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TUESDAY MORNING SESSION

March 26, 1946

The meeting reconvened at nine-thirty-five o'clock, Mr. William D. Mitchell, Chairman, presiding.

THE CHAIRMAN: We were discussing last night the new provision in lines 39 to 42 of Rule 26(b), on page 33 of our Second Preliminary Draft. The statement in full is:

"It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

I think the bar's opposition to that, as I said, was the result of misunderstanding of what is meant by inadmissible. I don't know that we can make the rule any better, but I think the note might clear it up a bit, explaining that it is inadmissible in the form in which it is hearsay or secondary evidence or whatnot.

JUDGE DOBIE: General, don't you think that the admissibility of evidence has a technical meaning?

THE CHAIRMAN: You mean you think it is insufficient?

JUDGE DOBIE: I think it is perfectly clear. I say that "inadmissible" has a perfectly technical significance in the law, as I understand it. It means a court won't receive it.

THE CHAIRMAN: I know, but there are a good many reasons for it.

JUDGE DOBIE: Yes.

THE CHAIRMAN: Suppose the evidence is inadmissible in the sense that the subject matter is something that the court considers entirely outside of the scope of the case. That is one reason. Another reason is that it is perfectly relevant, but is not the best evidence. It is hearsay.

I agree with you that we should not change the draft, but I would suggest that when you get up your notes referring them to the court, it might be well to try to bring out that idea. It is not inadmissible because it is irrelevant in the sense of having no relation to the case, but it is inadmissible because it is hearsay.

JUDGE DOBIE: I believe a note would take care of that.

THE CHAIRMAN: That is what I think. We passed it, and it stands.

We pass on, then, to Rule 27. Is there anything on that that you want to take up? That is Depositions Before Action or Pending Appeal.

JUDGE CLARK: No.

DEAN MORGAN: Somebody made a suggestion on 26(d), but I think there is nothing to that suggestion, probably.

JUDGE CLARK: It was a suggestion as to the taking of the deposition of a corporation. It is on page 33 of the first summary. It is from the Federal Rules Service. The first

question raised was why 26(d)(2) refers to directors, while Rule 37, dealing with the consequences of refusal to make discovery, does not. We don't put "directors" in 37(b) and (d), but there hasn't been any real question about it.

DEAN MORGAN: I don't think so.

JUDGE CLARK: It is rather a technical objection.

THE CHAIRMAN: Has any question arisen in court?

JUDGE CLARK: No.

JUDGE DOBIE: I think we had better pass that.

JUDGE CLARK: This is a theoretical objection. Then the same people, the editors of the Federal Rules Service, suggest that the rules should be amended to provide for the taking of depositions under Rule 26(d) of corporate employees. That is a matter we have discussed before.

DEAN MORGAN: I think that is out, don't you? It is to try to make that receivable as an admission, isn't it?

JUDGE CLARK: Yes.

DEAN MORGAN: I should think that is out. There is nothing to prevent your taking the deposition of a corporate employee like any other witness, is there? They want a provision so that the employee's deposition would be receivable whether or not he was available, and so forth.

THE CHAIRMAN: Yes.

DEAN MORGAN: Just as if he were an officer of the corporation.

JUDGE CLARK: We have discussed that several times before. There isn't anything really new.

DEAN MORGAN: I don't think there is anything in it.

THE CHAIRMAN: We haven't anything as to Rule 27, have we?

JUDGE CLARK: No.

THE CHAIRMAN: Rule 28?

JUDGE CLARK: Mr. Youngquist wanted to know if the material between lines 8 and 10 could be omitted, but that is what we put in.

THE CHAIRMAN: Why did he want to omit it?

JUDGE CLARK: I think he thought it was unnecessary, surplusage. We wanted to emphasize that the appointment of a person carried with it the power to do all these things, and the very phraseology suggested by Mr. Youngquist was thought to be doubtful as to whether the "person" appointed, if otherwise without authority, could administer oaths and take testimony. This makes it quite clear.

THE CHAIRMAN: I have your digest or note here, and he has a reason for it. It is not a mere question of surplusage. He says if a person appointed hasn't any other statutory authority to administer oaths, he doubts the power of the rules to grant him that authority.

JUDGE CLARK: Yes. I am wrong. You are right about that.

THE CHAIRMAN: He says it is doubtful whether the "person" appointed, if otherwise without authority, could administer oaths and take testimony. Your theory is that we grant him authority by a procedural rule.

JUDGE DOBIE: By virtue of the appointment he shall have power.

PROFESSOR SUNDERLAND: He may be appointed. The court grants the power to administer oaths.

THE CHAIRMAN: Yes.

PROFESSOR SUNDERLAND: Wouldn't the court have power in making the appointment to grant authority to administer oaths? It isn't that the rule gives the authority, but the court gives the authority in making the appointment.

JUDGE CLARK: If that can't be done, there isn't any reason for making the addition, because a person who couldn't administer oaths would be quite useless here.

THE CHAIRMAN: I think Edson knocked Youngquist out. The court can appoint a master, examiner or anybody, and has authority to give him power to administer oaths and swear witnesses.

Let's pass on to Rule 30, then, Depositions Upon Oral Examination. I don't know whether there is anything in it that we are in doubt about except this question of lines 14 to 17, "that designated restrictions be imposed upon inquiry into papers and documents prepared or obtained by the adverse party

in the preparation of the case for trial". The word "expense" is added down in line 28, which I think is all right.

PROFESSOR SUNDERLAND: I wonder if that is in the right rule. This rule refers to depositions upon oral examination, and then we insert this matter which relates to papers and documents.

JUDGE CLARK: Of course, Edson, a good many of the other rules now are tied up to this.

DEAN MORGAN: Yes.

JUDGE CLARK: Possibly the title may not be as adequate as it was originally.

MR. HAMMOND: You have in Rule 34 an insertion, "and subject to any applicable protective orders mentioned in Rule 30(b)".

PROFESSOR SUNDERLAND: Yes, but this doesn't really belong in 30(b).

THE CHAIRMAN: It is put in the clause on depositions and restrictions placed upon depositions upon oral examination. Whether right or wrong, that seems to be as good a place as any. Then the other rules, having relation to other forms of interrogation, are tied up with this and refer back to the powers that the court has under Rule 30. I am not sure that it makes any difference in what particular one of these discovery rules we put that provision for restrictive orders, if it is there and then referred to in all the others.

JUDGE DOBIE: Isn't this inquiry into rather than production of the papers, "imposed upon inquiry into papers and documents"? It doesn't say anything about producing them.

DEAN MORGAN: You can get a subpoena duces tecum for a deposition, and that will require the production of documents. So, you would have to have this part as well as any other part, I should think.

THE CHAIRMAN: It refers to when the production of documents is required.

To start the ball rolling, I have read all these cases in our federal courts in this country and in the English courts put out in the digest which the Reporter very kindly prepared. It gave me a different picture of the thing than I had before to read all those cases and see what they had done. The bulk of the cases in this country are in the Eastern and Southern Districts of New York, in Pennsylvania. There is just a smattering of any litigation on the subject reported outside.

The cases we have in this country show a disposition to place restrictions around the use of the information obtained in preparation for trial. Of course, you know what the English do. They hook it up on privilege, and any time you get a lawyer within forty miles of it, they say it comes under the privilege rule.

I must confess, in the first place, that I think this

provision that it is proposed to put in here, that is now in lines 14 to 16, won't do, because it doesn't help us any. It doesn't add anything. It simply says that a court can place some kind of restriction in a particular case around the use of the paper. I imagine that is so. There are cases where you have to admit some of the things in that file were entitled to protection, but it doesn't state any standard or any rule or any principle which a court may go on. I don't think it helps the district court to know how to handle this case.

I suggested getting some constructive proposals from the bar, something from the bar to propose a provision in the rule that would lay down in fairly general terms the standard for application of judicial discretion, and we have gotten no results. Perhaps somebody from the Committee can do it and satisfy the situation, but if not, my disposition would be to strike this provision, lines 14 to 17, out of the rule because I don't think it helps the situation any.

SENATOR PEPPER: Which rule is that?

THE CHAIRMAN: We are talking about Rule 30(b), on page 38, in which the proposal is "that designated restrictions be imposed upon inquiry into papers and documents prepared or obtained by the adverse party in the preparation of the case for trial". If we can't put in a standard that satisfies us and meets the situation with all the varied kinds of situations that may arise and the types of documents that may be there,

the differences in their origin, the time when they are asked for, and the purpose for which they are to be used, if we can't formulate a standard which will apply to all that, I favor leaving this proposal out, maybe with the hope that the Hickman case will get up to the Supreme Court (a writ of certiorari has been applied for) and they will attack the problem in the light of the decisions and in the light of their own view about the proprieties of things and lay down a rule on the subject. We are sort of passing the buck, of course.

DEAN MORGAN: The trouble is that the Hickman case gives an interpretation of privilege which certainly isn't the kind of privilege that applies at trial.

THE CHAIRMAN: What are they saying?

DEAN MORGAN: They are interpreting our statement of privilege. That is what they purported to do.

THE CHAIRMAN: I don't agree with that. We never used the word "privileged" as they say we did in any sense other than the standard attorney-client and doctor-patient relation. That is what we are talking about. The C.C.A. in the Third Circuit comes along and imputes to us the intention to use "privileged" in a broader sense, and with that as a basis they say the stuff is privileged.

DEAN MORGAN: Yes.

THE CHAIRMAN: It is a false argument. They may be right in their result, but they are certainly not right in

imputing to us a meaning of the word "privilege" that I don't think a man on this Committee ever dreamed of.

SENATOR PEPPER: The best comment that I have heard on that opinion was by a member of the Allegheny bar, in Pennsylvania, with whom I corresponded--Miss Graubert, a very intelligent woman.

JUDGE CLARK: I heard from her. She sends me all their articles.

SENATOR PEPPER: She is very good. She says:

"I do not think the basis of Judge Goodrich's opinion is sound. The privilege which exists between lawyer and client should be limited to such facts as the client himself discloses to the lawyer. To extend this privilege to any information which a lawyer or his client may obtain from any other source seems to me to be ignoring the reason for the privilege. I think the result which the Circuit Court sought to obtain could be reached by directing the processes of discovery to the client. If the rule should specify that counsel of record for every party shall not be subject to the processes of discovery, I think the benefits of the rule would be obtained without getting into the difficulties which Judge Goodrich anticipates. It may be that such a rule would provide an escape from complete discovery, but it might prove very embarrassing to permit a client to withhold information on the ground that only his lawyer had the facts. The court could, under such circumstances,

require the client to obtain the fact from his lawyer."

THE CHAIRMAN: Very clear.

SENATOR PEPPER: I think that is an acute criticism. Like you, Mr. Chairman, I have read the seventy-nine pages of that analysis with really very great care, and whoever did it did a fine piece of work, but I do think that a review of those cases makes a revision of the discovery rules imperative. I don't think it is creditable to this Committee that we should turn out a rule which is so lacking in clarity as to result in those seventy-nine pages of chorus of discord, because that is what it is. There are certain patterns that run through it, but they are inconsistent with one another.

I think what we have attempted to do is to steer some sort of middle course between two extremes--the extreme of allowing discovery only of books, papers, and other tangible things as they existed prior to the incident which gives rise to the action, and of things subsequently prepared, which gets mixed up with the question of privilege, with the rights, if any, of the insurer of one of the parties, and this whole question of the intervention of lawyers.

I think it would clear the air if I stated the length that I would be prepared to go in a revision of these rules. I think the rules, as amended, should be liberal in permitting discovery of all documents and other tangible things which were in existence before the event, giving rise to the action.

Discovery should not extend to any document prepared after that event, whether by or for a party or by or for the insurer of a party, except written statements or reports made immediately after the event in discharge of a duty to make them. Discovery also should be had of the names and addresses of persons believed to have knowledge of relevant facts, but not of the statements of such persons made to a party or his agent, whether lawyer or otherwise, subsequent to the event in question and whether or not made in preparation for trial.

In other words, I would draw the line at the happening of the event which gives rise to the action. I would make discovery ample and complete as to anything that was in existence at that time, and I would limit discovery of documents originating after that date to reports made in the discharge of the duty or to entries made in the discharge of the duty to make them.

THE CHAIRMAN: You mean require some of them made in the ordinary course of business, whether you have apprehension of a lawsuit or not.

SENATOR PEPPER: That is right.

THE CHAIRMAN: That is a very difficult test to apply.

DEAN MORGAN: How would you define "duty" there?

JUDGE DOBIE: That is what I was going to ask about. Here is a case I had: A man was killed down there in the mountains. A poor mountain boy got drunk and was run over by

two hearses--a terrible death! They had a coroner's inquest, but the counsel for the plaintiff didn't know about it. The counsel for the defendant had a stenographer there and took down the evidence at the coroner's inquest. Would you rule that out? Of course, the coroner tried the case in pursuance of his duty, but there is no requirement in Virginia for a transcript of the evidence.

SENATOR PEPPER: Judge Dobie, I would say that the typical case of the duty to make an entry or a report is the case of the log of a vessel, we will say, where the incidents of the day are entered. If they happened to include an accident, that would just take its course with the other things.

JUDGE DOBIE: How about a locomotive engineer who makes a report about a defective engine?

SENATOR PEPPER: Irrespective of whether the subject matter is an act causing damage or some incident that doesn't affect a third person, like the breakdown of a machine, any of those things, it seems to me, made immediately after the incident should be made the subject of discovery.

THE CHAIRMAN: You mean which had to be made under the rules or the regulations of the institution, whether anybody was hurt or damaged or not.

SENATOR PEPPER: That is right.

DEAN MORGAN: What about the reports of accidents that are supposed to be made to the Interstate Commerce

Commission, full statements, and so forth?

SENATOR PEPPER: I should say generally that I take my stand on the happening of the event, that I would include the right of discovery, always subject to privilege properly understood, as to any documents that were in existence at the time of the incident. I would limit discovery of documents originating subsequent to the incident to the typical cases that I have mentioned, where it is the duty to make the report not because of the act but because it is the duty to report in the ordinary course of business. Of course, the names of persons supposed or thought to have knowledge of the facts should be available, together with their addresses.

Mr. Chairman, we must realize that it is the attempt to accommodate the rule to all sorts of intermediate cases that gets us into trouble, and discovery is an extreme remedy. It seems to me that it ought not to be extended beyond the point that I have indicated.

THE CHAIRMAN: Let me ask you this. I can work out my own thoughts about this a little better if I am talking about concrete instances. For example, suppose the plaintiff in the lawsuit was a person injured in an accident, and shortly after the accident an agent of the insurance company, representing the person who might be charged with responsibility, got to the plaintiff and obtained a written statement from him and turned it over to the defendant and the defendant's lawyer.

Afterwards, the plaintiff hired a lawyer, and the first thing the lawyer asked was, "What is your statement about the case? Did you make any statement at or about the time of the accident to anybody?" The plaintiff told his lawyer, "Yes, I made one to the insurance company."

The lawyer wants to see it. Maybe it is for a legitimate purpose and maybe it isn't, but he asks for the production of the statement furnished to the defendant by the plaintiff. Under your general statement the plaintiff couldn't see that.

SENATOR PEPPER: That is right, and I think it is the attempt to deal with such cases as you put that gets us into trouble. I don't believe that you can distinguish between the case in which on the facts there is an element of injustice in not letting the plaintiff's lawyer see the document in question and the case in which it is desired by him for the purpose of cooking up evidence for the purpose of circumventing it. Gentlemen, we can't draw the line, it seems to me, unless we draw it on some objective test, such as freezing the situation as of the happening of the event giving rise to the action and then permitting declarations or statements in the course of business, the nature of which we have all threshed out for years in the law of evidence--book entries, shop records, and so on, the logs of ships, and the list of witnesses with their addresses.

THE CHAIRMAN: Let's say that the defendant is a

person who had apprehension of being sued or was sued, and he makes an investigation and gets in touch with a lot of witnesses who know about the case and obtains their statements.

SENATOR PEPPER: Yes.

THE CHAIRMAN: The plaintiff doesn't do it. He hasn't gotten around to it or isn't diligent enough or hasn't money or whatnot. Then, before the trial, the plaintiff asks to have leave to see the statements that the witnesses have made. That, of course, would be denied under your rule.

SENATOR PEPPER: Yes.

THE CHAIRMAN: I am wondering what is your principle or your reason for denying. Is it because there has been an undue use of money and expense, or is that placing a premium on laziness, or is it some other principle?

SENATOR PEPPER: All those elements enter into it, but I should say the basic principle is that in our system of procedure we ought to recognize that a lawsuit is an adversary proceeding, that the truth is most likely to be elicited as the result of cross-play between a plaintiff and defendant. The very names that we give them indicate that it is that kind of contest. I don't think a lawsuit is an occasion for resolving the whole thing into a UNO, with all open covenants openly arrived at and everything laid on the table. I think it is an adversary proceeding. I think that what is done by either side in the way of investigation after the event is something into

which we have no right to go in compelling discovery.

THE CHAIRMAN: Let me ask you one more question or two. The case which I have illustrated is one where the defendant gets statements from witnesses, has them in his file, and before the trial starts the plaintiff asks leave to see them, and you say it shall be denied. Suppose that the witnesses from whom defendant has obtained statements go on the stand at the trial, are sworn, and testify, and the plaintiff suspects or has reason to think that their testimony has been altered and that if their statements made at the time were disclosed by the defendants, it would appear that the defendant's own witnesses had perjured themselves. Suppose at that stage of the case, after they testified, he asked the court to direct the defendant to produce the statements of these witnesses whom the defendant has called on the stand, for the very legitimate purpose of seeing whether the testimony they finally swore to corresponds with their first story, what about that?

SENATOR PEPPER: That doesn't seem to me to be discovery at all. Discovery is a process to be resorted to in advance of trial for the purpose of informing the inquisitor as to matters which he wants to use in his preparation for trial. When you get into a situation where a witness has testified, of course you can impeach him by producing any document that you have which is inconsistent with his testimony,

which he had previously written.

THE CHAIRMAN: Suppose you haven't one.

SENATOR PEPPER: If you haven't, it is within the discretion of the court to order the other side to produce it.

THE CHAIRMAN: Then, as I understand it the last time, all your rule relates to discovery before the trial starts.

SENATOR PEPPER: That is right.

THE CHAIRMAN: If you get to the trial and then demand the production of these documents, the exposure of things in the investigation file, you are all right. Is that it?

SENATOR PEPPER: I think that under those circumstances you are just in the ordinary situation where a witness who has given testimony is subject to have his testimony impeached by any statement or other utterance of his previously made, but that use of a document to impeach a witness is altogether different from giving access to the statement to counsel for the other side, who may make an improper use of it. In all my long experience I have found the danger that injustice will be done by denying discovery of these statements of witnesses is not so great as the danger that, as a result of discovery, cooked up testimony will be produced to circumvent the statement which has been elicited from the proposed witness.

THE CHAIRMAN: It may be that my confusion of thought about discovery before trial started and discovery after trial

began arises from the fact that many of our rules, while implying in some cases that generally application for discovery is to be made before trial, are certainly applicable to demand the inspection and production of documents and things after the trial has begun. So, I didn't draw a line between discovery before trial and discovery afterward. Of course, if your rule is so drawn that none of these restrictions that you are suggesting apply necessarily after trial is started--

DEAN MORGAN [Interposing]: The point of cooking up testimony, however, is met by the fact that the defendant can immediately take the deposition of the plaintiff and tie him up on what the facts are in the particular case as far as the plaintiff knows.

SENATOR PEPPER: Which may be nothing.

DEAN MORGAN: Take a case like the Hickman case. You have a plaintiff without apparent means and a defendant there able to make this investigation and to make it right away, before the plaintiff had consulted a lawyer or before any action was brought or anything of the kind. What is to prevent the defendant from cooking all this stuff up, as you say, if the plaintiff doesn't get a chance to look at it?

SENATOR PEPPER: There is no rule that anybody can make that will prevent either perjury or subornation of witnesses, as the case may be, but you can strike a balance based on experience as to where the danger lies. That is a delicate

matter of opinion. Mr. Chairman, in these seventy-nine pages of analysis made by the Reporter, I noticed there was a persistant reference by many courts to the propriety of using these statements for purposes of impeachment. That means to me that a line should be drawn in our rule between the use of the document when produced under compulsion at the trial and in response to a judicial order and the eliciting of information by process of discovery before trial. It is only the latter that I am speaking to.

MR. DODGE: For purposes of comparison, I would like to have a reference to the Illinois law, which is somewhere in these papers. I can't find it. There is a provision in Illinois, and I would like to see just how, if at all, that differs in substance from Senator Pepper's suggestion.

DEAN MORGAN: I think it is the same, isn't it?

JUDGE CLARK: I will see if we can find it. The Insurance Counsel have cited that. Have you got that report that they sent around?

THE CHAIRMAN: That is the Committee on Insurance of the American Bar Association?

MR. HAMMOND: A separate organization.

MR. DODGE: I think it reads this way, in substance like Senator Pepper's statement, which impressed me very favorably: "This rule shall not apply to memoranda, reports, or documents prepared by or for either party in preparation for

trial or to any communication between any party or his agent and the attorney for such party." How does that differ from yours?

SENATOR PEPPER: It doesn't, sir. It states it better and more succinctly, but the principle back of it is the same.

MR. DODGE: Yes. I agree entirely with your suggestion that the very best way to prevent perjury is to keep these statements secret. To accomplish justice, it is essential that they should be, whether it is the defendant or the plaintiff that gets the statement.

JUDGE DOBIE: How about a case like this, Senator? I had the case of an accident at the St. Louis World's Fair. I represented the defendant. We took some depositions out there, but we settled the case. We had it transcribed, but nobody else did. The reporter left. Later on, one of these men went to Norfolk, was in a construction gang down there, and brought suit in Norfolk. We went down there and took some depositions, and I had a copy of his previous deposition, you see. Frankly, that witness was scared to death. He knew I had that paper there, his replies were very evasive, and they didn't help the other side at all. Do you think they ought to have a copy of that?

SENATOR PEPPER: As I understand it, this was a statement made after the incident.

JUDGE DOBIE: That is right; a deposition taken.

SENATOR PEPPER: And it was not in the discharge of any duty on his part that he made it.

JUDGE DOBIE: Not at all. We took his deposition and then settled the case, so it was never used. We had it transcribed; the other side didn't.

THE CHAIRMAN: The other side called him as a witness finally?

JUDGE DOBIE: Yes.

THE CHAIRMAN: And you had a former statement that you had taken.

JUDGE DOBIE: That is right.

SENATOR PEPPER: That seems to me to give rise to no difficulty. I think you had a perfect right to use his statement to impeach his testimony at the Norfolk trial, but I don't think that he would have had the right.

JUDGE DOBIE: That is what I wanted. You don't think his lawyer would have a right to see that statement.

SENATOR PEPPER: I don't think he would have had a right to get discovery of that which originated subsequent to the incident.

THE CHAIRMAN: The fellow whose deposition you took was the injured party?

JUDGE DOBIE: He was the injured party, and we settled the case, you see. Then another man who was injured

brought suit in Virginia.

SENATOR PEPPER: You see, it was a different person.

THE CHAIRMAN: The other case wasn't connected with this deposition?

JUDGE DOBIE: It arose out of the same accident.

THE CHAIRMAN: The plaintiff in the second case did not demand that you produce this fellow's statement?

JUDGE DOBIE: He did. He could have asked in the court and could have got it under Virginia law. He said, "I wish you would let me see that." I said, "I am sorry, I can't let you do it. I haven't authority to."

THE CHAIRMAN: It is a plain case of the defendant's having procured the statement of a material witness.

JUDGE DOBIE: Yes.

THE CHAIRMAN: It brings it down to that.

JUDGE DOBIE: It is a great threat to hold over a witness that you have something he said before. We all know that. Is the other side entitled to have that?

MR. DODGE: Under Senator Pepper's rule, the other party can get the names of the witnesses. Why give him the statements that you have taken when he can go and get them?

THE CHAIRMAN: The reason the courts have held that you can always get the names is that we have an explicit provision in one rule that you can get the names and addresses of material witnesses.

SENATOR PEPPER: I think that is fair because my observation is that the staff, we will say, of a transportation company or of a trolley line or bus company is much better equipped immediately after an accident to take the names of everybody and to take their addresses. It may well be that the injured plaintiff, especially if rendered unconscious by the accident or in cases of death, if killed, is powerless to get any access to sources of information. I think it is perfectly essential in the processes of justice that the names of persons believed to have knowledge of the facts should be disclosed by one party at the demand of the other

I am drawing the line at the point where statements or memoranda or other documents are produced after the event because, while I can think of hard cases if you don't grant discovery, I can think of more cases that are litigation-breeding and lead to injustice if you do. I don't think we have succeeded in formulating a rule, and I am groping for a clear standard, something which will not bring our rules into discredit as they are not in discredit to the extent of this particular subject.

THE CHAIRMAN: Why is it, Charlie, if you have any information, that the bulk of these cases involving litigation on this subject have all arisen mainly in the Southern and Eastern Districts of New York? Why hasn't there been a ruction about it around the country?

SENATOR PEPPER: There are quite a lot of cases elsewhere. There are cases in Mississippi; there are cases in California.

THE CHAIRMAN: There are relatively few. Maybe it is the mass of litigation that is there.

SENATOR PEPPER: I notice that the name of one of the litigants, recurring again and again, is Palmer. Is that that fellow in New York?

JUDGE CLARK: You mean the trustee of the New Haven Railroad, don't you? A great many cases are against the New Haven Railroad.

SENATOR PEPPER: I guess that is probably it.

JUDGE CLARK: He is the trustee. There are three of them. One of the famous cases on this question of statements is Hoffman v. Palmer, where they said that the engineer's statement wasn't a business entry because the business of the railroad was railroading, not litigating. That is one of the ways they got around it. I can't answer that fully. As we know, a great many cases are brought in, and one of the reasons (I don't know that it is the only one) is that the jury would like to be generous.

THE CHAIRMAN: Do you understand that generally around the country the courts are compelling discovery of papers such as the Senator mentioned? What is their attitude about it?

JUDGE CLARK: I think all we can tell is what the reported cases show. We wouldn't know. I think this is to be said about the Southern and Eastern Districts: I think there has been a little tendency to expand somewhat among some of the judges. For example, when we had our Judicial Conference in November, of these same judges, all except two wanted very broad powers. Two judges, Conger and Clancy, were opposed and wanted it restricted. Not all the judges would grant it freely. For example, Judge Cox thought that the court ought to have the power, but I think he would not grant it widely. Judge Moscowitz had quite a few of these earlier cases, and it is my feeling that Judge Moscowitz now would grant somewhat more discovery than he would in 1938.

This is a process of development, and for my part I don't have any feeling of shame or anything else about our development here. We are breaking new ground. In the past we could not have foreseen everything. This is a matter about which men of course are going to think differently. I must say that as I sit here and look at a case like the Hickman case, which I think is perhaps the prize case and brings the whole question up, it seems to me that it is manifestly unfair that because the defendant has the money and the force, he can get the kind of advantage that we safeguard for him forever against the family of a man who has been drowned. It doesn't seem to me that that is justice.

THE CHAIRMAN: Why shouldn't the plaintiff in that case, if he gets the names of the witnesses, as he could under our rule, go get a statement from the people? Of course, they might refuse to render one voluntarily, and then he would have to resort to deposition before trial, and that would be an expensive process. Is that the idea?

JUDGE CLARK: I think it is a little more than that. In the first place, as I recall the case, these were employees of a tugboat company. I think they had been somewhat scattered. I think, in the first place, it would be a question whether you could even get hold of them. In the second place, of course, if they have given a statement already, that statement is the most important. There isn't much use of your getting a statement quite contrariwise. That is, if you can get hold of him, you can examine for all you can get out of him, but I should say that there, from the way I look at it, that ought to be freely open to the defendant, too. It may be that the two statements will cancel each other. If so, all right.

THE CHAIRMAN: If you take a deposition, the other party has a right to a copy of it. It isn't a secret. So, when the discovery is obtained by deposition, both sides will have access to it.

JUDGE CLARK: Let me make one other suggestion about the Senator's dividing line of the time of the accident. It seems to me that that isn't sound in itself. I suppose you

have to face the question of whether or not you are going to allow preparation for trial to be discovered, but if you make it turn merely on the time of the happening, that practically means that you take discovery out of a certain class of cases which have been the fighting cases, that is, the tort cases. You are limited practically to cases of, say, contract. Possibly you could have the background of a contract. In other words, you are just limiting the nature of the case where you can get discovery.

MR. LEMANN: The happening of the event? Was that the language?

THE CHAIRMAN: Yes.

MR. LEMANN: Suppose you had a contract which would exclude anything as to the construction of the contract.

SENATOR PEPPER: Monte, I wasn't trying to use terms of art.

MR. LEMANN: Just to get the idea.

SENATOR PEPPER: I didn't mean to limit it to tort cases.

MR. LEMANN: That is why I asked.

SENATOR PEPPER: We have to adopt language that is flexible enough to apply both to contract and tort, because it seems to me the principle is the same.

MR. LEMANN: It would be more difficult, I should think, with contracts.

SENATOR PEPPER: I think it would be.

MR. LEMANN: Just as he was talking, it came to my mind.

THE CHAIRMAN: I have gotten the impression that some courts have held that where an accident happens, something out of the way in the operation of a plant, machines, or something, and it is the ordinary duty of the superintendent, the foreman, or an employee to make a report--

SENATOR PEPPER: Whether anybody is hurt or not.

THE CHAIRMAN: --whether anybody is hurt or not, that is not privileged. It must be included. As I understood from your statement, that would be privileged.

SENATOR PEPPER: No.

THE CHAIRMAN: It had to be a report whether there was an accident or not.

MR. LEMANN: In the regular course of duty.

SENATOR PEPPER: I carefully abstained from using the term "privileged." I think it has been badly abused. I think Miss Graubert's criticism is a good one. I think that our solution of the problem of discovery ought to leave the question of privilege untouched.

THE CHAIRMAN: I didn't mean the word technically.

SENATOR PEPPER: I see what you mean.

THE CHAIRMAN: I mean included.

SENATOR PEPPER: In any case, the report that you have

referred to, which would have been made whether the breakdown of the machinery had hurt a plaintiff or whether it hadn't, seems to me to be fairly within the reach of discovery.

THE CHAIRMAN: Only where the report is made because somebody is hurt.

SENATOR PEPPER: And with reference to a transaction which either does or is likely to result in litigation.

THE CHAIRMAN: That is what the English courts call apprehension.

SENATOR PEPPER: Yes. It is the interval between the happening of the event and the beginning of the suit. After the beginning of the suit they call it post litem motam, and before that time they call it ante litem motam.

THE CHAIRMAN: Suppose there is a standing order or rule requiring all superintendents, foremen, and so on, whenever there is an accident and anybody is hurt, immediately to make a report all about it. Do you mean to say that just because it is their ordinary course of routine to do it, that that stuff may be obtained under discovery, whereas if it were not by standing order or routine, but a special agent went out and made a personal inquiry of the foreman and shop superintendent and got the statement that way, it would be privileged? Are you drawing any line of that kind.

SENATOR PEPPER: Yes, I am drawing a line between that and statements made in pursuance of an established order

which causes the statement to be made irrespective of whether or not somebody has been hurt. The typical illustration is the log of a ship. I am saying that such documents seem to me fairly to come within a reasonable rule of discovery when they originate after the event.

THE CHAIRMAN: Then a factory owner would be very foolish to have a standing order to get the information in that way, which the plaintiff could obtain. If he didn't have a standing order but had a force of men who immediately hopped in and took statements in a particular case, that would be protected.

SENATOR PEPPER: That may be. If you can think of any way of protecting against contingencies like that, well and good. I can't.

MR. LEMANN: Investigation files are not made up of such reports as Senator Pepper has referred to. I think they are made up of the papers that you spoke of. Take the railroad cases, with which I have a little familiarity. In past years I have had occasion to pass upon opinions as to liability. I know what happens. If the railroad runs over an automobile at a crossing in New Orleans, the claim agent immediately gets out and takes a statement from the engineer, a much more detailed statement than that engineer would have made in the course of duty, as a general rule. I suppose the statement the engineer would make to his superior would be a very general

statement: "I ran over an automobile at the Gentilli Avenue crossing." But the statement of the claim agent is a very detailed statement from the engineer, of how fast he was going, whether he blew his whistle, whether he sounded his bell, how long the train was. It might be a page long. Then he goes and takes statements from everybody in the train crew and then takes a statement from the fellow who was driving the automobile and a statement from every witness he can find. Then it comes to the railroad attorney to express an opinion for the guidance of the claim agent in negotiating a settlement. That, I think, is the typical case of these claim files in most of the railroad companies and the insurance companies. I have seen them for the insurance companies.

DEAN MORGAN: The same way.

MR. LEMANN: Then they come to us for examination. We place a limit for the guidance of the claim agent as to how far he should go in trying to effect a settlement, based on the information disclosed in that file. Sometimes we ask for more information. We say, "He hasn't covered this phase. We think he ought to go back and dig this up." Then he will come in with a supplemental one.

That is the kind of file that I understand the plaintiffs would like to get hold of under this discovery rule, and I suppose their argument is: "We are trying to get the facts. You have a statement made immediately after the thing happened,

and we want to have the court informed as to what these witnesses said." Immediately the argument on the other side is chiefly, I think, that it permits the plaintiff to try to change his version of the facts to meet what is in those statements. That to me would be the most impressive argument on the other side. The argument about giving him the benefit of the large establishment of the railroad or the insurance company doesn't reach me much. I don't see why he shouldn't have that benefit or equalize the economic disadvantage of the plaintiff. I am more troubled about the point that you have mentioned in discussion off the record, Mr. Chairman, whether the plaintiff would be able to make an improper use of that information.

My guess is that most judges today are rather inclined to get these statements in and say, "Let's find out the facts. Let's see them." I just made a list of these cases for my own information. There are many of them coming from the Southern and Eastern Districts of New York. There are twenty-two from the Southern District, thirteen from the Eastern District, four from the Eastern District of Pennsylvania, seven altogether from Pennsylvania, and outside of New York and Pennsylvania, nineteen altogether. You see that two-thirds of them are in the hands of four or five judges.

THE CHAIRMAN: What is the trend of the nineteen outside?

MR. LEMANN: I haven't got that far yet.

THE CHAIRMAN: You haven't analyzed it that way? I haven't either.

MR. LEMANN: I was just tabulating them. I think it would be interesting to make that further classification. In New York apparently Moscowitz and Hulbert have gone against letting them see the statements. I think two or three have been a little bit more liberally inclined.

JUDGE CLARK: I haven't checked back on that, but that is what Hulbert said at the conference, that he made a distinction in statements made before the action was brought. I don't quite know why he made that distinction, but he seemed to think there was a difference. I don't know whether it is reflected in the cases, but that is his statement, that he would grant them more freely in the case of statements made before the action was brought.

THE CHAIRMAN: That is a logical rule.

SENATOR PEPPER: That is in line with the old evidence cases that Eddie knows so well, where declarations ante litem motam are made.

DEAN MORGAN: I don't see much force in that rule because in every case of accident we know perfectly well that if we don't settle it, there is going to be a suit.

SENATOR PEPPER: That is the reason I didn't take that as the test point.

JUDGE CLARK: I didn't see much to it myself. I asked

him why, but he seemed to be quite sure that that had some bearing.

MR. LEMANN: Charlie, was this a conference of district and circuit judges?

JUDGE CLARK: Yes.

MR. LEMANN: How many of your total were there? All of them, practically?

JUDGE CLARK: Practically all the judges were there.

MR. LEMANN: How many circuit judges and how many district judges?

JUDGE CLARK: Of the circuit judges, Judge Chase wasn't there, Judge Swan did not vote in the vote that is reported, and the rest of us were all there and voted. Judge Frank made the motion, as a matter of fact, after some discussion. The two Judge Hands and I were there.

DEAN MORGAN: Did both Hands vote for it?

JUDGE CLARK: Voted for the resolution, yes.

DEAN MORGAN: What you had before you then was from the lower court in Pennsylvania?

JUDGE CLARK: Yes, that is it. That was before the reversal.

MR. LEMANN: I think the resolution is quoted in your comment. Let's look at it, Charlie. What page is it on?

