why bother ourselves by coming back to this?

MR. LEMANN: As an effective way to do it, the only question is whether this is worth doing for any other reason.

THE ACTING CHAIRMAN: As I said, this isn't a very important part of the proposal. It may not be even a necessary part of the proposal. The real proposal is in 60(b), and I shall have to say, with perhaps a little hanging of my head, that I thought I was giving way to Mr. Dodge in 60(b).

MR. DODGE: I move that Section 6(c) stand as it is, without the suggested amendment.

THE ACTING CHAIRMAN: Any discussion? This has never been voted, so this is just a suggestion. All this came up after our last meeting, of course.

JUDGE DOBIE: You would rather not put that in there about "nor does the continuation of a term of court enlarge the court's power"?

MR. DODGE: I can't imagine anybody claiming that it did.

JUDGE DOBIE: Justice Roberts seemed to have that idea.

MR. DODGE: They didn't say so. They said, "We have the power, as a matter of fact, and we note that our term is still in existence."

MR. LEMANN: The court's term. The district court's term, not the Supreme Court's.

MR. DODGE: The term of court, whatever it was. The term in the district court.

JUDGE DOBIE: Above there, it seems to be clear enough, if it is ever going to be clear.

THE ACTING CHAIRMAN: Of course, Justice Roberts did do a little more than that. "The term had not expired, and the judgment was still within the control of the trial judge for such action as was in the interest of justice to the parties

to the cause," and we think that wasn't so.

PROFESSOR CHERRY: But these words don't take care of that. I don't think these words do anything.

THE ACTING CHAIRMAN: They may not.

MR. LEMANN: The words are for emphasis and to prevent anyone, even seven eminent men, from thinking that a term is any longer important. Maybe we ought to defer to that idea instead of correcting it.

MR. DODGE: The thing can be corrected so well when you come to 73 or 77 that this language seems silly to me.

MR. LEMANN: This wouldn't be sufficient to correct it, anyhow, I think.

DEAN MORGAN: This is just the converse of the other, that the expiration of the term doesn't affect the power or its continuation.

MR. LEMANN: That is right.

DEAN MORGAN: I suppose Charlie is referring to the fact that they made orders continuing the term for specific purposes under the old system. Didn't they, Charlie?

THE ACTING CHAIRMAN: Yes. They do that, of course, now in the criminal law right along, which is a funny thing. The district attorney asks you to order that the term be continued for the purpose of this case, and apparently it is his theory that you can continue it quite indefinitely. When I have sat in criminal cases I have said, "Very well." That was

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about all I knew to say. I always wondered about the effect of it.

PROFESSOR CHERRY: The only ambiguity that there could be in the rule as it stands, it seems to me, is that we talk about the expiration of the term and, at the bottom, about the continuation. It would seem that the term would have expired, but it has been prolonged for the reasons that used to be popular in civil cases, not now. What we really mean up above where we say "is not affected or limited by the expiration of a term of court", is that it is not limited or affected whether there is a term of court or not.

MR. LEMANN: Terms of court are unimportant. But isn't it true that Justice Roberts just didn't read 6(c); not that he didn't understand it, not that he would have thought it ambiguous, but he just didn't read it, and he spilled out this sentence without having read it?

MR. DODGE: He didn't say it enlarged the court's power. He said the fact that it hadn't expired left the court's power existing.

MR. LEMANN: If he had read 6(c), it seems to me he shouldn't have said that, because he would have thought even that an entirely inappropriate comment. I don't see how anybody could doubt that, reading 6(c) as it stands, so I think Mr. Mitchell is right in saying that they just overlooked 6(c) and probably overlooked all of 6, for that matter. They never

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referred to 6(b), either.

THE ACTING CHAIRMAN: Of course, the Chief Justice shows that Mr. Mitchell's letter was at least brought to the attention of the Court, because he says that he is instructed by the Court to say that the Committee should go ahead and do whatever it felt proper. Yet it made no change in that part of the opinion.

Let me ask this: We have attempted at times to add notes stating why we think a rule should not be changed. We haven't tried to cover every rule, of course, because this isn't an exegesis of the rules, but we have done that two or three times, and of course our action on Rule 6(b), the alternative, will cover that. If we make no change here, should the Reporter write a note saying, "We make no change in 6(c) because we don't believe the Court read it"?

MR. DODGE: I wouldn't make any comment on it. I would leave the rule as it stands.

JUDGE DOBIE: When we come to that ultimately, I understand that Mr. Mitchell is opposed to a flat statement that would overrule Hill v. Hawes, that the vacating of the judgment and re-entry shall not in any way affect the time for taking appeal.

THE ACTING CHAIRMAN: No; he is not opposed to it.

JUDGE DOBIE: I thought he said that he didn't like to do it. I wouldn't hesitate to do it.

to the cause," and we think that wasn't so.

PROFESSOR CHERRY: But these words don't take care of that. I don't think these words do anything.

THE ACTING CHAIRMAN: They may not.

MR. LEMANN: The words are for emphasis and to prevent anyone, even seven eminent men, from thinking that a term is any longer important. Maybe we ought to defer to that idea instead of correcting it.

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THE ACTING CHAIRMAN: He said that to the Chief Justice, but now he takes the Chief Justice's reply as authority to do just that.

JUDGE DOBIE: I think it ought to be done.

PROFESSOR CHERRY: Look at the bottom of page 2 of Mr. Mitchell's memorandum.

MR. DODGE: The top of page 3, yes.

PROFESSOR CHERRY: ".... (and the Chief Justice's letter suggests that the Court means we should not be backward about giving Hill v. Hawes a kick in the pants) ...."

MR. DODGE: He suggests a good one at the top of page 3.

PROFESSOR CHERRY: He proceeded to kick.

JUDGE DOBIE: "One is to make amendments reiterating more clearly our original intent and repealing, ... The other alternative is to assume that the Court has power ...." Then he says he favors the latter. That is not in here. It is in his letter to the Committee.

THE ACTING CHAIRMAN: Do you want to pass this or do you want to make some motion at this time?

MR. DODGE: I make a motion that this stands as at present.

JUDGE DOBIE: That is, 6(c)?

MR. DODGE: Rule 6(c).

JUDGE DOBIE: That leaves 77(d) for further

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consideration?

MR. DODGE: Yes.

THE ACTING CHAIRMAN: The motion is that Rule 6(c) stands as in the present draft of the rule.

MR. LEMANN: I second it.

THE ACTING CHAIRMAN: All those in favor say "aye"; those opposed. It is so ordered. (Carried) No change.

Rule 7 is one that has been voted, I think, from the beginning.

PROFESSOR CHERRY: Yes. We had no trouble.

MR. DODGE: It is to make plain what was intended.

THE ACTING CHAIRMAN: There hasn't been any question about it so far. Shall we just pass it, then? All right.

JUDGE DOBIE: The idea was to put "if the answer contains" instead of "to".

THE ACTING CHAIRMAN: No; it is the other way around. The matter in brackets goes out; the matter underlined is added.

MR. LEMANN: That has never given any trouble except in this commentary. I voted against that the first time on my general idea that we shouldn't change except where we have kicks. It seems to me a mighty little thing to put in a change on it. I voted against it before, so I am just recording myself.

THE ACTING CHAIRMAN: All right.

JUDGE DOBIE: I don't see how anybody could misread that. Of course there is a reply to a counterclaim. It

couldn't be anything else.

MR. LEMANN: I guess the time for a new trial is running against him on that.

THE ACTING CHAIRMAN: Are we up to Rule 12?

MR. LEMANN: Here is where blood will flow now.

THE ACTING CHAIRMAN: I don't know. There has been so much blood flowing so many times, is there much more blood left to flow?

Let me say broadly that there is first a question on 12(a), and 12(a) in general has not in the past been particularly controversial. The attempt there has been to get into shorter and more succinct form the question of time. Rule 12(a) is quite separate from the main questions, and I think we had better consider them separately. The questions about which the Committee is divided have been on the remaining portion, beginning particularly with 12(b) and centering, really, about 12(b). So, unless you have some objection, I suggest that we first take up 12(a) and consider it.

MR. DODGE: Isn't that, as you have written it here, exactly what we voted at the last meeting?

THE ACTING CHAIRMAN: It is, with--

MR. DODGE (Interposing): Some words added at the end, which were voted for.

THE ACTING CHAIRMAN: Yes, 12(a) as printed here on pages 7 and 8, as I understand it, is what we have approved

the cause," and we think that wasn't so about the effect

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before. You did vote to add, however (I am sorry to say that we omitted it, and I sent out a letter afterwards adding it), a provision at the end:

"The time for a party to plead or otherwise move under this rule may be extended by a written stipulation of the parties once without approval of the court."

JUDGE DOBIE: Any length of time?

THE ACTING CHAIRMAN: Yes. That was definitely discussed at the time. There was a proposal (I think it was Judge Donworth who made the motion) of some time limit. I have forgotten just what it was now, but there was a time limit. Then, after discussion, that went out, and this is the way the transcript shows it was voted. As I indicated in my letter to you, I regret it, but that is that.

MR. DODGE: We discussed that at considerable length before. Is it necessary to go over that again? I think Section 12(a), as we voted it before, after long discussion, should stand.

JUDGE DOBIE: That permits one amendment, one extension.

MR. DODGE: Yes.

JUDGE DOBIE: Without any time limit. Of course, that is susceptible of abuse, but I don't know that it will be done.

MR. DODGE: You get the agreement of both parties.

It isn't introduced by one party.

DEAN MORGAN: That is before trial, once before trial.

MR. DODGE: Yes.

JUDGE DOBIE: I don't know how they are in your part of the country, but the lawyers are entirely too courteous down in Virginia. One lawyer comes to the other and makes almost any proposal and, particularly if they are friends, it is considered a sort of breach of legal etiquette not to comply with it.

MR. DODGE: He wouldn't extend it very long, wouldhe?

JUDGE DOBIE: He might, but I don't think in practical cases he will.

PROFESSOR CHERRY: This is limited to once.

JUDGE DOBIE: Yes.

THE ACTING CHAIRMAN: It seems to me a little too bad to take this entirely out of the hands of the court. Under this, the court can do nothing about it. In almost every other place we have it that the approval of the court is necessary. This, of course, came up as a result of a decision of the Third Circuit which was really on a somewhat collateral point, and I don't think that here the demand is quite sufficient for it.

MR. DODGE: The courts aren't the parties who have the real rights in the matter; they are the clients of the people. If a man asked to extend time agrees to a reasonable

the cause," and we think that wasn't so about the effect

PROFESSOR CHERRY: But these words don't take care of

t. I don't think these words do anything.

THE ACTING CHAIRMAN: They may not.

MR. LEMANN: The words are for emphasis and to pre-

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MR. LEMANN: That is right.

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extension of time, the court isn't the sufferer.

JUDGE DOBIE: I think the court in nine cases out of ten would approve it. I know I certainly would, although I did smack down about those continuances.

PROFESSOR CHERRY: Would you on a first degree continuance, a first one?

JUDGE DOBIE: Ordinarily I would not.

PROFESSOR CHERRY: That is all this is.

JUDGE DOBIE: As soon as I went on the district bench they pulled that on me. They said, "This is a matter of course, and you have nothing to do with it." I immediately instilled the idea that I did have something to do with it. I don't remember ever denying a first continuance, but I did try to get the idea across that they had to have my idea, that they couldn't do it and just run the court.

MR. DODGE: It doesn't come up very often.

JUDGE DOBIE: I don't think so. I wouldn't make any point of it.

THE ACTING CHAIRMAN: Have you any views on this, Eddie? You didn't have before.

DEAN MORGAN: No. I am not kicking about this too much.

THE ACTING CHAIRMAN: You voted against it before.

DEAN MORGAN: Yes.

MR. DODGE: I move that paragraph (a) stands as

the cause," and we think that wasn't so about the effect

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ve sat in criminal cases I have said, "Very well." That was

written.

THE ACTING CHAIRMAN: It is moved that the subdivision stand as it is here, of course with this final sentence which was part of the previous vote.

MR. HAMMOND: May I say something? There are one or two questions on the other part of (a) in addition.

THE ACTING CHAIRMAN: Then I think we ought to take them up. Don't you think so?

MR. HAMMOND: You can vote, however, on the addition and have that out of the way.

DEAN MORGAN: That is already voted on.

THE ACTING CHAIRMAN: Go ahead, Mr. Hammond.

MR. HAMMOND: There hasn't been any formal vote on the addition of that.

THE ACTING CHAIRMAN: It was voted before.

DEAN MORGAN: Last time.

MR. HAMMOND: All right. Then this is just the wording of it. All right.

This is just on the wording of the amendment of (a). In the first place, I think this is a change of the sort that need not be made. It seems to me that the rule as it stood was perfectly clear and, furthermore, that the change isn't as clear as the rule was.

I should like to ask this question: How about a reply that is ordered? What is the time for that? We do permit

a reply on order of the court. Under the amendment, what is that time? It is not entirely clear to me from the rule. I suppose it is twenty days from the date of the order, as the rule originally read, but you have in there the words, "when required by these rules," and it seems to me that the amendment doesn't cover the time for a reply on order of the court.

THE ACTING CHAIRMAN: I would answer it this way: Of course, in the first place, it must be said, as is obvious, that what Mr. Hammond says is true. It isn't spelled out in so many words, but there it is a matter of the court's order, and it seems to me that it could be taken care of only by the court in the order and that there is no reason that it shouldn't be taken care of there. It was one of those things that it wasn't necessary to express. There wasn't any reason for spelling it out in so many words.

MR. LEMANN: I wonder whether the words "suspends these periods of time" in line 17 are any better than "alters", which is the word which was used in the original. Except for cutting out the reference to bill of particulars, which of course is proper, I shouldn't think that you have improved the language substantially. It is just something else for the bar to ask, "What change did this make?" and they will sit down and compare the original with the new language. Of course, you put in a note that says all you did was to state it in more concise, understandable form, but nobody has kicked about understanding

the cause," and we think that wasn't so about the effect

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THE ACTING CHAIRMAN: They may not.

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it. I wasn't here last time, but generally I am opposed to changes for which there has been no popular or serious demand.

A bill of particulars has to come out, of course, in view of the other changes made.

THE ACTING CHAIRMAN: I think that the question before you is really which you like better.

MR. LEMANN: From my point of view, I don't really think it is a question of which de novo would have been better. It is just a question of whether the original is so defective that there is a necessity for changing it.

MR. DODGE: It isn't much of a change.

MR. LEMANN: Very little change. If I were voting de novo, Mr. Dodge, I think I might prefer this new language, but that isn't my guide.

MR. DODGE: I think you are right.

Do you think, Mr. Reporter, that this is very much of an improvement over the prior language?

THE ACTING CHAIRMAN: I had thought so, yes. I don't mean to say that I want to make any strenuous argument for it.

MR. DODGE: Did we vote on this particular change? I had forgotten that.

THE ACTING CHAIRMAN: Yes, we have approved it.

JUDGE DOBIE: I think the idea was that we made a number of changes in this rule and were almost rewriting it, and therefore that the general proposition which Mr. Lemann

the cause," and we think that wasn't so about the effect

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advanced that we ought not to make changes unless they were vital would not apply, that while we were rewriting this thing we might as well make it as clear as possible.

MR. DODGE: You state in five lines what we had in ten, which is a point.

THE ACTING CHAIRMAN: That is perhaps the chief reason for doing it. It always seemed to me that the former rule was a little awkward, with quite a bit of detail of the obvious. As I recall, the way this came up was a bit incidental. At the May meeting we had suggested that this subdivision could be shortened and, as we thought, made more concise. I think I am correct that at the end of that meeting no definite proposal had been made, but there was some discussion and it was referred back to the Reporter to come out with a draft which would be more concise, which we did at the fall meeting, and then it was approved.

That is correct, isn't it, Mr. Moore?

PROFESSOR MOORE: I think so.

MR. LEMANN: Is it plain that the word "suspends" is better and more accurate than the word "alters" in line 17? Maybe so, but I am in doubt as to whether it is as accurate.

THE ACTING CHAIRMAN: That is what it does, really.

DEAN MORGAN: It doesn't suspend the period of time.

PROFESSOR CHERRY: It doesn't suspend the period.

PROFESSOR SUNDERLAND: "Suspends" means to carry it

the cause," and we think that wasn't so about the effect

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along. You don't do that.

DEAN MORGAN: It suspends the requirement, that is all.

PROFESSOR CHERRY: I think "alters" is better.

JUDGE DOBIE: Leave it as he suggests, but with "alters" instead of "suspends".

PROFESSOR CHERRY: Leave the rule as it was on that point.

JUDGE DOBIE: How about "any" and "provided for in"? Or would you agree to give the rule as the Reporter has modified it, but instead of the word "suspends" just put the word "alters"?

MR. DODGE: Then you go on, don't you, to define what the new periods of time are?

DEAN MORGAN: Yes.

JUDGE DOBIE: What I am thinking now is whether we would make the changes suggested; that is, put "a" for "any", and "permitted under" which I do think is better than "provided for in", and then continue as he suggests with the underlined, cut out what is in parentheses and just put "alters" for "suspends".

MR. DODGE: It would be better English, anyway. You can't suspend a period. It is clear, isn't it, that you can't suspend a period of time?

JUDGE DOBIE: I don't think "suspends" is a good verb

the cause," and we think that wasn't so.

PROFESSOR CHERRY: But these words don't take care of t. I don't think these words do anything.

THE ACTING CHAIRMAN: They may not.

MR. LEMANN: The words are for emphasis and to prevent anyone, even seven eminent men, from thinking that a rm is any longer important. Maybe we ought to defer to that ea instead of correcting it.

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there.

THE ACTING CHAIRMAN: I think it is all right to put in "alters". I should think that would be all right.

JUDGE DOBIE: You suspend the running of the statute of limitations. I move, then, just to get it before us, that we adopt the Reporter's suggestion there as to the sentence beginning "The service", but that we substitute the word "alters" for the word "suspends", in line 17.

PROFESSOR SUNDERLAND: Supported.

THE ACTING CHAIRMAN: Very well. Do you want to discuss that more? If not, all those in favor will say "aye"; those opposed "no." The "ayes" have it.

Have we taken any action on the first part of the rule?

PROFESSOR SUNDERLAND: On that first sentence underlined?

THE ACTING CHAIRMAN: Yes.

