P R O C E E D I N G S

ADVISORY COMMITTEE ON RULES

FOR CIVIL PROCEDURE

VOLUME I

May 17, 1943
Supreme Court of the United States Building
Washington, D. C.

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MONDAY MORNING SESSION

May 17, 1943

The meeting of the Advisory Committee on Rules for Civil Procedure for the District Courts of the United States, held May 17-22, 1943, at the Supreme Court of the United States Building, Washington, D. C., convened at 10:04 a. m., Honorable William D. Mitchell, Chairman of the Committee, presiding.

... The following were in attendance:

Members

Mr. William D. Mitchell, Chairman
Mr. Edgar B. Tolman, Secretary
Judge Charles E. Clark, Reporter
Mr. Scott M. Loftin
Professor Wilbur H. Cherry
Mr. Robert G. Dodge
Judge George Donworth
Mr. Monte M. Lemann
Dean Edmund M. Morgan
Professor Edson R. Sunderland
Mr. George Wharton Pepper
Judge Armistead M. Dobie

Others

Professor James Wm. Moore
Mr. Edward H. Hammond
Mr. Robert S. Oglebay
Mr. Alexander Holtzoff ...

THE CHAIRMAN: The Committee will come to order.

... There ensued a discussion of luncheon arrangements and the hours of the meeting of the Committee ...

THE CHAIRMAN: How do you want to take this up, rule by rule, and go right down the line as the Reporter suggested? If there is no objection to that, we shall start in, then, with Volume I of the Reporter's report. Rule 1. Mr. Reporter,

you have no recommendation for change there, have you?

JUDGE CLARK: That is correct; there is no recommendation for change.

THE CHAIRMAN: You refer us later to Rule 81, which we had better take up when we reach it.

JUDGE CLARK: I think that is so, yes.

THE CHAIRMAN: Is there anything anybody has to suggest about Rule 1? The next is Rule 2. Again there is no change suggested, is there, Mr. Reporter?

JUDGE CLARK: None here. There is one suggested later on in connection with Rule 39; not here, however.

THE CHAIRMAN: You mean there is one change in Rule 2 suggested under Rule 39?

JUDGE CLARK: No. The change in Rule 39 is forecast here.

THE CHAIRMAN: I see. Let's wait until we get to 39. No change in Rule 2.

JUDGE DOBIE: As to these things like the Tucker Act, I suppose you will take them up under 81. Is that right?

JUDGE CLARK: That was the suggestion.

JUDGE DOBIE: I think that is the best way to handle it.

THE CHAIRMAN: Rule 3. This is the commencement of actions and questions of the Statute of Limitations. The conclusion there is "We doubt if any helpful change can be made

under the Rules as such," which satisfies me. How about the rest of you?

DEAN MORGAN: I don't see how we can resolve a conflict on the Statute of Limitations.

THE CHAIRMAN: The note was a little incomplete, I thought, Mr. Reporter, because it referred to a whole lot of decisions, but it didn't quote the language of the state statutes involved and didn't give you a sharp picture as to whether our system (having a complaint filed and the clerk forthwith issuing summons to the marshal for service) in terms complies with most state statutes. If nobody has any suggestion to make on Rule 3, we will pass to Rule 4.

DEAN MORGAN: On paragraph (5) there is a suggestion about Rule 3, isn't there? That was Rule 4? Yes. I take it back.

JUDGE CLARK: Rule 4, yes.

THE CHAIRMAN: There was a suggestion there about the manner of service upon an officer of the United States or an agency. Will you present that to us, Mr. Reporter?

JUDGE CLARK: That appears on page 11 at the middle of the page. It was a suggestion made by the editors of the Federal Rules Service, and we rather endorsed it although we didn't think it was very important. At least, so far as we know, there hasn't been much difficulty. I think Mr. Hammond really raised a question as to whether it was proper or worth

while to do it. You will see that the only substance of it is to define more carefully who in the various agencies is to be served. If you will look at the middle of the page, you will see the added words underlined; "to the secretary of such" included before "agency", then "or the person in the agency serving in a similar capacity."

THE CHAIRMAN: In the case of the United States attorney, I remember, in order to make clear how service should be made on him under those circumstances where service has to be made on him, we made a special provision that he designate somebody in writing to receive service. If we are going to do anything about service on an agency or other officer, it would seem to me that that is the only exact way to do it. Say simply, "the executive of such agency or persons serving in a similar capacity." That doesn't help much. It means you would have to serve personally the Secretary of the Treasury or the Acting Secretary of the Treasury.

Has any trouble arisen on it?

MR. HAMMOND: No.

THE CHAIRMAN: If there hasn't, why should we change it?

MR. DODGE: One of the clerks in the District Court in Boston raised the question whether it was necessary to have the marshal serve the summons upon the Attorney General by registered mail under 4(d)(4). He thought it was an unnecessary

requirement and that the plaintiff ought to be allowed to make that kind of service.

THE CHAIRMAN: That whom ought to be allowed to do it?

MR. DODGE: That the plaintiff ought to be allowed to do the registered mail serving and make a return that he has done so, but as the marshal does everything else, I had some question whether that was advisable.

THE CHAIRMAN: It isn't a very safe course to leave that sort of thing to a party.

MR. DODGE: All the rest of the service has to be by the marshal.

DEAN MORGAN: You remember, we had a long debate on whether service should be made by the marshal or not. I still think it is an asinine provision.

THE CHAIRMAN: What is?

DEAN MORGAN: This provision that requires service to be made by the marshal or deputy. It seems to me the New York State practice is so much more sensible.

THE CHAIRMAN: Is there anybody who wants any amendment in the matter of service on government agencies?

JUDGE CLARK: If you pass this one, you might wish to take up a suggestion that the Government made which appears in our supplemental report which you have. It is on Rule 4, page 2--this same provision. I think Mr. Hammond has it in his mind. It is a suggestion of the Tax Division to provide service upon

the United States when the suit is against a collector or former collector.

MR. HAMMOND: Yes. The Tax Division considers that a very important provision, and they think they need it. You see, (d)(5) was intended to cover cases where an officer was sued in his official capacity. These suits against collectors are not suits against the officers in their official capacity. Therefore, instead of amending (d)(5), I suggest that we have a separate provision to cover suits against collectors, former collectors, and representatives of estates of deceased collectors.

There has been some question, as the memorandum from the Tax Division shows, as to whether the United States has to be served under (d)(5). In a great many of the suits they do actually serve the United States, but in others they don't. Of course, I don't think anybody would question that the United States ought to receive notice of any such suits. If there is to be any recovery at all, the United States will have to pay whatever amount is recovered, so they certainly are entitled to notice of that suit.

The judge, as you know, issues a certificate of probable cause, and then the money has to be appropriated out of the Treasury to pay it. The issuance of that certificate of probable cause is automatic. There has been only one case that I know of where they refused to issue a certificate of

probable cause, and that was a case of collusion between the estate of the former collector or of a deceased collector. It was a fraud case. In that case, after many years of litigation, the Sixth Circuit Court refused to issue a certificate of probable cause.

It seems to me that it ought to be perfectly clear in the Rules that the United States should get notice of these suits, and it is not clear in the Rules now. I recall that when (d)(5) was being considered, Mr. Mitchell himself said in a letter to Mr. Tolman, I think, "I assume that your use of the language 'upon an officer of the United States' means an officer sued in his official capacity." We originally had those words in there, and we struck them out because, as Mr. Mitchell said, he thought it meant that. If it means that, it doesn't cover the case where a Collector of Internal Revenue, a former collector, or a representative of the estate of a deceased collector is sued. So my suggestion is, instead of attempting to amend (d)(5), that we have a separate provision covering suits against collectors, former collectors, and representatives of the estates of deceased collectors.

THE CHAIRMAN: I can add to that, that that problem has been a very live one in the office of the United States District Attorney in New York. These rules had hardly gone into effect before he called me on the phone and wanted to know about service in a collector's suit and, as I recollect it, I

realized then that there was a gap in the rule. I think my notion is that under Rule 4 when we talk about service against the United States, we can just add a clause that in suits against Collectors of Internal Revenue, their representatives, or ex-collectors, in addition to service on them, service should be made on the United States in the manner prescribed in these Rules. We can add something like that and let the Reporter work the language out.

MR. DODGE: Are you talking about a suit against a former collector?

THE CHAIRMAN: Yes; a collector, a former collector, and the representative of the estate of a deceased collector. The Government foots the bill, and it ought to be served. You have to serve the collector or, of course, his representative because technically you are getting a judgment against him or his estate, but you ought also to require service on the Government as prescribed in the Rules, ought you not?

MR. DODGE: I think paragraph (5) ought to be so construed anyway. Has it ever been construed as not requiring service on the United States?

MR. HAMMOND: Yes.

THE CHAIRMAN: There is great doubt about it, because an ex-collector isn't an officer of the United States and yet the Government foots the bill. There might be that argument, and where he is actually an officer there is still the question

of whether he is sued as an officer or individually.

MR. DODGE: He is sued as a former officer, and I should think the paragraph ought to be so construed.

JUDGE DONWORTH: I should like to ask Mr. Hammond if there is anything in the 1942 Revenue Act that affects this question. I have been told that there is a section in that Act specifically treating the case of suits against collectors, but I haven't looked it up. Do you know anything about that?

MR. HAMMOND: It doesn't cover the question of service on the United States. It wouldn't help us on this thing at all.

SENATOR PEPPER: Mr. Chairman, may I inquire whether we use "service" as a term of art or loosely to cover both service and notice to one not a party?

THE CHAIRMAN: As a word of art.

SENATOR PEPPER: Then since the theory on which you sue the collector is that you want to avoid the difficulty that would be involved if you sued the United States, isn't the only thing that you owe to the United States a notice? The instant you use service as a term of art, it means that the person served is a party.

THE CHAIRMAN: You can call it "notice" if you wish, but the short way to do it would be simply to say that the summons is to be served on the United States in the manner prescribed by the Rules in addition to service on the collector, ex-collector, or representative.

MR. LEMANN: Has that given any practical difficulty? For years, I think, it has been the practice to serve the collector or to serve the former collector. Of course, to protect himself, he always passes it on to the government authorities.

MR. HAMMOND: He doesn't always do it.

MR. LEMANN: I think that has been in the law for twenty-five or fifty years. Personally, I have never heard of even the Government's making any complaint about it. It is not a suit against the United States. I think that is pretty well settled.

THE CHAIRMAN: The Government takes charge of it; the District Attorney defends it, and the Government pays the bill.

MR. LEMANN: They do, but they have never had any complaint about the service of it that I have ever heard of, unless there is some recent complaint after these Rules went into effect.

THE CHAIRMAN: That is what I am speaking of. They had trouble in the United States District Attorney's office in New York.

MR. LEMANN: Why didn't they have trouble before the Rules went into effect? That was the practice before the Rules. We didn't change it.

THE CHAIRMAN: There is an ambiguity here now whether the service is good at all if it isn't served on the United States. If you want to put it the other way and say, "No

service is required on the United States in suits against collectors," that will remove the ambiguity. There is a question of which way you want it, and it ought to be clear. It isn't clear now. I know that.

JUDGE DOBIE: I think the United States is entitled to service there, and I venture the suggestion that that is a case in which it is worth while to change the rule to make it perfectly clear.

MR. HAMMOND: I have drafted a rule to make a separate provision, (d)(8), which is in the supplementary comments of Judge Clark.

THE CHAIRMAN: (d)(8)?

MR. HAMMOND: Make it (d)(8).

THE CHAIRMAN: What rule are you talking about?

MR. HAMMOND: Rule 4.

DEAN MORGAN: Adding a paragraph to the numbered paragraphs, Mr. Mitchell.

SENATOR PEPPER: There is a catalogue of cases there ending at present with (7), and Mr. Hammond is adding (8) in the language that appears on page 3 of the supplementary comment.

MR. HAMMOND: Yes.

JUDGE CLARK: How much time does the collector get to answer?

THE CHAIRMAN: There is another thing. The United

States doesn't answer in a collector case, so the collector has twenty days. That would solve itself.

JUDGE CLARK: If the United States is served, wouldn't it come into that and answer in sixty days?

MR. HAMMOND: We ought to provide that they should, I think. They should have sixty days just as any other.

MR. LEMANN: You are making a change in the present practice, then, aren't you?

MR. HAMMOND: Suppose that is so, I think they ought to have it. Aside from all the reasons of having the Internal Revenue Department decentralized, with records all over the United States, it actually works out for the benefit of the taxpayer in many cases to give the Government that time. It affords an opportunity to the people who really decide these questions of tax law--and there are many people who are concerned in the decision of each question--a chance to go into it, and often cases are settled before they ever come to trial. Many compromises are effected that way. Furthermore, it enables the Government to take a consistent position in regard to these very similar matters. If it doesn't have that time, it will just have to go in and file an answer in a short time, and then you will have the Government taking an inconsistent position. It absolutely needs that sixty days.

DEAN MORGAN: Are they ever settled before they put in an answer?

MR. HAMMOND: Yes.

MR. LEMANN: In my experience I have had two cases recently, and in each of them the Government got, I think, between two and three extensions of time for answering. They had no difficulty in getting them. They just asked for them and got them ex parte from the court. I got the impression from those two experiences that they have been doing that regularly when they needed it.

I don't think we ought to take a long time about this point. My real question here is, what is to be our policy in suggesting amendments to these Rules? Perhaps this is just as good a time as any to pose that question. Are we to take up matters that haven't apparently given much trouble in the past, where a rule has been pretty well settled, and try to make a better rule and polish the thing up, or are we only going to take up the most serious questions? I was wondering a good deal about that as I read through the suggestions of the Reporter. Is this an appropriate time to ask that, or should we wait for that to be developed as we go along?

THE CHAIRMAN: Generalities are pretty dangerous. We planned to take it up in each particular case and decide whether it is of sufficient importance to take it up. I don't think we ought to be chopping the Rules up without any good reason for it. We want to be distinctly on the conservative side. But the truth is that there is an ambiguity which has

arisen here. The District Attorney in New York called me on the phone, and he was proposing to move to set it aside because the Government hadn't been served, because the taxpayer hadn't served the Government. He contended that it wasn't an officer of the United States. That struck me with that ambiguity. I think your record shows that it is a live one. We ought either to settle it one way and say the collector isn't an officer or, if he is, to say so and to provide for service on the United States as a means of giving notice to the Government, which really defends the case.

SENATOR PEPPER: The reason I asked my question was that it didn't seem to me competent for us to determine the status of the collector. He is undoubtedly an officer of the United States, but the suit against him is against him as an individual. If it is, I can't see any theory upon which you could serve the Government and give the Government the rights of a defendant in respect to the time to answer. I should think that the proper course is to make service upon the only defendant that there is and to give notice to the United States, which is the party ultimately interested.

THE CHAIRMAN: It is a question of phraseology. You can put it this way. You can say that service should be made upon the collector, and so on, and that notice should be given to the United States.

SENATOR PEPPER: That is it.

THE CHAIRMAN: By serving the United States in the manner provided for the service of summons. That gets rid of your word of art.

SENATOR PEPPER: You see, we are maintaining a fiction here. The theory is that the suit has to be against the collector as an individual to avoid suit against the Government. Now the fiction is pretty thin, but if we are going to preserve it at all--and I think we must--I should think that our language ought to be appropriate to the fiction.

JUDGE DOBIE: You would substitute "notice" for "service"?

SENATOR PEPPER: Yes; that is all.

THE CHAIRMAN: Prescribing the manner of giving notice?

SENATOR PEPPER: I don't think so. I don't think that is necessary. By giving notice to the United States and by delivering a copy of the summons and complaint to such collector, as provided by Mr. Hammond.

THE CHAIRMAN: How do you give notice to the United States? There has to be some form for that.

SENATOR PEPPER: Do you think so, sir?

MR. TOLMAN: Mr. Hammond has met the situation, I believe, Mr. Chairman. Here is his rule. It seems to me you could get something concrete before us if that could be read and considered.

THE CHAIRMAN: Isn't that included in the report? The

Senator makes the point that when you also say "by also serving the United States", you raise the implication that the United States is a party and has a right to answer. That is what we are trying to avoid. You want to make notice to the United States, service on the collector, and the remaining question is how the notice should be given to the United States.

PROFESSOR CHERRY: Mr. Chairman, may this not be broader than the one instance suggested of the suit against the collector?

THE CHAIRMAN: Can you think of any other illustration?

PROFESSOR CHERRY: I don't know that I can offhand, but there have been such things in regard to state officers, of course, many times. If it were put in this very narrow form, we would be running the risk at least that we were leaving out some other situations to which it might be applicable or become applicable by later statutes.

THE CHAIRMAN: This is the only case that I know of where real trouble has arisen. How would it do, Senator, to say, "In a suit against a collector, former collector, or personal representative, in addition to serving the defendant, plaintiff should give notice to the United States in the same manner as is required for the service of summons on the United States"? Doesn't that dodge the point?

SENATOR PEPPER: That is all right. I just meant as a bit of clear thinking, it seems to me that we ought in our

language to reflect the theory of the suit.

THE CHAIRMAN: That may give the inference that the United States is a party and has the particular sixty days to answer, may it not?

SENATOR PEPPER: If the United States claims that right, it may very well be held to be an implication from such a rule that it has it.

JUDGE DONWORTH: Is this difficulty one that was created by our Rules?

THE CHAIRMAN: Yes, because before the Rules were enacted it was perfectly clear that the only service required was the service on the collector or ex-collector or representative.

JUDGE DONWORTH: Isn't that still the fact?

THE CHAIRMAN: We came along and said "upon an officer or agency of the United States," and at least in the case of a collector who is still in office, a doubt arose at once then as to whether he was an officer of the United States within the meaning of the rule. Of course in the situation as to the ex-collector or the dead collector, the ambiguity didn't arise.

JUDGE CLARK: There might be a comparable case as to the state officer. I don't suppose we want to think of that, but under the Supreme Court doctrine of Ex Parte Young and others, if you are going to enjoin the Attorney General you have to go after the individual of the state; you can't sue the state. The theory of that suit was against an individual. I

don't believe there is enough problem. I think probably the Rules could take their ordinary course there.

JUDGE DOBIE: The problem in that Young case, as I understand it, was really whether it was a suit against the state. As I remember it, the Supreme Court held when he was acting unconstitutionally his official role fell away and he really then became an individual. Isn't that correct?

JUDGE CLARK: As I understand it.

THE CHAIRMAN: I believe that in those cases no one is ever sued in that way unless he is still an officer. That gives notice to the state.

Suggestion has been made that subdivision (8) to Rule 4, which we are thinking of adding, should provide in substance, with a little change of verbiage, instead of as drawn on page 3 of the supplemental report, that "Where service is made upon a collector, former collector, or personal representative of a deceased collector of internal revenue under the internal revenue law, notice should be given to the United States, which should be served on the United States in the same manner as provided for service of a summons on the United States."

Is that the thought you had?

SENATOR PEPPER: That is it.

MR. DODGE: Applying it only to a past collector or the estate of a deceased collector? You have already covered the collector as an officer of the United States.

MR. HAMMOND: No.

DEAN MORGAN: That is just the point.

THE CHAIRMAN: There is an ambiguity.

MR. DODGE: The present collector is not an officer of the United States?

THE CHAIRMAN: You are suing him to collect a judgment against him. I don't think it was our intention that if you are suing an officer who happens to be an officer for damages and getting personal judgment, he is being sued as an officer of the United States within the meaning of the Rules.

MR. LEMANN: What are the cases covered by the present paragraph (5) upon an officer of the United States? Can you give some illustrations?

THE CHAIRMAN: You sue the Secretary of the Interior or somebody here.

MR. LEMANN: And ask for judgment against him personally?

THE CHAIRMAN: No. You sue him as an officer to restrain him from doing something in his official capacity. He is an officer, and the Government has to be served. But where you are suing a fellow who happens to be an officer and you are trying to get a judgment against him personally, the rule is ambiguous as to whether your suit is against an officer.

MR. DODGE: There might be similar personal suits against officers other than collectors.

THE CHAIRMAN: That is so.

MR. LEMANN: But this amendment wouldn't cover it.

THE CHAIRMAN: No, it wouldn't.

MR. LEMANN: That is what I was saying.

PROFESSOR CHERRY: That is the point I was making. Those don't often happen, but they can.

MR. LEMANN: There would be a certain lack of artistry in having (5) relate to suit upon an officer and (8) relate to a suit upon a collector of internal revenue, because then you have Mr. Dodge's point that you are implying that a collector is not an officer; otherwise, he would be covered by (5). You would have to say in (5), "Except as provided in (8) for certain specific officers," wouldn't you, if you wanted to be artistic?

JUDGE DONWORTH: I think there is something to be said for the thought that the section does not need any amendment, that you, of course, serve the defendant that you are suing, and if section (5) applies, the careful practitioner will comply with section (5) also. I doubt if it is really necessary in suing the collector under the established practice whereby he is personally liable, with some claim over against the Government, but if (5) does apply, then (5) furnishes the method of doing it.

THE CHAIRMAN: I remember telling the District Attorney that if I were practicing law, in a case like that I wouldn't

take any chances; I would serve the collector as an officer and I would also serve the United States as prescribed by the Rules. This is a mere matter of precaution to cover a plain ambiguity. Some people don't serve the United States. The District Attorney wanted to move to set aside the service in the suit against the collector on the ground that the United States hadn't also been served. I think the practice which resulted in the New York situation was to take no chances and to serve both of them, but that doesn't seem very satisfactory. Why draw a distinction between a dead collector and a live one? When you come to look at the reason for notice to the United States, there should be no distinction.

MR. HOLTZOFF: May I venture a suggestion, Mr. Chairman?

THE CHAIRMAN: Go ahead, Mr. Holtzoff.

MR. HOLTZOFF: In order to avoid the proposed paragraph's being narrow and applying to an officer with only a particular title, I wonder if we might enlarge that by saying, "Upon an officer or former officer", and so on, if the action is brought to recover a personal judgment for a sum of money against the officer, and then in the present paragraph (5) add an exception, "Except when the action is brought to recover judgment for a sum of money."

THE CHAIRMAN: Do you want to act on it or do you want to refer it back to the Reporter to consider further?

DEAN MORGAN: May I make one suggestion, Mr. Chairman, if it is to go to the Reporter? Wouldn't you exclude the ambiguity if in section (5) you would put merely "Upon an officer in his official capacity", as we had it in the original suggestion? That would mean that if you are suing him other than in his official capacity, he is being sued just as an individual and the other section would take care of it. When you are suing him in his official capacity, you have to serve the United States.

THE CHAIRMAN: Suppose the man is a collector; he is in office and you allege he is a collector.

DEAN MORGAN: You are not suing him in his official capacity. That is settled by the decisions. You can't sue him in his official capacity.

THE CHAIRMAN: Then your idea is to abolish any notice to the Government in a suit against a collector?

DEAN MORGAN: Certainly. I don't think we ought to require it. It is the collector's funeral if he doesn't give notice to the Government. He won't get any money out of it.

THE CHAIRMAN: Is there any motion?

MR. HAMMOND: The representatives of the estates of deceased collectors don't give that notice. They don't care much about it. They don't have to pay anything out of the estate. It is nothing to them. They just take their own time about it.

MR. LEMANN: If they don't notify the Government, can they get the Government to pay it?

DEAN MORGAN: Of course not.

MR. LEMANN: Isn't there a requirement that they must assert certain things?

THE CHAIRMAN: There is no requirement in the existing law that means that the Government won't foot the bill if the representative of the collector failed to notify the United States attorney, is there?

DEAN MORGAN: They wouldn't get any order to show cause under those circumstances.

MR. LEMANN: It has worked so well for so many years, I am just wondering why it is making trouble all of a sudden. You say, in effect, that we made the trouble.

THE CHAIRMAN: That is right.

MR. LEMANN: It never would have occurred to me that we had, certainly as to former collectors, because I can't see anything here that would touch the former collector. I can see the point that we have raised some doubt that didn't exist before by the language of (5) as to the requirement of service upon the United States in a suit against a present collector, although I would have thought it was quite clear that under (5) if you sued a present collector you would have to notify the United States, because he is an officer. When you come to a former collector, where did we make any trouble? What in our

rules makes any ambiguity about the former collector? He is not an officer; he is not an agent. It seems to me we left it where we found it. It wasn't given any thought.

THE CHAIRMAN: The live collector, the collector in office, is the one where the ambiguity arises.

DEAN MORGAN: He is not an officer in the case. He is an individual and is sued as an individual.

MR. LEMANN: There I can see we might have made some trouble inadvertently, but I can't see where we have made any trouble about the former collector. That is the present collector.

THE CHAIRMAN: No, we didn't. But how about the suggestion of Mr. Morgan that we simply insert the words "in his official capacity"? That, he says, will eliminate any argument that the collector in office is being sued as an officer of the United States.

JUDGE DONWORTH: I fear that would create more doubt than it would eliminate.

PROFESSOR SUNDERLAND: After "officer" why not put in "sued either in his official or personal capacity"?

THE CHAIRMAN: If you sued an officer of the United States for rape, do you think you should serve notice on the Government?

MR. HAMMOND: If I may make a suggestion, I think that the Committee ought to decide whether they think that the

United States ought to have notice of these suits against a collector or a former collector or the personal representative of the estate of a deceased collector.

THE CHAIRMAN: They never did require it before we adopted these rules, did they? There was no law or anything else that required a collector or ex-collector or the representative of the estate of a collector to notify the Government.

MR. HAMMOND: No, I don't suppose there was, but I think they are entitled to it; I really do. We close our eyes to the fact that in reality it is a suit against the United States. The money has to come out of the United States Treasury and has to be appropriated.

JUDGE DONWORTH: Mr. Hammond, what you are now saying was just as true before these Rules were adopted as it is now. It was a suit against the United States in effect, and so on.

THE CHAIRMAN: The statutes providing for the United States' paying the judgment never prescribed that the United States wouldn't pay the judgment if the defendant didn't notify the Government of the suit, did they?

MR. HAMMOND: I didn't understand you.

THE CHAIRMAN: Prior to the adoption of these Rules, if a suit was brought against a collector or ex-collector or the representative of a collector, there was no statute which said that the defendant wouldn't be reimbursed by the Government unless he notified the Government in time to have the

Government protect itself in the case, was there?

MR. HAMMOND: No, I don't think there was.

THE CHAIRMAN: They got along, as Mr. Lemann says, for seventy-five or a hundred years or more under that system, and why should we change it?

MR. LEMANN: It is a question of our function. Is it our function to improve the position of the Government in details of this sort? I wonder. We can't cover the universe.

THE CHAIRMAN: If there is trouble that ought to be remedied, I think we ought to remedy it to protect any defendant or anybody responsible for payment.

MR. LEMANN: I wouldn't discriminate against the Government.

THE CHAIRMAN: Mr. Morgan's suggestion is that we put in the words "in his official capacity". I think your point is that.

JUDGE DONWORTH: Yes.

THE CHAIRMAN: I think that is the reason I tried to get it stricken out before, because I didn't know what it meant exactly.

JUDGE DOBIE: If you put a phrase like that in, I think it is going to cause a great deal of trouble.

DEAN MORGAN: I think this is the only ambiguity you have, in the word "officer," whether he is sued in his official capacity or his individual capacity. I don't see any other

ambiguity in it.

JUDGE DONWORTH: What about a suit against a collector to recover a tax paid?

DEAN MORGAN: That is in his individual capacity. All the cases say so.

PROFESSOR SUNDERLAND: We simply wouldn't provide for that case at all, then, under your suggestion.

DEAN MORGAN: Not at all. We have a suit upon an individual, then.

PROFESSOR SUNDERLAND: Yes.

DEAN MORGAN: That is just what it is. It is entirely covered.

THE CHAIRMAN: What is your pleasure? Maybe we had better let it go as it is. If anybody connected with the Tax Division isn't satisfied, he will have plenty of time when we get out a tentative draft to come back to us with intelligent suggestions.

DEAN MORGAN: Mr. Chairman, I was making that as merely one of the suggestions that the Reporter ought to consider if we are going to send it back to him for redrafting.

SENATOR PEPPER: I like the Chairman's suggestion. It seems to me when we have spent as much time as we have on a small matter, it would be just as well to take final action which either is to adopt some concrete proposal or to let the thing stand as is and await developments. I don't think we

ought to encumber the Reporter's notes with a re-reference of a small matter like this.

THE CHAIRMAN: Suppose you make a motion, then, that it stand as it is and that we await developments.

JUDGE DOBIE: I should like to make a motion that we add paragraph (8) as amended by Senator Pepper. It seems to me that there is an evil here, that the United States is clearly entitled to notice as a matter of good practice in equity, and to add a rule like this I think would not clutter up the Rules but would probably be a good way to remedy what seems to be an evil.

THE CHAIRMAN: Any second to that? There is nothing before us, then. Is there a motion one way or another to do anything with it?

SENATOR PEPPER: I understood Judge Dobie to make a motion.

MR. HAMMOND: He asked if there was any second.

SENATOR PEPPER: I beg your pardon. I see.

THE CHAIRMAN: The logical thing is for somebody to move to leave it as it is and await developments. R 42(5)

SENATOR PEPPER: I make such a motion.

JUDGE DONWORTH: I second that motion.

THE CHAIRMAN: Any further discussion? All in favor say "aye." It is carried.

JUDGE CLARK: Are we ready to go to the next one?

THE CHAIRMAN: The next what?

JUDGE CLARK: The next suggestion. By the way, Mr. Chairman, of course we worked on this, but I hope it is not thought that no one else can make suggestions.

THE CHAIRMAN: I understand, of course, that if anybody has anything up his sleeve that he wants to bring up, he will do it without being invited.

The next thing here is to strike out the word "rule" contained in the last line in subdivision (d). Shouldn't it be (e) instead of (d)?

JUDGE CLARK: Yes, I think it should be (e).

THE CHAIRMAN: On page 11, dealing with Rule 4, in the last line it says "subdivision (d)." It should be (e). The suggestion is that the word "rule" be eliminated.

DEAN MORGAN: I so move.

THE CHAIRMAN: Any objection to that?

JUDGE CLARK: I should say that that is a very obvious thing, but I suppose that will raise Mr. Lemann's policy again.

THE CHAIRMAN: That is just a mistake in the draft.

MR. LEMANN: This action will be a useful precedent.

JUDGE CLARK: Yes.

JUDGE DONWORTH: I am sorry, I don't get the reference here.

THE CHAIRMAN: Have you before you Rule 4, subdivision

(e)?

JUDGE DONWORTH: On page 11 of the notations?

THE CHAIRMAN: The rule isn't there. If you will look at the rule, Rule 4, subdivision (e), the word "rule" contained in the last line of subdivision (e) was inadvertently inserted. R4(e)

JUDGE DONWORTH: It seems so.

THE CHAIRMAN: If there is no objection, that will be stricken.

JUDGE CLARK: May I make a further point on that same rule? Mr. Hammond criticizes "state." You will find the criticism stated in the supplemental material, page 3. He says that "state" is inaccurate, that the statute referred to "district." We made the answer that under Rule 4(f) we think "state" is accurate.

THE CHAIRMAN: What page of your supplemental report is that?

JUDGE CLARK: Page 3.

SENATOR PEPPER: It is all raised by this sentence in the comment: "He points out" (that is, Mr. Hammond) "that no statute provides for service of summons upon a party not an inhabitant of or found within the 'state,' but that the statutes deal with parties not inhabitants of or found within the 'district' where suit is brought."

JUDGE CLARK: I think that is correct in the statement, but then we have our Rule 4(f), which provides for service

throughout the state.

THE CHAIRMAN: Which I don't think is worth the paper it is written on.

DEAN MORGAN: You don't?

JUDGE CLARK: Some courts have upheld it.

THE CHAIRMAN: Yes. However, assuming that our rule about service in the state is sound, then your phraseology is correct. Isn't that so, Mr. Hammond?

MR. HAMMOND: His phraseology is correct?

THE CHAIRMAN: Yes. The statute was dealing with a situation where the process could run only within the district.

MR. HAMMOND: Yes.

THE CHAIRMAN: The Rules now make the summons run inside the state whether outside the district or not.

MR. HAMMOND: Then you say, "Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state...." Of course, there is no statute that so provides.

THE CHAIRMAN: You mean the rule isn't valid?

MR. HAMMOND: It says "district." I just didn't think it was proper for the Committee to refer to statutes inaccurately.

THE CHAIRMAN: There is clearly something wrong there, isn't there, Charlie?

JUDGE CLARK: I suppose technically that is correct, but I suppose any rules have the force of statutes.

THE CHAIRMAN: We are frequently distinguishing between a rule and a statute here. We ought not to use the word "statute" to mean a rule.

MR. LEMANN: You could put in "or these Rules" in line two, and that would cover Mr. Hammond's last statement. It would read that "Whenever a statute of the United States or an order of court or these Rules provides..." Would that cover it, Mr. Hammond?

MR. HAMMOND: I couldn't hear you, Mr. Lemann; I am sorry.

THE CHAIRMAN: In subdivision (e), he suggests that it read, "Whenever a statute of the United States or an order of court or these Rules provides..."

MR. LEMANN: Yes. That was just to meet Mr. Hammond's last rejoinder to Judge Clark's point. I thought Judge Clark's point was quite right in view of the provisions of paragraph (f), which certainly we ourselves wouldn't want to question the validity of. I don't mean to imply that I would question it personally.

THE CHAIRMAN: I think that covers the point. Your point is that it is inept because it talks about a statute allowing service within the state, and now it is a rule that does it. The suggestion, Mr. Reporter, is to say "or these

Rules" before the word "provides" in (e). Do you get the suggestion there?

JUDGE CLARK: I think so.

MR. LEMANN: I doubt personally whether it is important enough to change at all, Mr. Chairman, unless we are going down and make a lot of the sort.

THE CHAIRMAN: It is an inaccuracy, but it may be a little more than that. Suppose you were in court and should say there isn't any statute now.

MR. LEMANN: I think if I were the judge I would know what I would say.

THE CHAIRMAN: Therefore, the rule wouldn't cover it because it is only when there is a statute or an order to cover it.

JUDGE CLARK: Do you want to comment on that, Mr. Moore?

PROFESSOR MOORE: That is true; it refers to district, but it is certainly broad enough to cover service for publication on people outside the state. I should think it is phrased accurately now, our notion being that if the person can be served validly within the state, you have to make in personam service, and you utilize Section 118 only for the service for publication.

THE CHAIRMAN: He is right.

JUDGE DONWORTH: I understand the Chairman doubts the

validity of personal service in the state outside of the district.

THE CHAIRMAN: Let's forget that for a minute. He was talking about phraseology now. I think Mr. Moore is right about that.

JUDGE DONWORTH: We know that for many years there has been a statute, still in effect, which provides that if the suit is quasi in rem, for instance, if it concerns real estate in the district, then you can get an order of the court for publication. Is the point that as we have attempted to provide for a personal service in that hiatus, living within the state, but not in the district, we have created a difficulty?

THE CHAIRMAN: No, it is a narrower point than that. It is a mere question of the appropriate word. "Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state...." The only statute there is refers to persons not inhabitants of or found within the district.