DEAN MORGAN: Charlie, that is the way you read it, and you have read these decisions, I take it.

JUDGE CLARK: That is right. On page 42 of the comment, the Conference passed this motion: "That it is the sense of this meeting that the interpretation of the rule in the Pennsylvania case [the District Court decision] that you read is correct, that the present rule should be retained, and that no change in the rule should be made that would narrow that interpretation." This action was taken after full discussion after an original motion "that it is the sense of this meeting that the committee should be requested or it be suggested in the committee that the criticized insertion in Rule 30(b) be omitted" was questioned as to meaning and explained by Judge Frank, the mover, "that if this language were eliminated then the rule would be substantially that laid down in the Pennsylvania District Court case, and that is what I intend by my motion that the rule shall be interpreted as in that case you read."

SENATOR PEPPER: Mr. Reporter, that decision was reached in the light of a careful and well reasoned exercise of discretion by the District Judge, Judge Kirkpatrick, in that case. Suppose he had exercised his discretion the other way, the principle would have been the same, but the result would have been abhorrent to the judges voting on the proposition. That is the difficulty that I have. If you put a case where discretion has been exercised with apparent intelligence and fairness, everybody votes in favor of discretion. If you put a

case where the discretion has been exercised in the other way, people vote against discretion. I say that indicates to me that it isn't a discretionary matter except within much narrower limits than this rule provides.

MR. LEMANN: The trouble with leaving it to the discretion of the judge, I guess, is that the rule is one way in one district and another way in the next district just because you have one type of man sitting in one district and another type sitting in another district. That doesn't seem to be a very satisfactory result, does it?

SENATOR PEPPER: No, it doesn't.

MR. DODGE: Most of these district court cases, I thought, dealt rightly with it. For example, Judge Chesnut held that the scope of the examination should be the identity and location of persons having knowledge of the relevant facts, that the defendant should not be required to produce or make available statements to the plaintiff, oral or written, of the persons he interviewed. Kirkpatrick himself, in Pennsylvania, said that the weight of authority is that documents made in preparation for litigation cannot be the subject of discovery under Rule 34. The following cases specifically so hold in connection with the statements of witnesses.

PROFESSOR SUNDERLAND: Mr. Chairman, I would like to call attention to another distinction that is made by some of these judges. In New York, Moscowitz, Mandelbaum, and Hulbert

have all stressed this point. They would allow the statements taken of witnesses to be shown if the witnesses were not available, but they would deny it if the witnesses were still available to the party asking for discovery. That might be a distinction that would be workable. If the witness is gone and cannot be found by the party asking the discovery, then his statement already taken by the other side might be available.

SENATOR PEPPER: For what purpose?

PROFESSOR SUNDERLAND: If the witness is still available to the party seeking discovery, then let him go and examine that witness instead of asking for the files containing the examination already made.

SENATOR PEPPER: Suppose the defendant takes the statement of a witness, and then the witness ceases to be available for anybody. He dies or disappears or what you please.

PROFESSOR SUNDERLAND: Under this distinction, that would allow discovery.

SENATOR PEPPER: What good would it do?

THE CHAIRMAN: To find out facts that would lead to other sources of information.

SENATOR PEPPER: That is pretty nebulous, isn't it?

PROFESSOR SUNDERLAND: It might be pretty valuable.

SENATOR PEPPER: I don't see that.

JUDGE DONWORTH: The admissibility of this statement

at the trial depends on just the opposite of what Professor Sunderland has indicated. If you have the statement of a witness called by the adverse party, you can use that in cross-examining, but if he isn't produced by the other party, his statement, except as the Chairman indicates it might help you get some outside source, is not admissible in the case.

DEAN MORGAN: Mr. Chairman, I agree with the Senator that a lawsuit is an adversary proceeding. I insist, however, that that consideration has been very much overdone and that a great deal of the unsatisfactory results in the American cases is because it has been overdone. Second, I think that any flat rule on this one way or the other is likely to work injustice. I think it would be too bad if one side could just lie back and take the results of all the work done by the other side. When a statement has been made by a witness, if he is telling the truth, I can see no reason at all that that statement ought not to be open to discovery of the other side as long as the court believes that the request is made in good faith.

I suppose that one of the greatest arguments against every reform in procedure has been that if you allow this, you are going to allow perjury or you are going to give the other side a chance to anticipate your case, to suborn witnesses, and so on. I think that has been overplayed. There has not been a reform in the law of evidence that hasn't been opposed for

that particular reason.

The next notion that you have is that your trial judges just can't be trusted, that if you leave anything to the trial judge, the result will be that there will be great manipulation at the bar, and so on.

You are not going to get any reform in procedure and you are not going to get any reform in evidence as long as you allow those considerations to be controlling. The question is whether this Committee thinks that in such a situation as that the federal judges just can't be trusted to do this sort of thing.

My notion is that these files that are made in preparation for trial or in anticipation of litigation ought not to be open without the moving party's making a showing of good cause for it and without having the trial judge really make a decent investigation. Have the file submitted to the trial judge and have him determine what parts of those can be fairly disclosed to the other party. If you make it a perfunctory matter, of course you will get just what Mr. Lemann said. In one district or before one judge in the same district you will find one rule applied, and before another judge, another rule.

When you talk about producing these statements at the trial, in the majority of jurisdictions in England, if a party just asks to see a statement, the other party can insist,

if it is produced, that the statement be received in evidence whether the material in it is otherwise admissible or not. That is the rule in the majority of jurisdictions. It was disapproved by the C.C.A. Second in Hoffman v. Palmer, but the Supreme Court of the United States didn't pass on that at all.

JUDGE DONWORTH: I would like to ask Dean Morgan if he favors elucidating this rule by putting in, in substance, the thoughts that he has just expressed; that is, to treat affirmatively of these statements and say that whether they shall be produced before trial is in the discretion of the judge, or words to that effect. Would you favor that?

DEAN MORGAN: Yes, sir. That is exactly what my solution would be. I haven't tried to draft anything for it.

JUDGE CLARK: Did you get what we tried to do on that on page 44?

DEAN MORGAN: Yes, I saw that.

JUDGE CLARK: That is made up from Kirkpatrick's opinion.

DEAN MORGAN: I know it, but it seems to me that you ought to have the procedure in this set out practically the way you people do on the production of a document at trial. First, they have really to submit it to the judge and have the judge actually pass on it.

JUDGE CLARK: That we developed in the criminal law.

DEAN MORGAN: Yes, you have done it in the criminal

law cases.

JUDGE DOBIE: It seems to me it boils down to this. The question is whether you want fairly rigid certainty, which Senator Pepper's I think encompasses, with the advantages or disadvantages thereunto appertaining, or whether you want a rather liberal rule, as Morgan suggests, without any very definite standards, leaving it very largely to the judge. I am rather inclined to think the latter is the best. I think it will work more fairly, although certainty is desirable.

SENATOR PEPPER: I want to say, in commenting on what Mr. Morgan has said, that I hadn't considered even the possibility of eliminating perjury or preventing sharp practice successfully. I don't think that can be done. I am the last one to express distrust of the judges, but I do think that if we are engaged in forming uniform rules of procedure, we ought to take notice of the fact that on a point like this, to grant discretion is the same thing as to give up all quest of uniformity. You get opposite results in different places, according to the temperament of the judge or the degree to which he feels free to look into the particular case and give time and attention to it. I think that, as a rule, you are not going to get the kind of careful consideration in the exercise of discretion that justifies the giving of it to the court in cases of this type. I think in the long run you will do better if you have a rule which gives to the judge a standard of

procedure rather than just an open invitation to do what on the whole he thinks just.

MR. LEMANN: I was a little uncertain what Professor Morgan thought about this discussion. He made some reference to a comment I had made about the unevenness of the result from one judge to another. Yet, as I finally understood him, he concluded that there was no way to help that. You would leave it to the discretion of the judge?

DEAN MORGAN: That is quite right.

MR. LEMANN: I wanted to be sure. You think it is too bad, but can't be helped.

DEAN MORGAN: That is right.

MR. LEMANN: I would like to ask you if you would look at the rule suggested by the Insurance Counsel on page 14 of the supplemental abstract, and see whether that contains some of the ideas that you were suggesting as a guide.

DEAN MORGAN: Of course, I shouldn't agree at all.

MR. LEMANN: I thought it had some of your ideas in it. I wasn't sure.

DEAN MORGAN: That is right.

JUDGE DOBIE: They would not require these things "unless the examining party shall show manifest prejudice to him if such production or inspection is not ordered." I think the burden is on him to show why it should be granted in cases like that. If he could show it, I would give it. While

there is a good deal in what Senator Pepper says about your having different rules in different circuits, all the way through here one of the big things in these rules is that in a lot of cases we have left it to the discretion of the judge.

MR. LEMANN: If we could formulate a little bit more definite directive to the judge, I think we would to a certain extent limit the wide variation of discretion.

MR. DODGE: Isn't this insurance suggestion Senator Pepper's suggestion modified by the power in the court to depart from it if the examining party shows manifest prejudice from the failure to do it?

THE CHAIRMAN: In a letter I wrote to the Insurance Counsel a year ago I admitted the deficiency of the provision we put in this rule to establish a standard. I said the difficulty was in drawing the standard. What we were trying to do was to draw a general formula to guide judicial discretion. I suggested that there might be put in a provision something along this line: Material prepared after the event in preparation for trial might be disclosed to the adversary party if the court were satisfied that he had some legitimate reason for asking and would be prejudiced if he didn't get it, and if the court also were satisfied under all the circumstances of the case that its production would not be abused. That is a pretty stiff requirement, you know, and it gives the court some kind of standard. Yet, these insurance fellows

came back at me and yelled their heads off. They said they wanted the whole thing privileged if it were in an investigation file. The idea of drawing a standard for the judge was just out of the cards. I hadn't noticed that they had prepared one.

JUDGE CLARK: Yes, they prepared that. Of course, they object to discovery here.

THE CHAIRMAN: Yes.

JUDGE CLARK: I think they had some such word, but if the Committee were adamant, then they would suggest this.

DEAN MORGAN: I would be willing to try that.

JUDGE CLARK: I think you could make something of this, but may I make some suggestions, if you will look at that directive? It would seem to me that the first sentence ought to go out, if that were to be used, because that places the burden in every case--

DEAN MORGAN [Interposing]: I mean only for these particular files.

JUDGE CLARK: Yes. Therefore, the first sentence should go out, because that is general. The second one is kept in.

DEAN MORGAN: What Monte meant was that this should apply to the files for preparation, that this whole business should go in.

MR. LEMANN: Yes.

DEAN MORGAN: That is my notion.

JUDGE CLARK: The first sentence applies to all sorts of discovery. Take out the first sentence. As to the second sentence, it seems to me that the words "manifest prejudice" are pretty hard.

DEAN MORGAN: I think that is pretty strong myself.

JUDGE CLARK: I think there should be something like this. I am not, of course, trying to give you an exact phrase. "unless the examining party shall show that he cannot fairly prepare a case". Frankly, I would say that he can't get any evidence because the other fellow has got it all. It is something along that line. He cannot adequately prepare his case without it. There should be something other than "manifest prejudice".

My last suggestion is that I don't think we should put in that the decision may be made by a disinterested person.

DEAN MORGAN: No, I don't think that is good.

SENATOR PEPPER: That is bad, both on its merits and because it is going to be used in a few instances as a means of getting a fee for somebody that the court wants to give a little job to. I am not in favor of that.

JUDGE CLARK: Those are the three suggestions I make. The first sentence comes out; second, a less overwhelming formula be used in place of "manifest prejudice"; and, third, the court does whatever is done.

DEAN MORGAN: I would rather leave the "manifest prejudice" in than to have a flat rule such as the Senator suggested.

SENATOR PEPPER: I like this because it draws the line at the point where, it seems to me, on principle the line ought to be drawn, and that is the point at which the cause of action accrues. You notice the language is "The production or inspection of contents of written instruments which came into existence subsequent to the accrual of the cause of action and are in the possession of an adverse party," and so forth.

JUDGE DOBIE: The only trouble about that is "accrual of the action". When does it accrue? In the case of notes, they have to be due, or something like that.

SENATOR PEPPER: That is the reason I said "the event giving rise to the action," which in the case of a contract means the act alleged to constitute the breach.

JUDGE DOBIE: I would say the execution of the note would be the accrual of the cause of action, rather than the maturity, wouldn't you, Senator?

SENATOR PEPPER: Yes.

JUDGE DOBIE: Or, in the case of a contract, the execution of the contract rather than the time for its performance, say.

MR. LEMANN: He said just the reverse. He said it ought to be the breach. You raise a lot of new difficulties. I would rather take my chances, I think, with a phrase like

this.

DEAN MORGAN: So would I.

MR. LEMANN: I wonder if you wouldn't want perhaps to include for the Reporter some of the language that he suggested on page 44, added to this other. Wait a minute, Mr. Dodge. I think you may like this. He would not include any "papers, documents, or memoranda containing notations, statements, or the like, reflecting an attorney's mental impressions, conclusions, opinions, legal theories, or other collateral matter, or the conclusions of expert witnesses". He is willing to say that you shall never get into that. If we adopted a combination of verbiage, Mr. Chairman, we could say to the Insurance Counsel, "We took your language," and the Reporter would have a nice sop, that we took some of his language.

MR. DODGE: It is all included in this shorter statement here.

MR. LEMANN: Is it?

JUDGE DOBIE: There is a phrase here that came in my coroner's story. I didn't finish that story. "the court may direct disclosure of only those portions", and so on. What we did in that case I thought was rather interesting. These lawyers didn't like one another. Both of them were pupils of mine. I am glad to say both of them were friends of mine. That sometimes happens. One said, "What we will do, Your Honor, is to turn this document over to you, and you can read

to the jury any portions of it that you think are relevant and important." The other man said, "That is satisfactory to me." So, that was the compromise.

MR. LEMANN: If you hadn't been a friend to both of them, you don't think they would have taken a chance on it.

JUDGE DOBIE: I don't believe they would. I don't object to this. I think probably that is the solution, still leaving it to the court's discretion, but in the case of these memoranda and things that are prepared and evidence procured after the happening of the accident or the accrual of the action, put the burden on the man who seeks the discovery. As Charlie says, put some phrase in that is not quite so strenuous as "manifest prejudice".

MR. LEMANN: I wonder if some of you gentlemen are right in saying that the Insurance Counsel's language would exclude things that the Reporter was willing expressly to exclude. I see that the Insurance Counsel would permit you to get the production and inspection of contents of written instruments. Wouldn't an attorney's opinion perhaps be an instrument, and wouldn't the conclusion of an expert witness be a written instrument?

JUDGE DONWORTH: I see one difficulty in the Insurance Counsel's proposal here, and that is it seems to imply that the court is going to look at a document without letting the adverse attorney see it, because if the adverse attorney

reads the document that is being submitted to the court, he gets the information, of course, that is the subject matter of a lot of our animadversions. If the court is going to examine it ex parte, it is a very bad situation for a confidential relationship to be established between the court and one of the attorneys, the other attorney being barred from looking at the paper. I don't quite see how the thing is going to work out.

SENATOR PEPPER: I don't see really any reason why the sentence should not stop with the word "ordered." It seems to me that it is not necessary to spell out the subsequent duty of the court. In other words, I agree with what you said, Judge Donworth. It seems to me the whole thing is contained in this:

"The production or inspection of contents of written instruments which came into existence subsequent to the accrual of the cause of action and are in the possession of an adverse party, his attorney, surety, indemnitor or agent, shall not be required unless", as the Reporter says, "for cause shown", and that phrase should be amplified to make it not necessarily a case of manifest harm to the moving party, but where on the whole injustice will be done if he doesn't get it.

MR. DODGE: I think the Reporter suggested "cannot properly prepare his case for trial".

SENATOR PEPPER: Something like that.

MR. LEMANN: I don't see how you can avoid Judge

Donworth's difficulty anyhow. If you left it to the discretion of the judge, he would have it shown to him by one lawyer and not by the other. It is inherent in the problem, it seems to me, Judge.

SENATOR PEPPER: I don't think we need spell it out, do you, Monte, in the language of the Insurance Counsel's suggestion, or would you favor that?

MR. LEMANN: I wouldn't see any objection to the last sentence here, taking out "or a disinterested person appointed by the court". "In such case the court shall first examine such written instruments," and so forth. I should think he ought to do it. I don't know how he is going to pass on it, really, without looking at it.

SENATOR PEPPER: That is exactly the reason I thought it wasn't necessary to say it.

DEAN MORGAN: I think you had better say it.

MR. LEMANN: It has a little caution in there that these gentlemen evidently set store by. If we leave it out, I think they lose something by it.

SENATOR PEPPER: Maybe you are right.

JUDGE DOBIE: I don't see any real objection about this confidential relationship here; I mean about the judge's seeing something. I should think in a number of cases it would be impossible for him to pass on this fairly unless he knew what was in those memoranda. He looks them over and sees what

is in them. Then he says that in this case he thinks the order ought or ought not to be granted.

SENATOR PEPPER: Would you favor the substitution, Mr. Reporter, of the word "writings" for "written instruments"? It seems to me that they will be quibbling about what is an instrument. It seems to me "writings" is better.

JUDGE DOBIE: That would be better, I think. "Instruments" would rather convey the idea of a formal report or a contract or a note or a will or deed or something like that which the law recognizes as the basis for legal liability.

MR. LEMANN: "papers or writings".

SENATOR PEPPER: Is the general sense of the Committee, Mr. Chairman, such as might be tested by a resolution that the subject of discovery be dealt with in line with the suggestion on page 14 submitted by the Insurance Counsel, leaving out the first sentence for the reasons given by the Reporter, substituting "writings" for "written instruments", leaving out the reference to the appointment of a disinterested person by the court, and modifying the phrase "manifest prejudice" in such a way as to conform to the view of the Reporter on the subject? That seems to me to be the way our minds are gravitating.

THE CHAIRMAN: Plus something from page 44 of the Reporter's draft about excluding opinions of lawyers and expert witnesses.

SENATOR PEPPER: I think that is helpful.

THE CHAIRMAN: That bolsters it up a little.

MR. LEMANN: I would put that in. That would curtail the orbit of discretion.

THE CHAIRMAN: Suppose we take a vote as to the general proposition and then turn it over to the Reporter and see if either this afternoon or tonight he can make a careful draft and bring it back to us tomorrow morning.

JUDGE DOBIE: I second that.

SENATOR PEPPER: Might I suggest, if it isn't out of line with the Reporter's thinking, that there would be some advantage if the scope of discovery could be dealt with in only one of these related rules. As it is now, there are phrases in at least three rules which seem to have some relation to one another. It seems to me there ought to be some one place where the scope of the discovery is stated and made applicable in all cases.

JUDGE CLARK: I think that might be. As I gather the general trend of sentiment, it would be something like this. Probably we had better make a separate paragraph and entitle it whatever we want. "Scope of Discovery of Material in Preparation for Trial" might be the heading. Then I suppose that we could use in substance this second sentence and perhaps say "for cause shown", and then make a separate sentence trying to define "for cause shown". Is that it?

SENATOR PEPPER: That is it.

JUDGE CLARK: "for cause shown" would then presumably cover some of this. Is that the idea?

SENATOR PEPPER: I think so.

THE CHAIRMAN: He dictated the statement. We had better get the reporter to give it to you. It was dictated very carefully, I think.

SENATOR PEPPER: When I was studying this and looking at Rule 34, I came to the conclusion that when we drafted Rule 34 we didn't have in mind documents originating after the suit was brought. It occurred to me that that rule is intended to deal with things in existence at the time the cause of action arises, and if that is so, we ought to make it clear that the rule that you are going to state on the subject of discovery is not subject to modification by incorporating into it, so to speak, the provisions of 34. Some of the courts have treated 34 as applying to matter originating after the suit was brought. I don't think that was intended.

THE CHAIRMAN: Say it is subject to any applicable protective orders mentioned in Rule 30(b), which we are now going to patch up. That would clear that, wouldn't it?

JUDGE CLARK: I was going to ask a specific question. Don't you think, among other things, you ought to be able to get a look at a photograph that may have been taken, subject to these restrictions? Suppose there has been a photograph or a

map or something of that kind.

SENATOR PEPPER: If so, it ought to be done under the thing that you are going to write, and not as an implication from Rule 34. It seems to me there is some advantage in keeping Rule 34 as applicable to things in existence at the time the cause of action arises. Then you are going to spell out a rule which deals with things that come into existence subsequently, and they might well include access to a photograph or something of that sort.

JUDGE CLARK: I can't answer without working it out, but I have a feeling that we are likely to get 34 restricted more than we want, or, turning to this rule in particular, I don't feel and the rule does not state that there should be an absolute limit on discovery of matter which is developed after the event. That isn't this rule. This rule is matter which is developed after the event and is held by the other side. I think Rule 34 should hit everything except that, and if 34 is made subject to the provisions of whatever is drafted here, isn't that as good a way to do it as any?

SENATOR PEPPER: All I meant was that at present the minds of the members of the bar with whom I have talked about this thing are in confusion as to where to look to find what the limits of discovery are. They look at one rule and say that that has such-and-such implication, but then they say there is Rule 34, which has other implications. All I mean is

that the obscurity ought to be removed. The rule ought to be susceptible of statement in one place, and other rules should be made subordinate to it by cross reference.

THE CHAIRMAN: I thought we were condensing or at least were proposing to incorporate in Rule 30 the extent and limitations, and Rule 34, in the light, as now proposed, states in line 3 "and subject to any applicable protective orders mentioned in Rule 30(b)". We can change the verbiage of that to say "and subject to any restrictions or any applicable protective orders stated in Rule 30(b)". I think the Reporter now is taking all these later rules and referring back to 30 as a guide or limit.

JUDGE CLARK: That is what I had in mind.

PROFESSOR SUNDERLAND: Rule 30 covers protective orders, but 26(b) is the one that covers the scope of discovery. It seems to me, if we are dealing with scope of discovery, that should go back to 26(b) because we are referring back to that in all these subsequent rules.

SENATOR PEPPER: The Reporter will consider whether it is a question of being subject to any applicable protective order or whether it is subject to the limitations on discovery heretofore set forth.

THE CHAIRMAN: Edson, Rule 26(b) is constructed on the theory that I have just stated, because Rule 26(b), Scope of Examination, says, "Unless otherwise ordered by the court as

provided by Rule 30(b)". Everything goes back to 30(b).

PROFESSOR SUNDERLAND: That refers to protective orders. That doesn't refer to determining the scope of the examination.

SENATOR PEPPER: That is the point.

THE CHAIRMAN: You can change the verbiage of it.

SENATOR PEPPER: That is all I meant.

THE CHAIRMAN: "subject to the limitations and protective orders".

PROFESSOR SUNDERLAND: We ought to be able to look in 26(b) and see what the scope of discovery is.

THE CHAIRMAN: Then you have to recast every one of these rules and rewrite them.

PROFESSOR SUNDERLAND: I don't think so. They all refer back to 26(b) now. Every one of them has a reference back to 26(b).

JUDGE CLARK: Edson, I would be sorry to do it that way. It seems to me that then you produce a question in every case, and I don't suppose that counsel may want to raise it in every case. You see, the scheme as now outlined is this: Rule 26 is the general, fairly broad rule of discovery. Not being in practice myself, I perhaps can't tell, but I suspect that in many cases the party will say, "All right, you can have everything." I myself think that that is often a nice tactical way of going ahead. The way it goes now is that it is

not until the question is raised, until you have the formal hearing, so to speak. Why isn't that a rather neat way to go at it? It is upon the hearing that this question comes up. It is sort of directing the procedure, so to speak. You don't have a formal hearing until you have really sort of squared off at each other and gotten ready for it.

THE CHAIRMAN: You mean if you scatter these protective orders, strew them around through the rules so a lawyer won't notice them, and don't make a clear statement of them, probably the point won't be raised? Is that the idea?

PROFESSOR SUNDERLAND: I think the protective orders ought to be together under 30, but the scope of the examination ought to be in Rule 26(b) as far as it can be done.

JUDGE CLARK: Aren't you going to have the situation, then, Edson, that the parties will be making an examination and you will have all sorts of objections to the making of the examination? They haven't gone to the court now. They have just served their notices. They are now conducting the examination. The attorney for the defendant comes in. They have not gotten protective orders of any kind yet, so he starts objecting to everything. Isn't it better to have it go the other way, have it so that if you want to hold things up, you go to the judge and then have this hearing?

THE CHAIRMAN: We haven't voted on the question yet. This is a question of detail and draftsmanship. The main

proposition hasn't been voted on. I would suggest that we take a vote on that and then let the Reporter or anybody on the Committee, Edson, take the other discovery rule and make any recasting or cross-reference that is necessary to make a clean-cut relation between them, so the lawyer won't have any difficulty in seeing what the limitations are. I don't think you are getting very far with this kind of discussion and disagreement about what rule ought to contain what. Let the Reporter correlate the discovery rule, and if anybody else has an idea about correlating, about where the stuff should be inserted, let him make a draft and bring it before us. It is hard for me to consider this unless I see something.

MR. DODGE: He is going to write a separate paragraph for Rule 30, and it might be provided "and this shall apply to Rule so-and-so," and settle the question once for all right there.

THE CHAIRMAN: That is one way of doing it, but he started the other way. In the other rules he has referred back to 30 and said in the other rules that the provision in 30 applies here. That is his way of doing it. I don't know which is better, but he certainly has a reference inserted in each one of these other rules that goes back pretty well to Rule 30. Maybe we made a mistake in the first place in not including all these provisions in Rule 26; maybe that was the appropriate thing, but he has centered the focus on Rule 30.

Anyway, I will submit the motion that has been made by Senator Pepper. It doesn't settle this question of the location.

SENATOR PEPPER: Not at all.

[The motion was put to a vote and carried.]

THE CHAIRMAN: We can leave to the Reporter, can't we, unless you want to give him definite instructions, the making of a draft and the proposal about correlating these other rules and bringing it before us.

SENATOR PEPPER: I don't think we ought to tie him down. He has caught the spirit of the discussion.

THE CHAIRMAN: We would like to have Edson, if he has an idea about it, bring it before us, too, as to where the stuff ought to be and how he hooks the rules together. If he has a definite idea about it, let's look at it.

SENATOR PEPPER: Yes.

JUDGE CLARK: I would like to ask Mr. Moore if he thinks he has the instructions clearly now, because he will have to work this up.

THE CHAIRMAN: You were whispering in his ear when the Senator dictated the motion. You will find it in the record. The Senator made a very clear statement of what parts of the Insurance Counsel's rule should be adopted, which was supplemented by the suggestion that we also incorporate something of the Reporter's rule on page 44, which has to do with the opinions of lawyers and expert witnesses, and so on. That

was agreed to.

JUDGE CLARK: You got that?

PROFESSOR MOORE: Yes.

SENATOR PEPPER: Apart from the question of draftsmanship, that leaves open only this question of the interrelation of the several rules.

THE CHAIRMAN: That is it. That is a thing that is hard to visualize unless you have the paper before you. We would like to get your ideas about that.

PROFESSOR SUNDERLAND: I will try it once more.

THE CHAIRMAN: It means taking the whole bunch of discovery rules and being sure that they are all subject to the same limitations, because it is absurd to have them different.

Can we go on?

PROFESSOR CHERRY: Before we leave that, Mr. Chairman have we dealt with the question of what isn't in a paper or a writing? Suppose the witnesses made oral statements, and the claim agent or whatnot has written them down but has not had them signed. Some of these cases that I have observed have gone into that and ordered him to disclose or to give in substance in some detail his recollection of what the witnesses told him. So far, we have been dealing merely with writings, but I think we had in mind by that a writing which the witness participated in or approved by signing it or otherwise.

THE CHAIRMAN: The language of the Insurance Counsel

rule is broad enough to cover a written memorandum or statement whether it was made by the witness or by the claim agent.

JUDGE DOBIE: You mean sometimes there is no writing.

PROFESSOR CHERRY: I am raising a question that I think is going to bother us when we see this draft, what we mean by writing.

THE CHAIRMAN: Do you want to include "a writing made by the agent of the insurer of the defendant recording an oral statement"?

PROFESSOR CHERRY: I would not, if you asked me that, but I am phrasing the question now to see whether we have in mind that we are dealing with that one way or the other. What do we mean by a writing?

THE CHAIRMAN: How would you draw a distinction?

DEAN MORGAN: I think you mean any writing.

PROFESSOR SUNDERLAND: The Hickman case discussed that point.

PROFESSOR CHERRY: No, it didn't.

PROFESSOR SUNDERLAND: No distinction was necessarily drawn between oral and written statements. They were trying to deal with both of them.

MR. LEMANN: "Any writings" would cover the claim agent's summary of what was told to him orally.

THE CHAIRMAN: We are discussing what we want to do now.

MR. LEMANN: I would think it should. After all, we finally agreed in this to leave it to the decision of the judge, with a general indication.

PROFESSOR CHERRY: Some of the cases go beyond that and require a disclosure, not by the lawyer perhaps, but by someone who investigated the case, of what he hasn't put in writing but what he recalls of the statements of the witnesses.

THE CHAIRMAN: I don't see the slightest distinction between a statement which a witness has signed and a statement which he dictates and somebody else writes down for him and which he doesn't sign.

JUDGE DOBIE: Sometimes there is no writing at all. The claim agent talks to a man, as I understand, and he doesn't make any writing.

MR. LEMANN: You would have to summon the claim agent and ask him. You don't need this rule for that, do you? You summon the claim agent, I suppose.

THE CHAIRMAN: And ask him what the witness told him.

MR. LEMANN: Yes. You can't cover that by this sentence, because this sentence relates to files and if the things are not in the files, you can't cover it by this sentence.

JUDGE DOBIE: The production of concrete things, tangible things.

MR. LEMANN: You have to subpoena the claim agent and ask him.

PROFESSOR CHERRY: We are going to reach the same problem there, aren't we, although it isn't in writing?

THE CHAIRMAN: You make a motion that you want the claim agent's record of an oral statement made by a witness to be either excluded or included in our provision, and we will take a vote on it.

JUDGE DOBIE: If the claim agent thinks the thing may be produced and it may contain damaging material, he won't write it down.

THE CHAIRMAN: Do you want the draft of the rule to include that for production or not to include it?

PROFESSOR CHERRY: I wanted the draft to deal with it That was my first problem.

THE CHAIRMAN: We will do it, but which way do you want it answered?

SENATOR PEPPER: Don't you think there is something to be said in favor of leaving the word "writings" without qualification?

DEAN MORGAN: Yes.

SENATOR PEPPER: I don't think we can go into the definition of every kind of writing, who makes it, and whether or not it is signed. When it is stated to be a writing, it is broad enough to cover all these cases that the court will have to decide.

THE CHAIRMAN: I thought so, too. Wilbur thought it

was ambiguous or that we didn't clearly understand what we were doing.

PROFESSOR CHERRY: I was just wondering whether we did.

MR. DODGE: I think you are referring to oral statements which aren't in any writing.

DEAN MORGAN: Then, you have to take a deposition on that.

MR. DODGE: What is the situation of the man who is asked what witnesses said to him orally? That is the question Mr. Cherry raises.

DEAN MORGAN: You have to take a deposition.

PROFESSOR CHERRY: I withdraw it.

THE CHAIRMAN: As Monte pointed out, that is not involved in this at all. We are not dealing with calling a witness to testify orally as to what some other person present at the accident said to him. That has nothing to do with the paragraph we are now talking about.

PROFESSOR CHERRY: Some of the cases, as in the Hickman case, did do that.

THE CHAIRMAN: No, they didn't. That was a written record of what the witness told the claim agent.

SENATOR PEPPER: Isn't there implicit in the word "discovery" the answer to what we are discussing? Discovery is access to something that exists in visible or tangible form.

It seems to me that whether or not the writing is signed does not enter into it. It is a question of whether it is suitable for discovery in any event.

THE CHAIRMAN: We are talking about so many different things here; we are talking about what we want to do, what we ought to do, and what "writings" means. I suggest that someone make a motion that the draft be so worded (maybe the word "writings" does it) as to include in the scope of the provision a writing which records an oral statement made to an investigator by a witness.

SENATOR PEPPER: I favor letting it stand on the word "writings".

THE CHAIRMAN: But we are arguing whether the word "writings" includes that or not.

SENATOR PEPPER: I don't see that it is arguable. A writing means anything written.

THE CHAIRMAN: You want to include it, don't you?

SENATOR PEPPER: Surely.

THE CHAIRMAN: Then you agree that you want it included and you vote "aye" on this motion, but you say the word "writings" already covers it and you don't need to change it.

SENATOR PEPPER: All I say is that I don't think you can make any term that is more inclusive than "writings", unless you get into the business of specifying particular kinds of writings, like writings unsigned, and so forth, where

the danger is that you will leave out something that ought to be included.

THE CHAIRMAN: Is it the sense of the Committee that whether the word "writings" does it or not (and I agree with the Senator's view about it), we want the draft so as to include in the scope of the thing a writing which records an oral statement made by a witness? Do we want it or not?

MR. LEMANN: I so move.

THE CHAIRMAN: What is your pleasure? All in favor say "aye"--

JUDGE DOBIE [Interposing]: But in connection with the scope of that word "writing," that gives perfectly tremendous scope, as in connection with a will. There was a will in writing on a man's back, and things of that sort.

SENATOR PEPPER: The statute of frauds, and so on. I am in favor of the broadest possible interpretation.

THE CHAIRMAN: Then the draftsman will bear the remarks in mind, and if he comes in with any effort to scramble this thing up with any definition other than "writings," we can sit on him. We think "writings" is enough.

JUDGE CLARK: I want to ask one thing more. Shall we go ahead without reference to what may happen to the pending application for certiorari?

THE CHAIRMAN: We want this draft tomorrow morning, anyway.

JUDGE CLARK: I trust we should go ahead with that.

THE CHAIRMAN: It will be next fall before that case is decided, if they grant a writ.

JUDGE DOBIE: They haven't granted the writ yet.

THE CHAIRMAN: They can consider it in connection with the Hickman case and take their choice.

MR. LEMANN: You might argue either that the change is explanatory of the original intent of the rule or that it is intended to make a change in the rule. Then they can decide the Hickman case as they see fit.

THE CHAIRMAN: Then they can revise our draft to fit their ideas before they promulgate it. It works fine.

MR. LEMANN: Have it all at one time, and it will work fine.

SENATOR PEPPER: Is there anything in Miss Graubert's suggestion that it ought to be clear that the process runs to the client and not to the attorney, that it ought not to be possible to take the deposition of an attorney, or is there nothing in that?

JUDGE CLARK: Frankly, I don't know. I will have to think about that.

SENATOR PEPPER: Will you think about that?

JUDGE CLARK: She is a girl apparently with ideas. I have thought of that before.

SENATOR PEPPER: She is very able.

THE CHAIRMAN: I suppose if a client handed a lawyer any document, paper, or anything, whether it was prepared after or before the event or any other time, if you want to go at it under the statutory privilege of communication from client to attorney, you can't put the lawyer on the stand and ask him to divulge what his client has communicated to him, old or new. The way to go at it is to go after the client and have the court order him to produce it, and if he says he hasn't it, that his lawyer has it, the court orders him to direct his lawyer to hand it back to him.

SENATOR PEPPER: That is her idea.

THE CHAIRMAN: I think it is obvious that you can't call a lawyer.

JUDGE CLARK: That raises a question along that line. Should we, in addition, try to say anything more about privilege?

DEAN MORGAN: I don't think so.

JUDGE CLARK: Pro or con?

THE CHAIRMAN: You might say when you make this draft what can and can't be shown to the court and say, "Nothing herein contained is intended to require the production by counsel or any other person of material that is privileged."

MR. LEMANN: "No provision of these rules shall be construed either to enlarge or to restrict the privileges which may exist between attorney and client."

JUDGE CLARK: Of course, in the light of the existing

authority, of which Hickman v. Taylor is now an authority, that might raise a question.

PROFESSOR SUNDERLAND: They have given a new definition of privilege.

JUDGE CLARK: Yes, they have given a new definition, which is the definition now covering the Third Circuit, at least.

THE CHAIRMAN: They accuse us of having established a new kind of privilege. They base their opinion on the word "privilege" used in our rules, and we meant something more than the ordinary privileges of attorney and client, of course.