PROFESSOR SUNDERLAND: I wonder whether that couldn't be improved a little by dropping out in line 12 "to a prior pleading". It seems as though that is superfluous. The time allowed for serving a responsive pleading has to be to a prior pleading. It couldn't be anything else. ".... when required by these rules, is 20 days". I should think you would want to put in after "20 days", "after service of the prior pleading". You don't know when that twenty days commenced. It would read

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then: "The time allowed for serving a responsive pleading, when required by these rules, is 20 days after service of the prior pleading."

PROFESSOR MOORE: After service of process, though, sometimes.

PROFESSOR SUNDERLAND: A responsive pleading?

PROFESSOR MOORE: Surely. Service of an answer to a complaint would be twenty days after service of process.

MR. HAMMOND: The complaint is served with the process.

MR. DODGE: Of course, the problem is almost always as to an answer. There aren't many answers to counterclaims and all that sort of thing, once out of fifty times, but the answer might be emphasized by saying, "The time for filing an answer" (that is what the ordinary lawyer wants to know) "or other responsive pleading, when permitted ...."

JUDGE DOBIE: Do you state anywhere when those twenty days start to run? Of course, we start now with the complaint, don't we, and the complaint is served on the man, instead of the old process?

THE ACTING CHAIRMAN: Yes.

MR. DODGE: Twenty days from service.

JUDGE DOBIE: From service of the prior pleading. It might be well to state that in there, as Mr. Sunderland suggests. I think it probably will be read that way, but while we are changing it we might make it so clear that not even the

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Supreme Court can misunderstand it.

THE ACTING CHAIRMAN: Mr. Moore suggests that that service of process does include service of the complaint, and I am not sure your complaint is completely valid. Is it?

PROFESSOR MOORE: When you do effect service on the United States, you serve on two or three different persons there, and the lawyers get copies of the complaint.

PROFESSOR CHERRY: That is provided for.

THE ACTING CHAIRMAN: That is only when it is completed, I guess.

PROFESSOR CHERRY: The United States is a special case.

DEAN MORGAN: You have a special one for the United States.

PROFESSOR CHERRY: That is taken care of separately.

PROFESSOR MOORE: "Service of process" is the accurate term, rather than "service of complaint."

MR. LEMANN: You had that pretty plain in the first line as it stands, so you see how you get into new arguments when you put in new language.

MR. HAMMOND: That is just my point.

MR. LEMANN: See Lemann, J., page 84: You had it very nice up there, Mr. Dodge.

THE ACTING CHAIRMAN: Mr. Sunderland moves, as to lines 11 to 16, that the words "to a prior pleading," be taken

the cause," and we think that wasn't so about the effect

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out in 12, and the words "after service of the prior pleading," be inserted after "days". Is that correct?

PROFESSOR SUNDERLAND: In 13; yes.

MR. LEMANN: Then comes Mr. Moore's point. Does "service of the prior pleading" cover you all right, Mr. Moore?

DEAN MORGAN: You can't have a responsive pleading to anything else, can you?

MR. DODGE: Yes, I think you can.

JUDGE DOBIE: Pleading to a process.

MR. LEMANN: I am not sure I caught Mr. Moore's point, but he had a point to object to on this.

PROFESSOR MOORE: Take the case where you serve a non-resident motorist, served by serving the secretary of state, who mails a complaint, and so on. It is true that the defendant is going to get a copy of that complaint, but technically the point when the twenty days begin to run is when the service of process is made, which includes not only the complaint but a summons.

MR. LEMANN: Don't you serve the summons and complaint on the secretary of state?

PROFESSOR MOORE: Yes.

PROFESSOR SUNDERLAND: Then you get the complaint at the same time as the summons, don't you, and respond to the complaint?

MR. LEMANN: Twenty days from the service of the

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summons and complaint. The complaint has been served on the secretary of state.

PROFESSOR SUNDERLAND: The response is certainly to the pleading.

MR. LEMANN: I think the original language, however, was better in that regard, if I may be permitted to say so, from the standpoint of the bar. I think they like nice direct, plain statements. He serves his answer. That is what usually happens. The other responsive pleadings, somebody pointed out, are very unusual, anyhow.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: Do you want to take it on Mr. Sunderland's motion or does somebody else want to move to amend or how do we stand from the parliamentary point of view?

DEAN MORGAN: Somebody will have to move to sbustitute the original.

MR. LEMANN: Yes. Move it, Mr. Morgan.

DEAN MORGAN: The original eleven lines.

MR. LEMANN: I move that we revert to the original eleven lines.

THE ACTING CHAIRMAN: I don't know whether parliamentarily it would be permissible or not, but I don't see why we shouldn't accept it, unless there is some objection. We might as well vote on Mr. Lemann's motion, I guess.

PROFESSOR SUNDERLAND: Just as well, yes. That is

along. You don't do that.

DEAN MORGAN: It suspends the requirement, that is all.

PROFESSOR CHERRY: I think "alters" is better.

JUDGE DOBIE: Leave it as he suggests, but with "alters" instead of "suspends".

PROFESSOR CHERRY: Leave the rule as it was on that point.

JUDGE DOBIE: How about "any" and "provided for in"? Or would you agree to give the rule as the Reporter has modified it, but instead of the word "suspends" just put the word "alters"?

MR. DODGE: Then you go on, don't you, to define what the new periods of time are?

DEAN MORGAN: Yes.

JUDGE DOBIE: What I am thinking now is whether we would make the changes suggested; that is, put "a" for "any", and "permitted under" which I do think is better than "provided for in", and then continue as he suggests with the underlined, cut out what is in parentheses and just put "alters" for "suspends".

MR. DODGE: It would be better English, anyway. You can't suspend a period. It is clear, isn't it, that you can't suspend a period of time?

JUDGE DOBIE: I don't think "suspends" is a good verb

there.

THE ACTING CHAIRMAN: I think it is all right to put in "alters". I should think that would be all right.

JUDGE DOBIE: You suspend the running of the statute of limitations. I move, then, just to get it before us, that we adopt the Reporter's suggestion there as to the sentence beginning "The service", but that we substitute the word "alters" for the word "suspends", in line 17.

PROFESSOR SUNDERLAND: Supported.

THE ACTING CHAIRMAN: Very well. Do you want to discuss that more? If not, all those in favor will say "aye"; those opposed "no." The "ayes" have it.

Have we taken any action on the first part of the rule?

PROFESSOR SUNDERLAND: On that first sentence underlined?

THE ACTING CHAIRMAN: Yes.

PROFESSOR SUNDERLAND: I wonder whether that couldn't be improved a little by dropping out in line 12 "to a prior pleading". It seems as though that is superfluous. The time allowed for serving a responsive pleading has to be to a prior pleading. It couldn't be anything else. ".... when required by these rules, is 20 days". I should think you would want to put in after "20 days", "after service of the prior pleading". You don't know when that twenty days commenced. It would read

then: "The time allowed for serving a responsive pleading, when required by these rules, is 20 days after service of the prior pleading."

PROFESSOR MOORE: After service of process, though, sometimes.

PROFESSOR SUNDERLAND: A responsive pleading?

PROFESSOR MOORE: Surely. Service of an answer to a complaint would be twenty days after service of process.

MR. HAMMOND: The complaint is served with the process.

MR. DODGE: Of course, the problem is almost always as to an answer. There aren't many answers to counterclaims and all that sort of thing, once out of fifty times, but the answer might be emphasized by saying, "The time for filing an answer" (that is what the ordinary lawyer wants to know) "or other responsive pleading, when permitted ...."

JUDGE DOBIE: Do you state anywhere when those twenty days start to run? Of course, we start now with the complaint, don't we, and the complaint is served on the man, instead of the old process?

THE ACTING CHAIRMAN: Yes.

MR. DODGE: Twenty days from service.

JUDGE DOBIE: From service of the prior pleading. It might be well to state that in there, as Mr. Sunderland suggests. I think it probably will be read that way, but while we are changing it we might make it so clear that not even the

Supreme Court can misunderstand it.

THE ACTING CHAIRMAN: Mr. Moore suggests that that service of process does include service of the complaint, and I am not sure your complaint is completely valid. Is it?

PROFESSOR MOORE: When you do effect service on the United States, you serve on two or three different persons there, and the lawyers get copies of the complaint.

PROFESSOR CHERRY: That is provided for.

THE ACTING CHAIRMAN: That is only when it is completed, I guess.

PROFESSOR CHERRY: The United States is a special case.

DEAN MORGAN: You have a special one for the United States.

PROFESSOR CHERRY: That is taken care of separately.

PROFESSOR MOORE: "Service of process" is the accurate term, rather than "service of complaint."

MR. LEMANN: You had that pretty plain in the first line as it stands, so you see how you get into new arguments when you put in new language.

MR. HAMMOND: That is just my point.

MR. LEMANN: See Lemann, J., page 84: You had it very nice up there, Mr. Dodge.

THE ACTING CHAIRMAN: Mr. Sunderland moves, as to lines 11 to 16, that the words "to a prior pleading," be taken

out in 12, and the words "after service of the prior pleading," be inserted after "days". Is that correct?

PROFESSOR SUNDERLAND: In 13; yes.

MR. LEMANN: Then comes Mr. Moore's point. Does "service of the prior pleading" cover you all right, Mr. Moore?

DEAN MORGAN: You can't have a responsive pleading to anything else, can you?

MR. DODGE: Yes, I think you can.

JUDGE DOBIE: Pleading to a process.

MR. LEMANN: I am not sure I caught Mr. Moore's point, but he had a point to object to on this.

PROFESSOR MOORE: Take the case where you serve a non-resident motorist, served by serving the secretary of state, who mails a complaint, and so on. It is true that the defendant is going to get a copy of that complaint, but technically the point when the twenty days begin to run is when the service of process is made, which includes not only the complaint but a summons.

MR. LEMANN: Don't you serve the summons and complaint on the secretary of state?

PROFESSOR MOORE: Yes.

PROFESSOR SUNDERLAND: Then you get the complaint at the same time as the summons, don't you, and respond to the complaint?

MR. LEMANN: Twenty days from the service of the

summons and complaint. The complaint has been served on the secretary of state.

PROFESSOR SUNDERLAND: The response is certainly to the pleading.

MR. LEMANN: I think the original language, however, was better in that regard, if I may be permitted to say so, from the standpoint of the bar. I think they like nice direct, plain statements. He serves his answer. That is what usually happens. The other responsive pleadings, somebody pointed out, are very unusual, anyhow.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: Do you want to take it on Mr. Sunderland's motion or does somebody else want to move to amend or how do we stand from the parliamentary point of view?

DEAN MORGAN: Somebody will have to move to sbustitute the original.

MR. LEMANN: Yes. Move it, Mr. Morgan.

DEAN MORGAN: The original eleven lines.

MR. LEMANN: I move that we revert to the original eleven lines.

THE ACTING CHAIRMAN: I don't know whether parliamentarily it would be permissible or not, but I don't see why we shouldn't accept it, unless there is some objection. We might as well vote on Mr. Lemann's motion, I guess.

PROFESSOR SUNDERLAND: Just as well, yes. That is

all right.

THE ACTING CHAIRMAN: Any further discussion? Mr. Lemann's motion is to retain lines 1 to 11 in place of the substitute in 11 to 16.

MR. LEMANN: To keep 12(a) as it stands relating to bill of particulars, and adding this provision about stipulation? Is there any other change?

THE ACTING CHAIRMAN: I thought that we had already voted to take the sentence beginning in line 16, with the change suggested.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: Do you want to reconsider that?

SENATOR LOFTIN: We only voted to change the word "suspends" to "alters".

THE ACTING CHAIRMAN: That is correct.

MR. LEMANN: That is going back to the original, and when you do that you haven't got your new result there in those lines, and it is not very significant. You have "alters" now, you see.

DEAN MORGAN: He said "these periods of time," instead of "the time fixed by these rules for serving any required responsive pleading."

THE ACTING CHAIRMAN: I might point out, too, over at the top of page 8, the addition about the bill of particulars that we suggested, and it was voted, you see, to leave out the

last sentence.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: The last sentence is so unimportant that it really seemed too bad to tack it on to the end of a long section. I don't mean the new last sentence that we have now added to it, but the last sentence as it was originally, to wit: "In either case the time for service of the responsive pleading shall be not less than remains of the time which would have been allowed under these rules if the motion had not been made."

You will see that that went out when we made all the time twenty days. The old rule had ten days after the motion. The whole thing was very inconsequential. It meant that if you got a motion decided, you would get perhaps ten extra days. It seemed simpler to make every period twenty days. It was easier to remember.

MR. LEMANN: You have ten days still referred to, haven't you, and twenty once?

DEAN MORGAN: You still have ten days here.

MR. LEMANN: In 21 and 24.

THE ACTING CHAIRMAN: The point is, if you are going back to the old rule, do you want also to retain this last sentence?

DEAN MORGAN: No, I don't think so.

THE ACTING CHAIRMAN: It is a foolish little thing,

I think, and it just causes more to worry about.

MR. DODGE: Who makes a motion and expects action on it by the court to take place within those twenty days?

DEAN MORGAN: I think it is nonsense with that last sentence.

MR. DODGE: So do I.

PROFESSOR CHERRY: It takes longer than ten days.

THE ACTING CHAIRMAN: That being so, I think the situation is that we have, for the time being at least, voted in the sentence in lines 16 to 25 with the changes as we voted them, that we haven't yet formally acted on that last sentence, and that we now have before us Mr. Lemann's motion, which is to retain lines 1 to 11 in place of 11 to 16.

MR. DODGE: In order to make progress, I move an amendment: And that the rest of (a) stand as you have written it.

THE ACTING CHAIRMAN: Yes. Very well.

MR. LEMANN: How about that word "alters"?

MR. DODGE: That has been done.

MR. LEMANN: That has been voted.

THE ACTING CHAIRMAN: Monte, do you accept the amendment?

MR. LEMANN: Yes, sir.

THE ACTING CHAIRMAN: Very well.

PROFESSOR SUNDERLAND: I just wondered why that word

in 23 was "may" instead of "shall"; "responsive pleading may be served within 10 days after" notice. You really mean it is required to be served.

MR. DODGE: That is one of those cases where "may" is to be construed as "shall."

PROFESSOR SUNDERLAND: If it is "may," then the inference is that it may be within ten days or some other time, as you please.

THE ACTING CHAIRMAN: This, you will see, is from the original rule. Why did we do it originally? You see, that is language that isn't changed.

PROFESSOR SUNDERLAND: If you are laying down a time requirement, it seems to me you ought to use "shall" instead of "may."

MR. DODGE: It means you shall have twenty days ordinarily, but you may have ten if this happens.

PROFESSOR SUNDERLAND: Yes, but shall be served.

DEAN MORGAN: You may get permission to go further.

PROFESSOR SUNDERLAND: Isn't that imperative?

MR. DODGE: It means "shall."

THE ACTING CHAIRMAN: That is the original form we had. That is not changed.

Are you ready for the question? The question now will be in substance accepting the old rule 1 to 11, accepting the new change from 16 on, subject to the modifications of

that change we have already made, which are (1) that "permitted under" is substituted for "provided for in" and (2) that "alters" is substituted for "suspends." Are you ready for the question? All those in favor will say "aye"; all those opposed. The "ayes" have it, and it is so voted. I take it, as we have discussed, that also includes the extra added sentence about the stipulation of the parties.

MR. DODGE: I think Mr. Sunderland was right that both those may's should be "shall".

PROFESSOR CHERRY: Lines 21 and 23.

MR. LEMANN: Do you so move?

MR. DODGE: Yes.

THE ACTING CHAIRMAN: Mr. Dodge moves that in lines 21 and 23 the word "shall" be substituted for the word "may".

DEAN MORGAN: Second.

THE ACTING CHAIRMAN: Any discussion? All those in favor will say "aye"; opposed. So voted. (Carried)

Now we come down to the question on the rest of the rule.

MR. LEMANN: What is the substantive change that you, without running against you on rehearings, propose to 12(b)? What is the importance of the change that you propose to the rule as voted in November?

THE ACTING CHAIRMAN: First let me say this: It was voted at that time to send out two drafts: the majority draft

as here, and the alternate draft which followed. I think it is only fair to say that the difference between them is much less than it has been before. I think that they are very much closer than they have been at any time before. It really seems to me that the general intent is much the same and also that probably the substantial result will be the same. Although I may be wrong, it seems to me, therefore, that it has now come down very largely to a question of wording. I didn't feel this quite as much at the time of the meeting as I did when we came to work on it. When we came to work on it, it seemed to me that in substance we were much closer than I ever realized. Now I think it is more a question of taste and expression.

If I may try to state the substantial difference--

MR. DODGE (Interposing): May I ask you first, is this first draft the one that we voted for after the long discussion?

THE ACTING CHAIRMAN: That is correct.

MR. DODGE: And we voted to submit an alternative draft, and you have prepared that.

THE ACTING CHAIRMAN: That is correct.

PROFESSOR SUNDERLAND: Did we vote to submit that to the bar, you mean?

THE ACTING CHAIRMAN: Yes.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: That was the understanding.

Let me say first, before I state anything more, I think that we should here first decide whether we want to follow that general program or to vary it. After we have decided that, then there are some questions of wording of certainly the first draft that have come in from various people, and there may be of the second.

MR. LEMANN: I am wondering a little bit how far we should go in submitting frequent (in more than one or two cases) alternatives to the bar. Number one, it indicates that the Committee isn't able to harmonize its views very effectively, as a court should; and, number two, it is a little confusing to the bar; and, number three, how intelligent a reaction will you get from the bar? I think only in a few instances will you have them favor you with a really well-considered preference. I don't know. I am just thinking aloud about it, Charlie. I am just wondering whether it is a good idea to do it to any considerable extent.

SENATOR LOFTIN: How many suggestions have we now in this draft?

JUDGE DOBIE: You had a good many before.

THE ACTING CHAIRMAN: I think since the last meeting (this one for 12 was the only suggestion definitely passed on then) there have developed more, and of course Hill v. Hawes perhaps presents more.

MR. LEMANN: We ought to have one in 6 at this meeting.

We just did it in 6.

THE ACTING CHAIRMAN: Yes. I think, all told, there were about four different instances. Of course, that might not be so when we get through at this meeting. I don't think there were more than four. This is the only place where at the last meeting we definitely decided to suggest alternatives.

I am a little afraid that I am talking too much, but I don't know what else to do. It is a little bit difficult being Acting Chairman and Reporter, and maybe you will want to change and get some other chairman in, because I would rather talk than not. At least for the time being I will go ahead.