JUDGE DONWORTH: Right.

THE CHAIRMAN: The reason the Reporter used the word "state" was that we by rule allow the process to go throughout the state instead of the district, and he thought there was a failure to be accurate in expression. That is about all there is to that.

JUDGE CLARK: Well, Mr. Hammond raised the point. I don't think I would try to change it myself.

MR. HAMMOND: I made a redraft of it, if you would like to look at it.

THE CHAIRMAN: "Whenever a statute of the United States or an order of court authorized by such a statute provides for service, by publication or other means, of a summons or of a notice or an order in lieu of summons upon a party not an inhabitant of or found within or who is absent from the district..." You are wrong about that because this would allow publication of the summons when the defendant isn't in the district, although the court has power to reach him if he is in the state.

MR. HAMMOND: I am not sure that isn't the way it ought to be. I was in doubt.

THE CHAIRMAN: Let's forget that. Certainly there oughtn't to be any publication of a summons allowed on a man who can be reached by personal service. That is perfectly plain.

MR. HAMMOND: Yes.

THE CHAIRMAN: As you have it, if he can't be found in the district, you can publish on him even though he can be found in the state and have personal service on him. That is the point I was trying to make to that suggestion.

Suppose we pass it by, then, if we are satisfied with it. That seems to be the sense of the meeting, doesn't it? If there is no objection, we will make no amendment to subdivision

R 4(e)

(e).

JUDGE DONWORTH: Except for striking out the word "rule".

JUDGE CLARK: Yes, I think that is agreed to.

JUDGE DONWORTH: We have adopted that?

THE CHAIRMAN: That is right. Now what have we next, Mr. Reporter? What do you have here under the head of "Territorial Limits"?

JUDGE CLARK: That is Rule 4(f). We have discussed the cases and suggested that we can add something to Rule 82 in connection with this rule.

THE CHAIRMAN: We will pass it until 82. You have made a general recommendation here, haven't you, in this section, to ask Congress for an amendatory act validating all these rules.

JUDGE CLARK: I did, yes. I put in a draft statute in the appendix.

THE CHAIRMAN: I guess we can stop right now to consider that as well as we can at the end. I would be most violently opposed to it. We have struggled for thirty years to get Congress to delegate the power to the Supreme Court. Then after we got it, we walked back to Congress and said the thing won't work because we can't distinguish between substantive and procedural law, so we want a statute invalidating the whole thing. When the statute gets in the Congress, they will turn

around and begin to tack exceptions on it and practically repeal every rule in the lot that they don't like. It is one thing to ask Congress for a statute on a specific point like this question of extending the process of the court outside the statutory limits. When that rule was passed, I had the gravest doubt of its validity, and I was astounded when the Court passed it. I thought they would wipe it out. I don't think they ever considered it. Now we have had some decisions, and I don't think the authority of the District Judge who says the rule is valid is worth much, because you are asking him to knock out a rule that has been approved by the Supreme Court, and there is all the weight in the world against it. Three or four District Judges have had the courage to say it is bad. I can't reconcile myself to the idea that it is a mere matter of procedure and that this Supreme Court could extend the territorial limits in which summons could be issued by the United States District Court in New York to the entire country. If we can do it to New York, we can do it to California.

When you read the decision of the Supreme Court in that Wilkes v. Buck case, you will see it just got through by five to four, with a very powerful debate in the committee on the proposition of requiring a man to submit to a physical examination when his physical condition was a procedural matter, not a matter of substantive right. I want to go on record now as saying that I haven't much doubt that when that comes up to

the Supreme Court, they are going to say that the question of territorial jurisdiction is just as important as the subject matter jurisdiction. The territorial jurisdiction of the United States District Court has been limited by Congress, and the Supreme Court can't by procedural rule allow a United States District Court in New York to drag a man from California to answer in a New York court. That is what I think they are going to do. I have felt all along that some litigant is going to get caught on that sooner or later.

When you come to submitting a statute to Congress, I should like to see a statute passed limited right to that one thing and tell them this question is a difficult one, and doubtful, and that we should like to have it confirmed by Congress. But, of course, we wouldn't do that unless the Supreme Court felt the rule as it stands is probably invalid.

DEAN MORGAN: Mr. Mitchell, as I read the ~~Wilkes~~ Wilson case, the division wasn't on whether it was procedural or substantive.

THE CHAIRMAN: I know what you mean, but the fact is that you are going to have a tight job on questions of procedure and questions of substantive law before the Court.

DEAN MORGAN: I realize that, but when you crack somebody's personal liberty you are going to have a hard job.

THE CHAIRMAN: What do you think about going up to that Court and saying, "Here, you have a rule where you can reverse the case, where a case now may be brought where either the

plaintiff or the defendant resides; a citizen of New York can sue a citizen of California, and the California man can be served in California and compelled to travel across the country and appear in a New York court."

MR. LEMANN: Not now.

DEAN MORGAN: You won't do it with this.

MR. LEMANN: We haven't tried to do that. It is a matter of degree. You say if you can do what you have done, you can do the other thing.

THE CHAIRMAN: There is no magic in state lines or district lines on the principle.

MR. LEMANN: I say, on principle you may be right, but I think the Supreme Court would have the power to do the greater thing, but it doesn't follow that it would want to do it, and it wouldn't follow that we would want to do it and we haven't tried to.

THE CHAIRMAN: You and I don't agree, then. If I were on the Court, I would "bust" that rule in a minute, and my prediction is that if it ever comes up to the Court, they will "bust" it. I should like to see the thing called to the attention of the Court again in a confidential note saying that the thing has created discussion in the Committee and there is a conflict of authority in the District Courts on the validity and putting it up to them again, asking them whether they think it is advisable to let it stand as it is or to get an act of

Congress extending the process limit to the whole state.

JUDGE CLARK: Mr. Chairman, I don't want to discuss this very much now, and all I will say is that we felt there were quite a few cases where you could raise the question. Of course, the effect of Railroad v. Tompkins is such that several matters could be considered doubtful. On the whole, I should rather hate to start that with the Supreme Court. I am afraid that it would put too many ideas in their minds.

THE CHAIRMAN: The statute wouldn't help you on Railroad v. Tompkins. A constitutional amendment would be required. Well, let's pass on. I didn't mean to take so much time.

JUDGE CLARK: Rule 5. Let me say how that comes up. I am not sure how important it should be considered. Various persons and various judges have apparently felt there was a lack in our Rules, that they didn't cover the subject of filing. We have had some letters, and of course there was considerable discussion at the time the District Courts were considering the uniform rules. The situation now is that at least certain districts (I don't know that they are very many) require very definite proof of service. It has seemed to me that that rule was against the spirit of what we intended, and I think it would certainly be rather unfortunate for us to adopt a general rule of that strictness, because I know that that is not done in at least many places.

THE CHAIRMAN: You mean our rules requiring the filing

of proof of service?

JUDGE CLARK: Yes; that is, the affirmative requirement that people think they want when they think about it at all I think would be unfortunate, because I know at least several districts that don't require it and get along very well. Whether we should respond to such suggestions as there are by, in effect, saying the contrary (because that is what I think we should say if we say anything) is the question. As it now stands, it is true that there may be a problem as to those districts which have adopted a specific rule. It would be rather my opinion that that specific rule is in conflict with our general principles here, and there may be doubt whether that is valid, but it seems to satisfy some feeling of required reaching for certainty that some lawyers and a few judges have.

That is the situation. I should think that if we were to do anything, in other words, we ought to negative the rule of these few districts that are requiring more, I think, than the circumstances really make convenient.

JUDGE DONWORTH: Isn't that covered by subdivision (g), Mr. Clark?

JUDGE CLARK: I should think it was, Judge Donworth. That is why I suggest that these district rules which require more are probably invalid, as being inconsistent with (g), but nevertheless there is quite a movement for adopting a specific rule. If you go back to the suggestion made in that draft for

uniform District Court rules, you will find there a rather definite requirement of proof of service.

MR. LEMANN: This hasn't even come up in any reported case. This is just what the Reporter has heard.

JUDGE CLARK: I think not. I think it is just a matter of worry on the part of some persons.

MR. LEMANN: We can't eliminate all worries, and we can't eliminate all arguments of lawyers. Perhaps we ought not even to try to do that. I move this just stay as it is.

THE CHAIRMAN: The main question, I think, is that our rule doesn't say specifically anything about it one way or the other.

MR. LEMANN: It doesn't need covering, as Judge Donworth suggested.

THE CHAIRMAN: It makes it reasonably clear under (d) that you don't have to file proof of service, because you may file notice with the court. Charlie's point is that we are not having uniformity of practice because some of the District Courts have provided local rules requiring the filing of proof of service and others have not. So, when you go into one court or another, you have to look up the local rule and haven't uniformity.

JUDGE CLARK: That is the point.

MR. LEMANN: "The person serving the process shall make proof of service thereof to the court promptly...." What

does that mean in (g)?

THE CHAIRMAN: Rule what?

JUDGE DONWORTH: 4(g).

MR. LEMANN: It is 4(g). Judge Donworth referred to it.

THE CHAIRMAN: That is process only.

JUDGE DONWORTH: As I understand it, when the defendant appears, very rarely does anybody look at the return of service. If there is an attorney appearing, that, of course, waives any question of service. It is only in the case of a default judgment that this return becomes very important. Isn't that true?

JUDGE CLARK: Yes. May I make it clear, Mr. Lemann? You all have in mind that this is not process. This is under (5), the serving of papers between attorneys.

MR. LEMANN: I see.

MR. DODGE: We say nothing about proof of service. Why can't a District Court properly make a rule, if it wants to, requiring some form of proof? I don't see how there is anything inconsistent with our rule in that.

JUDGE CLARK: Possibly not. It seemed to me that the idea of (d) and (e) was to the contrary. Of course, there is the other question of whether we shall try for uniformity here or not. Of course, you can't tell without finding out from the local practitioner.

THE CHAIRMAN: The more local rules you have, the more

lack of uniformity you have in the Federal system as a whole. There is certainly no requirement in these rules of proof of service or anything else, but a process must be filed. Neither is there anything saying that it shall not be filed. So the District Court says that the local rule requiring filing isn't inconsistent with the Federal rules, and that is probably so. There is nothing lax in it except the question of whether we ought to settle it one way or another so that the practice in every district should be just the same.

MR. DODGE: We require the filing.

THE CHAIRMAN: But not proof of service.

MR. DODGE: We don't say anything about proof of service.

JUDGE CLARK: Whereas we do very carefully in processes in the preceding rule, and, as I recall, I believe we did that with malice. They thought that this wasn't a condition. I don't feel very strongly about it. I just bring it to your attention. If you want some further references on it, you will find them on page 5 of the supplemental suggestions we sent around.

MR. DODGE: I wish we had had your suggested amendment in the original rule, but not having had it in there, I question whether it is important enough now to make an amendment.

SENATOR PEPPER: May I ask the Reporter for an illustration of how this question could come up practically?

It is provided in the case of pleadings in Rule 7 about the filing of complaints, and so forth, and it is provided in subsection (d) of 5 that "All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter." What is the case in which the filing of a paper in its relation to previous service becomes important?

JUDGE CLARK: The way it would come up, I suppose, is first that you would have one of these local rules which would provide as a condition that there must be a proof of service upon it.

SENATOR PEPPER: Yes.

JUDGE CLARK: Then suppose that there is no proof of service; the court takes some action against the other party, and then he comes in and says, "That is invalid because local rule so-and-so has not been complied with."

SENATOR PEPPER: Then what we really are seeking to do is to eliminate the possibility of a local rule on this subject.

JUDGE CLARK: Yes, and we do it because there are local rules and there has been some tendency to make local rules of this kind, and we do it, of course, to invalidate them, really.

SENATOR PEPPER: That is what I meant. I was just wondering whether our ideal uniformity cannot better be served

by letting those local peculiarities wear themselves out by proving that they accomplish no useful purpose rather than by irritating a District Judge by superimposing a rule merely for the purpose of invalidating a local practice.

THE CHAIRMAN: It isn't a bad idea to have these local District Courts act as sort of laboratories for the trial of something that we haven't done and see how it works.

JUDGE DONWORTH: Like Justice Cardozo's expression of leaving "some play in the joints," and the District Court rules can take up the joints.

SENATOR PEPPER: Is the District Court the joint in your illustration? (Laughter)

JUDGE CLARK: I think it was Mr. Hammond who suggested the scriptural rule I was applying with an opposite effect.

MR. HAMMOND: No, sir, I don't think I suggested that. All I did was to call your attention to the fact that there were local rules, and I thought the Committee's attention ought to be called to the fact that if they adopted your rule, they would be repealing the local District Court rule.

THE CHAIRMAN: This would be a good place, Mr. Lemann, for you to raise your generalization as to whether this is a thing that deserves amendment. Suppose you move that it stand.

MR. LEMANN: I made such a motion, but nobody seconded it.

JUDGE DOBIE: What was your motion?

MR. LEMANN: That it stay as it is and that we not change it.

R5(a)

MR. DODGE: I second the motion.

THE CHAIRMAN: Is there any further discussion? All in favor of leaving the rule to stand as it is say "aye." It is carried.

We are down to Rule 6 now.

DEAN MORGAN: Mr. Chairman, I have called Mr. Moore's attention to a criticism of Rule 5(a) by Professor Chafee in an article with reference to service in interpleader action. I don't know whether anything can be done about it or not. He points out that in an interpleader action if you got service on a defendant while he was within the state or within the district and then he got out, defaulted, before you could assert another claim in the interpleader action, even a compulsory counterclaim, if he were in default it would be impossible to serve him unless he got back in the state or in the district, while if he had appeared you could serve on his counsel. That is on account of the latter part of Rule 5 that when you assert a new or additional claim, then service is in the manner provided for service of summons in Rule 4. I don't know whether anything can be done about it, but there is a decision in that case where you have an interpleader action with a compulsory counterclaim.

THE CHAIRMAN: Did you consider that?

JUDGE CLARK: I hadn't, no.

DEAN MORGAN: I think it is worth considering. I should just like to get the reaction of the Reporter and Mr. Moore on it--not now. They might bring it up a little later.

JUDGE CLARK: Is this a new article of Chafee's that is coming out?

DEAN MORGAN: Not yet. I just have the galley proof of it.

JUDGE DONWORTH: It has to do with that insurance interpleader statute, hasn't it?

DEAN MORGAN: I don't know. He is considering the Federal interpleader statute and our interpleader statute and the question of service with reference to that kind of occasion.

THE CHAIRMAN: What is the name of the man who is writing the article?

DEAN MORGAN: Chafee.

R 5(a) Chafee

THE CHAIRMAN: Suppose you refer it back to the Reporter, with a request that he read the article and come in at our next meeting with a report on it.

DEAN MORGAN: I have given the thing to them, and it may be such that it won't require much discussion.

JUDGE CLARK: Mr. Moore can read it tonight and instruct me at breakfast tomorrow.

MR. MOORE: Is it all here?

DEAN MORGAN: I think just the part that I have marked

is what you need to look over.

THE CHAIRMAN: Is that all on 5? Then we shall take up Rule 6, which has to do with the enlargement of time.

JUDGE CLARK: Rule 6(b) Enlargement has caused some trouble, as you can see, as to how far enlargement may be had and as to the types of matters as to which you may have an enlargement. May you enlarge the time for taking an appeal or for motion for a new trial, and so on? If you have before you our suggestions, on page 15 of our original, you will see various suggestions.

THE CHAIRMAN: Suppose we take those up one by one. Your proposal generally is to put in a blanket provision to remove this ambiguity that has been causing trouble in the courts by specifying the particular rules under which enlargements are not to be permitted. There is a variety of them, and some of them may be good and some may not. So I suggest that we take those up one by one.

DEAN MORGAN: One that is omitted there is 25(a).

JUDGE CLARK: What is that, substitution?

DEAN MORGAN: I think that is substitution.

MR. HAMMOND: Yes.

DEAN MORGAN: I noticed a decision by Biggs, 4 Fed. Rules Serv. 457, on 25(a). I think you have it in your supplemental draft somewhere, haven't you, Charlie? It seems to me I saw it. On 25(a) there is a decision by Biggs that you can't

enlarge the time there, either.

JUDGE CLARK: On page 6 of the supplemental there is a reference not to the Third Circuit but to a Kentucky case.

DEAN MORGAN: This is the Third Circuit, a decision by Biggs.

THE CHAIRMAN: What section does that refer to?

JUDGE CLARK: That is the same thing, 25(a). Our comment was: "Mr. Hammond has suggested that possibly in light of Anderson v. Brady, a reference to Rule 25(a) should be inserted." We say there that we think if we do include specific rules, 25(a) should be included.

THE CHAIRMAN: All right. Then is there any objection, assuming we put in this blanket clause, to naming 25(a) as one of the periods that can't be enlarged? That has to do with substitution. It seems clear that it would be right to put that in.

SENATOR PEPPER: Is that in addition to 50(b)?

JUDGE CLARK: Yes, it would be in addition.

THE CHAIRMAN: The next he has here is 50(b), and I have a question mark after that in my own mind. It seems to me that some of these things in 50(b) plainly ought to be enlarged if the case shows a need for it.

DEAN MORGAN: 50(b) is neutral.

THE CHAIRMAN: If 50(b) is left in your amendment, Charlie, if a man wanted to make a motion for a judgment not-

withstanding the verdict, he would have to make it in ten days, and the court couldn't enlarge it. He couldn't get a transcript or anything else. Why should that be proper?

JUDGE CLARK: I think that is true, and if you want to eliminate it, it is quite all right. What I have done here, as I have suggested on the next page, is perhaps to put in more than you will want to put in. I have in effect suggested a policy of limitation, if you will, as to several of these matters. If a man gets a verdict, something will be said if the opposite side starts delaying. You have to check up on it.

THE CHAIRMAN: The judge has something to say about that. He doesn't get any more time unless the judge grants it.

MR. LEMANN: You are cutting down the discretion of the court.

DEAN MORGAN: Just the motions.

MR. LEMANN: I mean generally by his change he is cutting down the discretion of the court. He had given the court a general discretion, limited only in two instances, I believe. Now he is enlarging the instances in which the court shall have no discretion. Is that wise?

JUDGE CLARK: To a certain extent what you say is correct, but it is possibly more than that. In the first place, we have to face certain issues. The courts have faced them, and we ought to face them, particularly with reference to appeals. Therefore, the issue here is, how much are we going to extend

the time for filing the appellate record, and so on? The issue being that, do these matters that we are now discussing fall within the same general category or do they fall within another?

THE CHAIRMAN: That is why I suggested we take them up one by one, because there seemed to me to be quite a difference between them. The next one we are considering is 50(b), and that is, should we forbid the court to exercise its discretion to make an order allowing more than ten days for a motion for judgment notwithstanding the verdict? It seems to me that is a thing that the court clearly should have discretion about.

DEAN MORGAN: A motion for a new trial can't be extended. Why should a motion for judgment notwithstanding the verdict stand on any other basis? He has made his motion for a directed verdict.

THE CHAIRMAN: Where is the motion for a new trial section?

JUDGE CLARK: That is the next one; 59(b) is the provision for it.

MR. DODGE: The court can extend that.

DEAN MORGAN: Can it?

MR. LEMANN: You have previously prohibited any extension of time in 59 except as stated in 59(c). The present Rules prohibit any extension other than in 59. Mr. Morgan says that should stand as we have it. Why shouldn't 50(b) be in the same category?

MR. DODGE: Where does 59 exclude it?

MR. LEMANN: In the present rule, Rule 6(b). You may not enlarge the time for taking any action under Rule 59 except as stated in subdivision (c) there.

THE CHAIRMAN: Haven't some courts held, Charlie, that under their general discretion a court can extend the ten-day time for making a motion for a new trial?

JUDGE CLARK: I am not sure on a new trial. The matter has come up under 75(g) as to the record. Do you know about new trials?

PROFESSOR MOORE: It covers it, that you cannot.

DEAN MORGAN: You cannot. It says so in so many words.

JUDGE CLARK: Rule 6(b) says you cannot.

DEAN MORGAN: I don't know how you can construe that to mean that you can.

THE CHAIRMAN: If that is a fact, I suppose 50(b) ought to be in the same category.

JUDGE CLARK: Wouldn't it be a good idea just to go through these and look at them, then perhaps to go back over them and strike out any that you don't like? There seemed to be somewhat a general similarity here. They ought to be considered together first, and then you can eliminate if you wish.

THE CHAIRMAN: We know what 25(a) is, and we think that ought to be in. We know what 50(b) is. Now let's look at 52(b). What is that?

JUDGE CLARK: That is a motion to correct a finding or to amend a finding. You see, in general these are matters after judgment, so to speak.

THE CHAIRMAN: Yes. What is 59(b)?

JUDGE CLARK: Motion for a new trial.

THE CHAIRMAN: That is already limited to ten days, with no discretion, isn't it?

JUDGE CLARK: That is right.

THE CHAIRMAN: What is 59(d)? That is on the court's initiative. He certainly ought to be allowed to step in and set aside a verdict on his own motion without a limit as to time. What is 60(b)?

JUDGE CLARK: 60(b) is our relief from mistake, inadvertence, or surprise.

THE CHAIRMAN: That clearly was intended to be an absolute limit of six months, as worded here. Has some court held that it isn't a six months' limit?

JUDGE CLARK: I don't think any have held on that, but the theory of 6(b) applies generally to the Rules, and it would apply to 60(b), wouldn't it?

THE CHAIRMAN: I see.

JUDGE CLARK: There was one case discussed, wasn't there? I thought there was one case that discussed it and held "No."

THE CHAIRMAN: The old statutes under which that rule

was drawn all had a definite limit of one year, I think, and it couldn't be extended. The next section we have is 73(a).

JUDGE CLARK: That is the appeal. That, I suppose, would probably be clear. Maybe we have no power.

THE CHAIRMAN: It isn't a question of time, is it, in 73(a)?

JUDGE CLARK: Mr. Moore calls my attention, as to 60(b), to the fact that we have some cases applying to 60(b) on page 167. He says the cases are going both ways on that.

THE CHAIRMAN: It certainly ought to be in, then.

MR. LEMANN: Am I right in understanding that the only question on appeal has been whether the prohibition against extension of time applies only if you take an appeal or whether it also applies to the period for docketing the appeal? Is that a correct statement? Is that the only point that has come up?

JUDGE CLARK: No. I think the questions that have come up have been under 60(b) and under 73(g) particularly.

MR. LEMANN: 73(g) is docketing. I am talking about the appeals section now.

JUDGE CLARK: I don't think there has been any question under 73(a), has there?

MR. LEMANN: No. I think 73(a) has been conceded. The only question has been whether the prohibition now contained in 6(b) applies to 73(g).

DEAN MORGAN: That is right.

JUDGE CLARK: That has been the chief question. That is what originally raised this issue. But it also is being raised under 60(b). That is the six months rule.

THE CHAIRMAN: We are talking now about 73(a). That is the time for taking appeal. We wouldn't want to put that in because that would raise an inference that the Rules could regulate it.

MR. HAMMOND: It is already in the original rule.

THE CHAIRMAN: It says "within the time prescribed."

MR. HAMMOND: I think that is better language. It also covers 72, doesn't it, as well as 73? The wording of the present rule is, "but it may not enlarge the period for taking an appeal ..... as provided by law."

THE CHAIRMAN: Where is that?

MR. HAMMOND: On page 8 of the Rules.

THE CHAIRMAN: There is no need, then, of repeating that, is there?

JUDGE CLARK: That is already in, yes.

MR. HAMMOND: Doesn't it cover 72 as well as 73?

THE CHAIRMAN: Page 8 of the Rules?

MR. HAMMOND: Page 8 of our Rules.

THE CHAIRMAN: What rule is it?

JUDGE CLARK: Rule 6(b).

THE CHAIRMAN: There is already an express provision

that you can't enlarge the time for taking appeal provided by law, so we don't need it in this.

JUDGE CLARK: That is true. The two cases provided for already are the new trial and the appeal. We were adding some more, and the question is, if we add, what will be the phraseology of the addition?

THE CHAIRMAN: When you have a clause in Rule 6(b) which explicitly says that nothing in this general section shall authorize the extension of the period for taking appeal provided by law, why repeat that in your proposed amendment?

JUDGE CLARK: We had suggested a short general statement taking the place of that. It could still stay in if it is thought to be preferable language, but we certainly want to keep that in some way.

THE CHAIRMAN: I certainly wouldn't strike it out.

MR. HAMMOND: We are not striking it out.

THE CHAIRMAN: He has suggested striking it out.

JUDGE CLARK: No, no; with a substitution.

MR. HAMMOND: He is substituting 73(a) and (g) for the words "and the period for taking appeal as provided by law."

DEAN MORGAN: That is it.

JUDGE CLARK: I was going to say the reason for that is just textual. If we start enumerating, we have to enumerate as to all.

THE CHAIRMAN: Yes. The last one, then, is 73(g).

MR. HAMMOND: Before we get to that, may I suggest this? How about 72? In other words, our original language was "or the period for taking appeal as provided by law." Of course, 72 covers the allowance of an appeal. I didn't know whether we had chosen the language "or the period of taking appeal as provided by law" to cover both 72 and 73.

JUDGE DONWORTH: Of course, that expression in itself, the time allowed by law, furnishes some elasticity. I recall a recent decision (I forget whether it was by the Supreme Court or by the Circuit Court of Appeals) to the effect that a motion to amend the findings entertained by the court is equivalent to a motion for new trial and in itself extends the time. We are not attempting to deal with matters of that kind, with interpretation of what the time limit is.

MR. HAMMOND: Yes. That is the Leishman case, decided by the Supreme Court recently.

THE CHAIRMAN: Rule 72 doesn't say anything about any time for appeals; it doesn't mention time. So why throw that into the hopper? It doesn't say a thing about it. It says when an appeal is permitted by law, appeal shall be taken by petition in the manner prescribed by the existing means or mode of taking it. It doesn't say a word about time, whereas 73 does. It says "within the time prescribed." I shouldn't think you need to include 72.

That brings us up to 73(g). Let's see what that means.

JUDGE CLARK: That is the time of docketing the record.

THE CHAIRMAN: 73(g) ought to be in, oughtn't it?

JUDGE CLARK: I should think so. 73(g) is the one that perhaps provided the chief question, because 73(g) is pretty explicit in itself. But 6(b) is the one we talk about overriding 73(g). I should have thought not, but there are the cases. Some of them are cited here on page 15 of our notes.

THE CHAIRMAN: 73(g) expressly provides that the court can extend the time.

JUDGE CLARK: Yes, but only under certain conditions, you see.

THE CHAIRMAN: But your proposed amendment is wrong because the appeal then would be inconsistent with (g).

JUDGE CLARK: I shouldn't think so, at least not in our intent. Maybe we made it wrong. We say, "may not enlarge the period beyond the time stated in those rules."

THE CHAIRMAN: Oh, yes. I agree with that.

JUDGE CLARK: As it stands, (g) provides that your order for extension must be made before the expiration of the period, and so on. There are certain limitations on it. The Ainsworth case, which we cite on page 15, held, I take it, that 6(b) overruled that. Other cases have held the contrary. You see the cases at the top of page 15.

THE CHAIRMAN: Now we understand pretty well what the different things are that this amendment will accomplish if it

is adopted.

JUDGE CLARK: I am frank to say that I suggested for your consideration what might be termed the narrower time. I don't insist on it particularly, except that there is a good deal of pressure now on the judges to speed things up. There is that provision that we call familiarly the "Judge Parker statute" about conferences, and so on. We are always supposed now to see about expediting business, and yet matters of this kind come up right along where the parties have agreed. It is a curious thing how much time is lost here. Lately we have had two such cases. In one the record had not been filed for two years, and in the other case it had not been filed for two years and a half. It appeared before us by consent; that is, there was consent to file it. We have now adopted a local rule in our Circuit that the clerk is to take no record except within the time allowed by law or by some order of extension which is before him, but the last time I sat I still saw the record of a similar kind of case. I don't know whether the clerk still took it or what, but I suppose that comes in that sort of problem. There is some pressure on the judges to speed things up; there isn't so very much pressure on the parties, and it may very well be that there can't be. I don't know.

THE CHAIRMAN: As far as the situation is concerned where the filing of the record takes place two years after the judgment is entered and appeal is taken, this rule wouldn't

help any, would it?

JUDGE CLARK: It wouldn't help it absolutely. It would make sure that there would be no time extension by the District Court, but of course the Circuit Court could still extend the time, I suppose.

THE CHAIRMAN: Let me get my point clear. Your Rule 73(g) already provides that the court may extend the time. He makes the order before the time has expired. It is under that rule that you can file the record two years afterward that the lower court has extended the time.

JUDGE CLARK: Look at the very last sentence of 73(g). "....but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal." That is an over-all limitation unless perhaps 6(b) would make a change.

THE CHAIRMAN: What is your pleasure with this now? Do you think you know what it is? The proposal is to amend 6(b) of the Rules. The sentence now reads, "but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law." The Reporter suggested a substitute which reads, as shown on page 15 of his report under Rule 6, "but it may not enlarge the period for taking any action under Rules 50(b), 52(b), 59(b)-(d), 60(b), and 73(a) and (g), beyond the time stated in them."

MR. LEMANN: Would it be perfectly safe to say that the District Court should never extend the time? Of course, you could go to the Court of Appeals. I have a case now where the record is very long, there are a great many exhibits, and the court reporters are way behind generally. In my district we tried a case in March, and the reporter announced to me and to the court and opposing counsel that he couldn't give us the transcript until the first of May. The case was submitted the first week of March. He had so many other cases pending in which to prepare the transcript for appeal that he couldn't furnish the transcript in this District Court case just for the consideration of the District Court until two months later.

If we say that there shall not be any extension of time for the docketing of these appeals, don't we run some risk in some cases in which there are a great many exhibits and the reporters are way behind that we have a deadline here. You have to go and bother the Court of Appeals about it. Is that helping the courts or is that helping the administration of justice to do that?

THE CHAIRMAN: We already have given a 90-day limit.

MR. LEMANN: Yes. As it stands now, he has a limit anyhow.

THE CHAIRMAN: But all we are doing as far as that is concerned is to reiterate the limit we already have in the rule.

MR. LEMANN: Why do that if that is the only effect?

I didn't know that that would be the only effect.

JUDGE CLARK: May I explain a little more. Monte, if you will look at the top of the page, page 15, you will see the Third Circuit case, the Ainsworth case, which declares that Rule 6(b) modifies 73(g). There are other cases cited there which hold to the contrary. The primary reason for the discussion is what has been held by the courts to be an ambiguity in the Rules, whether rightly or wrongly.

MR. HAMMOND: But I don't think that the Third Circuit permitted an extension beyond the 90-day period.

MR. LEMANN: No.

JUDGE CLARK: That is correct.

MR. LEMANN: That is correct. I was wondering whether the effect of this change wouldn't be to prohibit even the extensions of the 90-day limit. I don't know. Maybe it would not. I thought it would prohibit the extension of the 90-day limit if we adopted this change. You think it wouldn't?

JUDGE CLARK: All I can say on that is this: The 90-day limit has already been in the Rules, and the Circuit Courts have ruled that they have power to extend. I don't believe that is questioned. Then your further question is whether they should have to go to the Circuit Court of Appeals when it is more than 90 days.

MR. LEMANN: The first thing I want to know is whether you want more than 40 days, which is the normal time. Would

the District Court have the power, if we made the change suggested, to give an appellant 50 days additional up to 90?

JUDGE CLARK: Oh, yes.

THE CHAIRMAN: Because the proposal he has here says that it may not enlarge the period for taking any action under 73(g) beyond the time stated in that rule, and the rule already says 90 days.

MR. LEMANN: The time set is not less than 40 days. Then it says it may extend the time to not a day more than 90 days. What would be the reference when it says it shall not extend the time beyond the time stated in the rule? What is the statement in Rule 73(g)? Is it 40 days or 90 days? Your answer is 90 days.

JUDGE CLARK: Ninety days. I should think so.

MR. LEMANN: I just wanted to be sure.

THE CHAIRMAN: I am not so sure about that.

MR. LEMANN: That was my only point. It is clear. I think the District Court ought to be able to give you up to 90 days.

JUDGE CLARK: I suppose there wouldn't be any question about that. I shouldn't think there would be, because the rule so specifies. What you have quoted is a provision in the first sentence, which applies to the case of more than one appeal from the same judgment. The first part of the first sentence provides the general rule of 40 days.

MR. LEMANN: Yes.

JUDGE CLARK: The second part provides for this special case.

MR. LEMANN: I am talking only about the first part of the sentence. It says 40 days.

THE CHAIRMAN: Yes. Then it says that the District Court in its discretion by an order made before expiration of this period may extend the time to not more than 90 days.

MR. LEMANN: Now we come with an amendment which says "but it may not enlarge the period for taking any action under Rule .... 73(g) beyond the time stated ...."

THE CHAIRMAN: Beyond the time stated in 73(g).

MR. LEMANN: Which is both 40 and 90 days.

THE CHAIRMAN: It is 90.

MR. LEMANN: Maybe you are right.

THE CHAIRMAN: The time stated is the limit on his enlargement as stated in that rule.

JUDGE CLARK: The particular part of 73(g) which comes in conflict with 6(b) is "if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended". 73(g) provides you must act within the time already set. 6(b), you will see, provides that you may get an enlargement after the time has expired.

DEAN MORGAN: That is right.

JUDGE CLARK: That raises the original question. From the original question and also cases under [illegible] we have developed the whole issue as it now is before you.

I might add one thing more. The Third Circuit held that a stipulation of the parties would not control an extension of time. That came up in connection with a default judgment in Orange Theatre Corp. v. Amusement Corp., 130 F.(2d) 185. We have just received from the insurance section of the A.B.A. an expression of hope that that would be changed so that the situation would govern. That is an additional point beyond this.

THE CHAIRMAN: I don't understand that you are proposing an amendment to Rule 6 about stipulations.

JUDGE CLARK: I am not proposing that, no, and I am not quite sure whether we should have it or not, but nevertheless I think this is a recent suggestion that has come in and I ought to bring it before you.

SENATOR PEPPER: Mr. Chairman, it doesn't seem to me that there is much likelihood that the point made by Mr. Lemann would give trouble under 73(g), but if it were desired to adopt the Reporter's suggestion and also to eliminate the difficulties suggested by Mr. Lemann, might it not be done by substituting this for the language suggested by the Reporter: "but it may not authorize or approve the taking of any action under Rules so-and-so beyond the time or after the time stated in

those rules respectively." In other words, instead of making it a reference to a possibly ambiguous period, make it clear that you are limiting the discretion of the court to the period stated, irrespective of those rules.

THE CHAIRMAN: Couldn't you do the same thing, instead of saying "beyond the time stated in them", by saying "except as provided in them"?

SENATOR PEPPER: Yes. That is the same idea.

THE CHAIRMAN: That is Mr. Lemann's point.

SENATOR PEPPER: That is the same idea, I think.

THE CHAIRMAN: We are not talking about stipulations now, are we?