MR. LEMANN: Privilege between attorney and client as the same existed independently of these rules and before their promulgation.

DEAN MORGAN: It is not only attorney and client, but there are others.

PROFESSOR SUNDERLAND: What we meant by privilege was subject to testimonial exclusion.

DEAN MORGAN: That is right.

PROFESSOR SUNDERLAND: We might put that in instead of our word "privileged." We might say "not subject to testimonial exclusion".

THE CHAIRMAN: That is what the court in the Hickman case said we meant.

PROFESSOR SUNDERLAND: They said we meant a lot more

than that. They said it meant professional privilege. Then they drew all these English decisions in under privilege because they called it professional privilege. It isn't testimonial exclusion at all. We might drop our word "privilege" and say "subject to testimonial exclusion". That would make it perfectly clear.

THE CHAIRMAN: I had never heard that expression before. It may have a definite meaning.

DEAN MORGAN: If you use that expression, God knows what they will do with it.

THE CHAIRMAN: I think we have probably done all we can for the present on this.

SENATOR PEPPER: Are we agreed as to the correctness of this statement of Miss Graubert? "The privilege which exists between lawyer and client should be limited to such facts as the client himself discloses to the lawyer."

JUDGE CLARK: Would you like to put that in? I am just wondering a little whether we ought not to say something about it. I don't know that I am sure yet.

SENATOR PEPPER: If we use the word "privilege," I think we ought to define what we mean by "privilege."

JUDGE CLARK: We use it, all right.

SENATOR PEPPER: We do at present, but I don't know that we will find it necessary to refer to privilege when the new rule comes in.

JUDGE CLARK: Either we have to take it out in the general rules of exclusion or it will still be there, of course somewhat undefined.

THE CHAIRMAN: Is there any difference in the local law in the different states as to the extent of the privilege?

DEAN MORGAN: Oh, yes. The local law has a number of cases that extend the privilege of attorney and client.

THE CHAIRMAN: You mean communications from the lawyer to the client.

DEAN MORGAN: Not only that, but also communications from the client's agents to the attorney.

THE CHAIRMAN: Then, my point is to try to define it.

JUDGE DOBIE: Is that statutory or is it just the way the court works out the law?

DEAN MORGAN: Minnesota has a rule which says that a statement made to a claim agent to be communicated to the defendant is within the privilege. There are four or five cases on that. So, I don't think you had better monkey with it.

JUDGE CLARK: Let me ask you this. It is a fairly important thing. In Rule 26(b) are the words "the deponent may be examined regarding any matter, not privileged". Would it be in line with our thinking, in this new rule, after we have provided for the restrictions, and so on, then to say, "To the extent that the judge makes an order herein, the matter covered shall not be privileged"?

THE CHAIRMAN: No.

DEAN MORGAN: I don't think so.

THE CHAIRMAN: I think if we want to do anything about that word "privileged" in view of the Hickman case, we ought to refer to the Hickman case in a note.

DEAN MORGAN: Our Rule 43, you see, says that if the federal rule is more liberal than the state rule in admitting the evidence, it shall apply. That would be a narrowing of privilege here, and I don't know of a federal case that extends the privilege of attorney and client beyond that of the common law, which restricts it to communications from client to attorney and advice from the attorney on the communication.

THE CHAIRMAN: What I have had in mind was not to try to define privilege, and I don't think we ought to do that, because I think as the rules are constructed we have said now that stuff is admissible on the most liberal rule that exists, state or federal.

DEAN MORGAN: That is right.

THE CHAIRMAN: Now we come in and make a rule here about limitation of privilege, and we find that some state law has a more liberal restriction about it and we run afoul of it. So, I don't think we ought to try to define the privilege of lawyer and client, but on account of the way the Court of Appeals in the Third Circuit handled our word "privileged" in

the rule in the Hickman case, we ought to note that these changes refer to the Hickman case, point out the fact that the court in that case attributed to us an added meaning to the word "privileged," and that we deny the allegation and defy the allegator. We didn't do anything of the kind. We should say in the note that we were using the word "privileged" according to its established meaning in each locality where the rule of privilege prevails. We will have gotten rid of all danger, I think, by doing it that way. They certainly hung a tag on us in the Hickman case.

DEAN MORGAN: They certainly did.

THE CHAIRMAN: Their whole opinion is based on their statement that we intended to use the word "privileged" in a certain way, and we didn't do anything of the kind. They blame us for their conclusion because we used the word "privileged" in that sense. I think we ought to repudiate them. It is not true.

MR. LEMANN: Are you sure they did impute that to us? I was just taking a look at the opinion.

THE CHAIRMAN: I have read it twice. Maybe I misunderstood it, but they refer to the word "privileged" in the rule, and they have a lot of stuff about what "privileged" means, the extent of it, the breadth of it.

MR. LEMANN: I am glancing over it here. At any rate, I don't think we should stop for that here, because in framing

the note which you suggest, I think it would be well in the note to make a reference to this case. We can then consider carefully what we should say about what they imputed to us.

THE CHAIRMAN: Where do we go from here, Charlie? What is the next rule?

JUDGE CLARK: I don't think that leaves any more on Rule 30(b), does it? We were dealing with 30(b).

THE CHAIRMAN: Is there anything in 31 and 32 that you have to bring up?

JUDGE CLARK: Rule 33 is the next one.

DEAN MORGAN: Charlie, what is wrong with Armstrong's suggestion there? I don't think you answer it by saying that it is the equivalent of trying to take a deposition. The corporate officer just doesn't know a particular thing, but if the information is accessible to him, why shouldn't he have to find it out? Say it is right in the corporate records.

JUDGE CLARK: That is in the middle of the page. He has an earlier one. In the beginning you will see this question of when you should serve interrogatories. There are some objections to limiting the service of interrogatories in time. For example, the California State Bar Committee makes the same suggestion as that of Mr. Cantrell, which we quoted above, namely, that service of interrogatories be permitted at any time after commencement of the action without leave of court. Let me first ask you about that.

THE CHAIRMAN: You have 15 days to answer them, and that is the equivalent of your 20 days, practically, under the other rule.

JUDGE CLARK: Of course, nobody gets default for quite a while, anyway. Actually, we know it is going to be more than 15 days if they want it.

THE CHAIRMAN: He has to make his objections to the interrogatories within 10 days. If we struck out the business about restrictions, it would leave him 10 days to get a lawyer before he would have to do anything under the interrogatories. Isn't that enough?

I also call your attention to the point I made on one other rule, that the new phrase in Rule 33, lines 6 to 11, is based on the assumption that interrogatories are submitted by a plaintiff, and if the defendant hasn't got a lawyer, he needs 20 days to get one; whereas if the interrogatories are submitted by the defendant, there is no reason on earth why he should not submit his interrogatories within twenty-four hours after the suit is started, because the plaintiff has his lawyer.

JUDGE DOBIE: You want to put in just the same term that we made further back.

THE CHAIRMAN: The limitation ought to be only on the person making the claim.

JUDGE DOBIE: Yes, just as we did in the deposition.

THE CHAIRMAN: You remember we made that change in one of the rules.

JUDGE CLARK: Yes.

THE CHAIRMAN: That is, if we are going to keep it at all. You raise the question whether you want to keep it in view of the fact that an interrogatory doesn't require any action at all for 10 days after service as you have it down here.

JUDGE CLARK: Yes. I ought to say, in fairness to Mr. Armstrong's suggestion, that at the foot of the page we dropped a line. We haven't stated it quite accurately.

DEAN MORGAN: I got that. He wants it after the service of summons.

JUDGE CLARK: He wants it after the service, which is the suggestion as to 26(a), but again I raise the question that interrogatories are something that is submitted to you and you have at least formal time to answer, anyway, and practically all time limits really don't do much more than try to push you ahead a little. Nobody really gets a default. Is it necessary to put in the restriction here? That is the point I raised.

MR. LEMANN: Which restriction? You mean about service?

DEAN MORGAN: Twenty days.

THE CHAIRMAN: I think there was need for it in the

case of deposition, where a deposition might require action in twenty-four hours, but under Rule 33, interrogatories don't have to be objected to for 10 days after served or answered until 15 days after served.

DEAN MORGAN: He gets 15 days to answer. That gives plenty of time.

THE CHAIRMAN: The defendant who hasn't a lawyer at the time suit is started has at least 10 and maybe 15 days to prepare himself, so he probably doesn't need any protection.

MR. DODGE: Suppose the interrogatories are served upon the individual himself when the case is entered. He doesn't know what they are, doesn't know he has been served. He isn't served with process for 10 days. Then his time for filing objections through his attorney is gone in one day.

DEAN MORGAN: No; 10 days after serving interrogatories.

MR. LEMANN: He has to have service of the interrogatories.

MR. DODGE: If the interrogatories are served, and he doesn't understand and doesn't know what they are and doesn't do anything about them until he is served with process.

MR. LEMANN: Wouldn't it be most unusual that you would serve interrogatories and didn't serve process?

MR. DODGE: I should think it would be, but it might be done.

THE CHAIRMAN: If a fellow would run to a lawyer when process was served on him, he would probably know enough to run to a lawyer when he was served with a bunch of interrogatories, which require him to answer in writing within a stated time, having to do with all this mess that he knows is a lawsuit.

MR. DODGE: I still think that there ought to be leave of court if it is done within 20 days after the beginning of the suit.

JUDGE CLARK: Maybe this isn't too important. It always seemed to me that often this 20-day limit was only a complicating factor and didn't mean anything. Of course, it does mean more in the case of depositions. I am not at all sure that practically it is going to operate too often then. Wasn't it Senator Pepper who said he would eat his trousers if anything happened in 60 days in most of these cases? Of course, in the case of depositions it is possible, at least, and in a deposition you have to square off and have really a kind of hearing. This is simply sending around your questions. Actually, as we all know, nothing is going to happen for some time even if they don't observe the 15-day requirement.

THE CHAIRMAN: In the case of a deposition a man can be haled up and he must respond and give testimony, under our rules as we have now adopted them, within 20 days after the suit is commenced. If you leave this same restriction in here

about 20 days and also you don't have to respond until 15 days after the service of interrogatories, we will have Rule 33 providing that if a man is going to be haled up for an oral examination, he can be dragged up in 20 days after suit is started, but if written questions are submitted to him, he can't be compelled to answer them until 45 days after the suit is started. That doesn't seem logical. You have a double time, 20 days before you can serve the interrogatories---

DEAN MORGAN: And 15 days to answer.

THE CHAIRMAN: ---and 15 days to respond to them.

MR. DODGE: That is assuming that the 20-day limitation remains in the rule as it is.

THE CHAIRMAN: If the 20-day provision that it is proposed to insert is left in lines 6 to 11.

MR. LEMANN: If we take this out as you are suggesting, then you will merely have a longer period in depositions still than you will have in interrogatories, 15 days for interrogatories and 20 days for depositions. Yesterday I suggested that we might cut down that 20-day limit for depositions. I didn't press it, but I thought maybe it would be just confusing. I would not have objected to saying that the limit for the plaintiff to proceed without an order of the court should be less than 20 days in the case of depositions, either 10 or 15 days. I thought maybe it would just introduce another time limit that might be a little confusing. On the other hand, if

you don't do that, you have the anomaly that with the change voted yesterday you have to wait 20 days to take a deposition, and if you adopt the Chairman's suggestion here, you can force interrogatories in 15 days.

THE CHAIRMAN: If you want consistency in here as the object, in Rule 33 you leave in the restriction and, instead of making it 20 days after the commencement of the suit, make it 10 days. Then that 10 days plus the 10 days in which you have to file objections to interrogatories represents the first action you are required to take and allows you 20 days to get a lawyer, which is what we have already done in the other case. So, the answer would be to strike out 20 in line 9 and make it 10.

SENATOR PEPPER: Then it is 15 plus 10, isn't it?

THE CHAIRMAN: No. It is 15 to answer, but you have to act by raising objections within 10 days after you get it, and you need legal advice to do that.

SENATOR PEPPER: Yes. That is provided for in the italics.

THE CHAIRMAN: It was in the part stricken out as well.

MR. LEMANN: Of course, you can always get an order of court in this case, as in the other case, to do it later.

THE CHAIRMAN: If it is agreeable, to make progress, shall we leave the restriction in lines 6 to 9, changing the

20 to 10 and also altering the provision as we did in the deposition rule, to make the restriction applicable only to the claimant and not to the defendant. The defendant can submit interrogatories any time he pleases after the suit is started.

SENATOR PEPPER: But not substitute "time of service" for "commencement of the action".

THE CHAIRMAN: We didn't in the other case. We avoided that because we didn't know how many defendants there might be.

MR. LEMANN: And we thought the time limit we gave was long enough to cover it.

SENATOR PEPPER: Yes.

THE CHAIRMAN: What is your pleasure about this?

SENATOR PEPPER: I move, in accordance with the suggestion of the Chairman, that in line 9, "10" be substituted for "20", and that the other provisions remain the same except for the cautionary provision respecting the case of the defendant as distinguished from the plaintiff.

JUDGE DOBIE: I second that.

[The motion was put to a vote and carried.]

THE CHAIRMAN: Is there anything else in here that we want to consider, Charlie?

JUDGE CLARK: Mr. Morgan referred particularly to Mr. Armstrong's second suggestion, which appears in the middle

of page 46. He says that where interrogatories are to be served on a corporate officer, no one officer may have sufficient familiarity with the facts to answer all the interrogatories either as of his own knowledge or on information. He proposes, therefore, that the rules require the officer to make such inquiry as will enable him to answer "provided the information is readily accessible in the corporation's files or may be obtained without burdensome expense from employees."

I think personally I would go with him. It seems to me that the way these interrogatories come in, as a matter of fact, as I see them in practice, they don't answer those that they think they can. I have rarely seen a case where anything happened, certainly not while there was any reasonable statement that could be made. I have seen something like this: "Not answered because the information is not available." I wonder if we need to put in the grounds of excuse, so to speak; I mean to try to spell them out?

DEAN MORGAN: I don't know, Charlie. All I know is that that is the English practice. A corporation officer has to answer what is in his files. An officer who is served with it can't just say, "I don't know," because it is part of his job to find out.

JUDGE CLARK: Are you thinking that this would expand discovery a little? I think Mr. Armstrong's idea is to restrict it.

DEAN MORGAN: Oh, no. It seems to me it is an expansion of the rule.

THE CHAIRMAN: It is an expansion you don't need.

DEAN MORGAN: The rule says you serve these on the officer, and the officer answers. He doesn't have to answer anything that isn't within his own knowledge.

THE CHAIRMAN: As a practical matter, if an officer comes up and says, "That is not in my department. I don't know anything about it," is there any doubt at all that the court would tell him to get the stuff or send in the man who knows?

DEAN MORGAN: I should think it ought to, but I don't know. Armstrong says, "provided the information is readily accessible in the corporation's files or may be obtained without burdensome expense".

MR. DODGE: I am very familiar with that form of discovery in Massachusetts, and it is the duty of the corporate officer who is named in the interrogatory to make inquiry of other corporate officers and agents and to answer for the corporation.

DEAN MORGAN: That is the way it ought to be construed, don't you think?

MR. DODGE: That is the way it is construed in Massachusetts.

DEAN MORGAN: They have the same kind of statute.

THE CHAIRMAN: You don't think, Bob, that it is

necessary to put that thing in the rule?

MR. DODGE: I don't think so. I think it would be so construed.

DEAN MORGAN: That is the construction that is usually put on it, but I thought Armstrong was insisting that you have a very narrow construction here, and I thought Charlie's answer was the same sort of thing. He says, "The basic problem is the same as that raised by those who wish to take depositions under Rule 26(d) of corporate employees." I don't think it is at all.

MR. DODGE: I don't think so. I think Armstrong was broadening the scope of the statement so that it would plainly cover that requirement.

DEAN MORGAN: Exactly.

MR. DODGE: It wouldn't do any harm to put in "whose duty it shall be to make inquiry of others".

PROFESSOR SUNDERLAND: Is this interrogatory addressed to an officer?

MR. DODGE: The common practice is to address the interrogatories to the corporation, to be answered by so-and-so, its treasurer, something like that.

MR. LEMANN: It says here, "If the party served is a public or private corporation or a partnership or association, [the answer is to be made] by any officer thereof competent to testify in its behalf."

PROFESSOR SUNDERLAND: Isn't it up to the party to determine what officer shall do the answering?

MR. LEMANN: Yes, but Armstrong's answer is that no officer will know of his own knowledge. Here is his language. He says:

"In the case of some large corporations--for example, railroad companies--no one officer will have sufficient familiarity with the facts to answer all the interrogatories either as of his own knowledge or on information. All of the facts, however, will be known to the corporation's attorneys before trial. Must the officer make such inquiry as will enable him to supply the answers? If the objective of the rules is to be obtained, the answer must be in the affirmative, provided the information is readily accessible in the corporation's files or may be obtained without burdensome expense from employees. The rule should deal with this contingency, which is not academic but is constantly arising."

I wouldn't have thought that interrogatories were so common that it would be constantly arising. I would have thought that most people would proceed by depositions. As we remarked once before, when you send interrogatories out, you give a good chance to the lawyer of the other side to frame the answers. I should think most people would prefer depositions. I am a little surprised that Armstrong says that.

DEAN MORGAN: It may be that in different jurisdictions

and different places, counsel take different attitudes toward whether they will make the disclosure or won't. I should have thought that they would want to do it as you say. They know they have to do it some time.

SENATOR PEPPER: Would it be possible in framing an interrogatory to cover the case by inquiring of the person to whom it is addressed, "If this matter is not within your personal knowledge but is accessible in the files of the defendant [or corporation], will you answer after consulting such sources of information?" I should think it could be taken care of, couldn't it, in the interrogatory? A witness could not very well decline to answer that interrogatory, could he? I should think the court would treat it as a reasonable inquiry.

THE CHAIRMAN: The only danger about that, Senator, is that in our line 5 we have stated "by any officer thereof competent to testify in its behalf."

DEAN MORGAN: That is it.

THE CHAIRMAN: We have limited the officer to a competent witness.

MR. LEMANN: You see that the New York Bar Association says to omit everything in the first sentence after the word "served" in line 3. That is their proposal.

DEAN MORGAN: That is, when you serve the corporation you have to serve somebody. Suppose a corporation has an officer for service.

MR. LEMANN: "Any party may serve upon any adverse party written interrogatories to be answered by the party served." I don't see how that really would solve the problem, but they go on to give their reasons for that. They say that if we abolish bills of particulars, the defendant is going to use interrogatories to find out what he used to be able to find out with a bill of particulars, and that in requiring such a statement of a corporate or governmental body, it is of no importance whether the person signing the statement is competent to testify. It is just important to have the statement signed by an authorized person, which will be binding upon the party.

JUDGE CLARK: Maybe there is something in that. You could stop with the word "served". I must confess I am a little worried about some of his colorful words, such as "readily". I don't suppose information is ever readily accessible in a concern like General Motors.

DEAN MORGAN: Your difficulty, Charlie, is that this makes the plaintiff choose the officer who in his opinion has the information, and that officer alone, particularly when you say "who is competent to testify". He wouldn't be competent to testify in his then condition if he had not looked up the information, and he could say, "I don't know." It might be available to him.

THE CHAIRMAN: Do you interpret this rule as requiring

the interrogator to name the officer? I don't.

PROFESSOR SUNDERLAND: I don't think so.

DEAN MORGAN: That is what you say.

THE CHAIRMAN: You can submit interrogatories to a corporation and say, "I want these signed by any officer who has knowledge of the facts or is able to testify."

MR. LEMANN: For that you just say, "I address the following interrogatories to the corporation."

PROFESSOR MOORE: I think the New York lawyers have a point there in wanting to stop after the words, "to be answered by the party served." The party served is the corporation. Let the corporation see what people can supply the answers.

THE CHAIRMAN: The only trouble is that it says "in writing under oath" later on. The question is whether a corporation makes an oath or not. Of course, it might be construed to mean that the individual officer shall make the oath, and not the party served.

MR. LEMANN: I would not be disposed to make any further changes. There are no reported cases showing any difficulties with this. There are just these two statements suggesting changes not heretofore considered. My general inclination would be against changes in details like this. Nobody thought of this before.

THE CHAIRMAN: The only thing I can see at all is

that the words "competent to testify" in line 5 raises a sort of inference that the officer has first-hand knowledge and can make an oath that it isn't hearsay with him.

JUDGE DOBIE: Monte, you remember that when the Chief Justice came in here one time, he said, "Don't tinker with the rules."

MR. LEMANN: That was my original idea all along. We ought not to do anything that had not made serious difficulty.

THE CHAIRMAN: In the seven or eight years that these rules have been in effect, has any difficulty arisen that we know about, where an officer has refused to testify because he didn't know of his personal knowledge?

JUDGE DOBIE: Have you ever heard of a case, Charlie, where this provision has given any trouble?

JUDGE CLARK: No, I don't think there has been any case on it. I am frank to say that it is my impression, as I see these coming in, that interrogatories generally are very definitely limited. I think that is inherent in the situation. I mean by that that I have seen a lot of them where they have not answered on various grounds. Apparently nobody thinks of doing anything particularly about it. Apparently the general disposition is to take almost any excuse. That may be a little strong. I don't see that anybody really gets very much excited about it. There will be a whole list of things, "Question

No. 1 not answered for this or that reason," and apparently it is accepted.

MR. LEMANN: I don't see how they are going to help you much as a substitute for a bill of particulars because they are going to have to be answered in 15 days. You would have to get them out immediately, and then you would have only 5 days within which to frame your answer.

JUDGE CLARK: I have an idea that you don't get by interrogatories much more than the party wants to give.

THE CHAIRMAN: Written interrogatories.

JUDGE CLARK: Yes, written interrogatories. It seems to me that is about the way it goes.

MR. DODGE: One usual feature of them is to extract documents. "Annex a copy or name a time and place where the same may be inspected by plaintiff's counsel."

JUDGE CLARK: Yes, I think it does get documents.

THE CHAIRMAN: It is the sense of the meeting, then, that we will let Rule 33 stand as the Reporter has drafted it or redrafted it, except that "20" becomes "10" in line 9, and the italicized phrase is to be revised to limit the restriction to the plaintiff.

JUDGE DOBIE: I second that.

MR. DODGE: I wonder if it is advisable, in view of the discussion, to provide how answers by a corporation or partnership can be made. They "shall be made by any officer,

partner [because hardly anyone is an officer of a partnership], or agent thereof, who shall answer in the light of all the information available to the corporation or partnership." There should be something to that effect.

JUDGE CLARK: Possibly a way of approaching it would be, in lines 5 and 6, to make it "by any competent officer" or "any appropriate officer".

MR. DODGE: "any appropriate officer, who shall supply all the information available to the corporation or partnership." That "competent to testify in its behalf" doesn't seem to me to add anything.

JUDGE CLARK: I should think that something along the line Mr. Dodge suggests might be clarifying.

THE CHAIRMAN: Put it in the exact words. We are up against the gun on these things. This is our final meeting.

SENATOR PEPPER: It has the additional advantage of eliminating the word "competent," which has a certain technical significance not appropriate here.

JUDGE CLARK: Yes, I think there is a great deal in that. What did you say, Mr. Dodge? "by any officer"?

MR. DODGE: I said "officer or agent". "Officer" is not applicable to a partnership. "officer or agent, who shall furnish all the information available to the corporation or partnership." Make it "to the party interrogating", because it might be an association.

MR. LEMANN: "corporation, partnership, or association."

JUDGE CLARK: That would seem to be an improvement. Don't you think so, Senator?

MR. DODGE: "if the party served is a public or private corporation", and so forth, "the answer shall be made by an officer or agent, who shall furnish such information as is available to the party."

MR. LEMANN: "all information".

JUDGE CLARK: Have you got that, Bill?

PROFESSOR MOORE: Yes.

JUDGE CLARK: I think that will be all right. Do you want to accept it or put it to a vote or what?

THE CHAIRMAN: The motion made will include the suggestion of Mr. Dodge. I take it that is the sense of the meeting. If there is no objection, the motion is adopted.

JUDGE CLARK: Next is Rule 34. At the top of page 48 you will see a reiteration of the point made before by Mr. Watkins, of the Department of Justice. He complains that documents or other matters to be discovered under Rule 34 must be designated specifically and declares that these decisions have greatly impaired the efficacy of the rule. He sent in a very long memorandum. He says the same objection applies under Rule 45(b), which is the subpoena duces tecum. His remedy appears to be the striking of the word "designated" in both

rules and the substitution of words which would call for the production of documents, and so forth, which relate to the subject of inquiry and which are described with reasonable certainty. His point is that courts don't compel the discovery of documents unless you describe each one separately.

JUDGE DOBIE: Have there been any cases?

JUDGE CLARK: Yes. He supplied a memorandum, which was distributed, but it was fairly long. You may not have looked at it. It is not a matter under deposition alone. There are some under the subpoena rule, too. It is a question of how much in detail you have to describe the documents. His argument was that the decisions have been restrictive.

MR. DODGE: How about "All letters between you and the defendant relating to the subject matter of this action"? That is a sufficient designation, isn't it?

JUDGE CLARK: Have we got his argument? It is my impression that he was arguing that he would want something of that kind, but I think his claim is that the decisions have been against him.

JUDGE DOBIE: Wouldn't you think that would be sufficient?

MR. DODGE: Something like that.

JUDGE DOBIE: "All documents passing between Robert Dodge and Monte Lemann with reference to the sale of Hiberian oil property."

MR. DODGE: Do you think that notice to produce a copy of all my correspondence between certain dates, without any further limitation, would be sufficient?

JUDGE DOBIE: I don't think you could do that.

MR. DODGE: Some of them are about as broad as that.

JUDGE CLARK: I have his letter.

MR. LEMANN: What is the date of it?

JUDGE CLARK: April 20, 1945. Here is what he says. I can't give you all the cases because he has a lot of them, but this may give a little of the flavor of it.

"The decisions as to the degree of specificity with which writings must be 'designated' have, to my notion, greatly impaired the efficacy of the rules.

"Connecticut Importing Company v. Continental Distilling Corporation (D.C. Conn. 1940) 1 F.R.D. 190, 193, holds that:

> . . . Rule 34 . . . is limited to 'designated' documents, etc. As a result a party against whom a motion is directed will know just what document is sought by his opponent . . .

"In United States v. Schine Chain Theatres (D.C. N.Y. 1942) 2 F.R.D. 425, 426-427, the Court held:

> The government without specification of any particular documents, generally speaking, asks discovery of 'All inter-office memoranda, correspondence, and other written communications, and all memoranda, correspondence, and other written communications with other major

> film distributors' with respect to negotiations or performance of agreements had by the several defendants with major film distributors over a period of nine years and concerned with many moving picture theatres in many different locations; the same discovery for the same period of time relative to the opening or closing of theatres at numerous towns, operating policy of theatres, purchase of leases of theatres; the remodeling, demolition, and construction of theatres, all having reference to numerous locations and many individuals; and also all agreements relative to non-engagement in the operation of motion picture theatres, covering a period since 1931.
>
> * * *
>
> . . . the documents purported to be sought are not sufficiently designated . . ."

JUDGE DOBIE: Most of them are government cases, aren't they?

JUDGE CLARK: Yes. Mr. Watkins was in the Antitrust Division. He includes a quotation from the opinion in United States v. American Optical Company (D.C. N.Y. 1942).

> Without going into an extensive discussion of the authorities, which seems to me to be unnecessary, what I have said is sufficient to say about the necessity of naming the documents sought, not merely mentioning them by categories.
>
> I hold that such designation in a motion under Rule 34 must be sufficiently precise in respect of each document or item of evidence sought to enable the defendant to go to his files and, without difficulty, to pick the

> document or other item requested out and to turn to the plaintiff saying "Here it is".

THE CHAIRMAN: That isn't discovery at all, if it is production in court. You have to make the discovery of the document first, and what it is and what it has in it.

DEAN MORGAN: And then ask for that.

THE CHAIRMAN: And then call for the production.

JUDGE DOBIE: Those antitrust cases are the worst ones. We had a fertilizer case in North Carolina, and under a subpoena duces tecum fourteen tons of papers were brought in.

JUDGE CLARK: I think that gives you the flavor of it. He has several pages of these along this line. Here is one which is a private case, 403-411 East 65th Street Corporation v. Ford Motor Co. (D.C. N.Y. 1939) 27 F. Supp. 37-38. He says: "the Court in part sustained a motion to quash a subpoena duces tecum under Rule 45(b) for want of specificity. The parts of the subpoena suppressed are as follows:

> 2. Together with all such documents, books and papers in the possession of Ford Motor Company which relate to the business of Park Central Motors, Inc. and/or Park Central Motors Service, Inc."

Then there was another one.

THE CHAIRMAN: Maybe the objection in some of those cases was because they called for great masses of stuff that might be relevant but were unreasonably burdensome and would require a freight train to bring them. However, that is a

different point, the question of whether the demand is unreasonable because of the tonnage involved.

MR. LEMANN: He has a lot of cases here. I have been looking it over while you were reading from it. I would be a little hesitant, without careful consideration, to say that we should undertake to set up a rule which would put in all the things that the court said a fellow couldn't get by a grab bag demand. In the case of the Ford Motor Company he called for "all other evidences and writings which are in the custody of Ford Motor Company and which relate to the causes of action set forth in the complaint herein."

THE CHAIRMAN: Isn't there a rule that if you have a notice like that served on you and you fail to produce some document within its scope, then if you try to introduce that document in evidence yourself, you can't do it? Is there danger under this broad theory that a man might be punished by overlooking documents which are specifically designated? What is the rule about that? If you don't produce it when you are asked to and ordered to, are you permitted to offer it in evidence yourself?

JUDGE CLARK: These come up on motions to limit or motions to quash a subpoena, and those are usually granted by the court in the cases he stated.

MR. DODGE: This is a narrower rule, less important than the rule on subpoena duces tecum, Rule 45, where we use

the word "designated." I think the question would be much more likely to come up there than under Rule 34, which is simply where you want to get a copy.

JUDGE CLARK: You understand he makes it as applied to both. He says there is narrow construction of both, and the same language is used. He also says that this is going into the criminal rules, and it means that you are not going to be able to get a subpoena in a criminal case.

MR. LEMANN: What do the criminal rules do? Do they use the same language?

JUDGE CLARK: He goes into the criminal rules at the end. I think they did. Continue with his letter, and you will see that he gets on to the criminal rules, too.

THE CHAIRMAN: Would he have a rule that if a request is made for production and is not fulfilled, the court may prevent the party who was asked to produce it from offering it in evidence, so these blanket, general descriptions of documents relating to the subject matter would put the man to whom they are submitted in peril. If he didn't get everything that was covered by the description and produce it, if he happened to unearth it later, he would be at the risk of being refused permission to introduce it in evidence himself, but the court could give him relief from that if he could show that he acted in good faith.

The proposition is whether we should strike out the

word "designated" in line 8 of Rule 34 and substitute other language.

MR. DODGE: Don't you think the word "designated" ought to be construed properly as authorizing any reasonable method of designation for class of documents?

THE CHAIRMAN: I think so, but the question is not so clear as to whether designation as broad as this is a designation of fact. If you say, "Any document relating to this case," would you think that is sufficient?

MR. DODGE: I should think the word "document" should be further defined, but the words "relating to the subject matter of this case" I think would be sufficient. "Correspondence relating to the subject matter of this case" is a sufficient designation, I should think.

THE CHAIRMAN: There are a lot of courts that hold otherwise.

JUDGE CLARK: It is true that a good many of them came up in cases where the request was pretty broad. Some of the statements are pretty restrictive. Take the case from which I read, of the American Optical Company, in which the court said "such designation in a motion under Rule 34 must be sufficiently precise in respect of each document or item of evidence sought--"

MR. DODGE: That is absurd.

JUDGE CLARK: "--to enable the defendant to go to his

files and, without difficulty, to pick the document or other item requested out and to turn to the plaintiff saying 'Here it is'."

MR. LEMANN: If we took out the word "designated" here, I think it would be construed as authorizing a very blanket general description, and I doubt that we want to give rise to that inference. He cites two decisions of the Supreme Court of the United States which he says were rendered before our rules, but I should imagine they would be applicable under our rules. In one of them, Brown v. United States (1928) 276 U.S. 134, 143, the court said:

> The subpoena . . . specifies a reasonable time, and with reasonable particularity the subjects to which the documents called for relate.

They said that was sufficient, and I should think they would say the same thing under our rules. In Consolidated Rendering Company v. Vermont (1908) 207 U.S. 541, 543-4, they said:

> We see no reason why all such books, papers and correspondence which related to the subject of inquiry, and were described with reasonable detail, should not be called for and the company directed to produce them. Otherwise, the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have.

I think they are sufficiently controlled.

THE CHAIRMAN: Is that the construction that this court places on the word "designated"?

MR. LEMANN: No, because these decisions were rendered before the adoption of our rules. They were rendered in connection with subpoenas in criminal cases.

THE CHAIRMAN: Doesn't that raise the suggestion that our word "designated" has been given a more limited interpretation and that we ought to strike out "designated" and say "documents described with reasonable certainty" in the language of the court?

JUDGE CLARK: That is his definite suggestion. He doesn't suggest leaving it out altogether, but he wants to strike out "designated" and to substitute "documents which relate to the subject of inquiry and which are described with reasonable certainty".

MR. LEMANN: It is in his last sentence: "My suggested remedy for the uncertainty which will arise if the interpretation of the civil rules becomes the rule for criminal cases is that the words 'designated therein' at the end of the first sentence of Rule 17(c) be deleted. This would, in effect leave in force the rule laid down in the Brown case", which I read a little while ago.

Where is Rule 17(c)? Is that in the criminal rules? That isn't our rule.

JUDGE CLARK: That is true.

MR. LEMANN: Meanwhile, as I understand, the Criminal Rules Committee has used our language, Mr. Mitchell, and he is really complaining more particularly about the criminal cases. I presume they had this letter before them. I suppose he sent it to them. They copied our language. That would make me additionally hesitant about changing it.

THE CHAIRMAN: I don't know whether it would or not. The cases are a little different. Fishing expeditions aren't looked upon with such favor in criminal cases. If we have a clause that has been unduly restricted by judicial decision and we want to get it on a sound basis, I think we ought to do it even though the criminal rules may be in the same boat.

MR. LEMANN: We have three or four cases that he cites, about which there was no complaint from any of the counsel or anybody that I know of. Nobody else has come in and kicked about these cases.

THE CHAIRMAN: Is that case that you just read from an interpretation of our rule?

DEAN MORGAN: No.

MR. LEMANN: Which case?

THE CHAIRMAN: It was before our rule was adopted?

MR. LEMANN: That is right, but he has here cases which he says are unduly restricted. Mr. Mitchell, the cases that he complains of as giving an unduly restrictive application of our rule are the following: a civil case from the

District of Connecticut in 1940, an antitrust case from the District of New York in 1942 (in this case the court cited the Supreme Court decision to which I last referred, but he complains that they ignored it and said it didn't apply under our rule), another federal antitrust case in New York, a civil case from Pennsylvania in 1943, a civil case from Missouri in 1939, in which the court said:

> The documents sought in these motions are described in such general omnibus language that they are not 'designated' at all. . . They call for 'all' documents, satisfying a certain general description, coming to the defendants during periods of years. . .

He cites from case from New York in 1939, also a civil case, in which they said:

> 'Designated' documents, etc., are those which can be identified with some reasonable degree of particularity. It was surely not intended by the use of the word 'designated' to permit a roving inspection of a promiscuous mass of documents, etc., thought to be in the possession, custody or control of the opposing party.

I see nothing wrong with that. The next case he has is another civil case in Maryland in 1941. Then he has a case in Kentucky in 1941.

JUDGE DOBIE: What is the Maryland case about?

MR. LEMANN: "In Lever Brothers v. Proctor & Gamble Manufacturing Co. (D.C. Md. 1941) 38 F. Supp. 680, the Court held that a motion that a party produce 'all written reports,

memoranda, or other records of conferences of officers, or members of the technical staff of the defendant' attended by a named person, at which certain processes were discussed, was too general and comprehensive."

JUDGE DOBIE: Chesnut.

MR. LEMANN: He has seven or eight of these cases. Nobody else has come in and said something was wrong with all these cases. I would hesitate to overrule all those cases without more consideration.