If I may suggest, it would seem to me that where a matter is important (and in the past we have considered this important) we ought to do it some. I may say that that is what the Advisory Committee on Criminal Rules did. They did that in their earlier draft, and there they had really more extensive arguments than as yet we have developed. If you recall, on that various members of the Committee made long arguments, and others replied. Those were in the appendix to the Criminal Rules. If a precedent is desired, there it is.

I wouldn't rely on that particularly, but I would say this: After all, what do we really submit it to the bench and bar for? I suppose between us here we could say that we do it somewhat to estop them, quite frankly.

JUDGE DOBIE: We get their good will very frequently,

I think, by submitting it to them, even though they don't make any valuable suggestions. At least they will know there hasn't been any Star Chamber stuff.

THE ACTING CHAIRMAN: I think that is very true and very desirable, and perhaps that may be the most desirable feature. Nevertheless, I think at least in form it is our story that we are seeking advice; and if we are seeking advice, isn't a better way to do it in cases where we have doubt to ask their advice upon it? It is quite a different thing than if we were acting finally. It is quite a different thing from submitting the two different versions of thought. This, after all, is preliminary, and we haven't reached any final conclusion as to what to submit to the Court.

MR. DODGE: You put one rule up as being voted by the Committee and then an alternative as being favored by some. I certainly think that this primary rule here, for which we voted after so many debates, should be put up as the Committee's primary draft.

THE ACTING CHAIRMAN: Of course, as to the details of how it should be submitted, I don't know. Mr. Mitchell raised a question on that. He apparently desires more explanation, and that is certainly quite all right. He says this:

"Rules 12: The Committee decided at the last meeting to print both proposals for comment by the bar. In the print there should be a careful note of explanation of both."

It would be my idea, too, that we should put in as much of the Committee's vote as will be helpful, and that is what I thought we had done. We had said that this was voted by the Committee.

MR. DODGE: That is what I had in mind.

MR. LEMANN: What is the important difference, now, that you want to bring out in this note of explanation?

THE ACTING CHAIRMAN: I take it the difference is really this--

MR. DODGE (Interposing): Not more than one motion, I think.

MR. LEMANN: That you have to put it all in a motion if you want to raise any of it, and you can't keep some of it for your answer? Would that be it?

THE ACTING CHAIRMAN: No, I don't think that is it. The difference is mainly down in lines 37 to 40. That is the most important part of all. In the original draft it is this:

"If matters outside the pleadings are presented to the court upon a motion made under defense (6), such motion may be considered a motion for summary judgment and disposed of as provided in Rule 56."

The alternative suggests directly that your motion is a motion for summary judgment.

The difference, I think, really is one--I don't want to use it opprobriously, but I should say one of frankness and

directness. The Committee draft seems to me to say that you start doing one thing and end by doing another, that the motion becomes transformed in the course of going ahead from a motion like the old demurrer into a motion for summary judgment. Why isn't it more correct and more straightforward to say it is a motion for summary judgment from the beginning? The summary judgment doesn't require affidavits, and if neither party wants to submit affidavits, they don't have to.

There has been a very serious difficulty with these two rules as to which governs, as to when you have a motion under Rule 12(b) and when you have a motion for summary judgment under Rule 56, and there has been doubt in the courts, but the circuit courts of appeals have come very substantially to say in effect that it doesn't make any difference, that in effect you consider a motion to dismiss with affidavits as a summary judgment. It is in the district courts where there has been the greater confusion.

Of course, now I am frankly suggesting the alternative, but why isn't it better to say it directly?

MR. DODGE: That is the exact question that we have argued and debated at great length, and it was, as I recall it, overwhelmingly voted at the last meeting that we should retain the equivalent of the old demurrer or motion to dismiss as such, and should not in every case label it a motion for summary judgment just because one time out of a hundred somebody

will not file what is a real demurrer but will file something supported by affidavits, which is of course a motion for summary judgment. Ninety-nine times out of a hundred, where it is claimed the plaintiff has no cause of action, the motion to dismiss (as they now call it) or the demurrer should be retained as a very convenient way of quickly disposing of litigation. We voted on that at the last meeting and, I think, at the meeting before that, and debated it at great length, and my recollection is that it was overwhelmingly carried.

THE ACTING CHAIRMAN: It is true we have debated this a lot, and Mr. Dodge is quite right in saying that we have considered it perhaps as much as we can, unless we get new light as we go ahead; but I do want to say two things, and I think I am entitled to it.

First, it was not overwhelmingly carried. It was a very sharp decision, very close--so close, you see, that Senator Pepper came to the support of the alternative. We have sent it to him, and he has expressed not final approval but very strong approval temporarily. The vote was just a bit over even at the end.

Second, I am afraid I shall have to disagree with Mr. Dodge on my experience at the bench when he says that in ninety-nine cases out of a hundred it is the demurrer which is important rather than the motion supported by affidavits. I am frank to say that I think the proportion should be just reversed.

MR. DODGE: I didn't say that. I said the real demurrer is not a document that is supported by affidavits outside the record. That is a motion for summary judgment and is properly so denominated. I have never, in forty-seven years of practice, seen a demurrer or a motion to dismiss on the ground that there was no cause of action, supported by affidavits going outside of the pleadings.

THE ACTING CHAIRMAN: I still want to say what I had in mind, that the case where the old demurrer is now useful is only one case out of a hundred, and I will stick to that because I think that is shown by my experience.

MR. LEMANN: You see only a few cases. But to get back, Mr. Reporter, let's compare page 9 of this draft with page 14. I just want to see what this vital difference of opinion is in what we are going to submit to the bar. I am addressing myself now to paragraph (d) of the majority vote, which is on page 9, isn't it. It is practically in the language of the present rule. Am I right?

DEAN MORGAN: What are you talking about? Page 9? It is page 8.

THE ACTING CHAIRMAN: Page 8 is the vital part.

MR. LEMANN: Subdivision (d) on page 9.

DEAN MORGAN: Subdivision (b) on page 8.

MR. LEMANN: I was looking at the changes made in (d), because you are making changes in (d), but very little change

in (d).

DEAN MORGAN: It is (b). That is the one.

THE ACTING CHAIRMAN: The changes in the main are in (b), on page 8, and are particularly in lines 37 to 40, for which would be substituted just the direct statement that you have a motion for summary judgment, which covers everything under this. Subdivision (c) would be out altogether, and (g) would go out altogether under the draft, because neither one would be necessary.

PROFESSOR SUNDERLAND: Subdivision (c) goes out? No motion for judgment on the pleadings?

THE ACTING CHAIRMAN: It is not needed, because you move under 56.

MR. DODGE: You have left out (6), haven't you, completely?

THE ACTING CHAIRMAN: Which is (6)? It is (c) and (g) that become quite surplusage. In (b) it is provided that you can make the motion which is entirely covered by 56.

MR. DODGE: You have left out (6). The fundamental difficulty from my point of view is that you have left out (6) completely.

DEAN MORGAN: You mean on page 13.

MR. DODGE: You have provided that nothing like the old demurrer can be raised except by a motion for summary judgment.

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we ought to do it some. I may say that that is what

THE ACTING CHAIRMAN: Again I say, in the cases we have, we only get the simple motion to dismiss, with nothing more, when the parties have agreed to submit only a question of law. That is very easy. They can do it under any process under any system. They can do it, of course, under the system that is provided here.

Then there are two other situations, which are with us more frequent. One of them is where the parties do submit affidavits, the defendant saying in effect that under no circumstances is there any claim for relief, the plaintiff saying, "This is my case, and if I haven't stated it correctly, I want to amend. I think I have said it correctly, but I don't know." In that case, in all the circuits, I think, except perhaps one, we always look at the affidavits.

The final case is where you have the bare pleadings, but you are not at all sure that the plaintiff has stated his case. That is really the hardest case of all, because after all we are a court and we are trying to do what we can for the parties.

JUDGE DOBIE: But do you have many of those cases where they do submit outside affidavits on a motion to dismiss? We do not.

THE ACTING CHAIRMAN: We do, and we always consider them now. It comes to really the same thing under this final case I have said, because when you get to the final case you

are not going to dismiss the case if you think that the plaintiff by amending can state it. We have all these steps in getting up to the upper court just because formal allegations haven't been made of the kind you want to accept. What we do for the most part when we get a complaint like that, when the trial court has been trying to shorten the cause and has given judgment, is to reverse, and that is what the other circuits have been doing, too, as we have pointed out in these cases on page 11.

In the main, I think it is a waste of time not to go to it directly. You see, the point is this: Nowadays courts don't want to decide on the formal pleadings. That isn't the way we do business any more. We don't decide finally, so we have to strain to see that the parties take care of themselves.

On page 11 in the note we first point out decisions of the circuit courts taking affidavits, and then at the end the second group of cases is just as strong. "The reluctance of appellate courts generally to permit decisions on mere allegations alone is well known ...." Those are recent examples of reversals.

This is a short way of making as sure as we can whether or not there is merit in the case. You see, the difficulty of the old procedure was that you contented yourself with what the plaintiff's lawyer had said very formally, and now we don't want to decide cases on that alone because we know that

you can't rely on the plaintiff's lawyer as being the consummate pleader and bringing it out.

MR. DODGE: You have in mind the formal difficulties in the statement of the case. What I have in mind is the real function of the demurrer, not to educate the plaintiff as to some formal allegations that he has omitted, but to state in substance that he hasn't any case. He has stated it all right, but the plaintiff doesn't come within the class that are to be benefited by that statute or to have rights under it, or something like that. That, in my experience, has nothing whatever to do with motions for summary judgment. There is no room for an affidavit. It is simply a case not of whether the plaintiff has stated a cause of action but of whether he has a cause of action.

DEAN MORGAN: Bob, isn't that taken care of in the motion for summary judgment?

MR. DODGE: Not by suggesting to him that there are affidavits. A motion for summary judgment is well understood by the bar to be applicable to cases where there is apparently a question of fact on the pleadings but where in substance there is no real dispute about the facts.

DEAN MORGAN: Yes, but 56 provides that "A party seeking to recover", and so forth, "may .... move with or without supporting affidavits for a summary judgment ...." That puts the summary judgment doing just exactly what you had in

mind. Instead of your (6) on page 8, you have the sentence on page 13, beginning in line 14, ending in line 16.

MR. DODGE: That may be another form of the same thing.

DEAN MORGAN: It is. That is what I was saying. So you can't say, really, that in the alternative (6) is omitted. It is included in a different form.

MR. DODGE: But I see no advantage whatever in calling every motion to dismiss or demurrer a motion for summary judgment, which is primarily applicable to a different sort of case, as the bar understands.

DEAN MORGAN: You are practically saying, of course, that what the bar understands by summary judgment now is a motion that is based on affidavits, so that when we say a summary judgment may be with or without affidavits, we are expanding summary judgment as we know it.

MR. DODGE: That is an unusual thing. Primarily, in motions for summary judgment I think everybody understands that there is apparently a question of fact, but that the affidavits will show that there is no real dispute of fact.

DEAN MORGAN: I have no doubt that that has been true in the past.

MR. DODGE: I am against the abolition of the old-fashioned demurrer, whatever you call it, and I don't want it to masquerade as a motion for summary judgment which, to the

bar at least, suggests affidavits and the showing that there is no real dispute of fact, although there is an apparent one.

DEAN MORGAN: You would rather put a speaking demurrer in, in other words.

MR. DODGE: I wouldn't call it a speaking demurrer. If there are to be affidavits, it is a motion for summary judgment and not what I know by a demurrer or motion to dismiss for failure--I don't like "to state a claim," but to have a claim.

DEAN MORGAN: Last time, in this part that was voted by the majority, it was agreed that affidavits could be presented on (6), which is a failure to state a claim. Of course, I objected very strongly to that language.

MR. DODGE: That really made it a motion for summary judgment.

DEAN MORGAN: That is quite right.

PROFESSOR SUNDERLAND: How can affidavits be appropriate to the point raised under (6)? If you are attacking the faith of a pleading, an affidavit can't possibly have any relevance to that.

DEAN MORGAN: That was my suggestion. Instead of putting it this way, I was going to say, "On a motion asserting defense (6), a party may present matter outside the pleadings. In that event, the motion shall be considered a motion for summary judgment and disposed of as provided in Rule 56."

MR. DODGE: You can accomplish the same result by

amending the statement. If his statement didn't state his real case, he could amend it.

THE ACTING CHAIRMAN: Of course, these differences have been existing right from the beginning.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: I don't know how we are going to go very much further. Mr. Dodge has felt that way very strongly from the beginning, and I shall have to say, with all due apologies and deference, that I have felt so strongly the other way that when the time comes, I shall ask for permission to go to the Court for dissent if there is a question of raising the old demurrer.

I think the old demurrer is an outworn instrument now except in the one case where the parties agree. When I say "the parties agree," I mean when the parties are willing to go up on a bare statement of law. When they are willing, you can achieve the result very simply. They can do it by stipulating facts or any particular way. Outside of that, I feel very strongly from such experience as I have had.

I wonder if it is worth while going over those points again. We have already decided that the two ideas be submitted. I take it this discussion has been a little to the point as to whether the alternative should be submitted and, for my part, I must say that really, if we feel as strongly as this, I don't believe you are quite entitled to vote down the submission of it.

MONDAY AFTERNOON SESSION

April 3, 1944

The meeting reconvened at 1:55 p.m., Judge Charles E. Clark, the Acting Chairman, presiding.

THE ACTING CHAIRMAN: I guess we had better proceed. Might it not be a good plan to go through the rules and then come back if you want to take an over-all view, instead of trying to take an over-all view first? Anything you wish, of course.

MR. LEMANN: You mean pass 12?

THE ACTING CHAIRMAN: No, I didn't mean that. I mean we have some suggestions of correction of detail in 12(b).

MR. LEMANN: All right, let's look at them.

THE ACTING CHAIRMAN: I don't know but that it might be a little quicker to look through it and then come back and see if there is anything we want to add, either pro or con or in the middle.

PROFESSOR SUNDERLAND: I have a suggestion on (b), if this is the appropriate time.

THE ACTING CHAIRMAN: I should think so. Shall we turn to the particular letter for the moment? We have been talking in general. My suggestion really is that we turn to the particular for the time being, or to the concrete.

MR. DODGE: Yes.

THE ACTING CHAIRMAN: All right, go ahead, Edson.

MR. DODGE: I wonder, instead of submitting such a long rule, if you couldn't just state what the point of difference is by fewer amendments.

THE ACTING CHAIRMAN: That of course can be done, and I think it could be done fairly easily, but on that we have been often met with: "We want to see it. We want to see just what it means." If you are going to do that, that could be done, and perhaps in a footnote or an appendix or somewhere else, you could then let them see what it looks like, but that is a question of ways and means.

Suppose we think this over. We really ought to adjourn for lunch. We shall come back at a quarter to two.

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

PROFESSOR SUNDERLAND: In the matter that you underline in (b) you state that "If matters outside the pleadings are presented to the court upon a motion made under defense (6)," (you limit it to (6)) "such motion may be considered a motion for summary judgment and disposed of as provided in Rule 56."

Then in your note you cite quite a number of cases, and the cases don't limit themselves to (6). They are much broader. You cite about half a dozen cases; one in 124 F.(2d) which was not a motion based on failure to state a claim for relief but a motion to dismiss for want of merits based on affidavits, really a straight-out motion for summary judgment. In 120 F.(2d) I couldn't see anything on the point. In 116 F.(2d), which is from your circuit, it was a motion to dismiss for want of jurisdiction. It wasn't under (6). It was for want of jurisdiction. In other words, that was under defense (1).

MR. DODGE: I noticed that, too, in looking at those cases.

PROFESSOR SUNDERLAND: Then in 128 F.(2d), in the Third Circuit, it was a motion to dismiss for want of jurisdiction over the subject matter.

MR. DODGE: Why shouldn't it be "upon a motion made hereunder"?

PROFESSOR SUNDERLAND: That is what I thought. I

thought that since the cases are broader, if you are going to go into the thing as a summary judgment, it ought to be universally applicable to any kind of motion, it seems to me. I wonder whether the way to handle it wouldn't be maybe this: (That sentence is repeated, by the way, under (c).) It seems to me that the place to have that provision is somewhere so that it would apply both to (b) and to (c), and not have to be stated twice. Put in a separate section which would be headed like this, perhaps:

"When motion is considered one for summary judgment. If matters are presented to the court upon any motion under (b) or (c) of this rule which show that there is no genuine issue as to any material fact, and that either party is entitled to judgment on the merits as a matter of law, the motion may be considered a motion for summary judgment and disposed of as provided in Rule 56."

That wording is in harmony with our theory of the summary judgment, which makes it a judgment on the merits.

MR. LEMANN: Will you read that again?

PROFESSOR SUNDERLAND: I will read that again. This would apply to (b) and (c) both in any case where there was one of these motions.

"If matters are presented to the court upon any motion under (b) or (c) of this rule which show that there is no genuine issue as to any material fact, and that either party

is entitled to judgment on the merits as a matter of law, the motion may be considered a motion for summary judgment and disposed of as provided in Rule 56."

MR. LEMANN: Which show that there is no difference as to the facts and that there is no difference as to the law?

PROFESSOR SUNDERLAND: That there is no material difference as to fact and that either party is entitled to judgment as a matter of law. That is the wording of our summary judgment rule.

MR. LEMANN: The "and" would have to be "or" there. The trouble there, Mr. Sunderland, it seems to me, is that you are dealing with a rule that relates to the law of the case. When you come to summary judgment, as Mr. Dodge says, I think the function of that is as a means of disposing of a case where there is no dispute at all between the parties on the facts. Here we are dealing with a case where there should be no doubt as to the law.

PROFESSOR SUNDERLAND: I am just repeating the language of our summary judgment rule there. Here is the language of Rule 56. I am simply using that same language so as to connect them up.

MR. DODGE: You may well have a dispute of fact under most of these numbered sections.

MR. LEMANN: Yes.

PROFESSOR SUNDERLAND: Rule 56(c) reads as follows:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

MR. LEMANN: I think that would be confusing to put it in here, because it is an entirely different thing.

PROFESSOR SUNDERLAND: If it is a summary judgment, it seems to me that our language ought to be similar to the language that we use in the summary judgment rule.