SENATOR PEPPER: No, no.

MR. LEMANN: He said "authorized." That might cover stipulations. I understood the Senator to put in the word "authorize."

THE CHAIRMAN: Your suggestion as to the amendment that is proposed is, instead of saying "beyond the time stated in them", to say "except as stated in them." That doesn't refer to any time. It refers to the power of enlargement. Doesn't that cover your point, Monte?

MR. LEMANN: I think it would cover it. I am just thinking of the English of it.

JUDGE CLARK: There is another question there. Do you want to continue the statement as to appeals? You could do

that separately in the language we had before, "but it may not enlarge the period for taking an appeal as provided by law or the period for taking any action under Rule so-and-so," leaving out 73(a) this time.

THE CHAIRMAN: That probably would be the safest thing to do.

MR. LEMANN: I think that would be better.

THE CHAIRMAN: Warning the lawyer.

SENATOR PEPPER: I think so.

MR. DODGE: Is it clear that if you can't get your record in 90 days, you will go to the Circuit Court of Appeals and get relief?

JUDGE CLARK: That method has been used right along. We have had a good deal of it. There is also the other question of whether you may stipulate, and as to that I don't know what the legality would be in the Third Circuit. In our Circuit we recognized stipulations until we found these long delays, and now we have adopted a rule against that.

MR. DODGE: Wholly apart from stipulations, you can get relief in the C.C.A.

JUDGE CLARK: I should suppose there would be no question about it, and certainly we rule on that right along. Do you know of any question?

JUDGE DOBIE: Our policy is clear as crystal that they can't take any power away from us by stipulation. They have

to be approved by us. We have had that up before us a number of times, and in every instance we have smacked them right in the face.

THE CHAIRMAN: There is a point a little different from that. He wanted to know whether in your Circuit, if the lower court no longer had any power under these Rules to extend, could they docket the appeal and ask relief from you.

JUDGE DOBIE: Yes, we do that, but the relief has to come from us. They can't automatically do it by stipulation.

JUDGE CLARK: I suppose all Circuit Courts do that. I don't know of any question.

THE CHAIRMAN: Why not adopt this amendment and let it go forth to the bench and bar and see what they think about it?

MR. DODGE: That is merely as to 73(g)?

SENATOR PEPPER: It is an amendment to Rule 6.

THE CHAIRMAN: It is an amendment to Rule 6(b). The proposed amendment would take the place of the phrase at the end of 6(b) which now reads, "but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law." The proposed substitute is: "but it may not enlarge the period for taking an appeal as provided by law, nor the period for taking any action under Rules 25(a), 50(b), 52(b), 59(b) and (d), 60(b), and 73(g), except as stated in them."

MR. DODGE: I don't see sufficient reason for taking away the discretion of the District Court in all those other cases. I would limit it to 73(g) on the appeal proposition.

THE CHAIRMAN: Of course, we already have limits on several of them. You would have to go back and amend all those existing rules and grant a discretion which the court does not now have--the motion for a new trial, the motion for a directed verdict.

MR. LEMANN: He has discretion now, hasn't he? He has a general grant of discretion to enlarge time except as denied, and we have denied it only in two instances as it stands now. I understand the Reporter's suggestion to be that there isn't any sense in denying the discretion in Rule 59 and not denying it in these new references.

THE CHAIRMAN: I thought as you did, and I was picked up on it. It was proved to me that "A motion for a new trial shall be served not later than 10 days after the entry...."

MR. LEMANN: I think he concedes that the judge now could enlarge that time under 6(b) as to motions for a new trial.

DEAN MORGAN: No.

MR. LEMANN: That is not under 59, is it?

THE CHAIRMAN: Am I right about that? Under the Rules as they stand, can a judge enlarge the time to make a motion for a new trial?

MR. LEMANN: No, because that is 59.

JUDGE CLARK: I should say no, except as stated there. There is an exception or two, but generally, no.

MR. LEMANN: My reference was wrong when I spoke of 59. Under 59 the judge now has no discretion.

MR. DODGE: That is right.

MR. LEMANN: Your point is that if he has no discretion under 59 to give an enlargement, neither should he have discretion under 50(b), 52(b), or 60(b), because they are analogous situations.

JUDGE CLARK: Yes, that is the general line. Of course, you may not think there is an analogy, but there is a general analogy. I might say I should suppose an additional reason for 60(b) was that it was a longer period, and we wanted to put a definite limit on it.

THE CHAIRMAN: That is the six months for fraud. That clearly ought to go in.

MR. DODGE: The absence of the absolute prohibition under those other three rules hasn't caused any trouble.

DEAN MORGAN: Which other three?

MR. DODGE: 50, 52, and 60.

THE CHAIRMAN: As I understand it, there is a conflict of authority of courts as to whether this broad clause does or does not override the limitations in some of the other rules. We have to settle that ambiguity, anyway.

MR. LEMANN: The only controversy, really, has been

under 72; is that right?

DEAN MORGAN: Oh, no.

JUDGE CLARK: Not on only one; 60(b) also.

MR. LEMANN: But not 52.

DEAN MORGAN: 25(a) has been.

JUDGE CLARK: I don't think there has been any particular conflict as to 59, the new trial, but I don't see why there shouldn't be. No; I guess I am wrong. 59 is already excluded. That is right. You would let that stay excluded, wouldn't you?

MR. LEMANN: Yes, I should think so. The question really is, has there been any conflict now in the decisions as to 50(b) or 52(b)? There has been as to 25(a) and 60(b), is that correct?

JUDGE CLARK: And 73(g).

MR. LEMANN: And 73(g).

JUDGE CLARK: Have there been any on the others?

PROFESSOR MOORE: I think not.

THE CHAIRMAN: You would have to leave 52(b) the same as a motion for a new trial, because 52(b) provides that a motion for a new trial and a motion for amendment of finding can be incorporated together, and if one has to be made in 10 days, the other certainly would have to be.

How do you want to treat this? Do you want to take a vote on it subdivision by subdivision and get it settled that

way as to which of these sections shall be amended in our proposed amendment?

SENATOR PEPPER: May I suggest that it would be simpler to take a vote on this resolution covering all of them, and if that were to carry it would settle the question? If it were defeated, then we could take them up one by one.

Just to bring it before the Committee, I move the amendment suggested by the Reporter as applicable to all the sections specified.

DEAN MORGAN: I second the motion.

THE CHAIRMAN: If you are ready to vote on that, all in favor of that say "aye"; opposed, "no." That seems to be carried.

MR. HAMMOND: I am not sure you are going to get rid of the Ainsworth case under 73(g), which really brought it up.

THE CHAIRMAN: What does the Ainsworth case hold? Was it a stipulation case?

MR. HAMMOND: Look at 73(g), the last sentence.

THE CHAIRMAN: Yes.

MR. HAMMOND: "In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order...." What happened in the Ainsworth

case was that the motion for extension was not filed until after the original period.

THE CHAIRMAN: I know, but the thing you just passed is not in accordance with what the Reporter has on page 15. You remember, we struck out "beyond the time stated in them" and said "except as stated in them", which would mean the time, the conditions, the limits and everything else.

MR. HAMMOND: I understood that, but turning back to 6(b), the court in the Third Circuit in the Ainsworth case took that provision of 6(b) which says that "upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect..." That is the provision which they said still applied, although I don't see how they did it in the face of our express provision in 73(g) that it must be done before the time expires. My point is that you are still leaving in 6(b) the provision which I just read.

THE CHAIRMAN: We are also stating something that isn't in 6(b) now where we say "but it may not enlarge the period except as stated in those rules."

DEAN MORGAN: Except as stated in 73(g). That is what it says.

MR. HAMMOND: You think that is what it says? Yes, I guess it does.

THE CHAIRMAN: It says, "Except as stated in those

rules, it can't be done after the time has expired."

MR. HAMMOND: I guess it does.

THE CHAIRMAN: The Reporter will check that up and be sure that we have it, and it is probable that the phrase I substituted, the words "beyond the time stated in them", may have to be elaborated and something said about "except as stated in them and under the conditions as stated in them."

JUDGE CLARK: All right.

MR. HAMMOND: In other words, all that the Committee is doing in this case is cutting out, making it perfectly clear that after the time has expired for filing the record, then the District Court cannot extend it further for any reason. In other words, a man can't come in after the 40 days have expired and say, "Oh, I just couldn't get this record up; the stenographers couldn't get it up fast enough."

THE CHAIRMAN: That is the intention of the Committee, and if that phrase doesn't quite do it, the Reporter will fix it up.

MR. HAMMOND: Yes.

JUDGE CLARK: There is just one matter here. We put in 25(a). Mr. Moore calls my attention to 25(d), which should go in too, I suppose. That is the six months after the successor takes office.

THE CHAIRMAN: That is 25(a) and (d). We will hold you responsible for going all through these Rules again and

seeing that we are not omitting any section we ought to have in, because it would just be poison if we did that.

JUDGE CLARK: All right, we will go over it again.

THE CHAIRMAN: Is there anything more on 6?

JUDGE CLARK: Do you wish to do anything about the stipulation? I offered to bring it up. I am not so sure I disagree with the action of the court, but I certainly think I ought to bring it before you, anyway. Have you all got the point? I shall read it to you. This is from the Chairman of the Insurance Section.

JUDGE DOBIE: What are you talking about now, Charlie?

JUDGE CLARK: Stipulation under 6(b), stipulations varying.

THE CHAIRMAN: You mean a stipulation--

JUDGE CLARK (Interposing): Of the parties.

THE CHAIRMAN: --for extension of time where the court hasn't granted or has refused to grant an extension.

SENATOR PEPPER: It is accomplishing by stipulation what the rule would otherwise forbid.

DEAN MORGAN: That is right.

JUDGE CLARK: That is true. The Third Circuit said "No," and these gentlemen say, "That is too bad." They want to put in that a stipulation is good. They say: "Attention is called to the construction of this rule" (6(b)) "in Orange Theatre Corporation where a default judgment was entered even

though the parties had agreed by stipulation to an enlargement of the time. The phraseology of the rule justified the construction, but we recommend that there be added to Rule 6(b) a provision allowing parties to extend the time by stipulation to be signed and filed in the court before the expiration of the period originally prescribed but with proper provision to prevent unwarranted delay."

THE CHAIRMAN: If we did that, there isn't a time limit within these Rules that couldn't be set aside by stipulation. We have to be consistent about it.

Before we pass on, how does the Committee feel about allowing parties to stipulate extensions without an order from the court?

MR. LEMANN: I move we are against it. They must get an order of the court. They can get an order if they are entitled to it. I don't think they should be permitted to do it without it.

MR. HAMMOND: I think the Rules say so. You remember, Mr. Mitchell, at all the proceedings on the Rules at Cleveland and New York, nearly everybody asked the question, can you extend time by stipulation? I think you said in New York that you could as far as the parties were concerned, that they wouldn't object, probably, but that you might run into trouble with the court later.

THE CHAIRMAN: That would answer it, wouldn't it? The

court might not recognize it.

JUDGE CLARK: Of course, the case itself was a little stiff. There is no doubt about it. They went ahead and entered a default judgment, and I think there was an appeal. It was an affirmance of a default judgment where a stipulation had been entered.

THE CHAIRMAN: There are a lot of questions that lawyers ask that we don't have to answer in these Rules.

MR. LEMANN: You can't answer all of them.

THE CHAIRMAN: What I should like to know is whether any court has held that notwithstanding the District Court hasn't made an order of extension on these things, the parties may effectively extend it by stipulation.

MR. HOLTZOFF: I don't think there are any reported cases on that.

JUDGE CLARK: I don't think it was held that way. This was a holding the other way.

THE CHAIRMAN: As long as they haven't held that you can do it by stipulation, what do we need to do about it?

SENATOR PEPPER: Isn't there something to be said for Mr. Hammond's thought that if we really mean that they are not to be permitted to do it by stipulation, we ought not to leave that inference, but to say so? It occurs to me that it would be a very simple matter, if that is the sense of the Committee, for the Reporter so to phrase the amendment that has just been

approved by saying, in substance, that there shall be no enlargement either by stipulation or by order of the court except, and so forth. If that is the sense of the Committee, it would not really make a cumbrous addition to the amendment to cover this stipulation case.

THE CHAIRMAN: You can just add a clause, if you want to, that stipulations shall not be effective unless affirmed by an order of the court.

SENATOR PEPPER: Yes. In order to get the sense of the Committee, I move that the amendment when finally phrased shall exclude the extension, by stipulation not approved by the court, of a time which the court without stipulation could not have authorized.

PROFESSOR CHERRY: What is the implication of that, Senator?

THE CHAIRMAN: That means that as long as you stipulate within the ultimate limits, the court can act on it and the stipulation is good.

SENATOR PEPPER: Yes.

THE CHAIRMAN: As it stands now, even if a stipulation is within the time that the court has power to extend and enlarge, it isn't good. Isn't that so?

SENATOR PEPPER: Yes. I consciously made the motion to give to the parties the latitude of stipulation within the limit of the court's discretion, but not beyond the limit of

discretion allowed to the court by the Rules. The other view is not to allow them by stipulation to accomplish what in the exercise of its discretion the court might do but had declined to do or had not been asked to do. If the stipulation is limited to the period of discretion allowed to the court, and if it is further required that the stipulation must be approved by the court, I don't think we shall have any conflict between counsel and court, because the court would either approve the stipulation or disapprove it.

THE CHAIRMAN: I didn't understand you. I thought you meant that the parties could stipulate without any action by the court if they kept themselves within the limits of the court's discretion. You didn't mean that?

SENATOR PEPPER: I mean that the stipulation must be approved by the court and that even with court approval it shall not operate to extend the time beyond the limit of discretion which the court could have exercised without stipulation. That is what I was trying to say.

PROFESSOR SUNDERLAND: Wouldn't the stipulation really operate as the basis upon which the court might exercise its discretion? We needn't say anything about stipulation. Put it in and let the court use it as the basis.

SENATOR PEPPER: I don't think it is vitally important, but I did think, the question having come up, we might as well dispose of it by a vote instead of talking about it. Why not?

I put the resolution just to take the sense of the Committee, and if they think it is not important, they can vote it down. I will just vote "aye" so as to support my own resolution.

THE CHAIRMAN: I take it there is a second.

DEAN MORGAN: I second it.

THE CHAIRMAN: All in favor of the Senator's resolution say "aye"; opposed, "no."

SENATOR PEPPER: Unexpected strength:

DEAN MORGAN: Great enthusiasm on both sides.

THE CHAIRMAN: The Chair thinks it is passed.

MR. DODGE: The only question is as to a stipulation not approved by the court, isn't it? That is the only thing that has made any trouble.

PROFESSOR CHERRY: I don't think that meets the point that was sent in to the Reporter. They want stipulations without approval.

DEAN MORGAN: But this particular provision cleans it up.

PROFESSOR CHERRY: We were in doubt a moment ago. If you have the approval of the court, you really have an order of the court. I don't think it means anything.

MR. LEMANN: This simply tells them that there is nothing doing on this idea of stipulations without an order of the court. That is the idea of it, as I understand it. Everybody agrees that they must have an order of the court. Mr.

Hammond says that you had better tell them that because some of them don't know it, and make it plain.

THE CHAIRMAN: Why not make it that a stipulation without an order of court shall not operate beyond the time?

SENATOR PEPPER: Then the implication is that with the approval of the court, it might enlarge the time indefinitely.

PROFESSOR SUNDERLAND: That is the trouble of taking up the stipulation at all. You don't know just what effect it will have.

MR. LEMANN: Are you going to make provision for stipulations only with respect to time? Perhaps you should put in a general article that no stipulation should be valid without an order of court and that the order of court shall be subject to all the limitations herein contained, or do you want to do that?

THE CHAIRMAN: The trouble is that you fellows talk one way and vote another. I shall put the resolution again. It was a week-kneed kind of vote. All in favor of dealing with the stipulations by the Senator's suggestion will raise their hands.

... Three hands were raised ...

THE CHAIRMAN: Those who are oppose raise their hands.

... Five hands were raised ...

THE CHAIRMAN: The motion is lost. Your voices are weak, but your hands are strong.

Have you anything more to suggest on 6, Mr. Reporter?

JUDGE CLARK: We made one comment on the matter of the time. I guess nothing can be done about it. Page 17. It has been held that this does not apply in the Circuit Courts of Appeals. I take it our friends of the Criminal Rules Committee can take care of all those matters. Isn't that so, Mr. Holtzoff?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: Some day we shall have to get an amendment to our enabling act and broaden it out to cover the Courts of Appeals as well as the District Courts. We are doing it in a back-handed way all the time, anyway. Has any member of the Committee an independent suggestion for Rule 6? If not, we will go to Rule 7.

JUDGE CLARK: On Rule 7 there are two or three rather small textual changes. There is also a suggestion which is somewhat interconnected with the discussion of Rule 12 as to whether a simplification could not be had by putting the time limitation to Rule 12 in here. I don't know how much of that you want to take up at this moment. I can speak of the small textual changes if you wish, or speak of the whole business.

THE CHAIRMAN: Take them in the order in which you have them here.

JUDGE CLARK: On the first, there has been some question in the cases as to what you do with the reply that the

lawyers file even though it is not authorized by the rule. There are certain decisions--and I guess I have been as responsible for them as anybody--which say that the only effect they have is as admissions. I am not sure that we need to do or can do anything about that point. The fact of the matter is that lawyers still follow their own practice notwithstanding the rules. That occurs a great deal, for example, in the Southern District of New York as to bills of particulars; that occurs in Connecticut as to replies, where a reply is freely permissible. I bring that up, and I am rather inclined to think that we should just leave it.

The proposed small change is a little different point. In the rule we say that where a counterclaim is pleaded there shall be a reply if the answer contains a counterclaim. A little question has arisen as to what the reply should be to, whether it should be to the counterclaim or to the entire answer. Mr. Hammond has suggested that it should be to the entire answer. That appears on pages 7 and 8 of our supplemental suggestions.

THE CHAIRMAN: Why should the new matter in the answer not constituting a counterclaim have to be replied to if there is a counterclaim in the answer, when it doesn't have to be replied to if there isn't a counterclaim?

JUDGE CLARK: That is what I should say. I should think that we should not require that, and I should think that

if we were going to require anything, it ought to be what we put at the top of page 19: "and there shall be a reply to a counterclaim denominated as such". I am frank to say that I am not sure that this has raised enough trouble. It is a question of taste. There is a slight ambiguity there which could be cleared up.

MR. HOLTZOFF: Don't most lawyers assume that you have to reply only to the counterclaim? I think that has been the customary understanding.

JUDGE CLARK: I don't know.

MR. HOLTZOFF: I believe so.

JUDGE CLARK: I think that is not an unnatural assumption, but this all goes back to the fact that in the various states the rules differ. I am rather afraid that probably the lawyers assume that their local practice still obtains under the Federal service, whichever it is.

THE CHAIRMAN: The present Rules do pin it down to this: The rule says, "and there shall be a reply, if the answer contains a counterclaim denominated as such". That has an ambiguity because if there is a reply merely because the answer contains a counterclaim, apparently it may be a reply to the whole answer.

The amendment proposed is "and there shall be a reply to a counterclaim denominated as such", which clarifies it. Let's decide that.

JUDGE DONWORTH: Is that important enough to make a change in the rule? Suppose a man does reply to the new matter that is in the answer, is there any harm done if he wants to do that?

THE CHAIRMAN: The point is, suppose he doesn't. Suppose he answers only the counterclaim and doesn't say anything about the new matter. Then the other lawyer gets up and says he has admitted the allegations in the new matter in the answer not constituting a counterclaim because the Rules say there shall be a reply if the answer contains a counterclaim.

JUDGE DONWORTH: I should think the context there indicated the purpose.

THE CHAIRMAN: I should think so. I certainly would not draw an answer to apply to anything else but a counterclaim. I don't know. What brought this to your attention? Have there been any decisions on it?

DEAN MORGAN: A letter by Becker.

JUDGE CLARK: I don't think there have been any questions. It has been raised by Mr. Pike, and he has some in the Federal Rules Service. He didn't have any cases, did he? Do you remember?

PROFESSOR MOORE: I don't think so.

MR. HOLTZOFF: I don't think there is any case involving that point, Judge.

PROFESSOR MOORE: Some lawyer wrote about it, too.

JUDGE CLARK: Yes, I think some lawyer did.

DEAN MORGAN: A man named Becker.

SENATOR PEPPER: In the Eastern District of Pennsylvania the practice is inveterately to file a reply to the whole answer whether it has a counterclaim in it or not. I mean they don't seem to be able to get away from the old idea of replication. I haven't observed that it causes any trouble.

DEAN MORGAN: In Maryland they file answers to motions now.

THE CHAIRMAN: There is a broader question that has been troubling me. I was troubled about it when the Rules were adopted and have been troubled more about it since. That is whether we were wise in eliminating a reply, because it has come up in so many cases. Suppose a man interposes a defense settlement. The plaintiff doesn't have to reply, and you can't pin him down on the pleadings to whether he admits that there was a settlement or not and whether he admits, if there was one, that it was fraudulently obtained or not, unless you go to court for a motion requiring him to reply. You can force a reply out of him, and you may get an admission right away that will give you a position for judgment on the pleadings in the case. But if you don't get a reply from him, you have to go to trial. Take the Statute of Limitations cases, the Statute of Limitations in the matter of defense. Suppose a plaintiff brings a suit. It may appear that more than six years have

elapsed since the cause of action, but that doesn't make the complaint defective. That is a deferment of defense which may never be raised, and the defendant puts in an answer and pleads the Statute of Limitations. That doesn't settle it. You can't make a motion for judgment on the pleadings because the statute has been tolled by the defendant's being outside the jurisdiction or under guardianship or half a dozen other things. The plaintiff has a right to put in a reply and defeat that defense by an allegation that the statute hasn't run, although the six-year period has passed, because the defendant was out of the jurisdiction part of the time.

I have had some correspondence with our Reporter about the question of whether you raise the Statute of Limitations under 12(b)(6), I think it is, on a motion for dismissal on the ground that the complaint doesn't state any cause of action. I say you can't because that motion is a motion to strike only what is stated in the complaint. The complaint doesn't have to negative the Statute of Limitations. It is an affirmative defense. The complaint is not defective merely because it shows a six-year period elapsed unless it also affirmatively shows that nothing has happened which could toll the Statute of Limitations.

So, under our practice without any reply, if you want to raise the Statute of Limitations you can raise it in your answer; there is no reply, so there is no chance for the plaintiff

to defeat the defense by showing that the statute was tolled for any reason. The only way you can raise it is not by a motion to dismiss or a motion for judgment, but by a motion for summary judgment, in which you stick in your affidavits about this statute, which challenges the plaintiff then to put in some affidavits showing he has proof that the statute was tolled, that the defendant was out of the jurisdiction or something.

I think of a great many cases where affirmative defenses are alleged, in which it is to the great advantage of the expeditious determination of the case, relieving the defendant from going on and getting ready for trial when he really ought to get a judgment on the pleading if the reply were exacted. I have never been quite sure why we didn't ask for a reply in such cases, alleging in the reply that the case was settled or at least challenging the settlement on the ground that it was fraudulently obtained. As things stand, all the issues that the plaintiff might raise about affirmative defense can't be developed until there is a motion for summary judgment or an interrogatory examination before trial in which you dig up issues. My notion about using the machinery of depositions before trial and all that is not so much to dig up the issues as it is to find out what the evidence is going to be. Of course, we have means to submit interrogatories to the plaintiff and ask him whether he admits or denies that he signed the

release or whatnot.

MR. DODGE: Isn't it enough to give the court, as we have the power to order, a reply in a case like that?

THE CHAIRMAN: There is a lot of rigmarole to go through with. You have to go to the court and say, "Here, we have pleaded release or Statute of Limitations. Now we want the plaintiff to be forced to come back with a reply and admit the truth so we can make a motion for summary judgment."

JUDGE CLARK: Mr. Chairman, if I might speak about this a little (if you recall, I didn't speak about it in the old days, so perhaps I may speak now), there are two or three things to be said. In the first place, I don't think the pleadings should be of the importance that they should be pressed to these far corners, so to speak. I just don't think you get enough out of pleadings to make them worth while.

As to this rule, the rule we adopted is one of the major rules in the country. It happens to be the New York rule, for example. It has been adopted very considerably. It has as much standing as the other rule. So, when we followed the habits of the lawyers, we were following the habits of perhaps the more numerous lawyers in the country.

The other rule, the rule of answering affirmative defenses, has on the surface and as established in the cases under code pleadings one major defect, and that is that nobody could tell what an affirmative defense is. You can't tell now,

to be sure, whether it is affirmative defense or not. There were lots and lots of cases trying to define whether it was something that had to be answered or not and whether the penalties of failure to answer should apply in a certain case, and I think that is one of those shadow-boxing things that we ought to get away from. Really, why should we be spending time on preliminary motions and deciding whether it is an affirmative defense or not? It seems to me that the rule is working pretty well. In a case that came down a few days ago, we applied the rule with its corollary, which is that matter which is not replied to stands either denied or voided as the case may be. I don't believe we are having unfortunate results.

On the point raised as to trying affirmative defenses, I must say that I am all for having them brought out, when they can be, by affidavits, and the fact of the matter is that that is being done right along now, particularly with reference to the Statute of Limitations. Some cases have raised doubt about it, but if you will look in Mr. Moore's last supplement at the citation that I have given here somewhere, you will see that what seems to be the majority of cases are allowing it to be tested that way. It seems to me it is being done with excellent result.

THE CHAIRMAN: Tested by what amounts to a motion for summary judgment.

JUDGE CLARK: Yes. It seems to me that that is

expeditious and useful and that no one is harmed by it. Either side brings to us the issues on the point. So I think, really, there were good reasons for the adoption of the rule originally, and it has worked pretty well.

THE CHAIRMAN: You are probably right about it. I had my misgivings.

Have we voted on this proposal: "and there shall be a reply to a counterclaim denominated as such"? Do you think that is important enough to make the change? Is there a motion pending? I have lost the thread of it.

DEAN MORGAN: I move that the change be made.

JUDGE DOBIE: What was the motion?

THE CHAIRMAN: The present rule says there shall be a reply if the answer contains a counterclaim denominated as such. The Reporter suggests that there is an ambiguity there, if the answer does contain a counterclaim, whether you have to reply to all the other stuff except the counterclaim.

JUDGE DOBIE: What is Mr. Morgan's motion?

THE CHAIRMAN: To adopt the Reporter's suggestion for the verbal alteration in the rule.

JUDGE DOBIE: What is the alteration to apply to such counterclaims?

THE CHAIRMAN: "and there shall be a reply to a counterclaim denominated as such", which limits the reply to the counterclaim.

DEAN MORGAN: And likewise to a cross-claim.

JUDGE CLARK: I want to bring that up, too. That is a further point. Mr. Hammond has brought out that we have not covered an answer to a cross-claim or to a third-party answer. That is discussed on page 7 of the supplemental discussion.

THE CHAIRMAN: Do you recommend that your proposals be enlarged to cover his point or don't you?

JUDGE CLARK: We said that we didn't think it was really necessary. What we said is at the top of page 8. "Apparently the difficulty indicated has not, as yet, been raised by the courts."

THE CHAIRMAN: You say the same thing regarding the original proposal.

JUDGE CLARK: That is true. I am frank to say I don't consider that either one of these is very important. It is perhaps a little addition to clarity.

THE CHAIRMAN: Apparently there is no decision on this subject. There doesn't seem to be any row about it. Why should we think of a verbal change that some of the lawyers have suggested? All in favor--

SENATOR PEPPER (Interposing): Before you put the question, may I ask, is it intended by implication to make it improper or out of order to file a general replication or reply?

THE CHAIRMAN: No more so than it is today.

SENATOR PEPPER: That is what I thought. In terms the

mere statement is such as to clarify the relation of the reply to the counterclaim and leaves the general practice untouched.

THE CHAIRMAN: Yes. I think if a man puts in a reply when it isn't necessary, probably to the extent that it is an admission against his interest, it would be an admission of the facts, but if it was a pleading, probably it would be disregarded.

SENATOR PEPPER: Yes.

PROFESSOR SUNDERLAND: Has there been particular use of our provision that the court may order a reply to an answer? The plaintiff never would ask for it, and the defendant never knows any basis for it. I wonder how it has worked.

THE CHAIRMAN: I tell you why the defendant won't resort to a motion to require a reply. If he puts in some affirmative defense like a release, instead of going to the court and trying to force the plaintiff to reply to it or to say it is so or isn't so, he just makes a short-cut by motion for summary judgment, because if he makes the motion against the reply, then he has to make another motion for judgment on the pleadings and has two motions to make. So, why not hit it by a summary judgment motion and be done with it?

PROFESSOR SUNDERLAND: Our authorization of that motion is superfluous, really, and of no practical use.

JUDGE DONWORTH: I think the plaintiff might move for a reply. As the Chairman says, perhaps he can get the same

result in an easier way.

THE CHAIRMAN: The defendant, you mean.

JUDGE DONWORTH: In one of the Institutes the question came up when the statement was made that if the plaintiff wanted to show that the defendant's defense had really been met in some other way, like a release or fraud and all those things, the plaintiff might move that a reply be required; he might himself move.

PROFESSOR SUNDERLAND: He wouldn't move to force the disclosure of something that he might just as well keep secret.

THE CHAIRMAN: No. The defendant is the one who normally would demand a reply.

PROFESSOR SUNDERLAND. Normally, all that he could say is that he has filed an affirmative defense and doesn't know what the plaintiff is going to say. He would like to know. So really, he has no basis at all for his application.

THE CHAIRMAN: He has a basis for it, but there are plenty of other means of getting at the same result under the Rules.

PROFESSOR SUNDERLAND: The same basis that he always has, however, whenever there is an affirmative defense.

THE CHAIRMAN: To get the question up, shall we adopt this amendment or shall we not? All in favor of it raise their hands.

JUDGE DOBIE: That is on the counterclaim?

THE CHAIRMAN: That is changing the verbiage so as to make it clear that the reply is to the counterclaim alone and not to any other part.

... About five hands were raised ...

THE CHAIRMAN: All opposed?

... One hand was raised ...

THE CHAIRMAN: The "ayes" have it. Now, Charlie, go on.

JUDGE CLARK: I am not sure whether you want in these provisions as to cross-claim or not.

THE CHAIRMAN: To be consistent, they ought to be in, shouldn't they?

DEAN MORGAN: All you have to do there is to strike out a lot of words. "An answer to a cross-claim." You don't need to say "If the answer contains a cross-claim."

THE CHAIRMAN: The words "if the answer contains" are now out. The way it reads now is: "there shall be a reply to a counterclaim denominated as such". The question is whether--

JUDGE CLARK (Interposing): No, it doesn't come up right here. It comes up in the latter part of the rule where it says the court may order a reply to an answer. The question is whether we say "to an answer to a cross-claim, or to a third-party answer."

DEAN MORGAN: "Any answer."

JUDGE CLARK: It seems to me that "answer" really means

any answer.

DEAN MORGAN: That is right.

MR. HAMMOND: Yes, but then you specify a third-party answer and leave out an answer to a cross-claim. If you have an answer to it, can the court order a reply to an answer to a cross-claim? I say, not under the Rules.

DEAN MORGAN: Why not?

MR. HAMMOND: Because you say "answer or a third-party answer", but you don't say "answer to a cross-claim."

DEAN MORGAN: You are saying "answer to a cross-claim," aren't you: "there shall be a reply to a counterclaim denominated at such; an answer to a cross-claim...."

MR. HAMMOND: That is a different thing from an ordinary answer.

JUDGE CLARK: This is in the last sentence of the rule, whether to insert "answer to a cross-claim". Textually I suppose Mr. Hammond is correct. Mr. Hammond is always a perfectionist, I think.

MR. HAMMOND: I think probably the Committee thought that the word "answer" covered it, but then they specify third-party answer, and they ought to specify answer to a cross-claim. Don't you think so, Mr. Morgan?

DEAN MORGAN: Yes. I figured you could strike out everything after "answer", making it a reply to any answer.

THE CHAIRMAN: What particular section of the rule do

you want to amend?

DEAN MORGAN: The last sentence.

THE CHAIRMAN: 7(a)?

DEAN MORGAN: Yes. "No other pleading shall be allowed, except that the court may order a reply to any answer" or "to an answer."

MR. HAMMOND: I think I would prefer it the other way. "the court may order a reply to an answer, to an answer to a cross-claim, or to a third-party answer."

DEAN MORGAN: I don't see the use of the specification.

THE CHAIRMAN: I don't quite understand it. What do you think ought to be done?

JUDGE CLARK: It is hard to say whether we should perfect or whether we should change only where the thing seems doubtful. It hasn't seemed to me very doubtful, and I wasn't very strong for a change. Of course, there is the textual criticism. You will see up in the first sentence that we have included by name "an answer to a cross-claim". The last sentence now reads: "No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer." The question is, may the court order an answer to a cross-claim between the defendants?

MR. HAMMOND: Or a reply to an answer.

JUDGE CLARK: Yes, whether it may order a reply to an answer to a cross-claim. I bet the court could and nobody

would say anything about it, but still there is perhaps that textual point.

There are two suggestions. Mr. Morgan suggests that we take out the possibility of ambiguity by just leaving the word "answer," without anything more; that is, eliminating the words "or a third-party answer." Mr. Hammond suggests that we specify, that we make it "that the court may order a reply to an answer, to an answer to a cross-claim, or to a third-party answer."

THE CHAIRMAN: Why doesn't the word "answer" include answer to a cross-claim?

DEAN MORGAN: It does.

JUDGE CLARK: I should rather think it did.

THE CHAIRMAN: It doesn't say any particular kind of answer--any old answer.

JUDGE DONWORTH: If you strike those out, it will be thought that you had some motive for striking them out, won't it?

THE CHAIRMAN: What is your pleasure on that?

DEAN MORGAN: Just to get rid of it--

THE CHAIRMAN (Interposing): You don't have to move anything. There is nothing before us.

DEAN MORGAN: --I move that we strike out the words "or a third-party answer" in the last sentence of Rule 7(a).

THE CHAIRMAN: That will arouse a question in the mind

that you can't have any reply to a third-party answer because we have eliminated it, I am afraid.

PROFESSOR SUNDERLAND: I should like to eliminate the whole exception.

JUDGE CLARK: I should say that if we were doing it over again I rather think I would agree with you, and I think you are right. I don't believe that it counts very much actually. I would go along if you wanted to eliminate it, but I am afraid the lawyers would feel a little naked, you know. They are used to it.

PROFESSOR SUNDERLAND: They never use it anyway.

JUDGE CLARK: I don't suppose we would know very well unless we went back in the trial court and looked. There wouldn't be any appeal on a thing like that, although I would guess with you that they don't use it. I don't believe they do.

THE CHAIRMAN: The danger I see in it is that when the legislature changes the statute, everybody will bob up and say, "Well, this means something. What does it mean?" It is changed; it is different from what it used to be.

PROFESSOR SUNDERLAND: You just can't ask for a reply any more if you cut the exception out.