DEAN MORGAN: Do you think the word "designated" is made more restrictive by repeating it in line 16, as the Senator points out, "designated land", having the same latitude for land as you do for documents?

MR. DODGE: I feel that those cases that Monte Lemann has just referred to would probably be decided the same way if we used the words suggested. It probably means about the same thing.

SENATOR PEPPER: It all means identifiable.

MR. DODGE: Yes.

THE CHAIRMAN: If you limited the application to a shorter period, for instance, in that description, and merely said all contracts and documents and correspondence relating to this matter, the court probably would not have objected, but the rejection of the application in those cases apparently was on the basis that it was unreasonable.

JUDGE DOBIE: I believe that in some of them it was not a question so much of description, but the court thought that the request in that broad scope was unreasonable.

THE CHAIRMAN: Unduly burdensome.

JUDGE DOBIE: I doubt if any language you put in there will cause any real change in the courts.

JUDGE CLARK: Would it be worth while to cite those Supreme Court cases in a note? Conceivably we could do that.

THE CHAIRMAN: As showing what you mean by designated. That might be a very sly way of giving a meaning to it.

JUDGE CLARK: Of course, the notes are not authoritative.

MR. LEMANN: Professor Sunderland, we didn't originate the language of 34, I believe. Wasn't that used in something else?

PROFESSOR SUNDERLAND: I don't recall getting it anywhere. That was the original language when it was first written up. I don't know whether or not we got it anywhere.

MR. LEMANN: You could just leave it out. I thought he almost suggested leaving it out and just saying "any documents," but you wouldn't want to do that. I shouldn't think "described with reasonable detail" would add much to "designated".

THE CHAIRMAN: The trouble is, having used the word once, an ulterior purpose will be ascribed to striking it out.

MR. LEMANN: That is right.

THE CHAIRMAN: It is like Pearl Harbor. They sent the fleet out there in the spring of 1940 and decided to keep it there for a while. Then afterwards the question came up whether it ought not to be brought back to the Pacific Coast. If they had never sent it out there in the first place, they would have kept it on the Pacific Coast, but having sent it out there, then they wouldn't want to put their tail between their legs and run back home. So, it is the use of the word now that gets us into trouble when we strike it.

MR. LEMANN: That is the worst trouble, I think.

MR. DODGE: Do you think it ought to be changed, Mr. Sunderland?

PROFESSOR SUNDERLAND: I shouldn't think so. I should think that all these changes would be just saying the same thing in different language.

MR. LEMANN: Then you create new controversies.

PROFESSOR SUNDERLAND: I think you have to construe that thing reasonably.

MR. LEMANN: We have no complaint from anybody else. A lot of fellows have lost these cases. Why didn't they say something about it?

THE CHAIRMAN: I suggest that we leave it as it is in the rule. There are some changes that we made in the rule that the Reporter may want to comment on in a note, and he may put

in a short note saying that some objection has been made to the word "designated" but the Committee thinks that it means thus-and-so, so held by the Supreme Court in such-and-such cases, and there isn't any use in substituting new words that mean the same thing. Let it go at that.

DEAN MORGAN: Did the Reporter have any suggestion? Unfortunately, my page 48 is blank in my copy, so I didn't know in advance what all this was about. Did you make any recommendation, Charles?

JUDGE CLARK: We said we thought somewhere in the suggestions it had been considered before.

THE CHAIRMAN: They say, "hence we recommend no change at this time."

DEAN MORGAN: All right.

MR. LEMANN: Then he says, "Mr. Watkins has since died", to tell you that the only guy who kicked is now dead!

JUDGE CLARK: That is true.

MR. LEMANN: Just a bit of biographical information which he threw in.

THE CHAIRMAN: That settles it.

JUDGE CLARK: Have you that idea about adding the Supreme Court cases to the note?

PROFESSOR MOORE: Yes.

THE CHAIRMAN: Then, we are up to Rule 36. You haven't anything on 35, have you?

JUDGE CLARK: No. On 36 we have that question of time, and the same people who didn't want any time as to written interrogatories don't want any time here. I wonder, since we cut down the time in that other case to 10 days, if that would not be the logical way to treat this.

THE CHAIRMAN: Ten days after service he is required to respond. If we made this 10 days, it would fit the other exactly. Change the "20" to "10" in line 10.

JUDGE CLARK: It seems to me that is logical and in line with what we did before.

I see that the Association of the Bar of the City of New York didn't want too many limitations in it. They think that the time for serving requests should remain as stated in the original rule. If you settle the question of time, I have one other suggestion.

THE CHAIRMAN: We also have to change the italicized provision in lines 7 to 12 by naming the defendant. It was intended for the protection of the defendant.

JUDGE CLARK: I guess probably it is the same idea, isn't it?

THE CHAIRMAN: Yes. What is your pleasure? To be consistent, we ought to change the italicized provision in lines 7 to 12 by striking out "20" and inserting "10" in line 10, and also by making a qualification such as we have done in two previous rules that this limitation doesn't apply to a

demand by a defendant.

SENATOR PEPPER: I move in accordance with the Chairman's statement.

THE CHAIRMAN: Is there any objection? That is so ordered.

JUDGE CLARK: Next, if you will look at the provision down in lines 30 and 31, Mr. Cantrell, of Oklahoma City, who has written a good deal about this, raises a question about the provision, "or the request, in whole or in part, is otherwise improper". Mr. Cantrell also believes that the words "is otherwise improper" in line 31 are too broad, invite restrictive orders by the courts and impair the utility of the rule. See comment under Rule 30(b), where Mr. Cantrell's remarks are set out in full. On this latter point we are inclined to agree, and we recommend striking from the proposed amendment the words "or the request, in whole or in part, is otherwise improper". This would still leave in the amendment the right to challenge a request on the grounds that some or all of the requested admissions are privileged or irrelevant, and this would seem to be quite adequate.

JUDGE DOBIE: Don't you think there might be a case where it might be both relevant and unprivileged, and yet the judge might say that under the circumstances he was not going to do it. Take a case, for example, where it presents a statutory restriction.

JUDGE CLARK: Maybe. All I can say is what I suggested before, that I don't think these are too effective anyway except when the parties are willing. They have an area of great utility. There isn't any question about that. But it is generally where the parties know they have to give up that they make the admission, and so on.

THE CHAIRMAN: The Reporter's suggestion is that in lines 30 and 31 we strike out of the proposed amendment the words "or the request, in whole or in part, is otherwise improper". Has anybody any objection to doing that?

MR. LEMANN: Do we have similar language somewhere else?

JUDGE CLARK: I don't think we have just that, have we, Bill? If you go back to page 41 of the summary, you will see that Mr. Cantrell states his views quite in detail. He says: "there appears to me to be an intent practically to restrict very definitely the existing rights of discovery", and so on. "My experience has been that the old Federal Equity Rule on Discovery was rendered practically useless because trial courts were continuously invited to and did enter restrictive orders defining the nature, scope, and extent of discovery because of objections upon the part of the interrogated party. The liberality of the present rules in connection with discovery has been one of the features of these rules which has most commended the rules to the lawyers, the litigants and the

public. My own personal experience, my study, and my observation of operation under the old rules has caused me to be firmly and seriously convinced that discretionary power of restriction upon the part of the trial courts should be very narrowly confined. My own prediction is that if the provisions are placed in the rules, the progress which has been made in connection with the field of discovery will be ultimately entirely wiped out."

DEAN MORGAN: Suppose in this kind of case that the facts that were asked for were not irrelevant or privileged, but would be entirely inadmissible in evidence. If you say only privileged or irrelevant, if you put in only those two grounds, aren't you saying that those are the only grounds on which a person can be excused from answering?

THE CHAIRMAN: Why do you need finally to say anything about the ground for objection? Why don't you say "written objections to the request, in whole or in part, together with a notice of motion setting the objections down for the earliest practicable hearing" and let it go at that, not sustaining the objection unless some good ground is stated for it.

DEAN MORGAN: "stating the ground therefor" is all you would need, isn't it?

THE CHAIRMAN: Yes. "written objections to the request, in whole or in part, stating the ground therefor,

together with a notice of motion setting the objections down for the earliest practicable hearing."

DEAN MORGAN: I don't think you ought to limit the grounds. We can't foresee all the grounds that might be properly objectionable.

MR. LEMANN: I don't see why we should change it.

JUDGE DOBIE: I don't believe any rational court would give that too broad an interpretation; I don't believe it would stop or stick on that term, do you?

MR. LEMANN: We have had only one complaint about this, from Mr. Cantrell, as far as I know. Has anybody else complained about it? If objection has been made that a request is improper, you could trust the judge to say whether it was or not. Anybody studying the history of these changes will get out this draft and see that we took this out and will ask why we took it out. The answer would be that we were afraid it might give them too broad a scope. I move that no change be made.

JUDGE DOBIE: I second that.

THE CHAIRMAN: You mean that no change be made in the italicized clause.

MR. LEMANN: Yes, in lines 27 to 33 on page 46.

JUDGE DOBIE: Leave in "or the request, in whole or in part, is otherwise improper". No change.

MR. LEMANN: No change in lines 27 to 33.

JUDGE DONWORTH: That means that we adopt the italicized amendment.

MR. LEMANN: That is right.

JUDGE CLARK: Of course, that is new. When you ask if it has caused any trouble or not, you can't tell. This is a new addition.

MR. LEMANN: I mean nobody else kicked. Everybody who got this draft had an opportunity to come in and say something about it. I don't see why you shouldn't present an objection on the ground that you are--

THE CHAIRMAN [Interposing]: There are a lot of things that the bar never discovered at all in these changes that we are proposing; for instance, this business about forbidding a defendant from making inquiry of the plaintiff for 20 days. The fact that they didn't point it out to us--

MR. LEMANN [Interposing]: Is not conclusive, but I don't see any adequate basis for the deletion.

JUDGE DOBIE: I second the motion.

THE CHAIRMAN: It has been moved and seconded that the Reporter's draft of Rule 36(a) stand as is in the report.

[The motion was put to a vote and carried.]

THE CHAIRMAN: Are we over to 41 now?

JUDGE CLARK: Not to 41. At the end of 36 the Association of the Bar wanted us to take absolutely the language of Rule 8(b) in lines 36 to 41. We made only a slight change.

We decided not to make the change. It doesn't seem to me that it is too important. I will pass it if there is no question raised. It is on page 51 of our summary.

THE CHAIRMAN: You mean you are making a suggestion for the revision of your own italicized matter in lines 36 to 41? Is that it?

JUDGE CLARK: No. I am stating a suggestion made by the Association of the Bar.

JUDGE DOBIE: Let's pass it.

JUDGE CLARK: All right. We have something on 37. Do you think we should press that at all, Bill, that little technical point of wording? I won't bring it up.

THE CHAIRMAN: Is there any merit in it? What is it?

JUDGE DOBIE: It has given no trouble. I think we might as well leave it.

JUDGE CLARK: Mr. Willis suggests amending 37(d) to read somewhat as follows: "If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after proper service of a notice, as prescribed in Rule 30(a)".

THE CHAIRMAN: This is 37(d), is it?

DEAN MORGAN: Yes.

PROFESSOR SUNDERLAND: What we do is to impose a condition or to imply a condition that doesn't exist. We say "after having been served with a proper notice". As a matter of

fact, we don't require any service upon officers. That can be changed by merely changing "being served". Make that read: "If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after such party has been served with a proper notice".

THE CHAIRMAN: It is perfectly possible, when you are asking and calling a party to appear, to serve a subpoena on an officer.

PROFESSOR SUNDERLAND: We don't require any service on the officer. We require service only on the parties.

JUDGE CLARK: If it is served on the party and the officer or managing agent wilfully fails to appear, can he be disciplined?

PROFESSOR SUNDERLAND: That is what we say. We say that service on the party will be a basis for disciplining the officer if he doesn't appear.

THE CHAIRMAN: What officer?

PROFESSOR SUNDERLAND: Any officer who is to testify.

MR. LEMANN: I move that we accept the Reporter's recommendation and make no change.

THE CHAIRMAN: If you serve notice on the corporation and the officer has not been designated either by the plaintiff or the corporation, there may be a half dozen men who know the facts and may step up and testify.

PROFESSOR SUNDERLAND: We give notice to the party, and in the notice to the party we state who is to be examined, but we don't serve a notice on the person. We notify the party who is going to be examined, but we don't notify the examinee.

THE CHAIRMAN: The motion is that we let the rule stand as it is. We are up to Rule 41.

JUDGE CLARK: The first suggestion is as to Rule 41(a), which appears on page 53 of the summary. Mr. Summers, of Seattle, points out that although the rule restricts the plaintiff's right to dismiss upon notice and without order of court to that preliminary stage of the litigation "before service of the answer", such a dismissal may be effected during that period even though the defendant has filed a motion for summary judgment. He thinks that the plaintiff should not be able to dismiss when the defendant has moved for summary judgment, and I should think there was at least some logic to his suggestion. We have suggested the possibility of an addition at the foot of the page. Mr. Summers feels that a defendant, therefore, is as much prejudiced by a voluntary dismissal after service of a motion for summary judgment as he would be by such a dismissal after answer, and that the rule in all fairness should be extended as suggested.

JUDGE DONWORTH: Have you drafted his suggestion?

JUDGE CLARK: We have drafted a suggestion at the

foot of that same page.

JUDGE DOBIE: Do you agree to that?

JUDGE CLARK: Yes, I think so.

JUDGE DOBIE: It is a little clearer, isn't it?

JUDGE DONWORTH: It seems reasonable.

JUDGE DOBIE: I move its adoption, Mr. Chairman.

JUDGE CLARK: This should be added. The way we drafted the suggestion, we did not limit it to a motion for summary judgment. We made it any motion. We suggested that clause (i) be amended to read: "(i) by filing a notice of dismissal at any time before service of motion or answer, whichever first occurs." His remarks were specifically directed to a motion for summary judgment. So, we have perhaps broadened it a little.

JUDGE DOBIE: I think that is a good thing.

THE CHAIRMAN: You mean a motion by the plaintiff? You don't say so. You mean a motion by defendant.

JUDGE CLARK: Yes.

THE CHAIRMAN: You don't say that. It would bar the plaintiff from dismissing without an order, if he had made a motion, as you have it.

JUDGE DOBIE: Of course, he could withdraw the motion.

JUDGE DONWORTH: Ordinarily, the filing of a motion by the defendant should not deprive the plaintiff of the right to dismiss. It would depend on the character of the motion,

whether in some way it would create prejudice by dismissal. I mean the mere fact that you make a motion to make definite or something of that kind and that it is pending doesn't deprive the plaintiff of the right to dismiss the suit. Am I not right?

THE CHAIRMAN: It sounds right to me. Why should you make it so broad, Charlie? Any kind of motion by the defendant would bar the plaintiff from dismissal without order.

JUDGE CLARK: That is the way we suggested it. I don't know that there is any absolute answer either way here.

THE CHAIRMAN: He says summary judgment. That is all he is worried about.

JUDGE CLARK: Suppose he makes a motion to dismiss.

DEAN MORGAN: For lack of ground. Why shouldn't he do so?

MR. DODGE: He can't object if the plaintiff dismisses.

DEAN MORGAN: He just says, "The insurance is no good. I quit." Judgment on the merits wouldn't bar another action.

MR. LEMANN: It seems to me this is another case of perfectionist changes that we could go on and make without limit if we start making them.

THE CHAIRMAN: As Judge Donworth points out, the rule would operate in some cases to deprive the plaintiff of the right to dismiss because of a dinkey little motion of some

kind.

SENATOR PEPPER: Isn't there something to be said in favor of the point, if it is limited to the pendency of a motion for summary judgment, because otherwise it will look as if the defendant was being deprived of an opportunity to get a judgment which is within his reach, by the action of the plaintiff in merely withdrawing or dismissing.

THE CHAIRMAN: Your suggestion is to limit it to a motion for summary judgment, and not any motion.

SENATOR PEPPER: That is right.

THE CHAIRMAN: Suppose the defendant makes a motion to set aside the service of the summons, ought that to bar the plaintiff from dismissing? No.

SENATOR PEPPER: It seems to me it is only where the motion for summary judgment is made in good faith, only where it seems as if a judgment for the defendant was within his reach and the plaintiff has dismissed in order to avoid having a judgment go against him on the merits, that this rule ought to be applicable.

THE CHAIRMAN: Is that satisfactory to the Committee?

JUDGE DONWORTH: That is Mr. Lane Summers, isn't it?

SENATOR PEPPER: Yes.

JUDGE DONWORTH: He is an active practitioner and is well versed in the practice. It seems to me that on the merits his suggestion is well taken.

JUDGE DOBIE: He limits it to a motion for summary judgment. Why not so limit it?

PROFESSOR MOORE: That would be just a motion by the defendant, then?

THE CHAIRMAN: Yes, because the plaintiff ought not to be barred by his own action from dismissing. It is to prevent him from dismissing and leaving the defendant with a big job done in preparation for a motion on the merits and not having had a hearing on it.

With the understanding that that is altered in that way, 41(a) is agreed to, is it? Is there anything else on it, Charlie?

JUDGE CLARK: Not on (a).

THE CHAIRMAN: Let's see about (b), then.

JUDGE CLARK: On (b) there is the question we have debated several times about the effect of dismissal at the end of the plaintiff's case. This refers to lines 29 to 36, the first sentence in particular. "In an action tried by the court without a jury, the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."

Mr. Armstrong says, "This ends a conflict in the cases, adopts the sounder rule and is in accord with the increasing weight of authority."

The Los Angeles Bar Association revealed itself as apparently in hopeless disagreement over the advisability of the first sentence of the proposed amendment, and objected to the second sentence.

Then you will see a long argument by my former colleague, Professor Steffen, of Yale, who thinks that the solution we have reached is not required by the cases and is an unjust solution.

THE CHAIRMAN: It is not required by the cases, of course, because they are in conflict. The question is whether it is a just solution.

DEAN MORGAN: I think Steffen is probably right, if he is taking the state cases as well as the federal cases, that usually on a motion to dismiss the judge doesn't go into the facts at all, but why shouldn't he as long as we have got the notion, which a good many courts repudiate, that you may get a judgment on the merits without resting your own case for the defendant. In our practice in Minnesota, a lot of times they wouldn't even entertain a motion for directed verdict at the close of the plaintiff's case. You had to go on and put in your case. However, we have repudiated that here, and I don't see why you shouldn't have the same rule. I don't know why Steffen is so insistent on this.

MR. DODGE: If a court renders judgment against the plaintiff as a matter of law and his finding of fact is that

all the testimony is true, that he believes everything that has been testified to, why should he make findings of fact? He decides it as a matter of law.

DEAN MORGAN: May he dismiss it when the plaintiff rests, anyhow, and make findings?

JUDGE CLARK: I think perhaps you ought to consider this in two steps, the first sentence and the second sentence. The first sentence is this question of policy. I don't say it shouldn't be done. I think perhaps that may be the weight of comment so far. Then, the second sentence would be whether we want to leave that as to finding of facts. You will notice that the Association of the Bar of the City of New York wants to make it read this way: "If the court does determine the facts and renders judgment".

THE CHAIRMAN: The theory they have back of it seems sound; that is to say, there is no use in making findings if it happens at the close of the plaintiff's case that there is really no genuine issue of fact left. They have the idea that if there is an issue of fact that is not absolute and conclusive, and the court determines that at the close of the plaintiff's evidence, then only should he make findings, but the difficulty in my mind is how you are going to lay down a distinction. How are you going to provide that the test is whether he did make any finding of fact?

JUDGE DONWORTH: Of course, the court may dismiss for

positive or negative reasons. For instance, the court might dismiss for the reason that there was some fact that appeared in the case that was fatal against the plaintiff. On the other hand, the court might dismiss because of no material evidence supporting a vital point in the case.

THE CHAIRMAN: That is their idea.

JUDGE DONWORTH: So, you don't really know what is the nature of his ruling.

THE CHAIRMAN: You might say, "If the court renders a judgment against the plaintiff and does in that connection determine the question of fact, he shall make findings".

MR. DODGE: You mean if he determines it as a question of fact, he must make findings of fact.

THE CHAIRMAN: Yes, if he enters a judgment and determines the questions of fact, he shall make findings.

JUDGE CLARK: Isn't that the suggestion of the Association?

THE CHAIRMAN: That is the substance of it.

JUDGE DONWORTH: I think that is all right.

MR. LEMANN: Have you read Mr. Steffen's article, Mr. Mitchell. He cites you as authority against this proposed change. I have just been looking it over. There is a long letter here.

THE CHAIRMAN: He means that a great many decisions have held that at the close of the plaintiff's case, in a

court-tried, jury-waived case, the judge can't deal with the case any differently than if he had a jury. If there is any question of fact left open, he must deny the motion. There is no doubt that there is a vast quantity of authority to that effect. We are rejecting that as a wise measure and are saying that it will shorten the litigation and expedite cases, since the judge is the trier of fact anyway, to let him have discretion (that is all we give him) to decide the case and decide the facts right then and there. He doesn't have to. He can go on and say, "I guess I will hear it all."

I think Steffen is hidebound by prior decisions on the point, and he is not looking at it as a question of improving the administration of justice by a new rule.

Don't you think, Charlie, that the idea of the Association of the Bar ought to be incorporated, and not make it necessary for the judge to make findings of fact unless in disposing of this motion he has actually determined the questions of fact?

DEAN MORGAN: Are they afraid of res judicata, Charlie? Is that it?

THE CHAIRMAN: No. They think it is a waste of time for the judge to make findings when the facts are not in dispute.

JUDGE CLARK: I think it is more than that. They doubt greatly the utility of findings, anyway.

THE CHAIRMAN: You say, "The Association thinks that

where the judge does not resolve any issue of fact, there is no reason for requiring findings."

DEAN MORGAN: But he may resolve an issue of fact because he may find that he disbelieves one of the witnesses.

THE CHAIRMAN: My proposal is that if he does determine facts, he shall make findings.

DEAN MORGAN: Yes, surely.

THE CHAIRMAN: That is what they say. They are not relieving him in all cases of making findings. They do it only when he has not had occasion to make any findings of fact.

DEAN MORGAN: Is he going to dismiss with prejudice?

THE CHAIRMAN: He may be ordering judgment against the plaintiff on the merits as if the case had rested. He can do that.

DEAN MORGAN: Can he order a judgment for the defendant on the merits? When he says that he dismisses because the plaintiff hasn't made a case, does he order it on the merits then? If it is just a judgment of dismissal, does he make it with prejudice?

JUDGE DONWORTH: You mean the court has the power in his discretion to grant a nonsuit.

DEAN MORGAN: Yes, practically a common law nonsuit.

JUDGE DONWORTH: If the situation calls for it.

DEAN MORGAN: Yes.

MR. DODGE: The rule says he can do that, but if he

doesn't do it, the dismissal is on the merits.

DEAN MORGAN: So, he wouldn't need findings to make it res judicata in that particular case.

MR. DODGE: No.

DEAN MORGAN: But suppose he doesn't make any findings and then orders a dismissal on the merits without any findings, and you go up on that, what is the question before the appellate court?

MR. DODGE: A question of law.

THE CHAIRMAN: They will look at the record and see whether there was any question of disputed facts, and if there were, they will say he ought to have made findings on it.

DEAN MORGAN: That is exactly it.

THE CHAIRMAN: They will send it back and ask him to make some.

DEAN MORGAN: So, if he wants to be safe, he had better make his findings every time, hadn't he?

THE CHAIRMAN: Suppose it is a case where he doesn't have any issue of fact to decide at all. He states that, on the facts alleged in the complaint, plus the evidence about which there is no dispute at all, as a matter of law the defendant is entitled to judgment on the merits. Why make any findings?

DEAN MORGAN: All right, but suppose he is mistaken about that. Suppose the appellate court upsets him on that.

Then you have to go back for a new trial on that sort of thing.

THE CHAIRMAN: So you may under Rule 52(a).

DEAN MORGAN: But if he had made findings and there was any evidence to support his findings, then there would be no chance of upsetting him. If you want to make the decision of the trial judge stick, he had better make findings every time.

PROFESSOR SUNDERLAND: Whether there is dispute or not.

DEAN MORGAN: Yes, exactly, because if he finds against the plaintiff, then he is O.K.

MR. DODGE: His finding is that all the testimony is true.

DEAN MORGAN: You would not take all the testimony up for that.

JUDGE DONWORTH: I think that lines 34 to 36 have a useful purpose in informing the appellate court along just what lines the judgment went. Did he think the plaintiff was guilty of contributory negligence, or was there some other point. It seems to me this is useful for giving the appellate court that information.

JUDGE CLARK: How would it be to insert after "judgment", "on the merits"? It would read, "If the court renders judgment on the merits against the plaintiff".

DEAN MORGAN: I think that would be fine.

JUDGE DOBIE: That is in line 34. "If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)."

THE CHAIRMAN: I don't object to it, except that I don't feel that it makes any difference whether it is on the merits or on any other thing. The question is really whether there is any issue of fact to be decided. That is the reason for requiring findings. If he hasn't made any findings of fact, but decides the case on a question of law and admitted facts, then why make findings? We substitute for that the irrational ground of the character of the judgment. It is all right if the Committee agrees to that. If there is no objection, I withdraw mine.

JUDGE CLARK: That is all on Rule 41. Before we adjourn, could I bring up another little matter? I think that finishes 41, and the next rule will be 44, but I want to raise some question about the eminent domain rule and condemnation. I might say that Mr. Williams of the Department of Justice expresses himself as at our service individually or collectively and would like to know if I want to see him or anyone else. I might just explain briefly how this came up.

You see the Major isn't here. The Major was the subcommittee. I got into it a little at one side. Mr. George Washington, Professor at Cornell and Special Assistant to the Attorney General, came in to see me, and we were discussing

various things and got on to this. You know, the Attorney General recommended to the Judicial Conference that something should be done. The Attorney General has taken the very definite position that there ought to be some rule of procedure. I said to George Washington, "Can't we do something about this? Can't we get somewhere? I don't think we are going to be able to agree as it now stands."

Fortunately, I communicated with him last week to see how things stood. I haven't anything very definite. Perhaps there isn't anything that we should do, but Washington said that Williams is ready to consult. I said, "It is the same old thing. We are not going to get anywhere."

He said, "I think you will find him very favorable."

What shall we do?

THE CHAIRMAN: I don't think we ought to have waited until this meeting was called to find out whether the Department of Justice agrees to the proposition that we are all set on. I asked Tolman in a number of letters to put up to the Department of Justice the question whether they would approve and support a rule which made the procedure uniform in all types of cases, including TVA and all the others, with the single exception that it left the constitution and nature of the tribunal that fixed the compensation to be determined by a federal statute if there was one, as in the TVA case, or, lacking a federal statute, by the local state law. Just one

exception to uniformity was the question of the nature of the tribunal, whether a commission or a court or whatnot. That is where all the row has been in Congress and everywhere else.

I don't think we ought to waste one minute of our time fooling around with 71A unless the Department of Justice tells us what they are going to do about it. Why should we fool with the thing if they won't support it? Why shouldn't they have told us long ago whether they would or would not? I don't understand why we haven't gotten some action. What is the Assistant Attorney General going to say when he comes up here? Is he going to argue with us about that?

JUDGE CLARK: I can't say. This is the situation as far as I know. I don't know whether Mr. Hammond can add anything or not. The Major has thought that Mr. Moore and I were unduly restrictive of the proper rule. We thought we were following out your suggestions. I kept trying to push the Major to try to get the reaction of the Department. Frankly, I don't know whether he has or not. I really don't know. All that I did--and I thought perhaps I was really going beyond what I was supposed to do in doing that--was to send the Attorney General a copy of our draft, and I told Washington I would like to have their comments. He said he would try to see if he could get some action from the Division. But I still left it to the Major to approach the Division directly.

THE CHAIRMAN: You mean you have never had any

response?

JUDGE CLARK: No.

THE CHAIRMAN: How long ago was it that you sent it to the Department?

JUDGE CLARK: I sent it to the Department as soon as we drafted it, but in a way I wasn't asking for a response. I was sending it to the Attorney General for information. I thought the Major, who had been negotiating with the Lands Division, you see, would take it up directly. I don't know, do you, Mr. Hammond?

MR. HAMMOND: I really don't.

THE CHAIRMAN: The Major bored a big hole in your draft. The suggestion I made, which we seemed to agree on, among some of us, was that the provision in the rule be that the rule is uniform in all cases, TVA and everything else, except that the constitution of the tribunal making the award of compensation should be as provided by federal statute or, in any case or in the absence of a federal statute, by state law. Then you made a draft which said not merely the constitution of the tribunal, but the methods and means of rendering the award, which covers a lot of questions of practice, should be as determined by a federal statute. The Major jumped on that and said that went away beyond my suggestion, which was quite true, and I understood that the draft was going to be amended so as to leave the lack of uniformity to apply only

to the make-up of the tribunal.

JUDGE CLARK: We put that in.

THE CHAIRMAN: Put what in?

JUDGE CLARK: We have given you a new draft. Of course, on that I must say--

THE CHAIRMAN [Interposing]: Did the new draft go to the Department?

JUDGE CLARK: No.

THE CHAIRMAN: That is just it, you see.

JUDGE CLARK: May I say again that the Major has been chairman of the committee, and I haven't been quite sure how far I should go over his head. On this point I am frank to say I thought the Major's argument was a technical legal argument. That was merely a question of changing the phraseology. We wrote to the Major first and asked for a change in phraseology. The Major really was fighting the whole proposition. There isn't any doubt about that. When we found that the Major was not prepared to suggest a change in phraseology, we did it, but it seems to me that whether it was a major hole or not, it was perfectly obvious that it was a question of linguistics.

THE CHAIRMAN: It was pretty plain that the draft went away beyond the suggestions. There is no question about that at all. The correction was made promptly when the thing was pointed out. I am not blaming you for--

JUDGE CLARK [Interposing]: You understand I didn't

send it in any way officially. I talked with the Attorney General about it. I was present at the Judicial Conference when the Attorney General made his extensive statement that something ought to be done. I went up to him then, and we discussed it a little. He said, "I hope something can be brought out." Then when we had done this, I said, "For your information I am sending you the idea that Mr. Moore and I are submitting to the subcommittee, and I suppose the Major will take it up with the Lands Division in due course." That is all I felt able to do.

By the way, you will find on page 30 of our supplement here our suggestion for correcting that point about the trial. As I said, it seems to me that is merely a matter of words to convey the meaning. If we slipped there, that is something that could be done very easily from the policy suggestion.

The question now is really ways and means. I am willing to call up Mr. Washington, or perhaps Mr. Hammond can call Mr. Williams if he knows him. We can call them up and ask, "Will you agree or not?" or we can go ahead and work up our own draft. I would just like a little advice as to whether we should do anything or not. I have no reason to say, on anything I know, that the Lands Division is in default as to us, because I don't really believe that they have been asked to do anything more than I have indicated. Isn't that probably

so, Mr. Hammond?

MR. HAMMOND: Of course, I haven't been in the Department since July 28, and I know nothing about what has gone on. The only suggestion I have to make on the thing is that you should give the Lands Division a copy of your latest draft, if you haven't already done it officially, which is limited, as I understand it, so that the tribunal making the award of compensation shall be as provided by federal statute.

[The meeting adjourned at one-thirty o'clock.]

TUESDAY AFTERNOON SESSION

March 26, 1946

The meeting reconvened at two-fifteen o'clock, Mr. William D. Mitchell, Chairman, presiding.

THE CHAIRMAN: We are on Rule 43, the rule having to do with evidence.

JUDGE CLARK: Is there any point in considering Rule 43? Does anybody want to make a change in it? There is a little discussion of the Code of Evidence first. Then a gentleman raises the question whether the official record includes the judicial proceedings.

THE CHAIRMAN: That is Rule 44?

JUDGE CLARK: Yes.

THE CHAIRMAN: I don't see that you have made any suggestions for change in Rule 43 or that anybody else has.

JUDGE CLARK: As a matter of fact, what I am saying is about Rule 44. We should have thought it clear that judicial record was included within the term "official record."

THE CHAIRMAN: Then we have passed on to 44, have we?

JUDGE CLARK: I should think so.

THE CHAIRMAN: You have a note on that. Is any question raised in any decision as to the scope of that rule or the meaning of it, or is it just some lawyer's imagination as to the ambiguity of it?

JUDGE CLARK: I take it it is the lawyers. It has

been held that an official record includes any paper which is work done by a person in the employ of the Government in the course of performing the duties of the position.

JUDGE DOBIE: Do you have any doubt that the official record includes a judicial one?

JUDGE CLARK: I shouldn't have supposed so.

JUDGE DOBIE: I don't believe we need to mess with that much.

THE CHAIRMAN: Let's pass on to 45.

JUDGE CLARK: On 45 there is first that question as to "designated" raised by Mr. Watkins.

JUDGE DOBIE: We have already disposed of that.

JUDGE CLARK: Then you will see that Mr. Youngquist suggests that the words "or tangible things" in line 4 are contradictory and superfluous, since books, papers, and documents are also "tangible things," although the writing in them is not. He states that the Criminal Rules Committee, of which he was a member, hit upon the word "objects", which now appears in Criminal Rule 17.

JUDGE DOBIE: I don't think there is much to that, do you?

THE CHAIRMAN: What do we mean by "tangible things"?

JUDGE DOBIE: Things that you can touch, that are concrete.

JUDGE DONWORTH: A gun.

THE CHAIRMAN: A ladder, a gun, or a broken rope.

JUDGE DOBIE: "Shoes, and ships, and sealing wax, and cabbages and kings."

THE CHAIRMAN: Let's pass 45 unless somebody has some criticism of the term "tangible things".

MR. DODGE: You might say "other tangible things" to get away from his difficulty.

THE CHAIRMAN: You get to the rule of sui generis. Is that what I am thinking about?

MR. DODGE: I shouldn't think so. We use the words "objects or tangible things" in Rule 34.

JUDGE DOBIE: That is broad enough.

THE CHAIRMAN: "photographs, objects or tangible things". Does anybody make a motion to amend 45?

JUDGE DOBIE: I move we leave it as it is.

THE CHAIRMAN: If there is not a motion to amend, we will pass it.

SENATOR PEPPER: Does that mean as it is or as proposed?

THE CHAIRMAN: When I say as is, I mean as is in the Second Preliminary Draft.

SENATOR PEPPER: Yes.

THE CHAIRMAN: How about (d)? Is there any question about 45(d)?

JUDGE CLARK: We have some suggestions from the

lawyers on the supplementary sheet. The New York County Lawyers' Association makes a suggestion, previously advanced by others, that Rule 45(d) be amended to permit the issuance of a subpoena before the giving of notice, which, it is claimed, now tips off a hostile witness to remain beyond the reach of the subpoena. The Committee considered this proposal at the January 1945 meeting and rejected it.

THE CHAIRMAN: We have some peculiar language here. It doesn't say that the subpoena shall be issued only on proof of service and notice. It says proof of service of the notice constitutes sufficient notification to the clerk. It doesn't say that is the exclusive authorization, that something else can't do it. That is without any order by the court.

JUDGE DOBIE: Without any order by the court.

THE CHAIRMAN: The judge could direct a subpoena to be issued before the notice was served, if he wanted to.

PROFESSOR SUNDERLAND: We have been basing some of those rules of procedure on the commencement of the suit in order to get a definite point from which to count. In the case of multiple parties, if you have got to wait to get your subpoena until you serve all your multiple parties, you are going greatly to slow up the procedure. Frequently you can't get a witness at all. He can get away from you if you have to make service on all your parties. I wonder whether (d)(1) should not read, "Proof of commencement of the action constitutes

sufficient authorization", so you could get out your subpoena and hold your witness as soon as you commence your action. You don't have to wait until you have made action on all the other parties.

JUDGE DOBIE: Does 30(a) require you to serve all parties?

PROFESSOR SUNDERLAND: Yes.

THE CHAIRMAN: Certainly I should think the rule should not need change because it already permits the judge to issue an order to permit issuance of a subpoena before the service of the notice of taking deposition. That is one way of solving it. The other is your proposal to change the wording.

PROFESSOR SUNDERLAND: I don't see why it would not be all right just to permit counting from commencement. Why put another period of waiting after that?