THE ACTING CHAIRMAN: May I go back and state a little history? Of course, as you know, I would be all in favor of the general spirit of Edson's motion. There are, however, these difficulties, which your discussion has brought out in the past. I can indicate it by first stating why the limitation appears in lines 37 to 40.

First, there isn't any question but that you certainly can use affidavits on these dilatory defenses. At the last meeting we came in with a long memorandum on the cases showing that at times they even have a trial by jury, but that affidavits are used a great deal. I think everybody was quite clear that affidavits were usable there, so much so that there seemed to be no question about it. The difficulty was raised, however, when we tried to make the summary judgment cover

matter in abatement as well as matter in bar. I still think it wasn't a bad idea, and I think there was some analogy from the New York practice. Nevertheless, the members of the Committee didn't take to it very much. They thought that the idea of the summary judgment was limited to matter on the merits and not on matter in abatement.

But, you see, Edson, you raise that same question again. You make the summary judgment now go back to cover jurisdiction--

PROFESSOR SUNDERLAND (Interposing): Oh, no. On a motion to dismiss for want of jurisdiction, if it appears on that motion to the court that on the merits of the case one party is entitled to judgment, he gets the summary judgment. In other words, these matters of merits may come up on any kind of motion, and that is the nature of these cases that you cited here.

THE ACTING CHAIRMAN: Understand, I agree with you, but nevertheless I thought we were overruled. It isn't so much on the merits. It is the difference between a decision in bar and a decision in abatement. You will remember that in our discussion before there was quite an exception taken to our suggestion that a summary judgment could be had on matter in abatement.

PROFESSOR SUNDERLAND: I don't think it ought to be, but I think if the merits happen to come up before the court,

no matter what they are talking about, so that it appears from what is presented to the court that one party is entitled to judgment on the merits as a matter of law, he should render it.

MR. DODGE: I should like to raise a specific question that will raise your point as to lack of jurisdiction over the person. The defendant files what would have been a plea in abatement and a motion to dismiss the action because it, a foreign corporation, has no place of business in the district, and moves, you would suggest, for a summary judgment.

PROFESSOR SUNDERLAND: He wouldn't unless there were a showing on the hearing of that motion.

MR. DODGE: Then he files an affidavit and moves for a summary judgment. Suppose he doesn't do that. Suppose there is a real contest, as there so often is, over that one point. Ordinarily, if a jury had been claimed in the case, in the state courts of Massachusetts, anyway, there would be a jury trial on that plea in abatement.

We were told at the last meeting that that was not in accordance with the general practice and that ordinarily such a thing would be disposed of on affidavits. Isn't that so, Mr. Reporter? On affidavits or without a jury?

THE ACTING CHAIRMAN: My impression is that you are stating it a little stronger. I think the cases indicate that very often it is so disposed of, but I think they also indicate that if anybody stood out for a jury trial, they would get it.

MR. DODGE: Yes. Suppose we had that practice. Why shouldn't we have a provision for a summary judgment on that issue not covered now by our Rule 56, which obviously applies only to the merits? In other words, why isn't Mr. Sunderland's suggestion a good one?

PROFESSOR SUNDERLAND: My suggestion didn't go that far at all. I confined my suggestion to the merits of the case.

MR. DODGE: How do we come to the merits of the case under these motions?

PROFESSOR SUNDERLAND: How do you get to the merits of the case on affidavits connected with a motion to dismiss because the facts aren't sufficient to constitute a claim for relief?

MR. DODGE: That is the only one that goes to the merits.

PROFESSOR SUNDERLAND: The actual merits have nothing to do with the judgment, any more than with a motion for judgment for want of jurisdiction.

MR. DODGE: Suppose in my case the point is of jurisdiction over the person. Would you let that go along in the natural course until the jury trial could be had months later, without any possibility of getting it summarily disposed of?

PROFESSOR SUNDERLAND: You would dispose of it by a motion to dismiss. It wouldn't be a summary judgment on the

merits.

MR. DODGE: How are you going to get your trial on the question of facts that are raised, if there is a real and bona fide dispute? I think there may be a gap in our rules on that point.

THE ACTING CHAIRMAN: It is covered at the present time under (b) and (d) together.

MR. DODGE: Under (b) and (d) together?

THE ACTING CHAIRMAN: Yes; (b) is the one we had generally, and (d) is for the hearing.

PROFESSOR SUNDERLAND: Subdivision (b) is confined, as it is now worded, to defense (6), isn't it?

THE ACTING CHAIRMAN: Yes; and the reason for that is that we got beaten down on the idea that they would use the summary judgment at all for the other previous five. We tried to use it for the previous five, and we were told no, that everybody realized that you used affidavits under those five, anyhow. That is why we have this truncated form.

It seems to me, Edson, that you run right up against the objection that we ran up against, which was in effect that the profession considers summary judgment not a matter for want of jurisdiction and the like. Personally, I would doubt that view. I don't think the profession has that strong a view with respect to summary judgment, but nevertheless that was the thought, and this rule was therefore drawn on the basis of

separating the two ideas.

MR. DODGE: You have it in (c), but you haven't got it in (d). You merely have a provision that the point shall be disposed of in some way before the trial on the merits, or may be so disposed of.

THE ACTING CHAIRMAN: That is it.

MR. DODGE: That doesn't provide for any summary judgment on the kind of case I spoke of, which is quite common.

THE ACTING CHAIRMAN: I don't know. That is the basis we have been going on right along, and that is the basis the courts have been deciding on. Rule (d) is used quite a little both ways; that is, from time to time they do postpone the hearing until the trial. But I don't quite see why it doesn't cover the matter. It does give the trial judge the option of combining it with the trial, which I must say I think has worked very well, because there are lots of times you can't decide it very easily in advance.

MR. DODGE: I don't think it ought to be consolidated with the trial if a very real issue was made as to whether the corporation was subject to suit in the district. You ought not to compel a hearing on the merits until that point is determined.

MR. LEMANN: It would be foolish to.

MR. DODGE: As the rules stand now, you can't get a trial on that issue until it is reached in due course.

MR. LEMANN: Why do you say that?

MR. DODGE: Because there is no provision for it.

MR. LEMANN: What does (d) say? Turn to (d). Wouldn't (d) let you do it?

MR. DODGE: ".... shall be heard and determined before trial ...." That is before trial on the merits.

MR. LEMANN: Yes.

MR. DODGE: ".... unless the court orders that the hearing and determination thereof be deferred until the trial."

MR. LEMANN: That is the way we have always had it.

MR. DODGE: Before trial?

MR. LEMANN: Yes.

MR. DODGE: What does that mean, that the court says, "This case shall be reached for trial in one year. I presume there will be a jury sitting about six months hence, and we will have a jury trial on this issue then"?

MR. LEMANN: What do they do now in your United States District Court if you file a plea in abatement or a motion to dismiss on the ground that the defendant corporation isn't doing business in the state? They don't tell you to wait six months to try it, do they?

THE ACTING CHAIRMAN: Very rarely.

MR. LEMANN: Don't they dispose of it?

MR. DODGE: I had one recently where a jury trial was reached. I think the court would advance it for a trial by

jury. They wouldn't let you wait a year and a half. They would advance it for trial by jury, but that wouldn't give the expedition that you could get on a motion for summary judgment if there was no real issue of fact, although the papers on file indicated that there was one.

MR. LEMANN: You have had no trouble in the practice up to now in not being able to present it on a motion for summary judgment in that kind of situation.

MR. DODGE: I never heard of a motion for summary judgment on this kind of issue, on anything except the merits.

MR. LEMANN: Is there a common law right of action, a constitutional right of action, for trial by jury for such a plea in abatement?

MR. DODGE: It would be so held in the state courts of Massachusetts. I don't know what the Federal courts in Massachusetts would say.

PROFESSOR SUNDERLAND: That is true of common law. They do that in Illinois.

MR. DODGE: Trial by jury?

PROFESSOR SUNDERLAND: Yes.

MR. LEMANN: On a plea of that sort going to the jurisdiction?

MR. DODGE: On a plea in abatement as well as on the merits.

PROFESSOR SUNDERLAND: That is a common law rule.

MR. DODGE: We have no provision for summary judgment on that issue.

THE ACTING CHAIRMAN: It seems to me we are just discussing the main issue again. To my way of thinking, (d) is an absolute essential, and I think it is one of the better rules. It has worked very well. I don't see any abuse.

MR. LEMANN: Nobody is proposing to remove that, are they?

MR. DODGE: Just trying to help your desire for expedition.

THE ACTING CHAIRMAN: If I understand Mr. Dodge, that is just what he is trying to do.

MR. LEMANN: He doesn't want to change (d).

THE ACTING CHAIRMAN: He wants to make a required trial on the merits on certain types of issues.

MR. LEMANN: He wants to take your provisions for summary judgment and extend them to summary judgment on pleas in abatement. Is that right, Mr. Dodge?

MR. DODGE: Yes. You have extended the summary judgment idea to the demurrers, where in my practice they would be rarely applicable, and you haven't provided for it in these other cases of pleas to jurisdiction over the person.

THE ACTING CHAIRMAN: That was just our proposal in October, which was voted down, and we were said to be shocking the bar. We were suggesting in effect that the summary judgment

be used to cover all these points.

MR. DODGE: That is a different thing.

THE ACTING CHAIRMAN: I am sorry, but I don't quite see why it is.

MR. DODGE: You want to call it a motion for summary judgment in every case, whereas it generally is not, it seems to me.

MR. LEMANN: In your case, Mr. Dodge, as a practical matter, do you think you would often have a case where you could dispose of that plea on a motion for summary judgment?

MR. DODGE: No, I don't.

MR. LEMANN: In most of the cases don't you think there would be a real, sharp difference as to what the facts were, perhaps?

THE ACTING CHAIRMAN: I am a little surprised at that, Monte, because, as a matter of fact, I supposed that almost always you did. Let's forget for a moment the question of name. If you don't like "summary judgment," let's make it "affidavits." While we did discover some cases which suggested there might be a right of trial by jury, certainly the more usual practice is to do it otherwise; and I wrote an opinion about two weeks ago on that very question, on service of due process on a receiver of a railroad, as to whether he was to be sued as an individual or whether he was to be sued as the railroad corporation.

MR. LEMANN: That didn't involve any fact question, did it?

THE ACTING CHAIRMAN: Yes. It finally came down to the question of how much business they did in the state and also of the capacity of the person served, as to whether he was the managing agent. Although this case was tried by a jury, both parties, on the main issue, which was that of negligence (it was a personal injury and death action), were satisfied to try this issue of service and jurisdiction (the two were together there) on affidavits. That is the way it was tried, and that is the way they came up on appeal.

MR. DODGE: That is by agreement of the parties.

THE ACTING CHAIRMAN: Well, there was no more agreement than there always is in this kind of case. The way it came up was that the defendant trustee, trustee of the organization, made a motion to dismiss, filing his affidavits in which he said, "I don't do business in the state. My residence is in Illinois," and so on. "The man served is not a real agent," and so forth. Then the plaintiff filed reply affidavits. You could call that agreement. I mean they didn't get together and agree on it, but both sides thought it was natural, and so did the court.

MR. DODGE: In my office a good many times we have been through long, extended trials of questions of fact as to whether a foreign corporation was doing business within the

state. I don't think the cases where there is no real issue of fact are common. Almost always there is a real issue which has to be tried out. So the summary judgment wouldn't be so useful in most cases.

MR. LEMANN: That is what I was thinking.

PROFESSOR SUNDERLAND: Under this sentence as you have it, "If matters outside the pleadings are presented to the court upon a motion made under defense (6)," suppose it appeared from affidavits under defense (6) that the action was prematurely brought, let us say. Would you consider on that showing that a summary judgment would be proper? That would be a case where it appeared from matters outside the pleadings.

THE ACTING CHAIRMAN: One thing I have thought about that all the while is that this all comes to a question of labels. That is one reason I don't like this rule. I do think it does overemphasize the question of names. I would say that I certainly would consider the issue on affidavits. I wouldn't have the slightest hesitation.

PROFESSOR SUNDERLAND: Would you grant a summary judgment there? It would still be in abatement, wouldn't it?

THE ACTING CHAIRMAN: If it were still premature, yes, or I would grant a judgment, whether you call it summary judgment or not. I certainly would by the time when the appeal was no longer premature. As a matter of fact, in our circuit we would say, "It is all taken care of." We wouldn't make them

start suit over again.

PROFESSOR SUNDERLAND: But that would be a case that would come squarely under your sentence here. It would be matters outside the pleadings presented to the court upon a motion under defense (6), and it would show a ground for abatement. Then under your rule you would have to have a summary judgment, make a summary judgment while in abatement.

THE ACTING CHAIRMAN: I see what you mean. I hate to argue against you. What do you say about the point that was raised before? The difficulty I am finding is that we go back over these things the same way. Taking the defenses (1) to (5), I have no doubt, and I guess you have none, but that affidavits can be used.

PROFESSOR SUNDERLAND: I think so.

THE ACTING CHAIRMAN: There may be a remote right to trial by jury. We don't need to worry about that because it isn't often claimed. But in the ordinary case it is going to be by affidavits. When we decide on that, is it going to be summary?

MR. LEMANN: It wouldn't be covered by lines 37 to 40, would it, because that is restricted to matters coming up under defense (6) only. The more I hear of this discussion, the more dubious I am about the consistency of that sentence that has been interpolated here: "If matters outside the pleadings are presented to the court upon a motion made under

defense (6), such motion may be considered a motion for summary judgment ...." If you leave the sentence in at all, it seems to me you would have to remove the limitation.

JUDGE DOBIE: That is what Sunderland's motion is.

PROFESSOR SUNDERLAND: That is my motion. If we are going to allow it under defense (6), we ought to allow it under all of them.

JUDGE DOBIE: In a proper case.

PROFESSOR SUNDERLAND: But if we do allow it under all of them, we ought to provide that, if they do come up under any of them, the results must be on the merits, or it isn't a summary judgment.

MR. LEMANN: On the merits of the particular motion or the merits of the whole case.

PROFESSOR SUNDERLAND: The whole case.

MR. LEMANN: That is going to confuse the lawyers terribly, Mr. Sunderland, because they think of a disposition of a case on a jurisdictional point as not a disposition on the merits. When you say that is a disposition on the merits, I certainly think you are going to confuse the lawyers.

PROFESSOR SUNDERLAND: The way you have it here, they will make a motion for dismissal for want of jurisdiction.

MR. LEMANN: Yes.

PROFESSOR SUNDERLAND: What kind of judgment do you get there?

MR. LEMANN: Not a judgment on the merits, I would say.

PROFESSOR SUNDERLAND: You get a judgment, dismissal, not on the merits. A summary judgment, differing from that, is a judgment which is rendered on the merits.

MR. LEMANN: Then, if you are correct in your definition of summary judgment, you ought not to use it for these other defenses.

PROFESSOR SUNDERLAND: That is what I think, but I have given up that position because we seem to be drifting in the direction of handling this thing under all of these heads.

MR. LEMANN: They talked you out of it, against your better judgment.

PROFESSOR SUNDERLAND: I think we ought to keep that summary judgment rule by itself and not say anything about it under this rule.

MR. LEMANN: I would agree. Of course, I ought to be estopped, because I wasn't here.

PROFESSOR SUNDERLAND: It seems to me it ought to be general.

MR. DODGE: Summary judgment on the merits has nothing whatever to do with these defenses here, except (6).

PROFESSOR SUNDERLAND: It has just as much to do with it as affidavits under (6) have to do with (6). This proposal of outside matters appearing before the court under (6) is a

pure anomaly. I can't conceive of anybody with a logical mind ever making any such showing under (6), because (6) refers solely to the face of the pleading; and yet we say, if on a matter relating solely to the face of the pleading, affidavits are brought in which disclose the merits of the case, then the thing will be called a summary judgment, and a summary judgment will be rendered, which I think postulates a procedure based upon absurdity.

MR. DODGE: I agree to that, but a motion to dismiss a case for want of jurisdiction over the person has nothing to do with the merits of the case, which may involve an admitted serious controversy over the facts. You have a method of disposing of the case right here, which has nothing whatever to do with the merits.

PROFESSOR SUNDERLAND: What I think we ought to do is just to allow these motions to dismiss, and leave the summary judgment rule to operate as it has been operating.

MR. LEMANN: Mind you, that summary judgment, as far as I understand it, is a new view in most of the states, to most of the lawyers through the country. Don't you think that is a fair statement, Professor Sunderland?

MR. DODGE: Comparatively new.

PROFESSOR SUNDERLAND: Well, yes, I would say so. The great majority of the states don't have it.

MR. LEMANN: Now you have them sort of accustomed to

it, and you have them sort of educated about it. They are not professors or teachers of law, trying to make a thing 100 per cent consistent, maybe, and I think you are going to confuse them.

PROFESSOR SUNDERLAND: By introducing it in here.

MR. LEMANN: Yes.

PROFESSOR SUNDERLAND: That is what I think.

MR. LEMANN: My own notion would be to take it out of this sentence.

PROFESSOR SUNDERLAND: I think it will be extremely confusing to have it at all.

THE ACTING CHAIRMAN: I think it must show that professors of law are now considering it, and not people who have actually to struggle with it, for this discussion is purely academic. I know if you start with the logic of the old demurrer, you couldn't have any speaking demurrer. That is what we were taught in common law days.

MR. LEMANN: What is a speaking demurrer? Would you mind telling me?

THE ACTING CHAIRMAN: A speaking demurrer is a kind of epithet. It is like your hip pocket rule, and so on. It is a term that somebody devised because they didn't like the idea. A speaking demurrer is one that is supposed to contain affirmative allegations. In the old days that would not be in accordance with the theoretically perfect system. Then, if

you were filing a demurrer, you should rest or fall (I suppose that is the origin) and say, "He hasn't got a good complaint." That is all right if you want to make the face of the complaint the most important thing, but that isn't practical nowadays. It seems to me that, if you were in the midst of trials, you would see it is not.

It has been stated here several times now that Mr. Mitchell, for example, was worried about this form of wording, but he said he recognized that courts don't like to decide cases now merely on the paper pleadings. We don't like to for the very natural reason that it isn't justice to do it. Actually, in the long run, no court sticks to doing it that way. What usually happens is some sort of postponement, a reversal, and we go back and do it over.