THE CHAIRMAN: You mean you want to cut out any case where the defendant wants to move and require the plaintiff to say "Yes" or "No" to the answer?

PROFESSOR SUNDERLAND: Cut out "except that the court

may order a reply".

THE CHAIRMAN: Why should you cut it out?

JUDGE CLARK: I think you are right about that.

PROFESSOR SUNDERLAND: We pretend we have something important there and, as a matter of fact, we have nothing in it.

THE CHAIRMAN: You are arguing that the defendant may never want to require the plaintiff to reply. Maybe he will. I don't know. There may be cases we don't know anything about in which he has asked the plaintiff to do it and it has been granted.

It is time to go to lunch now.

MR. LEMANN: Don't you think we should vote on this? Otherwise we will all come back with a good meal and start arguing about it. We have a motion pending, haven't we?

THE CHAIRMAN: All in favor of striking out the exception in the last sentence of Rule 7(a) so that it would read, "No other pleading shall be allowed", with the words "except that the court may order a reply to an answer or a third-party answer" stricken, raise their hands.

... Three hands were raised ...

THE CHAIRMAN: Those opposed?

... About five hands were raised ...

THE CHAIRMAN: That is lost.

JUDGE CLARK: Did you settle Mr. Morgan's motion?

DEAN MORGAN: That wasn't seconded.

JUDGE CLARK: It just failed at birth.

THE CHAIRMAN: Unless there is objection, we will adjourn until two o'clock.

... The meeting adjourned at 12:57 p. m. ...

MONDAY AFTERNOON SESSION

May 17, 1943

The meeting reconvened at 2:00 p. m., Chairman Mitchell presiding.

THE CHAIRMAN: The meeting will come to order, please. In looking over the Reporter's memorandum here we find that for the next rules, 7, 8, and down to 12, some of the amendments (not all) are predicated on the assumption that we are going to make some very radical changes in Rule 12, and it seems to me that we ought not to be considering amendments on that assumption until we have settled the assumption. We shall save time (I think the Reporter agrees with me about that) by passing over for the time being from Rule 7 to 11, inclusive, to Rule 12 and deciding what we are going to do with that. Having reached that decision, we can go back then and consider the proposed amendments to the prior rules. If we agree to change 12, that is one thing; but if we don't, then a good many of the suggestions he has made to the previous rules will be irrelevant. So, with your permission and the Reporter's approval, we shall go right to Rule 12, which is the basis of a good many of the amendments that he suggested as to prior rules.

Now, Mr. Reporter, do you want to take up Rule 12 and state briefly just what you want us to do with Rule 12?

JUDGE CLARK: I have probably overwhelmed you with material of one kind or another on Rule 12 to date. I think I

can state generally what I have in mind to do, and that is to provide for only one stage of preliminary hearing, which will be in effect a summary judgment. I mean by that a judgment which can go to the merits and which is not limited to the pleadings alone, which can raise also questions that the plaintiff might have, as well as the defendant.

It seems to me that the rule as we now have it has several features which are really opposed to our general attitude toward pleading. That is, we rather make pleading unimportant except on that basis of preliminary notice. It isn't binding. Rule 15(b) provides that after the proof, the pleadings are deemed to be amended to conform to the proof, and so on, and yet it seems to me by the setup of Rule 12, we have, on the other hand, emphasized the formal allegations, and we do that in two or three ways.

In the first place, in Rule 12(b) we have recognized as orderly procedure two different stages of preliminary motions. One might be termed the plea in abatement stage and one the demurrer stage. I might say that those terms come to me from the President of the Bar Association, who was rather public in some criticism of the Rules as being backward. He said the Federal Rules certainly weren't up to date when they still had, under another name, plea in abatement and demurrer. In addition to that set of preliminary motions, we have a different set of preliminary motions which are permissible to correct the

pleadings proper. That is the motion for a bill of particulars and the motion for a specific statement, and you can still have a motion to strike out.

It seems to me that all that tends to make a wrong emphasis upon the paper allegations rather than on the merits, and also to give the defendant a chance to bring up successively things which, if he were to say at all, he ought to have to say at one time.

I have made the suggestion on the basis of what seems to me both theory and practice. Practice, of course, would be very important. I am inclined to think that perhaps it would be more important than theory. Even if the theory, according to my judgment, made a wrong emphasis (here we emphasized pleadings, whereas elsewhere we have tried to reduce that emphasis), if the matter were working well in practice I don't believe there would be much to say, but it seems to me that the test of experience is very strong the other way. This is the one rule that has required more interpretation than any other. Most difficulties have appeared on the bill of particulars section, which I know from discussions with the District Judges they find very burdensome. In New York, where bills of particulars are allowed under state practice rather freely and where they come in after answers to limit the complaint but not really where the defendant breaches them at all, we find in the Southern District that bills of particulars are being

applied for about as much as ever and, rather curiously, they are being applied for after answer a great deal, although under our rules, unlike the state rules, they are not authorized at that time at all. According to the figures that the New York Law Society got, there seem to be about as many bills of particulars now, plus the addition of all the discovery features that we have. In other words, the conclusion seems to be that the number of pre-issue, before trial, proceedings has been increased substantially by the rule as well as otherwise.

The Rules, as we all know--and it is one of the desirable features of them--provide for extensive discovery devices and for pre-trial summary judgment. It might easily be asked, if we are going to have those preliminary proceedings, why do we object to these? I say if you provide for information to the opposing party completely by the system of discovery, then these should be unnecessary, but I think the question is a little more than that.

These, as I have suggested, are in the main paper matters. I mean by that that they are the allegations of the lawyers. The lawyers can make such allegations as they please backward and forward, and then when they come to the trial they can throw them over completely. They can do that in any modern system that I know of. Any modern system will allow amendments. If the lawyers have gotten off on some theory that doesn't fit with the actual facts, it can go by the board. They certainly

can do it under the Federal system, where amendments are favored. On the other hand, the discovery features, including summary judgments, go to the merits and not to the paper allegations, and that, I think, is the great difference and the great importance of the difference.

The changes that we may make in pleadings by this process of checking up on them are binding on nobody. That is the practical matter. Amendments are to be freely had, and they are not going to do anything to advance the trial unless the parties wish. On the other hand, of course, examination of either the plaintiff or the defendant or an affidavit signed by him which goes into details commits them very definitely of record as to what the facts are.

Coming a little more back to the question of experience, I have tried to adjust that in every way I know--in the reported decisions, in statistics, in what I can tell myself--with what I see of the practice--and I say that the results obtained by these preliminary motions are almost so small as to be negligible and that a good share of those that are obtained are wrong. I mean by that that they are the kind of result made summarily at the beginning that I think we are all going to agree should not be made. I mean on the substantive law, not as a matter of procedure. If there is available a preliminary motion to dismiss for improper service of process, of course, if the judge is convinced there is improper service of

process, he should dismiss; but my point here is that most of the cases that I can find reported are cases where he is wrong in dismissing it. I can say that with some sorrow because I have been in a couple of cases where I have done it myself, only to be reversed.

I should say that in the reported cases, I have found, in the first place, the motion is denied more often than not. Something less than half, in any event, are granted. I haven't very good statistics on that, but it is less than half. In the first place, that is a waste. In the second place, of those that are granted, I think if you would go over the decisions you would agree with me that at least 60 per cent should not have been granted on the substantive law. I think we can check up on that. There are a great many foolish lawyers, of course, but there aren't so many lawyers who are going to bring cases that are absolutely foolish and that can be stricken out by just looking at them. These are going to be serious matters that have to be thought over.

I spoke of cases where I had come to grief myself from dismissing. These happened to be cases after trial. We went all through trial, and I don't believe I could have gone even as far as I did without trial. In other words, my suggestion is that in practical results we waste a good deal of time and effort of all kinds in our emphasis upon these motions. Beyond that, I think it gives an entirely wrong impression to the

lawyers, anyway. It makes them think that there is still something to be fought over on the paper pleadings.

I have just sent around a little statement which I have entitled "More About Rule 12(b)," and if you will look at pages 2 and 3, you will see a whole series of cases there, many of which I have sat in, and cases around the Circuits generally, which seems to me to be an excellent sampling of what has gone on.

As I see it, one of the chief functions of an appellate court, not a supreme court (that is, not a completely policy-making court), is to prevent the District Courts from being rather rough. I don't think the District Courts are intentionally rough on counsel. I think generally they want to be sympathetic, and that is why in the first instance these cases are in the main denied. But every little while, for some reason or another (it may be just a theory of law or it may be that counsel has gotten on the nerves of the judge through too much persistence or one thing and another), the District Judge does act summarily, and then it appears to be our function in the appellate court in general to say, "No, you can't get anywhere by such hasty action." You have this series of cases that I have pointed out where we have said, "No, you can't do it that quickly and that summarily." I think the more we can get the merits emphasized, the better.

As I said, what I have been trying to work out is only

one general, broad preliminary hearing, that in the cases where the judge thinks it may get somewhere, and that completely on the merits as far as the parties want and not limited just to paper documents. I think I have done that in the draft here, but, of course, other ways and means for carrying out the purpose could easily be found. That is what I have been after.

MR. HOLTZOFF: Mr. Chairman, may I venture a suggestion about this? I am a little bit worried about one point in this revised Rule 12. As I read it, defendant would have to put in his answer before he could raise a question and would have to go through hearing the right of the plaintiff to maintain his suit if he complained that the facts do not constitute a cause of action. That might be very burdensome on defendants, because in many actions the preparation of an answer is very complicated.

I recall that several years ago I represented an officer of the United States in about sixty suits in different districts, and all of them went off eventually on the right to maintain the action. We tested all that by motion to dismiss. To have prepared an answer would have been a tremendous job because there were many factual issues, and it would all have gone for nought. I suppose that occurs, of course, to private clients as well.

JUDGE CLARK: That is an important part. If I may comment on that just briefly, as Mr. Holtzoff points out, I

have put in the provision that the defendant, so to speak, must declare himself. Let me say preliminarily that even if you didn't go that far--and, of course, the question of how much the Committee will take is at large--you could accomplish a lot, even if you didn't like that end of it. That isn't all there is to my suggestion or, to put it another way around, my suggestion would, I think, have a great deal left to it if that particular feature didn't appeal to you.

I might say that the general idea of a consolidated motion, I take it, is a feature of the new Missouri procedure and, if I understand the criminal rules, they have substantially adopted that. So, even if you were to drop out this provision itself and leave all the rest, I would say it would be a considerable advancement.

Let me, however, suggest why I put it in.

THE CHAIRMAN: Let me see. "Drop this out." What are you referring to there?

JUDGE CLARK: The provision that Mr. Holtzoff referred to, that the defendant in moving for a summary judgment should indicate what his answer is. You will find that provision in there.

DEAN MORGAN: I think it is section 12(a) which requires that every defense be stated in the answer.

MR. HOLTZOFF: That was the point I was directing my remarks to.

DEAN MORGAN: Not the motion for summary judgment. That is what he is talking about. It is the point on which we had a great discussion before, you remember, Mr. Reporter, as to whether there were lots of cases such as Mr. Holtzoff has indicated, where to put a person to the necessity of answering would put him to the trouble of making an expensive investigation if he were to answer truthfully. I remember very well we had a number of objections from the Pacific Coast on that basis. It rather surprised me, because in most of the litigation I had ever been connected with, it was fairly easy to prepare an answer.

JUDGE CLARK: The provision that I was speaking of is somewhat tied up with this provision. That is, there is the provision in 12(a) that the way of bringing up the objection is to put it all in your answer, and that, of course, implies that your answer will be that. In my provision for motion for summary judgment I provide that whenever a defendant moves for summary judgment he must indicate in general what his answer is. So I think the whole idea is consistent, and, frankly, it is against the suggestion that Mr. Morgan referred to; it is a suggestion which is often made, namely, that a lot of cases can be saved and the defendants can be saved the expense of lengthy preparation for trial by some provision whereby they do not need to disclose their answers.

All I can say is that I think that is not carried out

or proven by anything I can see in the reported cases. On the contrary, it seems to me that the emphasis comes on objections to form, to the form of service of process, and so on, in which general waste of time is caused. By and large, there are not many cases which are disposed of in this way, and it would be more conducive to progress if the defendant would have to say at the same time in general what his line of defense is. I doubt that it is going to be as burdensome to a defendant as is indicated. It doesn't seem to me to be possible that a defendant can go into court on anything--preliminary motion or what-not--without having a pretty fair idea of his line of defense, and that is all he needs. He doesn't need to investigate every witness, of course. He needs to know the line of defense. He needs to know if, in addition to this objection that he is now making on the form of the pleading or on jurisdiction, he is then going to attack on the facts, and if he is, there is practically nothing that can stop him. Theoretically, the summary judgment can, but as we know, whenever you show that you are going to issue on a material fact, the summary judgment is out. Practically all he has to do is to declare whether he is going to try it really on an issue of law or whether he is going to try it on an issue of fact. If he is going to try it on an issue of fact, there isn't a chance of the plaintiff's getting a summary judgment. If he is going to try it on an issue of law, it would be much better to have all these considered at

one time, in my judgment. That is the general theory I have.

THE CHAIRMAN: Judge Clark, I want to get my own mind clear. I don't know whether it is clear to all the others here. When this subject was up here four years ago, Rule 12 was drawn on the theory that you put every point you have in your answer, and then if there are some issues that can be disposed of in advance of a full trial, that can be done. That was right, wasn't it?

JUDGE CLARK: That is correct.

THE CHAIRMAN: The Committee took that up and after long discussion they concluded that there were certain points that the defendant ought to be allowed to raise and get disposed of, to compel a disposition of, before he made a complete answer, and the rule was amended accordingly.

I understand that this proposal now is to go back to the proposition that you had in the first place, that you put all your defenses and objections in the answer, whether as to the sufficiency of the case stated in the complaint or to jurisdiction or to venue or whatnot, and then let the trial judge decide which of those issues he wants to take up and dispose of before the full trial. Is that the case?

JUDGE CLARK: Yes, that is substantially so. Of course, I don't mean to say this wasn't considered before. Of course it was. I am now saying that the test of experience has been against the rule. I do think it can be said that for a long

while when we discussed it before, we had the idea of only one preliminary motion in sequence. Toward the end, the idea of two preliminary motions came in. Even if one doesn't quite agree with me, which is to start from the answer backward, so to speak, I would say that the idea of two successive preliminary motions is really much closer to the common law than the district code pleading in general. Code pleading in general has his answer in abatement and preliminary motion, but to have two preliminary motions in succession, one on jurisdiction, one on sufficiency of the pleading, I always thought was something of a retrograde step.

I might suggest, as I understand Mr. Hammond's proposal that he has put before you, he would make that an absolute requirement. It is true that under Rule 12 as it was drawn it is not required. The defendant may plead otherwise if he wishes. The defendant may plead in his answer, and then there is a second option, so to speak, which rests with the court, because if the defendant has pleaded in this successive, one, two, three way, the court of its own accord may postpone the issue to trial. So there is a kind of double option, first in the objector or usually the defendant, and then second in the court to combine these steps. As I understand it, Mr. Hammond's suggestion which was put out and sent around to us would prohibit those options.

SENATOR PEPPER: Mr. Chairman, may I ask the Reporter

a question? Apart from this question of simultaneousness or succession in respect of motions, could you make the case a little clearer to me by putting a typical illustration of a motion that could not be made under the rule as it is and that you think should be allowable under the rule as you ought to have it?

JUDGE CLARK: Perhaps I have been directing myself to motions which are now made and which I think ought to be discouraged. I will answer your question.

SENATOR PEPPER: Either way.

JUDGE CLARK: Let me answer it both ways.

SENATOR PEPPER: Yes, that is right.

JUDGE CLARK: First in the case of a motion which now can be made all by itself.

SENATOR PEPPER: Yes.

JUDGE CLARK: There is the case of Totus v. United States, of Judge Swellenbach, which seems to me to be a very serious one. That case was a suit against the draft board officials, involving Selective Service, and the summons summoned them to answer in 20 days. The Judge first held that they are officials of the United States. Next he said that they are entitled to 60 days. Next he quashed the summons and the suit because the summons said 20 days when he thought they should have 60. If you don't object to any other step in the process, why in the world say that having 20 days instead

of 60 days makes the process invalid, particularly with the rule we have, following the statute, for a motion to amend the process? Of course you aren't going to get anywhere there. The only thing you would achieve by that is to have the suit started over.

THE CHAIRMAN: What basis was there in the rule for his doing more than set aside the service of the summons? What basis had he in law or rules or anything else for dismissing the action?

JUDGE CLARK: He quashed the process, which is the same thing.

THE CHAIRMAN: No, it isn't. If the complaint is on file, he has to have a new summons issued. The suit is begun by filing a complaint. If your summons is in defective form and is served and is set aside, that quashes the summons and the service, but it leaves you with a suit pending that hasn't been dismissed. If Judge Swellenbach dismissed the suit, he didn't know what he was doing. That is all I have to say about it. I don't think that illustration helps us very much.

JUDGE DOBIE: Would there be any difference, General, in a case where it is perfectly clear that effective service of summons could never be had?

THE CHAIRMAN: I don't believe a judge would ever dismiss a case because he thought he never would be able to get service on the defendant.

JUDGE CLARK: Here is another case from down in South Carolina.

SENATOR PEPPER: What I am trying to do is to get some kind of factual or clear-cut issue so as to guide us. The abstractions are a little bit over my head, and I should like to get a case which would be within the rule as you would like to see it and one that is not within the rule as it is, or a case that is within the rule as it is and oughtn't to be there as you would like to see it.

JUDGE CLARK: What I am trying to do by these illustrations is to show the kinds of objections which can be raised under the Rules, which I should say are really an invitation to raise objections which to me seem very weak when you get there. I am not going to say they shall not be raised. I suppose if they are in a lawyer's mind, he is entitled to raise them. If you are going to raise that sort of weak objection, I don't see why you shouldn't have to go ahead when the time comes and say, "I am going to raise this issue of law," or "I am going to raise this issue of fact," perhaps, and so on. That is to get the thing in a situation where you can go further than this simple, formal, technical motion.

Let me give you just two more rather quickly on that side, and then I shall go to the other side.

The case I was going to give is Sweeney v. Greenwood Index-Journal Co., in South Carolina, one of the Sweeney libel

suits. There the judge held the process insufficient because the name of the newspaper served was the Index-Journal Co., not the Greenwood Index-Journal Co. I don't see how you can get very far with that kind of thing.

Another kind of case is on the insufficiency of the pleadings. We have had that a good deal. I suppose any court has it. I happened to think of one case (Downey v. Palmer is the name of it), and I have cited it here. That was a case of a suit on a stock assessment, and the defense was the Statute of Limitations and release. Then the attorney tried to change to sue for fraud in obtaining the release. There happens to be a state court of New York decision which says that you can't shift from a suit like that on a stock assessment to one of fraud, and under the New York State procedure they went up to the Court of Appeals and got a holding that you can't change the form of action. Next time, they started a new suit on fraud, and the lower courts held the first case res judicata and the Court of Appeals reversed, which seems to me to be a case where you have about six decisions of different courts, and at the end you have gotten where you ought to be when you started. So, in the case we had, Downey v. Palmer, which I think was 113 F.(2d), the lower court had held that you couldn't shift from stock assessment to fraud. We simply reversed and said, "Go back and amend." That is the kind of thing on insufficiency of law.

Those are the two types of motions that I would want to discourage.

SENATOR PEPPER: How do you discourage them?

JUDGE CLARK: I should say that you can bring them up only on a summary judgment, which means that the plaintiff at the same time can say, "Well, I want my money, because there isn't any real defense; he is just making a defense of form." The defendant will have to put in his affidavits, too. I don't mean to say that you could stop this altogether. Of course you can't. But you can stop the separate rounds of battle, so to speak.

MR. LEMANN: Let me ask you, in the Sweeney case you put, if we adopt the suggestion, the defendant could file his answer and could say, "You sued me by the wrong name. There is no such company." When the court came to the defendant, he would first say that the process should be set aside because the defendant's name was wrong. Then, pursuant to the proposed amendment, he would have to go on and answer. After he did that, he could then file a motion for a summary judgment quashing the process, could he?

JUDGE CLARK: Yes.

MR. LEMANN: Or he could ask the court to take that up first.

JUDGE CLARK: He wouldn't need to file a motion. He could take it up first. He could ask the judge to take that

up first. The judge would say, "I had better take that up first. That is correct; he is right. I quash the process." Wouldn't the plaintiff be in the same fix he was in in the case you cited after appeal?

JUDGE CLARK: Of course, it may happen; that is true.

MR. LEMANN: I mean not only may. Isn't it bound to happen?

JUDGE CLARK: No.

DEAN MORGAN: If you have the same judge, it is, isn't it, with a fellow as dumb as that?

JUDGE CLARK: I should think that is just what should not happen. The judge should say, "This is a mere mistake in name. Amend your name and go ahead."

MR. LEMANN: I don't think your amendment cures the disease, that is all. The disease is there. I think you need another remedy.

JUDGE CLARK: I don't know.

DEAN MORGAN: You need a new judge, Charlie; that is what you need in that case.

JUDGE CLARK: If the judge then thought he was going to get rid of old Sweeney's claims, I don't think he would have done it, probably, because Sweeney wouldn't have won anyhow. He had ninety suits around the country, and they were trying to throw them out on a technicality when the only way to get rid of them was on the merits.

The other side, the kind of case where I would want it brought up and it couldn't be now, is any of these cases where the claim is only on the pleadings, and you want to go outside and look at the merits. Practically all these cases that I gave you here are of that general kind.

SENATOR PEPPER: Could you take just one?

JUDGE CLARK: The two cases at the beginning here, Rule 12(b). I don't know that I could give Samara v. United States with enough completeness. I wasn't in the case myself. That was a case where the trial court had held the pleading insufficient on a claim against the United States because of the failure to put in a claim to the revenue officials. The upper court reversed and, by the use of affidavits in the record, held that the plaintiff did have a good claim.

The next case, Cohen v. American Window Glass Co., I was in, and that was a suit in the Southern District of New York against a Pennsylvania company, asking for certain matters of internal management included in the declaration of a dividend. In the District Court the process was held insufficient on the theory that you couldn't serve the defendant in New York. It came to us, and we held that that was in error, that the process was adequate. The defendant in that case, however, in making his motion on the process, had made it complete in the record, covering particularly the point that he wanted to raise, that this was a matter for the Pennsylvania

courts, it being a matter of internal management. He went through all the votes of the corporation, the Pennsylvania law, and so on. We went to that question, and on that we held it was a matter for the Pennsylvania courts and therefore modified the decision and dismissed it on the merits, which I think is a good example of the kind of thing I have in mind.

THE CHAIRMAN: When a defendant wants to raise a point that there has been improper service--it is a foreign corporation, for instance, and he wants to raise the point that he hasn't any agency in the state at all that is doing business so that the summons can be properly served on the alleged agent--is it your position that that claim should be put in an answer to prevent the trial court from disposing of that, as he may do, erroneously, which would mean an appeal and a reversal, so you will have to go to trial on the merits and have the whole case up in the court of appeals before you decide finally the preliminary point about service of process? Is that the way it works?

JUDGE CLARK: No, it doesn't go quite as far as that.

THE CHAIRMAN: How far short of that does it go?

JUDGE CLARK: In the first place, the defendant would have to state his other objections; that is, the defendant couldn't rely on a bare statement of his technical point.

THE CHAIRMAN: He hasn't any right to bring up that point in advance of trial, has he, under the rule?

JUDGE CLARK: Then he would ask the court to bring it up.

THE CHAIRMAN: I know, but suppose he doesn't, and the court says, "Oh, well....."

JUDGE CLARK: He probably would do that, but that is true, of course, under our present Rules. I understand the defendant has no absolute right against hearing, only it works the other way. He will get it unless the trial judge affirmatively says, "No, I don't know whether I can decide it or not."

THE CHAIRMAN: That is usually because the judge feels there isn't enough presented to him on which it is safe to render an opinion at that time, but, the other way around, it doesn't delay the disposition of it for that reason because he doesn't know what is going to be presented.

JUDGE CLARK: Of course, in general the reason I am suggesting this is that I think usually there isn't enough.

THE CHAIRMAN: It sounds to me as if you were rather indicting the court for making erroneous decisions on some point which needed reversing. But here is your rule on page 32, Rule 12(a) as you propose it. I shall try and get it a little concrete.

"Every defense or objection, in law or fact, to any claim for relief in any pleading shall be asserted in the responsive pleading thereto, if one is required under these rules; otherwise it may be asserted at the trial without formal

pleading. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading."

That means only that when a suit is brought, you have to put in an answer. If you claim the process hasn't been properly served and you are not subject to service in New York, if you claim the court is without jurisdiction, if you claim the venue is improperly laid or anything of that kind, all those have to go into the answer. If you also claim that the plaintiff's case as he set it up in his complaint doesn't show any ground for relief, not merely because he badly pleaded (because he can amend) but because of the full case as he states it as a matter of law, and doesn't give any right to recovery, that goes into the answer. Unless the court sees fit to take up some point as that, you have to prepare for trial and go into trial, and you don't know when you start to trial whether the court has jurisdiction, the venue is properly laid, the summons are properly served, or the plaintiff has a case at all. Isn't that really what this rule means?

JUDGE CLARK: Yes, that is true. The defendant can't bring up his various objections piecemeal. I suggest that the results show that although the defendant has the advantage now of making a series of motions, it doesn't get him anywhere.

DEAN MORGAN: Under those circumstances, though, Mr. Mitchell, the defendant could make a motion for summary judgment

and support the thing by affidavits, and so forth, and get that thing heard out. When we adopted Rule 12 in its present state we didn't consider two things, it seems to me, that are of importance. Those are the rule on pre-trial procedure and the rule for summary judgment in connection with it. All these preliminary points on jurisdiction, and so forth, can be just as fully taken care of on the motion for summary judgment and the parties can present their facts just as thoroughly on the preliminary motion. In that way you would confine it to one motion.

One thing I haven't heard the Reporter answer yet is a question of experience, it seems to me--the one Mr. Holtzoff raised--whether or not you ought to require a defendant to go to the expense of investigation, and so forth, for his answer before he determines whether the plaintiff has stated a cause of action. But as to the rest of the matter, it seems to me the summary judgment will take care of every objection that you are raising to this combination in one, and it will cut down the number of preliminary motions.

THE CHAIRMAN: If I were the defendant and had a question about the venue or the jurisdiction or a lot of other things, I should hate to have to put in an answer and then move for summary judgment and raise every ground for summary judgment I had on the merits as well.

DEAN MORGAN: That is, you want to have a lot up your

sleeve.

THE CHAIRMAN: No, I don't. I want to dispose of obvious defenses which may terminate the litigation before I am required to meet other things. That is the real basis for the Committee's action before. They felt that a man ought to have a right to get certain things settled before he was put to the preparation for trial, which is what it amounts to.

DEAN MORGAN: Do you have to have preparation for trial upon your motion for summary judgment? You don't have to have all your witnesses ready, and so forth. You don't have to go to all the expense. You have to get the kind of material that you have in your office for trial.

THE CHAIRMAN: Suppose that you had made a summary judgment motion on the ground that the court was without jurisdiction and you were defeated. You couldn't make another motion for summary judgment, could you?

DEAN MORGAN: I suppose not.

THE CHAIRMAN: That means that while you are raising the point about the jurisdiction and whatnot, you also have to get hold of all your witnesses, study out your theory of the merits, and prepare affidavits as to the facts, to see whether there is a real issue or not. Our theory was that the defendant ought not to be put to that. Of course, there is one thing under this rule: there are two successive steps of motions. I am not arguing that that ought not to be

consolidated, but there is another thing that appeals to me about this suggestion, and that is that it completely abolishes the necessity for anybody's drawing a pleading so that he states a valid claim. It wipes that out completely. He may mouth around in his complaint and not state any facts that would justify any recovery under equity, but the defendant is helpless. He prepares his case, and it is all decided on the merits.

MR. LEMANN: He could make that point in his answer under the Reporter's suggestion, couldn't he?

JUDGE CLARK: Yes.

MR. LEMANN: Then he could ask the court to take it up separately, and the court could take it up separately. If that happened, the Reporter's suggestion wouldn't help the situation, it seems to me. If you want to remedy the evil that you see, Mr. Clark, you would have to provide that all the defenses should be set out in the answer, all the defenses of every character, and that the case should be tried all at one time. The venue would go up, and you would have forced the parties to try the case. When they got to the upper court, the court would say, "It is too bad. This case doesn't seem much to try, but there was no jurisdiction over the defendant corporation." Your point there, I understand, is that that may happen now and then, but that it will make less trouble in the long run than what is happening now? Is that a fair statement?

JUDGE CLARK: Well, it is one statement. Let me just add two or three things. I want to reiterate that I am perhaps stating here what might be termed the most advanced position, and please don't throw the baby out of the bath in any event.

I might say that Mr. Moore is working privately on the one-motion stage of this affair, and I gather from what Dean Morgan says that at the moment he is more inclined to that than perhaps I am. It is possible. I am stating what I think is theoretically possible and desirable, but anything which provides for one summary judgment motion I think would be an advance over what we have now. I emphasize the summary judgment because I think that the possibility of having affidavits is a marvelous thing. I don't know that I can make it clear unless you really sit with this sort of thing. I know when these matters come up and we have a bare record, as sometimes we have, when the lawyers are fighting over something that is just written down here in the way of allegations, we hesitate nowadays to be sure we want to throw them out. They haven't done the thing very well, but nevertheless it is no longer a court's function to throw out a case just because it is poorly presented. You have a feeling of great uncertainty, as though you may be doing an unfairness to poor people who have a lawyer who is not very skilled, and all he can do is to yell that he is being robbed. That is what some of them seem to do. On the other hand, if the parties have their consciences searched,

so to speak, by affidavits (even by affidavits I think it does the job pretty well), you can see what they are driving at and you get the thing out there. I know I feel a great deal more certainty about it.

As to the suggestion that originally developed--and perhaps it is not yet thoroughly settled--as to whether you can consider affidavits under Rule 12, I can't tell you how remote from actualities it would seem in these cases when we get a record with affidavits there. The parties have put them in, and I think even if he were to say he wouldn't look at them, any judge is going to peek and see if there is any real case or not.

So I say in the first place, please bear in mind that one consolidated motion would be a great deal of help.

What I am trying to do is a little more than that. I am trying to provide that not only do you have that one consolidated motion to be heard on affidavits, and so on, but that also each side shall state enough of his case so that you can have cross-motions heard at the same time. If the case does present only an issue of law, you can try it out all at once. Maybe I am pushing too much on that last, but I just want to emphasize here that it is a further step and that it is one that does on the whole seem to be reasonable.

Now let me say one thing more from the standpoint of what seems to me to be the experience. You gentlemen speak of

throwing out a clear case. Maybe I am wrong, but even in the Federal Courts I don't see those clear cases, really. It seems to me that those are more the expression of a hope rather than otherwise. People really don't go to the expense of hiring lawyers and bringing cases unless they have something to fight out.

MR. HAMMOND: Or they think they have.

JUDGE CLARK: Of course they think they have. It might be on jurisdiction under Rule 14, bringing in third parties, which is still in doubt. If at the time a suit is brought the Supreme Court has made a definite pronouncement, it might be clear by that time, but by that time the parties might withdraw the case. So the chances of getting the cases disposed of on these clear issues are very small, it seems to me, in practice. There, too, the possibility of having it disposed of with a summary judgment, that is, of having it disposed of on affidavits, I shouldn't think would be harmful. I know it is helpful. That allows the parties to bring out the merits, but I shouldn't think it would do any harm. If they don't want to put in affidavits, they don't need to, but they can show whether they have any real issue involved or not.

THE CHAIRMAN: When you say "dispose of the case on affidavits," I am a little confused about that. There are certain things, according to our traditions and practices, that a trial court may decide on affidavits, that is, where they decide

the issue of fact on an affidavit. Most of those are motions, as I recollect it, that doubtless don't result in a judgment on the merits. It is contrary to all our conceptions of justice, and I don't know whether there is any clause in the Constitution, such as the due process clause, that affects it, to decide an issue of fact that settles a case on the merits on affidavits, to move to set aside the service and the judge will decide the conflicting issues of fact on affidavits. But he doesn't settle the merits; your lawsuit isn't gone. You can think of scores of different kinds of motions that are disposed of on affidavits where the affidavit is accepted as proof, and the judge decides who is telling the truth--motions for extension of time, scores of different motions under these Rules--but when you get to an issue that means judgment on the merits, there is no such thing, according to our Anglo-Saxon system up to date, of disposing of those on affidavits. The only thing we have is the summary judgment motion which deals with the merits, but the court doesn't settle the issue of fact on affidavits at all. He simply looks at the affidavits to see what proof one man says he has and what proof the other man says he has, for the purpose of finding out whether there is a genuine dispute and some evidence on each side. Then he does not settle the issue at all. He sends it to trial, with witnesses and cross-examination, and so on.

I am confused when you say "settle the case on

affidavits." You have a half dozen different defenses in your answer. One is that there is no jurisdiction; another is that service hasn't been properly made, and whatnot. Some of those things are susceptible of being disposed of on conflicting affidavits, and others dealing with the merits of the case are not.

Is it your idea that under these Rules the court is going to settle any issue of fact that settles the merits on an affidavit before trial?

JUDGE CLARK: Oh, no. My expression wasn't very well chosen, perhaps, or was elliptical. I didn't mean anything different by summary judgment from what I think you mean. Whenever there is a genuine issue of material fact, as we put it, you can't have a summary judgment. We very often are reversed on that ground, too. I think that in a way what you say rather reinforces when I am trying to say. I will say that you cannot decide many cases on summary judgment if the parties don't want you to. I mean if the parties think they have an issue of fact, that about settles it. They are going to try it out. But there are not so many cases statistically--and it is true--that can be settled on summary judgment. There are fewer that can be settled on the mere fact of pleadings alone. What I am trying to do is to combine these somewhat limited but nevertheless, in particular instances, useful cases in one.

THE CHAIRMAN: What have you to say about my suggestion

that under this rule a defendant can be forced to trial notwithstanding the complaint doesn't state facts which, if the applicable law applied, would entitle him to recover? Doesn't it abolish the necessity for stating a good claim in the complaint?

JUDGE CLARK: No, it doesn't, although there is one qualification that I think is still true under the present Rules. We certainly have applied it in our Circuit, and we have reversed the trial courts on it. Even now, if a complaint doesn't state a good claim but yet appears to be amendable and the parties indicate that they have grounds to amend, we won't dismiss.

THE CHAIRMAN: When the District Court sustains a motion to dismiss under (6) for "failure to state a claim upon which relief can be granted," doesn't he universally grant leave to amend?

JUDGE CLARK: I should think that generally he ought to, but as a matter of fact, often he does not. Sometimes he says nothing. We have certain cases as to what they mean when they say nothing. We have occasionally cases when they say definitely "without leave to amend."

MR. DODGE: You are very anxious to consolidate all the motions into one stage, but you go beyond that and ask that they all be embodied in the answer to the merits.