THE CHAIRMAN: All the lawyers have a right to get a subpoena issued any time they ask for it, anyway, without any showing of necessity for it or anything of that kind. It is just a formal act.

PROFESSOR SUNDERLAND: You have to show the clerk before you get the subpoena.

THE CHAIRMAN: That you have a lawsuit.

PROFESSOR SUNDERLAND: That you have done something. It seems to me it is enough to show you have commenced a suit.

THE CHAIRMAN: When you file your complaint, that is the commencement of the suit.

PROFESSOR SUNDERLAND: That is the commencement of the suit.

THE CHAIRMAN: If you mean it that way. Do you?

PROFESSOR SUNDERLAND: That is what I mean, and not wait until you have made service on all the parties.

THE CHAIRMAN: Not wait until you have made service of notice of taking deposition on all the parties.

PROFESSOR SUNDERLAND: Yes.

MR. LEMANN: I don't think this has given any trouble in practice. At least, I haven't heard of any myself. We have had practically no suggestions for change, except the suggestion that a witness might be spirited away.

JUDGE CLARK: There have been quite a few suggestions. I gave you the one of the New York County Lawyers' Association. You will see on page 60 of the general summary the California State Bar Association and the Los Angeles Bar Association renew a suggestion made earlier.

THE CHAIRMAN: A suggestion along the same lines?

JUDGE CLARK: Yes.

PROFESSOR SUNDERLAND: I don't think the judge would do it in the face of this rule.

JUDGE CLARK: That is what I should suspect. Would you do it if you were a district judge?

JUDGE DOBIE: I would consider the rule. The rule merely says it is authorization for the issuance by the clerk. It doesn't say anything about the judge. Do you mean in this case that the judge must first issue an order for the subpoena?

JUDGE CLARK: No.

JUDGE DOBIE: I think the judge can do it unless you prohibit him.

MR. LEMANN: Where are your suggestions about changing the subpoena? I don't see anything on page 60 about it. You said you had a number of suggestions on this point we are talking about.

JUDGE CLARK: Page 60, the last paragraph.

JUDGE DOBIE: That the rule be amended to permit the issuance of a subpoena before the giving of notice.

MR. LEMANN: We considered this at the January 1945 meeting and rjected it, and I see in your supplemental memorandum you have another reference from the New York County Lawyers' Association.

THE CHAIRMAN: You see, we are chewing that rule up. It isn't a case of marring a clean rule by amendment. We are chewing it up anyway. If it is necessary to notify all the adverse parties that you are going to take a deposition in certain instances before we slam a subpoena on him, I can see where there is a really serious objection to that in many cases.

JUDGE DOBIE: The witness would get away.

MR. LEMANN: They haven't given anything that I can see, except these two comments, which are not based upon actual experience, apparently, but are just fears that it might happen.

THE CHAIRMAN: I don't know whether they are based on actual experience or not. Maybe somebody has run into that situation.

PROFESSOR SUNDERLAND: Rule 45(d) as at present reads: "Proof of service of a notice to take a deposition as provided in Rules 30(a) and 31(a) constitutes a sufficient authorization for the issuance ... of subpoenas".

Rule 30(a) provides: "A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action."

So, if you observe 30, you can't get a subpoena until you give notice to every party.

MR. LEMANN: Can't you give that notice by mailing, and then just make an affidavit that you have mailed it? How hard is that?

PROFESSOR SUNDERLAND: Can you mail it before you have gotten jurisdiction over those parties to have it effective? You haven't got any jurisdiction over them at all.

MR. LEMANN: Suppose you are going to take a deposition immediately, haven't you put in a restriction here, as far as the plaintiff is concerned, that he can't do it without leave of court?

PROFESSOR SUNDERLAND: Within the 20 days.

MR. LEMANN: That is right. The defendant wants to take it immediately, so he puts it in the mail. Since he is the defendant, I don't suppose he has a lot of plaintiffs. He might have a lot of plaintiffs, but it wouldn't be very likely. It seems to me to be rather a fine-spun difficulty.

PROFESSOR SUNDERLAND: Can he put a notice in the mail and have it effective before he has any jurisdiction over those parties? I shouldn't think so.

MR. LEMANN: You mean over the witness?

PROFESSOR SUNDERLAND: Over the defendants.

MR. LEMANN: Who are you, the plaintiff or the defendant?

PROFESSOR SUNDERLAND: Suppose we have a dozen defendants?

MR. LEMANN: All right, you are the plaintiff. You can't take any deposition for 20 days without an order of the court, can you?

PROFESSOR SUNDERLAND: No, and I want to get an order of the court.

MR. LEMANN: All right, you go and get an order.

PROFESSOR SUNDERLAND: I get an order.

MR. LEMANN: You have to serve it.

PROFESSOR SUNDERLAND: Now I need a subpoena to hold my witness.

MR. LEMANN: You get an order of court to take the deposition. The judge thinks you ought to have it before the 20 days are up even though you haven't served the summons. You say, "Judge I am in a great rush now to get this." You have to go out there and get an order from the judge to do it, and he agrees that you should have it.

PROFESSOR SUNDERLAND: I get an order.

MR. LEMANN: I think when you go out to get your order it would be very easy, if you have a lot of defendants, to mail a notice to all the defendants. You have to give them a little notice to get around there. I suppose you have to give them forty-eight hours' notice.

PROFESSOR SUNDERLAND: I don't see how his mailing the notice would be effective.

THE CHAIRMAN: It is the notice of taking of the deposition that he is talking about.

MR. LEMANN: Yes. I understand you can give it by mail.

PROFESSOR SUNDERLAND: Mailing a notice to a person who never gets it is enough, do you think?

MR. LEMANN: What is your requirement about giving a notice?

MR. DODGE: Page 6 of the old rules.

JUDGE DONWORTH: I don't believe that service by mail is legal unless the rules expressly provide for it, and

I don't recall any such provision.

MR. DODGE: Yes, they do; Rule 5(b).

MR. LEMANN: I know I have done it. I thought I was doing it right.

MR. DODGE: Service shall be made by delivering a copy or mailing it. It is also provided there that wherever notice is called for, notice need not be given to parties in default for failure to appear.

PROFESSOR SUNDERLAND: That wouldn't be this case because we haven't served any summons on them.

THE CHAIRMAN: If it is served by mail, don't you have to give them longer notice? Where is that provision?

MR. HAMMOND: Rule 6(e), on page 8.

MR. DODGE: Where some action is called for by the other party.

THE CHAIRMAN: He has to give him 3 days' more notice if it is mailed.

MR. DODGE: If it calls for any action by him.

MR. LEMANN: You don't think that applies to notice of deposition. I shouldn't think so. We have had nobody come up and say that this thing has given trouble. Even if mail notice is not sufficient, it could give trouble only where you have plenty of defendants and you are unable to give them all notice in time.

PROFESSOR SUNDERLAND: You see, heretofore we have

had the time for taking depositions deferred until after jurisdiction has been obtained over some of the parties. We have had that delay in our rule heretofore. Now we are getting rid of that and are putting on more speed.

MR. LEMANN: You have a 20-day limit.

PROFESSOR SUNDERLAND: Yes.

MR. LEMANN: That isn't so fast.

THE CHAIRMAN: I thought the trouble here was not in the detail, the matter of service of numbers of parties and all that, which may be a factor in it, but the naked fact that you can't get a subpoena from the clerk to serve on a witness until you have notified the adverse party that you are going to take the witness' testimony.

PROFESSOR SUNDERLAND: That is true.

THE CHAIRMAN: That is the point.

PROFESSOR SUNDERLAND: That is the point.

THE CHAIRMAN: You have to make service and notify him, and you have to name the witness in your notice.

PROFESSOR SUNDERLAND: Yes.

THE CHAIRMAN: Then you hop to the clerk's office. The party knows you are going to take this fellow's testimony if you can get him, and he tips him off or let's him hop a train or something. By the time you have gone to the clerk's office and have gotten your subpoena and have gotten it into the hands of somebody for service, the fellow cannot be found.

That is the objection the bar associations make. I don't see any way of curing it. There is a question of whether or not there is substance to it, whether or not it happens often enough to change the rule.

PROFESSOR MOORE: Counsel could avoid that by serving notice by mail. As soon as he has served his notice by mail, he makes an affidavit, takes it up to the clerk's office, and that is proof of service of notice.

THE CHAIRMAN: The fellow hasn't gotten the notice yet.

PROFESSOR MOORE: You have made service when you mail it.

MR. LEMANN: You just make an affidavit that you have given it. I never have had any trouble getting it.

JUDGE DOBIE: That is proof of service.

MR. LEMANN: That is proof of service, and the clerk issues the subpoena right away.

MR. DODGE: And summons the witness before the notice is received.

PROFESSOR CHERRY: Is this question ever going to come up except where you are getting an order of court permitting you to take a deposition?

THE CHAIRMAN: Oh, yes, it comes up every time when you serve notice to take a deposition. You notify your adversary--

PROFESSOR CHERRY [Interposing]: No, I mean the precise difficulty that is involved here. You are talking about the case where you have a man who is about to get away from you.

THE CHAIRMAN: That is the point. You always have it.

PROFESSOR CHERRY: In the situation where you have to apply to the court for the order to permit you to take the deposition, he could also authorize the subpoena. Wouldn't that take care of the only really difficult situation?

THE CHAIRMAN: No. It is a mistake to assume that this difficulty arises only in the first twenty days of the case. It may happen six months after the suit started, and the process is served, summons are served, and the answer is in. Then you want to take a deposition of a witness and serve notice on your adversary that you are going to take it, with the name and everything.

JUDGE DOBIE: They say the giving of the notice tips off the hostile witness, Bill.

THE CHAIRMAN: That is it.

JUDGE DOBIE: You don't have to give notice to the person. You can give notice to the parties to the cause, and then get the subpoena for the witness?

THE CHAIRMAN: That is right.

JUDGE DOBIE: So, mailing the notice wouldn't necessarily tip off the hostile witness at all.

THE CHAIRMAN: Of course, it wouldn't necessarily,

unless the hostile defendant tips him off.

JUDGE DOBIE: I believe, as Cherry says, we are raising a bugaboo here.

PROFESSOR CHERRY: I think service by mail does the trick, if that is the situation after the suit had got going and the 20 days had gone by.

MR. LEMANN: My point generally is that if we were writing the rules all over again, we might try to get another form of expression, although I imagine this also was taken from some other code. Now that we are undertaking to make only important changes, I should not think that the mere suggestion of two bar committees that this might happen would be justification to make a further change, even though you are amending the rule otherwise.

JUDGE DOBIE: I move to leave it as it is.

THE CHAIRMAN: If there is no objection, it is agreed to.

JUDGE CLARK: That is all on that rule. The next rule we had in order was Rule 50. We had somebody who wanted us to do something new on Rule 49. That is in our second summary on page 20. That is a rule we haven't touched before. Mr. Jones, of St. Louis, urges that "if the jury cannot agree on an answer to any one or more interrogatories submitted to them under Rule 49(a), they should ... be permitted to so state and then proceed to answer such of the other

interrogatories on which they are able to agree on an answer thereto".

SENATOR PEPPER: Where are you reading, Mr. Reporter?

JUDGE CLARK: Page 20 in the supplementary report, this typewritten supplementary report.

JUDGE DOBIE: I think the answer is in the last line. Certainly the judge could tell them. They say, "We can't answer questions one and two," and the judge says, "Go ahead and answer three and four, then," if that will be determinative in the case. I don't see why you need to put anything in there about that.

JUDGE CLARK: I don't see why it can't be done. His suggestion, of course, is that it was not done in his case. He lost out. He had the case.

JUDGE DOBIE: The jury answered two in the affirmative, disagreed on the third and were discharged without determining the fourth. I don't see why the judge can't tell them to answer the others. You don't need any rule for that, as I see it.

MR. DODGE: The trial judge made a mistake in not getting an answer to question four.

JUDGE DOBIE: Certainly he did. Jones ought to have said to him, "Your Honor, if the jury can't answer questions two and three, they probably can answer four. Get them to answer it. Send them back out again to confer."

THE CHAIRMAN: It is a question of whether our rule is so worded as to require answers on each of them or no answer at all.

JUDGE DONWORTH: What does the Reporter recommend?

JUDGE CLARK: We didn't recommend anything. We thought it was probably covered. Don't you think it would be, Judge Donworth?

JUDGE DONWORTH: I would have thought so, and yet as long as the point has been raised, it is possible that there should be something of that kind because I suppose it is claimed that the jury have disagreed unless they have answered all of the questions, and perhaps the court could dispose of the case without an answer to those. It seems to me it might be well to cover it. I don't know.

THE CHAIRMAN: If the dourt had said, "Gentlemen, have you agreed on all the questions?" and they replied, "No, we have agreed on three of them, but we can't agree on the other," I don't think there is any doubt in Rule 49 that the court could have said, "Well, I will take your report on the three and discharge you and decide later what effect that is going to have on the case." I have read that rule over carefully, and there is no explicit statement that the answer shall be rejected unless it covers every question submitted. I think the court could do that, and I think he ought to do it. The trouble with that lawyer was that he didn't ask the court

to do it.

SENATOR PEPPER: In this case, as I understand it, there were four interrogatories. The lawyer in question would have won if any one of them had been answered in the negative. Two were answered in the affirmative. That didn't help him. On the third there was disagreement. That didn't help him. And he failed to ask the court to elicit an answer from the jury to the fourth question, which they had never given. That is where he slipped up, I should think, because the rule clearly says that "the court shall direct the jury both to make written answers and to render a general verdict." All he had to do, having directed them to answer four interrogatories and they having answered only three, was to call on them to answer the fourth.

THE CHAIRMAN: There is nothing in the rule that forbids a judge from doing that. He ought to do it.

JUDGE DOBIE: I don't see why you need to rephrase the rule to cover a situation like that. I know Mr. Jones. He is a very well-known personal injury lawyer.

SENATOR PEPPER: Jones was asleep at the switch.

JUDGE DOBIE: Every time one lawyer has a case which gives him a little trouble in any of the rules, he feels it is a matter which should be corrected by amendment to the rules.

THE CHAIRMAN: The Reporter agrees with me. It would seem that under the rule now stated the court could

have secured an answer.

JUDGE DOBIE: Of course it could.

THE CHAIRMAN: Let's pass on unless there is some objection.

PROFESSOR SUNDERLAND: It is a common enough practice in a number of states. I don't think any statute covers this point.

JUDGE CLARK: On Rule 50(b) we have had various comments. Some people have approved it. Mr. Walter Armstrong says, "The Committee has now further clarified and bettered the practice ..." Mr. Armstrong does reiterate his claim of need for more time. He usually asks for that or suggests that. He says that 10 days is insufficient time. He advocates a period of 30 days. As we point out here, numerous state procedures have the same or shorter time limits, as for motions for new trials, and at the foot of our page 61 we refer to various state statutes: 10 days, 6 days, 4 days, and so on. I think we have considered this before, so we suggest no change as to time. There are various other suggestions that I want to go into, but on the time matter we suggest no change.

MR. DODGE: Isn't it entirely possible for him to file his motion in 10 days and then wait before arguing it until he can get the transcript?

JUDGE CLARK: Oh, yes.

MR. DODGE: It is the easiest kind of motion to file

within 10 days.

JUDGE DONWORTH: What rule is that under?

JUDGE CLARK: Rule 50(b).

JUDGE DOBIE: Charlie, in the Hallibut? case we followed your case and directed judgment for the defendant without sending it back. I hope that goes to the Supreme Court and they pass on it.

JUDGE CLARK: Shall I go on, then, if there is nothing here?

THE CHAIRMAN: Yes.

JUDGE CLARK: On the matter of formulation of wording here, it is interesting that some people still want the fiction retained. They think that it is safe, and one lawyer thinks it is a good suggestion to the judge.

SENATOR PEPPER: What is that they want retained?

JUDGE CLARK: The fiction that we used originally to get away from the Slocum case.

THE CHAIRMAN: That the court will be deemed to have reserved the question. I am not worrying about the safety after all that has happened. If the Supreme Court adopts our suggestion, wipes the fiction out, and takes a flatfooted position in this rule, I can't imagine it turning around the next day and holding that what they did was unconstitutional.

JUDGE CLARK: I think we have done all right on that. I am going to come to some verbal suggestions that

Mr. Youngquist has made, but before I come to that I think I had better take up some other suggestions.

THE CHAIRMAN: Is it the supplemental report that you are dealing with now,

JUDGE CLARK: Yes. The Chicago Bar Association renews the suggestion that a party should be permitted to move, after verdict, for a judgment notwithstanding the verdict without having made a motion for a directed verdict at the close of all the evidence. We point out that this was discussed before and rejected.

THE CHAIRMAN: That would be a very, very fundamental and radical thing. We might get into constitutional difficulties there.

JUDGE CLARK: I will pass to the next suggestion on the same page. They suggest that the rule should also cover the situation where the verdict of the jury is in favor of the plaintiff.

THE CHAIRMAN: You are not reading from this report, are you? I can't find any such language.

JUDGE CLARK: Rule 50, page 21.

THE CHAIRMAN: I have that before me.

JUDGE CLARK: I am dealing with the long paragraph. This is with regard to Rule 50, lines 50 to 73, pages 55 and 56 of the Second Draft. The Chicago Bar Association suggests that the rule should also cover the situation where the verdict

is in favor of the plaintiff (or defendant) and a motion by the defendant (or plaintiff) for judgment notwithstanding the verdict is granted. The Association asserts that there is no provision which will allow the losing party to make a motion for a new trial upon which conditional action may be taken by the court pending appeal from the judgment n.o.v., and that the party must either seek an outright new trial and abandon appeal, or appeal from the judgment n.o.v. and abandon any effort to seek a new trial. The Association believes that the losing party "should have the right to move conditionally for a new trial or at least the rule should be so framed as to give the appellate court power to consider the new trial question on appeal from the judgment, where it is of the opinion that there was no error in entering judgment ... notwithstanding the verdict."

We point out that this was also considered by us. We raise the question, which may not be important, that the suggestion of the Association seems beyond the Committee's province in so far as the suggestion relates to the power of appellate courts, but that, of course, may be too strong. We have done quite a little on the possibility.

MR. DODGE: Isn't the plaintiff protected in a case like that? If the judge sets aside the verdict and enters his judgment, doesn't that start the running of the time for the filing of a motion for new trial?

JUDGE CLARK: Of course, this is a very narrow issue. I suppose there is the technical point that you haven't covered everything, but it is likely not to happen very often. You move for a new trial, and then I suppose their theory is that if that is denied, your appeal is only from that.

JUDGE DOBIE: Don't you think the appellate court would have the power to send it back for a new trial where motion for judgment ought not to have been granted and it ought to be tried?

JUDGE CLARK: How would you then take advantage of the original jury verdict in your favor? You see, the jury verdict was originally in your favor.

JUDGE DOBIE: And then set aside on the n.o.v.

JUDGE CLARK: Yes. Then what shall you do? If you appeal directly from there, the claim is that you then limit yourself to getting either the verdict of the jury or none at all, that you don't then get a chance to claim a new trial. Then supposedly you have lost the chance to the claim that you should hang on to your jury verdict.

MR. LEMANN: The plaintiff would ordinarily appeal, I should suppose.

JUDGE CLARK: I should think that he would.

MR. LEMANN: The defendant has a judgment n.o.v., and the plaintiff has a jury verdict. I suppose the plaintiff would then appeal. When it gets to the upper court, the upper

court could conceivably affirm the judgment n.o.v., in which event the plaintiff would be out of business anyhow, or they could say that the jury verdict shall stand, which would give the plaintiff all that he wants, or couldn't they send it back for a new trial, as Judge Dobie suggests, without the plaintiff having made an alternative motion?

SENATOR PEPPER: As I understood it, the case the Association was most worried about was the case of a losing party who makes a motion for a new trial upon which some conditional action is taken pending the disposition of an appeal from a judgment n.o.v.

JUDGE CLARK: The suggestion is to provide a procedure for making a conditional action, on the theory that there is no such procedure now.

THE CHAIRMAN: When you say "losing party," I can't make out from the statement whether that refers to the one who lost the verdict or who lost the motion for judgment notwithstanding the verdict.

JUDGE DOBIE: The one who lost the motion n.o.v.

THE CHAIRMAN: It doesn't say so. Is it the party who has lost the motion?

JUDGE CLARK: That is correct.

JUDGE DOBIE: I believe the appellate court would have now in all those cases to send it back. If it hasn't, I am like Charlie; I doubt that we have the right to give them

any power. We can provide what should be done in the lower court, but we can't prescribe what the effect of that is going to be in the upper court.

THE CHAIRMAN: If he takes an appeal and wins it---

JUDGE CLARK: If he takes an appeal and wins.

THE CHAIRMAN: ---he has his verdict. That is all right.

JUDGE CLARK: That is the point they are making, about the case you put.

MR. DODGE: Isn't there a gap there? Suppose the plaintiff thinks he has made out a case to the jury after the verdict has been set aside and judgment ordered. He has 10 days after that has been set aside in which to file a motion. He says, "I think I have made out a case for the jury as it was and can win on appeal, but in any event I have this newly discovered evidence," and he files a motion without waiving his appeal based on the newly discovered evidence.

SENATOR PEPPER: That is a motion for new trial.

MR. DODGE: Motion for new trial. Why shouldn't that be held open until the motion for appeal is disposed of?

JUDGE CLARK: Do you think that on appeal, without any provision, the appellate court could now order a new trial?

MR. DODGE: Not on the ground of newly discovered evidence, which was the basis for it.

JUDGE DONWORTH: Of course, it is fairly complicated,

but we recognize that a judge has the right in his discretion to grant a new trial even though the evidence is conflicting, if in his judgment he thinks that a new trial is proper, and we don't want to deprive the judge of that power. I don't mean to imply that we are taking that away, but the general discretionary power of the judge to grant a new trial should not be taken away. Is there anything in what I am saying, Mr. Reporter?

JUDGE CLARK: Yes, although I don't know that it is quite fair to say that you are taking away anything. This is all sort of adding to the powers in the first place. This is a little place that isn't completely covered. That is about the gist of it.

MR. LEMANN: It would be a very unusual case, would it not?

JUDGE CLARK: I should think it would be very unusual.

MR. LEMANN: A fellow has a case before the jury, and the jury has brought in a verdict. The judge says, "Notwithstanding that, I think the defendant is entitled to judgment. I should not have let the case go to the jury to begin with. So, I am going to give judgment for the defendant."

The plaintiff says, "I want to appeal, but I have some new evidence. I think I had enough to begin with, but I have some new evidence, and if I can't make this jury verdict stand, I want a new trial on that new evidence."

The suggestion is that we haven't got that case

covered. Is that right, Mr. Dodge?

MR. DODGE: I understand that is the complaint.

MR. LEMANN: I suppose that would be not a very frequent occurrence.

JUDGE CLARK: I don't suppose, Monte, that this idea is limited to a new trial for newly discovered evidence.

MR. LEMANN: No.

JUDGE CLARK: It could be a new trial for any kind.

JUDGE DOBIE: That is the stock case, a new trial for supervening grounds.

PROFESSOR MOORE: It seems to me that is covered over in 59(b). As soon as the judge enters a judgment n.o.v. for the defendant, the plaintiff can then move for a new trial within 10 days.

MR. LEMANN: But he wants to appeal. He doesn't want to acquiesce. He wants to appeal. The point is that he would rather appeal and stand on that jury verdict than to have a new trial. He doesn't want a new trial unless he loses on the appeal. The thought is that then he might be too late to get it or couldn't get it. He says, "I think this case was tried properly and that the jury was right. Your Honor, you are wrong in giving a judgment n.o.v., and I am going to appeal, but I would like to keep a second string to my bow and I would like to say that if it should be held that, on the evidence originally submitted to the jury, judgment properly should have

been entered for the defendant, then and in that event I want a new trial."

Rule 59 wouldn't cover that, would it, Mr. Moore?

PROFESSOR MOORE: No. He would have to make a motion for new trial.

MR. LEMANN: It would cover it all right if the plaintiff said, "Well, Judge, I guess you are right on the case made up to the jury, you are right that judgment should go for the defendant, but I want a new trial." He can do that. Then if the judge refused a new trial, I suppose he could appeal. He would be appealing then, I guess, from the judgment denying a new trial.

PROFESSOR MOORE: He doesn't have anything to appeal on.

THE CHAIRMAN: He lost his verdict, though.

MR. LEMANN: He has lost his verdict. That is theoretically possible. I think that this case might arise.

THE CHAIRMAN: I wonder how this ingenious fellow figured this all out. Did he have a case?

MR. LEMANN: I think they just discuss these in vacuo just as we do, as intellectual dialecticism. You say we considered this once before and voted it down?

THE CHAIRMAN: Yes.

MR. LEMANN: Maybe we can get some light.

MR. DODGE: Did we discuss this exact point? I don't

remember it.

THE CHAIRMAN: It doesn't make any impression on my mind as anything I have ever heard about before. Maybe we just slopped over it last time without thinking what it was.

JUDGE CLARK: I can't tell at the moment whether we discussed it or not.

SENATOR PEPPER: I have a strong impression that we did. I seem to remember the dilemma of one who wants to appeal from the refusal to grant a new trial, confronted with the consequences that will overtake him because he has lost his verdict.

THE CHAIRMAN: That is a situation that has existed ever since judges started granting judgments notwithstanding the verdict, isn't it? All these years have gone by, and nobody has ever complained about that. I had verdicts directed in my favor and against me fifty years ago and motions for judgment made afterwards, and no question about this kind of rigmarole ever arose. There never has been a day, as far as we know, that this motion for judgment notwithstanding the verdict might not produce this situation in the last hundred years.

DEAN MORGAN: That is right.

THE CHAIRMAN: So, we are faced now with the suggestion that we cure an evil that has existed for a hundred years, and nobody has ever suffered from it as nearly as I can make

out.

JUDGE CLARK: I guess this came from a state rule. When we had it before, it wasn't as extensive as now. It was the Chicago Bar Association Committee before, at our meeting in 1945. "It is also suggested that consideration be given an Illinois State Supreme Court rule that when the appellate court reverses a judgment n.o.v., it shall have the power and shall be required to determine the validity of the ruling on the alternative motion for a new trial."

THE CHAIRMAN: That isn't this case. That is the familiar case that Roberts' opinion covered. We have dealt with that, but that isn't this case. It is where the fellow who has lost his verdict loses his motion for judgment. That is the case. Here it is the case where the fellow who won the verdict loses the motion for judgment.

JUDGE CLARK: No.

DEAN MORGAN: The plaintiff wants it in the alternative, doesn't he?

JUDGE CLARK: Yes. This is the Illinois State Supreme Court rule that when the upper court reverses a judgment which has been granted n.o.v., it shall then go on and rule on the question of a new trial.

MR. DODGE: That is on the defendant's motion.

DEAN MORGAN: That is on the defendant's motion then.

JUDGE CLARK: Why not? That is this situation.

DEAN MORGAN: But is the plaintiff going to make a motion for new trial? Until he is sure that he has lost his verdict, he doesn't want a motion for a new trial. When he is confronted with this, does he always have to make a conditional motion for a new trial?

MR. DODGE: Why can't he do that? It may well be a hardship on the plaintiff if he can't say, "Conditionally, depending on the outcome of my appeal, I ask for a new trial."

SENATOR PEPPER: That is what they want to do.

MR. DODGE: That is what I think they ought to have a right to do, don't you, Eddie?

DEAN MORGAN: I should think so.

MR. DODGE: The plaintiff is in a tough position.

JUDGE DONWORTH: I have a vague notion that I have seen decisions where the trial court in granting the motion non obstante has said, "If this judgment that I am now rendering for the defendant is reversed, then I grant a new trial."

DEAN MORGAN: He can do that all right, Judge, but suppose the plaintiff has not moved for a new trial, suppose the court has kept out some evidence, suppose that if that evidence had gone in, he might have had a case for the jury, and the judge grants judgment notwithstanding.

MR. DODGE: The error in ruling on the evidence would be opened on the plaintiff's appeal.

DEAN MORGAN: Yes. But if the plaintiff loses out

on his appeal but has ground for a new trial, why shouldn't he have a right to present it there?

JUDGE DONWORTH: The judge can take care of that, I think. I think they do take care of that by a proper order.

JUDGE CLARK: The appellate court, you mean?

JUDGE DONWORTH: The trial judge.

MR. DODGE: I don't see how the appellate court can take care of that.

THE CHAIRMAN: The time has gone by in our rules for making motion on the ground of newly discovered evidence. When the case gets back to the district court, you are in trouble unless you have made it before it went up.

MR. DODGE: Of course, the plaintiff can waive his appeal and file an absolute motion for new trial. I think he should have the right to insist on his appeal, but conditionally to move for a new trial.

DEAN MORGAN: He has to make his motion for a new trial within 10 days.

MR. DODGE: Within 10 days after the judgment is entered.

DEAN MORGAN: Judgmemt notwithstanding, yes.

MR. LEMANN: Do you think it is clear that when you get in the upper court the plaintiff could not say to the appellate judges, without having appealed or filed a motion below--I don't see how he could cross-appeal. The plaintiff

would appeal. He would not be taking a cross-appeal because the defendant has gotten the judgment. When he gets to the court of appeals, the plaintiff's lawyer says to the court, "I think this case properly went to the jury, and I don't think you ought to maintain this judgment n.o.v.; but if you should dispute me about that, I call your attention to the fact that the record shows that I offered some evidence that the trial court erroneously excluded, and I think, Your Honors, if you are going to agree with the trial judge in his judgment n.o.v., you ought to take notice of the error he committed in excluding evidence and you ought to send the case back for new trial and reverse the judgment below."

The appellate court might say, "You didn't say anything to the trial court about that. You didn't ask for a new trial."

You would reply, "I didn't ask for a new trial because I was taking an appeal. I wanted to stand on my verdict. I wanted to preserve my verdict."

JUDGE DONWORTH: Couldn't the Reporter draw some elastic clause?

DEAN MORGAN: The plaintiff is appealing here, is he?

JUDGE DONWORTH: Could you not draw a clause to the effect that the appellate court shall have the power to deal with a matter affecting the judgment or a motion for new trial as may be in accordance with justice, or something of that kind?

JUDGE CLARK: You know, I think in general that would be rather nice to do, but that is the thing we tried to avoid, perhaps halfheartedly. We have avoided saying what an appellate court could do, on the ground that these were district court rules. You think we now should break over and give the appellate court direct advice.

MR. LEMANN: Don't you think the appellate court would send the case back if there was a manifest error in excluding evidence and would say, "We reverse the judgment n.o.v. and send the case back for new trial because the trial court committed some errors"?

JUDGE CLARK: I should have thought that the appellate court would have power to do either way.

DEAN MORGAN: Suppose you have newly discovered evidence.

MR. LEMANN: Newly discovered evidence would be more difficult.

MR. DODGE: You remember that despite the exclusion, wrongly, of evidence offered by the plaintiff, the jury has found for the plaintiff, and the only question before the appellate court is whether upon the evidence that was introduced that was a proper action by the trial court.

DEAN MORGAN: Yes, but if you already have assigned the other error, if that was what kept you from going to the jury, obviously you could show that error had an effect upon

the result that the trial court reached, so it was a prejudicial error. You could do that. However, the newly discovered evidence is the thing that bothers me. Suppose it is newly discovered evidence.

JUDGE DOBIE: You can't do that in the appellate court.

MR. LEMANN: You would file an affidavit in the appellate court.

DEAN MORGAN: I don't think so.

MR. LEMANN: Do the books show that any case of this sort has ever arisen, gentlemen?

JUDGE CLARK: No.

MR. LEMANN: No case of this sort ever happened. No plaintiff ever got out of luck because of this sad combination of circumstances.

THE CHAIRMAN: This situation was possible long before these rules were adopted, under any system for a judgment notwithstanding the verdict, from time immemorial, and I don't remember having ever heard of a case of that kind before.

DEAN MORGAN: The English practice never had it, so it is from the time the state legislatures began adopting judgment notwithstanding the verdict, not from time immemorial. Under the common law rule, you could not get judgment notwithstanding the verdict, only on new trial. So, you didn't have it in all those old cases.

JUDGE CLARK: It would be a brave district judge now who would grant a judgment notwithstanding the verdict. It is a brave district judge who directs a verdict any more.

THE CHAIRMAN: If a case like this ever arose with this peculiar combination of circumstances and the fellow who had the verdict originally in the district court lost it on a motion for judgment notwithstanding the verdict and at that stage of the case, before taking his appeal, filed a motion for new trial on the ground of newly discovered evidence and made it conditional on his not winning his appeal and asked the judge to lay it over until it was decided, if the judge refused to do that and would have nothing to do with it, and then if the appeal was taken to the circuit court of appeals from the judgment that had been ordered notwithstanding the verdict, if the appeal was lost and he couldn't reinstate his verdict, he could say to the circuit judges, "Here, I had this other point, newly discovered evidence, and made a motion to grant a new trial conditional upon my losing this appeal, and the judge wouldn't rule on it, but it is obvious that equity and justice require that he do so."

I have no doubt that the upper court would say, "We will remand the case. We will affirm the judgment, subject to consideration by the district court of the motion that was made for a new trial."

DEAN MORGAN: You are going to get that error in the

record, you think, assign an error on the refusal of the judge to pass upon the question?

THE CHAIRMAN: Not an error. It isn't an error.

DEAN MORGAN: Then, what is it?

THE CHAIRMAN: Simply show that a situation exists where the upper court could see that it would be a miscarriage of justice not to make an order like that. It is not an appealable error, but it is a situation which gives the court discretion either to let the judgment stand or to grant a new trial. I don't think there would be any difficulty about that sort of situation if a fellow made that motion in the district court before he took his appeal. If the district judge acted on it and accepted the idea, all well and good. If he didn't and the appeal went haywire, the appellant could say, "Look at the fix I am in. I have a real ground for a new trial. I lost my verdict. Instead of affirming the judgment below, you should affirm it subject to the condition that the district court considers and denies the motion for new trial on the ground of newly discovered evidence."

They would do it, beyond question, because you know and I know of cases in the circuit court of appeals where some suggestion has been made to the circuit court, nothing in the appeal record at all, about some newly discovered evidence having come up, something of that kind that justice requires a new trial or consideration by the district court, and the

appellate court takes the bull by the horns and remands the case for further action. I don't see why we need to---

MR. LEMANN: Spell it out.

THE CHAIRMAN: ---to cumber up this rule with a very intricate problem that it would require a half page to state.

MR. LEMANN: Might I ask you if the same problem might arise where the judge does not let the case go to the jury but directs verdict for the defendant at the close of all the evidence? If I lose on that, I may want a new trial. The same problem could arise, couldn't it, in that situation without having a n.o.v. judgment?

THE CHAIRMAN: On newly discovered evidence.

DEAN MORGAN: Not except for newly discovered evidence. That would be the only place.

THE CHAIRMAN: He might on the ground that evidence was wrongly excluded.

DEAN MORGAN: You would have that in your record when you appealed on the directed verdict.

MR. LEMANN: You would have in the other case, too.

DEAN MORGAN: You wouldn't on newly discovered evidence.

MR. LEMANN: At this juncture I am just asking, can't this same point arise on a directed verdict as well as in the situation of a judgment n.o.v.?

DEAN MORGAN: Oh, yes, we have had appeals on that

very often where there was a directed verdict and judgment on it. You have the assignment of error in the directing of the verdict and also in other things that are in the record. That has happened often enough.

THE CHAIRMAN: Could that happen exactly the same? In the case you mention, the fellow who is the plaintiff never did get a verdict, so he hasn't anything to hang on to, don't you see? I think the difference between the case you cite and this one is that the fellow who is in trouble, the plaintiff, in the first case did get the verdict and he wants to reinstate it, but in the case you speak of there never was a verdict and there is nothing to reinstate.

MR. DODGE: He would press his motion first, obviously, and take his appeal up secondarily, but this other case is different.

JUDGE DONWORTH: May I read from matter that I have written up here? I offer this with a good deal of diffidence. Add to the rule the following:

"When in any such case there is a motion for a new trial and also a motion for judgment n.o.v., the action of the district court with respect to such motions, or either of them, shall not impair the power and right of an appellate court to which the case is carried to make such order in the premises with respect to any of said motions as justice may require."