One in a while, of course, if a court does try to carry out these rules, you may have actually thrown a person out when his lawyer has made some mistake of allegation. It is just what is said in the letter that Judge Learned Hand wrote (and I sent it around), where he said that if the poor oaf knew what he was doing, it would be one thing. But they don't know on technical details. They think they have a claim, and they want to put it up. It is the duty of the court to pass on it. Even though the complaint isn't technically accurate, it should be done.

I wonder, Edson, when you say we should have a motion

to dismiss, what you would do if you were a judge. If you have a plain motion to dismiss, the case has been dismissed below, you think technically it should stand up on the complaint as put up, but the parties tell you they have something that is a good complaint, what would you do?

MR. DODGE: Let them amend the declaration, not file affidavits about it. That is the way they do it in my practice.

THE ACTING CHAIRMAN: That would be easy enough if we were down in the trial court, but we can't let them amend. The way these things come up is that the district judge after a time becomes a little weary. That is only natural. Finally he is likely to say, "Out you go," and then it comes to us. A part of our proper job, I take it, is to ameliorate the harshness of the rules.

MR. LEMANN: Where does this go? Of course, I don't come in contact as much with the appellate judges as I do with the district judges, but the average district judge has no trouble down my way, I think, in permitting amendments. If anything, he may permit too many at times, and I don't think the appellate judges have any special monopoly on hating to see people thrown out of court. I think the district judges are just as anxious, in my experience, to keep people from being thrown out of court. Don't you feel that way, Scott?

SENATOR LOFTIN: They are very liberal down my way.

THE ACTING CHAIRMAN: I don't think that is any

answer to what I am saying at all, if I may say so. Of course, the district judges hear perhaps a hundred cases to our ten, and they have been exercising their patience and granting their amendments, and all that, and those cases are taken care of after a long while, usually three or four whacks at the thing in this process of education, whereas one would do just as well if they could listen to the merits and it wasn't merely a question of polishing up the pleadings.

That is the thing that I think is by-gone, and why should we now try to make rules to make the pleadings something very definite and precise, when our whole tendency is to get away from it? You can't re-educate the bar back now because our pleadings aren't that good.

But then in the few that we get, the district judge has given it up, and it comes to us, and the question is about the same in the district court as it is with us, although the wrong the district judge does may be more permanent if we don't try to do something about it.

I think it is just trying to turn the clock backward if you try to make judges decide on the mere face of the pleadings. I don't think they are going to do it, anyway, and I think you are going to have the kind of hodgepodge that we have been having. They have reached a rule that is fairly sensible for the most part, but they have done it by being illogical, as Edson puts it. But I think it is better to be illogical and

try to get to the merits of the question than it is to be logical and say we still believe in demurrers and negative pregnants, and whatnot.

MR. DODGE: We shouldn't proceed on the theory that all demurrers are merely based on formal defects due to the ignorance of the lawyer, or something of that sort. The important demurrer raises the merits of the existence of the cause of action or the existence of the defense, and that is where the demurrer is useful and, in my judgment, it ought not to be adversely affected by rules here simply because there are a lot of incompetent pleaders who omit formal allegations that ought to be in the statement of a really good claim.

DEAN MORGAN: How about it, though, Mr. Dodge? Aren't you just fighting over terms? Don't you get just exactly the same result under Judge Clark's proposal. If you can make a motion for a summary judgment on the pleadings, that is, you make a motion for summary judgment with or without affidavits, if you have everything in the pleadings, your motion is just as good as your demurrer. It serves exactly the same purpose. If you haven't got everything on the pleadings, it can be supplied by affidavit, and you can get to the merits a good deal quicker. By your method, he says, "This pleading is bad," and you go back and amend it. Then you have to have a demurrer to the amended pleading to show whether or not he does have a cause of action.

MR. DODGE: That happens once in a while.

DEAN MORGAN: Surely it does.

MR. DODGE: Once out of forty demurrers you might get these repeated attempts to amend.

THE ACTING CHAIRMAN: I would just reverse those figures completely. I am quite sure it is the other way. It is out of proportion.

MR. DODGE: It may be in the appellate court, but it isn't in the practice of the law.

DEAN MORGAN: Let's see, Mr. Dodge. You are talking now about your particular practice, where you practice with lawyers who put their cards on the table.

MR. DODGE: All kinds of lawyers.

DEAN MORGAN: Of course, I haven't practiced in Massachusetts.

MR. DODGE: I have practiced with the cheapest kind of lawyers you ever saw, all kinds of them.

DEAN MORGAN: That is a place where I can run in competition with you, without any question!

MR. DODGE: I have had the same kind that you have had.

DEAN MORGAN: All right. In seven or eight years of practice, I never once saw a demurrer interposed which really went to the merits and determined the case on the merits; never once.

MR. DODGE: In forty-seven years of practice, I have seen a great many upon which cases were legitimately disposed of, not as a matter of form but as a matter of substance.

MR. LEMANN: Who suffers most from your objection to this demurrer basis? Is it the plaintiff who has failed to state a cause of action or is it the defendant who wanted to bring in something on a speaking demurrer and somebody wouldn't let him bring it in?

THE ACTING CHAIRMAN: I think for the most part it is the plaintiff. I mean it is the man who is trying to state a case and--

MR. LEMANN (Interposing): Doesn't know how. He has left out something that he should have put in, or he should have negatived something that he failed to negative. He isn't a good enough draftsman. The facts are available.

THE ACTING CHAIRMAN: I think that is really an over-simplified statement, because in a good many of these cases he won't know how until the court has finally disposed of it. For some reason or other the case doesn't look attractive (that is the hardest kind of cases that we have to deal with), and you doubt that he is going to win eventually. Then there is always the inclination to throw him out summarily, and I think generally it is unwise. You don't shorten things that way. So in that case it is awfully hard for him to make a pleading that is going to be held complete.

I have noticed that, and I was telling Mr. Dodge at lunch that we have just reversed a case where they tried three times below to state a case under the Sherman Anti-Trust Law. It is going to be a long, drawn out trial, and it doesn't look very attractive. I don't think they could ever have stated a case that would have gotten by. We in the upper court rather doubt that he will ever prove his case, but we don't see how it could be shut out. So we have proceedings going on for two or three years.

MR. LEMANN: Here is what I was getting at when I asked you that question. If it is the plaintiff who suffers, he can always be protected by leave to amend, you say?

THE ACTING CHAIRMAN: No, he can't always be protected.

MR. LEMANN: You don't think he can ever get it stated? That is pretty tough on the defendant, because if the plaintiff can never get the case stated, the defendant has to go to bat on a case that he doesn't know just what it is about until he gets in the court room. That is sort of tough on the defendant, isn't it?

THE ACTING CHAIRMAN: As a matter of fact, it can be tough either way. I don't believe that getting the thing out on the merits is tough on either party, and I want to say right now that on Mr. Dodge's case of what you might call the Puritan law, I would agree with him entirely that that is a

good case to have decided separately in advance, but I still should like to ask how many of those cases that he has seen in his forty-seven years of practice weren't cases where the parties were willing. You see, if the parties accept, it is a question of law, and under any of these rules we can bring it up very easily. You can call it a demurrer or you can call it anything else. That is the case where it works, but I think that is going to be almost automatic. Whenever the parties are ready to go to bat on a question of law, the court is ready to hear them, and it is all very simple, and of course there are quite a few cases disposed of there. They don't run into large numbers, but there are cases and there are good cases under some of the new statutes.

But that is all taken care of automatically. The case is where one side is resisting.

MR. LEMANN: Let me get back to your hardship case. We will stick for a while to the plaintiff, and then I am going to come to the defendant. This plaintiff has made three attempts to state a cause of action. He hasn't succeeded yet.

THE ACTING CHAIRMAN: We have held he has.

MR. LEMANN: The third time you figure he has?

THE ACTING CHAIRMAN: No. We would have sustained the first complaint, as a matter of fact.

MR. LEMANN: You would have sustained the first one. How is that fellow going to be any better off with this change

in the rule?

THE ACTING CHAIRMAN: Of course, in some cases he may not be. You can't make any rules perfectly automatic. But he is going to be able to say this--

MR. LEMANN (Interposing): What is he going to put in an affidavit that he couldn't have put in an amended petition?

THE ACTING CHAIRMAN: He is really going to plead in detail, if you so wish, or he is going to meet the other side. What happens on the affidavits is that this brings out the issues very much more than the formal pleadings do. The formal pleadings are so broad now that they don't bring out the points.

MR. LEMANN: Are you maintaining that we ought to have more particulars in the petition?

DEAN MORGAN: Heavens no.

THE ACTING CHAIRMAN: I don't think so.

MR. LEMANN: You are arguing against yourself, then, I think.

THE ACTING CHAIRMAN: No, I don't. It seems to me that is what makes it workable.

MR. LEMANN: I should think it very easy for a fellow to state a cause of action now, generally, because he can be so general. I don't see how you can help him by an affidavit, because he can't bring in in an affidavit what he couldn't put in an amended petition, if he wanted to.

THE ACTING CHAIRMAN: You see all these, and then of

course we see them a good deal in court, but we see them all by hindsight. I mean by that that the case is all presented, and you wonder how it comes as it does. That is one of the things I get over and over again. I just wonder how the parties got to where they are. I can't explain it except that I know we are looking back at it, so to speak. Nevertheless, they do come up over and over again, and it is one of the most troublesome things ever.

I think that one of the worst wastes we have now is the attempt to be summary in justice. It isn't so easy to be summary, and you are going to disappoint somebody if you do it. It might be all right to disappoint them if you are sure of your grounds, but the thing of it is that you are usually putting them off on some question of technical pleading that never satisfies them, and they come back some other way, by bill of review or something of that kind. The affidavits give them a chance to say everything they want, and if they haven't done it then, it is their own fault.

MR. LEMANN: I still don't see why he couldn't put it in his petition.

THE ACTING CHAIRMAN: Theoretically, yes. In fact, I think that if a person did say that on such-and-such a day I did this and did that, and so on, we probably nowadays wouldn't strike it out. In the old days they would strike it out as evidential, and so on. We probably wouldn't do it now.

MR. LEMANN: He says the defendant did this, that, and the other thing?

THE ACTING CHAIRMAN: Practically no lawyer is going to do that. Even today they don't do it.

MR. LEMANN: What is he going to put in the affidavit that he can't put in the petition? That is what I want to know. The plaintiff, now, the poor plaintiff that we are trying to protect because he is a poor pleader, and we want to keep it in court. We all agree to that, but I don't see how you are going to help him by saying, "Bring in some affidavits. You don't have to put it in the petition, but give it another name, put in an affidavit, and swear to it." He doesn't have to swear to a petition. He has to swear to an affidavit. "Put it in an affidavit, and you will be better off." I don't see how he is better off.

DEAN MORGAN: You are making a grand argument for the abolition of the demurrer altogether, saying that if they want to get to trial right away, let them put it in their answer, which is what Charlie advocated to begin with.

MR. LEMANN: I don't think that would follow, Eddie.

DEAN MORGAN: I think that is exactly the point.

THE ACTING CHAIRMAN: I think so.

DEAN MORGAN: That is the only way to cut out shadow-boxing. That is what you are saying.

PROFESSOR SUNDERLAND: Doesn't this sentence that we

are talking about, "If matters outside the pleadings are presented to the court upon a motion mader under defense (6)," come to this: Doesn't that in effect say that if on a pure demurrer the parties file affidavits, then the court can consider the affidavits in rendering judgment? That is an absurd case, because people on a pure demurrer don't put in affidavits, and it is this suggestion that it is good practice to put in affidavits on a pure demurrer which I think is misleading.

THE ACTING CHAIRMAN: I don't think that is absurd in anything except the mind of a theoretical person. I think practically you get it over and over again. Of course, again as Monte is suggesting, if these fellows acted perfectly mechanically, it would be all right, but they don't.

DEAN MORGAN: Furthermore, Edson, we aren't going to have any pure demurrers.

PROFESSOR SUNDERLAND: But these are pure demurrers.

MR. LEMANN: Maybe fellows like Senator Loftin and I have been lucky in our practice. Mr. Dodge says he practices with many poor lawyers.

MR. DODGE: All kinds.

MR. LEMANN: But I don't see much shadow-boxing in my part of the country on demurrers based on failure to state a cause of action. Where we used to run into the delays, and still do, was on what we call dilatory motions that don't go to the guts of the controversy at all. The fellow hasn't told

you enough detail. You want to know when this happened and where this happened. Those are the things that make the delay. We don't have much shadow-boxing on whether he stated a cause of action. My own feeling has been that really it expedited the administration of justice, didn't delay it, to find out whether a fellow had a case or didn't have a case.

THE ACTING CHAIRMAN: Then you want a motion for a bill of particulars. You want the old special pleadings.

MR. LEMANN: I say that is what has made the trouble. I have been consistently with you on limiting the bills of particulars, as far as that is concerned. There again I think in your zeal to reform at times you may defeat your own purposes. I don't know. Maybe I have just been lucky to practice with intelligent people who know how to state their cases.

DEAN MORGAN: Maybe you have, Monte.

MR. LEMANN: But I can only go according to my own experience.

DEAN MORGAN: I haven't seen a case book on pleading that has been made up of very modern cases, but you can take any case book on pleading or practice and find nothing but shadow-boxing from almost one end to the other. Isn't that right, Professor Cherry? There are just thousands of cases. There isn't any question about it.

MR. LEMANN: I doubt that you will find many under these rules, Eddie.

PROFESSOR SUNDERLAND: Don't we preserve the pure demurrer? We do, don't we?

PROFESSOR CHERRY: Not in the alternative.

MR. DODGE: Under the rule as it stands here.

PROFESSOR SUNDERLAND: Ground (6) is the pure demurrer.

THE ACTING CHAIRMAN: No, it is the impure demurrer.

PROFESSOR SUNDERLAND: It is the pure demurrer, failure to state a claim.

PROFESSOR CHERRY: You do except that.

PROFESSOR SUNDERLAND: That is the pure demurrer. Now we go on to say that in the case of a pure demurrer, if affidavits are filed, then the court may render a judgment based on the showing of the affidavits.

DEAN MORGAN: That is changing it into a motion for summary judgment. There isn't any question about it.

PROFESSOR SUNDERLAND: It is ridiculous to say, on a pure demurrer, if affidavits are filed the court can do so-and-so, because affidavits aren't filed, unless the lawyer is a perfect dumbbell, and I don't think we ought to prescribe a lot of rules of what to do if all sorts of fool things are done.

PROFESSOR CHERRY: He is not a dumbbell necessarily. He may have read the C.C.A. opinions:

DEAN MORGAN: He is up to date. Edson, you are a back number, just where I was last week.

MR. LEMANN: Has anybody ever taken the cases in the

Federal courts in the last ten years where a fellow has been thrown out of court, just thrown out of court because he hasn't stated a cause of action, and the case has been reversed? I don't believe there is a single case where he has amended and he has finally prevailed on the merits of the case. I would like to see some study made. It would be quite a job to go back as you did for the Wickersham Committee and make a study of the actual records for ten years and see how often it happened about this thing that we are so excited about.

THE ACTING CHAIRMAN: Of course, I don't think that would be any answer, Monte, if I may say so. I think that is one difficulty. The judges are quite sure that they can tell from the face of the complaint and the attitude of the lawyers and one thing and another that there is nothing in the case, and in a great many cases that is likely to be so. In the Sherman Anti-Trust case that we reversed, I can't believe that they are going to get a judgment eventually, but I believe they are entitled to try it out, and I don't believe we can stop them. I think the way that that has to be settled is by a formal judgment finally, after hearing it. I think we are probably not doing our duty if we try to shut them out.

On all this, I wonder how many of you have read these cases that we put in on page 11. It seems to me that the circuit courts have been reaching a pretty good result. They are under some difficulties of analysis, but they have done it.

MR. LEMANN: Under the rules as they now stand?

THE ACTING CHAIRMAN: Yes.

MR. DODGE: They would have reached the same result exactly if the substance of the affidavits had been put as it normally would, outside of these few cases, in the form of an amendment of the complaint.

THE ACTING CHAIRMAN: Of course, you would never have any of these questions if (a) the lawyer was very skillful and (b) he could foresee the reaction of the court. The latter is very important, too. It isn't merely being a good lawyer; it is foreseeing the reaction of the court.

MR. DODGE: He doesn't have to be any more skillful to amend his declaration than he has to be to prepare an affidavit; less so, if anything.

DEAN MORGAN: If he is a good lawyer, he won't foresee.

MR. DODGE: Those cases are exceptional cases. In most cases, if the demurrer points out a defect, he files at once a motion to amend. He doesn't prepare an affidavit and begin to go into the question of sworn testimony.

THE ACTING CHAIRMAN: If I may say so, again that is a complete oversimplification of the question. Monte was trying to get this piecemeal, and of course that is always one way. That is what the demurrer really was for. What you did in the old cases (I used to see it in my state practice) was

to move to strike out a part here, and then a part there. Eventually, you would demur. You always wanted to take the case piecemeal.

This is not as simple a thing as that this fellow should have put in his complaint what he put in an affidavit. It is a question of the court's trying to find out if there is any merit, and where it is, and the defendant's affidavits often are more important than the plaintiff's. I mean, the defendant's affidavits are on whether the plaintiff has a claim or not.

It is a question of whether we must look at the formal allegations, pleading and reply, or whether we can try to go underneath and see, as we do in the course of the argument, what the question is. It changes the whole emphasis on the question really at litigation between the gentlemen before us. The latter is, I think, still informal. If we can go to the real question, we can get it, and even if we do it by questions from the bench, we can do it. It isn't a question of allegation any longer. It seems to me that is the whole difficulty. You place the emphasis still on the formal documentary statements rather than on the real controversy.

MR. LEMANN: Charlie, the courts have reached what you think is the correct result on the rules as they stand, and they haven't needed any amendments to do it. You haven't anything to the contrary to show where it has given any trouble.

THE ACTING CHAIRMAN: Oh, yes, I have.

MR. LEMANN: How many cases? Are they cited here?

THE ACTING CHAIRMAN: No. A few are cited, but, you see, the question usually came up in the district courts. The district courts started out on the theory (this is what a good many of them said) that a speaking motion is not allowable, talking good old common law pleading. That was the ruling in several parts of our circuit. In the Southern District of New York and in the Eastern District they were going to town on that. As soon as it got to us, we announced that you could take affidavits on all these motions, which is the rule we follow. That is the same thing that has been done in most of the circuits. The two where there seem to be questions are the Fifth--

MR. LEMANN (Interposing): That is the defense that is coming in now, is it?