JUDGE CLARK: Yes.

MR. DODGE: I object very strongly to such a complete abolition of the equivalent of the old demurrer, because very often, not as a matter of defective pleading but on the substantial claim that is stated by a perfectly competent lawyer, you have nothing but a question of law raised as to whether there is a cause of action. The lawyers differ on it. There is no reason, in my judgment, that the defendant should go to the burden of preparing a long answer if there is a real claim of that sort. I don't see any objection to consolidating all the motions in one stage, but I do see a strong objection to requiring the defendant to answer to the merits in detail and carefully where there is obviously a question of law, either jurisdiction over the subject matter or a failure to state any legal claims, where he can state in technical and proper language why there is failure to state any legal cause of action. Why should you have to go to the burden of answering to the merits before you can raise that question? I don't see any sufficient gain from so doing.

JUDGE DONWORTH: I think there is much in what Mr. Dodge says. I think we should remember that when an action is started, a lot of consequences ensue. When a case is pending there are a lot of things--discovery, perhaps attachment, perhaps garnishment, and so on--we can think of that happen in a lawsuit, and it doesn't seem right to say that those things must follow the filing of a complaint, when the judge, on

reading the complaint and the point being called to his attention, would say, "This action is against public policy," or "This complaint doesn't state any cause of action for relief under the law of this state or the United States." It seems to me that opening up for a plaintiff all the consequences of the pending lawsuit when he hasn't stated grounds for getting into court would be going too far.

THE CHAIRMAN: There is one other thing that I should like to mention at this time. The Reporter has spoken about it. I think he and I are in pretty sharp disagreement about what the Rules provide. Maybe you have been reading some of these cases (Goodrich has written one or two in that Circuit) which have intended, at least by name, the kind of motion which isn't mentioned in these Rules, called the "speaking motion." The thing comes up in this way: Rule 12(b)(6) provides for making a motion to dismiss "for failure to state a claim upon which relief can be granted." There have been motions made in a number of courts which were nominally motions to dismiss under 12(b)(6) where, if the complaint did on its face state a cause of action, the defendant put in affidavits of facts to show that the man didn't in fact have a cause of action. The easy way for the judges to handle that is the way that Augustus Hand did in one case in the Second Circuit. He said, "That isn't a motion to dismiss for failure to state a claim; that is a motion for summary judgment, and they ought to treat it as a

motion for summary judgment." I say that Rule 12(b)(6) means exactly what it says, and the question isn't whether you have a cause of action or whether your affidavits show that you have or you haven't. The word "state" shows plainly what it means. Does the complaint state a cause of action? If you have something outside of the complaint that you want to rely on by affidavit, it is a motion for summary judgment. That is in a sense a speaking motion, as a speaking motion is thought of. That summary judgment is the only speaking motion that we have under these Rules.

What I criticize in those decisions is that they have tried to invent a new kind of motion that isn't defined or described in the Rules, called a "speaking motion," and to draft on the rules something that lawyers don't understand. The only speaking motion you have under these Rules is a motion for summary judgment where the motion papers are supported by affidavits. I am not talking about a motion to dismiss for failure to serve or something of that kind. I am talking about a motion that goes to the merits. So I say that that means just what it says and that this speaking motion business is just causing all kinds of confusion.

There have been three or four Circuit Court of Appeals decisions and quite a number of District Court decisions which very loosely say these Rules permit speaking motions and that therefore they will allow a motion under 12(b)(6) for failure

to state a cause of action by supplementing the motion by affidavit, and they are wrong about it. I have examined every one of those decisions, and there isn't a one of them where the court couldn't have treated the motion as a motion for summary judgment and decided precisely the same way on the ground that, taking the affidavits all together and those things in them about which there was no dispute, no real issue of fact existed on questions of fact on which the ultimate disposition of the claim on the merits depended.

Of course, if you want to eliminate entirely this motion to dismiss for failure to state a cause of action, which is similar to the old demurrer under the code system, that is one thing, but if you are going to keep it there, you ought to keep it as it is and as what appears on the face of the complaint and what is stated there, and not otherwise. There isn't a case in the Second Circuit or the Third Circuit which talks about speaking motions.

... Chief Justice Stone appeared and commented briefly to the members of the Committee ...

THE CHAIRMAN: You don't need to bring up that proposition about what our policy is going to be any more.

JUDGE DONWORTH: Mr. Chairman, supplementing what the Chief Justice has said, as you all know, Judge Fee is one of the U. S. District Judges at Portland, Oregon, and he is an exceedingly good judge, quite clear-headed and all that. He was

up at the meeting of The American Law Institute at Philadelphia last week, and I had a brief talk with him--not as long as I should have liked. He understood that this meeting was to be held here, and he asked, "Has your Committee called upon the Federal Judges to send in suggestions?" I said, "Not as yet, but if it is not too late, we may do that." He said he had some thoughts, but, as I understood him, he hadn't concluded what course to pursue to get those thoughts before the Committee. I inquired if he was going to be in Washington this week, and he said no, that he was leaving for the West at once. That is all I know about that.

THE CHAIRMAN: Judge Fee sent me a copy of the communication the Chief Justice had, and I answered it. I will say two things about it. He suggested that some Federal District Judges be invited to appear before the Committee, and I answered by saying that we would be glad to have any of them come here who wanted to (it was only last week that he wrote this thing) but that it would hardly be practicable to arrange for that in the coming meeting. I said, "Any preliminary draft we made would be printed and distributed in advance, I assume, to members of the bench and bar, and they would have several months in which to study what the Committee proposed to report to the Supreme Court and then to come in with their suggestions. We should be very glad to have them."

The other thing, right on the very point we are dis-

cussing now, is that Judge Fee, instead of wanting any changes in these Rules which render the pleadings and the allegations of the complaint of less importance than they are today, bitterly assails the pleading system under the Rules because it doesn't give an opportunity, as he says, sharply to define the issues of the pleadings before you get to trial. So, instead of wanting to minimize the importance and value of pleadings as applying to the issues, he wants to increase them. Of course, he is in altogether too far in his views about that. That is the gist of his communication.

JUDGE CLARK: Judge Fee, of course, made this suggestion at Boston before the Institute of the American Bar Association long before the Rules were adopted. Judge Fee also has written it out in the Oregon Law Review. He longs for the old days of common law pleading. He is very serious and very intent about it, but for my part I can't consider anything worse than to follow the system he has in mind. All my experience and the whole experience of the judges in New York, I am quite sure, have been to the contrary. If he were to come down here and speak, I think we ought to have the New York District Judges, who are as busy as any in the country, who, as I know, are very favorable to the Rules, and who also passed a resolution to do away with the bills of particulars among other things.

DEAN MORGAN: And the Boston judges wanted to do away with the bill of particulars.

JUDGE CLARK: Could I speak on this matter of affidavits? I have been talking a good deal but, after all, this is important, and I hope everybody is interested.

I would disagree with the Chairman on his interpretation of the wording of the rule, but I don't want to go into that very much.

THE CHAIRMAN: When you say "rule," you mean 12(b)(6), failure to state a claim?

JUDGE CLARK: Yes, I know, but there is a provision in Rule 43, I think, for the use of affidavits, and Rule 7 also indicates affidavits. I think what it does is to put a great deal in one word, "state." I would rather not leave it with that. After all, if the matter can as easily be done by summary judgment, there it is, but what I am afraid of is what we run into, that the lawyers don't know this procedure as well as they might, and the lawyers are likely to make mistakes. If I could be sure in every case that every motion to dismiss would be treated as a summary judgment ipso facto, I would be perfectly ready to agree with Mr. Mitchell. In the cases I think that the courts have apologized, even in Judge Hand's case. There has been a suggestion that this could be treated as a summary judgment. I think Judge Hand's case particularly could be treated as a summary judgment, but it seems that under Rule 12 motion to dismiss, affidavits may be had.

What I do want to emphasize--and I am sure about this--

is that I think there isn't any question but that it would just be a tragedy if material of that kind were shut from the eyes of the judge and particularly from the appellate judge. I think that is one of the most useful things we have. However it is reached, I should say that I would be glad if it were made so that there is no question about it. If it were to be provided that every motion should be considered a summary judgment, or vice versa, that would be all right, but I don't want to make any qualifications whatsoever as to the essence of it. It seems to me that is the one thing that gives us a little feeling on these preliminary matters that we know what we are doing, that we are not going in the dark on formal allegations.

As the Chairman pointed out, whenever there is a question of fact, we can't act anyway. Therefore, in the cases of summary judgments, the number of those that are granted is about even with the number of those that are denied. Certainly in a great number of cases we can not and should not grant the motion, but we do have a feeling of knowing somewhat what the parties are about which we don't get from the formal allegations of the law. So I say, however it is done, whether you call it a summary judgment or whatnot, I am quite clear that it would be just emphasis of form, and it would be a distressing situation if we deprived the parties of a chance of supplementing what they are doing by stating what the case is.

THE CHAIRMAN: If the plaintiff wants to supplement

the complaint, why can't he do it by an amendment instead of an affidavit?

JUDGE CLARK: The thing of it is that this all presupposes that the lawyers are quite clear about what they want and what they are doing and also about what the courts are going to do. Of course, all these things are possible. If a lawyer is astute and clever and can foresee, he will do all these things, and that is one reason I feel so strongly about it. The thing that distresses me is the poor fellows who have some sort of claim and don't know how to state it any too well, who don't realize what they are doing and make a motion to dismiss and then are met by the fact that it isn't a summary judgment, that they have just called it by the wrong name.

THE CHAIRMAN: Every court so far says that if it is a motion to dismiss by the defense, supported by affidavits, it can be treated as a motion for summary judgment, and the epithet that you put at the top of your motion doesn't mean anything. Your own Court has said that.

JUDGE CLARK: I have tried to help that on. I believe in that thoroughly, and if we got that thoroughly established, this question won't mean anything. I agree with you, it won't mean anything, but it isn't thoroughly established yet. There are some courts who think there is something in the name.

THE CHAIRMAN: I wouldn't object to your putting in a clause in the rule that a motion to dismiss, if affidavits are

presented to supplement the pleadings, may be treated as a motion for summary judgment.

JUDGE CLARK: Of course, that is one thing I have in there.

DEAN MORGAN: It ought to be "have to be" instead of "may be" so as to give the other parties a chance for counter affidavits and all that sort of thing, because the procedure is quite different in the two.

PROFESSOR SUNDERLAND: Would you call a motion made under the first five of these subdivisions of 12(b) summary judgments? Would you say they were just summary judgments? On the merits you couldn't have a summary judgment if there was any issue of fact, and if you did get a summary judgment it would be a judgment on the merits where there was no issue of fact involved. These first five aren't that type. You don't get a judgment on the merits on any of them, and there may be issues of fact which the court may decide.

THE CHAIRMAN: On affidavits?

PROFESSOR SUNDERLAND: On affidavits. I don't think they are summary judgments.

JUDGE CLARK: I don't quite see what difference it makes. Suppose, instead of calling them "summary judgments," we call them "summary orders" or "summary dispositions of the case."

PROFESSOR SUNDERLAND: The procedure is altogether

different. The question of the summary judgment is whether there is any issue of fact on any material point affecting the merits. That isn't the question in the first five of these motions for dismissal. I don't think they are summary judgments.

JUDGE CLARK: I guess on shrewd analysis maybe they aren't. I was trying to think of it practically.

JUDGE DOBIE: None of them would prevent you from bringing another action, would it?

PROFESSOR SUNDERLAND: No.

JUDGE CLARK: Yes. I don't know what difference it makes to the immediate thing.

PROFESSOR SUNDERLAND: I point out there is a decided difference in this matter of service of process. There may be affidavits in regard to that service, and there may be counter affidavits. The court would have to decide an issue of fact on those affidavits. That isn't summary judgment procedure at all. It is wholly different.

MR. DODGE: That is the old form of plea in abatement.

PROFESSOR SUNDERLAND: Yes, tried by the court instead of being tried by the jury.

THE CHAIRMAN: That is why I have insisted that motions going to the merits of the case, in which affidavits are added to the pleadings, ought to be treated as motions for summary judgment and nothing else, because the summary judgment rule

makes it perfectly clear that you can't decide a conflict on a question of fact on affidavits. Underlying all that I have said about this thing is the fundamental proposition that you have to be awfully careful to distinguish between matters that can be decided on conflicting affidavits that dispose of your case on the merits and matters that can't be so decided.

PROFESSOR SUNDERLAND: The distinction is whether you are dealing with the merits or are not.

THE CHAIRMAN: Exactly, and when you say there is a speaking motion under these Rules, except this summary judgment rule, you are running head-on against the proposition that you can't dispose of meritorious issues.

MR. DODGE: If you support a motion purporting to be under subheading (6) by affidavit, it isn't a motion under section (6); it can't be.

THE CHAIRMAN: That is it. That is my point exactly.

MR. DODGE: It couldn't be anything but a motion for summary judgment.

THE CHAIRMAN: That is exactly it, but they say that it is a speaking motion, that it isn't a summary judgment motion but a speaking motion, and that Rule 12(b)(6) itself permits affidavits, when it says in plain language that what you are driving at is not what the fact is but what the complaint states. It uses the word "state" on the face of it. If there is any fault with the rule, it is that the Reporter has been too

precise in making it perfectly clear that what you are driving at is what is stated. It reminds me of a case before the Supreme Court of Minnesota some years ago when I was a young man. It was a case in which under the code system the defendant had demurred to the complaint on the ground that it didn't state a cause of action. That is the exact language of the code, just as this is. The lawyer for the appellant, who had had his complaint knocked out below, got up before the court and argued at great length. He paid no attention to what was said in the complaint. He practically offered himself as a witness and began to tell the court what the facts were outside of the complaint. The other lawyer simply got up and said, "Your Honor, I was demurring to the complaint and not to the surrounding atmosphere," and sat down. That was the end of it.

That is what this rule means. Maybe it is wrong, and maybe you ought not to have a rule which allows you to raise a question of whether the fellow states a good claim in his complaint, but that isn't the point.

JUDGE CLARK: Let me say first, as to Professor Sunderland's suggestion, of course under our Rules you can't get a jury trial unless you claim it. As far as I know, I don't think there is any doubt but that you can get a jury trial on some of these preliminary issues if they are issues of fact. If you claim a jury trial, I know of nothing in the world that says you can't have a jury trial on them if they are issues

of fact. I suggest with all deference that I don't think the distinction goes to the extent he suggests. I think that you can treat them, given some difference in situations, as substantially the same.

I still want to come back to the main point, which is that I don't believe there is any justification--and I say this warmly from experience--under a motion to dismiss merely on the form of the pleading if from the record before you there appears to be a substantial issue on the merits. I think it is pretty hard if you are now going to ask the District Courts and Circuit Courts to rule in that event that there must be a dismissal, whatever may be the nomenclature used.

The decisions now in the Circuit Courts are pretty strong. As far as I know, there is only one dictum, plainly a dictum, said to be by Judge Gardner, who says that affidavits can't be used. There are decisions from the Second, Third, Fifth, Sixth, and Seventh Circuits, at least. I don't know whether I have covered them all or not. Certainly that is the correct and efficient way of getting at the question of whether there is a real issue to be fought out. That is what courts are for.

THE CHAIRMAN: What is a complaint for if you don't have to state a cause of action and you can't get it dismissed because you have failed to do it? What do you have a complaint for? Why don't you follow the English system, which permits

you to endorse on the back of the summons just a statement in a general way of what the nature of the case is?

JUDGE CLARK: They get along down in Virginia pretty well with a notice of motion. There is a question whether you couldn't make it a lot less than we do require by our forms. I am not sure but that you could do less than we require, but it seems to me it is going the wrong way if we are going to require more and then have hearings as to whether we have got enough or not. What we do have from our system is a general, broad announcement of the type of case and an indication, if not in the complaint, from the man forced to declare himself by affidavit or otherwise, that he has a claim that we can see there is a possibility of recovery, and we get the question, really, whether he has any affirmative right to recover or not, but we say that it isn't fatal if he hasn't put it in this document that he has called a complaint. He can show it to us in whatever way he can, but whenever he shows it, we are not going to shove him out of court simply because he hasn't labeled the document that he has put in as a complaint.

THE CHAIRMAN: Why don't you require him to amend his complaint instead of attaching an affidavit to it?

JUDGE CLARK: As a matter of fact, we often do. In the case that I spoke of, Downey v. Palmer, which was the case of a shift from a suit on stock assessment to a claim of fraud, that is just what we did in the appellate court. Judge Conger

wrote the opinion, and we reversed in order to have them amend to fraud. May I add that I stuck in a note that I thought there was enough in the complaint that he didn't have to do it, but nevertheless the judgment of the court was two to one that he did have to do it, and he went back for amendment.

THE CHAIRMAN: Would you be satisfied with an amendment to this Rule 12(b)(6) that if the court sustains a motion to dismiss because the complaint doesn't state a claim under which relief can be granted, the trial court shall be compelled to allow the man 20 days in which to amend his complaint?

JUDGE CLARK: No, I wouldn't like that at all.

THE CHAIRMAN: The gist of the thing I am getting at is that under your proposal, it is never necessary down to the last day of the trial for a man to state on the face of his complaint the facts which justify recovery.

JUDGE CLARK: I don't think so.

THE CHAIRMAN: Why not?

JUDGE CLARK: Because, I am sorry to say, that isn't quite the rule as I have suggested it. There must always be in the complaint something which justifies a recovery. I may construe a complaint more broadly. I was willing to do it more broadly than Judge Swan in the case I spoke of. I look for it, and if I don't see it I order an amendment just as much as he does. Sooner or later, you could push me to the point that I would order an amendment. Other judges might do it sooner, but

certainly the theory is the same.

DEAN MORGAN: On these special motions that you have been talking about, Mr. Reporter, they have all been cases where the affidavits were in support of the pleading rather than against it.

THE CHAIRMAN: No, no; both sides.

JUDGE CLARK: That is true; they are on both sides.

DEAN MORGAN: Suppose that they are against the pleader, and the pleader has a statement in there, let's say, that there was a promise made that has been broken, and so on. The speaking demurrer or speaking motion is to the effect that no promise was made, and it is supported by an affidavit. The affidavit doesn't help any then, in your opinion, does it?

JUDGE CLARK: No.

DEAN MORGAN: So any affidavit that would destroy a good statement would be disregarded.

JUDGE CLARK: By no means.

DEAN MORGAN: What would happen?

THE CHAIRMAN: It would be a summary judgment.

DEAN MORGAN: Would he have to come back with a counter affidavit?

JUDGE CLARK: Yes.

DEAN MORGAN: Then it is a motion for summary judgment.

JUDGE CLARK: Oh, yes, I think so. I was going to say that a great many times it gives judgment to the defendant, if

not more than to the plaintiff.

DEAN MORGAN: Suppose the judgment is denied because there is dispute, then you say he has to amend his complaint according to his affidavits?

JUDGE CLARK: If the affidavits bring in something that is not in the complaint, yes. We have held that.

SENATOR PEPPER: Mr. Reporter, would you clear my mind up on one point? Suppose that the proposed substitute for Rule 12 were adopted the same as it appears on page 32 of your comment, would that be in effect a substitute not only for 12 as it now is, but also for the summary judgment section?

JUDGE CLARK: The summary judgment also goes over. On 33 you will see that there are some changes in 56, but 56 will still be there. Look at the bottom of 33 and you will see the suggestions I made to bring 56 in line with it.

SENATOR PEPPER: Why should there be a separate conception of motions of the type covered in the proposed Rule 12 and motions of the type that we speak of as summary judgment motions? If you are right in your fundamental proposition, are you not really eliminating the distinction between the two?

JUDGE CLARK: Answering your last question first, yes, as far as I can, I certainly am, and in fact, I provide that when you make a motion under 12, it shall be treated as under 56.

SENATOR PEPPER: I see.

JUDGE CLARK: Your next question is quite a proper one. In fact, since 56 follows out 12, why not let it follow it and have nothing more to it? I have discussed that a little here and have said that that was a feasible idea, that if you wanted to work it that way, you could work it that way. There were two reasons that led me at least to the suggestion not to do it, but I didn't say it couldn't be worked out that way. One of the reasons is that Rule 12 is geared to the objecting party only, and the summary judgment, you see, is for either. As a matter of fact, I suppose the plaintiff even more often may make a motion for summary judgment than the objector, perhaps. That is one difficulty. Perhaps that could be covered by expanding your one statement to cover both, but that is a difficulty.

The other was perhaps a little along the same line. That is, we are used to the two ideas. I think we haven't considered thoroughly how interwoven they are, and let me say that I think the great defect of Rule 12 was that we hadn't thoroughly considered how interwoven 12 and 56 are. Therefore, I thought it might be helpful for our understanding and for people who are lawyers who look at it to have the two still there.

MR. DODGE: Mr. Reporter, may I ask this? Your redraft of Rule 12 in this much shorter form, which I like very much (that is, the shortening of it), could readily be amended

so as to obviate the necessity of filing an answer with these preliminary motions.

JUDGE CLARK: That is true.

MR. DODGE: If that were done, in what other respects does your redraft of Rule 12 eliminate material that was in the former rule?

JUDGE CLARK: I think mainly it does not. Of course, there is the bill of particulars, which I think is a separate matter, but outside of that, generally it doesn't.

May I suggest this? Mr. Moore worked on something in between, and he has drawn it up. Would you like to look at it?

MR. DODGE: I should like very much to see it.

JUDGE CLARK: Suppose you pass some of these around.

DEAN MORGAN: May I ask, Mr. Reporter, if all you have said doesn't really go back to the fact that we ought to have notice pleading instead of what we have--a cross between notice pleading and code pleading?

JUDGE CLARK: Of course, I am certainly tending that way, although I rather hesitate to talk about notice pleading, because what is notice, you know. Certainly those are tags or appellations that have been used.

DEAN MORGAN: That is what it comes down to.

JUDGE CLARK: I am pushing that way, yes.

DEAN MORGAN: Your amending is a mere formality, isn't it, after the facts appear by affidavit? You say, "You

have got to amend your pleading according to the facts that appear in the affidavit." That is just a mere formality.

JUDGE CLARK: Could I ask Mr. Moore to talk about this draft, Mr. Mitchell, when it comes to you?

JUDGE DONWORTH: I should like the Reporter to let me put a question first about which I am not quite clear. You substitute the matter on page 32 for the present 12(b). What provision is there for taking up this lack of jurisdiction over the person, the insufficiency of service of process, and so on? How do you cover that?

JUDGE CLARK: That is all in there. It is not separately stated; I haven't specified that you do it separately, but you state your objection in your answer and then, under (b), you call it up for a separate hearing.

Now, perhaps, you will let Mr. Moore talk about this. As I understand it, in general it is an attempt to follow the framework of 12(b) and make the corrections somewhat less.

MR. LEMANN: It makes 12 a little longer instead of considerably shorter.

JUDGE CLARK: Not longer than now. I think it is a good deal the same as now. Do you want to explain this, Mr. Moore?

MR. LEMANN: Could you take it up paragraph by paragraph and tell us just what changes it makes as we go along with it?

PROFESSOR MOORE: In 12(a) there is one change shortening the time for actions brought in the District of Columbia against the United States, following the suggestion of Mr. Mitchell, and secondly, since I proposed to strike out and eliminate entirely the motion in the bill of particulars, the former reference in 12(a) to bills of particulars had to be eliminated.

JUDGE DOBIE: You eliminate the motion to make more definite?

PROFESSOR MOORE: Yes.

JUDGE DOBIE: Let's suppose that the pleading is in such shape that you can't present any reasonable answer to it. What is the remedy under your new rule? The complaint is in such bad state, so indefinite and so obscure, that you really don't know enough about it to file an intelligent answer.

PROFESSOR MOORE: Then I should think that it wouldn't state a cause of action.

JUDGE DONWORTH: What then?

JUDGE CLARK: Then you would get to it under the Rules. It doesn't state a cause of action.

JUDGE DOBIE: You don't think there is any such thing as a complaint that states a cause of action or a claim, but is yet so indefinite and obscure that you cannot plead to it intelligently?

PROFESSOR MOORE: I should think not. The man must

state the issues A, B, C, to state a cause of action, and if he stated those in sufficient form the court would say that a cause of action had been stated. To require him to state something more and make more definite and certain would be to require him to supplement an otherwise good pleading.

SENATOR PEPPER: Are there any cases where a claim is made generally for an accounting but without sufficient specification of the limits of the accounting, either as to time or subject matter, so that you could not say that there wasn't a good cause of action stated, where the defendant was clearly in a position where he owed an account to the plaintiff, but where he was perfectly at sea as to what the account is which he is asked to file? It seems only common sense that under those circumstances there should be some way of getting certainty into the claim other than merely taking your chance on a motion to dismiss for lack of a cause of action, because by supposition there would be a cause of action.

THE CHAIRMAN: I can remember many cases of that kind. My notion about the bill of particulars and the definite statement is that the mass of decisions in the trial courts are that the clause for a bill of particulars ought to be stricken out, that the clause for a more definite statement in the complaint ought to be left in, and that the phrase "in order to prepare for trial" ought to be eliminated, so that you have left merely the right to make a motion to make a complaint more definite

and certain in order to enable you to know just what the nature of the action is and how to plead. Some of the District Courts have already read out of the Rules this "in order to prepare for trial" business. Just like the old mare, they have backed up and switched their tails, and they won't have it. We might as well strike it out and leave it just a motion to make more definite and certain for the purpose of enabling you intelligently to meet the issues in your answer and pleadings, and let the preparation for trial go to discovery and whatnot.

JUDGE CLARK: May I suggest that that is a little of a separate issue? Of course, it is all tied up here. I wonder if Mr. Moore couldn't go ahead and finish what practically covers 12(b) here.

THE CHAIRMAN: Yes. I was just following up some of the questions. I guess you are right, and we should let him go ahead and explain it.

PROFESSOR MOORE: 12(b) permits one preliminary motion and even broadens the grounds that can be urged. For instance, non-joinder of necessary or indispensable parties can be urged in a preliminary motion.

There is one big change, though: "failure to state a" (those words are eliminated) "no claim upon which relief can be granted." Together with another subdivision, (d), that would ~~barely~~ clearly allow defendant to use a speaking motion that although the plaintiff has stated a good cause of action, as

a matter of fact, he doesn't have one or that the defendant has a good defense, such as discharge in bankruptcy, Statute of Limitations, and as to that defense there is no issue of fact. It is a matter of law that defense is established.

THE CHAIRMAN: That means you couldn't make a motion for summary judgment, as we now understand it, unless you (the defendant) make it before answer.

PROFESSOR MOORE: No, I think not.

THE CHAIRMAN: Why not?

PROFESSOR MOORE: He doesn't have to accompany this claim with affidavits. Subdivision (d) is a permissive one.

THE CHAIRMAN: Oh. You allow the defendant to make a motion for summary judgment on the ground that the complaint in fact has no real issue, as a preliminary matter before answering. He can do that anyway, can't he?

PROFESSOR MOORE: He could. Right here he could in effect move to dismiss the complaint because he had failed to state a cause of action. He could move to dismiss on the ground that although the plaintiff has stated a cause of action, as a matter of fact the plaintiff does not have one. He could do either one.

THE CHAIRMAN: State that again. You have stricken out the words "failure to state a". I don't quite get the point.

PROFESSOR MOORE: The defendant could move to dismiss

on the ground that the plaintiff has failed to state a cause of action.

THE CHAIRMAN: Under your proposed rule?

PROFESSOR MOORE: Yes, sir.

THE CHAIRMAN: Why have you brackets around that?

PROFESSOR MOORE: Because I wanted it broad enough that he could also move to dismiss on the ground that even though the plaintiff has stated a cause of action, he doesn't have one.

JUDGE DONWORTH: That latter is what the trial or summary judgment is for; that is to disapprove the plaintiff's allegations and claim. That is usually done by a trial on a motion for summary judgment.

PROFESSOR MOORE: I think you do run right back to summary judgment on this proposition. I think a number of the Circuit Courts by sanctioning the speaking motion have in effect treated the motion under 12(b)(6) as a motion for summary judgment.

PROFESSOR SUNDERLAND: They are certainly two wholly distinct propositions. One is, the plaintiff has stated it, and the second is, can you prove it? They are two separate things.

PROFESSOR MOORE: Certainly, but then the defendant ought to be able to show that even though the plaintiff has stated he has, he doesn't have.

PROFESSOR SUNDERLAND: If that is true, he can do that by summary judgment.

JUDGE DONWORTH: Or trial.

PROFESSOR SUNDERLAND: Or trial. But suppose the plaintiff hasn't stated one. You wouldn't let him raise that.

PROFESSOR MOORE: Yes, he can raise it. "no claim upon which relief can be granted."

PROFESSOR SUNDERLAND: That isn't the point. The point is, he hasn't stated one.

PROFESSOR MOORE: He moves to dismiss the cause of action and doesn't accompany the motion with any affidavit. The only thing the court can test it on is the complaint as drafted.

PROFESSOR SUNDERLAND: I think you put two things together that are quite different.

THE CHAIRMAN: One point I make is that under your new rule if he makes a motion at all of any kind, of any one of these five or six different kinds, if he doesn't then make a real summary judgment motion with affidavits, he is barred from making it again later.

PROFESSOR MOORE: I don't think so.

THE CHAIRMAN: It says so. It says, "A motion making any of these defenses shall be made before pleading if a further pleading is permitted." If that doesn't say you have to make a motion for summary judgment before you put your answer in or

make any motion or lose the right, what does it mean?

PROFESSOR MOORE: There may be an ambiguity, but look over in subdivision (h). I intended to cover that, at any rate.

THE CHAIRMAN: (h) doesn't allow you at any later date to make a motion for summary judgment.

PROFESSOR MOORE: "A party waives all defenses and objections which he does not present as provided in these rules." Rule 56 would stand. All (b) is intended to do is to give the pleader an option to come forward and raise defenses prior to answer, either on the complaint as a pleading without anything more, or the defendant can go beyond the pleading if he supports his motion with affidavits.

THE CHAIRMAN: My point is that the way you have it worded, whether you meant to do it or not, if you make any one of these motions, for lack of jurisdiction or anything else, you have then and there to couple with it a motion for summary judgment, a so-called speaking motion for summary judgment, and if you don't, you lose your right to do it. It seems pretty clear to me that is what it does.

PROFESSOR MOORE: Of course, that can be doctored up.

THE CHAIRMAN: There is another thing I want to ask you about. You have stricken out "failure to state a claim" and say, defense that there is "no claim upon which relief can be granted. That means to me that you have a defense that in fact you haven't a claim on which relief can be granted. It

doesn't mean merely that the plaintiff has failed to state it. You have abolished the motion to dismiss the whole case on the ground that the plaintiff hasn't in his complaint stated it. You say here, as it reads, "Every defense, in law or fact, to a claim for relief in any pleading, ... shall be asserted in the responsive pleading thereto ...., except that the following defenses may at the option of the pleader be made by motions". One of those defenses is "no claim upon which relief can be granted." That isn't quite the same as saying he hasn't stated one.

MR. DODGE: I think the language which he originally had in there should be preserved.

THE CHAIRMAN: If you want to preserve the right to attack the sufficiency of the complaint, yes.

MR. LEMANN: This would say that you couldn't file a demurrer or an objection that the pleading didn't state a cause of action if there is any theory upon which he could have stated a cause of action. You must say that he couldn't have any cause of action. What does that mean?

THE CHAIRMAN: "No claim upon which relief can be granted."

MR. LEMANN: How could you say a man could have no claim upon which relief could be granted? Suppose he sued you for breach of contract, but he had a good claim for assault and battery.

PROFESSOR MOORE: Mr. Lemann, if the defendant moved to dismiss under 12(b) before answering the complaint for breach of contract, the court in deciding on the defendant's motion to dismiss (which I will assume is not accompanied by any affidavit and doesn't have to be if you look at subdivision (f) or (d)--the defendant can file but is not obliged to) would construe that "no claim upon which relief can be granted" to mean the claim which the plaintiff was asserting in his complaint. That is the only thing before the court.

MR. LEMANN: Why not say so, as you did originally?

MR. DODGE: That is what I was about to say, if you mean the same.

MR. LEMANN: If you don't mean the same thing, what do you mean? I think I put a pretty false case.

DEAN MORGAN: Wait a minute. Suppose there are affidavits claiming that he has a case of assault and battery. That is the next thing.

PROFESSOR MOORE: I want the defendant to have the option to show that despite the plaintiff's pleading of the contract, there is no issue of fact.

MR. DODGE: That is a straight case under the other rule for summary judgment.

PROFESSOR SUNDERLAND: Why couldn't you just add to these six a seventh, reading, "The plaintiff is entitled to summary judgment"?

JUDGE DONWORTH: Then you would have to make a motion. The objection has been raised to that that he might want to move for summary judgment after he had filed instead of before.

THE CHAIRMAN: Yes. He might have discovered some witnesses to show that the charges of fact are sham long after the answer had been filed but before the case was tried. He might find some new witnesses and go around and get their affidavits stating that they will testify thus and so in court. Then he makes a motion for summary judgment and puts those affidavits in and puts the burden on the plaintiff to produce some other affidavits showing that he is able to refute that testimony or to meet it. I should think that many cases might arise where the occasion or the reason for making the motion for summary judgment might be developed in the course of the preparation for trial but long after the answer was in.

JUDGE DONWORTH: Then you could take care of it by providing that you don't waive failure to state a cause of action or jurisdiction or right to summary judgment.

THE CHAIRMAN: You might fix it that way, but as the rule is now worded, you don't have a right to make another motion for summary judgment.

PROFESSOR SUNDERLAND: If it is put in there, then you could take care of it by adding it to the other two that you don't waive.

PROFESSOR MOORE: I didn't intend to eliminate a later

motion for summary judgment. If it is eliminated under that wording, that should be changed.

THE CHAIRMAN: That is right.

JUDGE DONWORTH: Am I not right in the impression I get from this debate (and I should like to be corrected if I am wrong) that there are really two points under attack here? One is the idea of allowing the defendant to raise the point that the complaint does not state a claim or a cause of action. The contention of the Reporter, as I understand, is that he should not be allowed to do that; that is, specifically attack the complaint on that ground, that he should be required to go into the merits to some extent, and that he cannot attack the pleading. I think the second point which the debate makes upon me is that the succession of the motions one after another gives an undue advantage to the defendant. Am I right in those points?

JUDGE CLARK: Yes, substantially, although I want to add to the first statement. The first statement is that there is a perfectly amendable claim, and I require that right along. I am not requiring any claim up in the air, as such. Before denying the motion, I am requiring that there be a showing of an amendable claim.

I must say that I am a little surprised at the course of the discussion here. Would any of you, as a judge, grant a motion to dismiss if there was a showing of an amendable claim?

JUDGE DONWORTH: Only as a matter of penalty after various other amendments had been made, and it was negligent.

JUDGE CLARK: Of course, it doesn't come up as simply as that. The way it comes up is that the trial court has summarily dismissed the complaint. As I said, if the lawyers were full of skill, they could foresee it, but very often the trial judge has dismissed the complaint on the merits, so to speak, and it comes up to us, and what are we going to do? Are we going to affirm a judgment like that when we think it is wrong on the law?