THE CHAIRMAN: That is the first time we have ever

flatfootedly attempted to regulate the practice in the circuit court of appeals. We have done it by innuendo and subterfuge by stating that it shall not be necessary for purposes of review to make certain directives.

JUDGE DONWORTH: I guarded against that. I say that this order shall not prevent the appellate court from making such order with respect to such motions as justice may require. Well, I don't argue this.

THE CHAIRMAN: What is your pleasure, gentlemen? Do you want to try to doctor up this rule to cover this case?

JUDGE DOBIE: I move that we let it stand. I believe it will occur only once in twenty-five years, and we can't provide for everything. I am inclined to think that the appellate court will do what is right there.

MR. DODGE: I don't think this is something that ought to be left and not dealt with at all. I don't feel at all confident that the question never has arisen. I shouldn't feel that confidence unless there had been a thorough examination of the authorities on that point. It is so obvious that not only the plaintiff may not have failed to get some evidence which he discovers shortly after the trial, but through inadvertence or other excusable neglect he has failed to put in something that would have carried him to the jury, he ought to be allowed to preserve the right to ask the court for a new trial, if he is wrong in his confident belief that he was

entitled to go to the jury as it stood. If the mere filing of a motion to that effect is a waiver of his appeal, that is very unjust, because you don't want another trial unless it is necessary. Perhaps there has been a long trial, and the facts are disposed of.

SENATOR PEPPER: That sounds to me like mighty good sense. Suppose, in an appellate court hearing on an appeal by the plaintiff from a judgment notwithstanding the verdict entered against him, the court on appeal thinks that the action of the court below in entering the judgment notwithstanding the verdict was erroneous and reverses, then the plaintiff has the verdict again; but suppose they are of the opinion that really what ought to happen is that there should be a new trial, they are then, on account of the condition in the district court, powerless to order a new trial. Isn't Judge Donworth right in saying the thing to do is to put the record in the district court in such shape that the appellate court would be free to decide either upon the motion n.o.v. or to direct a new trial?

MR. DODGE: Not to direct a new trial, but to send it back.

SENATOR PEPPER: Yes, to send it back to the court below.

MR. DODGE: For action on that motion.

SENATOR PEPPER: To entertain the motion.

THE CHAIRMAN: It all presupposes that the plaintiff

in the case we are dealing with gets the verdict and loses on the motion for judgment notwithstanding the verdict. It all presupposes that before he takes his appeal, he will make the motion for a new trial in the case conditional upon his not succeeding, and I think he can do that anyway. Then the case goes up, and he loses his appeal. He can't reinstate his verdict, and then he yells and says, "I made a motion for new trial on newly discovered evidence to save my rights for another trial conditional upon my losing this appeal, and it is still pending in the district court, undisposed of or wrongly disposed of. You have the power to say whether there shall be judgment notwithstanding the verdict or a new trial. In your discretion under the circumstances you may remand the case affirming the judgment that was rendered below, but subject to the right of the district judge to entertain and pass on this motion for new trial on newly discovered evidence, or finding error and granting a new trial."

MR. DODGE: Do you think our present rule permits that?

THE CHAIRMAN: I can't think of a circuit court or any judge on it that I see around here that would not take the bull by the horns and say, "We will do that. There is this motion down there. This man was put on the horns of a dilemma, and he saved his right as far as he could."

JUDGE DOBIE: There is nothing in our rules for him

to make both those motions, is there?

THE CHAIRMAN: The only motion he makes below is a motion for new trial conditional on losing his appeal. Our rules don't say specifically that you can't make a conditional motion for new trial. They say you can make a motion for new trial.

JUDGE DONWORTH: I had supposed that was unquestioned. You can move for directed verdict non obstante and, in the alternative, if it is denied, for a new trial.

THE CHAIRMAN: Yes, it does that, but this isn't that case. You are not moving for a directed verdict. You got the verdict, and you lost it on a motion for judgment for the other fellow. You want to appeal. You think you can reverse that order of judgment notwithstanding the verdict and reinstate your verdict, so you won't have to have a new trial.

JUDGE DONWORTH: That is true.

THE CHAIRMAN: You are thinking in the back of your head, "Maybe I will lose on my appeal on the record, but then I can easily get a new trial on newly discovered evidence, which will make an entirely different case the next time in my favor, if I can only get it." He wonders how he can get it and take an appeal. It may be that he ought to be required to demand a new trial unconditionally and to forego his right to appeal, and not play fast and loose, coming and going. We all seem to think that maybe he ought to have the right to try to save

his verdict on appeal and then get his motion for a new trial considered if he is entitled to one.

SENATOR PEPPER: The virtue of your suggestion lies in the conditional quality of the motion for the new trial.

THE CHAIRMAN: Yes. The only question in my mind is whether the rules forbid his making such a motion. I don't think they do.

SENATOR PEPPER: That does seem to be the apprehension, doesn't it?

THE CHAIRMAN: That the rules forbid it.

SENATOR PEPPER: This bar association or whoever it is seems to see in the rule something inconsistent with the common-sense course that you and Mr. Dodge relate.

THE CHAIRMAN: They seem to feel that a fellow could not possibly make such a motion for new trial conditional on the judgment notwithstanding being set aside on appeal. I still think there is nothing to forbid an appellate court from injecting itself into the situation on that record, if such a motion had been made, affirming the judgment below, the judgment notwithstanding the verdict, but subject to or conditioned on the right of the district court to consider and pass on the motion for new trial.

DEAN MORGAN: But that motion, according to our rules, must be made within 10 days. On newly discovered evidence it can be made within a year, can it not?

MR. DODGE: Six months.

DEAN MORGAN: Any motion for new trial on the ground of newly discovered evidence can be made within a year, can't it?

THE CHAIRMAN: But the appeal has to be taken in 30 days.

DEAN MORGAN: I am talking about a case where he doesn't have the newly discovered evidence within the 30 days.

THE CHAIRMAN: He has to have it within 10 days in order to make a motion. If he doesn't have the newly discovered evidence until after he has taken his appeal, there is no point to this at all, because then he can take his appeal, and if he sticks to it he probably--

DEAN MORGAN [Interposing]: Then it comes back, and a judgment is entered after the appeal.

THE CHAIRMAN: It is one of those judgments on which relief can be granted to him under 60(b) for newly discovered evidence not discovered within the 10 days required by the motion rule. The fact that the judgment was affirmed by the appellate court---

DEAN MORGAN: That doesn't make any difference.

THE CHAIRMAN: ---doesn't make any difference. That would be my point of view.

DEAN MORGAN: I suppose that is true.

THE CHAIRMAN: Of course, the whole case that we are

talking about is a case where certainly within the 30 days allowed for appeal the fellow discovers the new evidence, because he is not confronted with this problem otherwise.

DEAN MORGAN: If he discovered the misconduct of a juror, that wouldn't do him any good because the jury found in his favor.

SENATOR PEPPER: That won't cover it. What worries me is that if the appellate court simply affirms the judgment of the court below entering judgment notwithstanding the verdict, unless there is something more in the mandate of that court to the district court, the district court is then in the position of having been asked to order a new trial after a judgment has been entered. A motion for new trial precedes the entry of judgment usually.

DEAN MORGAN: Not under these rules.

SENATOR PEPPER: Doesn't it under our federal rules?

THE CHAIRMAN: The judgment is entered forthwith on the verdict for an amount certain.

SENATOR PEPPER: Is it a very different position where the court above has affirmed?

THE CHAIRMAN: I think not.

SENATOR PEPPER: That is what was worrying me.

THE CHAIRMAN: Take Rule 60. Suppose the new evidence has not been discovered until after the appeal is taken, maybe two or three months after. Of course, if that is so, we

are not confronted with this situation at all because there is nothing that can be done in the district court at that stage. He goes up to the court of appeals and loses his appeal. He fails to set aside the judgment notwithstanding the verdict. It is remanded and affirmed. That is a final judgment. Then, under Rule 60(b), the court may relieve a party from a final judgment, and it makes no difference whether it is affirmed by the court or not.

SENATOR PEPPER: I see.

THE CHAIRMAN: "on the following grounds: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)". That is 10 days. If that is the result, I don't see why the upper court would have any difficulty in remanding, affirming the judgment notwithstanding the verdict on the record as it stood, taking note of the fact that there is an undisposed of motion for new trial on the ground of newly discovered evidence pending, which has never been disposed of or which has been denied on some false supposition. I don't see why they can't affirm the judgment, but subject to action of the district court on the motion for new trial.

DEAN MORGAN: What would be the effect of making a motion for new trial on the ground of newly discovered evidence while the case was on appeal? Would the trial judge have any authority to receive a motion of that kind?

THE CHAIRMAN: I should think not.

DEAN MORGAN: Suppose that a year elapses before the affirming judgment comes down. You have no conditional motion for a new trial then, and you can't make another one. You can imagine all sorts of cases if you just let your imagination run.

THE CHAIRMAN: I should think the one-year period in Rule 60 would run from the date of the mandate confirming. I should think it ought to.

DEAN MORGAN: You think the judgment would not be final while it was on appeal?

THE CHAIRMAN: It says, "The motion shall be made within a reasonable time, but in no case more than one year after the judgment, order, or proceeding was entered or taken." It might mean the date of its original entry, and it might mean the date it was affirmed.

MR. LEMANN: It would mean the original entry.

THE CHAIRMAN: I don't want to take any more of your time on this.

MR. LEMANN: Why not leave it to the Reporter to draft a provision to cover it?

THE CHAIRMAN: Speaking of tampering with the rules, there is not any more remote possibility in any consideration than that which we have here.

MR. LEMANN: I would agree with that last suggestion. On the other hand, if anybody thinks that the thing is very

important, I think we ought to ask the Reporter first to draw a sentence and see what it would look like.

THE CHAIRMAN: Somebody ought to draw a clause and recommend it and move it. That is the way to bring it up.

MR. DODGE: I would suggest that one sentence could be framed right at the end of the rule making it plain that nothing in this rule shall prevent the plaintiff from filing a conditional motion for a new trial if the judgment of the lower court is set aside.

THE CHAIRMAN: That only fits the plaintiff's end of it. How about the defendant? Suppose the defendant has won the verdict, and the plaintiff comes along and gets judgment notwithstanding the verdict. You keep visualizing one fellow's case, but it works both ways, as I understand it, doesn't it?

DEAN MORGAN: That is right. Either one could get it.

THE CHAIRMAN: So, your phrase won't work if you are talking about the plaintiff. You have to describe it in terms of the fellow who got the verdict, whether plaintiff or defendant.

MR. LEMANN: Just to get it up, I move that we leave it as it stands on this point.

JUDGE DOBIE: I second that motion.

SENATOR PEPPER: Let's not vote that up merely because we haven't got the right phraseology. If Mr. Dodge substituted "Nothing in these rules shall deprive a party

against whom an appeal from a motion n.o.v. has been decided from pressing a conditional motion for a new trial," it seems to me it would be in pretty good shape, and I don't see why that isn't safe.

THE CHAIRMAN: Another way of doing it would be to go back to your motion for new trial rule and to say, in addition to what you have there, "A motion for new trial may also be made--"

SENATOR PEPPER: "pending an appeal".

THE CHAIRMAN: "--by a person who has an appeal pending", describing the situation; "by a person who has had a verdict in his favor set aside".

JUDGE DONWORTH: Is there anything in this? "In any action where a motion for directed verdict or for judgment n.o.v. is made, either party may make in the district court a conditional motion for new trial conditioned upon the action of the trial court or an appellate court adverse to the party making such conditional motion with respect thereto."

THE CHAIRMAN: That comes closer to it than anything I have heard yet.

JUDGE DONWORTH: Respectfully submitted!

THE CHAIRMAN: Would that go on the motion for new trial rule or in this section here?

JUDGE DONWORTH: That would be a matter of working it out.

SENATOR PEPPER: It is conformable with the Chairman's suggestion that it be an additional provision in connection with the motion for new trial.

JUDGE DONWORTH: I will hand this in in its present rough draft, if desired, to utilize. It may be reworded, of course, but I will read it again

[Judge Donworth reread the suggested provision.]

SENATOR PEPPER: I move that the suggestion of Judge Donworth be accepted in principle and referred to the Reporter with the request that it be embodied either in the rule now under discussion, Rule 50, or as an additional provision in the case of motions for new trial.

DEAN MORGAN: I second the motion.

THE CHAIRMAN: Upon further reflection, I feel myself that my suggestion about putting it in the new trial provision would be a mistake. It would fit in better and be more intelligible if added to Rule 50. The Reporter can use his judgment about submitting a minor revision.

SENATOR PEPPER: Surely.

MR. DODGE: I think it ought to be in Rule 50, plainly. We have a whole paragraph on that question there now.

THE CHAIRMAN: That is what I thought.

[The motion was put to a vote and carried, Judge Dobie and Mr. Lemann dissenting.]

MR. LEMANN: While we are on this great difficulty

that the Chicago Bar Association suggests in this rule, the Reporter says we have voted this down before, too. He says we have previously voted down the suggestion we have just voted up.

DEAN MORGAN: We haven't ever considered this suggestion.

MR. LEMANN: This was another suggestion, the one we just voted.

DEAN MORGAN: I don't think we have ever considered thoroughly the one we just voted on.

MR. LEMANN: I thought the Reporter thought we had.

JUDGE CLARK: I guess that is right. I had the summary statement beforehand. I don't think we discussed it in a meeting.

MR. LEMANN: Now they come in with a point which the Reporter also says we have given considerable thought to, that you should be permitted to make a motion for judgment notwithstanding the fact that you failed to move for directed verdict. They say we are trying to iron out all the technicalities. A fellow might overlook moving for a directed verdict, and that ought not to preclude him from moving for judgment n.o.v. They say:

"We are strongly of the opinion that the right of a party to move to set aside the verdict and for entry of judgment notwithstanding the verdict should not be conditioned upon his having made a motion for directed verdict at the close of

all the evidence. It is conceived that the Advisory Committee of the Supreme Court of the United States is making diligent effort to eliminate from the rules as many technicalities as possible. It appears to us that if the evidence is so insufficient that it will not sustain a verdict, relief upon that ground should be available to the party against whom verdict is rendered, irrespective of whether he made a motion for directed verdict prior to the submission of the case to the jury. To the extent possible, every opportunity should be afforded by the rules to correct errors of the trial court in that court."

THE CHAIRMAN: Monte, a fellow sits tight in court and sees his adversary rest his case and go to the jury with a technical hole in his evidence and says nothing, and the verdict goes for his adversary. Then, after the jury is discharged, he comes in and moves for a judgment notwithstanding the verdict on account of this hole in the evidence. If he had made his motion for directed verdict before the jury was discharged, he would have been bound to disclose to the court what the defect in the proof was, and it would have been corrected immediately. This is just a trap for an unwary fellow to get caught. He makes a slip, forgets some item of proof in his case, and the fellow on the other side sits tight and says nothing. He gets his verdict all right, but the next day he is faced with a motion for judgment notwithstanding the verdict, which is well founded.

DEAN MORGAN: But all he would get is a new trial, because the court won't grant judgment n.o.v. on that.

THE CHAIRMAN: Maybe you are right.

DEAN MORGAN: That is what they all say.

THE CHAIRMAN: Why tamper with the Slocum case and the Redman case?

DEAN MORGAN: You can get a new trial on just that trap. I have two cases in mind where that was done.

JUDGE DONWORTH: Did they get a new trial?

THE CHAIRMAN: I agree to your point. I am raising another one now, and that is the question of whether you come under the Slocum and Redman cases if you even go to the trouble of making a motion for directed verdict.

DEAN MORGAN: That may be going further. Yes, I see. They may very well knock us on that.

THE CHAIRMAN: That is something new entirely. That is giving a judgment by court decision in a jury case where you haven't had--

DEAN MORGAN [Interposing]: That is right. You have that Slocum case.

MR. LEMANN: That may be the answer.

DEAN MORGAN: I guess we had better make haste slowly on this one.

THE CHAIRMAN: We have thrown that overboard anyway.

DEAN MORGAN: I know, but you don't throw over the

Seventh Amendment. All you are throwing over is just the fiction in the Redman case.

THE CHAIRMAN: Is there anything more under 50?

JUDGE CLARK: Yes, if you will turn to page 63 of the original summary. At the top of the page Mr. Longsdorf raises some question about using the words "reversal on appeal", and so on, on the ground that it is a "dangerous venture into appellate jurisdiction". I am going to pass that unless there is some question and go down to Mr. Youngquist's suggestions.

Mr. Youngquist's first suggestion is to omit the words "as an alternative". I think we should retain those. They may not be absolutely necessary, but I think that they are descriptive. We have considered that before.

THE CHAIRMAN: I think that the state statutes say "A motion for new trial in the alternative may be joined with a motion for judgment." I think your verbiage is all right.

JUDGE CLARK: The original rule, line 32, said "in the alternative".

In line 53 Mr. Youngquist suggests substituting "refuse" for "decline". I don't care about that.

DEAN MORGAN: Will you tell me what is the difference?

THE CHAIRMAN: No.

JUDGE CLARK: I don't know.

DEAN MORGAN: If you don't know, does Youngquist know?

JUDGE CLARK: Presumably.

THE CHAIRMAN: Line 53 on page 55 of our printed preliminary draft. There is nothing in that.

JUDGE CLARK: In lines 54 to 55, he suggests substituting "ordering that it be granted or that it be denied" for the proposed words "determining whether it should be granted". We do not recommend this change. If it were made, the word "conditionally" would have to precede the word "ordering".

If you have gotten past that, then we come to one of which we approve.

THE CHAIRMAN: Which is that?

JUDGE CLARK: That is the last one, which begins at the bottom of the page. It is just a change in wording.

DEAN MORGAN: He switched a phrase so that you don't split your verb.

JUDGE CLARK: "In case the district court has refused to rule upon the motion for a new trial when granting the motion for judgment and the judgment is reversed on appeal, the district court shall then dispose", and so on.

DEAN MORGAN: I think that reads more smoothly.

THE CHAIRMAN: I have a note here in pencil, in my own handwriting, and I don't know what it means. "Use the word 'refrain' from ruling upon a motion." Is there anything in it? I can't remember now why I did it.

JUDGE CLARK: Maybe that was a substitute for "decline" or "refuse".

THE CHAIRMAN: I think it was. I didn't like "refuse" any better than "decline", and I thought "refrain" covered both refusal and just an ignoring of the action, no action at all.

JUDGE DOBIE: He does nothing at all. He refrains, but he doesn't decline.

THE CHAIRMAN: But he refrains from granting if he makes an order.

JUDGE DOBIE: "refrain" is a broader word. If he does nothing at all, you can't say that he declines, but he does refrain from passing.

THE CHAIRMAN: That is why I thought "refrain" would be better than "decline" or "refuse".

JUDGE DOBIE: I am inclined to think that is better.

THE CHAIRMAN: That is what struck me as I jotted it down in pencil at the bottom of the page. Do you think that is worth while? I am glad to be told what I had in mind. "If the district court, when granting the motion for judgment refrains from ruling upon the motion for a new trial".

JUDGE CLARK: Shouldn't that be also made in line 53, too? The word "decline" is used there.

JUDGE DOBIE: I think it ought to be uniform. I second that.

JUDGE CLARK: I think it is all right. I suggest that "refrain from ruling" be used in 53 and also that the provision at the end be modified, line 69, but taking the rest

of Mr. Youngquist's suggestion as to 68 to 73 involving the reversal of the clauses.

JUDGE DOBIE: "In case the district court has refrained from ruling upon the motion for a new trial when granting the motion for judgment and the judgment is reversed on appeal, the district court shall then dispose".

JUDGE CLARK: That would be it.

JUDGE DOBIE: I make that motion to bring it before the house.

MR. DODGE: What do you substitute for "decline to rule"?

THE CHAIRMAN: "refrain from ruling".

SENATOR PEPPER: "resists the temptation to rule".

THE CHAIRMAN: That is true, too.

[The motion was put to a vote and carried.]

THE CHAIRMAN: What are we up to? Rule 52? There is nothing on 51, is there?

JUDGE CLARK: No. They are still against having findings. It is said to be a relic of stage coach days. A man writing in the American Bar Association Journal says that. The Chicago Bar Association and others object. I don't really think there is anything new here.

THE CHAIRMAN: We threshed that all out at the last two meetings. We have been unanimous on this thing almost as it stands.

JUDGE DOBIE: He can put them in the opinion.

JUDGE CLARK: There is a gentleman from Boston who wants to substitute "prima facie" for "clearly erroneous". He wrote at some length, citing a statute in Massachusetts on that. I don't know whether he is doing any more than submitting it to Mr. Grinnell's Massachusetts Quarterly or what. He had submitted it.

JUDGE DOBIE: "clearly erroneous" is a stock phrase. I think we should leave it. It is a term of art, don't you think?

THE CHAIRMAN: It is taken from a long series of Supreme Court decisions.

JUDGE DOBIE: That is why I think you had better leave it.

JUDGE CLARK: As a matter of fact, I was a little surprised. This gentleman wrote a long article in the Boston University Law Review and criticized various things that I and others have written. I thought he was going to make a startling change. Then he came out with only this change to make it "prima facie". That wouldn't have any effect on the actual decisions.

MR. DODGE: He cited a six-page statute which didn't seem to bear on your question at all.

DEAN MORGAN: What does anybody mean by prima facie evidence, anyhow? That is what I would like to know.

MR. DODGE: Has this rule caused any trouble with the district judges? Have they raised any points about it?

THE CHAIRMAN: They kick about having to make findings.

JUDGE DOBIE: A lot of them have kicked about that. They have said that if they have an opinion, it wasn't necessary to have findings, too. Frank Caffey was very strong on that.

JUDGE CLARK: The district judges don't like it. I think they like our modification. Our modification seems to give them a little help. It doesn't go as far as they would like to go, but we do say that they can put their findings in their opinion.

JUDGE DOBIE: And need not designate them as such.

JUDGE CLARK: Yes. They think that is helpful.

DEAN MORGAN: The district judges in some parts of the country where they have been used to make findings think it is all right, and the lawyers think it is all right, don't they?

THE CHAIRMAN: Oh, yes.

DEAN MORGAN: New York doesn't like it because they have not been making findings in the federal court, have they?

JUDGE CLARK: Yes. Under the Conformity Act they had a whole lot of state rules about findings. We have a bad system in New York.

MR. LEMANN: This language, "may be incorporated as

a part of the opinion", in line 19, made me wonder if it was a very happy expression where the findings and conclusions are in the opinion. I usually use the expression, "incorporated herein and made a part hereof", when I am talking about something that is not in the first document but which will appear by reference.

JUDGE DOBIE: You think "included" is better?

MR. LEMANN: The other document is "incorporated herein and made a part hereof by reference". I wonder if that is a very happy expression when what you are really talking about is that you can glean the trial judge's findings and conclusions from the opinion. That is what you really mean.

DEAN MORGAN: May be made a part of the opinion.

THE CHAIRMAN: You mean it is not necessary to separate them and label them as findings of fact and stick them in the opinion, but they may be scrambled with the opinion.

MR. LEMANN: I understood that was what some of the cases had held, that the opinion might stand as findings and conclusions. I think there are a number of cases so holding. If you read the opinion, you can see very clearly what the trial judge found as the facts and as the law. He doesn't have to say stylistically, "I make the following findings of fact: 1, 2, 3, and 4."

THE CHAIRMAN: How would you suggest that this be worded so as to avoid the conclusion that he has to be

stylistic about it? "If an opinion or memorandum of decision is filed, the findings of fact and conclusions of law".

MR. LEMANN: "may appear from the opinion or memorandum." "It will be sufficient, if an opinion or memorandum of decision is filed, that the findings of fact and conclusions of law appear from a reading of the opinion or memorandum."

MR. DODGE: How about Mr. Morgan's suggestion, "may be made a part of"?

DEAN MORGAN: "may be made as a part of".

MR. LEMANN: That still might be open to the point that you have to label them as such, and I understood we were sanctioning the practice that you don't have to label them as such.

JUDGE DOBIE: We held the other way in that Carter Coal Co. case, where they were clear, but they wanted that sent back because there were no formal findings of fact. I wrote the opinion in that case.

JUDGE CLARK: I don't know that we have often gone so far as to say that a mere opinion alone would be a substitute for findings. I would be perfectly willing to do it, but that is a thing that we have rather balked at so far, on the theory that the Supreme Court hasn't gone that far. We have been creeping up on it. We can try it directly. Another expression might be "shall be embodied in".

MR. LEMANN: That would be better, perhaps. You have

used the word "incorporated", which means "embodied in".

THE CHAIRMAN: "If an opinion or memorandum of decision is filed, it may contain the findings of fact and conclusions of law."

MR. LEMANN: To make it plain that this is what we want to permit, I would say to change lines 17 to 20 to read as follows: "If an opinion or memorandum of decision is filed, it is sufficient that the findings of fact and conclusions of law appear therefrom" or "therein."

JUDGE CLARK: I think that is a good idea, but I really think that is going somewhat further than we have gone here. If we do it openly and avowedly, maybe it is O.K.

THE CHAIRMAN: Is it your interpretation of the draft now that if you use this method of putting the findings of fact and conclusions of law in the opinion, you have got to state formally in your opinion, "I find the facts to be so, and my conclusions of law are thus and so," or can the court's discussion of the law and his opinion on the facts all be woven together? Which do you mean?

JUDGE CLARK: I had supposed technically it was the former. I use the word "technically" because I think perhaps we had a little hope that nobody would kick if it were only the latter, but if you were really following the rule, you were still doing the former.

THE CHAIRMAN: That is no advantage over what our

present rule is. If you have to draw formal findings of fact and conclusions of law in writing the opinion, embodying the findings of fact and conclusions of law doesn't relieve the judge a bit.

JUDGE DOBIE: I think the rule ought to be very generous, if you can get rid of that technical term. You don't have to label them, "This is a finding of fact," and "This is a conclusion of law," but the appellate court reading the memorandum opinion can glean from that the essential findings of fact and conclusions of law, and that certainly ought to be enough. I am satisfied that is what the district judges want.

DEAN MORGAN: Isn't that going back to the old practice? Didn't they always have to have that much?

JUDGE CLARK: I was just going to say, you understand I would be glad to get rid of the findings, but as I understand the Interstate Circuit case, which is the one they balked on, at about 301 U.S., it was just a case of an opinion containing what could be gleaned as findings, and they said it was insufficient.

MR. LEMANN: What do these cases say? We ought to look at the cases that you have cited on page 59.

SENATOR PEPPER: I have seen a good many opinions which were so skillfully written that you could not tell just what the conclusions of fact were upon which the court was

basing its law.

JUDGE DOBIE: So skillfully or so unskillfully, Senator?

MR. LEMANN: I think we ought to make it plain, if we are going to make this change, just what we mean by this language. If we mean that you have to continue to label findings of fact and conclusions of law and that all you can do is to include them in the body of your opinion, we really haven't made much of a change. This may be misleading.

THE CHAIRMAN: I have the feeling also that what we are doing now is to knuckle down to the objection made by a dozen, fifteen, twenty, or thirty district judges in certain areas of the country, who don't like to be loaded with what they think is the extra work. They aren't accustomed to do this. I don't know how many district judges we have in the country. What is it? About three or four hundred?

MR. LEMANN: There are ninety-two districts. I would say two or three hundred.

THE CHAIRMAN: Two hundred or more. I think I would gamble that three-quarters of them are in areas where the judges have been making findings of fact and conclusions of law since the appeal codes were adopted, and nobody is worried about it and nobody feels overloaded from it. They don't growl and get together among themselves and condone with each other about the terrible job they have got or magnify it.

They just take it for granted. They haven't made any kick about this proposal to embody them in the opinion.

JUDGE DOBIE: Some of them are very elaborate. I know that in one patent case there were seventy-nine. In that Proctor & Gamble case there was a flock of them, you may remember, General. We had an admiralty case in which the judge was sick, in very bad shape, and the proctor for the libelant who won before him drew these findings, which were very exhaustive and very binding. The judge just signed them without a word. He never would have done that in an opinion.

JUDGE CLARK: Of course, we get that right along. We get these long findings that the lawyers have drawn up.

JUDGE DOBIE: A lot of it is nonessential.

DEAN MORGAN: Of course, the findings really ought to cover only the ultimate facts. They ought not to cover evidence.

JUDGE DOBIE: Charlie, in your circuit do the lawyers usually draw them, or do the judges?

JUDGE CLARK: Yes. Of course, we have complained rather strongly about it. Some district judges work hard now, and occasionaly they do their own. Judge Leibell, for example, works very consistently.

JUDGE DOBIE: I know that in one case you criticized the practice of having the lawyers draw them and the judge just approve them.

JUDGE CLARK: I know. Now we have given a chance for the opposing lawyer to object to the findings as being nothing but the lawyer's argument. We had one we were struggling with the other day where Judge Knox just took the lawyer's statements.

JUDGE DOBIE: Sometimes the district judges have asked me what is the difference between findings of fact and conclusions of law. It does impose a heavy burden to define the line between them. I think if they have the stuff in the opinion, that is all you need.

MR. LEMANN: My only real point was to make it plain what we mean by this language. If you use the word "incorporated", as he does in the rule and in the note, I would say that in ordinary language that word "incorporated" would simply mean that you include.

THE CHAIRMAN: You scramble them.

MR. LEMANN: No. I would have said--

THE CHAIRMAN [Interposing]: You agree with the Reporter, then, that all he has done, instead of having a separate document, is to have the findings and conclusions stuck in bodily as a section of the opinion.

MR. LEMANN: Which means nothing, if that is all he has done, you see, and yet, taking the English language as I understand it, I would say that that is all he has done, and that is nothing. If he meant to go beyond that, I think the

language is not clear.

DEAN MORGAN: What does "incorporated" mean? It means made a part of the body of what you are talking about.

MR. DODGE: The words are not "incorporated by reference", but "incorporated".

DEAN MORGAN: If you are talking about incorporation by reference, what does "by reference" mean? Why do you put "by reference" in?

JUDGE DOBIE: That is a separate document, too.

DEAN MORGAN: It doesn't mean that he has to label them as findings of fact or conclusions of law. If he gives an opinion in which he has the findings of fact and conclusions of law set out, it doesn't make any difference whether they are set out in ordinary manner or not.

MR. LEMANN: You don't think if you had just a change in verbiage it would make it any plainer?

MR. DODGE: Read it again. The way you had it, I thought it was very good.

SENATOR PEPPER: If that is true, I think it should appear, instead of as a separate statement at the end of the rule, embodied in the first sentence of (a): "the court, either in a separate document or in the course of a memorandum opinion, shall find the facts specially and state separately its conclusions of law thereon".

DEAN MORGAN: That is all right, yes.

SENATOR PEPPER: All that would mean would be simply that you didn't have to have a separate document, but an opinion might be made to serve the same purpose if the findings were specifically stated.

JUDGE CLARK: You may recall that I tried to get you to adopt, and you did temporarily, a requirement that the findings must be made with the opinion.

SENATOR PEPPER: Yes.

JUDGE CLARK: I still think that is a good idea. There were certain judges who protested rather strongly, and we have decided it was perhaps a little too hard to try to make them do it. That would get rid of this business of taking the lawyer's statement.

THE CHAIRMAN: What would you like?

SENATOR PEPPER: Just to bring it up, I will move that, in lieu of the matter in italics on page 59 of the pamphlet, (a) be so modified that it will read:

"In all actions tried upon the facts without a jury, or with an advisory jury, the court, either in a separate document or in the course of a memorandum opinion, shall find the facts specially and state separately its conclusions of law thereon".

JUDGE DOBIE: I don't like that word "separately".

DEAN MORGAN: Leave out "separately".

MR. LEMANN: I will offer as a substitute that lines

17 to 20 be changed to read as follows:

"If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear from a reading of the opinion or memorandum."

SENATOR PEPPER: I withdraw my motion.

JUDGE DOBIE: "appear upon a reading" or "as a part"?

MR. LEMANN: "appear therein." That is what I think we mean to do.

JUDGE DOBIE: I will second that.

JUDGE CLARK: I am certainly willing to do it. I think that that is against the Interstate Circuit case, which I think is all right. Judge Caffey foams at the mouth at the thought of that case.

MR. LEMANN: Is that cited in your note here?

JUDGE CLARK: I think we kept very quiet about it.

THE CHAIRMAN: This is what we think ought to be done, and if anybody kicks about it, except the Supreme Court of the United States (if they don't like it, they can stick to the present system), that is all right with us.

DEAN MORGAN: I still think you want the district judge to do a job, and to do a job right he ought to make separate findings of fact and conclusions of law.

THE CHAIRMAN: I have felt that all along.

DEAN MORGAN: Otherwise, he acts just on a hunch like a jury, and then when he comes to draw his findings he tries to

make them conform to his hunch.

THE CHAIRMAN: This system has worked well for three-quarters of a century.

JUDGE DOBIE: Mr. Lemann's motion is before us. I second it.

THE CHAIRMAN: Did we pass that motion? Mr. Lemann's draft is up for action.

[The motion was put to a vote and carried.]

SENATOR PEPPER: That is all right with the Reporter, isn't it?

JUDGE CLARK: Yes, I think so. We ought to face the fact that we are making the difference, but I think it is all right.

DEAN MORGAN: I want to vote "No" on that last one.

SENATOR PEPPER: I notice from the memorandum of the Reporter, he says that while he is sympathetic, he doesn't indulge in any active suggestion.

JUDGE CLARK: That is right. Mr. Lemann has indulged in the active suggestion.

THE CHAIRMAN: Are we up to 53?

JUDGE CLARK: On 53(c) we have Mr. Tower, a gentleman from Milwaukee, a very nice fellow and very persistent, who thinks we can do something for the patent bar people. He represents the patent group, and they are hoping to simplify the law of infringement somewhat, which of course is a very

desirable thing. He proposes an amendment to 53(c). He has other ideas in mind, but the other ideas are mainly by statute. He proposes the following amendment to 53(c):

"A master to whom is referred an accounting to determine profits or damages in an action for infringement of a patent shall not extend the accounting to any act of infringement that the court has not determined shall be included in the accounting."

Mr. Tower states that under the present procedure (citing cases) a master is not obligated to limit the accounting to the devices which the court found to be an infringement, but may extend the accounting to new devices which the court did not consider. This, he says, results in prolonging the proceedings and increasing expenses.

THE CHAIRMAN: I don't believe that. I won't until I read the cases.

DEAN MORGAN: I don't either. If I were judge, he certainly would not get pay for time he spent on that.

JUDGE DOBIE: I thought he always had to keep within the reference. I never heard of that practice, Charlie, did you?

THE CHAIRMAN: I don't believe there is a line of cases that does that sort of thing.

JUDGE DOBIE: Of course, there are a lot of cases that show how far he should go and what he should consider.

We had that in the Coca Cola case, but that is a different one.

JUDGE CLARK: He is very persistent.

THE CHAIRMAN: Who has read the cases? Who will verify the fact that after judgment on the merits has been entered in a patent case, and claims so-and-so are infringed by certain devices, on which there is to be an accounting, the master may then extend the accounting to other devices?

JUDGE CLARK: That is what he says in his letter of April 26, 1945.

"The proposed amendment has for its purpose to expedite the proceedings in accountings for recovery in suits for infringement of patents.

"As it is now in a suit to obtain a recovery for infringement of a patent, an accounting for damages and profits is a prolonged and expensive proceeding, even though limited to the devices found to be an infringement before the reference for accounting.

"The master is not obligated under the present procedure to limit the accounting to the devices which the court considered and found to be an infringement, but may extend the accounting to new devices which the court did not consider.

"The accounting may begin with devices A, B, and C, which the court before found to be infringements, and then it may be extended to new devices, D, E, and F, which the court finds in the end, after the accounting, are not infringements.

"The new devices, D, E, and F, which the court has not before considered, in addition to prolonging the proceedings and increasing the expenses, impose upon the court an undue burden in considering a voluminous record.

"In order to mitigate the evils in the accounting procedure and the incessant complaints arising therefrom, the amendment now proposed seeks to preclude the master from extending an accounting beyond the devices the court has determined to be an infringement, as was sanctioned in the Second Circuit and the Seventh Circuit in the following decisions."

THE CHAIRMAN: What are these cases called now? I didn't get that. Are these cases that allow a master to do this thing?

JUDGE CLARK: That is what he says. I haven't read them, so I can't say. That is what he states in so many words.