THE ACTING CHAIRMAN: Of course, it can be either.

MR. LEMANN: The speaking demurrer, though, is where the defendant wants to do something.

THE ACTING CHAIRMAN: He is the one that files the pleading, of course. This thing I don't think you can fairly separate between the two. Sometimes it is a question in whose favor the courts, knowing the real issue, will benefit, and it may be the defendant and it may be the plaintiff. You can't be sure in advance which it is.

DEAN MORGAN: They did it by main strength and awkwardness. There is no question that it wasn't justified by the rule. They just did it by main strength and awkwardness. Although the rules don't call for it, they got that result.

MR. DODGE: Is that ever done? Does the defendant undertake to support a demurrer by filing an affidavit of facts?

THE ACTING CHAIRMAN: I didn't know anybody still called it a demurrer. He at least calls it a motion to dismiss, and on a motion to dismiss I think there is considerable basis for the argument which went on. If you recall, there are two different parts of the rule which speak of having a motion supported by an affidavit. One is 41--

PROFESSOR SUNDERLAND (Interposing): What is the affidavit for?

DEAN MORGAN: It isn't for failure to state a claim or ground for relief.

THE ACTING CHAIRMAN: It doesn't state what it is for.

MR. DODGE: You can't possibly have an affidavit in support of an old-fashioned demurrer. I think the Reporter talks as though demurrers were always to form. The demurrer I am interested in saving is the demurrer to substance, which is the vital demurrer.

THE ACTING CHAIRMAN: The demurrer for substance I think takes care of itself. As I said, I am all for the essence of that, but I never saw any difficulty with that.

That is the case where there is a real question of law and the parties are agreed on it, and they raise it.

MR. DODGE: I don't want to call it a motion for summary judgment, which suggests affidavits.

DEAN MORGAN: It suggests affidavits to anybody who doesn't agree to Rule 56.

MR. DODGE: You have to wait for time for affidavits. The demurrer and the old-fashioned demurrer, whatever you call it, can be disposed of quickly.

PROFESSOR CHERRY: Mr. Reporter, I hate to offer any other language because we have a proposed amendment and proposed alternative, but it seems to me that the alternative is trying to make it possible for the party moving to make his motion a motion for a summary judgment instead of a motion to dismiss, and I think it overreaches itself by not allowing him to make it anything else, by not allowing him to make it the old-fashioned demurrer or the motion to dismiss. That language, however, does take care of his need, but the need that this discussion has been considering is the need of the man who wants to oppose the motion.

I should like to suggest the use of the alternative, with these two changes: First, to reinstate what is No. 6 of the proposal to amend and what is in the rule itself, that is, the failure to state a claim. Then, to add at the end of line 16 on page 13, in the alternative, some such sentence as this:

"A motion which does not demand a summary judgment" (you see, the preceding sentence says that he may demand it) "may nevertheless be treated as a motion for summary judgment when it appears at the hearing that the case can be disposed of on the merits thereby, in which event the parties shall submit affidavits and have further hearing as such times as the court shall direct."

That is in effect what has been done in those C.C.A. cases that have been referred to, except that the court has treated it as a motion to dismiss, a speaking demurrer, or whatnot.

Wouldn't some language of that sort really take care of all the situations?

First of all, if the moving party wants to make it a motion for summary judgment, this alternative says he may. However, this proposal would retain his opportunity to make it a straight-out motion to dismiss on the basis of the pleadings he is attacking, and nothing else. But if he does that, and at the hearing the judge sees that this "poor oaf" again hasn't pleaded his case properly but may well have one, he can say that this is to be treated as a motion for summary judgment and fix the time for submitting affidavits and hearing with those affidavits.

Doesn't that take care of all these needs?

MR. DODGE: He can amend his complaint.

PROFESSOR CHERRY: He can still do that, if he wants to. If it turns out that what you ought to have here is a motion for summary judgment, and the plaintiff ought to be allowed to support his attacked pleading by showing that he really has a case but hasn't stated it properly, the judge says, "All right, I am going to treat this that way. Bring in your affidavits on both sides," because on that supposition the only affidavits you have are those the plaintiff has brought in, because the original moving party thought he was moving to dismiss on the pleading alone, the old-fashioned demurrer.

Why doesn't that take care of the whole trouble? I know you won't like that because it retains the possibility of the thing that is now in the rule that represents the old demurrer for failure to state, and so on, but why shouldn't that be retained. All the difficulties that your circuit has had can be met by calling to the trial judge's attention that if he thinks this is a case for disposition on the merits, he can make it a motion for summary judgment.

THE ACTING CHAIRMAN: All I can say is that I don't like it very much, although I would say it is better than having the old demurrer in its pristine glory. If it is a question of going back that far, of course what you are suggesting is better. It is not as simple as the practice we have already reached. What it does is to take two steps to reach what is now done simply in one. If the parties and the court know and

take time to see what they are doing, presumably your two steps, while taking more time, ought to get the same result; but every time you add to the machinery of litigation you make more chance for defects in carrying out the process.

I know how it is going to operate in the Southern District of New York, as it would in any crowded district. It might be all right where the judge will sit down with the parties and take his time, but these come on on a motion calendar with a couple of hundred a day, something like that, not all motions to dismiss, but every kind of motion, and they are pushed through just as rapidly as they can be. It is an awful job. Here comes a motion to dismiss formally on the face of the pleading, and then the judge is going to look over the pleadings very rapidly. True, if every lawyer is on his toes and he gets time enough from the judge to get him interested, you might make it work, but you can only do it by taking up his time, whereas the simplest thing is what they are doing now, you see, where the practice is already known.

PROFESSOR CHERRY: You mean that judge wouldn't let the party amend?

THE ACTING CHAIRMAN: What do you gain by it? I don't see that you gain anything except just a gesture to the past.

PROFESSOR CHERRY: But take your two hundred a day. If he gets that kind of thing, he won't let the man amend?

THE ACTING CHAIRMAN: Oh, no.

PROFESSOR CHERRY: I don't mean that. Then you are going to get another step, anyhow.

THE ACTING CHAIRMAN: It is a question. Of course, if he sees the case and gets it over, that is all right, but when you have two hundred motions facing you, you have to get it over pretty fast.

PROFESSOR CHERRY: All right, suppose you don't get it over. He is going to let him amend.

THE ACTING CHAIRMAN: Here again you have to go through the machinery, and I don't see that the machinery does any good. There is always a chance of slip. If your machinery works perfectly, yes, you have everything, and all you have done is to take more time. If it slips anywhere, if the judge is tired and wants to get home and doesn't see the point, if the lawyer stutters a little and doesn't make it clear, you haven't got it. There it is. For every additional wheel you put in there is another chance for a crack in the cogs. I still don't see anything you gain by it except a gesture that somebody thinks you must still have the old demurrer.

DEAN MORGAN: But you have it, Charlie, as far as that goes. You have it in your motion for summary judgement, without affidavits.

THE ACTING CHAIRMAN: You have it without the two steps.

DEAN MORGAN: I know; and then you particularly provide, don't you, in 56 that he shall not grant the motion for summary judgment without giving an opportunity to amend. So you aren't going to get away from the exercise of the function that is performed by the old demurrer. It is only a question of speeding up the process in the majority of cases, that is all. You can't stop a person from attacking a pleading by a motion for summary judgment on the ground that it doesn't state any ground for relief.

MR. LEMANN: Would you abolish all demurrers?

DEAN MORGAN: Yes.

MR. LEMANN: If you were a judge, you mean to say that a man could sue me and say, "Lemann offered to pay me a thousand dollars," and that is all?

DEAN MORGAN: That is all.

MR. LEMANN: There was no pretense that I got any consideration for it, and then I would go down to court with my witnesses. You would favor that if you were drawing this up?

DEAN MORGAN: I say, do what you do here. Put in your answer. You say for your first defense that it doesn't state ground for relief and, for your second defense, you deny it.

MR. LEMANN: Could I bring up my first defense in advance?

DEAN MORGAN: That would be discretionary with the

judge, yes.

MR. LEMANN: If you were the judge, would you let me bring it up?

DEAN MORGAN: Sometimes. It might depend on who you were.

MR. LEMANN: You would think, then, that the idea of trying out in advance--

DEAN MORGAN (Interposing): Sometimes I wouldn't let them bring up anything in advance.

MR. LEMANN: That is the trouble. You gentlemen are wanting to make a system based upon a poor opinion of a large section of the bar.

DEAN MORGAN: I don't care about that. Flexibility in the rules is what counts. I wish they would abolish all reporting of the rules. We ought to have a law to prevent their reporting decisions on these Federal rules.

MR. LEMANN: All decisions. Then Mr. Justice Roberts wouldn't have to say, "It is like a railroad ticket--good for only one day," because that is what the Supreme Court is heading for now.

DEAN MORGAN: This is on practice that I am talking about.

MR. LEMANN: Why limit it to practice?

JUDGE DOBIE: One of these rules won't work because of the ignorance of the rural lawyers, and the other rules are

going to impose a great burden on the busy metropolitan judges. So where are we?

MR. LEMANN: It seems to me if you went to the logical extent, you would say, "Take each case as it comes, and let the judges decide it and not have any rules."

DEAN MORGAN: That is right.

MR. LEMANN: You realize yourself you wouldn't go that far.

MR. DODGE: I think we have voted several times to retain the demurrer.

DEAN MORGAN: There is no doubt about that.

MR. DODGE: We have voted to retain it.

DEAN MORGAN: You can't abolish the function.

MR. DODGE: Shall we take much more time in considering its abolition?

JUDGE DOBIE: I don't think so.

DEAN MORGAN: That fundamental we fought out from the very beginning. We have to have something that performs the function of the old demurrer. There is no doubt about that.

MR. DODGE: The only question really, then, is Sunderland's suggestion that if matters outside the pleadings are presented to the court, and so forth.

MR. LEMANN: We have two or three suggestions. Mr. Sunderland's is that if it stays in, it ought not to be so limited.

PROFESSOR SUNDERLAND: I would like to take it out.

MR. LEMANN: Then you say we had better take it out. I should be inclined to take it out and be willing for the courts to deal (Mr. Morgan says they are going to deal with it anyhow) with the cases as they come up. They are handling them satisfactorily under the rules as they now stand.

THE ACTING CHAIRMAN: Monte, I might ask you about that, what would you do with these decisions that have gone the other way?

MR. LEMANN: Where are they? One thing I was reproaching myself about as I was talking was that I really ought to look at the cases, which I haven't done.

THE ACTING CHAIRMAN: I wish you would, because it seems to me that these cases--perhaps they are illogical--reach natural results.

MR. LEMANN: Have you cited the cases that you are now speaking of that go the other way?

THE ACTING CHAIRMAN: The cases on page 11. We have pretty thoroughly established the rule in four different decisions (they are not all down there, as a matter of fact) that we are going to look at the affidavits. Do you say to us that we mustn't? I take it that is what you want to do now.

MR. LEMANN: No. I would favor leaving the rule as it stands, changing it only by putting in what you say about indispensable party and by putting in what you say about leave

to amend. Otherwise, I wouldn't change the rule. I wouldn't stop anything being done now.

I would take the view, Charlie, that you have a pretty workable set of rules now that the bar is getting to understand pretty well and likes, that the judges like, and they are getting justice. I wouldn't change them unless you had some glaring trouble with them. Now you want to liberalize them by putting in leave to amend. I would have thought they were now giving leave to amend, but apparently somebody thinks that some of the judges are not liberal enough and put in lines 36 and 37.

THE ACTING CHAIRMAN: Of course, what we are trying to do here is to discuss polishing up a rule that I don't really believe in, anyway. I am satisfied with the alternative rule. It has been voted that that be submitted, and I want to submit it.

As to the major rule, of course those who were for it I suppose should, after all, state it as they want it. This is the way that you voted, because you did vote before for the use of affidavits. There wasn't any question about that. That was discussed at great length, among other things. As I said, Mr. Mitchell, who more or less sympathized with this general position, agreed that the courts are not going to decide questions on pure matters of pleading alone. It is a little foolish to try to put blinders on them.

All I can say is that if you want to do it, I am not on that side of the fence and I can't say you shouldn't. Only, just in passing, I will ask, are you going to say that we should change our rule and the Sixth Circuit's and the Third Circuit's, and so on? I take it now you would say, "No, let's leave it indefinite, as it is now, so Judge Sibley who doesn't like the rule generally can hold the other way," as Judge Sibley is doing, although not too clearly. I am not sure he has seen all the ramifications in this Fifth Circuit case, but it looks pretty much the other way in this Kohler v. Jacobs case.

DEAN MORGAN: A great many trial judges have been doing it.

THE ACTING CHAIRMAN: A great many trial judges in the Southern District of New York. Of course, we have now beaten them somewhat into submission the other way. Are they to go back and do the other thing?

DEAN MORGAN: They had the same constitutional objection I have to using an affidavit on failure to state a claim, just as in Pennsylvania they make you verify a demurrer and swear that the fellow doesn't state facts sufficient to constitute a cause of action.

MR. LEMANN: Was I the only member absent at the last meeting?

THE ACTING CHAIRMAN: Mr. Oglebay says yes, you were

on this point. We had a pretty good, full discussion of it before.

DEAN MORGAN: That was the time before last.

THE ACTING CHAIRMAN: Last time.

DEAN MORGAN: Monte wasn't here last time.

MR. LEMANN: I wasn't here in November. I wondered if I was the only one who wasn't here.

MR. HAMMOND: I think you were.

MR. LEMANN: I think Charlie is right that the people who voted to put this sentence in should decide whether to leave it in. As he says, he isn't for it, anyhow, and he has an alternative that suits him down to the ground.

DEAN MORGAN: I know, but if this other goes to the other, I don't want to seem to be such a damned fool as to want an affidavit on failure to state a claim. I want to change the language there and say: "On a motion asserting defense (6), the party may present matter outside the pleading, and in that event the motion shall be considered a motion for summary judgment and disposed of as provided in Rule 56."

MR. DODGE: I will take your language if it is going to be in at all, but shouldn't it be that if the plaintiff, instead of amending his complaint, chooses to file an affidavit, he puts himself in the position of filing a motion for summary judgment or forces the other fellow to treat it as such?

MR. LEMANN: What do you get a summary judgment on

when you file an affidavit without amendment?

DEAN MORGAN: Pleadings and affidavit.

MR. LEMANN: On the cause of action stated in your petition.

JUDGE DOBIE: He might in his affidavit state things that are not in the complaint but which add to the complaint, which show that he is not entitled to anything at all, and in that case of course the judge could go ahead and dispose of it. I think these affidavits would be much more frequently filed by the man who is interposing a motion to dismiss, or whatever you call it, than by the plaintiff.

MR. DODGE: How can he file that? I don't understand how he could file that in support of a motion to dismiss for failure to state a claim.

JUDGE DOBIE: He states facts in addition to those stated in the complaint.

MR. DODGE: Then he isn't basing his motion on the failure of the complaint to state a cause of action. He says that the complaint plus something else shows that he hasn't any cause of action.

JUDGE DOBIE: Yes.

MR. DODGE: That isn't the old-fashioned demurrer.

JUDGE DOBIE: No, it isn't the old-fashioned demurrer. It is the modern speaking motion to dismiss.

MR. DODGE: That is a straight motion for summary

judgment.

THE ACTING CHAIRMAN: Of course, there is another way out that the courts may take, and that is to call these always a motion for summary judgment, and I think they may take that if they are forced to. It is all right, if they were sure to do it, if we put in our rules, "Whenever a motion to dismiss is supported by an affidavit, it shall be known as a motion for summary judgment and so treated." I don't object particularly, but you see actually this comes up, as I can see, over and over. They make a motion to dismiss. Somebody perhaps told them not to, but that is what they call it.

MR. DODGE: It isn't under section (6), though. It is some other kind of motion.

PROFESSOR SUNDERLAND: I think there is such a thing as overworking the summary judgment. You could, if you wanted to, make all litigation go forward under the form of application for summary judgment. I don't think that would help anybody. It would mix everything up in a common mess.

DEAN MORGAN: That is just what we said here in the alternative.

MR. LEMANN: Charlie, under 56, that is the summary judgment rule, couldn't you really do anything that you properly ought to be able to do? You just suggested adding a sentence here that courts may consider as a motion for summary judgment any motion drawn under this section, and if the motion would

entitle the mover to relief under Section 54, he shall have that relief." Is that about what you said to put in?

THE ACTING CHAIRMAN: You mean under this main rule? I think that is about what the main rule says, yes.

MR. LEMANN: Haven't you got that without saying it? You say, "Well, the district judges don't know it, and we have to tell them," but you tell them, and when you tell them, that tells them.

THE ACTING CHAIRMAN: Of course, in a sense what you say is so. There was this history that we speak of. Quite a good many of the district judges, not all of them, said you can't have a speaking motion. That was the favorite form of expression, and writers like Moore and the California Law Review and the George Washington Law Review have articles on the speaking motion. You will find all that. Then most of the circuit courts have decided the other way.

MR. LEMANN: They treat it as a motion for summary judgment.

THE ACTING CHAIRMAN: They do, and they don't. What they usually say is something like what Judge Hand said in that Boro Hall case, which is the first one here. "It can be treated as equivalent to summary judgment, but it doesn't make any difference, anyway; we will take the affidavits." That is usually the kind of thing they do. They say, "We will do it either way. If necessary, we could call it a summary judgment."

MR. LEMANN: Are we going to try to legitimize what you consider as a bastard child under the rules as they now exist? Do you think it is a bastard child that needs legitimizing? All you are trying to do is to validate the result that is reached. I don't think it needs any validation.

THE ACTING CHAIRMAN: Of course, I am a little troubled, too. Here are two distinguished legal scholars, Dean Morgan and Professor Sunderland, who get terribly upset by the form. I must say that I don't feel that way at all. I know that historically it is illogical. Of course. There isn't any doubt about it. But, as you say, if the bastard child were thoroughly legitimatized, I wouldn't worry, but when two great scholars protest it, and two circuit courts--

DEAN MORGAN (Interposing): You don't need to damn me by that term "scholar," because what I am talking about is just plain English.

MR. LEMANN: You need a scholar to know that.

DEAN MORGAN: Failure to state a cause of action, failure to state a ground for relief. It isn't a question of failure to state; it is failure to have a ground for relief.

THE ACTING CHAIRMAN: I will say that I thought the language that Eddie sent in was good language.

DEAN MORGAN: Thank you, Charlie.