MR. LEMANN: You can't entirely prevent the stupidity and incompetence of trial judges. Haven't you a provision that at every stage of the proceedings amendments may be presented and urged?

JUDGE CLARK: That has never been construed as an amendment in the upper court.

MR. LEMANN: Doesn't that require the District Judge to permit amendments when he sustains the motion?

JUDGE CLARK: What are we going to do in the appellate court?

MR. LEMANN: You will reverse him when he makes mistakes. You can't prevent him from making mistakes.

JUDGE CLARK: This is the way it comes to us, don't you see? I must say I am a little worried. It seems to me that what is really workable under Rule 12 is what is under

attack. The thing that really makes Rule 12 workable now is the construction that has been given to it by the courts. If you take that away, I think it would be just perfectly horrible. The matter comes to us, the trial court having dismissed it, and we are shown that there is a good, amendable claim. If it is a matter of statement only, of course we have to affirm, and there are cases called res judicata not only because of the claims they have put up but because of the claims they should have put up. I don't see any escape from that if we are forced to it.

THE CHAIRMAN: If he is getting knocked out in the District Court for failure to state a cause of action, why doesn't he apply to that court for leave to amend, if he can make a good one? Why wait until he gets up to a Court of Appeals and then apply for an amendment or have the Court of Appeals bolster his case up because he didn't apply for an amendment when he readily could? If you want to, put a clause in the rule requiring the District Court, if he is going to dismiss the suit for failure to state a cause of action, to make the order conditional and to say that the order shall be effective unless the plaintiff amends his complaint within 20 days. What you are doing is waiting until the case gets into the appellate court, and the plaintiff hasn't resorted to his obvious right to get amendments in the lower court. Then you want to say, "We will take your case up and make it just as good

as if you had pleaded your case right below or as if you had applied in the lower court for leave to amend and the court had refused." That is the philosophy about this thing that I don't understand.

JUDGE CLARK: I only wish that I could take you with me and, before any of you knock out the progress which has been made (which I think you would be doing if you were going to restrict this motion more than it is now in the decisions), that you would read all these cases that I have cited--and I will get you some more, too--because it seems to me that the suggestions that you are going on are awfully unrealistic as to what actually happens. It is true that if judges and lawyers both were perfectly mechanical and could see all these problems immediately, it ought to work just as it is suggested, but what happens right along is this: The trial court has acted for various reasons. Quite often he has taken one view of the law. It may be a real difference on the law. That happens very often. There will be an actual decision on law that no claim is stated, and it will come up to us and we feel that under certain aspects of the case there would be a good claim. The trial judge would not have suggested to the counsel that they amend because the trial judge hadn't thought of it, hadn't thought it was worth doing. Of course, if the lawyer could see everything that passes in our minds, he would have amended, but there he is. He is up before us, and he hasn't amended. We

have taken a theory somewhat different from that of the trial judge, and yet the case has gone into judgment and is fully res judicata.

If you say that we should be hard-boiled in that kind of case even though we think the plaintiff has a good claim, and say, "You just didn't know enough to foresee what we were going to think," that is one thing, but I must say that it is rather shocking to me in this day and generation that we can't touch it when we can see that there is a good claim.

MR. DODGE: Why don't you say so in your opinion, say, "Judgment affirmed unless plaintiff makes this amendment in the District Court by allowance of the judge within 10 days"?

MR. LEMANN: That is what he does in effect, doesn't he? You say that the District Judge was right in holding that because the plaintiff didn't state a cause of action, but he should have stated a motion to amend, and we now give him that leave. Isn't that what you do?

JUDGE CLARK: Sometimes we do; sometimes we don't. Of course, it is true that there are certain cases in which we do just that sort of thing.

MR. LEMANN: Don't you do it wherever you think you should?

JUDGE CLARK: Of course, you have looked at only one side of the question, too. It is just as important from the defendant's end, because in fully half of these cases we

eventually affirm the trial court's action, because we say that the trial court can't on one side, but then we look at the whole situation and find that the trial court was right, but on a different ground. It seems to me that is just as important and just as useful and just as helpful. It gives us an opportunity to try to look at the merits without looking for the formalities of pleading. The more I see of those formalities, the less I think you can rely on them to know what is going on. You can do it just as much from the defendant's end, sometimes I think even more. The defendant is likely to lose a good judgment if he can't do it, and if you go through these cases, you will find a lot of that kind, where we have affirmed on a different ground.

Cohen v. American Window Glass Co. is a good example. The trial court was summary about it and said that the process was insufficient, which was to our mind a very weak way of doing. We said, "It won't stand," but they spread everything on the record, you see, and we affirmed with modification of the grounds.

We can settle the whole thing. I can't now see what you gain by saying that shall not be done. It seems to me it is sort of preserving a vision of common law pleading. The pleadings must be correct. What do you gain by it? What is there to be lost by allowing the parties to say, "Now, Judge, this is what we are fighting over. We may not have stated it

very well, but this is really what we want to fight over"? What is the court for?

MR. LEMANN: Is anybody proposing what you say is being proposed? I didn't get it from the discussion. To me, you are putting up a straw man.

JUDGE CLARK: I hope so, but I must say that this discussion that it is all wrong to use affidavits under 12(b) troubles me greatly.

THE CHAIRMAN: I am not saying that we shouldn't have a motion directed to the complaint and allow affidavits on a motion for summary judgment, but the point I have made from the start is that you have said in this rule that you can raise by that motion whether the complaint states a cause of action. The rule is explicit, and you can't distort it by saying, "Well, even though it doesn't state a cause of action, fix it up some other way." I say you meant what you said when you said a motion may be made to dismiss a complaint because it doesn't state a cause of action, and that is a thing that has been in existence under the code system since 1848. What I object to is trying to distort that rule and saying that it means something different from what it says.

If you want to attack the complaint, you have to do it by a motion for summary judgment. You leave it to the plaintiff to come in and supplement his pleadings by affidavits to show that he has something more than he has pleaded. That is one

thing. I say the right way to do it is to require him or to allow him when he is confronted with such a motion, to amend his complaint instead of tacking an affidavit on as an exhibit. What is the use of having a pleading if you start by putting in a jumbled up story in the complaint that doesn't mean anything and that will stay as meaningless right to the end of the trial, and then having a lot of affidavits attached to it to supplement it and enlighten the defendant as to what the plaintiff really has up his sleeve? I don't see it. What is the use of having the pleadings if you don't require them to state the case?

MR. DODGE: Why do you need any provision about affidavits in this rule? You have the affidavits on the motion for summary judgment. We also have a general provision that any motion founded upon facts not appearing of record may be supported by affidavits. Why do we need any further reference to affidavits on these motions?

JUDGE CLARK: I think the law is developing pretty well on that. There is some dissent from some District Judges. It is certainly developing pretty well in the Circuit Courts. I should say that if we are going to limit it, I would rather let the law develop as it is now developing.

On this feature, the reason that we brought it up, in the main, is that there seemed to be some question about it. Mr. Mitchell has asked, "Why don't you say it directly?" When

we say it directly, the idea is subject to attack, and again I ask, how can we have the ideas that we set forth here generally that pleadings are not the final limitation? How, for example, can we have Rule 15(b) if we are going to say, as I say, that the complaint is dismissable when the parties show that it is perfectly amendable?

MR. DODGE: I don't see any reason that the Circuit Court of Appeals can't direct the lower court to direct an amendment to be made within a certain period; otherwise, the judgment to be affirmed.

JUDGE CLARK: What would you do with the opposite case, when the judgment below is a dismissal on one ground and that ground is improper, and an affidavit shows that there is good ground for dismissal. Would you reverse that and have them go back on that?

DEAN MORGAN: How did the affidavits get there, Charlie?

JUDGE CLARK: Simply because the parties put them there. They will move to dismiss. It is probable that if they had some of us right by their elbows, and we told them not to do that, that it would be a great mistake, they wouldn't do it, but they don't know enough on that. So they call in a motion to dismiss and file affidavits. That is a very usual way to do.

THE CHAIRMAN: I think they have done it because some of your opinions stating that have been published, under Rule 12(b)(6), which authorizes a motion to attack a complaint

because it doesn't state a cause of action. You have invented the speaking motion and say that under that very rule you are not confined to what the complaint states at all, that you can put in affidavits. Of course they have been doing it. That is why I object to this stuff about speaking motions in these decisions.

MR. LEMANN: When they put in affidavits like that, the other fellow can put in counter affidavits.

THE CHAIRMAN: Surely, they always do. In every one of these decisions in the Circuit Courts that they have spoken of, there have been affidavits on both sides, and the whole thing has been conducted precisely like a motion for summary judgment.

MR. DODGE: It ceases to be a motion under paragraph (6).

THE CHAIRMAN: The courts have said, "We will treat it as a motion for summary judgment."

MR. DODGE: Which, of course, it is.

THE CHAIRMAN: It has been labled at the top, "Motion to dismiss," and the label ought to have been "Motion for summary judgment." So they strike out one label and substitute the other one there. Of course, any court could do that.

JUDGE CLARK: You ought to put in that when a motion to dismiss is made under (6), the parties can make it a summary judgment motion and it is all right. The only difficulty

is that the poor gink who doesn't know gets caught.

MR. LEMANN: The fellow who doesn't know any better gets a good result.

JUDGE CLARK: We are getting good results because we are doing what some people think is strong-arming, but I don't think it is strong-arming.

THE CHAIRMAN: I don't think you need a shrewd lawyer to understand that when Rule 12(b)(6) says you may move to dismiss because the complaint doesn't state a cause of action, it means what it says and that whether the complaint states a cause of action or doesn't is the issue in the case. I don't think many of us are so dumb as not to know that.

DEAN MORGAN: Mr. Chairman, don't you think that as far as that difficulty is concerned, it can very easily be remedied by a mere provision, such as has been suggested, that the courts treat it as if it were made under Rule 56 but that the other still remains--the matter of only a single motion?

THE CHAIRMAN: I feel very strongly about this thing, and probably I am taking a whole lot more time than the Chairman ought to take shooting off his mouth about things like that, but I think we ought to have clear thinking about it when we talk about (b)(6) as being anything but a demurrer to the sufficiency of the complaint.

DEAN MORGAN: I quite agree with you, but doesn't experience show that trial judges and counsel believe that you

ought to have the equivalent of a speaking motion for this sort of thing? The equivalent is to treat this motion, which counsel mistakenly makes under this rule, as if it were under Rule 56.

MR. DODGE: The only rule which it can be under.

DEAN MORGAN: The only rule which it can be under. Let's say that we are under a system where labels don't mean anything.

THE CHAIRMAN: What we ought to do is to provide that a motion might be made to dismiss because the complaint doesn't state a cause of action, and state that that can be converted into a motion for summary judgment and be at the option of the plaintiff or the defendant. The plaintiff may want to convert to a summary judgment motion by putting in affidavits, and if he does, then my point is that when he shows he has something more that he ought to have in there, instead of tacking an affidavit to the complaint, he ought to go about amending his complaint.

MR. DODGE: Has any court ever yet treated a motion that there is no cause of action not because of the statement in the complaint but because of this affidavit filed as being a motion under this rule?

THE CHAIRMAN: Yes, under 56.

MR. DODGE: No; under 12.

JUDGE CLARK: Yes, a lot of District Court Judges.

THE CHAIRMAN: They have done it by inventing this new

speaking motion idea and saying the speaking motion is permissible. My point is that instead of inventing a third type of motion that isn't mentioned in the rule, they ought to have done the obvious thing and said, as Judge Augustus Hand said in one of his opinions, that whatever you call it, this is really a motion for summary judgment, and treated it as such. Instead of that, Goodrich has written an opinion demonstrating that so-called speaking motions are permitted by the Federal Rules and that 12(b)(6) can be converted into a speaking motion, although not a motion for summary judgment.

MR. DODGE: In spite of the language of item (6) there.

THE CHAIRMAN: Yes.

JUDGE DONWORTH: Isn't there room for the idea that affidavits are proper under the rule as it now reads along this line? We have a very liberal Rule 15. "Amendments. A party may amend his pleading once as a matter of course", and so forth. "Otherwise a party may amend", and so forth; "leave shall be freely given when justice so requires." I think it may be that the filing of affidavits by the parties is good on the motion to dismiss as indicating whether the claim can be amended, whether the facts justify the amending, and when there is objection made to his complaint on this ground--a motion to dismiss--the plaintiff may file affidavits which would be the basis of his making a motion for an amended complaint.

THE CHAIRMAN: That is what he ought to do. He says,

"Why, Your Honor, maybe my complaint is bad. Here is an affidavit that shows I have certain facts that I haven't set up in my complaint. Therefore, this motion for summary judgment ought to be denied, and I ought immediately to be granted relief." That is what I am contending for. We ought to get this in the trial court.

PROFESSOR CHERRY: May I add a little confusion? Didn't we get into our difficulty, really, when we dropped the word "demurrer," which we have all been accustomed to and know? I don't want to go back to that, but I am just pointing out where this thing came in. In this speaking matter, a man could say in Minnesota that he demurred from the pleadings and not from the atmosphere around it, but motions so often do have affidavits, and we invited this a little bit by calling this a motion to dismiss and making it look as if it were something different from the old general demurrer.

My suggestion would be to drop this out altogether as one of the grounds of a motion and to make proper provision for it under your motion for summary judgment, where it belongs. There, once you make it your ground for a motion, automatically either party may put in affidavits, and you can get to the real basis which Judge Goodrich has been talking about as a speaking motion. Anybody can put in affidavits there. Leave the whole matter to that place and take it out of Rule 12 altogether. Then nobody would think he had a right to make a

motion on that ground. If he wants to get relief on that basis, he ought to have a judgment or, of course, if the other fellow can show that he has something that would be cured by amendment, that would be an answer for the motion for a summary judgment; if he can't, there is a basis for summary judgment. It never ought to be a motion to dismiss.

THE CHAIRMAN: Wouldn't you get the same result if you put a clause right in this rule, for instance, that upon a motion to dismiss because the complaint states no cause of action, if the court thinks the motion is well founded, he must allow the plaintiff 20 days in which to amend, or 10 days in which to amend? Then your courts would amend the pleading in the trial court.

PROFESSOR CHERRY: Then you are also having in Rule 12 something which is really part of summary judgment proceeding. I think that is where the whole confusion comes. If you could get it out of 12 and put it under summary judgment, I don't think you would have any occasion for confusion there.

MR. LEMANN: Is it usually considered under summary judgment procedure?

PROFESSOR CHERRY: No.

MR. LEMANN: When I think of summary judgment, I think of it just as a new thing that goes beyond the pleadings to get at the question of whether there are any facts in controversy, assuming that everything is well pleaded. I wonder if your

suggestion wouldn't sort of confuse the profession by tinkering with this thing in that way. I don't know.

MR. DODGE: I think so. I object to striking that out of Rule 12 and leaving it to the summary judgment rule, which is intended for an entirely different set of circumstances.

DEAN MORGAN: I don't think it is for an entirely different set of circumstances. I think it is one of the circumstances for which it is permitted now.

MR. LEMANN: Isn't this a sort of hybrid thing between the two, and wouldn't it be best covered and prevent confusion in a large section of the profession if we put in a paragraph, if we want to, to permit what is being permitted in the Second and Third Circuits and just say so in so many words and sort of legitimatize this illegitimate child, if you are all willing to acknowledge it? Isn't that what it really comes to on the merits, if we all think what is being done is a good thing to do? Say it in an appropriate way, in a less confusing way, and make it plain.

DEAN MORGAN: You have three choices, it seems to me. One is to abolish this as a ground for a motion and put it in summary judgment. Another is to go to notice pleading right away and just say that a pleading doesn't have to state facts sufficient to show ground for relief.

MR. DODGE: Rule 12 is designed for those cases where the pleadings make an issue of fact.

THE CHAIRMAN: What is the third option?

DEAN MORGAN: The third is the one that Monte has suggested, that we treat every motion to dismiss as a motion for summary judgment at the option of either party.

PROFESSOR CHERRY: But still keeping it in 12?

DEAN MORGAN: Yes.

JUDGE DONWORTH: As I understand the origin of this motion to dismiss, it is from the equity rules.

DEAN MORGAN: It is the New York rule of civil procedure.

JUDGE DONWORTH: No, I don't think that is it. I think it comes from the equity rules adopted about 1910, which abolished the demurrer and substituted the motion to dismiss. I think that is the origin of the clause here.

SENATOR LOFTIN: That is correct. We agreed at the beginning that we would follow those rules as far as they could be made applicable to this procedure.

JUDGE DONWORTH: Under those equity rules, it was the custom freely to allow the plaintiff to amend. The judge would grant the motion to dismiss, conditioned on the plaintiff's failing to amend within a certain time, and so constituted, it didn't produce any trouble.

JUDGE DOBIE: Even without that, don't you think in practically every case where a motion to dismiss is heard and the judge grants the motion to dismiss, he would then permit

the plaintiff to amend if he made a showing that he had an amendable claim?

SENATOR LOFTIN: I doubt that he would require the plaintiff to make a showing. He would just ask permission to amend.

JUDGE CLARK: What would you do in the upper court?

JUDGE DOBIE: I know we allow amendments rather freely. We had one very complicated case down there that we practically treated as if the amendment had been made.

JUDGE CLARK: That is a good way to do it. I don't know how you are going to do it if you restrict the rule. A great difficulty in abolishing the demurrer, as expressed by Professor Valentine, is that it has substantially been a fraud because it was just abolishing it and keeping it under another name. What the courts are doing under the rules is to make it freer. It seems to me that the results have been most desirable. Again I say, I am distressed to see the suggestion that it should be restricted. It is true that there are quite a few District Courts that have taken the position that they won't look to anything except the formal allegations of the complaint. It seems to me that is quite out of line with the rest of our pleading system, particularly with such provisions as Rule 15(b). Almost any of these suggestions would do it. Professor Cherry's would do it completely, of course. Mr. Mitchell made one alternative that he threw out; he didn't

press it. He said that either plaintiff or defendant at its option could treat it as a summary judgment, and that would do it. Any of those things would do it, but I say if you don't allow it to be gotten at some way, I am quite sure that this is more theoretical, that this is an argument based on wording and doesn't look at what is going on in the courts and looks for a kind of perfection of pleading on the part of the parties that they just don't have. It means that we in the courts have got to emphasize the formal allegations when we don't want to.

THE CHAIRMAN: Isn't it a fact, Charlie, that your proposals fall short of this? Where it is developed in the lower court or the upper court that the complaint is insufficient but the affidavits or something show that the man has more at his command than he has set forth in the complaint, you don't take the next step at all and make any provision for amending the pleading, and the net result of it is that right from the time the suit is started until the time the final judgment is entered, you don't have to state a good claim in your complaint. It seems to me that you lay yourself vulnerable to attack such as Judge Fee is making as far as the pleadings are concerned, that they are not really a good instrument under this system for defining the issues, that they don't amount to anything, that they are defined by the proof at trial.

JUDGE CLARK: There still appears Rule 8(a) that you

have to set forth a claim for relief, "(2) a short and plain statement of the claim showing that the pleader is entitled to relief". I am not suggesting that that be taken away. I am simply saying that you can get at that by what the pleader tells you as well as by what he has formally set out. I simply say, "Follow 8(a)." That means if I don't find in the complaint something which shows that he is entitled to relief, I certainly would order an amendment.

MR. LEMANN: I should like to make a motion and see if it would enable us to dispose of it. I move that the Reporter be requested to prepare a provision to the effect (1) that where a motion to dismiss is sustained, leave to amend shall be expressly provided.

THE CHAIRMAN: Under 12(b)(6), a motion because the complaint is insufficient.

MR. LEMANN: That is right. And (2) that at the option of either party (I am not stating the exact words), a motion to dismiss may be converted into a motion for summary judgment by affidavits under the procedure under Rule 56.

Won't that accomplish the things that probably everybody thinks should be accomplished?

JUDGE CLARK: I think the two probably would do it. It seems to me to be a paraphernalia that is unnecessary, because that is what is being done now. It seems to me that it is just making a gesture to form. If there is something worth

while in making a gesture to form, I suppose I am willing to do it. I should think that would do it.

MR. LEMANN: It seems to me your last statement amounts to the same thing, that it isn't worth doing, that everything is working all right, and we don't need to do anything.

JUDGE CLARK: I think it is working pretty well. There are quite a few District Court decisions the other way, but as far as I know, every Circuit Court that has ruled on it has reached the correct result except that one dictum--and the Judge says it is a dictum--in the Eighth Circuit.

MR. LEMANN: I shall withdraw my motion, Mr. Chairman, because I think the fewer changes we make, the better on this sort of thing. We will complicate matters and create a new set of controversies. The Reporter's last statement is that it is working all right.

DEAN MORGAN: I don't agree with the Reporter. I don't think it is working all right. I think a lot of the District Judges, without writing opinions on it, are applying the rule as it is stated, as certainly I should do if I were a District Judge. If the rule says that the motion shall be granted if it doesn't state a cause of action, I would grant it if it didn't state a cause of action. I wouldn't listen to affidavits except on a motion to amend. I don't see how the rule can be working all right if the interpretation that the Reporter wants to put on it is to be put on it. I think we

ought to clear it up.

PROFESSOR CHERRY: Quite apart from that, Mr. Chairman, don't we have to do something with Rule 12?

MR. LEMANN: Not necessarily on this point.

PROFESSOR CHERRY: We can't just leave Rule 12 the way it is. I suppose that is the one rule we would agree on as to that.

THE CHAIRMAN: As I have gathered, the general impression is that if we keep these motions, we ought to put them all in one instead of having two successive stages of motions.

PROFESSOR CHERRY: Something will have to be done.

THE CHAIRMAN: I don't think there is much support for that.

PROFESSOR CHERRY: I have a good deal of sympathy, too, Mr. Chairman, with the comment that we got from one source (I think it was from Atkinson) that nobody could keep the provisions of Rule 12 in mind from one day to another. I think that is a fair criticism of our draft there.

THE CHAIRMAN: The trouble is that Rule 12 was drafted originally on the theory that the Reporter is presenting today, and we were dissatisfied with it and ordered him to change it, and the probabilities are that it would have been in the interest of clarity if he had thrown his original draft in the wastepaper basket and started anew. However, he patched his draft up, with the result, as always comes in such a case, that

it is complicated, and you have to read it over and over again and can't remember it from one day to another. If it could be clarified with such changes as we want to make, it would be very helpful. I think it is the most unsatisfactory rule in the book when it comes to clarity and terseness.

SENATOR PEPPER: Mr. Chairman, as far as I am concerned, I am clear that I am going to be confused as long as we retain in one category the motions that are specified under Rule 12 and in another category the motions that are specified under the summary judgment rule. I can't escape from the alternative put by Professor Morgan that we must either adopt the notion of notice pleading (which I am opposed to) or make our motions on the theory embodied in the summary judgment section. I think the confusion arises from an attempt to make an unreal distinction between motions in advance of trial under 12 and under the summary judgment section.

Just to make my meaning clear, let me read these few lines, which seem to me to dispose of the matter in a way satisfactory to those who like the idea of supplementing the motion by affidavit as distinguished from a demurrer which takes no account of anything except the sufficiency of the pleading. Suppose our summary judgment rule and the matter under 12 were combined thus:

"At any stage of the action and before trial, a party may move for a summary judgment in his favor and may support

his motion by affidavit. Only one such motion shall be permitted except in case of matter arising after a preceding motion has been made. If the court is of the opinion that a decision in advance of trial may dispose of the action or of some material issue therein, he shall order an immediate hearing and thereafter enter judgment in favor of the party entitled to it. At the hearing or in advance thereof, answering affidavits may be filed by the parties against whom the motion is made."

I submit, sir, that that statement, subject, of course, to changes in verbiage and clarification, makes the issue fairly clear, and just to test the sense of the Committee (not now, because we want to debate it further, but at some stage), unless a better motion to the same effect is put, I am going to ask for a vote on that as a substitute for the motions now provided for in 12 and under the summary judgment rule. I am quite certain that as far as I am concerned, no amount of clarification of statement or anything else is going to help me as long as we keep the unreal distinction between the two sets of motions. I think they are all summary judgment motions, or we had better come to notice pleading.

THE CHAIRMAN: You mean by that, for instance, that the defenses of lack of jurisdiction over subject matter, of improper venue, and of insufficiency of service of process should all be incorporated in it?

SENATOR PEPPER: Yes.

THE CHAIRMAN: Then you don't make any distinction in your resolution, such as the summary judgment section today provides, that when it comes to disposing of the merits of the claim, it can't be tried on affidavits. The purpose of the affidavit is only to see if there is evidence on both sides.

SENATOR PEPPER: That is right.

THE CHAIRMAN: But that isn't true with respect to setting aside the process on insufficient service, because you can decide that on affidavit.

SENATOR PEPPER: There is no necessity of spelling that all out in the rule. You make your motion to the court, and if it is a motion based on lack of jurisdiction, lack of service, improper venue, or whatnot, it is disposed of as that sort of motion. If you are making your motion to the court on the ground that the pleading or counterclaim fails to state a cause of action, leave to amend is granted or, if that leave is granted and not availed of, the judgment goes against the party who is in default. We are spelling out all the things which a court is to do with or without affidavits, when in the long run it seems to me the court has to decide what he can do with affidavits and what he can't do.

THE CHAIRMAN: The summary judgment rule has been sustained as constitutional on the sole ground that it expressly provides that the real question there is not what the fact is

but whether there is conflicting evidence. If you abolish your present summary judgment rule and get another one that doesn't make that distinction, aren't you running some risk?

SENATOR PEPPER: The distinction is right on the surface of the statement. You can't make an exchange of affidavits as a substitute for trial by jury or any other hearing on the merits, but short of that, a court upon receiving affidavits can decide whether or not the case is one which can be disposed of either in whole or in definite part without waiting for trial and even without requiring the defendant to file an answer. I am very conscious of the importance of the point made by Mr. Holtzoff awhile ago of how futile it is to require a defendant to file an answer as a prerequisite to a motion to dispose of the case on some matter as to which the factual averments in the answer are immaterial.

I represented a lot of defendants under the Sherman Act in anti-trust proceedings against the oil companies, and the preparation of the answers of the companies in those cases took months of anxious study and preparation. Just suppose there had been a question in the nature of jurisdiction or venue to be raised there. How futile it would have been to require the filing of an answer merely to indicate the nature of the substantive defenses;

I can't help believing that we are not thinking clearly unless within the limits to which a summary judgment is

constitutional, we make provision for it as a substitute for all other kinds of motions to dispose of the case in advance of trial.

... Brief recess ...

THE CHAIRMAN: May we have the Committee brought to order, please?

JUDGE DONWORTH: Senator Pepper, is your amendment ready?

SENATOR PEPPER: I didn't mean to bring that up. I just meant that unless somebody presented a better one, I was going to move what I read not as a full statement of the summary judgment rule but merely as what you might call the enacting clause of it, letting the provisions that guard its constitutionality stand as they are now. My purpose was to indicate the similarity in nature between the motions under 12 and the motions under summary judgment. If you are going back to the old-fashioned idea of a demurrer--a real demurrer, not a speaking demurrer--I have found in practice the courts have lost interest in them. As Mr. Clark said, the courts want to have factual matter upon which to decide a motion. If you are going to have a speaking motion, you really have crossed the line and will find yourself in the domain of the summary judgment motion. When you are once there, I don't see why they all can't be disposed of in that category.

That was just a statement of my point of view, and

there was no motion, if it was inconsistent with anything you wanted to offer, Judge.

JUDGE DONWORTH: I desire to present a motion, and I will state some of the reasons that lead me to this.

Rule 12(b) in the first five subdivisions does not really involve any matter of discretion. Of course, it is implied that amendments may be made even to those points, but the one that has given rise to the most difficulty, as ascertained by our Reporter and by Professor Moore, is the one about the failure to state a claim.

I am rather disposed to keep separate the provisions of 12(b) from the summary judgment rule. They were not intended originally, at least, to cover the same ground. It just happens that they run in together. I think the genesis of this dismissal motion is, as I indicated awhile ago, that the Federal equity rules some thirty years ago abolished the demurrer and substituted a motion to dismiss, but I think it was the universal practice (I know it was as far as I was able to observe) that if the defendant under an old bill in equity moved to dismiss and certain points were raised, the judge would say, "It seems to me that these points are well taken and that I shall have to dismiss this bill unless the plaintiff can obviate them by amendment, and I will allow him 20 days," or whatever it might have been. Justice was done, and there was no idea of cutting off anybody. If this Rule 12(b) has resulted in any

injustice by cutting off the right of amendment, that certainly ought to be obviated. I don't think anybody on the Committee ever anticipated that.

So my motion, subject to verbal correction, of course, is to add at the end of subdivision (b) of Rule 12 these words: Dunworth

"If a motion to dismiss made on ground (6) of this subdivision (b) is sustained, the court may withhold judgment of dismissal pending the hearing of a motion to amend the complaint, which motion may in the discretion of the court be made within a time to be fixed by the court."

JUDGE CLARK: Mr. Chairman, as I have indicated, that is clearly inadequate, I think, and to my way of thinking if that were put in alone, it would be quite a step back in the inferences that it would carry. I think if anything of that kind is going to be done, there should be full provision as suggested by Mr. Lemann. I would say that I think Senator Pepper has the right idea. These are fundamentally the same. The courts are going to treat them the same unless you absolutely forbid them to, because he is quite right that courts no longer can take great interest in formal allegations. They are interested in the facts in dispute, and when they are brought out by pre-trial or anything else, they naturally are going to look for them. It seems to me that is one of the best developments we have, and I hate to see suggestion made to hold that back, which is what this is, I think, without any doubt.

Therefore, I move an amendment to add the provision suggested by Mr. Lemann.

THE CHAIRMAN: What was it?

JUDGE CLARK: That at the option of either party, the motion to dismiss may be made a motion for summary judgment.

PROFESSOR SUNDERLAND: On ground 6.

JUDGE CLARK: Yes.

THE CHAIRMAN: Why couldn't you adopt both?

SENATOR LOFTIN: Mr. Chairman, that was not all of Mr. Lemann's motion, was it?

MR. LEMANN: I had three branches to it. The Reporter indicated it was working all right, so I said I didn't want to do anything.

JUDGE CLARK: I think perhaps you went farther than I intended. I said that the Circuit Courts of Appeal were making it come around. There is no question, as Mr. Morgan says, that the District Courts are not. The District Courts treat it just as a demurrer and cite the old cases really as though it were a demurrer. Let me say again, I much prefer Senator Pepper's suggestion, and it is just because I am rather distressed at Judge Donworth's suggestion if it stands alone that I make these additions, because I think without these additions it is really very definitely a step backward.

THE CHAIRMAN: You move to amend by adding to it Mr. Lemann's suggestions. Will you state just what they are, Monte?

MR. LEMANN: Two of them have been stated, I think, Mr. Chairman. Judge Donworth has one; Judge Clark has the other. My present recollection is that the third was to cover the other two points that have been suggested. I don't recall which of them I specified. These two points are (a) that we cut out the reference to bill of particulars and substitute only the requirement to make more certain, and (b) that we permit only one motion in advance of the answer, in which all these matters (1) to (6) now must be included except perhaps one, lack of jurisdiction over the subject matter.

THE CHAIRMAN: Those two other things are not directly related to this one question. Perhaps we can discuss them. Suppose we leave them out for the present.

MR. LEMANN: I think that would be wise, yes.

THE CHAIRMAN: Judge, instead of what you have, wouldn't it be all right simply to say, "Dismissal under subdivision 6 shall not be granted without giving the plaintiff the 20 days in which to amend," and specify the days right there?

JUDGE DONWORTH: I think you are right. I have no pride in this at all, of course. I don't know about the 20 days except that 20 days would be upped later by the other rules about extending the time. I wouldn't want to cut a man off in 20 days, although it might be well to mention 20 days in view of the fact that the time can be extended.

THE CHAIRMAN: Call it a reasonable time. The other

suggestion was that in an appropriate case, any motion under subdivision (6) may be treated and conducted as a motion for summary judgment under Rule 56. That is precisely what Judge Hand said could be done in that case.

MR. DODGE: That is where it isn't really under point (6) but is something different that looks something like it.

THE CHAIRMAN: The point is that some affidavits are dumped in, and that is an appropriate case for treating it not as a motion under (6) but as a motion for summary judgment. You have heard the motion.

SENATOR PEPPER: I will vote for that motion on the theory that I think 12 ought to be perfected if it is to remain as is, but without prejudice to the right, if the issue arises here after further debate between distributing the motions between 12 and the summary judgment section, to favor the assembly of them covered by a comprehensive provision as to summary judgments.

JUDGE CLARK: It seems to me that Senator Pepper's suggestion presents the issue better than these piecemeal suggestions. It would seem to me that he was first in point of time, too, and that that ought to be voted on first.

SENATOR PEPPER: I don't want to do that. I think it is only fair to the sentiment of the Committee, because the prevailing sentiment is to stand by 12 as much as possible--I think it is only fair to perfect that as much as you can, and

if you perfect 12 to the point of satisfaction, that is that. It won't satisfy me, for the reason I gave a while ago, but I think that a mere attitude of construction on a matter like that is valuable. So I will vote for this as a motion to perfect 12, but I want to reserve the right to raise the question of whether or not the whole matter cannot be better treated in line with the suggestion originally made by Professor Cherry under summary judgments.

DEAN MORGAN: Mr. Chairman, I feel the same way as the Senator, but I don't know what we are going to gain by postponing debate on the matter. It seems to me that now we have talked over Rules 12 and 56 so much that we might just as well try to settle it now.

JUDGE CLARK: The only difficulty is that I am not sure that the present motion does settle it, because people might hesitate to vote for it because of the inadequacy of form as well as substance.

DEAN MORGAN: It would have to be perfected in form, of course.

JUDGE CLARK: It does carry the effect of polishing up an inconsistent thing. It would be better, I think, if we could have a fair vote on the idea.

SENATOR PEPPER: May I suggest, Mr. Chairman, that I have simply made a statement of a point of view and reserved the right to present it in the form of a motion, but in the

meantime Judge Donworth, in a form corrected by you, which he has accepted, makes a definite motion. It seems to me he is entitled to have that passed upon. It is in the nature of a proposal to perfect 12. I hope by tomorrow to be able to put the suggestion that I made in the form of a motion, and if I am given leave to offer that then, the vote will be decisive on that question.

THE CHAIRMAN: I really feel that we have talked about this thing so much that we ought to decide now.

SENATOR PEPPER: All right.

THE CHAIRMAN: We should determine whether we are going to consolidate Rule 12 and the summary judgment motion. I think that would clear the air.