"Sundh Electric Company v. Cutler-Hammer Manufacturing Company, 244 F. 163, C.C.A. Second Circuit, May 25, 1917.

"Sundh Electric Company v. General Electric Company, 235 F. 708, D.C. N.D. N.Y., September 4, 1916.

"Sundh Electric Company v. General Electric Company, 217 F. 583, D.C. N.D. N.Y., November 2, 1914.

"Murray v. Orr & Lockett Hardware Company, 153 F. 369, C.C.A. Seventh Circuit, February 8, 1907.

"O'Cedar Corporation v. F. W. Woolworth Company, et al., 73 F.(2d) 366, C.C.A. Seventh Circuit, October 19, 1934.

"The executive group of the Committee on Patents of the National Association of Manufacturers has approved the amendment submitted herein, as have likewise many lawyers conversant with proceedings in accountings."

DEAN MORGAN: How can a master go outside the order of reference?

SENATOR PEPPER: What is really needed is a direction to the court to limit the order of reference.

DEAN MORGAN: Yes. Are we going to do that?

JUDGE DOBIE: I don't see much in that.

THE CHAIRMAN: This man is the Chairman of the Subcommittee on Accounting Procedure of the National Association of Manufacturers. He is not even a lawyer.

JUDGE CLARK: Oh, yes, he is a lawyer. He is a lawyer from Milwaukee. He comes down and visits with me extensively and talks about Frank Baldwin, and so on. You notice they have a very interesting suggestion, a bill for Congress, which he says they are all supporting, to limit damages in patent infringement suits to a rate of fair royalty on the patent as set by the court, which would seem to me to be some job for a district judge. He thinks they have to do a great deal of simplifying the procedures, and of course by simplifying it somewhat, they will not only make a better procedure generally, but I take it that in the back of the minds of all these patent fellows is that it will eliminate some of the criticism,

too.

THE CHAIRMAN: We wouldn't tamper with the law in the patent cases without getting a suggestion from the Patent Bar Association anyway, would we?

DEAN MORGAN: No, and I certainly wouldn't want to try to tell a judge what he had to do in the order of reference to a master. He might think this matter was coming up later and was bound to come up later and that he was going to save time and money doing it that way.

JUDGE CLARK: I have had a great deal of doubt about that. I told him both those. I told him I thought that was a matter for the order of reference, and I told him if this were settled accounting practice, maybe it was pretty nearly substantive law anyway as to what you did on your judgment. All I can say is that he doesn't content himself with merely writing letters. He will be around and want to know what we have done.

JUDGE DOBIE: If a court holds that the Clark self-starter is infringed, but that the Clark exhaust and the Clark manifold are not infringed, and he refers it to a master on the self-starting device, I cannot conceive that a competent master would take evidence on the manifold and the exhaust.

THE CHAIRMAN: His case is where the court has not made a direct finding of no infringement in the case of an initial device. He made a finding that a certain device was

infringed and directed an accounting. After it got to the master, some other devices came along that the court had not considered at all. The master thought they were equivalents, or something like that, and he started taking evidence of damages as to those on the chance that when he got back the court would hold that they were infringed also.

JUDGE DOBIE: I don't think we ought to clutter up the rules with a provision of that kind.

JUDGE CLARK: Without having looked at the cases, I should think it would be not an unnatural thing for a master to do it because, after all, these things take years, you know.

DEAN MORGAN: They certainly do.

JUDGE CLARK: An infringer can start shifting his device a little. I suppose what has happened is that the master is hearing it, and there is a little shift in the device. He is told that it is entirely different, that he has no order on that, but the master says, "I will clean the whole thing up." He doesn't know but that that is the equivalent.

THE CHAIRMAN: Why doesn't the master at that stage of the game refer it back to the judge for initial instructions instead of assuming to go for years taking an accounting?

SENATOR PEPPER: When the order of reference is being considered by the judge, it seems to me that counsel for the party that is to do the accounting could ask the court to limit the accounting to the devices already determined to be infringements. If there was any good reason why it should

not be limited, the court would not limit it, which would mean that we ought not to try to limit it if there is some good reason that it should not be. On the other hand, if it is obvious, as this gentleman seems to think, all you would have to do would be to ask the court to put the limitation in the order, and it would be done.

THE CHAIRMAN: The court can then say, "If any new devices come up in the course of the proceeding, don't take any evidence on them but refer the matter to me for supplementary order."

MR. LEMANN: Not to take evidence, but to go to the judge at the proper time and say, "This fellow is going too far. Stop him." Couldn't he do that?

THE CHAIRMAN: We don't agree with Mr. Tower.

JUDGE CLARK: All right. He is not an unpleasant person. I like his visits, except he is a little windy.

THE CHAIRMAN: If he gets on your neck, write him a letter and tell him to get the order of reference fixed up to cover the evil.

Rule 54.

JUDGE CLARK: Rule 54 is our provision as to judgments at various stages. Of course, that has been a very difficult thing. It is one of the most complicated things that has come out of our new practice. It seems to me that it is fair to say that our new provision has gone fairly well.

THE CHAIRMAN: Most of them probably don't understand it.

JUDGE CLARK: I won't deny that.

THE CHAIRMAN: Not that there is anything wrong with the draft, but it is a very complicated subject.

MR. LEMANN: The only comment you have is from the Chicago Bar Association?

JUDGE CLARK: There were a couple on the first summary.

THE CHAIRMAN: Mr. Longsdorf again.

JUDGE CLARK: He spends all his time studying these things, you know. He is on the Criminal Rules Committee.

MR. LEMANN: Has he written a book on this?

JUDGE CLARK: He was editor of the first edition of the Encyclopedia of Federal Procedure. They didn't have him on the second edition. I don't know why. I guess it would have kept him busy if they had. The Chicago Bar Association suggestion is really that they like what we did and want us to go further.

DEAN MORGAN: Yes. They don't want any judgment entered.

JUDGE CLARK: That isn't quite right, is it, Eddie? I should say they want the district judge to have power to enter judgment. They want to give a good deal of power to the district judge.

DEAN MORGAN: They want to put all of them on the same basis as those that arise out of the same transaction. That is what they want. They want no automatic judgment. What do you think of that?

JUDGE CLARK: It is an interesting idea, and at one time I agreed with it and suggested it here, that no judgment in effect should be final unless the district court so labeled it. That didn't take very well at the time, and there are some difficulties about it. You see that I have noted that my colleague, Judge Frank, is worried about having the district judges with as much power as this. He says that it isn't a matter for the district judge to do any labeling. We have given a comparatively limited power here.

JUDGE DOBIE: Frank doesn't mean, does he, that a district judge can label this thing final and that that makes it appealable as a final judgment, regardless of its essential nature or the reality?

JUDGE CLARK: Oh, no. He is opposed to the idea of anything like that. He says the district judge shall not be entitled to touch it. He states, in fact, what I think is his only direct criticism of our present draft. He says that if we go that far in these italicized sections, he thinks that we are making a mistake. We do a little, you know, in what we have put out, but not very much. It seems to me that is justified. I don't believe we properly can go any further. It is,

after all, a matter of final judgment, I suppose, for the appellate court to say.

DEAN MORGAN: We can tell when it can be reopened, can't we?

THE CHAIRMAN: Yes. When we give the district court power to reopen and revive and make the entry conditional on his not doing it, we have destroyed the finality of the judgment.

DEAN MORGAN: I should think so.

MR. LEMANN: The Chicago Bar Association makes three or four sets of criticism.

JUDGE CLARK: Yes. They have some questions on matters of detail.

DEAN MORGAN: What do you think of their position on the matter of substance there, Monte, that where the claims are separate claims, the court might enter them just as provisional judgments if he thought that, although not arising out of the same transaction, they ought to be decided before any--

THE CHAIRMAN [Interposing]: --writs of execution were issued.

JUDGE CLARK: He can do that, of course, Eddie.

DEAN MORGAN: He can do it on writ of execution, but can't stop appeal on it.

JUDGE CLARK: That is right. He can go further than that and say, "I think this is the way it should be decided.

I don't want to do it later, and therefore I direct the entry of the judgment now."

DEAN MORGAN: He can do that.

MR. LEMANN: He could always do that.

DEAN MORGAN: He could take care of it.

JUDGE CLARK: That is what I suggested here, that he can always achieve the result, if he is anxious to do it, by merely delaying the entry of judgment. Of course, as I have indicated before, one of the troubles we run into is that the district judge politely never gives a damn and probably never thinks of it. Sometimes I think if they ever think of it, it is to thank God that this is going to bother the appellate court, but I don't suppose it is quite as malicious as that. They just enter these orders and say, in effect, "Thank God it is off our docket for the moment," and then we struggle with what they have done. We were trying to get something fairly automatic, that if they hadn't said anything, we should have this conclusion to draw from.

MR. LEMANN: That disposes of their first main point, doesn't it?

DEAN MORGAN: Yes.

MR. LEMANN: The next point is that they say they don't like the use of the terms "final judgment", "judgment", and "order or other form of decision, however designated." They say, "These terms seem cloudy to us, in view of the

definition of 'judgment' in Rule 54(a)." How about that, Mr. Reporter?

JUDGE CLARK: You see what I said about that. I said that this objection has theoretical merit; that is, by definition you don't need the word "final" because somewhere else we have said that the judgment is the final judgment. However, as a matter of fact, in the case of the first one, lines 19 to 20, page 61, where we said "judgment may be entered", I think it might be rather desirable to use their phrase, "disposition may be made thereof".

THE CHAIRMAN: Suppose we agree to that right here. That is their suggestion in line 20.

JUDGE CLARK: O.K.?

As to the word "final" in lines 22, 27, and 40, it is perhaps tautological in view of the definition in Rule 54(a), but it does convey the very important idea which is the nub of the rule. That is the comment I make. It is a flag, "final judgment", and really what we are saying is that you can appeal on it.

MR. LEMANN: Really, "judgment" as defined in 54(a) is always a final judgment, isn't it?

DEAN MORGAN: Unless you put "final judgment" over in 54(a).

MR. LEMANN: There is no difference between "judgment" and "final judgment", is there, under the rules here?

PROFESSOR MOORE: Yes.

MR. LEMANN: Of course, you might have an interlocutory judgment from which an appeal lay.

DEAN MORGAN: You might have one from which an appeal did not lie.

THE CHAIRMAN: Suppose you say you may enter judgment, but that judgment is subject to revision by the trial court at any time before the disposal of similar claims arising out of the same transaction, that is not a final judgment because it is still in the bosom of the trial court, subject to revision at any time.

MR. LEMANN: It is not even a judgment under 54(a).

THE CHAIRMAN: That is another point.

DEAN MORGAN: Why not?

MR. LEMANN: Because 54(a) says a judgment is any order from which an appeal lies.

DEAN MORGAN: It doesn't say that, does it?

MR. LEMANN: Doesn't it?

DEAN MORGAN: I thought it said an order from which an appeal would lie, but if it were denominated a judgment--

MR. LEMANN [Interposing]: "'Judgment' as used in these rules includes a decree and any order from which an appeal lies."

DEAN MORGAN: Includes, that is all.

MR. LEMANN: "Includes" means sometimes it does and

sometimes it doesn't.

DEAN MORGAN: I didn't suppose it did here. "includes a decree and any order from which an appeal lies." I didn't suppose that that meant that every judgment was something from which an appeal lay.

[Brief recess.]

MR. DODGE: How about a judgment with enforcement stayed? Is that an appealable judgment?

JUDGE CLARK: Yes.

MR. DODGE: They raised that question.

THE CHAIRMAN: In a suit for an accounting, if the court determines that you are entitled to it and an order is entered to that effect, and then it orders an accounting later, that wouldn't be judgment.

MR. DODGE: That is appealable, isn't it, by statute?

THE CHAIRMAN: Only in the patent cases. There is a special statute in patent cases. In a patent case, if the court holds a patent to be valid and infringed, although it used to be interlocutory, it can be appealed from so as not to have an accounting in case the decision is reversed. However, that is a special patent statute. Generally speaking, in the federal courts, if you get a decree from a judge that you are entitled to an accounting, that is not appealable. You have to wait until the accounting is had and judgment is entered. I am wondering whether, under the definition of 54(a), that

interlocutory judgment is a decree. The phrase in 54(a) stating from what an appeal lies includes both a decree and an order.

SENATOR PEPPER: Mr. Chairman, how about a treble damage suit where the issue is tried on the question of liability and the district court decides that a certain act has been violated and the defendants are liable? An appeal would lie on that question of liability before the question of the damage was decided, wouldn't it?

THE CHAIRMAN: Not unless there was a special statute in antitrust cases.

SENATOR PEPPER: There isn't any statute that I know of. I have just gone through that. I represented some defendants, Warner Bros., and so on, in a treble damage suit in the district court, and the court adjudged the defendants to be free of liability but made no decision on damages.

DEAN MORGAN: You say free of liability?

SENATOR PEPPER: They entered judgment for the defendant.

DEAN MORGAN: You see, that is final.

JUDGE DOBIE: That settles everything, but for the plaintiff pleading damages undetermined, it has been repeatedly held not to be final.

THE CHAIRMAN: I am talking about a case where the district court holds there is liability, and then, before the accounting is had and the judgment on that, the question

arises whether his judgment that there is liability is appealable. I say it is not, unless there is a special statute as in patent cases to give a right to appeal to what ordinarily would be an interlocutory judgment.

JUDGE CLARK: I think that is correct. The closest to it lately is a decision on condemnation. Some circuit courts, including my own, had ruled that a judgment of taking was final without ascertainment of the amount, but the Supreme Court in the Catlin case, which is fairly recent, Catlin v. United States (1945) 65 S.Ct. 631, ruled that it was not and said they didn't want piecemeal litigation, and so on, which would be a fairly close analogy, I should think.

THE CHAIRMAN: We are on Rule 54(b). Is there anything more that you want to say about it?

JUDGE CLARK: I haven't anything.

THE CHAIRMAN: We agreed to one or two modifications.

JUDGE CLARK: You agreed to that first one.

THE CHAIRMAN: Unless somebody has a motion to alter the draft, we will proceed to ...?

JUDGE CLARK: Subdivision (d) of the same rule.

THE CHAIRMAN: Subdivision (d) of Rule 54. This is supplemental, page 25 of the supplemental report of the Reporter

JUDGE CLARK: We had something interesting there from the American Bar Association. I must say that I was on the Committee of Jurisprudence and Law Reform, and I suppose,

since I didn't dissent, I agreed to make the recommendation; but now, as Reporter, I raise the question whether we really can monkey with costs against the United States.

THE CHAIRMAN: We have always said we couldn't. We have always said that we couldn't even fix costs as between private litigants. That is a matter of statute. We have never attempted to alter the costs fixed by statute even in litigation between private parties.

JUDGE DOBIE: I don't think Congress would take kindly to that, General.

THE CHAIRMAN: No, I am sure they wouldn't.

JUDGE DOBIE: I think they would go right up in the air, to be perfectly frank, if we tried to set aside that ancient rule of no costs against the United States.

THE CHAIRMAN: It seems strange that the American Bar Association would make a recommendation that we start fixing costs against the United States when the statute says that the United States shall not have any costs against it.

MR. LEMANN: You say the Reporter thinks we ought to make an official communication to the American Bar Association.

JUDGE CLARK: I suppose. It was recommended by the Committee of Jurisprudence and Law Reform, passed by the House of Delegates, and it came to us officially. I think, though, as I first saw it in the recommendation of the Bar Association,

it recommends a statute, or a rule if the Advisory Committee thinks a rule will do it.

THE CHAIRMAN: The American Bar Association has this tacked on it: "provided that the Advisory Committee shall be of the opinion that the prescription of such a rule is within the power of the Supreme Court of the United States under the Act of June 19, 1934." They recognize the probable lack of power or the possible lack of power.

MR. LEMANN: If we all feel we probably have no such power, the only point is, are we called upon to take notice of it? Has this resolution been formally sent to us?

JUDGE CLARK: It was sent to us by the Secretary of the Bar Association at the direction of the Bar Association.

MR. LEMANN: Your thought is that we ought to acknowledge it and say, "We seriously doubt our power or the power of the Court, and therefore we make no recommendation." You think we ought to go on record.

JUDGE DOBIE: Granted the power, I would doubt the expediency of going further, wouldn't you?

MR. LEMANN: I am only raising the question of whether we are called upon to address ourselves to the American Bar Association.

JUDGE DOBIE: I think we ought to reply.

JUDGE CLARK: Just as you feel about it. The American Bar Association always has taken a fatherly interest in us.

As they said down in Congress when we were there, these are American Bar Association rules.

MR. LEMANN: That is a good feeling for them to have, but we haven't written to the Chicago or the New York Bar Association, for example.

THE CHAIRMAN: I am wondering if we ought not to. They have made a serious, careful recommendation, and we have considered it, and for the reasons stated their conclusion is not followed. A system should be set up whereby we drop them a line and say we have given careful consideration to it, and a majority of the Committee feel thus and so about it. Otherwise, if the thing just comes out and we don't even mention their point in the notes or otherwise, we ignore it and nothing is done about it.

MR. LEMANN: Do we acknowledge the suggestions of any other association, or ought we to do it as a matter of professional good will?

THE CHAIRMAN: Any time they are addressed to me before they get into the file, I always write them civilly and explain our position and all that sort of thing.

MR. LEMANN: We don't do that with the Chicago Bar Association, do we?

THE CHAIRMAN: They are not addressed to me personally. They are just addressed to the Advisory Committee.

MR. LEMANN: I wonder if the Committee should acknowl-

edge it.

MR. HAMMOND: They are acknowledged, Mr. Lemann.

MR. LEMANN: They are all acknowledged?

MR. HAMMOND: Yes, by the Secretary's office.

THE CHAIRMAN: That is just a formal acknowledgment by a subordinate, with no explanation of why we have ignored them.

MR. LEMANN: It would be too much of a burden to do that.

THE CHAIRMAN: It probably would be in most cases, there are so many of them.

MR. LEMANN: Do you think we ought to adopt a motion in this case?

THE CHAIRMAN: I think the Reporter, without a motion, ought to drop a line to the Bar Association which sent it in and explain that we thought and always took the position on the question of fixing costs, especially costs against the United States, that it was probably not within the function and the powers of the Court.

JUDGE CLARK: You would like to have me do it? I am perfectly willing and glad to do it.

MR. LEMANN: Could I revert to the Chicago Bar Association on paragraph (b)? They say: "For example, is the 'judgment' with enforcement stayed (lines 31-36) appealable? If so, is it necessary to use the word 'final' in lines 22 and

27; if not, it is inconsistent with the definition in Rule 54(a)."

THE CHAIRMAN: Are you going back to 54(b)?

MR. LEMANN: Yes, I am going back, if I may.

JUDGE CLARK: I don't think I know of any explicit holding on that. I don't think I know of even any discussion. There is no question that we intended it to be appealable.

MR. LEMANN: You did intend it to be appealable even though its enforcement was stayed.

JUDGE CLARK: That is it, yes.

MR. LEMANN: They find the language rather muddy, if you read their whole comment. If a group like that is doubtful about what it means, I suppose we ought to give it a little thought. They talk particularly about the language in lines 31 to 36. "the court may stay the enforcement of any judgment so entered". They ask, Is it appealable?

MR. DODGE: I raised that question, and he says it is.

MR. LEMANN: If he says it is, then they want to know why you use the word "final" in lines 22 and 27. They say that it seems cloudy to them, because they think somebody has the idea that you can't appeal from a "judgment," that you can appeal only from a "final judgment," which of course I suppose is ordinarily true.

THE CHAIRMAN: The truth is that in the latter part of the rule, in lines 36 on, we are referring to a judgment that

may appear to be a final disposition of it but that, by the express terms of our rule, is subject at any time to revision and is therefore interlocutory in character. We make it that. Therefore, it isn't an appealable judgment.

MR. LEMANN: You say it is not appealable?

THE CHAIRMAN: No. I say that the judgment referred to in line 43 is not an appealable judgment.

MR. LEMANN: No, but they are not talking about that. They are talking about line 32. They don't have any trouble with line 43.

THE CHAIRMAN: I don't know whether that is appealable or not.

MR. LEMANN: Ought we to leave it blank? The Reporter says it is appealable.

DEAN MORGAN: I should suppose there would be no doubt about it.

THE CHAIRMAN: I should think so.

MR. LEMANN: They don't like the use of the word "final" in some places and not in others. They find that confusing.

MR. DODGE: Would it be cured by putting the word "final" in line 28?

MR. LEMANN: Yes, I think it would. Is there any objection to putting the word "final" in line 28 before "judgment"?

THE CHAIRMAN: Between "time" and "judgment" in line 28.

MR. LEMANN: Yes.

JUDGE CLARK: In fact, they suggest something of that kind. I am not sure whether 28 is the place. For example, they simply say, "These terms seem cloudy to us, in view of the definition of 'judgment' in Rule 54(a)."

THE CHAIRMAN: We think that if you put the word "final" between "time" and "judgment" in line 28, then your cloudiness would disappear all the way through. You would be consistent.

MR. LEMANN: It would remove what they think is the implication that the judgment referred to in the sentence beginning in line 27 is not appealable.

JUDGE CLARK: Let me suggest this. This comes back to me now a little. I don't think "final" should be entered in line 28. If I remember it correctly, the upper portion, lines 17 to 27, was an attempt to say fairly clearly when you have final judgment. "(1) when all claims arising out of a single transaction or occurrence have been decided final judgment may be entered on those claims; (2) when one or more but less than all claims arising out of a single transaction or occurrence have been decided ... final judgment may be entered." On the next page at the end you have the opposite, where a final judgment is not entered. This sentence in the middle is one

which is colorless on the point of final judgment, but deals with the general power in the court to stay enforcement.

MR. LEMANN: Is that an appealable judgment? You said it was.

JUDGE CLARK: I made a mistake, then, because I had not read it afresh. It is not at the same time both, but the statement refers to both types of judgment.

MR. LEMANN: It may be or may not be.

THE CHAIRMAN: It may be either. They can stay the enforcement of the final judgment or the judgment which is not final.

JUDGE CLARK: That is the point. This second sentence deals only with the question of stay. The first sentence defines final judgment. The third sentence defines interlocutory judgments. The intermediate sentence gives the general power in all kinds of judgments, final and interlocutory, to stay enforcement.

MR. DODGE: Then, you don't mean in 28 if at the time judgment is entered as aforesaid upon any claim.

JUDGE CLARK: No, you don't. You don't want the word "final" in 28. Notice what is said in line 29. That gives the tipoff, which I should have noted. "whether or not arising out of the same transaction or occurrence, have not been adjudicated". We have said up above that if they all arise out of the same occurrence and have been adjudicated, they are

final. If they arise out of the same occurrence and have not all been adjudicated, they are not final. That is the last sentence. But here we say, whether they are one or the other, the court has the power.

JUDGE DOBIE: Without any determination of its finality?

JUDGE CLARK: Not in this sentence.

THE CHAIRMAN: Give me an illustration of an interlocutory judgment, a nonappealable judgment, that can be executed, unless there is a stay order on it.

MR. LEMANN: You wouldn't think you needed a stay order if it was purely interlocutory.

THE CHAIRMAN: That is my point. If you can't give me an illustration, I will say his theory that this final judgment business in the intermediate sentence applies to either interlocutory or final judgment can't be so. If a stay of execution can be granted, is granted, and that destroys the finality and it is an interlocutory judgment, I don't see why you would need a stay of execution.

MR. LEMANN: I don't, either. First he said it was a final judgment. Then he said it might or might not be a final judgment. I don't know how you find out which it is. He says in the note that we want to remove the uncertainty of parties as to whether or not they can appeal. With this sentence, I wonder how a fellow would determine whether he is

to appeal or not.

THE CHAIRMAN: I still ask for an illustration of any kind of interlocutory nonappealable judgment which can be executed against the party against whom it is rendered, unless there is a stay of execution. Maybe there is, but I don't know.

SENATOR PEPPER: It need not be a judgment followed by execution. It may be a judgment such as you suggested a while ago, sir. In the case of a claim that a defendant is liable to account to the plaintiff, the defendant revises and claims that for certain reasons he is not accountable. The court holds that he is accountable, appoints a master, and directs him to go forward and take an accounting.

THE CHAIRMAN: You don't need a stay of that judgment, do you? You can't execute it until you get the accounting.

SENATOR PEPPER: I should think that it would be important there to stay the proceeding before the master.

JUDGE CLARK: Yes. This is not a stay of execution. That isn't the term of it. It is enforcement of the judgment.

SENATOR PEPPER: That is right.

JUDGE CLARK: In the case stated, the judgment could go ahead and you could have your hearings before the master. There isn't anything, unless the court so orders, to stop it. Wouldn't the same thing be true in the case of an injunction, or isn't it possible to think of that case? You grant an injunction, but does the injunction contain some terms perhaps

mandatory and otherwise, and the court doesn't want it to go into effect?

MR. DODGE: This isn't an appealable judgment.

PROFESSOR MOORE: Here, I think, is an illustration. The plaintiff recovers judgment on his claim. Under the rule as drafted, if the defendant has a compulsory counterclaim which has not been disposed of, the disposition by the court of the plaintiff's claim is not an appealable judgment. I suppose, unless the court stayed the plaintiff, he would have a right to proceed to collect the judgment that was entered on his claim.

MR. LEMANN: Can the defendant appeal that judgment that was rendered for the plaintiff?

PROFESSOR MOORE: Not under this rule.

MR. DODGE: Why not? It is a final judgment if it arose out of the same transaction.

PROFESSOR MOORE: No. That would fit under the first clause. All the claims arising out of a single transaction have not been decided.

MR. LEMANN: Why do you have to enter an order if it is not a final judgment? As Mr. Mitchell said, why do you have to stay its enforcement? It is not final. What can you do about it?

PROFESSOR MOORE: It is not final for purposes of appeal. It does finally adjudicate the right, that the

plaintiff is entitled to recover $10,000 from the defendant. It may be the defendant has a recoupment or some other accounted claim that he recover $5000.

MR. LEMANN: You mean a counterclaim?

PROFESSOR MOORE: Yes.

MR. LEMANN: Can you imagine, Mr. Moore, that a plaintiff can have a judgment for $10,000 on which he can take out execution and that the judgment is not appealable?

PROFESSOR MOORE: Not appealable at that point.

MR. LEMANN: You take execution on it. That is what mixes me up. I can understand when you tell me it is not appealable, but when you proceed to tell me that the plaintiff can take out execution, then I can't get it in my system that the defendant could not appeal.

JUDGE CLARK: I think that that is something that never has been decided because it wasn't necessary, you see, until our rules. Our rules tried to define the result, and I think that our rules do say just that.

MR. LEMANN: I think you should add to this sentence that we are talking about, then, in line 27, that when an order is entered staying the enforcement of such a judgment, the judgment is not appealable. At least you let everybody know.

JUDGE CLARK: I have been very anxious to do that right along. The only thing is, it is our inhibition. We don't talk about whether it is appealable or not.

THE CHAIRMAN: In the last line you can do it the other way. You don't say it is appealable or isn't appealable, but you say it is subject to revision. That destroys the appealability of it because the court still has a hold on it. He hasn't said the last word. Why can't you do the same thing in the sentence commencing in line 27?

JUDGE CLARK: The sentence commencing in line 27 is intended to cover both types. It covers both types which are appealable. Those are the ones which do not arise out of the same transaction.

MR. LEMANN: Read 54(a). "'Judgment' as used in these rules includes a decree and any order from which an appeal lies." You use the word "appeal" in 54(a). Therefore, you have no inhibition from putting in here that this judgment, the enforcement of which has been stayed, is not a judgment from which an appeal lies.

JUDGE CLARK: That is not quite our moralistic point of view. We can give a name to a proceeding which is appealable, but we have always hesitated to say that this may or may not be appealable. We have come pretty close by circumlocution.

MR. LEMANN: You certainly could say, "This judgment, the enforcement of which has been stayed, is not a judgment from which an appeal lies."

JUDGE CLARK: But my point is that we are talking a little differently. We don't want to say it here because it is

not what we mean. If we put your suggestion in lines 27 and 28, we put in a very unfortunate restriction, so much so that we would have to make another sentence. The only way to cover this is to make two sentences out of this one.

MR. LEMANN: You ought to tell the bar whether they should appeal from this judgment.

JUDGE CLARK: We have told him, Monte, not in this sentence, in the other two sentences. That is, we have told him to the best of our ability. Read them. You see, this sentence deals with something else. Maybe we should take this out and put it in a little different place, a different paragraph. There may be a question of the order, but waiving that for the moment, the second sentence is not supposed in our version to have anything to do with the question of appealability. The first and third sentences state the two opposing viewpoints on that.

MR. LEMANN: Suppose this is a permissive counterclaim. It doesn't arise out of the same transaction. The plaintiff gets judgment on his claim, and the court has not decided upon the counterclaim. Could the court, under this sentence in line 28, stay the enforcement?

DEAN MORGAN: Surely.

JUDGE CLARK: That is one of the intents, yes.

MR. LEMANN: Then go back to 20: "when all claims arising out of a single transaction ... have been decided,

final judgment may be entered". Is the judgment entered for the plaintiff a final judgment under lines 20 to 23?

DEAN MORGAN: In that case, yes.

MR. LEMANN: Then, it is a final judgment which is not appealable because the court stayed the enforcement of it, or is it appealable?

DEAN MORGAN: Surely, it is appealable.

JUDGE CLARK: We would suppose it is appealable.

THE CHAIRMAN: As I understand it, it is supposed to be appealable. It is litigated, but the fellow can't get a writ of execution on it because there is a counterclaim arising out of a different transaction, and if the court allows the successful party in the first case to collect his judgment, then ultimately the counterclaim may go against him, and he may be bankrupt and unable to pay. So, the court holds the execution of the first judgment as a possible set-off or credit on the judgment he may render the other way on the counterclaim. That, as I get it, is what they are driving at here, and that is all, isn't it?

JUDGE CLARK: That is correct.

THE CHAIRMAN: Just holding up the payment of the judgment. The question of the right of appeal, having ultimately adjudged whether that judgment is going to stand or not, isn't interfered with in any way, and it should not be. It can go right up.

MR. DODGE: The passage in (2) overlaps on the sentence that begins in line 27. If you read (2) by itself, it seems to be a final and appealable judgment. When you come to the sentence beginning in line 27, that includes that sort of case and also the cases where they do not arise out of a single transaction, unless the finding of the court that there is no just reason for delay under (2) excludes that case from the next sentence.

JUDGE CLARK: I still think that we are talking about different things. If you will look at (2) and then compare it with the provision down in the last sentence, lines 40 and 41 in particular, you will see that excludes that. The whole difficulty seems to be that this second sentence is a different idea, and it is possible that we ought to take it out of here and put it in a separate paragraph.

SENATOR PEPPER: What are you calling the second sentence, the one commencing in line 27?

JUDGE CLARK: That is it. That second sentence, in our intent, says nothing about final judgment.

MR. DODGE: But you assume that the court has ordered an entry of judgment. You differentiate between "judgment" and "final judgment" in that sentence.

MR. LEMANN: As I understand it, "judgment" in line 28 is an ambiguous term; that is to say, it is a double-faced term. It may be final or it may not be final; it may be

appealable or it may not be appealable.

THE CHAIRMAN: To clarify it, you would say, "If at the time judgment, whether or not final, is entered upon any claim", if you want it that way.

JUDGE CLARK: That is it, of course.

MR. LEMANN: The last sentence is really a case that arises under (1), isn't it?

DEAN MORGAN: (1) and (2).

JUDGE CLARK: The last sentence is the converse of (2).

THE CHAIRMAN: I can't see why the sentence commencing in 27 can have any purpose as applied to anything except a judgment for the collection of money, because it isn't an injunction or anything of that kind. They are granting a stay to hold a credit against a possible counterclaim. That must be a money affair, mustn't it? What is the object of holding up what is really a final judgment, for instance, on an independent matter when it is the only matter arising out of that transaction in the case, unless it is for the purpose of saving the other fellow, assuring him that he will get his judgment paid if he gets judgment on a counterclaim that comes up on another transaction? It isn't fair to make a fellow pay one man's judgment and then not be able perhaps to respond and pay another fellow's judgment a year or two later.

If that is what the meaning of that is--and I don't see what else it can have--then it can relate only to a money

judgment, and all this talk about an interlocutory judgment from the injunction proceeding doesn't apply. It is a money judgment. I again ask, if you have a money judgment and stay the execution of it, do you have an appealable judgment or not?

MR. DODGE: In the sentence that begins in line 27, aren't you speaking among other things about section (2), that class of cases where the court does not expressly determine that there is no just reason for delay but apparently does want to stay the execution?

JUDGE CLARK: Suppose that we followed up the suggestion which is implicit here so far, which is that the sentence in line 27 on shall apply only to the final judgment case. If you do that, it seems to me that however technically right you may be--and I am not fully sure that you are even technically right--you certainly are going to have the courts somewhat more confused about this, because they are then going to ask whether there is anything they can do in various instances, of which the most important is the one involving compulsory counterclaim. "I have entered judgment for the plaintiff on the main point. I have not yet decided the compulsory counterclaim. What am I going to do about it? Is there anything I can do to hold it up? The power as now drawn by the rule refers only to a final judgment. There is no final judgment in the case of an action leaving compulsory counterclaims unadjudicated. Therefore, I lack the power." What is the objection to making it

explicit this way?

SENATOR PEPPER: Would you clear up my difficulties by taking a specific case and applying these rules to it? Suppose that there are, we will say, three claims all arising out of a single transaction. If the court adjudicates all of those claims, then I understand that, under subsection (1) in line 20, a final judgment may be entered. That is correct, isn't it?

JUDGE CLARK: That is correct.

SENATOR PEPPER: Am I right also in thinking that that judgment can never be stayed?

JUDGE CLARK: It never is stayed under this provision.

SENATOR PEPPER: That is what I mean, as far as this rule is concerned.

JUDGE CLARK: That is so.

SENATOR PEPPER: There may be extraneous reasons, but as far as this rule is concerned, we are through when final judgment is entered on claims one, two, and three.

JUDGE CLARK: That is correct.

SENATOR PEPPER: Those are the only claims in the case, three claims. I am taking the minimum number that satisfies this language.

MR. LEMANN: The sentence beginning in 27 would no longer apply.

SENATOR PEPPER: The sentence beginning in line 27

doesn't apply at all to that case because we have now decided that the judgment entered, so far as this rule is concerned, may never be stayed.

JUDGE CLARK: That is correct.

THE CHAIRMAN: Hold on a minute.

MR. LEMANN: Because it has been disposed of.

THE CHAIRMAN: "when all claims arising out of a single transaction ... have been decided final judgment may be entered". Line 27 says, "If at the time judgment is entered upon any claim, any other claim or claims, whether or not arising out of the same transaction or occurrence, have not been adjudicated".

MR. LEMANN: He is assuming that that is not so, that they have all been adjudicated.

SENATOR PEPPER: I am advancing step by step. The first step is to think of a case that satisfies the requirements of (1). That is the case in which there are three claims, all originating in a single transaction, and all three have been adjudicated. The judgment there, by common consent, is a final judgment, In so far as this rule is concerned. We make no provision for staying.

The next case is where claims one and two have been adjudicated, and claim three has not been. That is subsection (2), "when one or more but less than all claims arising out of a single transaction ... have been decided", and the court

expressly determines that the fellow in whose favor one and two have been decided is entitled to judgment. Then some kind of judgment (I am not calling it final now) is entered on claims one and two. There has been no adjudication as to three. Am I right in understanding that, so far as this particular part of the rule is concerned, it is only in the case where claims one and two have been adjudicated and, therebeing no reason for delay, judgment is entered upon those, that the judgment may be stayed?

DEAN MORGAN: Yes, that is right.

JUDGE CLARK: That judgment may be stayed, and it is also final the way we have stated it here.

SENATOR PEPPER: Before we get into terminology, it is a judgment which may be stayed, and if it is a judgment for the collection of money, that means it is a stay of execution.

JUDGE CLARK: That is it.

SENATOR PEPPER: What consideration would move a court to say that there is no just reason for delay and to enter judgment on one and two and then immediately to entertain a motion for a stay which puts the case back in the same position as if the judgment had not been entered?