THE ACTING CHAIRMAN: Still, it isn't my rule, but if I had any power I would accept it, for that matter.

PROFESSOR CHERRY: Yours is good language, too.

MR. LEMANN: Would you be willing to say that we go to the people on an amendment which would strike lines 38 and 39, that sentence beginning with "If matters", taking it out and going to the country without it, and that Judge Clark should go to the country on his substitute?

MR. DODGE: That would be better, I think.

MR. LEMANN: As I followed the discussion, that would be your idea, Mr. Sunderland.

PROFESSOR SUNDERLAND: Yes, that would suit me exactly.

MR. DODGE: That would suit me, too.

MR. LEMANN: Then you would strike the corresponding language, I take it, in 50 and 51.

PROFESSOR SUNDERLAND: Yes.

MR. LEMANN: Because that is the same.

PROFESSOR SUNDERLAND: The same thing.

DEAN MORGAN: Of course, that was voted by the majority.

PROFESSOR SUNDERLAND: They have to stand together. Both go in, or both go out.

MR. LEMANN: It is all voted by the majority, Eddie. It would be a reconsideration if you were going to--

MR. DODGE (Interposing): If the defendant files an affidavit, it ceases to be under section (6). If the plaintiff files an affidavit, of course the court will say, "Amend your

declaration accordingly, and demurrer is overruled."

MR. LEMANN: Or they say, "We consider it as equivalent to an amendment of your declaration."

THE ACTING CHAIRMAN: They can't consider the affidavits even if they are in the record.

MR. DODGE: Of course they would say that. If a fellow made a statement of fact, is not entitled to a motion to amend the declaration, and you have a statement in addition to his claim, of course any judge would take that as a motion for amendment.

THE ACTING CHAIRMAN: The only thing is that they didn't.

MR. DODGE: Who didn't?

DEAN MORGAN: Some of the district judges.

THE ACTING CHAIRMAN: The judges in the Southern District. I don't think Judge Sibley is doing it. Judge Garner decided the question in the Eighth Circuit in the Cohen case here, and I stuck my neck out enough to write him about it afterwards. He said he wasn't going to do it, anyhow.

MR. DODGE: The plaintiff filed an affidavit?

THE ACTING CHAIRMAN: I don't remember which is which. In most of these cases they both file affidavits.

MR. LEMANN: Who was this judge who told you he was going to pay no attention to you?

THE ACTING CHAIRMAN: Judge Garner, of the Eighth

Circuit.

MR. LEMANN: That illustrates what I said before. No matter what we do, we can't prevent some judges from doing things that we don't think they should do.

DEAN MORGAN: Heavens! When they have the rule here right this way?

PROFESSOR SUNDERLAND: I wonder how many cases there are of this type. There is only one in the Second Circuit cited, and that isn't in point.

THE ACTING CHAIRMAN: I can't agree with you. I noticed what you say, but I think there are four directly in point. I don't see why that doesn't come right under 12(b). Rule 12(b) as originally stated was a whole, and I don't see how you can pick out parts of 12(b) and say that those parts that we want, we will use affidavits on, and the rest we won't. It seems to me that is one of the most illogical things. Rule 12(b) was certainly a unit. No differentiation is made between them.

PROFESSOR SUNDERLAND: This sentence we are talking about is limited to (6), and that is not a case that is supported by your case from the Second Circuit.

THE ACTING CHAIRMAN: Of course, this (6) is not my idea. This (6) is what we were driven to as amanuenses of the majority of the Committee. We were driven to (6) because the majority in working out their rule, not I, thought it clear

from the first five that affidavits were usable.

SENATOR LOFTIN: Do you remember, Mr. Chairman, whose language the particular clause we are discussing now is in or who it came from?

MR. DODGE: Lines 37 to 40?

THE ACTING CHAIRMAN: Can you tell that?

PROFESSOR MOORE: I think that was Judge Donworth's.

SENATOR LOFTIN: Judge Donworth?

PROFESSOR MOORE: I believe so.

MR. LEMANN: With him not being here, it is a good way to remove it. I move we remove it, delete it and the corresponding language in 49 to 51.

PROFESSOR SUNDERLAND: I support it.

THE ACTING CHAIRMAN: Well, you have heard the motion. Any further discussion? If not, all those in favor will say "aye"; those opposed, "no."

MR. LEMANN: Better hold up the hands.

THE ACTING CHAIRMAN: Yes, I think so. All those in favor hold up their hands. Five. All those opposed will hold up their hands. Two.

PROFESSOR CHERRY: I did not vote. I don't like it either way.

DEAN MORGAN: I don't like this stuff myself.

THE ACTING CHAIRMAN: One not voting.

SENATOR LOFTIN: Do I understand your objection is

that it doesn't go far enough?

MR. DODGE: I move that section (b) with that change be affirmed.

THE ACTING CHAIRMAN: You mean section (c)?

MR. DODGE: Section (b). There are one or two other changes. There was one other change on failure to join an indispensable party added, and the power to amend, cautionary power.

MR. LEMANN: It is a prohibition against refusing amendment, isn't it?

DEAN MORGAN: That is right, a regular code provision.

MR. LEMANN: I am surprised that you have to put it in, but you say you do.

DEAN MORGAN: If you don't, it is discretionary with the trial judge.

MR. LEMANN: I mean I should think every trial judge would permit it. Down my way they would.

DEAN MORGAN: All of them won't.

MR. LEMANN: I second Mr. Dodge's motion that we approve (b) as amended today.

THE ACTING CHAIRMAN: All right, are you ready for the question? All those in favor will say "aye"; opposed, "no." The "ayes" have it.

MR. DODGE: I make the same motion as to (c).

THE ACTING CHAIRMAN: It is moved that (c) be approved

with deletions comparable to those voted in (b).

PROFESSOR SUNDERLAND: Supported.

THE ACTING CHAIRMAN: Any discussion? If not, all those in favor will say "aye"; those opposed, "no."

DEAN MORGAN: No.

THE ACTING CHAIRMAN: Carried.

MR. DODGE: The same motion might as well be made on (e), (f), (g) and (h).

THE ACTING CHAIRMAN: There isn't a change in (f), is there? Just (e), (g), and (h)?

MR. DODGE: Yes.

DEAN MORGAN: Bob, you don't mean that . On (h) you don't want to approve that the objection of failure to state a legal defense may be made by motion or at the trial on the merits. You don't want failure to state a claim to be a legal defense to be made at the trial.

MR. LEMANN: That is in the present rule. Isn't that in the present rule?

DEAN MORGAN: I grant you that it is, but it is damned foolish.

MR. LEMANN: There has been no suggestion to change it, has there?

DEAN MORGAN: What do you say about it? It is a matter of sense. Failure to state a legal claim or defense at the trial.

MR. DODGE: I don't see any sense in that.

DEAN MORGAN: There isn't any sense to that at all.

MR. LEMANN: Is that a motion for arrested judgment?

DEAN MORGAN: You can't move for arrested judgment. Certainly that is all it is. It is a common law motion for arrested judgment. Do you think there is any sense in that?

MR. LEMANN: Of course, I am colored by my own defective experience, but with us we can raise the point that the fellow has no cause of action on appeal.

DEAN MORGAN: Has, but this is states. Of course you can raise the fact that he has no cause of action at any time, but not that he hasn't stated it. That seems to me perfectly absurd.

MR. LEMANN: It got by us before. Mr. Morgan gets upset, but it got by his eagle eye. I don't see how an infamous thing like this got by.

DEAN MORGAN: Surely it did, but, by George, that doesn't mean, because I have been blind on one occasion, that I have to keep my eyes shut.

MR. LEMANN: I am disappointed in you, though.

THE ACTING CHAIRMAN: I think maybe we had better take these up one by one, because it seems that we have some suggestions on them. We voted (c). Suppose we now take up (d). I think (d) should probably have the changes voted because, you see, we added the indispensable party. In the light of

what we have done, that would be a small change, but one that would be needed, I should think.

MR. LEMANN: Which is that?

THE ACTING CHAIRMAN: Section (d). That is substituting (7) for (6).

DEAN MORGAN: You agreed on that. He moved that.

MR. DODGE: Yes.

THE ACTING CHAIRMAN: Then (d) is accepted?

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: I am taking these up separately because we have some suggestions. Now let's consider (e). Mr. Hammond?

MR. HAMMOND: Mr. Tolman made a suggestion on this, and I thought I ought to call the Committee's attention to it. There is an insertion in lines 65 and 66, and here is what Mr. Tolman says: "I think the underscored words in these lines are not only unnecessary but are also too peremptory. I should like to see them deleted."

DEAN MORGAN: That is in which one? (d)?

MR. HAMMOND: In (e).

JUDGE DOBIE: "and the motion shall not be granted unless the conditions herein specified are shown to exist."

PROFESSOR SUNDERLAND: That is something you might add to every provision throughout our rules.

MR. LEMANN: It seems to imply that the judge will

grant the motion without their being shown to exist. If I were a district judge, I would not enjoy that imputation.

THE ACTING CHAIRMAN: Of course that is what they have been doing. I think this was Mr. Mitchell's suggestion.

MR. LEMANN: An admonition.

THE ACTING CHAIRMAN: That there should be an admonition, too.

PROFESSOR SUNDERLAND: On the ground that they are more likely to fail to follow this rule than they are most of our rules where we don't put in any such thing?

THE ACTING CHAIRMAN: No. It was a question of trying to make it clear.

MR. LEMANN: It is clear. This sounds like rapping them on the knuckles.

DEAN MORGAN: "We mean what we say."

MR. LEMANN: "We don't mean what we say ordinarily, but here we do."

JUDGE DOBIE: If one ground for a motion is stated and nothing else is said, if that ground doesn't exist you certainly can't grant it under this rule. I think there is something in what somebody said, that if you put it in here and don't put it in other places, it will imply, "Well, boys, we mean it here, but maybe we don't in other instances."

THE ACTING CHAIRMAN: What do you want to do?

PROFESSOR SUNDERLAND: I move it be deleted.

JUDGE DOBIE: I second the motion.

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

DEAN MORGAN: No.

THE ACTING CHAIRMAN: I think it is passed five to two, as usual.

SENATOR LOFTIN: Who was the second one?

THE ACTING CHAIRMAN: I was.

MR. LEMANN: What this Committee needs is a little new blood and reconstitution.

THE ACTING CHAIRMAN: Of course, you had better not press that too far. It might well be considered.

Let's see, what is the next suggestion?

MR. HAMMOND: Mr. Chairman, I happen to note another suggestion of Mr. Tolman's, back in (e). That is the "Motion for Judgment on the Pleadings," on page 8. It seems to be a matter of form. The sentence in lines 48 and 49, the underscored lines, stayed in, didn't it?

PROFESSOR SUNDERLAND: Yes.

MR. HAMMOND: He suggests that that should read: "If the court finds that a party is entitled to judgment on the pleadings, reasonable opportunity shall be given for amendment, before entry of judgment."

MR. DODGE: That is just another way of stating the same thing.

MR. HAMMOND: It seems so to me.

MR. LEMANN: A little bit more exact, perhaps, but then you would have to change the corresponding language in 36.

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: Has anybody any suggestions or any motion?

SENATOR LOFTIN: Section (c) has already been approved.

MR. HAMMOND: It was my failure to bring up Mr. Tolman's suggestion.

JUDGE DOBIE: Do you think there is any danger if we we don't adopt the Major's suggestion? No court is going to grant summary judgment if a party asks leave to amend and shows to the court that he can cure the defect by amendment, is he?

MR. HAMMOND: I didn't understand you.

JUDGE DOBIE: I say, no court is going to grant summary judgment if one of the parties applies for leave to amend and it is proper that he should be so permitted.

MR. DODGE: We have already provided that the court must give him the opportunity, and this is just a change of language.

PROFESSOR SUNDERLAND: Different wording.

MR. DODGE: After the underlined words in 60 to 62

of course we want to strike out the words "or to prepare for trial." So many of the courts have read it out of the rule, anyway. But is your change of language necessary? Does it correct sufficiently or improve those words which have passed the test now for so long?

DEAN MORGAN: We have fought over this a long time.

THE ACTING CHAIRMAN: Yes, we have. Of course, I think the motion for more definite statement ought to go with the bill of particulars, too. I think they ought to be consigned to the limbo of forgotten things.

DEAN MORGAN: I voted for that last time, but it didn't get by.

MR. LEMANN: This is one thing that has given rise, as you say in your note, to more variation in the decisions than almost any other point in the rule, isn't it?

DEAN MORGAN: That is right, and that is why we kept 65.

MR. DODGE: A good many of the courts read those out of the rules. I came across that in my practice a few months ago.

JUDGE DOBIE: What gave trouble was trying to make fanciful distinctions between bills of particular and motions for more definite statement, a lot of courts holding that a bill of particulars was only to prepare you for trial, whereas a motion for more definite and certain statement was so that

you could plead. They didn't know when to grant which and why, so you just practically cleaned out the bill of particulars. Isn't that correct?

THE ACTING CHAIRMAN: Yes. Of course, the history of this is that some of us thought this whole rule was unessential and misleading. We were told, however, to make definite provisions limiting the use of the provision which was made originally in some statements found in Moore's book, which in turn came from some cases, and it was suggested that those be put in. Those have been put in, and then they were voted for.

Here we are steadily losing ground, one by one. Half of it has been voted out already. The second half is now on the spot. All I can say is that I do feel the Committee is on a little retreat toward special pleading, and I think it is a little too bad when you remember Judge Chesnut's general views of the effect of the rules, and so on. I hate to see it going this way.

MR. LEMANN: Going which way?

THE ACTING CHAIRMAN: Going toward special pleading. That is what I think the amendments are tending toward.

MR. LEMANN: What amendments go that way?

THE ACTING CHAIRMAN: I think what you are doing in (b) and (c) is a direct step that way. That has been my main point, but we don't need to go over that again. Now aren't you going to leave us a little, even in vague and ambiguous

them from granting the motions so freely as they did.

MR. DODGE: Do you think this would do it?

DEAN MORGAN: I think it would help, and that is one reason I think you made a mistake in striking out that matter in 65 and 66.

MR. DODGE: All right. Let it go, then.

THE ACTING CHAIRMAN: You don't want to put both back in, then?

MR. DODGE: What is the idea of striking out "A bill of particulars becomes a part of the pleading"?

DEAN MORGAN: We don't have any bill of particulars now.

PROFESSOR CHERRY: We don't have any at all.

MR. DODGE: That is the reason, is it? That is satisfactory to me. Then I move that (e), with the words struck out which we have just stricken out in lines 65 and 66, be approved.

PROFESSOR SUNDERLAND: What is your motion, Mr. Dodge?

MR. DODGE: That (e) as it is written here be approved, subject to the amendment made by striking out in lines 65 and 66 certain words.

PROFESSOR SUNDERLAND: Yes.

THE ACTING CHAIRMAN: Any discussion? All those in favor say "aye"; opposed, "no."

DEAN MORGAN: Note that I didn't dissent on this one, Charlie.

THE ACTING CHAIRMAN: The "ayes" have it, and it is so ordered.

MR. LEMANN: Section (f) stands as is; no changes by anybody.

THE ACTING CHAIRMAN: Next we come to (g). That was Mr. Monte Lemann's proposal. He was willing to cut it down to more or less one motion.

MR. LEMANN: That is right.

THE ACTING CHAIRMAN: This has been approved. Does anybody want to re-do it?

PROFESSOR SUNDERLAND: I should like to raise a point, which is a small point. It reads this way: "A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him." That is all right. "If a party makes a motion under this rule and does not include therein" (in that one motion) "all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion", and so on.

That means if he makes a motion, say, to strike scandalous matter or if he makes a motion to strike or for a more definite statement, and doesn't include in that motion these various grounds for dismissal, he waives them.

DEAN MORGAN: That is right.

PROFESSOR SUNDERLAND: They don't belong in that motion.

DEAN MORGAN: Of course he ought to join them.

MR. LEMANN: He puts them in the answer, Mr. Sunderland. He doesn't waive them.

PROFESSOR SUNDERLAND: I suggest that line 88 read: "If a party makes a motion under this rule and does not include therein or in some other motion made at the same time all of the defenses and objections then available ...."

MR. LEMANN: What advantage would there be in two sheets of paper?

PROFESSOR SUNDERLAND: You can't make a motion to dismiss as a part of a motion to strike out scandalous matter. They are different motions.

DEAN MORGAN: You can move (a) to do this, and (b) to do that, and (c) to do this and that.

MR. LEMANN: If I were doing it under this rule, I would first move to dismiss the action because of failure to state a cause of action, and then I would go on, without in any manner waiving the foregoing, to make all my others. I don't see how it would help to have two sheets of paper.

PROFESSOR SUNDERLAND: You have three motions; you want to dismiss, you want to strike out scandalous matter, and you want a more definite statement. Do you have three motions

or one motion with three parts?

MR. LEMANN: You would have to have only one motion, and put them in the answer.

PROFESSOR SUNDERLAND: If that is one motion, this is all right, but I think they are three motions. There is one paper, but wouldn't there be three different motions? You move (1) to dismiss, (2) to--

MR. LEMANN (Interposing): I would say that, technically, under the terminology of these rules, it is one motion, and that one motion has in it--

DEAN MORGAN: Various grounds.

MR. LEMANN: --various grounds, various purposes and ends desired. Under the terminology of this rule it would be one motion. The main difference made by this rule, as I understand it, is that before you had three bites. You could have one motion to dismiss for lack of jurisdiction.

JUDGE DOBIE: You could move to strike out scandalous matter, and stop there.

MR. LEMANN: Then you could bring in another motion, and then you had your answer. This was a concession to the speed of justice by saying you could have only one motion, but you can put other things in your answer.

PROFESSOR SUNDERLAND: If that strikes the rest of you as being all right, it is all right with me. It seems to me that we have three different types of motion.

JUDGE DOBIE: Say something like "at the same time" instead of "include therein".

MR. LEMANN: Even if you were perfectly clean and not within the jurisdiction, you would have to add your objection to scandalous matter, you would have to add your objection to failure to state a cause of action. All your objections would have to go in there, unless you wanted to save them for your answer.

PROFESSOR SUNDERLAND: What kind of motion would you call it?

PROFESSOR MOORE: I suppose, Edson, that is technically right about its meaning include therein or join therewith other motions stating all defenses and objections, because the first sentence talks about joining with it "the other motions herein provided for".