I just want to say about that myself that this summary judgment rule has had a separate development. It is a new thing to a great many branches of the profession. It was developed as a rule for the purpose of eliminating sham issues, of making a man show the truth and not letting him get away with his case and go to trial by false allegations which he could not maintain. Furthermore, that rule was very bitterly attacked as being a deprivation of jury trial and was sustained on the ground that it didn't provide for any decision of conflicting issues of fact by the affidavits, but was simply intended to find out the things which were not in dispute. There are a great many sections of the bar that didn't know anything about that. They

have had motions for summary judgments in New York and maybe some other states, but it was new to the bulk of the lawyers. Now they have been pretty well educated to know just what its purpose is. It is to drive at that one thing, to get rid of sham allegations and sham issues. Now if we throw the two things together, personally I am very much afraid that we are going to cause a good deal of confusion.

MR. DODGE: I don't see that the summary judgment rule has anything to do with any of these six points except the hybrid (6), which is really not (6) at all but a motion where an affidavit is filed, and in spite of what he says, he really hasn't any claim.

THE CHAIRMAN: There is, of course, something to be said in favor of the theory that really within some limits the two things are the same. It isn't that I disagree so much with that as the fear I have of confusion in the minds of the bar. If Judge Donworth will permit me, I will put the Senator's motion for consolidating the two rules first.

SENATOR PEPPER: I will make it as a definite motion so we can take cognizance of it in a parliamentary way.

I move to amend subsection (b) of Rule 12 by striking out all of the remainder of that subsection after the words "thereto if one is required" in the fifth line. I move to amend Rule 56, on summary judgment, by striking out (a) and (b) and substituting the following:

"At any stage of the action and before trial, a party may move for a summary judgment in his favor and may support his motion by affidavits. Only one such motion shall be permitted, except in case of matter arising after a preceding motion has been made. If the court is of the opinion that a decision in advance of trial may dispose of the action or of some material issue therein, he shall order an immediate hearing."

The rest of 56 to stand as now printed.

DEAN MORGAN: I second the motion.

JUDGE CLARK: Could I ask just one question? Don't the two last sentences of 12(b) stay in on the theory you are going on?

SENATOR PEPPER: Let me see. "No defense or objection is waived by being joined with one or more other defenses...."

JUDGE CLARK: I should think in accordance with your general idea those should stay in.

SENATOR PEPPER: I can make only one motion. Doesn't that take care of it? I think the statement in my resolution that only one such motion shall be permitted except in the case of after-discovered matter takes care of that question of waiver.

JUDGE CLARK: Yes. Well, all right.

SENATOR PEPPER: "If a pleading sets forth a claim for relief", and so forth. It goes without saying, does it not,

that if summary judgment is refused, then you go on to trial?

DEAN MORGAN: Yes, but "If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense", and so on.

SENATOR PEPPER: If that seems important, I shall be glad to include that in my motion, and I am modifying what I said a while ago by limiting the specification of the matter to be stricken from subsection (b) of 12 to the matter beginning on printed page 15 with the words "except that the following defenses" and ending with the words "pleading or motion" at the top of page 16.

THE CHAIRMAN: Are you ready for the question?

MR. DODGE: I must say that these motions seem to me to be entirely distinct from the sort of case contemplated by the summary judgment rule. How are you going to deal with lack of jurisdiction over the person?

DEAN MORGAN: The same way.

MR. DODGE: What do you mean?

DEAN MORGAN: Get a summary judgment of dismissal if there is no jurisdiction over the person.

SENATOR PEPPER: Just make your motion either with or without affidavits and dispose of it, and the same way with lack of jurisdiction of the subject matter, venue, insufficiency of process, insufficiency of service, failure to state a claim

upon which relief can be granted.

MR. DODGE: That is only where no real issue of fact is presented. Ordinarily there presumably would be a real issue of fact.

SENATOR PEPPER: If so, then under the remaining sections of the summary judgment rule, the court dismisses the motion. It seems to me it becomes awfully clear the more you think of it.

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JUDGE CLARK: In the first place, this rule was unlike anything before, and the reason for Professor Sunderland's suggestion is that the common form of summary judgment historically has been to specify that judgment may be granted and contract action taken, and so on. We broke away from that

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originally, and I don't think there is any particular mystic meaning in "summary" as such. It means a quick decision.

PROFESSOR SUNDERLAND: If it means a quick decision, it is confusing.

JUDGE CLARK: It isn't any more confusing than our rule was originally. Our rule made the original departure from the other rules. We decided we would not limit it to certain specified issues.

SENATOR PEPPER: I think it would be regrettable, Mr. Chairman, if the big principle that is involved here were to be obscured by a question of terminology. It would be simple enough to entitle these motions not "Motions for summary judgment" but "Motions in advance of trial" or "Judgment on motions in advance of trial" or what you please, but with the understanding that if the resolution carries, the question of terminology is subject to the further consideration of the Committee. I think it would be a mistake to confuse the merits of the issue with the historical question of whether "summary judgment" is copyrighted or not.

PROFESSOR SUNDERLAND: Isn't there another difficulty, Senator? We have provided a machinery for summary judgments in view of the fact that the thing we are trying to determine on an application for summary judgment is whether there is any issue of fact. That is the one thing we are trying to determine. We have got our machinery for that purpose. On these five

grounds in abatement that isn't the question at all. It takes entirely different machinery. I don't believe the machinery for the summary judgment, which is aimed entirely to determining whether there is an issue of fact involved, is adapted to dealing with these five grounds of abatement.

MR. LEMANN: May I ask, Mr. Reporter, how you think a change of this sort would fit in with the Chief Justice's admonition?

JUDGE CLARK: Of course, I can't tell all the Chief Justice had in his mind, but I should say that you can, of course, press that too far. I don't believe he meant any more than we all believe. I thought that I agreed with the Chief Justice entirely that the Rules have worked well and that in general we want to preserve their structure.

MR. LEMANN: If we consolidated Rules 12 and 56 would we be preserving the structure?

JUDGE CLARK: I think we are, decidedly. What I think we are doing now is carrying out the real objective we had in mind. We hadn't clearly seen the interweaving of these two rules. Now we do. Of course, I could make the same suggestion that if we were to take out from Rule 12 the privilege now followed by certain courts of using affidavits, it would perhaps violate the Chief Justice's admonition if we pressed it that far. I don't believe he intended to do that.

THE CHAIRMAN: Of course, Mr. Sunderland's proposition

is that the whole theory of the rule of summary judgments is to find out whether there is a conflict on a real issue of fact and if there isn't, to deny the motion. A lot of these things covered by Rule 12 will be decided on affidavit even if there is a conflict, and even though you try to consolidate them, you have to put provisions in here that cover both those things. For instance, if there is a motion to set aside the service of process, the mere fact that there is an issue of fact conflict in affidavits wouldn't prevent a trial court under our accepted procedure from setting it aside or refusing to set it aside.

DEAN MORGAN: In some states they are entitled to a jury on it.

THE CHAIRMAN: They are not in the Federal system.

DEAN MORGAN: In abatement they are entitled to a jury, aren't they?

PROFESSOR SUNDERLAND: According to the Illinois practice, they are entitled to a jury trial. While the court was administering the conformity rule in Illinois, they held that they would not allow a jury trial on a plea in abatement, but would settle it on a motion.

THE CHAIRMAN: I guess we understand the motion. Of course, there may be some details that we are not clear about, but it involves a broad question, whether we will consolidate the Rule 12 provision with the summary judgment.

JUDGE DONWORTH: Mr. Chairman, this tentative motion of mine of course was prepared in a hurry. Upon reading subdivision (b) again, I find that probably the possibility of amendment would apply to every one of those grounds, not simply to (6). It may be that the complaint could be amended to show jurisdiction or that the return of service could be amended and the process might be amended, if you can imagine such a thing. So I think if my idea is followed, the language of the insertion would be more like this, and perhaps this would be more agreeable to the Reporter, who manifestly does not like the idea of emphasizing an amendment to the complaint.

"If a motion to dismiss made under this subdivision (b) is sustained, the court may withhold judgment of dismissal pending the hearing of a motion to amend--"

It doesn't say what; whatever is necessary.

"--which motion may in the discretion of the court be made within a time to be fixed by the court."

THE CHAIRMAN: Amend the complaint, you mean.

JUDGE DONWORTH: No. It might be a return of process.

THE CHAIRMAN: It says nothing about return here.

JUDGE DONWORTH: Any of those things under these six rules, if found defective, might be the subject of amendment, and that is what I have in mind. However, I am not pressing this. I merely put it into the record for those of us who are interested to read.

THE CHAIRMAN: The question is on Senator Pepper's motion, if you are ready for it.

JUDGE DOBIE: Would you read that motion again, please?

SENATOR PEPPER: The motion is to strike from subsection (b) of Rule 12 the words "except that the following defenses may at the option of the pleader be made by motion", and so forth, down to and including the words "in a responsive pleading or motion" on the following page; and then in Rule 56, on summary judgment (and, I may say, without prejudice to subsequent correction of terminology if it is desired), to strike out subsections (a) and (b) and substitute language which is as follows:

"At any stage of the action and before trial, a party may move for a summary judgment in his favor and may support his motion by affidavits. Only one such motion shall be permitted, except in the case of matter arising after a preceding motion has been made. If the court is of the opinion that a decision in advance of trial may dispose of the action or of some material issue therein, he shall order an immediate hearing."

The rest of the rule to stand as is.

JUDGE DONWORTH: Senator Pepper, do you mean to abolish the possibility of moving in limine to quash the service of process?

SENATOR PEPPER: Not at all, sir.

JUDGE DONWORTH: Haven't you done that?

SENATOR PEPPER: Not at all, sir. "At any stage of the action or before trial...." The action is commenced by filing summons and complaint, and at any stage subsequent to that and before trial any motion can be made covering any matter which is now thought of as either within the limits of Rule 12 or within the limits of Rule 56.

THE CHAIRMAN: The general purpose of the motion is to consolidate the summary judgement rule and this one. Of course, there are certain questions that I don't think we need to bother with now. It is perfectly obvious, for instance, that you say at any stage of the trial you can make a motion to set aside the service.

DEAN MORGAN: The action.

THE CHAIRMAN: Yes. Suppose the man's actions appear generally and literally under your motion to set aside, and there is another minor objection. I am just raising this to show that while these things aren't important, they are things that have to be considered by the draftsman if your resolution is passed, because it gives the plaintiff a right to make motion for summary judgment the day after the suit is brought, before the defendant has time to hire a lawyer. He is given 20 days to get a lawyer and put in an answer, but he can be hailed before the court in twenty-four hours and compelled to resist a judgment. There are little things like that that have

to be patched up, of course, but we understand the main proposition, don't we, so that we can vote on it as a matter of policy?

SENATOR PEPPER: I wouldn't concede that the objections you have just enumerated, sir, are applicable. The language is "At any stage of the action and before trial a party may move for a summary judgment in his favor." That doesn't mean that he gains any advantage by so doing if he makes a frivolous or a foolish motion. It is disposed of by the court like any other. The purpose of it is not to undertake to enumerate the motions that he can make, because you want to have an all-inclusive right to make all the motions, starting with lack of jurisdiction of the court and running down to the failure of the last antecedent pleading to state a valid claim.

JUDGE DONWORTH: I hope that Senator Pepper will consider whether the language that he uses hasn't done away with the whole idea of special appearance and questioning the jurisdiction, because when you get the service of process vacated you are not receiving a judgment in your favor. So, if there is no jurisdiction, you are not getting a judgment in your favor. You are objecting to any judgment. I think that your language should be very carefully weighed in the light of those considerations.

SENATOR PEPPER: What have we done, Mr. Reporter, about special appearances?

JUDGE CLARK: We don't have them.

THE CHAIRMAN: We don't have them.

SENATOR PEPPER: That is what I thought.

JUDGE DONWORTH: This old (b) takes the place of that.

MR. HAMMOND: We struck out that part about special appearances.

SENATOR PEPPER: We haven't any.

JUDGE DONWORTH: How are you going to question the service of process?

SENATOR PEPPER: By motion.

JUDGE DONWORTH: And ask for a judgment in your favor?

SENATOR PEPPER: Surely.

THE CHAIRMAN: I think what we are dealing with are details of draftsmanship and matters of detail that will have to be polished up if the resolution is passed. For example, you have stricken out absolutely the clause that the plaintiff can't make a motion for summary judgment until after the answer is in, and now you allow plaintiff to bring defendant into court, as I said, in twenty-four hours under threat of immediate judgment. But I think that is just a matter of detail. Let's vote on the wide principle that is involved here anyway.

All those in favor of Senator Pepper's motion raise their hands.

... Four hands were raised ...

THE CHAIRMAN: Those opposed?

... Six hands were raised ...

THE CHAIRMAN: The motion is lost. Now the question is on the motion of Judge Donworth to put a clause in here requiring the court to give a man reasonable time to amend before dismissing a suit under these preliminary motions, plus your--

JUDGE DONWORTH (Interposing): What about Mr. Lemann's motion?

THE CHAIRMAN: I was going to say his was added to yours, and what was your proposition, Mr. Lemann?

MR. LEMANN: A provision to authorize the court to treat a motion to dismiss as a motion for summary judgment by following the requirements of Rule 56.

THE CHAIRMAN: Yes, in an appropriate case.

PROFESSOR SUNDERLAND: For either party.

MR. LEMANN: Yes, for either party.

JUDGE DONWORTH: You haven't written that out?

MR. LEMANN: No. I thought it had to be worded with some care, and I think the Reporter could do it with the thought very well--better than anyone else.

JUDGE DONWORTH: I feel very modest about presenting this motion because I am not at all sure it is the right thing. It will prevent the mischief that the Reporter has called attention to, of sewing up a man when he could amend himself into court. I shall just state the motion for the record.

The motion is to add to subdivision (b) of Rule 12

these words: "If a motion to dismiss made under this subdivision (b) is sustained, the court may withhold judgment of dismissal pending the hearing of a motion to amend, which motion may, in the discretion of the court, be made within a time to be fixed by the court."

THE CHAIRMAN: I suggested a substitute for that which I thought you had accepted, because this involves the idea that after the motion to dismiss has been heard, the parties go out of court and have to come back again with the formality of a motion to amend. To get rid of that sort of rigmarole, I suggested that the motion be merely that the court shall not grant dismissal under subdivision (b) without first granting the party a reasonable time to amend. He can amend right there in court without another motion if he wants to, I suppose.

JUDGE DONWORTH: Will you state that again, please? I think that is all right.

THE CHAIRMAN: It is just the general idea. I am not attempting to draft it, because that is a thing the Reporter would have to work on. It is that a motion to dismiss under subdivision (b) shall not be granted by the court without giving the party reasonable time to amend. Your rule would be permissive of the court; mine is compulsory. He can't dismiss without giving time.

JUDGE DONWORTH: "If a motion to dismiss made under this subdivision (b) is sustained, the court shall withhold the

judgment of dismissal---"

THE CHAIRMAN (Interposing): No, he shall not enter judgment of dismissal, if you want it that way, without first giving the party reasonable time to amend.

JUDGE DONWORTH: That is all right.

JUDGE CLARK: And it contains also Mr. Lemann's further provision.

THE CHAIRMAN: The further provision that any motion under subdivision (b) in an appropriate case may be treated by the court as a motion for summary judgment under Rule 56. That is merely declaring what some of the courts have already done.

JUDGE DONWORTH: I accept that amendment.

JUDGE CLARK: Now may I say just a little? Maybe I have said too much, and if anybody wants to throw me out, go ahead. I shall say two things, and then you can throw me out.

The first is, wouldn't it be simpler and wouldn't it come to the same thing if you just said for (6) that the sixth ground is a motion for summary judgment under Rule 56(c), if you just added that? That is one of the things.

There is another slight question I raise as to Judge Donworth's form as it is now settled, and that is that all discretion is taken away from the court as to refusing an amendment. Of course, generally he shouldn't refuse an amendment, but suppose that he has already had six or seven stating the same ground, there is a little question of whether we may not

tie his hands the other way.

That is all I have to say.

THE CHAIRMAN: After thinking that over, you can come back with anything like that that you think of and it will be taken care of.

JUDGE CLARK: I just throw out the suggestion. Why doesn't the substitute for (6) that I put in cover it all, really?

PROFESSOR SUNDERLAND: (6) ought to be left in.

JUDGE CLARK: Why should (6) be left in?

PROFESSOR SUNDERLAND: For the same old reason we have been giving.

PROFESSOR CHERRY: Mr. Chairman, the Reporter's first objection, I take it, was in line with the suggestion I made a while ago, to put that subdivision (6) into the rule on summary judgments. Is that it?

JUDGE CLARK: That is it, yes.

PROFESSOR CHERRY: I still prefer that procedure, Mr. Chairman, explaining in advance the reason that I shall vote "No" on the motion.

THE CHAIRMAN: Why don't you put the motion for judgment on the pleadings in Rule 56 too while you are at it?

JUDGE CLARK: Personally, I think it is already there.

PROFESSOR CHERRY: I thought we were still dealing only with Rule 12.

THE CHAIRMAN: Are you ready for the question? All in favor of Judge Donworth's motion plus Mr. Lemann's addition raise your right hands.

... About six hands were raised ...

THE CHAIRMAN: Opposed? That is carried.

MR. LEMANN: Now I move that the preliminary motions be limited to one and that all the grounds stated in Rule 12(b) must be in that except lack of jurisdiction over the subject matter, which of course the court must itself notice at any time and which the parties may call to the attention of the court at any time.

JUDGE CLARK: I think that is fine. I second the motion.

MR. LEMANN: That is the first time I have pleased him this afternoon. We forced the right of amendment and he said that may be bad, but here we have him pleased.

JUDGE CLARK: Well, if you can't get roast beef now, maybe you can get some good fish.

THE CHAIRMAN: Will you state the motion again?

MR. LEMANN: That all the defenses referred to in Rule 12(b) must be presented in one motion at one time, except the defense of lack of jurisdiction over the subject matter, which may be called to the court's attention at any time.

PROFESSOR SUNDERLAND: Does that mean that you could not make a subsequent motion for judgment on the pleadings?

MR. LEMANN: Yes. We put everything in at one time.

PROFESSOR SUNDERLAND: You can't raise the insufficiency of the stated cause of action at any other time.

MR. LEMANN: Of course, the plaintiff could present a motion for judgment on the pleadings because he wouldn't have had his whack at the defense. The motion for a judgment on the pleadings will often, perhaps usually, be presented by the plaintiff after the answer is in. Do you understand what I am trying to say to you, Professor Sunderland?

PROFESSOR SUNDERLAND: Suppose the plaintiff doesn't state a cause of action.

MR. LEMANN: That would have to be in the same motion.

PROFESSOR SUNDERLAND: Suppose the defendant doesn't put this number (6) in; suppose he waives the point. He can't raise it afterwards in any form whatever.

MR. LEMANN: No, that is right.

SENATOR PEPPER: That is in advance of trial.

PROFESSOR SUNDERLAND: Any time.

MR. LEMANN: Any time.

PROFESSOR SUNDERLAND: He can't make a motion and raise it on appeal, I suppose. It is completely waived. That is quite drastic. I don't know of any state that does that.

SENATOR PEPPER: Does that mean that if you are suing on a contract, there has been failure to state consideration, and no advantage has been taken of that by motion, when it

comes to trial and the defendant offers to prove lack of consideration, the evidence is inadmissible?

DEAN MORGAN: No, no.

MR. LEMANN: I didn't really mean to eliminate (h), Professor Sunderland. The point you are making now is covered by (h), isn't it?

PROFESSOR SUNDERLAND: Yes, (h). Isn't that what you are talking about?

MR. LEMANN: I didn't mean to move to eliminate (h). I really did not have my mind directed to that. I was talking about 12(b).

JUDGE CLARK: As a matter of fact, I think you have it all right. I don't think you need to say anything about subject matter or jurisdiction. If you just provide for one consolidated motion under 12(b), that leaves (h) standing.

MR. LEMANN: Yes, that is what I meant.

PROFESSOR SUNDERLAND: I thought you were dealing with (h).

MR. LEMANN: No, I was dealing with 12(b). My mind wasn't focused at all to that.

THE CHAIRMAN: As I get your motion, if any one of the various motions permitted to the defendant by 12(b) is made, they all have to be made in one motion. That is the proposition, isn't it?

MR. LEMANN: That is right. It would change 12(g) to

the necessary extent.

THE CHAIRMAN: As matters stand now, you can make the motions you find in (b) successively, can you?

MR. LEMANN: Except as limited by 12(g).

THE CHAIRMAN: You can make the first five successively.

MR. HAMMOND: You can make six.

THE CHAIRMAN: Where is the provision?

JUDGE CLARK: It really comes in (g). The last clause of (g) provides it.

THE CHAIRMAN: What you are driving at is (g), isn't it, Monte?

MR. LEMANN: (c) and (g).

THE CHAIRMAN: Your motion relates to (b) and (g), and the purpose of it is to amend those two sections in an appropriate way, one or the other or both, so as to provide that if the pleader exercises his option to make any motion, he has to make them all at once and not successively. Are you ready for the question?

SENATOR PEPPER: Except for lack of jurisdiction of the subject matter.

JUDGE CLARK: That is covered already by (h).

SENATOR PEPPER: That is covered sufficiently, is it?

JUDGE CLARK: Yes.

THE CHAIRMAN: Are you ready for the question? All in

favor of that motion say "aye"; opposed. It is carried.

MR. LEMANN: There is only one more change I gathered that everybody is agreed upon, and that is to amend 12(a).

JUDGE CLARK: You want the bill of particulars. That is 12(e).

MR. LEMANN: It is 12(a) too, isn't it, Charlie?

JUDGE CLARK: Yes; 12(a) will have to be made to conform.

MR. LEMANN: Amend 12(a) and 12(e) so as to eliminate reference to bill of particulars and eliminate reference to preparation for trial.

THE CHAIRMAN: Let's go to (e). That will settle what we are driving at. Then the other sections will be brought into line by the Reporter. Your motion is to strike out the provision "or for a bill of particulars"?

MR. LEMANN: And then in the following line the words "or to prepare for trial."

JUDGE CLARK: Maybe I shouldn't say anything more. Of course, that is a little help, but I think that it still leaves a good deal of a question. I think probably the essence of it is still there. A motion for more definite statement should bring in all these questions of preliminary fight. I really don't think it changes things very much.

MR. LEMANN: I am frank to say I think you are right, but I thought I would give you a crumb and maybe it would come

along afterwards.

THE CHAIRMAN: Why don't you do something more, Monte, and add to your motion the provision that the Reporter draft a statement for the rule there defining just as nearly as may be for what purposes the motion made for more definite and certain statement should be granted, so as to try to whittle it down?

MR. LEMANN: I accept that suggestion.

JUDGE CLARK: I am willing to try that, and I shall say right now that one thing I should like to do if I am going to try it is to provide that the form shall be sufficient. That is something I suggested.

DEAN MORGAN: That is another thing.

JUDGE CLARK: That is something we have suggested, anyhow.

DEAN MORGAN: Moore has a good expression in his supplement about the kind of indefiniteness that ought to be a ground for this motion, as I remember it.

JUDGE CLARK: I am perfectly willing to do what I can on this.

MR. LEMANN: He served you with notice that he is going to eliminate all the requirements.

THE CHAIRMAN: As nearly as we can do it by the Rules, to prevent a fellow from making these intolerable motions for the purpose of delay. That is the thing we are driving at.

MR. LEMANN: Without going to the other extreme of not

giving a man really enough to know what you are suing him for.

THE CHAIRMAN: As Senator Pepper pointed out.

MR. LENANN: Judge Dobie gave me a striking case the other day.

PROFESSOR SUNDERLAND: I should like to make a suggestion on that to make it more definite and certain. In England they have a rule of this sort: "Before applying for particulars by summons or notice, a party may apply for them by letter." It seems to me we might get rid of this whole matter of the court's ruling on particulars by adopting that device, and if that were done, we could provide that no motion for particulars or to make a pleading more definite and certain or to strike out any material or scandalous matter shall be made, eliminating them all, but that the court may strike out scandalous matter on its own motion.

THE CHAIRMAN: Suppose he refuses to answer the letter?

PROFESSOR SUNDERLAND: "If any matter is not alleged with sufficient definiteness or particularity to enable the adverse party properly to prepare a responsive pleading or to prepare for trial, any person who signed the pleading may be requested in writing by the adverse party to serve specified additional particulars as to designated items or details. If a request for proper particulars is made and no particulars are served within 10 days after service thereof, or if the particulars served are not substantially in accordance with the

request, and the requesting party thereupon avails himself of the rules for discovery to obtain the particulars requested, the adverse party shall be required to pay the requesting party the amount of reasonable expenses incurred by him in obtaining such particulars, including reasonable attorneys' fees."

THE CHAIRMAN: That abolishes this motion.

PROFESSOR SUNDERLAND: That would put it up to the other side to put enough particulars in so that he wouldn't have to resort to discovery rules, and if he did have to resort to discovery rules because the adverse party held back particulars, then the man who held back would have to pay the expense.

THE CHAIRMAN: In the meantime, he is in default for an answer, because that says "prepare for trial," you see, and we wipe that out.

PROFESSOR SUNDERLAND: If you cut that out, then I don't care so much about this.

THE CHAIRMAN: All we want to do now is to make the hodgepodge of the complaint a little more definite. It really ought to be made a little more definite. If you go to discovery and that is the remedy, what becomes of the time to answer?

PROFESSOR SUNDERLAND: It seems to me we could avoid a court ruling on all these matters of particulars by putting it up to the adverse party on request.

DEAN MORGAN: But what happens to your answer in the meantime? Do they hold up the answer until they get a proper response to the request, and so forth?

PROFESSOR SUNDERLAND: I suppose they hold it up during the 10 days.

DEAN MORGAN: There you are.

PROFESSOR SUNDERLAND: That isn't very serious.

PROFESSOR CHERRY: Mr. Chairman, may I ask Professor Sunderland if that wouldn't give us all the woes that the New York lawyers have now? They are asking each other for bills of particulars, and they get into special term all the time, don't they, after they do that?

PROFESSOR SUNDERLAND: It gets into the court. This will never get into the court.

THE CHAIRMAN: You haven't answered my question. You are required to go to discovery to get a definite statement, and meanwhile all we want a definite statement for is so that the defendant can intelligently prepare his answer. It takes you six weeks or two months to have discovery and dig it up that way, and meanwhile you are in default for an answer.

PROFESSOR SUNDERLAND: Unless the time for the answer is postponed.

THE CHAIRMAN: You would have to go into court for that, wouldn't you?

PROFESSOR SUNDERLAND: Unless it is provided here.

THE CHAIRMAN: Why not go into court for a definite statement and be done with it?

PROFESSOR SUNDERLAND: I wonder if it wouldn't eliminate going into court in most cases.

THE CHAIRMAN: I don't think people would furnish the information.

JUDGE CLARK: I don't know, but they do actually furnish a lot in New York. That is one reason that you have so many bills of particulars furnished after answer when they are not necessary, but the plaintiff who wants to get his case to trial thinks that is the easiest thing to do, so he does actually answer it. Lots of them file even though they are not required to do so under the Rules.

THE CHAIRMAN: There is nothing under our Rules to prevent a lawyer from writing another lawyer, saying, "I should like a more definite statement as to this and that."

PROFESSOR SUNDERLAND: No, but if he doesn't furnish it, he wouldn't have a right to charge him with expenses.

JUDGE CLARK: Of course they can do it now, but there is nothing to make them.

PROFESSOR SUNDERLAND: No penalty is applied.

JUDGE CLARK: I think there is a little something to push them to it. I think they can do it under Rule 33--I don't see why they can't--but they don't do it very much.

THE CHAIRMAN: I could see the object of that if it

were for the purpose of getting information to prepare for trial. Then you put in your answer and go on with your discovery in preparation for trial. But now we have whittled this thing down so that the only purpose we want the definite statement for is to enable the man to plead. We can't hold up the pleadings while he is taking depositions for discovery very well.

MR. LEMANN: I think we give the Reporter a difficult assignment when we ask him to whittle this down as you suggested. I like the theory, but I think it is a hard thing to do. I also realize that if you leave it to the courts, which is the way it now is, that gives you time for delay and opportunity for abuse on the part of the person asking for the more definite statement. But the only solution would be to wipe out any requirement for more definite statement and just leave it as a very general allegation put to the defendant to the proceeding by interrogatories or by depositions.

DEAN MORGAN: What about interrogatories? Isn't it just as easy for him to bring interrogatories as to ask?

MR. LEMANN: With the provision we have today for the time of interrogatories, you would have to proceed pretty rapidly on interrogatories.

DEAN MORGAN: Why shouldn't you?

MR. LEMANN: Let's see what the provision is now.

DEAN MORGAN: It is 33, isn't it?

MR. LEMANN: "Interrogatores to Parties." He has 15

days to answer. You have provision for objections to interrogatories. The first thing you know, unless you change those times, your time for answering would be out before you could get the information. From the standpoint of the plaintiff, I don't know whether we would help him any, Eddie, because if you force the defendant to resort to interrogatories and give him a reasonable time schedule, I don't know that you would expedite matters much.

THE CHAIRMAN: You know, Monte, there is a good deal in the fulminations in the nature of admonitions of the court. I have changed my mind about that. In Rule 1 we stuck in a clause, "They shall be construed to secure the just, speedy, and inexpensive determination of every action," and we all looked at each other rather sheepishly and wondered whether that was a fulmination that was in bad taste and didn't mean anything. The truth is that it has had more influence on the construction of these Rules than anything else we have done.

JUDGE DOBIE: I have cited it twice in formal opinions.

THE CHAIRMAN: My theory is that the Reporter can draw up a clause about this motion to make the complaint more definite--not for a bill of particulars for preparation for trial, but just for pleading--and say it ought to be granted in a clear case where it is perfectly plain that the defense can't plead adequately without having the issues narrowed down in some way. You know, that may be an admonition, but the courts

as a result are going to throw these motions out just like that. The judges are going to be impatient with them and strict with them, as they are not now. Time and time again under these Rules I have been in cases associated with other lawyers where they want to make a whole lot of motions for more definite statements and bills of particulars, and I have said, "Oh, you haven't a gambler's chance of that. You know what the case is about. You don't need that." They put in a motion a foot thick, and the court takes it under advisement for three weeks and makes an order granting about fifty or a hundred requests that they make. There are difficulties attached to it. If the Reporter puts in a good, stiff jolt like this fulmination in Rule 1, I think it will have a very restrictive effect on motions to make more definite the complaint for pleading purposes.

We have eliminated the bill of particulars and preparation for trial business, and I am not ready to agree that the complaint really ought not to be made more definite and certain under some particulars, that the defendant ought to be helpless in such a case as Senator Pepper spoke about. There are cases where it ought to be made more definite. But let's try it another three or four years, putting an admonition on the courts. If it really isn't much more than that, I think it will be effective.

MR. LEMANN: I agree I think we ought to try it, be-

cause the other remedy may be worse than this.

JUDGE DOBIE: We are abolishing the bill of particulars, then?

THE CHAIRMAN: Yes, and the preparation for trial business.

JUDGE DOBIE: Do you think it would be advisable to put in there some saving clause, such as, "When an application for a bill of particulars is in reality intended as a motion for more definite information, it should be treated as such by the court and so decided"?

MR. LEMANN: That would destroy the emphasis that the Chairman has suggested, I think, Judge. I think we ought to go along with the idea of discouraging this. If we put in your suggestion, I think it might be construed the other way.

THE CHAIRMAN: That is inviting a lawyer to make a motion for a bill of particulars when we have abolished it, and then allowing the court to say, "Oh, you made a mistake. You ought not to have made that motion, but we will treat it as a motion to make the complaint more definite." I don't think we ought to encourage that.

JUDGE DOBIE: I think probably you are right. I just brought it up because in the great metropolitan centers where you practice, the lawyers are going to read these Rules very carefully, but some of the others won't read the new Rules, and we are going to have motions in courts down there for a bill of

particulars.

THE CHAIRMAN: We will have the Rules changed and published with notes explaining the striking out.

JUDGE DOBIE: The judge in that case could have overruled it, which wouldn't have stopped the man from later filing a real motion for more definite statement.

JUDGE CLARK: The judge probably would fix it up anyhow.

JUDGE DOBIE: I don't think that is necessary.

THE CHAIRMAN: Unless you have some further discussion of Mr. Lemann's motion, all in favor--

PROFESSOR SUNDERLAND (Interposing): How does that read now?

THE CHAIRMAN: The motion has to do with Rule 12(e). We strike out the words "or for a bill of particulars", and we strike out the words "or to prepare for trial."

MR. DODGE: That also involves striking out in the second line the words "if no responsive pleading is permitted by these rules".

JUDGE DOBIE: It also involves striking out the last sentence: "A bill of particulars becomes a part of the pleading which it supplements."

THE CHAIRMAN: Yes. There are other places where bills of particulars are mentioned, and we shall have to depend on the Reporter to eliminate that.

JUDGE DOBIE: There is something about them in (a).

THE CHAIRMAN: The third element in his motion was that the Reporter endeavor to draw a clause placing an iron hand on motions to make the complaint more definite and certain, causing the judges to be hard-boiled about it.

JUDGE DONWORTH: Mr. Chairman, do you feel that the courts will be more strict against granting motions to make more definite than they have been about the bills of particulars? Will we gain anything by this, do you think? If you have a lengthy complaint and they have just asked to have paragraph (6) made definite, to have a bill of particulars under paragraph (6), and so forth, isn't it a little easier and less cumbersome in your office to do that than to draw an entirely new complaint? I am just throwing that out. I don't have any particular thought on the subject. Isn't it increasing the work instead of diminishing it?

MR. LEMANN: It is just a matter of emphasis, Judge. I started out, as I said to the Reporter, just giving him a crumb, saying that we should cut out the bill of particulars and leave the rest of it in. I realize it doesn't make a great deal of difference except as a matter of emphasis. The Chairman reinforced the matter of emphasis with another pious admonition. I thought it was worth trying. It is as far, I think, as the majority of the Committee probably would want to go at this time in discouraging these delays. It may help to

stir up judges to a more vigorous denial of frivolous applications.

JUDGE DONWORTH: I am not opposing the motion at all.

MR. DODGE: The motion should be amended, Mr. Chairman, by adding to be struck out also, the words "if no responsive pleading is permitted by these rules, within 20 days after the service of the pleading upon him".

JUDGE CLARK: Yes, I should think so.

THE CHAIRMAN: Yes, that is right. That is another detail the Reporter will take care of. Is there any further discussion of this motion? All in favor of it say "aye"; opposed. It is carried.

JUDGE CLARK: Mr. Chairman, I should like to bring up one further matter about 12, and I think that will be about all. Then we will have to go back. I want to bring up something on the waiver of defenses provision. That goes to the form of (h). Shall I do it now?

THE CHAIRMAN: If there is anything else under 12 that you are going to change, let's take it up now, and then go back.

JUDGE CLARK: The point I want to make about (h) is with reference to an old friend. That is number (1), the waiver of objection to a failure to state. I really don't think that is true here. I don't think it is true in the light of Rule 12(b). We have made a suggestion on page 33 which covers this, except that I suppose now our suggestion should have

included motions in the first part of it. Motions have been left out. Taking the exception part on 33, you could do it this way: "except that (1) the objections of failure to prove a legal claim or a legal defense may always be made at the trial, subject to any evidence that has been received pursuant to any subdivision of Rule 15, and (2) lack of jurisdiction of the subject matter of the action shall always be noted by the court whenever or however brought to its attention."