JUDGE CLARK: On that, I should suppose that ordinarily when you have three claims tandem there would not be any just reason for hurrying it up. I don't know. Possibly there might be. Suppose it is a poor widow, these are very clear,

and there isn't any defense. Maybe the court would stay it.

SENATOR PEPPER: Then you would stay it. It would be subject to stay.

JUDGE CLARK: That is a separate act of the judge.

SENATOR PEPPER: It is a separate act, but apparently there is no qualification. He might say, "I really can't properly allow execution on claims one and two until I have adjudicated claim three, because the measure of recovery in the cases may be different according to the number of people held liable."

JUDGE CLARK: I suppose what you are asying, Senator, is true as a practical matter, that it would be foolish for a judge first to say there is no just reason for delay and, therefore, he is going to mark it final, and then in the next breath to say he is going to stay it.

SENATOR PEPPER: Yes.

JUDGE CLARK: I suppose that might be generally true, and then he might have an eye on the appeal rather than enforcement. He might say, "This is an important question which has never been decided. The way to get this up quickly is for me to do" just what you have said. Of course, the more natural case, where it might seem more practicable, would be the counterclaim case, anyway.

SENATOR PEPPER: Yes, but still sticking to the case of the three claims, of which two have been adjudicated and one

hasn't, and where the court for the reasons given here has entered judgment on one and two--

DEAN MORGAN [Interposing]: May I interrupt there? Do you assume that the claims are all in favor of the plaintiff and against the defendant?

SENATOR PEPPER: Yes.

DEAN MORGAN: You are assuming that?

SENATOR PEPPER: I am assuming that.

DEAN MORGAN: I can see how you are puzzled to find out why there would be any reason for stay there, if you are going to allow a judgment to be entered.

THE CHAIRMAN: The reason is that there is a res judicata on the first two claims, and if the other one which is not adjudicated yet is related to the same transaction, then you are tied as to what you can do in the third claim.

DEAN MORGAN: That is right.

THE CHAIRMAN: So, they are holding up the finality of the first two decisions to avoid a res judicata until they have considered the third claim and made up their mind they don't want to go back and change the decision. That is the reason for it other than collection and payment.

SENATOR PEPPER: But is it correct to say, if the status of the matter is such that res judicata is avoided by the stay, that at the same time the thing is appealable as a final judgment?

JUDGE CLARK: It would be our version, I should suppose, that the res judicata and appealability would depend on the same rule, the same criteria, and that enforceability would be something different. I would suppose that was the way we would look at it.

THE CHAIRMAN: We are not talking about the cases stayed, because subdivision (2), line 27, does not deal with stay. It says one or more but less than all.

SENATOR PEPPER: I am so slow in my mental operation, I am trying to take it step by step.

JUDGE CLARK: He is still on the easy cases. That is what you are saying. You are just moving up to the really hard cases.

SENATOR PEPPER: This is what I really want to know. If the third claim is not adjudicated and the judgment entered on one and two is stayed for that reason, because they don't want one and two to become res judicata as to the third, doesn't that by the terms of the proposition mean that one and two are not appealable?

JUDGE CLARK: Not as we have framed it. I think what you are asking in effect is whether we think we will get away with what we have said here. Is that what you meant to say?

SENATOR PEPPER: What did we mean to say? I see now that you do mean to say what you have last suggested, that it is final and may be appealed.

JUDGE CLARK: Yes. I think that is clearly what we intended to say, and I am not at all sure that there might not be a question about this rule. It might possibly be that some upper court will say, "It is for the upper court to say what all this means. It is not what the district court does." Nevertheless, we tried this out, and that was our intent, I think.

MR. LEMANN: I still think, if that is what you mean to say, it has to be made clearer and that you can go back and use the same kind of language you used in 54(a) and say that this is a kind of judgment from which an appeal will lie, if that is what you mean in that sentence beginning in line 27.

JUDGE CLARK: We don't mean it there.

MR. LEMANN: You say may or may not be.

JUDGE CLARK: "If at the time judgment, whether or not final". You want to put that in.

MR. DODGE: One other point that seems to me to be worth calling attention to is that in the first four lines you refer to more than one claim for relief in general; that is, whether they arise out of a single transaction or not, judgment may be entered as follows. Then you describe two classes of cases where all the claims arise out of a single transaction. You don't say anywhere how judgment may be entered if they do not arise out of the same transaction, but go on to impose and to authorize the court to stay the enforcement of a judgment

which may be entered although they do not arise out of the same transaction. Then in the last sentence you come back to claims arising out of the same transaction. There is no authority there or description of how judgment may be entered on claims that do not arise out of a single transaction.

THE CHAIRMAN: All that is said about it is that it is assumed that judgment may be entered, and he makes provision for stay of it.

MR. DODGE: You stay a judgment if it is entered, but you start in by saying that judgment may be entered as follows, and then you start after the single transaction cases are dealt with.

DEAN MORGAN: Isn't it perfectly clear from the discussion here, if Mr. Lemann and Mr. Dodge can't interpret this rule, it must be in bad shape. It seems to me it has to be re-formed. It seems to me from the way the discussion is going, if you had one paragraph about claims not arising out of the same transaction and one about claims arising out of the same transaction and spelled them out, you would get somewhere.

THE CHAIRMAN: Another bit of evidence is that the Honorable George Wharton Pepper can't construe it.

MR. LEMANN: How about the Honorable William D. Mitchell?

DEAN MORGAN: You have only two stages out of about fifteen that he has up his sleeve.

SENATOR PEPPER: It is no reflection on the rule that I can't understand it, but I entirely agree, if Monte and Robert Dodge can't, I think he's got something.

MR. LEMANN: The Chairman wants to join that distinguished company, and maybe Professor Morgan himself would.

JUDGE DOBIE: If Pepper, Morgan, Dodge, and Lemann don't know what the rule means after all this discussion, it is putting a pretty hard thing on the district judge.

THE CHAIRMAN: For the benefit of the Reporter when he comes to revise it, I want to say that I disagree with the view that was expressed here that under subdivision (1) judgments are not subject to stay. I say they are. Just listen.

"If at the time judgment is entered upon any claim, any other claim or claims, whether or not arising out of the same transaction or occurrence, have not been adjudicated, the court may stay the enforcement".

You have in line 27 on plainly a case which may possibly call for a stay of the judgment under subdivision (1). There is no doubt about it. There are three claims, you say, arising out of a single transaction. When they have been decided, final judgment may be entered on those claims. Suppose there are three claims arising out of the same transaction upon which judgment is entered, but there is another claim there not arising out of the same transaction which has not been adjudicated.

MR. DODGE: Whether or not arising.

THE CHAIRMAN: I know, but I am taking the half that applies. If it doesn't arise out of the same transaction, it isn't within (1), but if it does not arise out of the transaction you may have a case precisely described in (1), where you have under the next sentence, lines 27 and following, another claim that does not arise out of the transaction, that has not been adjudicated, and in that case if the three claims described in (1) have been adjudicated, you can stay the enforcement.

I think that is another proof that this thing is confusing. Some of us had interpreted the rule the other way. The Reporter agrees that under subdivision (1) when all claims arising out of a single transaction have been decided and final judgment may be entered, there is no provision for stay. The Reporter has misconstrued his own rule when he says that. I am not criticizing the Reporter, but I just think--

DEAN MORGAN [Interposing]: Senator, you were taking such an easy case where you had one plaintiff and one defendant and three claims. I don't think you are going to get into much trouble in that case, but if you have one defendant and one plaintiff and two claims by the plaintiff and one by the defendant, that is the time you are going to get into more trouble.

THE CHAIRMAN: We are troubled enough with a simple

case.

JUDGE CLARK: I am surprised and shocked that Professor Moore should have put out a rule such as this!

PROFESSOR MOORE: Personally, I like the old draft, not fooling with it. I think it was all right in the Second Circuit.

THE CHAIRMAN: As I understand it, it is the sense of the meeting that Rule 54 has to be recast and clarified, a major operation performed on it.

JUDGE CLARK: Suppose you look back at the original rule. It is crossed out here.

MR. LEMANN: I think you probably could state what you said you intended to by rewriting the language from 17 on. I see some difficulty in going back to your original language after we have sent out to the profession statements saying that the original language gave rise to difficulties and uncertainties. We will practically have to say, "Well, it did, but we can't help it."

JUDGE DOBIE: We would have to say, "What we have now would give rise to more uncertainties."

MR. LEMANN: I think perhaps you would reword the language from 17 on so as to break it up into paragraphs and particularly to split up that sentence beginning in line 27 or to expand it and make plain your meaning.

MR. DODGE: Tell us when a judgment can be entered

where the claims do not arise out of one transaction.

THE CHAIRMAN: You think there ought to be a (3) that deals with claims not arising out of the same transaction, to be consistent?

MR. DODGE: Yes. You have to put in an affirmative clause about that and then bring in some of these qualifications later.

JUDGE DONWORTH: I have an idea that this thing is as clear now as it can be made if the suggestions of the other side are adopted. Before this Committee came into existence, the Supreme Court had occasion to construe an act of Congress which said that no suit in equity should be maintained if there was a plain, adequate, and complete remedy at law. A district court entered an order that a certain cause of action stated was equitable, and it issued an order against any jury trial in that proceeding, or vice versa. I do not remember whether it issued an order that there should be a jury trial or that there should not be. At any rate, the Supreme Court held that the order directing how the case should be tried was in effect an injunction against trying it the other way. They held that under the statute which makes appealable an interlocutory injunction, the order of the district court determining as between law and equity made that appealable because it was an injunction against proceeding the other way.

I feel that the able gentlemen we have presiding in

the Supreme Court and the circuit courts of appeals will work this thing out as it is by applying this rule that I have referred to, that any order that stops the enforcement of a claim and requires it to be postponed until some later date is appealable, and I think that will be applied here. Period.

JUDGE CLARK: I appreciate the kind thoughts of Judge Donworth, but I think I will agree with Bill Moore that it is probably hopeless. It certainly is in our circuit. We are right in the midst of two cases now on final judgments, and I'm damned if I don't think the results we are reaching are quite opposite in the two. I am writing the opinion in one, a dissent of thirty-five pages, and I have dissented in the other with a dissent of only two and a half pages. I don't know how we are going to make a simple rule, anyway, in final judgments when we have actions of wide content.

THE CHAIRMAN: I don't see why we can't. If you think a judgment ought to be held up until other claims are settled, all you have to do is to say that any judgment entered is subject to revision and modification by the court. That destroys the finality of it. You can give him discretion whether to reserve the power to modify or to abandon, to say that it is final and not subject to appeal in a very clear case, and it prevents any argument about whether or not the judgment is appealable. Then you can also provide, as we have tried to do in line 27, that although a judgment is final and

you intend it as such and it is not subject to revision on that particular claim and therefore is appealable and the time for appeal starts to run, still in order to protect the other fellow in his counterclaim on a transaction different from the first one, you can stay the execution on that claim until you have reached the second case, granted judgment in that, and set the judgments off against each other.

I don't think there is any difficulty about it. I think that it requires just a very little revision of this rule as they have got it.

Bob's idea has to be carried out to make it a clear rule. Maybe that provision about staying judgments that are final ought to be cut out where it is and stuck down at the bottom somewhere. It is a mere matter of arrangement, I think, and with a little change in verbiage you will have a very good rule there.

MR. LEMANN: I would like to suggest for the Reporter's consideration the following framework for recasting:

"When more than one claim for relief is presented in an action, whether as claim, counterclaim, cross-claim, or third-party claim, disposition of such claims may be made as follows:

"A. Claims arising out of a single transaction.

1. All claims disposed of.

2. Only parts of the claims disposed of.

"B. Claims not arising out of a single transaction."

That is as far as I have gotten at the moment.

JUDGE DOBIE: Some disposed of and others not.

MR. LEMANN: Then a separate paragraph for the stay of enforcement.

THE CHAIRMAN: At the end. Exactly. It applies to any case where there is really a final judgment.

MR. LEMANN: I think when you got through, even Mr. Dodge and I might understand it.

THE CHAIRMAN: Suppose you try it.

DEAN MORGAN: Even I might understand that.

THE CHAIRMAN: We are not in disagreement at all with what you are trying to do. It is a question of whether you have done it clearly.

JUDGE CLARK: Let me suggest one other alternative that may be going too far. The old rule of the Supreme Court was very definitely that when any claim was not adjudicated, it was not final. This has all come up because we have expanded the content of the action so much. Would there be any reason, for the sake of making it clearer, to go back to the old rule somewhat and say that when any claim of any kind remains undisposed of, the judgment shall not be final unless the district court has done what we have said here, unless the district court has---

THE CHAIRMAN: Affirmatively said so, in other words.

JUDGE CLARK: Yes. ---expressly determined that

there is no just reason for delay and so orders?

THE CHAIRMAN: Try it and let's look at it.

I would also suggest that maybe when you speak of a judgment as final or not final, we may come to the conclusion that in order to reach the same thought, to describe a judgment that is subject to further control and alteration by the court or is not, instead of using the words "final judgment" maybe we want to use both and say "a final judgment which is not subject to further revision by the trial court" or "a judgment that is not final and is subject to revision."

I think the idea of judicial control of the judgment is the thing that determines its finality, and not the use of the word, the epithet, in the rule.

MR. LEMANN: Perhaps we can consider your language in 54(a), where you use the words "judgment from which an appeal lies." That would be plain to the profession. You have used substantially that language in 54(a). You might consider that.

THE CHAIRMAN: I think we have given them some material to work on. I think you made a starting outline that will lead them right down the line.

DEAN MORGAN: I should think so.

THE CHAIRMAN: Do you mean when there are not the same parties to each of the claims involved?

PROFESSOR MOORE: Yes, or where the complaint might

be dismissed as against one defendant and not as against the other.

JUDGE CLARK: We struggled over that in my circuit recently. The Supreme Court in one case has said that whenever you dismiss as against one defendant and not as against the rest, it is not final. I had thought that had been generally followed. There are other cases. There is the Huntsman case down in the Fifth Circuit, and there have been others. We handed down a decision last week in which we found some way of getting away from that.

There is another quirk to this. I think certain parts of it are fairly settled. Suppose that you sue A and B, who are concurrent tort feasors. If for some reason the judge should throw out the case as to A only and still allow it to stand as to B, it would not be a final judgment.

JUDGE DOBIE: I don't think so, not under the stock definition that a final judgment is such a judgment that if affirmed by the appellate court there is nothing for the trial court to do to dispose of all the issues, save to carry out the mandate of the upper court.

JUDGE CLARK: When you said, "I don't think so," what side are you on? I didn't tie it up.

JUDGE DOBIE: I don't think that disposes of the case, do you?

JUDGE CLARK: I see. You were agreeing with what I

said.

JUDGE DOBIE: Yes.

MR. LEMANN: You mean if A sues B and C and there is a judgment saying B is dismissed, that is not a final judgment from which A can appeal?

JUDGE CLARK: That is correct, yes.

MR. LEMANN: He has to wait until the case against C is finished.

JUDGE CLARK: Yes.

MR. LEMANN: How will that fit into this framework? Is that what you are asking?

JUDGE CLARK: We tried to cover it. It is the same general thesis as this. It is perhaps a particularized case of this kind.

MR. LEMANN: All I am saying is that I think my scaffolding includes everything you told us you were trying to put in here.

THE CHAIRMAN: Multiple parties is not anything that arises by virtue of our provision for joinder of claims. There may be no joinder at all. There may be one suit and one claim but a bunch of parties, and that is all. I assume that what we are trying to do in 54 is to deal with the situations that arise because of this practice of bringing all sorts of counter-claims and cross-claims and third-party claims, and it is not a question of the number of parties. It is multiple claims that

we are dealing with. So, I don't think that in this rule we need to say anything about multiple parties. Of course, they will work it out in so far as it enters into this case, just as they will in cases that do not involve multiple claims at all. They do it there without any rule, so why shouldn't they do it here without any rule?

SENATOR PEPPER: May I inquire on this point, where all the claims arise out of the same transaction and all have been decided, is there any reason that there the entry of final judgment should not be mandatory, why we should say final judgment may be entered? Oughtn't it to be said that in that case final judgment shall be entered? Then, when we get to the second category where some have been decided and some have not, we make it permissive that final judgment may be entered on those that have been decided. Then comes the third category, of claims not arising out of the same transaction. Don't we mean there that no judgment shall be entered until all the claims are decided?

THE CHAIRMAN: No final judgment.

SENATOR PEPPER: That is what I mean.

THE CHAIRMAN: It is an interlocutory judgment within the control of the judge.

SENATOR PEPPER: No final judgment.

DEAN MORGAN: No, you don't.

MR. LEMANN: That is the case of the permissive

counterclaim. They don't arise out of the same transaction. That is the case where I think you want to provide that the court may enter a final judgment which will be appealable, but at the same time stay execution.

JUDGE DOBIE: I think you are quite correct there, because that fits into the definition, Monte. There the court has disposed of everything before him.

MR. LEMANN: Not everything before him.

JUDGE DOBIE: I mean this permissive counterclaim has never been adjudicated.

MR. LEMANN: It is before him, but he hasn't got to it.

SENATOR PEPPER: I don't care what the provision is. I want to have a statement of what happens where all the claims arise out of the same transaction and all have been decided; second, where they arise out of the same transaction and have not all been decided; and, third, where they don't all arise out of the same transaction.

MR. LEMANN: That is what I tried to do, except that I made two main divisions between one transaction and several transactions. I think you need those two first main divisions, and then under those main divisions you have your subdivisions.

THE CHAIRMAN: Then, the truth is that the stay provision is something separate again, down at the end, and not in your categories.

SENATOR PEPPER: I agree to that.

THE CHAIRMAN: Let's pass it now.

JUDGE DOBIE: Wouldn't it be better to put that under a separate subsection? Wouldn't it be better if we put that under a separate subheading, General, and labeled it "Stay"? It is sandwiched between two sentences which are divorced in content.

THE CHAIRMAN: You have subheadings for the other three classes, and you might have a fourth one.

JUDGE DOBIE: Dealing with stay apart from finality.

MR. LEMANN: Or you might put the bulk of my material under subdivision (b), Judgment at Various Stages, and then have (c), Stay of Enforcement of Judgment. That might also help.

JUDGE CLARK: Of course, that could be done. I think it would be a little too bad because 54(c) is a very important provision about which we have had many decisions. It would confuse the commentators. That is one of the most important provisions in the whole rule.

MR. LEMANN: He doesn't want to change 54(c) to 54(d), Mr. Chairman, so he objects to a new 54(c).

JUDGE CLARK: Judge Frank has just written an article in which he says that is the crowning achievement of the rules, and he cites 54(c) six times in one opinion.

MR. LEMANN: Then you don't want to change 54(c). Find some other device.

JUDGE DOBIE: Put it at the end so you won't disturb

it. That is just a suggestion.

THE CHAIRMAN: Suppose, then, that we pass on.

JUDGE CLARK: We will go to a rule on which there was not such unanimity among the bench and bar!

THE CHAIRMAN: Is there anything on 55, default judgments, that we ought to deal with?

JUDGE CLARK: I don't think we have anything on that.

THE CHAIRMAN: That brings us up to Rule 56, Summary Judgment. Have we any material on 56(a)?

JUDGE DOBIE: Armstrong has a suggestion on that, hasn't he?

DEAN MORGAN: It is the same old objection about the 20 days.

JUDGE DOBIE: That the period begin to run from service of complaint rather than commencement of the action.

MR. LEMANN: Don't you want to make the same change that Mr. Mitchell has suggested?

DEAN MORGAN: The defendant can make the motion--

MR. LEMANN [Interposing]: The defendant can make the motion at any time. We ought to note here that we are making a change corresponding with the other changes.

PROFESSOR MOORE: He already can, Mr. Lemann, in 56(b).

THE CHAIRMAN: You see, 56(a) relates only to claimants, Monte.

MR. LEMANN: I see. So, it is already covered.

THE CHAIRMAN: It is covered in (b), I think. We will look at 56(b).

MR. LEMANN: I see. We are changing only (a).

THE CHAIRMAN: Rule 56(b) is that any party at any time can move. That is consistent with what we have been doing in the other rules.

MR. LEMANN: That is right.

JUDGE CLARK: I think that is all under (a). It seems to be the question of time. Of course, we have gone over it a good deal, and I should think that we have pretty much exhausted the subject of the time of moving.

PROFESSOR SUNDERLAND: What do you think about the objection of some of the bar associations to a motion for summary judgment before there is jurisdiction over the defendant?

THE CHAIRMAN: "The Chicago Bar Association is of the opinion, expressed before, that a motion for summary judgment should not be permitted to be made prior to the time jurisdiction of the defendant has been obtained."

MR. LEMANN: That is the same point they made before, isn't it, that they don't want to permit this to be done?

PROFESSOR SUNDERLAND: The point was on depositions on discovery. This is on judgment.

MR. LEMANN: I mean it is the same kind of point. It is the same point presented under a different rule.

PROFESSOR SUNDERLAND: I suppose they are raising a technical point here, but they have no business giving judgment until they have jurisdiction over the parties.

THE CHAIRMAN: Instead of saying "after the expiration of 20 days from the commencement of the action," you could say "after the expiration of 20 days from the time of service of the summons upon the person against whom the judgment is sought".

PROFESSOR SUNDERLAND: That would certainly meet their point.

THE CHAIRMAN: It would meet the point about jurisdiction and you have service. You can't make the judgment motion until the fellows have been notified of the suit. They have 20 days to get a lawyer. It seems an impossible situation to serve a motion for summary judgment on a fellow before you reach him with a summons. It doesn't sound like common sense.

JUDGE DOBIE: No judge would grant it, of course.

THE CHAIRMAN: How would it do to say, "after the expiration of 20 days from the service of the summons upon the defendant against whom judgment is sought", you can move for summary judgment against any fellow that you have a process against, even though you haven't reached some of the other defendants?

SENATOR PEPPER: At least you couldn't proceed for summary judgment until he knew he had been sued.

THE CHAIRMAN: That is right.

SENATOR PEPPER: That sort of excludes a practical joke from the rules.

THE CHAIRMAN: The Chicago Bar Association suggests that the time commence to run from the date you get jurisdiction over them. What is your pleasure about it? To let it stand as it is?

MR. DODGE: Is the suggestion "after the expiration of 20 days from the service of process"?

MR. LEMANN: That is the way it reads now.

THE CHAIRMAN: No.

DEAN MORGAN: It now reads "from the commencement of the action".

JUDGE DOBIE: You may not have any service at all.

MR. LEMANN: The suggestion is that maybe you haven't got service at the end of 20 days from commencement of the action. How are you going to proceed for summary judgment if you haven't got service? We brushed Mr. Armstrong aside on depositions by saying, "Well, in 20 days you will get service."

MR. DODGE: These attempts to speed this up so tremenedously amuse me in view of the fact that the last one of these I was in I went to the court and asked, "When can we get a hearing on this?" and the court said, "In three months." That is a long motion.

JUDGE DOBIE: Was that a federal court? [No response.]

MR. DODGE: Twenty days from the service of process would be better, I should think.

THE CHAIRMAN: Let's make it that way. It would be from the service of summons. We called it "summons" in our original rules.

DEAN MORGAN: They both have to be served together, don't they, Charles?

JUDGE CLARK: Yes.

JUDGE DOBIE: The summons and a copy of the complaint.

MR. LEMANN: I wonder if for uniformity we should go back to Armstrong's suggestion and fix it the same way in the other rules. There is a difference.

DEAN MORGAN: There is a great difference.

THE CHAIRMAN: There is a difference between what?

MR. LEMANN: In circumstances between this and the other rules as to which he made the suggestion. The other cases were of depositions and interrogatories.

THE CHAIRMAN: Yes.

DEAN MORGAN: Those are quite different.

THE CHAIRMAN: There is no reason that this should not run from the date of service.

DEAN MORGAN: I should think not.

MR. LEMANN: In the other case it is conceivable that 20 days after the commencement of the action you might still not have service, and he asks, "Why permit the taking of a

deposition?" That is his point. We brushed that aside on the theory that that wasn't likely to happen. Technically, I guess his point might be correct.

THE CHAIRMAN: There is one difficulty about it. If the plaintiff starts a suit, he can't move for summary judgment until 20 days after the defendant has been served. Suppose the defendant gets a lawyer and hustles right into the court 5 days after he has been served and he moves for summary judgment. The other fellow is barred from making such a motion until 20 days are up.

DEAN MORGAN: Doesn't it provide that the court can order summary judgment either way on the hearing, Charlie?

JUDGE CLARK: We have left that out, as I remember. I think we recommended it, and it was voted down. Am I correct about that? Yes, we recommended that, and the Committee didn't accept it.

DEAN MORGAN: Then Mr. Mitchell's objection is pertinent here.

JUDGE CLARK: Yes. I wanted to add something of the same kind about the argument made for the technical case where the defendant has appeared and yet he hasn't been served. If you are going to do anything of this kind, haven't you got to take some language such as we have in the old deposition rule? It wouldn't be by leave of court here; it would be after jurisdiction has been obtained over any party or over property

which is the subject of the action. That is, it isn't necessarily service of process that is the criterion.

THE CHAIRMAN: I think you are right. I withdraw the suggestion.

JUDGE CLARK: I thought I supplemented your suggestion.

THE CHAIRMAN: I think it won't work. There are too many complications about it.

MR. LEMANN: Your point that you would tie up the plaintiff for 20 days after commencement of the action would still be open, Mr. Mitchell, under the present suggestion. You could cover the service point and say "provided that service has then been made". You couldn't do it before you made service, but you would still have your difficulty that you would be putting the plaintiff at a disadvantage as compared with the defendant. We considered that in case of depositions, and we answered it by saying, "Well, the plaintiff has had plenty of time to get himself a lawyer and study his case, and the defendant hasn't. So, the plaintiff will have to give the defendant time. The defendant won't have to give the plaintiff time because the plaintiff has had his time before he got into court. He could have got to court sooner." Maybe that point is still available here, not quite to the same extent.

Is it so terrible that the defendant can come in in 5 days and that the plaintiff can't?

DEAN MORGAN: Why couldn't the plaintiff counter

right there so that when you have the hearing the judgment might be rendered summarily either way? That is the point. Charlie said that they suggested that last time, and the Committee turned it down.

MR. LEMANN: I don't know quite why.

THE CHAIRMAN: There is some merit in the suggestion that it is like a demurrer. It reaches all the way back through the pleadings. If either one makes a motion for summary judgment and they fight it out, the court can give it either way.

DEAN MORGAN: Surely. He can hear the whole thing.

JUDGE CLARK: That is a provision that recently has been adopted in New York as to summary judgment.

THE CHAIRMAN: How is it worded? Is it a statute?

JUDGE CLARK: It is all by rule of court, you know, in New York. That is where the summary judgment comes from. It is made specifically in the rules of court. We definitely brought it up. I am very sure of it.

DEAN MORGAN: Why did we do it, Charlie, do you know? You remember, I would rather be right with Roosevelt. We must have had some reason.

THE CHAIRMAN: One fellow was caught unexpectedly by a boomerang. That was the idea.

PROFESSOR MOORE: A fellow might come in and move for summary judgment on some defense such as res judicata or

some other affirmative defense. We thought that the plaintiff should not be able, without moving for summary judgment, to get a judgment on the affirmative claim.

THE CHAIRMAN: You can provide that if one fellow brings in a motion for summary judgment, the other fellow, without the formality of notice or anything else, can move then and there for judgment in his favor. If he wants a motion, he can bring it right in court.

PROFESSOR MOORE: But the plaintiff would have to support his motion for relief on his claim with supporting affidavits, and the defendant would have to have time to counter that.

THE CHAIRMAN: Yes, if he wanted it, but suppose he steps in and--

DEAN MORGAN [Interposing]: Puts in counter-affidavits showing a perfect case.

THE CHAIRMAN: Suppose he moves right away. The court will allow everybody opportunity to introduce proof on a thing like that. It won't allow anybody to be caught unawares on some point he should provide affidavits on. You could say, "A party seeking to recover upon a claim, counterclaim," and so on, "at any time after the expiration of 20 days ... or at the time his adversary makes a motion for summary judgment, may move with or without supporting affidavits".

MR. LEMANN: What is the language of the New York

rule? Don't you think we ought to have that before us in the morning? Then we could see whether we could fit that in.

THE CHAIRMAN: I haven't seen it. Is it an amendment to the Civil Practice Rules?

JUDGE CLARK: Yes.

THE CHAIRMAN: How old is it?

JUDGE CLARK: It isn't very old, is it?

THE CHAIRMAN: The Congressional Library ought to have a copy of it.

JUDGE CLARK: It will be in the Civil Practice Manual.

MR. LEMANN: I think perhaps we should throw into this rule, to cover a point made, "may at any time after the expiration of 20 days after the commencement of the action, provided summons has been served".

DEAN MORGAN: That might help it.

JUDGE DOBIE: This man can move in 20 days, but he has to serve it.

THE CHAIRMAN: They are talking about appearance without summons. Then you have to say, "after summons has been served or appearance has been made".

DEAN MORGAN: He said, "provided summons has been served".

THE CHAIRMAN: Suppose it hasn't and that defendant voluntarily appeared.

MR. LEMANN: Put that in, too. "provided the summons

has been served or the defendant has appeared", or, "provided jurisdiction has been obtained over the defendant". I think that phrase is better. Of course, that would theoretically permit you to serve the summons on the nineteenth day after the commencement of the action and bring the guy in the next day.

DEAN MORGAN: But this is all in the hands of the marshal anyhow for service, isn't it?

MR. LEMANN: Yes. So, it wouldn't be very likely.

THE CHAIRMAN: I suppose if one of the parties makes a motion for summary judgment and the other fellow feels that he wants to counter it, then instead of having the right to make the motion formally in court, he serves a motion and maybe he is three, four, or five days later than the other fellow with his motion. However, before either of them is heard, the court knows there are two of them, so he makes an order setting both down for hearing at the same time. He certainly would not hear one with another one pending, would he?

MR. LEMANN: No.

THE CHAIRMAN: So, it is more or less a theoretical idea.

MR. LEMANN: The way it stands now, you would say that theoretically the plaintiff could not proceed for 20 days, but the defendant could proceed the next day.

THE CHAIRMAN: That is right.

MR. LEMANN: That is another point that perhaps we

ought to cover.

THE CHAIRMAN: That is the point I raise.

MR. LEMANN: That is why we are told now that the New York practice has a provision that says that if either one starts, the other fellow can lock on for himself. Is that right?

THE CHAIRMAN: I think the point about the plaintiff's being tied up while the defendant can go on is very simple to clear up. You can say that he may after the expiration of 20 days, and so forth, or after his adversary has served such a motion, whichever date is earlier.

MR. LEMANN: That is right.

THE CHAIRMAN: "or when his adversary has made such a motion".

MR. LEMANN: I think we ought to permit it.

THE CHAIRMAN: Yes. That might be even better. Have you found the New York rule?

JUDGE CLARK: Yes. I am afraid this is just a summary of it. This is from the New York Civil Practice Act of 1944. Rule 113, which is the old summary judgment rule, provides that the moving party must make affidavit "that there is no defense to the action or that the action has no merit, as the case may be." This is the quote:

"If upon such motion made on behalf of a defendant, it shall appear that the plaintiff is entitled to judgment,

the judge hearing the motion may award judgment to the plaintiff, even though the plaintiff has not made a cross motion therefor."

THE CHAIRMAN: I don't like that, because the plaintiff may raise a point that the defendant wasn't trying to meet by his affidavit at all, and it is a sort of surprise affair. I like my idea that the defendant makes a motion, and the plaintiff can counter with a motion of his own and is not restricted then as to the 20-day limit.

MR. LEMANN: You could put that in a sentence under 56(a).

THE CHAIRMAN: The virtue of that is that he is required to expose his grounds to the adversary. The New York rule doesn't require him to. He can sit tight and then jump up.

JUDGE CLARK: I think they have done it in other provisions, too. You will recall that the New York motion started out by being geared in terms of the defendant's motion, anyway. Another rule covers the case of the plaintiff. Here is the rule, 112. What I gave you was 113. Rule 112, Motion for Judgment on the Pleadings After Issue Joined.

"If either party be entitled to judgment on the pleadings, the court may on motion give judgment accordingly, and without regard to which party makes the motion."

In the revision of motions, I think they have rather generally put in that sort of crossing.

DEAN MORGAN: Of course, under 113, Charlie, they would have to give the defendant time to put in counter-affidavits to anything new in the counter-affidavits of the plaintiff, I should say.

JUDGE CLARK: I presume so.

THE CHAIRMAN: Of course those civil practice acts can be gotten right out of the Supreme Court library here in the building.

JUDGE CLARK: It is not of any importance now, but here is the rule that we suggested. We put in a third sentence, (c), "Without regard to which party has made the motion, an appropriate judgment shall be rendered forthwith if all the pleadings show that there is no genuine issue of material fact and that either claimant or defending party or both is entitled to judgment as a matter of law." That is what we suggested.

DEAN MORGAN: Was that on a motion for summary judgment?

JUDGE CLARK: That is what we suggested as a revision of 56, in (c).

THE CHAIRMAN: You mean in our consideration of proposed amendments for the last year or two?

JUDGE CLARK: Yes.

THE CHAIRMAN: Why did we reject that?

PROFESSOR MOORE: I don't know.

THE CHAIRMAN: I myself don't remember its ever being

raised.

PROFESSOR MOORE: I recall that the reason I gave you a while ago was part of the discussion.

THE CHAIRMAN: What was that reason?

PROFESSOR MOORE: The defendant might move for summary judgment because of some affirmative defense, such as res judicata, and there were some members of the Committee who were fearful that if at that hearing the court could render a summary judgment for the plaintiff, it would be dangerous unless the plaintiff had formally moved.

THE CHAIRMAN: Had warned the other fellow of his point. I still agree to that. I believe it is cured if you put in a provision here that if the defendant makes a motion for summary judgment, the other party without restriction as to time can immediately make one himself, but he warns the other fellow what his points are so that he doesn't get caught, as was indicated might be true on this automatic business.

JUDGE CLARK: I have the whole discussion here at page 457 of the transcript.

"Judge Clark: On 56(c) I had an additional idea which may or may not be bright, but I will bring it up. I have distributed a new draft of (c). ... It contains an additional provision which you may or may not want to include. ... It is in effect that whenever either side moves for a summary judgment, the court may give the final judgment as it determines

it should be, or, in other words, it may in effect give the judgment, if it wishes, when there is not a cross-motion. The genesis of this idea comes from the New York rules," and so on.

I talked at some length, and then the Chairman said, "The other fellow hasn't made a motion for summary judgment against me, but I have been caught under this rule on the whole record. He has no dispute but has a question of law and wins the case against me. I haven't had the foresight, and I am caught in court that way."

Senator Pepper asked, "Isn't that simply an application of the old common law rule that on demurrer the court will examine the whole record and give judgment in favor of the party who on the whole appears to be entitled to it?"

Suppose I pass on for the moment and see where the action comes. There seems to be a lot of this.

"Mr. Lemann: I am inclined to leave well enough alone. There has been no outcry for it."

MR. LEMANN: The Lemann rule, after about a half hour of debate.

THE CHAIRMAN: Gentlemen, I think I stick to the idea I had before, that instead of an automatic counter-motion catching a fellow by surprise, the safest thing to do is to let the other fellow counter with a motion stating his point so as to put the first one on guard. That can be done promptly, and both can be heard together. All that it is necessary to do

is, when you place a limitation on the plaintiff of 20 days before he can bring such a motion, that it ought to be qualified that if the other fellow makes a motion he can make one right away, too. If you do it that way, the only question left under (a) is whether the time runs from 20 days from the commencement of the action. Why not leave it that way? It is just like a deposition. There has to be a notice of a motion, and there has to be how many days' notice?

JUDGE DOBIE: Ten days.

THE CHAIRMAN: What if it is commencement of the action? You have 10 days' notice of hearing on the thing. That is enough to warn you. Why not just leave it 20 days after commencement of the action, with the qualification that the limitation is reduced if the other fellow brings in a motion against him. Do you understand that?

JUDGE CLARK: Have you got it?

PROFESSOR MOORE: Yes.

THE CHAIRMAN: Can't we adjourn, then, if we are agreed to that?

[The meeting adjourned at six o'clock.]