JUDGE DOBIE: It is really a question of time. You can't do anything different, whether there are one, two, three, or four papers. Isn't that right, Eddie?

DEAN MORGAN: That is right. It is just a question of English.

JUDGE DOBIE: If you want to improve the English and make it perfectly clear at the same time. I suppose some lawyers would prefer having two papers.

MR. LEMANN: I hadn't looked at the first sentence.

DEAN MORGAN: That is usually required, Monte.

MR. LEMANN: We removed 6(c) when we were arguing on Hill v. Hawes.

THE ACTING CHAIRMAN: What does who want to do, and which and why? How does it stand?

MR. LEMANN: You want to change the language, Professor Sunderland.

PROFESSOR SUNDERLAND: I want to insert something. I think you had something drawn, didn't you, Eddie?

DEAN MORGAN: No. I just said "include therein or join therewith other motions stating".

JUDGE DOBIE: I think that is better, because that fits with the first. The first one treats them as two motions. It says, "A party who makes a motion under this rule may join with it the other motions".

PROFESSOR SUNDERLAND: That is all right.

JUDGE DOBIE: Now we say, if he makes a motion, he must "include therein," which would seem to indicate there is one motion.

PROFESSOR SUNDERLAND: That is all right.

MR. LEMANN: I would say leave it alone because it is purely a stylistic change. It hasn't hurt anybody. If we start making stylistic changes, I think we could make a great many.

PROFESSOR SUNDERLAND: One sentence treats them as different motions, and the next treats them as the same motion.

PROFESSOR CHERRY: If he wants to say this is a motion or several motions, what difference does it make?

THE ACTING CHAIRMAN: Major Tolman, I see, has a suggestion, too. He says that the words "and then available to him" don't need to be repeated. He wants to leave them out the first time, and not the second.

MR. DODGE: They are always available. All these exist at the beginning, or not at all.

THE ACTING CHAIRMAN: Not all of them. Some of them may come in only on amendment, you know. That is, suppose he moves for a bill of particulars and then gets it. Then the complaint is amended. Then he may have further--I shouldn't say "bill of particulars," a motion for more definite and precise statement, which is about the same thing. But, you see, it could come up on amended pleading.

PROFESSOR SUNDERLAND: Just to get a vote, may I make a motion and see if anybody will second my motion on that? It is that 88 and 89 read:

"If a party makes a motion under this rule and does not include therein or in some other motion made at the same time all defenses ...."

JUDGE DOBIE: I will second that. I think that makes it a little clearer.

THE ACTING CHAIRMAN: All right. Any further discussion?

PROFESSOR CHERRY: I don't think that does it, because the trouble is that the first sentence is amended now. Your first sentence treats it as separate motions. Now your second is going to make it alternative with him whether he makes it one or more. You have the same difficulty still.

JUDGE DOBIE: The second sentence starts out by treating it as one, and the first sentence treats it as two.

PROFESSOR CHERRY: That is right, and no harm has come of it. I don't see why any amendment is called for, but if you are going to make an amendment, you had better amend the first sentence, too, because you would still have a difference between your first and second sentences.

PROFESSOR SUNDERLAND: Where? I don't see it.

PROFESSOR CHERRY: Because the first sentence says they are separate motions. Now your second one says they may be one or they may be separate. They are still different.

PROFESSOR SUNDERLAND: The first one says that you may join two motions.

PROFESSOR CHERRY: That you may join with it the other motions. That treats them as separate.

PROFESSOR SUNDERLAND: There are three motions, aren't there?

PROFESSOR CHERRY: Yes.

PROFESSOR SUNDERLAND: To dismiss, to strike, and to make more definite and certain. If you use one, you may join

another one with it.

PROFESSOR CHERRY: All right, why not say that? That is not what your present suggestion is. If you want to say that, you could say, "If a party makes a motion under this rule and does not join with it all defenses ...."

JUDGE DOBIE: This says "include therein".

PROFESSOR SUNDERLAND: That won't apply to a case where he makes a motion to dismiss on one ground and doesn't include the ground for the other motion in the same case.

THE ACTING CHAIRMAN: Do you want to discuss the matter some more? It has been moved and seconded as you have heard. Are you ready for a vote on Mr. Sunderland's addition to line 89 of "or in some other motion made at the same time" after the word "therein"?

PROFESSOR SUNDERLAND: "or in another motion made at the same time".

MR. DODGE: What is the idea of having two sheets of paper?

MR. LEMANN: We have a paper shortage, too.

THE ACTING CHAIRMAN: Shall we vote?

PROFESSOR SUNDERLAND: Put it quickly:

THE ACTING CHAIRMAN: All those in favor of the motion will say "aye"; those opposed, "no." In the opinion of the Chair the "noes" have it. The "noes" have it. The motion is lost.

I guess that takes care of the Major's suggestion because the Major's suggestion was to strike out something already in.

Shall we pass on to (h)? As far as I can see, I think Eddie is right; I don't believe that the defense of failure to state a claim is good, even if the rule says it is. I mean, practically, I don't believe it is, and it shouldn't be.

MR. LEMANN: Have we anywhere that the fellow who has no claim can be brought up at any time? That is what I thought.

DEAN MORGAN: Proved.

THE ACTING CHAIRMAN: That is what this was intended to do.

MR. LEMANN: That is what I thought it was.

THE ACTING CHAIRMAN: But of course the word "state" there is a troublemaker. I don't think we ever thought it as important as it has become later.

MR. LEMANN: It hasn't made any trouble, has it?

THE ACTING CHAIRMAN: The place it has made trouble is in (b).

MR. LEMANN: But not here.

THE ACTING CHAIRMAN: I don't know that I know, but if it means all it means in (b)--of course, I never thought it did; I thought we were making it carry the whole weight of historical meaning in (b)--then it must carry that same weight

of historical meaning in (h), and then it is clearly wrong in (h).

MR. DODGE: If we strike it out, no court will decline to direct a verdict if no claim is established merely because there was no motion to dismiss.

DEAN MORGAN: Certainly not.

MR. LEMANN: Why not substitute the word "prove" for "state"?

THE ACTING CHAIRMAN: That is the idea.

DEAN MORGAN: Hold on. Wait a minute, you can't do that on a motion for judgment on the pleadings. ".... may be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings". Then you could strike out "or at the trial on the merits," and let it go at that. "and except (2) that, whenever it appears by suggestion of the parties ...."

PROFESSOR CHERRY: Striking it out might suggest to somebody that we are trying to say that something could have been considered under the rule as written and that that can no longer be done.

JUDGE DOBIE: Is there any verb, "establish" or something like that, that will get rid of that mess we are getting in about "state"?

MR. DODGE: The point there is that if you don't file a motion for failure to state a cause of action, you can

put that in your answer.

DEAN MORGAN: I don't think you ought to be able to make it for a motion for judgment on the pleadings, anyhow.

MR. DODGE: You ought to be allowed to put it in your answer.

DEAN MORGAN: Yes, that is it.

MR. DODGE: That is all that this says, "that the defense of failure to state a claim upon which relief can be granted .... may .... be made by a later pleading".

DEAN MORGAN: Yes.

MR. LEMANN: "if one is permitted". You have to keep that.

DEAN MORGAN: That is right.

MR. LEMANN: You wouldn't want to let it come in after that, but I think you ought perhaps to have somewhere that failure to prove a cause of action can always be brought up.

DEAN MORGAN: You can say, "or that a cause of action is not proved or that it has no claim upon which relief can be granted".

MR. LEMANN: "may always be brought to the attention of the court"? Or do you mean to put it in under (2): "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter or that an indispensable party is not joined or that no claim exists upon which relief may be granted"?

DEAN MORGAN: Yes.

MR. LEMANN: Entitling the party to relief.

DEAN MORGAN: That is the place to do it.

MR. LEMANN: Would that do it?

DEAN MORGAN: Yes.

MR. LEMANN: How about that, Mr. Reporter? The suggestion is that we omit in lines 100 and 101 the words "or at the trial on the merits", and that we insert in line 103: "or that no grounds exist entitling--"

DEAN MORGAN: "upon which relief".

MR. LEMANN: "--upon which relief may be granted.

THE ACTING CHAIRMAN: I guess it does what you want it to do. Of course, in the alternative (h) you will see we did the other thing. We made it a question of "prove" there, and there is no motion for judgment, anyhow. But that is another story.

DEAN MORGAN: You see, this has to work into the phrasing that we have here, Charlie.

THE ACTING CHAIRMAN: Yes, that is true.

DEAN MORGAN: We wanted to abolish judgment on the pleadings; we wanted to abolish a lot of things.

THE ACTING CHAIRMAN: I guess that is so.

MR. DODGE: But you want leave, if possible, to put in an answer instead of a motion to the effect that there is no claim.

DEAN MORGAN: I think that is quite right.

THE ACTING CHAIRMAN: All right. Then Mr. Lemann, I take it, moves, in subdivision (h), line 100, to strike out "or at the trial on the merits".

DEAN MORGAN: "or by motion for judgment on the pleadings or at the trial on the merits".

THE ACTING CHAIRMAN: Is that included?

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: Fine. To strike out "or by motion for judgment on the pleadings or at the trial on the merits" in lines 100 and 101, and to insert in line 103 after the word "joined"--now will you give what you had, Monte?

DEAN MORGAN: "or that no ground exists upon which relief can be granted".

THE ACTING CHAIRMAN: "or that no grounds exist upon which relief can be granted".

PROFESSOR MOORE: You have to take care of the defense, too.

THE ACTING CHAIRMAN: Yes.

MR. LEMANN: I am just wondering about striking out those words about motion for judgment on the pleadings, because the remark makes me a little suspicious, and Mr. Dodge yields such ready acquiescence. That got by me. I am just wondering.

THE ACTING CHAIRMAN: I withdraw my joy.

MR. LEMANN: Suppose a man brings in an answer in

which he sets up a defense that is no good; he doesn't state any defense in his answer. How are you going to get that, then? We have been using that for years now in Louisiana. Where a man comes in with an answer (which he has to make under oath with us), but on the face of it the defense that he states is no good in law, we have found it very useful to go in with what we call a motion for judgment on the pleadings.

DEAN MORGAN: You could demur to the answer, couldn't you?

MR. LEMANN: Demur to the answer?

DEAN MORGAN: Surely. Why not?

MR. LEMANN: We have never had a demurrer to pleadings or pleadings after the answer, but we do provide for judgment on the pleadings. Judgment on the pleadings is what we had here, and I thought that was a useful thing to have.

JUDGE DOBIE: They used to demur to a defense, didn't they? If I should bring suit against you in tort, and you pleaded infancy (which is no basis of relief from tort, of course), I could demur to that in common law.

MR. LEMANN: In common law you could, but not in our practice, but we have it, you see, by moving for judgment on the pleadings. We we want to eliminate that?

MR. DODGE: No. We had that before.

MR. LEMANN: Where do we have it now?

PROFESSOR SUNDERLAND: There is a section on that.

MR. LEMANN: Section (f)?

DEAN MORGAN: Yes.

MR. DODGE: Not section (f); section (c).

MR. LEMANN: That is right. We don't need it there. Why laugh? Why exult, Dean? You have these people giving you nothing, just a stone, and you thought it was bread!

PROFESSOR SUNDERLAND: You can renew your exultation now.

DEAN MORGAN: "by motion as hereinbefore provided". You have it here.

MR. LEMANN: That is right.

DEAN MORGAN: If he doesn't make a "motion as hereinbefore provided", he has to put it in his answer.

THE ACTING CHAIRMAN: It still stays that that comes out, I take it.

MR. LEMANN: Yes.

THE ACTING CHAIRMAN: Now going down to 103, I think Mr. Moore has a point.

DEAN MORGAN: Yes, he has.

THE ACTING CHAIRMAN: You have said, "or no ground or claim or defense exists".

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: Will that cover it?

DEAN MORGAN: That is right; "or no ground or claim or defense".

PROFESSOR MOORE: I think you ought to split it up and have: "except (2) that the defense of failure to prove a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the defense of failure to prove a legal defense to a claim may also be made at the trial on the merits, and except (3) ..." Then let (3) relate solely to jurisdiction with the usual terms there: "whenever it appears by suggestion of the parties ...."

MR. LEMANN: I think Mr. Moore's suggestion is better than the suggestion we had previously.

MR. DODGE: Not striking out from the answer, necessarily, the allegation that there is no claim stated.

PROFESSOR MOORE: No. No. 1 states that.

MR. LEMANN: He is just changing the present (2) in lines 101 to (3) and putting in a new (2).

MR. DODGE: So that it reads how?

PROFESSOR MOORE: I am taking the language out of our alternative (h) at the bottom of page 14 and the top of page 15, which reads:

"(2) that the defense of failure to prove a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to prove a legal defense to a claim may also be made at the trial on the merits, and (3) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction

of the subject matter, the court shall dismiss the action."

MR. LEMANN: If in your (h) in the redraft on page 14, we took out the reference to summary judgment--

PROFESSOR MOORE (Interposing): I am not proposing our (h).

MR. LEMANN: I am wondering whether it might not be better to lift it into (h). I am just wondering if you took out your (l) on page 14--

THE ACTING CHAIRMAN (Interposing): It would be just the same.

MR. LEMANN: It would be just the same.

THE ACTING CHAIRMAN: Either take the one as you moved it or substitute the one in the alternative (h). I think it comes to the same thing. Doesn't it?

MR. LEMANN: You have indispensable party. How did we settle with Mr. Moore about indispensable party before?

THE ACTING CHAIRMAN: I am a little sorry to see them come back in, but technically it is correct. I think we probably thought they weren't important enough, and we may even have thought it came in under the defense of failure to state a claim.

MR. LEMANN: I wouldn't think that in the ordinary use of language, would you? I think we should have said something about it. I wonder how it got by everybody.

THE ACTING CHAIRMAN: I wouldn't know. I am a little

sorry to see indispensable parties coming back into the law.

MR. LEMANN: You can't get along without them!

DEAN MORGAN: Not if they are indispensable.

"If no ground of defense exists, you will have to give judgment accordingly," or something of that sort is the way to have it end.

THE ACTING CHAIRMAN: Moore suggested a quite longer one, that in place of the (2) of the present (h) you take (2) and (3) from the alternative (h) on 14 and 15.

MR. LEMANN: I think that will do it, don't you? If it is in the alternative, it must be O.K.

DEAN MORGAN: Probably something is to be said for that, Monte.

THE ACTING CHAIRMAN: Of course, the only thing is, Monte suggested it. Well, Moore suggested it originally.

MR. LEMANN: That takes the poison out of it.

MR. DODGE: He leaves out of that reference to the failure to state a legal defense. This is "prove," isn't it, and not "state"?

PROFESSOR MOORE: Your (1) stays in.

MR. LEMANN: We want to get away from "state," don't we? It gets away from that trouble that we have with "state" in the rule as it now appears.

MR. DODGE: That is all right.

THE ACTING CHAIRMAN: The motion, as I now understand

it, would take the existing (h) down to the word "permitted" in line 100, and thereafter would take the alternative rule beginning at (2) and going on through it.

DEAN MORGAN: What line?

THE ACTING CHAIRMAN: Take the alternative rule beginning at line 57 on page 14, to the end.

Is that now agreeable? Are you ready to vote? All those in favor will say "aye"; those opposed, "no." The "ayes" have it, and it is so voted.

That covers everything except the alternative rule, and I don't know that you want to sit down and go over that, do you? Eddie, I will say that I think your suggestions are fine.

JUDGE DOBIE: Doesn't what we have done practically take care of the alternative rule?

THE ACTING CHAIRMAN: Take care of it? You mean it makes it more important than ever.

PROFESSOR SUNDERLAND: My theory is: the worse the alternative rule is, the better.

THE ACTING CHAIRMAN: The alternative rule is now the only hope of the white man and free people. (Laughter) But does anybody want to discuss it or say anything more?

DEAN MORGAN: I said enough last time, Charlie.

THE ACTING CHAIRMAN: Then we will consider that we have now finished Rule 12 and the two drafts.

MR. DODGE: They will be put up as a Committee rule and a rule favored by some members.

MR. LEMANN: The majority of the Committee.

THE ACTING CHAIRMAN: I suppose so.

MR. LEMANN: I am a little troubled that we have such a small group here and that we vote five to six votes, but I just wondered if there was any feasible way to get the reaction of the absentees on some of these changes. Mr. Dodge says, not without hearing the discussion. I think he is right, because it is very difficult to get an intelligent reaction without hearing the debate.

DEAN MORGAN: It certainly is. There is no question about it.

MR. LEMANN: I guess we just can't help it.

THE ACTING CHAIRMAN: I don't know on that. I thought they heard a very intelligent discussion before, and they reached a result which has now been overturned.

MR. LEMANN: They have forgotten it.

THE ACTING CHAIRMAN: I guess that always happens.

JUDGE DOBIE: If we had a hundred meetings, every time we came back there would be a great many suggestions of changes, and a number of them would be made. There is no doubt about that.

MR. DODGE: I don't think we have made any real changes in the substance of what we voted before.

MR. LEMANN: Have you made any changes in your opinions?

JUDGE DOBIE: Sometimes we do, and sometimes we don't. Every judge sees every opinion, whether he signs it or not. He makes suggestions, and then the judge who wrote the opinion gives his reactions to it. If there is any really serious objection, we have another conference and vote on it.

MR. LEMANN: You change your own vote, though, don't you?

THE ACTING CHAIRMAN: The only thing this reminds me of is a story of three fellows who escaped from an insane asylum. The three were in a well together, with one on top and the others hanging from him below. He said, "Hang on, boys, while I spit on my hands." I think that is really what Mr. Dodge is doing. We are spitting on our hands.

Let me say this, which I was going to bring up before. I have a letter from Judge Donworth, which has been handed to me.

"Honorable William D. Mitchell

"Dear Chairman Mitchell:

"In spite of my best endeavors to arrange for attendance at the meeting of the Committee beginning April 3, I find that it is impossible for me to make the connection in these strenuous times.

"I authorize the signing of my name to the report

which is to be made to the Court at this time." That is really very nice.

"I regret exceedingly that I shall not be able to cooperate with the members of the Committee at this session. Both as a matter of public duty and for the pleasure that these meetings bring, I should be present if circumstances at all permitted.

"With kind regards,

"Yours very truly,

"George T. Donworth."

So I am afraid we are not going to have Judge Donworth with us.

... Brief recess ...