MR. LEMANN: I move that the suggestion of the Reporter for change in 12(h) be adopted.

JUDGE CLARK: You see, it shortens it a little. The main point of substance is to make this a matter of proving.

DEAN MORGAN: That is right; it ought to be done there.

SENATOR LOFTIN: What you read takes the place of (h)?

JUDGE CLARK: Yes. As I said, it would be practically our suggestion on 33 except that we have to put back in such motions as we still have. I shall have to look over the first part and add the motions again, but the "except" clause as stated on page 33 will take the place of the "except" clause in the present (h).

THE CHAIRMAN: You are talking about 33 of your report?

JUDGE CLARK: Yes, that is it.

JUDGE DOBIE: Does the last sentence, the objection, stay in?

JUDGE CLARK: No, that wouldn't stay in, because we

have already covered it. That is contained in the exceptions.

JUDGE DOBIE: So it starts with "except" and goes down to the end?

JUDGE CLARK: That is it.

THE CHAIRMAN: You understand that now. Are we ready to vote on it? All in favor of the motion say "aye"; opposed. It is carried.

Is that all under Rule 12 now?

PROFESSOR CHERRY: Would it be appropriate at this time, Mr. Chairman, to move that it be the sense of the Committee that the Reporter reconsider the order and presentation of the substance of 12 in bringing us back these drafts? In other words, I think it is now feasible to redraft the whole thing, and I think we were agreed that that was desirable.

JUDGE CLARK: You mean taking (a) out and putting it in ahead, or have you some other idea? I am not sure.

PROFESSOR CHERRY: It is not a specific idea I have in mind, but simply that difficulty that the bar has suggested to us about keeping it in mind and using it and that now we have a different approach to the problem presented by these several motions.

JUDGE CLARK: Anything you suggest, of course. I shall be glad to rearrange it somewhat, but I must say that unless the Committee indicates some desire, I am a little afraid that I shall now be transgressing what you had in mind. I got the

impression that you wanted to make the changes without, shall I say, seeming to make too many.

PROFESSOR CHERRY: I am suggesting the opposite idea, Mr. Chairman. It is frankly a rewriting of the rule, because I believe that that would neither contravene the admonition of the Chief Justice nor, to put it mildly, disturb the bar.

JUDGE CLARK: I thought we had indicated that perhaps the majority thought they didn't want to do it.

THE CHAIRMAN: What is the proposition? What part of Rule 12 are you suggesting be rewritten?

PROFESSOR CHERRY: The whole scheme of it. As you said awhile ago, Mr. Chairman, we started with the problem that the setup of the rule suffered from the way in which the rule came into being, the ideas that came before us. This was an attempt to redraft the rule that started from another basis and to superimpose on that a different idea. Now I am suggesting that in view of these various changes and of that idea, the form of the rule has not been a happy one (which I thought we had all rather agreed on) and that the Reporter might find it feasible to recast it in bringing it back.

THE CHAIRMAN: He is at liberty to make a draft and recast it and bring it back, and he had also better make a draft as we have directed him, and we can take our choice. There is no bar on him to make any revision that he thinks desirable.

MR. LEMANN: You are talking about form only.

PROFESSOR CHERRY: No changes in the substance at all, Mr. Chairman.

MR. LEMANN: He thinks it can be rearranged a little to make the form simpler and easier to read.

PROFESSOR CHERRY: It is the order in which these ideas appear in the rule, as I gather from what judges and lawyers have said.

MR. LEMANN: They may have become used to it.

JUDGE CLARK: I am still a little in doubt on Professor Cherry's suggestion. I shall be glad to do it, but I really thought that you wanted to keep the framework of 12 substantially. I am not quite sure. It was my interpretation of what I should do that I should follow 12(b) except for the addition that is put in and that the other sections should follow as they are now.

THE CHAIRMAN: Do both. Why not do both? If you have an alternate, more elaborate revision that you think is desirable, bring it back, and also make it as he has suggested.

JUDGE CLARK: All right. I shall talk to you about that rule.

THE CHAIRMAN: Then we go back now to Rule 7? Is that the rule we were on last?

JUDGE CLARK: Yes, I think so. Partly in the interest of priority and partly in the interest of simplicity, I

suggested trying to shorten (a) and putting it up in 7.

THE CHAIRMAN: You mean 12(a)?

JUDGE CLARK: 12(a). So I don't know whether you want to do it now or not. I think that probably the suggestion I made, which is on page 19 of my draft, needs to be reconsidered a little more because there are some motions left. I think with just a little explanation I could still do it. Do you desire to do that or not? I think it would have been a good idea if we had done that originally. I think 12 would have looked simpler.

MR. LEMANN: I am sort of torn between two considerations, one to make as few changes as possible, with the idea that the bar has gotten sort of used to where to look for things and that we should not start them to looking in a different place, and another irrepressible desire to improve on arrangement. From that standpoint, I wonder if 12(a) would go well over in Time, Rule 6, where in paragraph (d) we have provision for some time.

JUDGE CLARK: Very well.

THE CHAIRMAN: That doesn't specify. Privately I was talking to the Reporter about transposing the first part of subdivision (a) of Rule 12 to Rule 7 and simplifying it as he has on page 19 of his report. I made a very violent objection to changing it from Rule 12 to Rule 7. I conceded that it might have been done in the first place, but there are a lot of textbooks and decisions of courts now that talk about Rule

12. Now if we put that stuff out of 12 and put it in 7, any lawyer who wants to read the textbooks which have been printed or the decisions of the courts on Rule 12 will have to be wise enough to know that when they are talking about Rule 12, they mean what is now Rule 7. I think it is very bad business to transpose the subject matter now from one numbered rule to another.

JUDGE DOBIE: I think it is particularly desirable to keep the numbers of these, Mr. Chairman, if we possibly can, and not strike out a whole rule if we can possibly avoid it.

THE CHAIRMAN: They have become accustomed to know that it is in Rule 12 or Rule 7, and they would have to learn it all over. There is a question, Charlie, whether it might be wise to have the first part of Rule 12 read somewhat as you have it on page 19 but not to transpose it.

JUDGE CLARK: Yes, that is quite possible.

THE CHAIRMAN: You consider that and bring it back.

JUDGE CLARK: Very well.

THE CHAIRMAN: That is, if you think we ought to consider that again. What else had you on Rule 7 that you thought should be changed?

JUDGE DOBIE: Did we settle that thing about the last sentence of (a)?

JUDGE CLARK: I thought we settled it by approving of the answer to a counterclaim, but as I understand it, we

didn't put in an answer to a cross-claim. That is the way we did.

THE CHAIRMAN: We voted on that before lunch.

JUDGE DOBIE: All right. We left that as it is.

THE CHAIRMAN: No, we changed it.

JUDGE DOBIE: I know about the counterclaim up there, but I mean the last sentence.

THE CHAIRMAN: The last sentence in what?

JUDGE DOBIE: The last sentence in 7(a).

THE CHAIRMAN: "to an answer or a third-party answer."

JUDGE CLARK: We voted to change that in accordance with the suggestion.

THE CHAIRMAN: No.

JUDGE CLARK: Wait a minute. I guess I am confused. What we did, as I understand it, was to take the suggestion at the top of page 19 of the suggestions: "and there shall be a reply to a counterclaim denominated as such". We did not change that.

JUDGE DOBIE: I am talking about the last sentence.

THE CHAIRMAN: We did not change that last sentence. Is there anything else under Rule 7?

PROFESSOR SUNDERLAND: You didn't out out the exception at the end of 12?

JUDGE CLARK: No.

THE CHAIRMAN: We did not vote to cut it out. The

Reporter seemed to think it was all right.

JUDGE CLARK: I don't think that is a very valuable thing. I don't think many lawyers will do it, but it is in the New York Code, for example, which is what our rule was modeled on. I didn't think it was doing enough harm to cut it out. It isn't very important. I wouldn't feel badly about cutting it out.

THE CHAIRMAN: The next provision we come to is Rule 8, and the first matter, I think, is subdivision (c), about "Affirmative Defenses."

MR. HAMMOND: Mr. Chairman, may I interrupt just a minute. Under Rule 7 Judge Clark suggested an amendment of the time provisions. He has added a suggestion, which I think he said came from you, that in actions against the United States or an officer or agency thereof, brought in the District of Columbia--

THE CHAIRMAN (Interposing): That isn't in Rule 7.

JUDGE CLARK: It is in either 12(a) or 7, wherever it appears.

THE CHAIRMAN: Oh, yes. Where is it in your report?

MR. HAMMOND: It is on page 19.

THE CHAIRMAN: "It will be noted that in the proposed amendment to Rule 7(a) there is a new restriction as to actions against the United States...." That is on the theory that you are going to transpose part of 12(a) to Rule 7, but the same

problem arises under 12(a), doesn't it?

MR. HAMMOND: Yes.

JUDGE CLARK: Mr. Hammond is correct, Mr. Mitchell. It was your suggestion, and may I put the baby in your lap?

THE CHAIRMAN: The point I am making is that your proposal for restricting the time that the Government may answer in the District has been left in Rule 12 and is not in Rule 7.

MR. HAMMOND: That is true.

THE CHAIRMAN: While we are on 12, before we go back to 7, let's take it up.

I became completely outraged by that 60-day rule for the Government, and I will tell you the facts.

After we got our decision by the German-American Mixed Claims Commission awarding the fifty million dollars of money in the Treasury on the Black Tom explosion, a number of people who had previously worked on another matter and didn't want us to get the money, because it would deplete the fund so that they wouldn't get paid in full, brought suit against the Secretary of the Treasury to enjoin him from paying our award, on the theory that it would deplete the fund and there wouldn't be enough to pay the full principal and accrued interest on their claim. They would get the principle, but they wouldn't collect the interest. We were the real parties in interest, and the Government was a mere custodian of this German money available for our claim, and we were not made parties to the defense.

So we obtained leave to intervene. That is another story, which I will tell you when we get to the intervention clause. The rule is so worded that we got in only by the grace of the court, although we were the only fellows who were really interested in the controversy.

We made a motion for summary judgment against the plaintiff after we had intervened. Then we filed a cross-claim in our pleading against the Government, asking affirmatively for a writ of mandamus against the Secretary of the Treasury to pay our award, and the Government had 60 days to answer that. When we made our motion for summary judgment against the plaintiff and it was heard, we wanted also to make a motion for summary judgment against the Secretary on our cross-claim to get affirmative judgment against him directing him to pay it, but the Rules provided that that couldn't be done by a plaintiff (we were the plaintiff on the cross-claim) until the defendant had answered, and the Government had 60 days to answer.

I know of my own knowledge that the Department of Justice had every bit of information right here in the District of Columbia fully available for preparing their answer within a week or two. The officials of the Claims Commission were right at their elbow and gave them the stuff. They had their answer drawn weeks before the motion for summary judgment came on, and they deliberately withheld from filing it until the

last day of the 60 days in order to prevent us from bringing on for hearing our motion for summary judgment against the Government. I think I know whereof I speak. There was this 60-day rule which allowed the Government to take advantage of it, and they did take advantage of it to defeat our motion for affirmative judgment and motion for summary judgment against the Secretary because the Government's answer wasn't in. That was kept out. It was a perfectly plain case where they didn't need any 60 days; they didn't need 20 days.

I got very angry about it, naturally, and my suggestion was that the 60-day rule is all well enough for suits brought against the Government in California or Nevada or Minnesota or some place where the District Attorney has to write down here and get the data on which he can put in his answer and all that sort of thing, but in these cases brought right here in the District against the Government--and there are scores of them--the Departments are right here, the officials are right here, and the people are right here who know all about the things, and there is not anywhere near the same reason for giving 60 days as there is outside.

Of course, my feeling about the thing is plainly warped by prejudice and by a personal experience of that kind, and maybe I am not right about it, and that is all right with me, but I thought that the limit of time to the Government in the District of Columbia ought to be shortened from 60 days to

20 or 30 days, that the 60-day period should stand for suits outside. I told this bitter story of mine to the Reporter, and he put the thing in but takes no responsibility for it. I don't care. I have cooled off a good deal since that happened. If you want to stick to your original guns on it, all right.

SENATOR PEPPER: What was the reason for the 60 days? If suits against the Government could have been brought only in the District, this 60-day distinction never would have been made, would it?

THE CHAIRMAN: I doubt it. Of course, there are 60 days allowed under the Tucker Act, aren't there?

MR. HAMMOND: Yes, there are.

THE CHAIRMAN: The Tucker Act cases are brought outside the District, and that is all right. We didn't want to fool much with the Tucker Act, so we naturally adopted the Tucker Act's 60-day rule.

SENATOR PEPPER: That doesn't apply to the District?

THE CHAIRMAN: No.

SENATOR PEPPER: That is just conforming to the states.

THE CHAIRMAN: Conforming with the United States Courts outside. I know how the Government people feel about it. They insist they have to have this time, and all that sort of thing. I want to say that I served eight years in the Government service, and I don't believe they need 60 days in the District except in exceptional circumstances. All they would

have to do would be to go to the court and by stipulation have an extension, which would be a very unusual thing, if they really needed it. They could say, "Here, we want an order extending our time. The Secretary of the Interior is busy and his assistants haven't given us the data; they haven't had time. The war is on."

To make a rigid rule of 60 days, in any event, just makes that possible for the Government. We all know how a great many Government lawyers are. They just don't do anything (like the rest of us) until they have to, and you can't get an answer until 60 days, I don't care how easy it is.

SENATOR PEPPER: It seems to me we ought to act on principle in the matter. Our general attitude is that we want to expedite litigation. Our question is, what is a reasonable time to give for answers? If it be true--and I think it is--that there isn't any reason that the Government in the District should have more leniency shown to it than the individual citizen, why not have the Rules so provide?

MR. LEMANN: What is the rule in the Court of Claims? Do these Rules cover? They do not, do they?

MR. HAMMOND: Our Rules do not cover the Court of Claims.

THE CHAIRMAN: No.

MR. LEMANN: Suppose they sue the Government in the Court of Claims. How much time do they have?

THE CHAIRMAN: They may have 60 for all I know, but there is something different about that, because nine out of ten of the Court of Claims cases are old and complicated affairs, such as Indian tribe cases, contract cases, and tax cases that go back for a long time.

MR. LEHMANN: I was thinking that if it were true that they do have 60 days in the Court of Claims, where the suits do have to be brought in the District of Columbia, it might make our ground much more doubtful in cutting the time down here. It seems to me that between now and tomorrow morning we could find out about that.

THE CHAIRMAN: Will you do that for us?

MR. HAMMOND: Yes.

JUDGE CLARK: Mr. Hammond has already referred to some statutes on page 6 of the supplemental material, where you will find the references. He says, "Not only the Tucker Act but other statutes, providing for suits against the United States, grant the United States 60 days to answer."

THE CHAIRMAN: What page is that in the supplemental book?

JUDGE CLARK: Page 6.

THE CHAIRMAN: Are those cases outside the District or in the District?

JUDGE CLARK: Do you remember, Mr. Hammond?

MR. HAMMOND: No, I don't recall whether they were

outside. They were just suits against the United States.

MR. LEMANN: Without limitation as to where they were brought. You make the point here on page 8 that if you bring the suit in the District of Columbia, the people in the District of Columbia may not (as they did in Mr. Mitchell's case) have the facts upon which to base their answer, that they may have to write out to California to find out the facts.

MR. HAMMOND: Yes. They are just as likely to have to do that in many, many instances. The case that he spoke of was just a particular instance of where they did happen to have everything here, and it wasn't a suit against the Secretary of the Treasury.

MR. LEMANN: It was a case of abuse such as you might have, such as we all have in private litigation. Of course, the Government could get extensions of time. I spoke this morning of suits against collectors where they did get extensions of time just by asking for them. Sometimes they get 90 days just by going in and getting 30 days at a time by asking the court for it.

THE CHAIRMAN: Suppose you come back tomorrow, Mr. Hammond, and tell us, in the first place, what the rule is in the Court of Claims and, second, whether any of these statutes you refer to deal with cases in the District of Columbia.

MR. HAMMOND: All right, sir.

THE CHAIRMAN: Let's pass it.

JUDGE CLARK: Here is one statute that does, in which the United States is a defendant party in the foreclosure of mortgages. That specifically refers to the District of Columbia.

MR. LEMANN: It gives them how much time?

JUDGE CLARK: Sixty days. Here is another case which doesn't say particularly. It just says "a suit in equity."

THE CHAIRMAN: We will let that go over until morning. I am probably wrong about it. I got hot under the collar.

What else?

JUDGE CLARK: You are on Rule 8 now, are you? I was going to say that this bloody Tompkins case rears its ugly head, and if you want to look on page 10 of the supplemental, there is one suggestion I made.

DEAN MORGAN: I don't agree with you, Charlie, that our rule intended even to touch burden of proof. If it did, we would have discussed then the question of whether it was substance or procedure, with the Supreme Court cases staring us in the face that it was substance.

THE CHAIRMAN: Some of the District Courts have held that we didn't intend to require a thing to be proved by the defense if under the law it had been treated as a matter for the plaintiff to deal with.

JUDGE CLARK: I think we thought the burden of proof was all right and that there wasn't any use--

DEAN MORGAN (Interposing): It wasn't then, even.

JUDGE CLARK: --providing affirmative defenses if under local law they are matters that shall be pleaded.

DEAN MORGAN: I think it would be terrible to have this. I think it would be terrible to put this amendment in. You might just as well throw out the whole section.

JUDGE CLARK: What is the amendment?

DEAN MORGAN: The amendment to conform to state practice. To me that is just plain nonsense.

JUDGE DONWORTH: The law is that while we can fix the necessity of the pleading, the proof goes under state law. Isn't that it?

DEAN MORGAN: That is right; the burden of proof is according to state law.

JUDGE DOBIE: You have to prove the absence of it; the defendant has to prove the presence.

JUDGE DONWORTH: The allegation, as we say, doesn't change the rule as to proof.

DEAN MORGAN: You would have to put the Statute of Limitations in there too if you wanted to do it for North Carolina, because the defendant has but to plead the Statute in North Carolina and the plaintiff has to show that he has a fresh claim as to burden of proof.

JUDGE CLARK: Let me say this: It seems to me that it is a good deal of a trap for the lawyer now if the burden of proof is on the plaintiff, but the defendant, in order to get

the burden of proof working, has to plead. I think that is really a trap. I don't believe that we visualized that. I think we thought the burden of proof was on the defendant by the laws of the United States. I think this is an unfortunate situation, but I think it is created by the Tompkins decision.

DEAN MORGAN: I think the question of burden of persuasion and burden of pleading usually do coincide, but not necessarily. They didn't at common law, and they didn't under the code in exceptional cases. The purpose of the pleading was just to give notice that that particular issue was to be raised. I think it was unfortunate that the Supreme Court held that the burden of proof was a matter of substance in those terms--but, then, the Tompkins case did lots of things.

JUDGE DOBIE: You think we ought to leave it as it is?

DEAN MORGAN: I don't think it has hurt anything as it is, but what the English rule did was to denominate a lot of things and then say "any other matter which would be likely to take the plaintiff by surprise." You could say, "In an answer or reply, a party desiring to tender an issue as to any of the following shall set forth the facts affirmatively," if you wanted to.

MR. LEMANN: Is this important enough to require us to change it?

DEAN MORGAN: I doubt it.

MR. DODGE: Hasn't the Supreme Court settled this?

Hasn't it held that it does not involve a burden of proof?

MR. LEMANN: I think this comes within our general admonition.

JUDGE DOBIE: I move that we pass it and leave the rule as it is.

JUDGE DONWORTH: I second it.

JUDGE CLARK: It won't break my heart. I think twenty years from now the Tompkins case won't be as strong as it is now, anyway.

THE CHAIRMAN: What has the Supreme Court held?

DEAN MORGAN: They said that pleading is a matter of procedure and that proof is a matter of substance.

THE CHAIRMAN: I know, but I mean on the interpretation of this rule as it reads.

DEAN MORGAN: That is what they said on this rule. That is what they said in Palmer v. Hoffman, didn't they?

JUDGE DOBIE: In the question of the burden of proof of establishing contributory negligence local laws must apply; in the question of citizenship cases the Federal law must apply.

DEAN MORGAN: It covers only pleadings.

THE CHAIRMAN: Then your theory is that the law, as the Supreme Court has settled it, is that under this rule the defendant has to plead these things, including contributory negligence, and so on, for the purpose of informing the plaintiff that he is going to raise those points, but whether the

burden is on the plaintiff to negative or on the defendant to prove is another matter.

DEAN MORGAN: That goes in the charge to the jury. What shall the jury find when their minds are in equilibrium on the question?

THE CHAIRMAN: That means there is no need for amendment in view of the fact that the Supreme Court has cleared it up, is that right?

DEAN MORGAN: Yes.

JUDGE DOBIE: Cleared it up or messed it up--either one. Anyhow, I move to pass it. Mr. Chairman, I move that we pass it and leave it as it is.

THE CHAIRMAN: Motion has been made and seconded that we leave Rule 8(c) as it is. Is there any further discussion? All in favor say "aye." It is carried. 8(c)

What is your next, Charlie?

DEAN MORGAN: Charlie, have they made any decisions on negative pregnant under these Rules?

JUDGE CLARK: I don't think so. It has been talked about.

How much should we talk about Comment II? In the light of what has been done, I am not sure but that your general reaction is not to do anything about it. At least, I shall mention it, and you can see. It was our theory that it is perfectly all right to raise matters such as the Statute of

Limitations, and so on, by motion with affidavits, and in order to make it somewhat clearer, we put in the suggestion which you will find at the top of page 23 of our notes.

JUDGE DOBIE: Supplemental?

JUDGE CLARK: No, the original. Rule 8, page 23. What we do substantially is to make it "In an answer or reply, a party desiring to raise these issues shall plead them." So it is only when he is filing an answer or a reply, and not while he is moving.

THE CHAIRMAN: This is a proposed amendment to Rule 8(c), is it?

JUDGE CLARK: That is it, yes.

THE CHAIRMAN: What is the purpose of it?

JUDGE CLARK: The purpose of it is to limit the pleading of the affirmative defenses to only when you are pleading, and therefore when you are moving you don't need to plead them affirmatively.

MR. DODGE: I move that the rule be left as it is.

MR. LEMANN: I second the motion.

THE CHAIRMAN: Any discussion? All in favor of the motion say "aye"; opposed. Carried.

JUDGE CLARK: Next, still on page 23, there has been some suggestion that we ought to add further admonitions about brevity and simplicity. The Colorado rules have the provision that you find in quotes toward the end of the page. I am not

sure myself whether it is worth while to try to gild the lily--maybe that is what I have been directed to do--as to the bill of particulars. At any rate, I am not sure whether this helps or not, but you can see what it is. The provision of the Colorado rule is: "If a pleading otherwise meets the requirements of this rule it shall not be objectionable for failure to state the ultimate or material facts, as opposed to conclusions of law and evidentiary matter."

THE CHAIRMAN: You are talking about an amendment to Rule 8(a), are you?

JUDGE CLARK: Rule 8(e)(1). It is just adding an admonition.

THE CHAIRMAN: Well, let's skip it.

JUDGE CLARK: Then that is forgotten. Page 24, then.

MR. LEMANN: You don't recommend page 24.

JUDGE CLARK: I beg your pardon?

MR. LEMANN: You make no recommendation on page 24 except not to make a change.

JUDGE CLARK: Yes. That is a suggestion that has been made to us: "he may make the allegation or denial upon information and belief." The cases apparently so hold without there being anything in the Rules.

MR. LEMANN: "We question whether a formal change is necessary." I move we endorse the question.

JUDGE CLARK: All right.

THE CHAIRMAN: Are we up to Rule 9, then?

JUDGE CLARK: Rule 9 has given some difficulty. In a way, it seems to be somewhat opposed to pleading generally. This is on fraud now, Rule 9(b). It seems to require particularity to an extent not required in other cases.

DEAN MORGAN: It certainly does. You remember the first form I drew on this? Judge Clney jumped on my neck because I hadn't specified the particulars.

JUDGE CLARK: If you want to take just a brief look at the supplemental material, page 13, you will see that there is quite a little bit of comment on that.

THE CHAIRMAN: What do they hold?

JUDGE CLARK: Assistant Attorney General Berge has criticized 9(b) as holding them up too much and refers to the case of the United States v. Hartmann, a denaturalization case.

PROFESSOR CHERRY: He couldn't grant a bill of particulars under 12 now, but we will have an admonition in there.

JUDGE CLARK: You see, we are suggesting a loosening up of the original rule. That is what it really comes to.

THE CHAIRMAN: Is that the only case you have in which it makes trouble?

JUDGE CLARK: It is a matter that has caused some little worry. Mr. Pike has a comment on that requirement of particularity in pleading fraud. We seem here to be saying that particulars are required, and generally we say that they are not.

Suppose you take a look at the draft that we are suggesting and see if that helps any. That is on 9, page 25 of our original.

THE CHAIRMAN: That wouldn't have helped Berge any because you say there,"shall be stated with as much particularity as the knowledge of the pleader permits."

JUDGE DOBIE: You can't go much further than that, can you?

THE CHAIRMAN: He was hooked by the District Court under our Rules and he would be hooked by this amendment.

JUDGE DOBIE: You can't state anything beyond what your knowledge permits. Of course, you can go out and increase your knowledge.

THE CHAIRMAN: If you do, you are a liar.

JUDGE DOBIE: If you do, you are still within your knowledge.

JUDGE CLARK: Of course, we are trying to turn this into an admonition on the rule of law, just a general admonition, so to speak.

SENATOR PEPPER: If we don't give the Chairman relief on the Black Tom case, I am opposed to giving Berge relief on this. He evidently feels badly about it.

JUDGE CLARK: Of course there is a little more. Perhaps I haven't stated that correctly. Senator Pepper, there is a little ambiguity between sentence one and sentence two of this rule. People don't quite know how to put them together.

DEAN MORGAN: Do fraud and mistake bring malice in the case? If you allege that a person had knowledge of a particular fact, I don't see that there is any conflict between that and the first sentence, or even if he had intent to do such and such a thing.

JUDGE CLARK: I think that is true. You can reconcile the words, but you have two horses, and they are facing in opposite directions.

DEAN MORGAN: I don't think so.

THE CHAIRMAN: I don't see that your proposed amendment on page 25 helps matters any.

DEAN MORGAN: What would you do--just strike out the first sentence, Charlie? Is that the idea?

JUDGE CLARK: What do you think?

PROFESSOR MOORE: This was in lieu of the first sentence.

JUDGE CLARK: This suggestion was in lieu of it, but it is suggested that it doesn't do any good.

THE CHAIRMAN: It doesn't help much. I am afraid if you struck it out entirely that would mean you would just say that it is fraud and that would be the end of it.

JUDGE DOBIE: I don't believe that amendment will help much. I am inclined to leave it as it is.

THE CHAIRMAN: What is your pleasure with it?

JUDGE DONWORTH: I move it stand as it now is.

SENATOR PEPPER: It seems to me if anything is to go out, it ought to be the second sentence, merely on the ground that that is self-evident. The averment as to what constitutes fraud or mistake is to be a measuring stick for the information of the person against whom the fraud or mistake is charged, but the man who is charged with malice, intent, and knowledge or other mental condition is the man who least needs notice. That is a mere suggestion that the plaintiff ought to be made to prove the reality of his case by a particular averment. It can't be for the information of the man whose state of mind is at issue. All that he needs to know is that he has been charged with doing a thing with intent or maliciously. That puts him on whatever defense he has.

THE CHAIRMAN: In that denaturalization case, I think the Government ought to have alleged particularly just what the fraud consisted of and why it was that he wasn't qualified to be naturalized. I don't know of any reason that the Government shouldn't have asserted that. That was the ground on which they were seeking to cancel his naturalization.

MR. HAMMOND: They did that on answers to interrogatories, but they seemed to object to it here on the pleading because it caused so much delay. They have been very freely answering the interrogatories and giving all the information.

THE CHAIRMAN: Where is the delay? They are specifying right at the start in the complaint exactly how this fellow

deceived the Naturalization Court.

MR. HAMMOND: They filed a motion for the bill of particulars, and they held the thing up a long, long time.

THE CHAIRMAN: They held it up to file motions because the Government failed to specify. Why couldn't they specify? If they had, there wouldn't have been any motion for a bill of particulars.

SENATOR PEPPER: Somebody moved that (e) stand. I second that motion.

THE CHAIRMAN: Any further discussion? All in favor of the motion say "aye"; opposed. Carried.

Is there anything more on Rule 9?

JUDGE DOBIE: You have one recommendation about (f).

JUDGE CLARK: On the time and place allegations, which is (f), we originally put in that they should be considered material, so that you had to specify them exactly and the question could be raised on demurrer or something like it. The general feeling that we have is that that hasn't worked very well. It forces the pleader to anticipate defenses such as the Statute of Limitations, and it isn't necessary if you allow the summary judgment rule.

DEAN MORGAN: You will have the same old talk about negative pregnant, won't you, if you don't have time and place as material? If anybody makes a denial or a statement with reference to the time and you try to take issue on the time or

place where it is not material, the pleading is no good.

PROFESSOR MOORE: You still have the time and place for testing the sufficiency of the pleading.

DEAN MORGAN: That is what you say here, isn't it? "For the purpose of testing the sufficiency of a pleading, averments of time and place are material...."

PROFESSOR MOORE: But in answering, you could still have a negative pregnant if you denied in terms of time and place.

DEAN MORGAN: I don't see anything wrong with that.

JUDGE DONWORTH: This is not important enough to go against the Chief Justice's admonition.

JUDGE DOBIE: There are no cases, are there, Charlie?

JUDGE CLARK: Are there any cases?

PROFESSOR MOORE: No.

JUDGE DOBIE: I move that it be retained.

SENATOR LOFTIN: I second it.

THE CHAIRMAN: Without objection, it is so ordered. Rule 10.

JUDGE CLARK: On 10(b), separate statements, I thought that what we were trying to do was to make long discussions of separate statements unnecessary now and that the courts would not bother very much about it. There are three cases here where they granted them practically automatically, and I think there is another case that our Court had that I wasn't sitting

on where Judge Swan reversed a decision by Judge Mandelbaum this winter. After we had reversed the case in which Mandelbaum required a separate statement, it went to the appellate court for reversal on that. It seems to me that is a lot of waste motion and not getting anywhere.

DEAN MORGAN: It went to the appellate court on the failure to require or on the requirement of a separate statement?

JUDGE CLARK: On the requirement. The plaintiffs refused to do it, and it came up. I don't know whether you can stop judges from doing that sort of thing, but I made the suggestion to try to weaken this requirement still more. At the end of the second line of the suggestion, it should be "stated in a separate count", not "account."

THE CHAIRMAN: If we put in an amendment such as you have, that it "may be stated in a separate count or defense if it appears that such separation will facilitate the clear presentation....", it doesn't mean a thing because it leaves it optional for the pleader to put it in or leave it out.

JUDGE DOBIE: You can qualify it by saying "whenever the separation facilitates the clear presentation". Do you think that is important enough to change it?

JUDGE CLARK: It all depends. I can't say for sure. I don't think that many courts are requiring it. It is just a kind of nuisance that some courts have and are still doing it.

You can answer that we can't correct everything the courts do.

THE CHAIRMAN: In your case you say the judge ordered a separate statement, the party refused to furnish it, and it went up on appeal, and you got the order of the lower court reversed.

JUDGE CLARK: It is Original Ballet Russe Ltd. v. Ballet Theater Inc.

"A complaint alleging that defendants for the purpose of unlawfully destroying plaintiff's business induced employees of plaintiff to break their contracts of employment and maliciously circulated false statements to injure plaintiff's reputation, states but a single claim for relief based on the tort of interference with business, and not two claims. ..... Allegations of conspiracy are immaterial to the question. Even if separate claims were involved, a separation into counts is not necessary to facilitate the clear presentation of the matter set forth, where the defendants' acts are not pleaded as separate transactions or separate judgments asked. ..... Before answer the defendants moved for an order requiring the plaintiff to amend its complaint so as to state and number separately the various causes of action set forth therein. Being of the opinion that the complaint alleged at least two separate and distinct torts (defamation of plaintiff and inducing its employees to break their contracts), the District Judge granted the motion. An amended complaint was then filed, which the

Court found subject to the same infirmities, and a second order was entered directing compliance with the former order under pain of having the amended complaint dismissed. The plaintiff declining to amend further, a judgment of dismissal was entered, from which the plaintiff has appealed."

Judge Swan wrote the opinion. He held, first, there was only one cause of action, but second, if there had been two, it wouldn't have helped any to separate them. We do think that the separation of the counts is necessary to facilitate the clear presentation of the matter set forth. The order of dismissal was reversed, and the cause remanded.

THE CHAIRMAN: Do you want to do anything with this rule?

JUDGE DOBIE: I move that it stand as is.

SENATOR PEPPER: I second it.

THE CHAIRMAN: All in favor of allowing 10 to stand R10 say "aye"; opposed. The motion is carried.

JUDGE CLARK: On 11 we had nothing that we wanted to change. We did call attention (I think this is interesting) to the fact that while we are doing away with the oath, the New York Judicial Council is pushing for it with all the strength possible, and every year lately it has reiterated the position that all pleadings should be required to be sworn to. I think it is too bad that reformers can't get together, but I don't know that anything can be done about it.

THE CHAIRMAN: I agree with the Judicial Council myself. One of the things that sticks in my mind through years of trial work in the lower courts where issues of fact are involved, and a thing that always terrified me, was perjury. I sweat blood at night, knowing what the truth was, but wondering what the plaintiff or the defendant, as the case might be, was going to swear to the next day. They are given to shifting their position on the facts to fit the developments of the case. Time and time again if you have unsworn pleadings, they state the facts with particularity just as they really are, and then they want to squirm out of it and make them something else. When they see the case is going against them on that theory, they say, "Oh, well, the lawyer signed that. It doesn't mean anything. I never saw it," or something of that kind. If you get that party on the stand and he is appealing there with verification, he will say that he read the above pleading and knows the contents therein and that the same are true to his own knowledge, and then the notary public business is read to him. He is perjuring himself by shifting his position, and the jury pay some attention to it.

DEAN MORGAN: In all of my experience when I have asked, "Did your lawyer read it over to you?" they say, "Maybe he did; he told me to sign that, and I signed it." I have never gotten a thing out of them that way.

JUDGE CLARK: I thought it had been the experience

under the code that this didn't help at all.

THE CHAIRMAN: We have settled it, anyway.

How long do you want to sit tonight? It is a quarter of seven, and I think it is a good time to stop.

JUDGE DOBIE: We have just finished with 12.

MR. LEMANN: I move we adjourn until nine-thirty tomorrow morning.

... Following discussion of hours of the Committee sessions, the meeting adjourned at 6:47 p. m. ...
